

## Lake Erie Bill of Rights: Stifled by All Three Branches Yet Still Significant

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### I. INTRODUCTION

The innovative [Lake Erie Bill of Rights](#) (LEBOR), an amendment to the City of Toledo, Ohio charter which declared that Lake Erie has enforceable rights,<sup>1</sup> debuted to much fanfare in 2019. City residents voted overwhelmingly in favor of the new ordinance in a special election.<sup>2</sup> Many hoped it would be a new legal tool in the fight against harmful algal blooms in Lake Erie, which have plagued the region for decades and in 2014 deprived nearly half a million persons in the Toledo area of safe public drinking water for three days. The ordinance also was widely hailed as a groundbreaking “rights of nature” law, and one of its leading proponents was invited to and addressed the United Nations.<sup>3</sup>

Yet just a year later LEBOR was dead, declared to be unlawful.<sup>4</sup> This article examines LEBOR and what gave rise to it,<sup>5</sup> and describes and evaluates how all three branches of government—judicial, executive and legislative—played

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<sup>1</sup> Lake Erie Bill of Rights, Charter of the City of Toledo, Ch. XVII, §§ 253-260 (added Feb. 26, 2019), [https://codelibrary.amlegal.com/codes/toledo/latest/toledo\\_oh/0-0-0-158818](https://codelibrary.amlegal.com/codes/toledo/latest/toledo_oh/0-0-0-158818) [hereinafter LEBOR].

<sup>2</sup> James Proffitt, *Great Lake Gets Great Rights*, GREAT LAKES NOW (Feb. 27, 2019), <https://www.greatlakesnow.org/2019/02/great-lake-gets-great-rights/>.

<sup>3</sup> See *infra* Parts II-III. See also Laura Johnston, *Toledo’s Lake Erie Bill of Rights Is Stuck in Court – But Inspiring Environmentalists Nationwide*, CLEVELAND.COM (Dec. 16, 2019), <https://www.cleveland.com/news/2019/12/toledos-lake-erie-bill-of-rights-is-stuck-in-court-but-inspiring-environmentalists-nationwide.html>.

<sup>4</sup> *Drewes Farms Partnership v. City of Toledo*, 441 F. Supp. 3d 551 (N.D. Ohio Feb. 27, 2020).

<sup>5</sup> See *infra* Parts II-III.

roles in killing LEBOR.<sup>6</sup> But it also argues that LEBOR, a well-intentioned albeit legally flawed ordinance, remains significant even after its demise.<sup>7</sup>

## II. CONTEXT FOR THE RISE OF LEBOR

One of the most critical environmental problems facing Lake Erie today is harmful algal blooms (HABs), and the problem is growing worse.<sup>8</sup> These blue-green algae, technically cyanobacteria, since the turn of this century have formed virtually every summer or fall in Lake Erie due to excess nutrients entering the lake, especially phosphorus.<sup>9</sup> Although HABs are most prevalent in the warmer western basin of Lake Erie near Toledo,<sup>10</sup> in some recent years the thick green scum has extended into the central basin past Cleveland.<sup>11</sup> HABs adversely impact recreational use of the lake, tourism, lakefront property values, commercial fishing, aquatic life, and drinking water.<sup>12</sup> Importantly, HABs also produce toxins, such as microcystin, that can cause illness and even death to humans.<sup>13</sup>

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<sup>6</sup> See *infra* Part IV.

<sup>7</sup> See *infra* Part V.

<sup>8</sup> U.S. & Canada, State of the Great Lakes 2019 Highlights Report 18 (2020), <https://binational.net/wp-content/uploads/2020/05/May-4.2020-2019-SOGL-FINAL.pdf> (due to HABs, Lake Erie's health is poor and deteriorating); Intl. Joint Comm'n, A Balanced Diet for Lake Erie: Reducing Phosphorus Loadings and Harmful Algal Blooms 2-4 (2014), <https://www.ijc.org/sites/default/files/2014%20IJC%20LEEP%20REPORT.pdf> (algal blooms pose severe, accelerating threat to Lake Erie) [hereinafter *Balanced Diet for Lake Erie*].

