LAKE ERIE BILL OF RIGHTS

ESTABLISHING A BILL OF RIGHTS FOR LAKE ERIE, WHICH PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE THE BILL OF RIGHTS

We the people of the City of Toledo declare that Lake Erie and the Lake Erie watershed comprise an ecosystem upon which millions of people and countless species depend for health, drinking water and survival. We further declare that this ecosystem, which has suffered for more than a century under continuous assault and ruin due to industrialization, is in imminent danger of irreversible devastation due to continued abuse by people and corporations enabled by reckless government policies, permitting and licensing of activities that unremittingly create cumulative harm, and lack of protective intervention. Continued abuse consisting of direct dumping of industrial wastes, runoff of noxious substances from large scale agricultural practices, including factory hog and chicken farms, combined with the effects of global climate change, constitute an immediate emergency.

We the people of the City of Toledo find that this emergency requires shifting public governance from policies that urge voluntary action, or that merely regulate the amount of harm allowed by law over a given period of time, to adopting laws which prohibit activities that violate fundamental rights which, to date, have gone unprotected by government and suffered the indifference of state-chartered for-profit corporations.

We the people of the City of Toledo find that laws ostensibly enacted to protect us, and to foster our health, prosperity, and fundamental rights do neither; and that the very air, land, and water – on which our lives and happiness depend – are threatened. Thus it has become necessary that we reclaim, reaffirm, and assert our inherent and inalienable rights, and to extend legal rights to our natural environment in order to ensure that the natural world, along with our values, our interests, and our rights, are no longer subordinated to the accumulation of surplus wealth and unaccountable political power.

We the people of the City of Toledo affirm Article 1, Section 1, of the Ohio State Constitution, which states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

We the people of the City of Toledo affirm Article 1, Section 2, of the Ohio State Constitution, which states: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

And since all power of governance is inherent in the people, we, the people of the City of Toledo, declare and enact this Lake Erie Bill of Rights, which establishes irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a healthy

environment for the residents of Toledo, and which elevates the rights of the community and its natural environment over powers claimed by certain corporations.

Section 1 – Statements of Law – A Community Bill of Rights

(a) *Rights of Lake Erie Ecosystem.* Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve. The Lake Erie Ecosystem shall include all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed.

(b) *Right to a Clean and Healthy Environment.* The people of the City of Toledo possess the right to a clean and healthy environment, which shall include the right to a clean and healthy Lake Erie and Lake Erie ecosystem.

(c) *Right of Local Community Self-Government.* The people of the City of Toledo possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

(d) *Rights as Self-Executing.* All rights secured by this law are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. Further implementing legislation shall not be required for the City of Toledo, the residents of the City, or the ecosystems and natural communities protected by this law, to enforce all of the provisions of this law.

Section 2 – Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful for any corporation or government to violate the rights recognized and secured by this law. "Corporation" shall include any business entity.

(b) No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo.

Section 3 – Enforcement

(a) Any corporation or government that violates any provision of this law shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this law, shall count as a separate violation.

(b) The City of Toledo, or any resident of the City, may enforce the rights and prohibitions of this law through an action brought in the Lucas County Court of Common Pleas, General Division. In such an action, the City of Toledo or the resident shall be entitled to recover all costs of litigation, including, without limitation, witness and attorney fees.

(c) Governments and corporations engaged in activities that violate the rights of the Lake

Erie Ecosystem, in or from any jurisdiction, shall be strictly liable for all harms and rights violations resulting from those activities.

(d) The Lake Erie Ecosystem may enforce its rights, and this law's prohibitions, through an action prosecuted either by the City of Toledo or a resident or residents of the City in the Lucas County Court of Common Pleas, General Division. Such court action shall be brought in the name of the Lake Erie Ecosystem as the real party in interest. Damages shall be measured by the cost of restoring the Lake Erie Ecosystem and its constituent parts at least to their status immediately before the commencement of the acts resulting in injury, and shall be paid to the City of Toledo to be used exclusively for the full and complete restoration of the Lake Erie Ecosystem and its constituent parts to that status.

Section 4 – Enforcement – Corporate Powers

(a) Corporations that violate this law, or that seek to violate this law, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law, including the power to assert state or federal preemptive laws in an attempt to overturn this law, or the power to assert that the people of the City of Toledo lack the authority to adopt this law.

(b) All laws adopted by the legislature of the State of Ohio, and rules adopted by any State agency, shall be the law of the City of Toledo only to the extent that they do not violate the rights or prohibitions of this law.

Section 5 – Effective Date and Existing Permit Holders

This law shall be effective immediately on the date of its enactment, at which point the law shall apply to any and all actions that would violate this law regardless of the date of any applicable local, state, or federal permit.

Section 6 – Severability

The provisions of this law are severable. If any court decides that any section, clause, sentence, part, or provision of this law is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the law. This law would have been enacted without the invalid sections.

Section 7 – Repealer

All inconsistent provisions of prior laws adopted by the City of Toledo are hereby repealed, but only to the extent necessary to remedy the inconsistency.

Lake Erie Bill of Rights
LEBOR

FROM TOLEDO TO COLUMBUS, BACK TO TOLEDO, BACK TO COLUMBUS, AND BACK YET AGAIN TO TOLEDO!

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Opinions expressed are not those of the Ohio Sixth District Court of Appeals

Our story begins in Toledo....

LEBOR

- August 6, 2018, petitioners submitted signed petitions in support of a proposed Amendment to the Toledo City Charter entitled the Lake Erie Bill of Rights (LEBOR).
- Wanted to include the Amendment on the ballot for the November 2, 2018 *general election.*
- Lake Erie and the Lake Erie water shed "possess the right to exist, flourish, and naturally evolve, and the citizens of Toledo have a right to clean and healthy environment, including the Lake Erie ecosystem."
- Section 2 of the amendment made it unlawful for a corporation or government to violate the rights provided by LEBOR

- Section 3 would allow the city of Toledo, or any resident to enforce the rights and prohibitions under LEBOR in the Lucas County Court of Common Pleas This included filing actions on behalf the Lake Erie ecosystem
- Section 4 purports to nullify any state laws or agency rules that conflict with the provisions of LEBOR.

- Toledo's clerk of council submitted the petition, directly to the Board of Elections – Toledo City Council did not pass an ordinance ordering the amendment to be placed on the ballot

Toledo City Charter, Chapter 1, Section 5

- Any amendment to the Charter may be submitted to the electors of the City for adoption by resolution of the Council, two thirds of the members thereof concurring, and shall be submitted when a petition is filed with the Clerk of Council setting forth the proposed Amendment and signed by not less than ten percent of the electors

- It shall be the duty of the Clerk to notify the election authorities of the adoption by the Council of a resolution for submission of a proposed amendment, or of his or her determination that a sufficient petition for submission has been filed * * * and the Clerk shall request the election authorities to provide for an election * * *

Ohio Constitution, Article XVIII Section 7

- Specifies the procedure for placing an Amendment to the city charter on the ballot.

Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a 2/3 vote of the legislative authority thereof, and upon petitions signed by ten percentum of the electors of the municipality setting forth any such proposed amendment shall be submitted by such legislative authority. The submission of the proposed amendments to the electors shall be governed by the requirements of section 8 * * *

Article VIII Section 8

- The legislative authority of any city or village may be by a two-thirds vote of its members, and upon petition of ten percentum of the electors shall forthwith provide *by ordinance* for the submission to the electors, of the question * * *. (Emphasis added.)

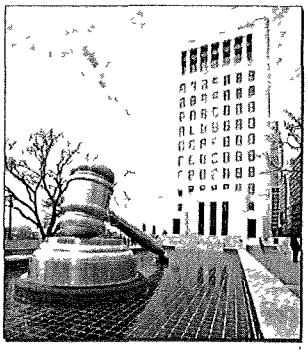
- Because of the number of signatures that were collected pursuant to the City charter, the city council clerk submitted the petition directly to the Board of Elections for placement on the ballot.

- But the Board refused by a 4-0 vote to place the petition on the ballot on the ground that it contained provisions that are beyond the authority to enact because (1) it created a new cause of action; and (2) confers jurisdiction on the common pleas court to hear the new cause of action.

- The Board's decision was based upon the Ohio Supreme Court's recent decision in *State ex rel Flak v. Betras,* 152 Ohio St.3d 244, 2017-Ohio-8109, 95 N.E.3d 329 (a county board of elections may properly refuse to certify a proposed municipal ordinance to the ballot when the ordinance encompasses a matter beyond the scope of the municipality's authority to enact).