<sup>9</sup> Jeffrey Reutter et al., Lake Erie Nutrient Loading and Harmful Algal Blooms: Research Findings and Management Implications 2 (2011), <https://legacyfiles.ijc.org/publications/June2011LakeErieNutrientLoadingAndHABSFinal.pdf>. By 2007 HABs in Lake Erie were such a concern that Ohio convened a multi-disciplinary task force to study the algae problem in Lake Erie. See Ohio Env'tl. Prot. Agency, Ohio Lake Erie Phosphorus Task Force Final Report 11 (2010), [https://epa.ohio.gov/portals/35/lakeerie/ptaskforce/Task\\_Force\\_Final\\_Report\\_April\\_2010.pdf](https://epa.ohio.gov/portals/35/lakeerie/ptaskforce/Task_Force_Final_Report_April_2010.pdf) [hereinafter *Ohio Lake Erie Task Force I*].

<sup>10</sup> U.S. Env'tl. Prot. Agency, U.S. Action Plan for Lake Erie 2 (2018), [https://www.epa.gov/sites/production/files/2018-03/documents/us\\_dap\\_final\\_march\\_1.pdf](https://www.epa.gov/sites/production/files/2018-03/documents/us_dap_final_march_1.pdf); *Balanced Diet for Lake Erie*, *supra* note 8, at 2-3.

<sup>11</sup> See D'Arcy Egan, *Algae Woes on Lake Erie Demand Immediate Attention from Federal, State Agencies*, CLEVELAND PLAIN DEALER (Oct. 24, 2011), [https://www.cleveland.com/outdoors/2011/10/algae\\_woes\\_on\\_lake\\_erie\\_demand.html](https://www.cleveland.com/outdoors/2011/10/algae_woes_on_lake_erie_demand.html) (2011 bloom); James McCarty, *Lake Erie Algal Bloom Was a Record-breaker, Scientists Say*, CLEVELAND PLAIN DEALER (Nov. 10, 2015), [https://www.cleveland.com/metro/2015/11/lake\\_erie\\_algal\\_bloom\\_of\\_summe.html](https://www.cleveland.com/metro/2015/11/lake_erie_algal_bloom_of_summe.html) (2015 bloom).

<sup>12</sup> See *Balanced Diet for Lake Erie*, *supra* note 8, at 3.

<sup>13</sup> *Algal Blooms*, NAT'L INST. OF ENVTL. HEALTH SCIENCES, <https://www.niehs.nih.gov/health/topics/agents/algal-blooms/index.cfm>.

The human health risk from HABs became all too real for people in the Toledo region in August 2014. The City of Toledo public water system, which serves customers in the city and surrounding areas, draws its water from the HABs-prone western basin of Lake Erie. On Saturday morning August 2, the system issued a do-not-drink advisory as a result of elevated levels of microcystin detected in its finished, treated water. For three days, until the toxin levels subsided and the advisory was lifted on Monday evening August 4, nearly half a million persons in the Toledo area were without access to safe drinking water from their taps.<sup>14</sup>

Experts agree that the solution to the HABs problem in Lake Erie is to drastically reduce the amount of phosphorus entering the lake.<sup>15</sup> Experts also agree that most of the phosphorus entering Lake Erie is from agricultural stormwater runoff of manure and fertilizer in Ohio.<sup>16</sup> Unfortunately, however, existing laws are doing a lousy job of controlling agricultural stormwater runoff of phosphorus into the lake.

Fifty years ago, human sewage was the major source of phosphorus entering Lake Erie, primarily from municipal sewage treatment plants.<sup>17</sup> But since passage of the federal Clean Water Act in 1972,<sup>18</sup> discharges of pollutants from *point sources* such as municipal sewage treatment plants must comply with the terms of permits.<sup>19</sup> As a result, the amount of phosphorus entering Lake Erie from point source discharges has decreased markedly,<sup>20</sup> and today municipal sewage treatment plants contribute less than 10% of the phosphorus

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<sup>14</sup> See Tom Henry, *Toledo Seeks Return to Normalcy After Do Not Drink Advisory Lifted*, TOLEDO BLADE (Aug. 5, 2014), <https://www.toledoblade.com/local/2014/08/05/Toledo-seeks-return-to-normalcy-after-do-not-drink-water-advisory-lifted/stories/20140805073>; Emma Fitzsimmons, *Tap Water Ban for Toledo Residents*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/04/us/toledo-faces-second-day-of-water-ban.html>.

<sup>15</sup> The consensus seems to be that a reduction of about 40% in phosphorus loading to Lake Erie is necessary. Ohio Env'tl. Prot. Agency et al., *Ohio Lake Erie Phosphorus Task Force II Final Report* 31-34 (2013), [https://lakeerie.ohio.gov/Portals/0/Reports/Task\\_Force\\_Report\\_October\\_2013.pdf](https://lakeerie.ohio.gov/Portals/0/Reports/Task_Force_Report_October_2013.pdf); *Balanced Diet for Lake Erie*, *supra* note 8, at 8; U.S. Env'tl. Prot. Agency, *U.S. Action Plan for Lake Erie*, *supra* note 10, at 1, 6 (2018).

<sup>16</sup> See Ohio Lake Erie Comm'n et al., *Ohio Domestic Action Plan 1.1* at 5-6 (2018), <https://www.lakeerie.ohio.gov/Portals/0/Ohio%20DAP/DAP%201-1%20FINAL%202018-08-27.pdf>; Ohio Lake Erie Task Force I, *supra* note 9, at 17, 73; *Balanced Diet for Lake Erie*, *supra* note 8, at 2-5.

<sup>17</sup> Ohio Lake Erie Task Force I, *supra* note 9, at 12-16; *Balanced Diet for Lake Erie*, *supra* note 8, at 2-4.

<sup>18</sup> Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387).

<sup>19</sup> See 33 U.S.C. §§ 1311(a), 1342(a).

<sup>20</sup> Ohio Lake Erie Task Force I, *supra* note 9, at 12-16; *Balanced Diet for Lake Erie*, *supra* note 8, at 2-4.

loading to Lake Erie.<sup>21</sup> By contrast, discharges of pollutants from *nonpoint sources* do not require a Clean Water Act permit and are virtually unregulated under federal law. Regulation of nonpoint source discharges, such as agricultural stormwater runoff, is left to state law.<sup>22</sup>

But in Ohio, like most farm states, regulation of nonpoint source agricultural pollution under state law is limited. Instead, Ohio relies primarily on programs aimed to entice farmers to take voluntary measures to reduce nonpoint source agricultural pollution.<sup>23</sup> Shortly after the 2014 Toledo tap water crisis, the Ohio General Assembly did enact legislation that took a few discrete steps toward regulating nutrient pollution from agricultural stormwater runoff—primarily, imposing timing restrictions on the application of manure and fertilizer in the western Lake Erie basin watershed.<sup>24</sup> But in 2018 even the Ohio Environmental Protection Agency acknowledged that the current, mostly voluntary measures are not making sufficient progress in reducing phosphorus loading to Lake Erie from agricultural stormwater runoff.<sup>25</sup>

So, fed up with the inadequacies of federal and state law to solve the HABs problem in Lake Erie, the Toledo citizenry took matters into their own hands.

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<sup>21</sup> Kristen Fussell et al., Summary of Findings and Strategies To Move Toward a 40% Phosphorus Reduction 2 (2017), <https://www.in.gov/isda/files/Final%20Summary%20of%20Findings%20%20Strategies%20toward%20a%2040%20percent%20P%20reduction.pdf>.

<sup>22</sup> See generally Kenneth Kilbert, *Distressed Watershed: A Designation To Ease the Algae Crisis in Lake Erie and Beyond*, 124 DICK. L. REV. 1, 10-15 (2019) (describing how the Clean Water Act leaves regulation of nonpoint sources, including agriculture, to state law). The Clean Water Act specifically exempts “agricultural stormwater discharges” from the definition of point source. 33 U.S.C. § 1362(14).

<sup>23</sup> See, e.g., Ohio Rev. Code § 939.02(E)(3), (F) (cost-share grants to assist farmers in installing best management practices); Act of July 11, 2018 (Clean Lake 2020), Am. Sub. S.B. 299, § 4, 132d Gen. Assy. (Ohio 2018) (making more money available to entice farmers to take voluntary measures). Ohio’s latest such initiative is the H2Ohio plan, which emphasizes funding incentives for farmers in the Lake Erie watershed who voluntarily implement practices to reduce agricultural nutrient runoff. News Release, Governor DeWine Announces H2Ohio Water Quality Plan (Nov. 14, 2019), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/h2ohio-water-quality-plan>. See also Jamie Smith Hopkins, *Voluntary Measures*, GRIST.ORG. (Jan. 23, 2020), <https://grist.org/food/ohio-officials-know-how-to-stop-lake-erie-from-turning-toxic-but-no-one-will-do-it/>.

<sup>24</sup> Act of April 2, 2015, Sub. S.B. 1, § 1, 131st Gen. Assy. (Ohio 2015) (codified as amended at Ohio Rev. Code § 905.326-.327 (fertilizer) and § 939.08-.09 (manure)).