- *Flak* involved two Youngstown initiatives, the Bill of Rights for Fair Elections and Access to Local Government (capped election contributions at $100)
- Youngstown Drinking Water Protection Bill of Rights (similar to LEBOR)
- In *Flak*, the court recognized a municipality is not authorized to create new causes of action

Next stop - Columbus...



- Petitioners file an expedited "original action" in the Supreme Court on August 30, 2019, asking the court to compel the Board to place LEBOR on the November 2018 General Election Ballot.
- *State ex rel. Twitchell v. Saferin*, 155 Ohio St 3d 52, 2018-Ohio-3829
- What relief/causes of action would be included?

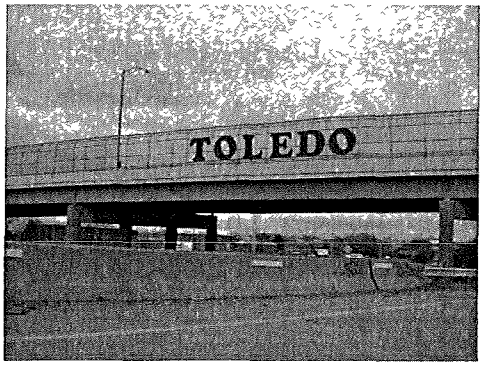
A Mandamus Action

What is a Mandamus Action?

- Asking a court to direct an public official or agency to take action they are required to take - "Just Do It"
- Clear legal right to the relief requested
- Clear legal duty on the part of the respondent to provide that relief
- Lack of an adequate remedy in the ordinary course of the law
- To satisfy the first two requirements, a relator must show that the respondent engaged in fraud or corruption, abused its discretion or acted in clear disregard of applicable legal provisions.

- Since City Council failed to "pass an ordinance" ordering that the amendment be placed on the ballot, the Supreme Court found that the relators had failed to show that they were clearly entitled to relief under law.
- Thus no mandamus relief would be granted
- Instead of relying upon *Flak* for the proposition that the Board is not required to place legislation on the ballot where a municipality creates new causes of action, the court overruled *Flak* and relied upon different grounds in affirming the Board's decision in refusing to place LEBOR on the ballot for the November 2018 general election

So what happens next? Back to -



LEBOR II – The Sequel

- On December 4, 2018, the Toledo City Council passed Ordinance 497-18 declaring that the clerk of city council had received sufficient signatures from the voters to place LEBOR on the February 26, 2019 special election ballot.
- Thus, it appeared that City Council had cured the problem identified in *State ex rel. Twitchell v. Saferin*, 155 Ohio St.3d 52, 2018-Ohio-3829.

- Relator Abernathy submitted a written protest that LEBOR was ineligible to appear on the ballot because its provisions exceeded the authority of Toledo to enact (one of the Board's original reasons for rejecting LEBOR); and LEBOR was barred from being placed on the ballot due to res judicata arising from the Supreme Court's decision in *State ex rel. Twitchell*
- The Board denied the protest but two of the members made clear their belief that LEBOR was unconstitutional on its face but that the Board was obligated to place the measure on the ballot pursuant to the recent decision in *State ex rel. Maxcy v. Saferin*, 155 Ohio St. 3d 496, 2018-Ohio-4035, 122 N.E.3d 1165 (the Lucas County Jail Charter Amendment case).

Back to Columbus...

- Relator Abernathy filed an original action for a writ of prohibition in the Supreme Court seeking to prohibit the Lucas County Board of Elections from placing LEBOR on the ballot.

- *State ex rel. Abernathy v. Lucas Cty Bd. of Elections*, 156 Ohio St.3d 238, 2019-Ohio-201.

Writ of Prohibition "Just Don't Do It"

- To obtain a writ in an election case, a relator must show: (1) the board of elections exercised quasi-judicial power; (2) the exercise of that power was unlawful, and (3) the relator has no adequate remedy in the course of law.
- Court concludes that the 2nd element necessary for relief is not present here because "a board of elections has ***no legal authority*** to review the substance of a proposed charter amendment and ***has no discretion*** to block the measure from the ballot based on an assessment of its suitability." (Emphasis added)

- "[O]nce the municipal legislative body passes an ordinance placing the proposed charter amendment on the ballot, 'the duty of the board [of elections] is to simply add the proposed charter to the ballot'"
- Thus, because City Council had passed the ordinance to put LEBOR on the ballot, the Board was required to act in its ministerial capacity and place the legislation on the ballot
- The Board was not permitted to examine the constitutionality of the amendment, it simply had to place it on the ballot

Leftover Issues from LEBOR Constitutionality of 3501.11(K)

- R.C. 3501.11 requires a board of election to examine each initiative petition to determine whether it constitutes a valid exercise of initiative power
- Concern is that this violates separation of powers since it potentially blocks initiatives from the ballot without providing those parties a right to judicial review.
- Justice Fischer has dissented and raised concerns over the constitutionality of the statute in multiple opinions, but the majority has not addressed the constitutionality of the statute.

Questions

Lake Erie Bill of Rights Panel
(Documents in support of LEBOR presentation)

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I. New O.R.C. § Sec. 2305.011 (from Am. S. H. B. No. 166, Ohio's 2019 Biennial Budget Act)

II. .Amended O.R.C. § 929.04, Ohio's Right to Farm Act (from Am. S. H. B. No. 166, Ohio's 2019 Biennial Budget Act)

III. Advancing Rights of Nature: Timeline

IV. Excerpts from *Mike Ferner, et. al., Plaintiffs, v. State of Ohio, Defendant*
(Judge Michael R. Goulding)
Lucas County Common Pleas Court Case No. G-4801-CI-0201902904-000
"Plaintiffs' Response to State of Ohio's Motion to Dismiss," August 16, 2019

V. *Excerpts from Drewes Farms Partnership, Plaintiff, v. City of Toledo, Ohio, Defendant*
(Judge Jack Zouhary)
Case No. 3:19-cv-00434-JZ (U.S. District Court of Northern Ohio, Western Division)
"Defendant City of Toledo's Combined Reply in Support of Its Cross-Motion Under Rule 12(c) for Judgment on the Pleadings as to Drewes Farms Partnership (Doc. #47) and Reply in Support of Its Cross-Motion Under Civil Rule 12(c) as to the State of Ohio (Doc. #48)," (Document #56), September 6, 2019

VI. *Environmental Law and Policy Center v. United States Environmental Protection Agency*, 349 F.Supp.3d 703, Case No. 3:17CV1514, (N.D.Ohio, W.D., October 3, 2018)

division for a similar purpose.

(2) As used in division (E) of this section:

(a) "Criminal cause" means a charge alleging the violation of a statute or ordinance, or subsection of a statute or ordinance, that requires a separate finding of fact or a separate plea before disposition and of which the defendant may be found guilty, whether filed as part of a multiple charge on a single summons, citation, or complaint or as a separate charge on a single summons, citation, or complaint. "Criminal cause" does not include separate violations of the same statute or ordinance, or subsection of the same statute or ordinance, unless each charge is filed on a separate summons, citation, or complaint.

(b) "Civil action or proceeding" means any civil litigation that must be determined by judgment entry.

Sec. 2305.011. (A) As used in this section:

(1) "Nature" means the phenomena of the physical world collectively, including plants, animals, the landscape, other features and products of the earth, the natural environment or wilderness, and generally areas that are not human or human creations, have not been substantially altered by humans, or that persist despite human intervention.

(2) "Ecosystem" means a complex community of living organisms in conjunction with their physical environments, all interacting and linked together as a system through nutrient cycles and energy flows in a particular unit of space.

(B) Nature or any ecosystem does not have standing to participate in or bring an action in any court of common pleas.

(C)(1) No person, on behalf of or representing nature or an ecosystem, shall bring an action in any court of common pleas.

(2) No person shall bring an action in any court of common pleas against a person who is acting on behalf of or representing nature or an ecosystem.

(3) No person, on behalf of or representing nature or an ecosystem, shall intervene in any manner, such as by filing a counterclaim, cross-claim, or third-party complaint, in any action brought in any court of common pleas.

(D) Nothing in this section shall be construed to prevent the state or any of its agencies from enforcing the laws pertaining to environmental pollution, conservation, wild animals, or other natural communities or ecosystems.

Sec. 2305.231. (A) As used in this section:

(1) "Dentist" means a person who is licensed under Chapter 4715. of the Revised Code to practice dentistry.