<sup>25</sup> See Andy Chow, *Ohio EPA Chief Says It May Be Time To Regulate Farm Run-off*, WKSU (June 19, 2018), <https://www.wksu.org/post/ohio-epa-chief-says-it-may-be-time-regulate-farm-run#stream/0>. See also Ohio Env’tl. Prot. Agency, Nutrient Mass Balance Study for Ohio’s Major Reivers 2 (April 16, 2018), [https://epa.ohio.gov/Portals/35/documents/Nutrient%20Mass%20Balance%20Study%202018\\_Final.pdf](https://epa.ohio.gov/Portals/35/documents/Nutrient%20Mass%20Balance%20Study%202018_Final.pdf) (indicating no clear decrease in nutrient loading in nonpoint source dominated watersheds like the Maumee River, Lake Erie’s largest tributary).

## III. LAKE ERIE BILL OF RIGHTS

City of Toledo residents, by a margin of 61% to 39% in a February 2019 special election, voted in favor of adding LEBOR as an amendment to the City of Toledo charter.<sup>26</sup> The proposed amendment made it onto the ballot as a result of a citizen's initiative which included a petition signed by more than 10,000 persons.<sup>27</sup> The petition was organized by Toledoans for Safe Water, a local community group frustrated by years of government inaction in the aftermath of the 2014 Toledo tap water crisis.<sup>28</sup>

LEBOR states that Lake Erie, and the Lake Erie watershed, "possess the right to exist, flourish, and naturally evolve."<sup>29</sup> This right extends to the "Lake Erie Ecosystem," which includes all natural water features and communities of organisms that are part of Lake Erie and its watershed.<sup>30</sup> LEBOR also states that the people of the City of Toledo "possess the right to a clean and healthy environment," which includes the right to a clean and healthy Lake Erie and Lake Erie Ecosystem.<sup>31</sup> LEBOR prohibits any corporation, defined as including any business entity, or any government from violating these rights.<sup>32</sup>

The amendment allows the City of Toledo or any resident of the city to sue in state court, specifically the Lucas County Court of Common Pleas, to enforce LEBOR's rights and prohibitions.<sup>33</sup> LEBOR further provides that the Lake Erie Ecosystem itself may enforce the rights and prohibitions, as a named party and real party in interest, through a suit brought by the city or any resident of the city.<sup>34</sup>

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<sup>26</sup> Order Invalidating Lake Erie Bill of Rights, *Drewes Farms Partnership v. City of Toledo*, 441 F. Supp. 3d 551, 554 (N.D. Ohio Feb. 27, 2020); James Proffitt, *Great Lake Gets Great Rights*, GREAT LAKES NOW (Feb. 27, 2019), <https://www.greatlakesnow.org/2019/02/great-lake-gets-great-rights/>. Although only nine percent of registered voters turned out for the special election, the sizeable majority voting "yes" came despite heavy spending on a campaign against the amendment, largely bankrolled by BP Corp. Tom Henry, *Campaign Finance Reports: BP Backed Anti-Lake Erie Bill of Rights Effort*, TOLEDO BLADE (April 9, 2019), <https://www.toledoblade.com/local/environment/2019/04/09/campaign-finance-reports-bp-financial-backer-anti-lake-erie-bill-of-rights/stories/20190409145>.

<sup>27</sup> Order Invalidating Lake Erie Bill of Rights, *Drewes Farms*, 441 F.Supp. 3d at 554.

<sup>28</sup> See Jason Daley, *Toledo, Ohio Just Granted Lake Erie the Same Legal Rights as People*, SMITHSONIAN MAG. (March 1, 2019), <https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/>.

<sup>29</sup> LEBOR, *supra* note 1, § 254(a).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 254(b).

<sup>32</sup> *Id.* § 255(a).

<sup>33</sup> *Id.* § 256(b).

<sup>34</sup> *Id.* § 256(d).