(CC) "Residual farm products" has the same meaning as in section 939 01 of the Revised Code

(DD) "Voluntary nutrient management plan" means any of the following

(1) A nutrient management plan that is in the form of the Ohio nutrient management workbook made available by the Ohio state university

(2) A comprehensive nutrient management plan developed by the United States department of agriculture natural resources conservation service a technical service provider certified by the conservation service, or a person authorized by the conservation service to develop a plan,

(3) A document that is equivalent to a plan specified in division (DD)(1) or (2) of this section, that is in a form approved by the director or the director's designee, and that contains at least all of the following information

(a) Results of soil tests conducted on land subject to the plan that comply with the field office technical guide established by the conservation service and adopted by the director in rules adopted under division (E) of section 939 02 of the Revised Code and that are not older than ~~three~~ four years,

(b) Documentation of the method and seasonal time of utilization and application of nutrients,

(c) Identification of all nutrients applied, including manure, fertilizer, sewage sludge, and biodigester residue,

(d) Field information regarding land subject to the plan, including the location, spreadable acreage crops grown, and actual and projected yields

Sec 929 04 (A) As used in this section, "agricultural activities" means common agricultural practices, including all of the following,

(1) The cultivation of crops or changing crop rotation,

(2) Raising of livestock or changing the species of livestock raised,

(3) Entering into and operating under a livestock contract,

(4) The storage and application of commercial fertilizer;

(5) The storage and application of manure,

(6) The storage and application of pesticides and other chemicals commonly used in agriculture,

(7) A change in corporate structure or ownership,

(8) An expansion, contraction, or change in operations,

(9) Any agricultural practice that is acceptable by local custom,

(B) In a civil action for nuisances involving agricultural activities, it is a complete defense if

~~(A)~~(1) The agricultural activities ~~Were~~ were conducted within an

agricultural district or on land devoted exclusively to agricultural use in accordance with section 5713.30 of the Revised Code, or were conducted by a person pursuant to a lease agreement, written or otherwise,

~~(B) Agricultural~~(2) The agricultural activities ~~Were~~ were established ~~within the agricultural district~~ prior to the plaintiff's activities or interest on which the action is based,

~~(C) the plaintiff was not involved in agricultural production, and~~

~~(D)~~(3) The agricultural activities ~~Were~~ were not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or were conducted in accordance with generally accepted agriculture practices

~~The~~

The plaintiff may offer proof of a violation independently of proof of a violation or conviction by any public official

Sec. 936.01. As used in this chapter,

"Education" means any activity designed to provide information regarding propane, propane equipment, mechanical and technical practices, and uses and promotion of propane to consumers and members of the propane industry.

"Propane" means liquefied petroleum gas, a material with a vapor pressure not exceeding that of commercial propane composed predominately of the following hydrocarbons or mixtures

(A) Propane,

(B) Propylene,

(C) Butane,

(D) Butylene

"Propane council" or "council" means the propane council created under section 936 02 of the Revised Code.

"Retailer" means a person engaged primarily in the sale of odorized propane to the ultimate consumer or to a retail propane dispenser

"Wholesale distributor" means a person whose primary business involves the sale of propane to a retailer.

Sec. 936.02. (A) The director of agriculture shall establish a propane council and adopt rules in accordance with Chapter 119. of the Revised Code necessary to implement this chapter.

(B) The director shall appoint the following members to the council in accordance with this section and rules adopted under it,

(1) Two multi-state propane gas retailers,

(2) Two intrastate propane gas retailers,

(3) One cooperative propane gas retailer;

(4) One wholesale propane gas wholesale distributor,

Advancing Legal Rights of Nature: Timeline

Expanding the body of legal rights to include nature has been an idea brewing for generations Indeed, more than a century ago, environmentalist John Muir wrote that we must respect *"the rights of all the rest of creation"* In 2015, Pope Francis stated that, *"A true 'right of the environment' does exist"*

Below are key moments in the development of the movement for the Rights of Nature

- In 1972, the Southern California Law Review published law professor Christopher Stone's seminal article, "Should trees have standing – toward legal rights for natural objects" Stone described how under the existing structure of law, nature was considered right-less, having no legally recognized rights to defend and enforce
- In 1989, Professor Roderick Nash, published The Rights of Nature A History of Environmental Ethics In it he explains how, throughout history, the right-less – slaves, women, others – have struggled to expand the body of legal rights to include themselves Nash provides a context for how and why the body of rights is moving in the direction of expanding to include nature
- In 2001, Thomas Berry published The Origin, Differentiation and Role of Rights in which he described how all members of the Earth community possess inherent rights
- In 2003, Wild Law A Manifesto for Earth Justice, was published Authored by South African attorney Cormac Cullinan, with Berry, he opens up a new front on the Rights of Nature – adding a significant spiritual and moral element to the legal and historic discussion begun by Stone and Nash
- In 2006, Tamaqua Borough, Pennsylvania, in the U S , banned the dumping of toxic sewage sludge as a violation of the Rights of Nature Tamaqua is the very first place in the world to recognize the Rights of Nature in law Since 2006, dozens of communities in ten states in the U S have enacted Rights of Nature laws
- In 2008, Ecuador became the first country in the world to recognize the Rights of Nature in its national constitution In 2011, the first Rights of Nature court decision was issued in the Vilcabamba River case in Ecuador, upholding the Rights of Nature constitutional provisions
- In 2010, Bolivia held the *World People's Conference on Climate Change and the Rights of Mother Earth*, where the *Universal Declaration on the Rights of Mother Earth* was issued. It has been submitted to the U N for consideration
- In 2010, the *Global Alliance for the Rights of Nature* was formed In 2014, the Global Alliance sponsored the first *Rights of Nature Tribunal* in Ecuador Subsequent tribunals have now been held, including in Bonn in 2017
- In 2010, Bolivia's Legislative Assembly passed the Law of the Rights of Mother Earth
- In 2011, a campaign was launched in Nepal to advance the Rights of Nature Today, Members of Parliament are considering a Rights of Nature constitutional amendment.
- In 2012, a campaign was launched in India to recognize rights of the Ganga River through national legislation The campaign slogan is "Ganga's Rights are Our Rights"
- In 2012, the International Union for the Conservation of Nature (IUCN) adopted a policy to incorporate the Rights of Nature in its decision-making processes
- In 2013, the campaign for the European Citizen's Initiative for the Rights of Nature was launched The initiative process allows citizens to present proposals to the European Union government for consideration
- In 2014, the first Rights of Nature state constitutional amendment was proposed in Colorado Efforts are now advancing in Ohio, New Hampshire, Oregon, and other states
- In 2014, the New Zealand Parliament passed the *Te Urewera Act*, finalizing a settlement between the Tūhoe people and the government The Act recognizes the Te Urewera – a former national park, of more than 2,000 square kilometers – as having "legal recognition in its own right."
- In 2015, Sweden's Riksdag considered a motion to create a commission to prepare a proposal on how the Rights of Nature can be incorporated into Swedish law
- In 2015, Pope Francis, in calling for a new era of environmental protection at the U N , declared, "A true 'right of the environment' does exist"
- In 2016, the Green Party of England and Wales adopted a Rights of Nature policy platform The Greens in Scotland have taken similar steps
- In 2016, the Ho-Chunk Nation took a first vote for a Rights of Nature tribal constitutional amendment, the first tribal nation in the U S. to do so
- In 2016, Colombia's Constitutional Court ruled that the Rio Atrato possesses rights to "protection, conservation, maintenance, and restoration," and established joint guardianship for the river shared by indigenous people and the national government
- In 2017, Mexico City incorporated language into the city constitution which requires a law to be passed which would "recognize and regulate the broader protection of the rights of nature formed by all its ecosystems and species as a collective entity subject to rights"
- In 2017, the New Zealand Parliament finalized the *Te Awa Tupua Act*, granting the Whanganui River legal status as an ecosystem
- In 2017, the High Court of Uttarakhand in India issued rulings recognizing the Ganga and Yamuna Rivers, glaciers, and other ecosystems as legal persons with certain rights
- In 2017, Lafayette, Colorado, in the U S , enacted the first *Climate Bill of Rights*, recognizing rights of humans and nature to a healthy climate, and banning fossil fuel extraction as a violation of those rights
- In 2017, *Colorado River v State of Colorado* was filed in U S federal court In this first-in-the-nation lawsuit, an ecosystem sought recognition of its legal rights
- In 2017, the international *Rights of Nature Symposium* was held at Tulane Law School in the U S The *Rights of Nature Principles* – outlining the central elements of Rights of Nature laws – were issued from the Symposium The Principles are available at https //celdf org/rights-nature-symposium/
- In 2017, the Municipality of Bonito, in the State of Pernambuco in Brazil, enacted a rights of nature law, securing rights to "exist, thrive, and evolve"
- In 2018, the Ponca Nation of Oklahoma adopted a customary law recognizing the rights of nature
- In 2018, the Colombian Supreme Court recognized the Colombian Amazon as a "subject of rights"
- In 2018, in Colombia, the Administrative Court of Boyacá recognized the Páramo in Pisba, a high Andean ecosystem facing significant mining, as a "subject of rights"
- In 2018, the Municipality of Paudalho, in the State of Pernambuco in Brazil, enacted a rights of nature law
- In 2018, the White Earth band of the Chippewa Nation adopted the "Rights of the Manoomin" law securing legal rights of manoomin, or wild rice, a traditional staple crop of the Anishinaabe people This is the *first law* to secure legal rights of a particular plant species Rights of Manoomin was also adopted by the 1855 Treaty Authority
- In 2019, the National Lawyers Guild in the United States amended the organization's constitution to include the rights of nature, stating "human rights and the rights of ecosystems shall be regarded as more sacred than property interests"
- In 2019, Toledo, Ohio, residents adopted the *Lake Erie Bill of Rights*, following three years of fighting for the right to vote on the measure It is the first law in the U.S to secure legal rights of an ecosystem
- In 2019, Uganda enacted the National Environmental Act of 2019 in which nature is recognized as having "the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution"

- In 2019, residents of Exeter, New Hampshire in the U S , enacted a law securing the rights of nature, including the right to "a stable and healthy climate system "
- In 2019, residents of Nottingham, New Hampshire, in the U S , enacted a law securing the rights of nature, including the right to be free from "chemical trespass "
- In 2019, the High Court in Bangladesh recognized legal rights of rivers
- In 2019, the Yurok tribe in the U S recognized legal rights of the Klamath River
- In 2019, in Colombia, the Plata River was recognized as a "subject of rights "
- In 2019, a workshop on the rights of nature was held in the Swedish Parliament, the Riksdag, the first event of its kind

Excerpts from:

MIKE FERNER, et al , Plaintiffs, v STATE OF OHIO, Defendant
Judge Michael R Goulding
Case No G-4801-CI-0201902904-000 (Lucas County Common Pleas Court)
"Plaintiffs' Response to State of Ohio's Motion to Dismiss," August 16, 2019

A. Plaintiffs and Lake Erie have suffered many concrete injuries

Plaintiffs assert that ecological reality is more important than legal ideology All life depends on clean water, breathable air, healthy soil, a habitable climate, and complex relationships formed by living creatures in natural communities

Social morality must emerge from a humble understanding of this reality Law is integral to social morality, so law must emerge from this understanding, too In this case, this Court is presented with an opportunity to help Ohio law change so that it may adequately respond to both the Lake Erie crisis and the global environmental crisis

Injuries to the Lake Erie Ecosystem and Watershed are injuries to all who depend on the lake Therefore, Plaintiffs have suffered more than *an* injury, they have suffered many Their drinking water has been poisoned and continues to be poisoned They experience harmful algae blooms every summer

No one who has visited the shores of Lake Erie in the vicinity of an algae bloom can claim that these injuries are speculative or abstract

B Plaintiffs' and Lake Erie's concrete injuries are directly traceable to the State's conduct

1 The State refuses to enforce many regulatory laws U S District Judge James G Carr recently found that the State of Ohio's Environmental Protection Agency "failed in 2014 and again in 2016, to determine as the [Clean Water Act] requires whether Lake Erie's open waters met the state's own water quality standards " *Envtl Law & Policy Ctr v United States Envtl Prot Agency*, 349 F Supp 3d 703, 705 (N D Ohio 2018) Because of this, Carr stated that the State of Ohio has demonstrated a "long-standing, persistent reluctance and, on occasion, refusal, to comply with [Clean Water Act] " *Id*

"As a result of the State's inattention to the need, too long manifest, to take effective steps to ensure that Lake Erie (the Lake) will dependably provide clean, healthful water, the risk remains that sometime in the future, upwards of 500,000 Northwest Ohio residents will again, as they did in August 2014, be deprived of clean, safe water for drinking, bathing, and other normal and necessary uses " *Id*

2 The laws the State does enforce are in reality reckless government policies that include permitting and licensing the very activities known to pollute Lake Erie and to cause harmful algae blooms

3 The State has failed to adequately intervene in the polluting processes and actions that produce dangerous cumulative effects and ultimately poison Lake Erie

4 The State has dangerously deregulated radioactive road de-icers and dust suppressants

5 By filing suit in June 2019 against the City of Toledo in an express attempt to invalidate the democratically enacted Lake Erie Bill of Rights and by prolonging a suit where a temporary injunction against enforcing the Lake Erie Bill of Rights has been issued, the State ensures that Lake Erie continues to endure more than a century of assault and ruin

C. Plaintiffs' and Lake Erie's injuries would be redressed by Plaintiffs' requested relief.

One of the darkest times in American history was when African Americans were defined as property to be bought and sold by white slaveowners It wasn't until African Americans were recognized as rights-bearing citizens that we began to correct this atrocity The situation is similar for Lake Erie Currently, under American and Ohio law, Lake Erie is defined purely as the property of the State Perhaps it is because the State only sees Lake Erie as property, as an object to be consumed and destroyed, that the State fails to adequately protect Lake Erie and all those who depend on her

The Environmental Working Group and Environmental Law and Policy Center report that between 2005 and 2018, the number of factory farms in the Maumee river watershed, which boasts the largest drainage area of any Great Lakes river "exploded from 545 to 775, a 42 percent increase The number of animals in the watershed more than doubled, from 9 million to 20 4 million The amount of manure produced and applied to farmland in the watershed swelled from 3 9 million tons each year to 5 5 million tons "

If citizens could use the Lake Erie Bill of Rights to alleviate the problems corporate power enables, if they could eliminate the phosphorus added to the Lake Erie watershed by corporate, factory farms in Ohio, they could eliminate the single biggest source of pollution in the Lake Erie watershed It is clear, then, that the poisoning of Lake Erie that the State ensures and protects could be redressed by the relief Plaintiffs request

D Plaintiffs' claims are rooted in the plain meaning of Article 1, Sections 1 and 2 of the Ohio State Constitution

When a government enables the poisoning of a community's water supply and protects those doing the poisoning against those being poisoned, the people have a moral and an ecological imperative to reform their government The Lake Erie Bill of Rights is a peaceful, democratic attempt to do so

E. Despite the State holding Lake Erie in trust for the benefit of all Ohio citizens, it consistently fails its duties as trustee

The State's claims that Lake Erie is "held by the State as a public trust resource for the benefit of all Ohio citizens " MTD, pg 8

City of Toledo states,

"Although the State concedes it holds Lake Erie in trust for the benefit of the public it ignores its inaction regarding those duties entrusted to it While the State repeatedly shouts that it is the trustee for the [sic] Lake Erie and the public, it does not allege or argue that it has fulfilled its duties to address the

[Harmful Algae Blooms] and environmental deterioration of Lake Erie and its watershed The State has substantially failed to comply with its duties under the Clean Water Act " (*internal citations omitted*), Dkt # 48, pg 5

Drewes Farms Partnership, et al v Toledo, N D Ohio No 19-cv-00434, Dkt # 48 ("*Drewes*")

F. This Court has an opportunity to stand on the right side of history.

Before and after *Dred Scott v Sandford*, much like the Plaintiffs in the case at hand, anyone arguing that members of "the enslaved African race" should be entitled to American citizenship had no legal basis for making that argument.

Similarly, until the Nineteenth Amendment passed, those who argued women should have the right to vote had no legal basis for making their argument

Despite courts routinely standing on the wrong side of American history, there have been some brave judges willing to push American law towards justice American school children are still taught to celebrate the American Supreme Court's willingness to overturn Jim Crow racial segregation laws and decades of precedent in *Brown v Board of Education*

The State has demonstrated its impotence to adequately address the destruction of Lake Erie time and time again Instead of supporting a democratically-enacted law that would give citizens the tools to enforce meaningful protections for Lake Erie, the State protects the corporations primarily responsible for the pollution causing Lake Erie's harmful algae blooms and is working to undermine the will of the people of Toledo as represented by the Lake Erie Bill of Rights When the State refuses to protect the people's drinking water, and the courts refuse to support the people's efforts to protect themselves, where else can the people turn?