Under the amendment, a corporation or government that violates LEBOR is subject to criminal conviction and fines.<sup>35</sup> Additionally, corporations or governments engaged in activities that violate the rights of the Lake Erie Ecosystem, in any jurisdiction, shall be strictly liable for all harms resulting from those activities.<sup>36</sup> In an action by the Lake Erie Ecosystem, damages are measured by the cost of restoring the Lake Erie Ecosystem and are paid to the City of Toledo.<sup>37</sup>

Further, LEBOR provides that no permit or other authorization issued to a corporation by any state or federal entity is valid within the City of Toledo if it would violate prohibitions or rights under LEBOR.<sup>38</sup> Corporations that violate LEBOR cannot assert preemption by state or federal laws as a defense.<sup>39</sup> State laws are valid in Toledo only to the extent they do not conflict with the terms of LEBOR.<sup>40</sup>

A law recognizing that a natural resource has enforceable legal rights is highly unusual, if not unique, in the United States.<sup>41</sup> As a result, LEBOR garnered national and international attention. Stories about LEBOR appeared in national publications as diverse as the *New York Times* and the *National Review*,<sup>42</sup> and the groundbreaking ordinance was featured on *The Daily Show*.<sup>43</sup> One of the leaders of Toledoans for Safe Water, Markie Miller, was invited to speak about LEBOR at the United Nations, which she did on Earth Day 2019.<sup>44</sup>

But not everyone was happy about LEBOR, and steps to throttle it began immediately. The effort to stifle LEBOR played out in all three branches of government—judicial, executive and legislative.

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<sup>35</sup> *Id.* § 256(a).

<sup>36</sup> *Id.* § 256(c).

<sup>37</sup> *Id.* § 256(d).

<sup>38</sup> *Id.* § 255(b).

<sup>39</sup> *Id.* § 257(a).

<sup>40</sup> *Id.* § 257(b).

<sup>41</sup> The Community Environmental Legal Defense Fund (CELDF), which advocates for so-called “rights of nature” laws, called LEBOR “the first right-based law in the United States that specifically acknowledges the rights of a distinct ecosystem.” *Rights of Lake Erie Recognized in Historic Vote*, CELDF (Feb. 27, 2019), <https://celdf.org/2019/02/rights-of-lake-erie/>.

<sup>42</sup> Timothy Williams, *Legal Rights for Lake Erie? Voters in Ohio City Will Decide*, *N.Y. TIMES* (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/us/lake-erie-legal-rights.html>; Wesley Smith, *Lake Erie Now Has Rights*, *NAT’L REV.* (March 1, 2019), <https://www.nationalreview.com/corner/nature-rights-movement-lake-erie/>.

<sup>43</sup> *The Daily Show with Trevor Noah, The Fight to Turn Lake Erie into a Person*, *YOUTUBE* (July 19, 2019), <https://www.youtube.com/watch?v=3fyUD28UtlU>.

<sup>44</sup> James Proffitt, *Lake Erie Activist Addresses United Nations on Earth Day*, *GREAT LAKES NOW* (May 7, 2019), <https://www.greatlakesnow.org/2019/05/lake-erie-activist-addresses-united-nations-on-earth-day/>.

#### IV. ROLES OF THE THREE BRANCHES IN STIFLING LEBOR

##### *A. Description*

The day after the special election a lawsuit was initiated in federal court aimed at killing LEBOR. Plaintiff Drewes Farms Partnership, which owns and operates farms in four counties near Toledo and within the Lake Erie watershed, filed a complaint against the City of Toledo in the U.S. District Court for the Northern District of Ohio seeking a declaration that LEBOR is unlawful and to enjoin its enforcement.<sup>45</sup> The complaint asserted that LEBOR violates multiple provisions of the U.S. Constitution, including due process, and various Ohio state laws.<sup>46</sup> The State of Ohio, represented by the Ohio Attorney General, subsequently successfully intervened as a plaintiff, claiming, *inter alia*, that LEBOR unlawfully interferes with the state's interests in Lake Erie, exceeds the city's municipal authority under Ohio law, and is preempted by federal and state law.<sup>47</sup> The court, however, denied a motion to intervene as a defendant in support of LEBOR filed by Toledoans for Safe Water and by the Lake Erie Ecosystem.<sup>48</sup>

On February 27, 2020, exactly one year after the Drewes Farms complaint was filed, the federal court entered an order invalidating LEBOR.<sup>49</sup> Vague laws, U.S. District Judge Jack Zouhary explained, violate due process because they can trap the innocent and invite arbitrary enforcement. The court held that the rights and prohibitions set forth in LEBOR are unconstitutionally vague— aspirational statements, not rules of law.<sup>50</sup> Further, noting that Lake Erie touches four states and two nations, the court called LEBOR's attempt to invalidate conflicting Ohio state law in the name of environmental protection a “textbook example of what municipal government cannot do.”<sup>51</sup> Judge Zouhary concluded: “This is not a close call. LEBOR is unconstitutionally vague and exceeds the power of a municipal government in Ohio.”<sup>52</sup>

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<sup>45</sup> See Order Invalidating Lake Erie Bill of Rights, *Drewes Farms Partnership v. City of Toledo*, 441 F.Supp. 3d 551, 554 (N.D. Ohio Feb. 27, 2020).