The Lake Erie Bill of Rights is not only law, but a statement by the citizens of Toledo that healing the natural world is more important than clinging to tired legal dogma To invoke sovereign immunity to neutralize effective measures for healing Lake Erie is to proclaim that it is more important to protect the ability of government actors to enable environmental destruction with impunity than it is to protect Lake Erie, the health of hundreds of thousands of humans, and the lives of countless nonhumans who depend on clean Lake Erie water

The general laws of Ohio have failed to protect Lake Erie So, they should not be used against LEBOR

While it may be true that LEBOR conflicts with the laws cited by the State, those laws have failed to protect Lake Erie and all those who depend on the lake. At this point, to rely on Ohio's Home Rule Amendment to invalidate LEBOR is to condemn Lake Erie to intensifying destruction

Meanwhile, the clock is ticking The pollution of Lake Erie intensifies The danger to the health of Toledo citizens grows The sooner this Court provides the relief requested by the Plaintiffs the closer we all get to healing Lake Erie

Excerpts from:

Drewes Farms Partnership, Plaintiff, v City of Toledo, Ohio, Defendant
Judge Jack Zouhary
Case No 3 19-cv-00434-JZ (U S District Court of Northern Ohio, Western Division)
"Defendant City of Toledo's Combined Reply in Support of Its Cross-Motion Under Rule 12(c) for Judgment on the Pleadings as to Drewes Farms Partnership (Doc #47) and Reply in Support of Its Cross-Motion Under Civil Rule 12(c) as to the State of Ohio (Doc #48)," (Document #56), September 6, 2019

III. The State's Complaint Also Fails on Its Merits and Should Be Dismissed.

The City incorporates into this section its above discussion concerning the deficiencies in the State's Complaint In addition to the arguments above and in the City's Rule 12(c) Cross-Motion, even if the Court addressed the State's preemption arguments on the merits, the City's actions related to LEBOR are consistent, and do not conflict, with the Ohio Constitution or other applicable law, including the Ohio Constitution's declaration that "[a]ll power is inherent in the people" and its provision that the people "have the right to alter, reform, or abolish the same, whenever they may deem it necessary " Ohio Const Art I, §2, Art II, §§1, 1a The State asks the Court to ignore authority and right and power to local self-government granted by the Ohio Constitution to municipalities and Ohio's citizens *See Federal Gas & Fuel Co v City of Columbus*, 96 Ohio St 530, 118 N E 103 (1917)

But, the State does not explain how LEBOR conflicts with any state or federal law, or how LEBOR conflicts with "Ohio's constitutional limitations on municipal authority" (Doc. #52, State's Opposition, p 2) Rather, the face of LEBOR establishes there is no conflict Pursuant to home rule, the State sets the floor, and the locality can exercise powers of governance delegated to it by the State, including a municipality's power to exercise local self-government This is what LEBOR does It works within applicable State law, incorporates it by reference, and is not contrary to it The State has failed to show how LEBOR infringes on matters of general or statewide concern The Sections of LEBOR cited in the State's Opposition, Sections 2(a), 3(a), 3(c), and 4(b), do not say that LEBOR invalidates any federal or state law, in fact, Section 4(b) incorporates state law and merely indicates that LEBOR expands upon state law, as is appropriate for local self-government The State's suggestion that Council's passage of Ordinance 497-18 constituted anything other than properly following the City's Charter for citizens-initiative petitions is inaccurate The City has taken no action to deprive the State of any right, nor has the City taken any action to enforce LEBOR

The State's assertion at page 2 of its Opposition that LEBOR "would render meaningless state and federal law" and "elevate municipal authority over that of state and federal governments" is unsupported, and ignores the plain language of the Ohio Constitution that laws may be passed "for the government of municipalities," which "shall become operative in any municipality" after submission to its electors who affirm it with a majority vote Ohio Const Art. XVIII, §2 The State further disregards the plain language of Ohio Const Art. XVIII, §7, which authorizes municipalities to "frame and adopt or amend a charter for its government" and, subject to Art XVIII, §3, to "exercise thereunder all powers of local self-government " And, the State ignores the provisions of Ohio Const Art. XVIII, §9, that when an amendment to a charter "is approved by a majority of the electors voting thereon, it shall become part of the charter of the municipality " Nor does the State explain how LEBOR supposedly conflicts with Ohio Const Art XVIII, §3, which authorizes municipalities "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws "

The Ohio Constitution does not "limit" the City's conduct in this case, it supports and authorizes the City's actions responding to the citizens-initiative process and the vote of the electorate The State's obvious efforts to downplay its delegation of authority to municipalities to self-govern ignore the rights of municipalities and Ohio's citizens to engage in citizens-initiative petitions and participate in the electoral process The State cannot divorce itself from the right to self-government afforded to municipalities and Ohio's citizens

The City further does not overstate its legal authority regarding Lake Erie The City accurately cited and applied R C §721 04 This statute is not nearly so limited as the State suggests, and further evidences that the State legislature did not intend to preempt the entire field of authority or activities related to Lake Erie, and instead specifically delegated authority to the City Federal, state, and local legislation can address Lake Erie, no evidence suggests LEBOR has flouted state or federal environmental regulations or laws, and the City does not seek to limit state or federal laws within its bounds.3 The State's suggestion that LEBOR "purports to invalidate *all*" state and federal laws is inaccurate and contrary to the face of LEBOR, and confirms that the State can identify no specific federal or state law invalidated by LEBOR

Finally, the State appears to take umbridge with the reference in LEBOR's preamble to Lake Erie's "imminent danger of irreversible devastation" due to "reckless government policies, permitting and licensing" and that it has "gone unprotected by government." But, the fact is that Lake Erie is in grave danger, the State has not taken corrective action to solve the problem, the State has failed to comply with its duties under the Clean Water Act, and the State has not protected Lake Erie These are not new theories advanced by the City, as this Court has already recognized the State's failings in this area. *See Environmental Law and Policy Center*, 349 F Supp 3d 703 In short, the State has alleged no viable claim

IV. DFP's Complaint Also Fails on Its Merits and Should Be Dismissed.

DFP's ongoing assertions that LEBOR has a disparate impact on corporations, as opposed to individuals, are untrue LEBOR's application to businesses and governmental entities is supplemental, but consistent with, the City's other Code provisions preventing individuals and businesses from polluting That LEBOR applies to corporations and governments does not mean individuals are free to pollute The City's Code, and particularly Chapter 963, already specifically prohibits individuals and businesses from polluting and from dumping chemical waste and other substances into public waters *See* Toledo Municipal Code, Chapter 963 25 DFP, of course, has not challenged Chapter 963 as unconstitutional, even though it, like LEBOR, imposes strict liability, results in criminal penalties, and counts each day as a separate violation Toledo Municipal Code, Section 963 99

Regarding DFP's request for injunctive relief, its Opposition still fails to allege any irreparable harm, and continues to rely on bare speculation and fear of possible future injury *See Sampson v Murray*, 415 U S 61, 90, 94 S Ct 937 (1974) DFP does not dispute that the balance of equities does not tip in its favor, and that injunctive relief is not in the public interest, given that granting DFP's requested relief would invalidate multiple provisions of the City's Charter, and contradict the common interest in protecting and preserving the environment

349 F Supp 3d 703 (N D Ohio 2018), 3 17CV1514, Environmental Law and Policy Center v United States Environmental Agency /**/ div c1 {text-align center} /**/

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349 F.Supp.3d 703 (N.D.Ohio 2018)

ENVIRONMENTAL LAW AND POLICY CENTER, et al., Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL AGENCY, et al., Defendants.

No. 3 17CV1514

United States District Court, N.D. Ohio, Western Division

October 3, 2018

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[Copyrighted Material Omitted]

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Daniel R Dertke, U S Department of Justice, Washington, DC, Jody L. King, Office of the U S Attorney, Toledo, OH, for Defendants

ORDER

James G Carr, Sr U S District Judge

This case concerns the Clean Water Act (CWA) 33 U S.C. § 1251 et seq., and Ohios long-standing, persistent reluctance and, on occasion, refusal, to comply with the CWA. As a result of the States inattention to the need, too long manifest, to take effective steps to ensure that Lake Erie (the Lake) will dependably provide clean, healthful water, the risk remains that sometime in the future, upwards of 500,000 Northwest Ohio residents will again, as they did in August 2014, be deprived of clean, safe water for drinking, bathing, and other normal and necessary uses

The principal problem is that for years, with varying degrees of intensity, summertime Harmful Algae Blooms (HABs) have afflicted the Lakes Western Basin There is no dispute - not even on the part of Ohios elected and appointed officials - that HABs result from unregulated and uncontrolled phosphorus-containing runoff from farmland in the watersheds of the Lakes northwestern tributaries

HABs present a significant threat to public safety because they can produce microcystin- a "cyanotoxin" hazardous to "humans, animals, and ecosystems " (Doc 29, ID 9001) The effects of the ongoing phosphorus pollution and annual HABs has not been limited to the August 2014 Toledo Water Crisis Those effects, albeit

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to a lesser degree, have also impacted everyone who relies on the Lake not just for drinking water, but for recreation and their livelihoods

That crisis and those effects notwithstanding, the Ohio Environmental Protection Agency (Ohio EPA) failed in 2014 and again in 2016, to determine, as the CWA requires, whether Lake Erie's open waters met the States own water quality standards *See* 33 U S C § 1313(d)

Ohios failure in 2016 to list Ohios Lake Erie open waters as "impaired" led the plaintiffs, the Environmental Law and Policy Center, Advocates for a Clean Lake Erie, and private citizens Michael Ferner and Susan Matz, to file this suit against the United States Environmental Protection Agency (U S EPA or the Agency), acting Administrator Andrew Wheeler, and Regional Administrator Cathy Stepp [1] Their suit sought reversal of the U S EPAs decision to approve, despite the omission of Lake Erie's open waters, Ohios impaired waters list

Three motions are pending defendants counter-motion for summary judgment (Doc 38), plaintiffs motion for leave to supplement their initial complaint (Doc 36), and intervenor the Lucas County Board of Commissioners motion to join the case as a party plaintiff (Doc 56)

For the reasons that follow, I grant defendants counter-motion for summary judgment, deny leave to plaintiffs to supplement the complaint, and deny leave to the Lucas County Board of Commissioners to intervene [2]

Background

1. Ohios 2012, 2014, and 2016 Reports, the U.S. EPA Responses, and Ohios Inaction

The CWAs biennial reporting provision (the § 303(d) list) requires the states to submit to the U S EPA a "listing of the states impaired waters" *i e* , "a list of waters that do not currently attain, and based on current pollution controls are not expected to attain, applicable water quality standards " *Anacostia Riverkeeper, Inc v Jackson,* 798 F Supp 2d 210, 215 (D D C 2011) (citing 40 C F R § 130 7(b)(3) & (d)), *see also e g* , *Hayes v Whitman,* 264 F 3d 1017, 1021 (10th Cir 2001) (describing the duty to create an impaired waters, or § 303(d), list) (citing 33 U S C § 1313(d)(2))

In 2012, the U S EPA provided Ohio with "water quality-related" data from Lake Erie's open waters in a direct effort to encourage Ohio to engage in water quality assessment (Doc 29, ID 9006) Ohio nonetheless declined to evaluate the area for that years § 303(d) list.

In 2014, the year of the Toledo Water Crisis, the Ohio EPA designated assessment units in Lake Erie's shoreline as impaired But, once again, the Ohio EPA did not include the waters beyond the shoreline, *i e* , the Lakes open waters, on that list. The State did so despite alarming test results from Toledo and Oregons water intake points - results that, not surprisingly, exceeded Ohios own threshold limit for microsystin (*Id*)

While the U S EPA expressed concern at the omission, it approved Ohios 2014

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§ 303(d) list with one caveat. based on Ohios promise for the 2016 listing cycle to "expand coverage to all drinking water intakes in the Western Lake Erie Basin," the U S EPA deferred its final decision on whether waters beyond the shoreline should also be listed as impaired (*Id* at 9007)

In hindsight, even this conditional approval reflected an undue measure of confidence in Ohios willingness to evaluate the condition of Lake Erie's open waters Indeed, in preparing its 2016 impaired waters list, Ohio, despite its promise, gave no heed to the U S EPAs expectations

Ohios 2016 § 303(d) list identified more impaired shoreline assessment units, but explicitly declined "to pursue development of the open water assessment units and methods at this time " (*Id* at 9009) When the U S EPA again reminded the State of its statutory obligations - pointing to the 2014 Toledo Water Crisis as a reason to be more proactive - Ohio refused Instead, in

derogation of its CWA-imposed duty to assess all the waters within its boundaries, Ohio reiterated its "firm and consistent position" that the U S EPA, rather than Ohio, should itself "develop a coordinated response" for Lake Erie Ohios EPA dismissed the Agencys instruction to fulfill its CWA obligations as "absurd " (*Id*)

After failing to respond for seven months, and following plaintiffs initial lawsuit against the U S EPA demanding that it, in accordance with the CWA, either approve or disapprove Ohios 2016 § 303(d) list, the Agency issued a letter approving the States 2016 § 303(d) list.

Plaintiffs then filed this, their second suit, challenging the substance of the Agencys approval decision They argued the U S EPAs approval was untenable due to the Ohio EPAs express refusal to "assemble and evaluate all existing and readily available water-quality related data and information" relating to Lake Eries open waters 40 C F.R § 130.7(b)(5).

Rather than defending or reversing outright its approval of Ohios 2016 impaired waters list, the U S. EPA withdrew its approval for further consideration In doing so, the Agency cited the very failing that had provoked plaintiffs lawsuit "Specifically, the States submission does not demonstrate that the State has satisfied its statutory and regulatory obligations to assemble and evaluate all existing and readily available data and information regarding nutrients in the open waters of Lake Erie within the States boundaries " (*Id* at 9012) [3]

The Agencys withdrawal of its approval meant that it had no longer taken final agency action on Ohios deficient 2016 § 303(d) list. Consequently, the Administrative Procedure Act (APA), 5 U S C § 704, compelled me to conclude that plaintiffs could not maintain their claim challenging that revoked decision Thus, on April 11, 2018, I denied their motion for summary judgment. (Doc 29) *Envtl Law and Policy Ctr v United States Envtl Protection Agency,* 2018 WL 1740146 (N D Ohio).

I remanded the case to the Agency for "further action consistent with the correct legal standards" within thirty days of that order and retained jurisdiction I also withheld ruling on defendants counter-motion

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for summary judgment - which I address in this order (*Id* at 9019)

2. Events Following The April 11, 2018 Order

Since April 11, 2018, the Ohio EPA has submitted an amended 2016 § 303(d) list, adding three new assessment units for Lake Eries open waters, and declaring all three impaired The U S EPA approved Ohios amended 2016 submission (the Amended Submission) on May 10, 2018, just within the thirty-day deadline imposed in my order [4]

While Ohio had hoped its Amended Submission would "resolve the pending litigation" (Doc 30-2, ID 9027), the U S EPAs approval prompted plaintiffs to seek leave under Fed R Civ P 15(d) to supplement their complaint

In support of that request, plaintiffs point out that although the Ohio EPA at last declared its new open waters assessment units impaired, it also "refused to develop a Total Maximum Daily Load [TMDL] for the phosphorus pollution that causes" HABs in Lake Erie (Doc 36, ID 9220)

Developing a TMDL is a bedrock obligation under the CWA. TMDLs "establish[ ] a maximum daily discharge of pollutants into waterway" and serve as "an important aspect of the federal scheme of water pollution control " *Scott v City of Hammond,* 741 F 2d 992, 996-97 (7th Cir 1984) (per curiam) States must establish a TMDL for certain pollutants "[f]or each impaired waterbody" they name on a § 303(d) list. *Hayes, supra,* 264 F 3d at 1021 (citing 33 U S C § 1313(d)(1)(C))

Creating TDMLs is, moreover, not optional "Each State *shall* establish" TMDLs for particular pollutants identified by the Administrator under the CWA. 33 U.S C § 1313(d)(1)(C) (emphasis added) *See Scott, supra,* 741 F 2d at 998 n 13, *Alaska Ctr for the Envt v Reilly,* 762 F Supp 1422, 1427 (W D Wash 1991) ("Congress repeated use of the term shall clearly places a mandatory duty upon the EPA to take affirmative action after disapproving a states unacceptable submission ")

Nonetheless, Ohio has affirmatively stated that it is not going to develop a TMDL for phosphorus runoff in Lake Eries open waters - at least not right now

"Given the complexity of the algae bloom problem," the Ohio EPA stated in its 2016 Amended Submission that it "believe[d] the best approach" for remediating Lake Erie "is through the collaborative process established under Annex 4 of the Great Lakes Water Quality Agreement" (GLWQA) (Doc 30-2, ID 9035) Ohios "Domestic Action Plan" under the GLWQA includes "phosphorus reduction goals of 20 percent by 2020, and 40 percent by 2025 Th[is] plan is not intended to be static but to be revised following the adaptive management philosophy " (*Id*)