<sup>46</sup> Plaintiff's Complaint, *Drewes Farms*, 2019 WL 95479 (N.D. Ohio Feb. 27, 2019). Drewes Farms alleged that fertilizing its fields is crucial to its economic survival, and because despite using best practices it could never guarantee that all fertilizer runoff will not reach Lake Erie, LEBOR exposes it to potentially massive liability. *Id.* ¶¶ 4–5.

<sup>47</sup> Intervenor State of Ohio's Complaint, *Drewes Farms*, 2019 WL 6704564 (N.D. Ohio May 24, 2019).

<sup>48</sup> Order Denying Motion to Intervene, *Drewes Farms*, No. 3:19-CV-434 (N.D. Ohio May 7, 2019).

<sup>49</sup> Order Invalidating Lake Erie Bill of Rights, *Drewes Farms Partnership v. City of Toledo*, 441 F. Supp. 3d 551 (N.D. Ohio Feb. 27, 2020).

<sup>50</sup> *Id.* at 555-57.

<sup>51</sup> *Id.* at 557.

<sup>52</sup> *Id.* at 558. The court did not, however, invalidate LEBOR for providing that Lake Erie has enforceable legal rights.

The City of Toledo appealed the district court decision invalidating LEBOR to the U.S. Court of Appeals for the Sixth Circuit. However, in May 2020 the city withdrew its appeal, citing budgetary constraints.<sup>53</sup>

On the legislative front, in July 2019, just a few months after LEBOR was added to the City of Toledo charter, the Ohio General Assembly enacted a statute directly aimed at invalidating LEBOR and banning any similar “rights of nature” laws.<sup>54</sup> Tucked into the 2,600-page annual state budget bill was a section providing that “nature” or an “ecosystem” does not have standing to participate in or bring an action in state court.<sup>55</sup> It further provided that no person shall bring or intervene in an action in state court on behalf of nature or an ecosystem.<sup>56</sup>

### *B. Evaluation*

It is hard to fault the judicial branch for killing LEBOR. While the amendment was well-intentioned, LEBOR was also legally flawed, and not just for the reasons relied upon in Judge Zouhary’s decision. For example, according to LEBOR no permit or authorization issued to a corporation by a federal or state entity is valid in Toledo if it would violate rights under LEBOR,<sup>57</sup> and corporations which violate LEBOR cannot assert preemption by state or federal laws as a defense.<sup>58</sup> So a corporation sued for violating the rights of a clean and healthy Lake Erie by discharging pollutants into the lake could not defend itself on the basis of the discharge being authorized by a Clean Water Act permit issued by a state or federal government agency. LEBOR impermissibly turned principles of preemption and the Supremacy Clause<sup>59</sup> upside down; municipal law cannot supersede state or federal law on such matters.

The record of the executive branch with respect to LEBOR is more mixed. Because LEBOR purported to override conflicting state law and regulate the whole Lake Erie watershed far beyond the Toledo city limits,<sup>60</sup> the Attorney

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<sup>53</sup> See Tom Henry, *City Quietly Drops Appeal of Lake Erie Bill of Rights Ruling*, TOLEDO BLADE (May 11, 2020), <https://www.toledoblade.com/local/environment/2020/05/11/toledo-quietly-drops-appeal-of-lebor-ruling-lake-erie/stories/20200511082>. The city’s decision to drop the appeal came during the Covid-19 pandemic, which was negatively impacting the city’s budget. See *City Employees Facing Emergency Leave as Toledo Faces Budget Shortfall During Covid-19 Crisis*, MSN.COM (April 9, 2019), <https://www.msn.com/en-us/news/us/city-employees-facing-emergency-leave-as-toledo-faces-budget-shortfall-during-covid-19-crisis/ar-BB12oFNI>.

<sup>54</sup> Act of July 17, 2019, Am. Sub. H.B. No. 166, 133d Gen. Assy. (Ohio 2019) at 482 (codified at Ohio Rev. Code § 2305.011).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> LEBOR, *supra* note 1, § 255(b).

<sup>58</sup> *Id.* § 257(a).

<sup>59</sup> U.S. Const. art. VI, ¶ 2.

<sup>60</sup> See LEBOR, *supra* note 1, §§ 254(a), 257(b).



General on behalf of the State of Ohio had reason for intervening in the federal lawsuit and seeking to declare the ordinance invalid. But, as the State recognized in its pleadings, the State holds Lake Erie in trust and has a duty to protect the lake for the public.<sup>61</sup> The State's executive branch, including agencies such as the Ohio Department of Agriculture and Ohio EPA, should be doing more with their existing statutory authority to fulfill their public trust duty and to accomplish LEBOR's goal of a clean and healthy Lake Erie. Most importantly, that means regulating agricultural stormwater runoff to reduce the amount of phosphorus entering Lake Erie. Examples of steps Ohio agencies could and should take include designating key watersheds in the Lake Erie basin as "distressed," thus releasing a suite of binding restrictions specifically aimed at reducing nutrient pollution from agricultural nonpoint sources,<sup>62</sup> and more diligently enforcing existing Ohio laws aimed at reducing nutrient pollution from agricultural sources.<sup>63</sup>

In my view, the legislative branch is perhaps the most blameworthy regarding LEBOR. While LEBOR was legally flawed, it seems like an over-reaction to pass a bill to ban all "rights of nature" laws of every stripe.<sup>64</sup> The concept of a "rights of nature" law is neither unprecedented nor new. Nearly half a century ago, Professor Christopher Stone wrote a provocative and influential law review article titled "Should Trees Have Standing?,"<sup>65</sup> and U.S. Supreme Court Justice William O. Douglas, in a dissenting opinion, asserted that natural objects should have standing to sue for their own protection.<sup>66</sup> In recent years "rights of nature" laws have taken root in some foreign nations, including in the constitution of Ecuador and via legislation in New Zealand, and are starting to make inroads in this country.<sup>67</sup> A carefully crafted "rights of

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<sup>61</sup> See Intervenor State of Ohio's Complaint, *Drewes Farms Partnership v. City of Toledo*, 2019 WL 6704564 at ¶ 27, 31, 36 (N.D. Ohio May 24, 2019) (citing *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) and *State v. Cleveland & Pgh. Ry.*, 94 Ohio St. 61, 113 N.E. 677 (1916)).

<sup>62</sup> See Kenneth Kilbert, *Distressed Watershed: A Designation To Ease the Algae Crisis in Lake Erie and Beyond*, 124 DICK. L. REV. 1, 35-43 (2019) (discussing "distressed watershed" designation under the Ohio Administrative Code).

<sup>63</sup> See *id.* at 15-23 (summarizing existing Ohio law governing agricultural nonpoint sources of nutrient pollution).

<sup>64</sup> See Act of July 17, 2019, Am. Sub. H.B. No. 166, 133d Gen. Assy. (Ohio 2019) at 482 (codified at Ohio Rev. Code § 2305.011) (barring all state court actions by or on behalf of "nature" or an "ecosystem").

<sup>65</sup> Christopher Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 SO. CAL. L. REV. 450 (1972).

<sup>66</sup> *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting).

<sup>67</sup> See Caroline McDonough, Comment, *Will the River Ever Get a Chance To Speak? Standing Up for the Legal Rights of Nature*, 31 VILL. ENVTL. L.J. 143, 144-55 (2019); Gwendolyn Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 53-58 (2018).

nature” law—clearer about what it prohibits and more limited in scope—might have a legitimate place in the environmental protection legal toolbox in Ohio.<sup>68</sup>

More importantly, the Ohio General Assembly should be devoting its legislative attention to achieving LEBOR’s goal of a clean and healthy Lake Erie by enacting bills to regulate the major source of phosphorus loading to Lake Erie, agricultural stormwater runoff. Examples of such legislation could include requiring agricultural operations to follow specific best management practices to reduce stormwater runoff of manure and fertilizer,<sup>69</sup> and lowering the threshold numbers of animals necessary to trigger the state’s more rigorous laws governing concentrated animal feeding facilities.<sup>70</sup>

## V. LEBOR IS STILL SIGNIFICANT

LEBOR is dead, but its importance lives on. LEBOR is a high-profile landmark in the nascent “rights of nature” law movement in the United States. As such, it may inspire more jurisdictions to pass laws providing that a natural resource has enforceable rights. Admittedly, at this stage it is not clear what legal advantages a “rights of nature” law confers for fighting pollution or protecting a natural resource. Arguably, however, recognizing that a lake or other natural resource has enforceable rights could have procedural, substantive and rhetorical advantages.<sup>71</sup> Procedurally, it could make standing less of a hurdle. Instead of having to show an individual plaintiff has suffered an injury from pollution to the lake, perhaps injury in fact could be established simply by showing the plaintiff lake itself has been injured by pollution.<sup>72</sup> Substantively, whereas environmental regulatory laws like the Clean Water Act literally permit