Should this "collaborative process fail to restore" the Lake, the Ohio EPA "recognize[d] that a TMDL or other approach allowed by the U S EPA" may "ultimately be required" at some unspecified point in the future (*Id*)

Discussion

1. Motion for Leave to Supplement the Complaint

Believing, based on Ohios declared intent not to fulfill its duty under the CWA to develop a TDML, plaintiffs seek to supplement their complaint. (Doc 36) Defendants oppose the motion (Docs 38, 39)

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Rule 15(d) of the Federal Rules of Civil Procedure permits a party to supplement the pleadings to account for "any transaction, occurrence or event that happened after the date of the pleading to be supplemented " Standards for granting or denying leave to supplement under Rule 15(d) are the same as those for granting or denying leave to amend under Rule 15(a) *Mattox v Edelman,* 851 F 3d 583, 592 (6th Cir 2017), *Spies v Voinovich,* 48 Fed Appx. 520, 527 (6th Cir 2002)

Like any complaint plaintiffs proposed supplemental complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face " *Ashcroft v Iqbal,* 556 U S 662, 678, 129 S Ct. 1937, 173 L Ed 2d 868 (2009)

Plaintiffs, asserting two alternative theories for relief, want to add a single claim challenging the U S EPAs May 10, 2018 response letter approving Ohios Amended 2016 § 303(d) list

First, plaintiffs argue the U S EPAs May 10, 2018 response is a final agency decision approving, not only Ohios amended 2016 impaired waters list, but also the States professed refusal to develop a TMDL for Lake Eries open waters Because the CWA demands that "[e]ach

State shall establish" TMDLs for its impaired waters, 33 U S C § 1313(d)(1)(C), plaintiffs allege, in Count I of the proposed supplemental complaint, that the U S EPAs approval of Ohios no-TMDL plan was "arbitrary, capricious" or "otherwise not in accordance with law " 5 U S C § 706(2)(A)

Alternatively, plaintiffs assert that, if the Agencys May 10, 2018 response is not a final agency action approving Ohios no-TMDL plan, then the Agency has failed to act, and "any citizen may commence a civil action against the Administrator" for failing to perform a nondiscretionary duty 33 U S C § 1365(a)(2) Specifically, plaintiffs allege the Agency had a nondiscretionary duty to reject the Ohio EPAs attempt to avoid developing a TMDL for Lake Eries open waters

This is the basis for the CWA citizen suit plaintiffs allege in Count II of the proposed supplemental complaint Simply put, the CWA tells Ohio it "*shall* " establish TMDLs for those impaired waters, 33 U S C § 1313(d)(1)(C) (emphasis added), and Ohio forthrightly states that it wont do so In the face of that denial, plaintiffs assert, the Agency had to disapprove the amended 2016 impaired waters list.

Although I appreciate plaintiffs frustration with Ohios possible continuation of its inaction, I agree with defendants on the law Counts I and II of the proposed supplemental complaint fail under existing law to state claims against the Agency on which a court can grant relief

Accordingly, I must deny the motion for leave to supplement

A. The U.S. EPAs May 10, 2018 Response Letter Does Not Approve Ohios No-TMDL Plan

As with their initial claim arising from the U S EPAs later-revoked approval of Ohios original 2016 § 303(d) list, plaintiffs proposed supplemental complaint first alleges the U S EPAs May 10, 2018 letter approving Ohios Amended 2016 submission is also a "final agency action" approving the States claimed refusal to develop a TMDL 5 U S C § 704

It is not And presenting this erroneous "legal conclusion" as an allegation of fact gets plaintiffs no closer to stating a viable APA claim *See Iqbal, supra*, 556 U S at 678-79, 129 S Ct 1937 (courts are "not bound to accept as true a legal conclusion couched as a factual allegation"), *see also*

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Marquette Cty Rd Commn v EPA, 188 F Supp 3d 641, 646-47 (W D Mich 2016) (plaintiffs "do[ ] not state a viable [APA] claim against the EPA" absent a disputed "final agency action")

Defendants agree the CWA requires Ohio to establish TMDLs for each water quality segment it identifies on its § 303(d) list. 33 U S C § 1313(d)(1), 40 C F R § 130 7(c)(1) They also agree that, by designating Lake Eries open waters as impaired, Ohio "trigger[ed] a statutory obligation to develop total maximum daily loads . which specify the absolute amount of particular pollutants the entire water body can take on while still satisfying water quality standards " *Anacostia Riverkeeper, supra*, 798 F Supp 2d at 216 (citing 33 U S C § 1313(d)(1)(C))

However, the U S EPA also emphasizes that these obligations are distinct. Section 1313(d)(1)(A) requires states to "identify" impaired waters, section 1313(d)(1)(C) then requires states to "establish" for each of those waters a TMDL 33 U S C § 1313(d)(1) And nothing in the CWA requires a state to "simultaneous[ly] submit[t]" its list of impaired waters "with the TMDL[s] to correct each polluted water " *San Francisco BayKeeper v Whitman,* 297 F 3d 877, 885 (9th Cir 2002)

Regulations implementing § 303(d) require states to submit an impaired waters list every two years 40 C F R § 130 7(d)(1) States need only submit their proposed TMDLs to the EPA Administrator "from time to time " 33 U S C § 1313(d)(2) More specific "[s]chedules for submission of TMDLS [are] determined by the Regional Administrator and the State," rather than federal regulation 40 C F R § 130 7(d)(1)

Unlike a § 303(d) list, which the federal government might reasonably expect from the states "biennially," *Id* , "TMDLs may require substantial time and resources to develop " *Ohio Valley Envtl Coal , Inc v Pruitt,* 893 F 3d 225, 231 n 4 (4th Cir 2018), *see also San Francisco BayKeeper, supra*, 297 F 3d at 885 ("The development of TMDLs to correct the pollution is obviously a more intensive and time-consuming project than simply identifying the polluted waters ") "EPA guidance [therefore] recommends that states establish TMDLs for all impaired waters on their Section 303(d) Lists within eight-to-thirteen years of the initial listing," while acknowledging that " slightly longer times may be needed depending on specific factors " *Ohio Valley Envtl Coal , supra*, 893 F 3d at 231 n 4

TMDL submissions also undergo a separate approval process "Once a state submits a TMDL, EPA must approve or disapprove it within thirty days " *Id.* at 227 (citing 33 U.S C § 1313(d)(2)) "If EPA disapproves of a TMDL, EPA must develop, submit for public comment, and finalize its own TMDL within thirty days " *Id* (citation omitted)

How do I know the U S EPAs May 10, 2018 letter approves only Ohios amended 2016 § 303(d) list, and not the TMDL-related remarks the Ohio EPA made in the Amended Submission? The documents themselves provide the answer

First, the letter the Ohio EPA included with the Amended Submission identifies the submission as "an amendment to the final Ohio 2016 Integrated Water Quality Monitoring and Assessment Report for U S EPAs review and approval under Section 303(d) of the Clean Water Act " (Doc 30-1, ID 9026)

Second, the Amended Submission itself updates Ohios 2016 impaired waters list to add a recreational use algal impairment for the open waters of Lake Eries Western Basin, as well as a public drinking water use impairment for assessment units in the

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Western Basin, Central Basin, and the Sandusky Bay due to microcystin These designations harmonize with the States responsibilities in § 303(d) to "identify those waters within its boundaries for which [current] effluent limitations are not stringent enough to implement water quality standards applicable to such waters," 33 U S C § 1313(d)(1)(A), including Ohios narrative water quality criteria for "nuisance growth of aquatic weeds and algae " Ohio Admin Code § 3745-1-04(E)

Third, the U S EPAs May 10, 2018 response letter confirms that its approval relates exclusively to Ohios § 303(d) amendment

Based on Ohio EPAs May 4, 2018 letter and its revised 2016 [Integrated Report], EPA finds that Ohio has met the requirements of Section 303(d) of the CWA . This supplemental decision constitutes EPAs rationale for approving the remainder of Ohio EPAs 2016 Section 303(d) list,

which was the subject of EPAs January 2018 withdrawal letter Specifically, EPA is approving the list of the open water assessment units of Lake Erie as impaired for the recreational use due to the presence of algae and/or the public drinking water supply use due to microcystin Consequently, EPA has now approved Ohios 2016 Section 303(d) list in its entirety
(Doc 30-3, ID 9092)

An agency action is final if it "mark[s] the consummation of the agencys decisionmaking process" and if it is "one by which rights or obligations have been determined, or from which legal consequences will follow " *Jama v Dept of Homeland Security,* 760 F 3d 490, 495-96 (6th Cir 2014)