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<sup>68</sup> For example, perhaps the City of Toledo could enact an ordinance that authorizes any city resident to bring an action, in the name of Lake Erie, to enjoin any farm in the city from operating absent compliance with an approved nutrient management plan. *Cf.* City of Pittsburgh Code of Ordinances, title VI, art. I, ch. 618, [http://pittsburgh-pa.elaws.us/code/coor\\_titlesix\\_arti\\_ch618](http://pittsburgh-pa.elaws.us/code/coor_titlesix_arti_ch618) (banning new natural gas extraction within the city and authorizing any city resident to enforce the ban by suing in the name of natural communities or ecosystems within the city).

<sup>69</sup> Ohio’s current Agricultural Pollution Abatement statute, Ohio Rev. Code ch. 939, arguably does not cover commercial fertilizer. *See* Kenneth Kilbert, *Distressed Watershed: A Designation To Ease the Algae Crisis in Lake Erie and Beyond*, 124 DICK. L. REV. 1, 49-51 (2019).

<sup>70</sup> Compare Ohio Rev. Code ch. 903 (regulating concentrated animal feeding facilities with more than a threshold number of animals), with Ohio Rev. Code ch. 939 (imposing much less rigorous requirements on animal feeding operations with fewer animals).

<sup>71</sup> *But see* Laura Spitz & Eduardo Penalver, *Nature’s Personhood and Property’s Virtues*, 45 HARV. ENVTL. L. REV. – (forthcoming 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3538522](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538522) (identifying all three arguments but questioning value of first two).

<sup>72</sup> *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (case dismissed because plaintiff environmental group lacked constitutional standing; no individual member could establish injury in fact).

discharges of pollution to the lake, affording the lake “rights” might place more emphasis on protecting the lake from pollution. If a fictional entity like a corporation can benefit from having rights like a person, why not a real entity like a lake?<sup>73</sup> Rhetorically, advocates may find it more powerful to be viewed as arguing on behalf of the lake itself, not just a person or group.<sup>74</sup>

Even more significant, though, is the signal that LEBOR has sent. LEBOR shows that the people of Toledo—to borrow a [famous line from a classic movie](#)—are mad as hell and they’re not going to take it anymore.<sup>75</sup>

It has been six years since the Toledo tap water crisis of August 2014, and unfortunately not much has changed: the legislative and executive branches of Ohio have done little to regulate agricultural stormwater runoff and HABs continue to plague Lake Erie every summer or fall. LEBOR is stark proof that the people of Toledo are tired of waiting for their state government to act, so they are trying to take control of their own destiny. More than 10,000 persons signed the petition to get LEBOR on the ballot, and then an overwhelming majority of votes were cast in favor of adding it to the city charter.<sup>76</sup> The message to Ohio’s elected officials, and the agency personnel they appoint, should be unmistakable: Take action to reduce phosphorus loading to Lake Erie by regulating agricultural stormwater runoff, or else the people of Toledo—and the many other voters in Ohio who care about Lake Erie—will take action themselves in the next election by voting against those who failed to do what is necessary to solve the HABs problem in Lake Erie.

## VI. CONCLUSION

LEBOR is a pioneering “rights of nature” ordinance that grew out of frustration with existing state and federal laws that have failed to solve the severe HABs problem in Lake Erie. Given life by citizens at the ballot box, LEBOR was quickly snuffed out by the judicial branch, the executive branch and, perhaps most egregiously, the legislative branch. Although LEBOR is now dead in the water (pun intended), government officials should heed its loud, clear message and take the overdue steps necessary to restore a clean, healthy Lake Erie.

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<sup>73</sup> *Cf.* *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010) (corporations are protected by First Amendment right to free speech).

<sup>74</sup> *See, e.g., Palila v. Hawaii Dept. of Land & Nat. Res.*, 639 F.2d 495 (9th Cir. 1981) (lead named plaintiff was endangered bird); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (same).

<sup>75</sup> *NETWORK* (Metro-Goldwyn-Mayer Studios 1976) (shouted by character Howard Beale).

<sup>76</sup> *Order Invalidating Lake Erie Bill of Rights, Drewes Farms Partnership v. City of Toledo*, 441 F. Supp. 3d 551, 554 (N.D. Ohio Feb. 27, 2020).