Plainly, the above language "consummat[es]" the U S EPAs decisionmaking process regarding Ohios 2016 § 303(d) list Earlier in the letter, the U S EPA says just that "This supplemental decision and the May 2017 decision together complete the EPAs review and approval of Ohio EPAs 2016 CWA Section 303(d) list " (*Id* at 9091). The letter also determines Ohios rights and obligations with respect to that list, with the federal Agency "now approv[ing] Ohios 2016 Section 303(d) list in its entirety " (*Id* at 9092)

Regarding Ohios intent to develop (or not develop) a TMDL, on the other hand, the U S EPAs May 10, 2018 response says nothing

If the Agency signals its final approval of a § 303(d) list by specifying that "[t]his decision complete[s] the EPAs review and approval of Ohio EPAs Section 303(d) list," one might assume it would use equivalent language to communicate an equally final approval of a states TMDL plans Yet the U S EPA used no such language relative to Ohios discussion of its plan to substitute the GLWQA process as an alternative to the TMDL process

Nevertheless, plaintiffs maintain the Agency approved that variant approach

In support of their contention, plaintiffs point to the U S EPAs statement "[f]ind[ing] that Ohio EPAs discussion of its prioritization of Lake Erie satisfies the requirement to submit a priority ranking" under 40 C F R § 130 7(b)(4) (Doc 30-3, ID 9092) According to plaintiffs, the "Ohio EPAs discussion of its prioritization" necessarily includes its statements characterizing the GLWQA as "the best approach for solving the issues in western Lake Erie," and indicating that it will develop a TMDL only after this "collaborative process fail[s] to restore" the Lake to its "designated use attainment." (Doc 30-2 ID 9035)

Since the U S EPA found that the "Ohio EPAs discussion of its prioritization satisfies the requirement to submit a priority

ranking," plaintiffs argue it must have also found that the Ohio EPAs TMDL-related statements "satisfie[d]" the CWAs requirements

Their interpretation does not persuade me

The regulation the U S EPA cited, 40 C F R § 130 7(b)(4), merely requires states to "include a priority ranking for all water quality-limited segments still requiring TMDLs" in their impaired water lists It does not authorize the U S EPA to review or pass judgment on a states priority ranking

More to the point, the U S EPA did not cite the statutory provision that directs the EPA Administrator to approve or disapprove a states proposed TMDLs "not later than thirty days after the date of submission " 33 U S C § 1313(d)(2) Such an omission is unlikely if that is what the U S EPA meant to do

Where the U S EPA has issued letters approving or disapproving a states TMDL plans, the Agency makes that point plain The case on which plaintiffs rely, *Sierra Club v McLerran,* 2015 WL 1188522 (W D Wash 2015), proves as much

McLerran involved a specific request from an environmental advocacy group asking the U S EPA to determine whether the Washington State Department of Ecology had "abandoned" the TMDL process for a specific chemical in the Spokane River, "thereby triggering the EPAs duty to prepare a TMDL" on the states behalf *Id* at *4 In response, the U S EPA issued a specific decision concluding the state "had not renounced the completion of a TMDL," and affirming Washingtons discretion to delay the TMDL process *Id*

Because the U S EPA issued a final agency decision explicitly approving Washingtons delayed TMDL implementation, the court could conduct APA review to determine whether that decision was "arbitrary, capricious," or "otherwise not in accordance with law " 5 U S C § 706(2)(A)

Here, by contrast, the U S EPA did not issue its May 18, 2018 letter in response to plaintiffs request for a specific finding approving or disapproving Ohios TMDL statements It issued the letter in response to Ohios 2016 Amended Submission, for the express purpose of "approving the remainder of Ohio EPAs 2016 Section 303(d) list," thereby "approv[ing] Ohios 2016 Section 303(d) list in its entirety " (Doc 30-3, ID 9092). To conclude otherwise ignores both the language of the letter and the context of this case

I will not infer that the U S EPA completed a review and approval Ohios TMDL plans when all it claimed to do was "complete review and approval of Ohio EPAs 2016 CWA Section 303(d) list " (*Id* at 9091)

Because plaintiffs have not shown that the U S EPAs May 10, 2018 letter is a decision approving Ohios TMDL remarks, they have failed to identify the "final agency action" predicate to an APA claim 5 U S C § 704 Count I of the proposed supplemental complaint therefore fails to state a claim on which relief can be granted [5]

B. Ohios TMDL Statements Do Not Prove Constructive Submission

Plaintiffs proposed Count II also relies on *McLerran*, but for a different proposition It asserts a CWA citizen suit for "an alleged failure of the [EPA] Administrator to perform" a nondiscretionary "act or duty," 33 U S C § 1365(a)(2) The required act, plaintiffs contend, is disapproval of the Ohio EPAs stated intent to follow the GLWQA, instead of developing a TMDL for phosphorus runoff [6]

This alternative cause of action relies on the "constructive submission" doctrine, which the Seventh Circuit first enunciated in *Scott v* Hammond, supra, 741 F 2d at 996

The constructive submission doctrine is premised on the U S EPAs statutory duty to act on a states TMDL submission within thirty days 33 U S C § 1313(d)(2) *Scott* posits that where "a state fails over a long period to time to submit proposed TMDLs, this prolonged failure may

amount to the constructive submission by that state of no TMDLs " *Id*

"As a submission, " a states prolonged failure to submit TMDLs "would then trigger the EPAs nondiscretionary duty under § 1313(d)(2) to approve or disapprove the submission of no TMDLs within thirty days " *Hayes, supra*, 264 F 3d at 1023 (citing 33 U S C § 1313(d)(2)) "If the EPA fails to respond within this period, it is subject to suit under the citizen-suit provision of the Clean Water Act to compel it to perform this nondiscretionary duty " *Id* [7]

"Courts that have endorsed this doctrine note that without it, states could refuse to promulgate their own TMDLs and therefore easily frustrate an important aspect
Page 714
of the federal scheme of water pollution control " *Ohio Valley Envtl Coal supra*, 893 F 3d at 229-30 (quoting *Scott, supra*, 741 F 2d at 997, and collecting cases)

However, these same authorities also caution against applying the doctrine too broadly

In *Hayes,* for instance, the Tenth Circuit held that constructive submission occurs "only when the states actions clearly and unambiguously" demonstrate an intent not to submit any TMDLs 264 F 3d at 1024 There, Oklahoma submitted between three and twenty-nine TMDLs to the U S. EPA (though the plaintiffs argued many were insufficient) and was "making progress toward completing about 1500 TMDLs over a twelve-year period " *Id* Under those circumstances, "a constructive-submission claim is not viable " *Id* , *see also, e g* , *San Francisco BayKeeper, supra*, 297 F 3d at 883 (declining to find constructive submission where California "submitted at least eighteen TMDLs and has established a schedule for completing its remaining TMDLs") *Hayes* is also indicative of the tendency to evaluate TMDL programs on a state-wide basis - a useful approach in terms of discerning whether a state actually intends to abandon wholly the TMDL process

For example, courts will not infer constructive submission where a state "has produced at least some TMDLs" in the past and "has a plan in place to produce others" in the future *Ohio Valley Envtl Coal , supra*, 893 F 3d at 230, *see also Sierra Club v Hankinson,* 939 F Supp 865, 872 n 6 (N D Ga 1996) (no constructive submission where Georgia has "made *some* albeit totally inadequate" TMDL submissions) On the other hand, a state that has "not submitted a single TMDL to the EPA" over a number of years, *Alaska Ctr for the Envt, supra*, 762 F Supp at 1425, 1429, and has "no plans to remedy this situation," *San Francisco BayKeeper, supra*, 297 F 3d at 882-83, may well have "clearly and unambiguously" forgone its TMDL obligations

According to the parties research, *McLerran* may be the only exception to this general rule *McLerran* opined that constructive submission can also occur in the case of a states refusal to develop a single, specific TMDL, even where that state might have an adequate TMDL program on the whole

[T]he Court finds nothing in the text of the CWA or its purpose to support Defendants contention that a states abandonment of a specific statutory obligation should be treated differently from a states wholesale failure To the contrary, a states discretion to prioritize TMDLs over other TMDLs does not remove its ultimate obligation to produce a TMDL for each water pollutant of concern in every 303(d) water segment In light of this statutory obligation, it would be absurd for the Court to hold that a state could perpetually avoid this requirement under the guise of prioritization, such an administrative purgatory clearly contravenes the goal and purpose of the CWA Accordingly, the Court rejects Defendants [*sic*] contention that the constructive submission doctrine cannot apply when a state abandons its obligations under the CWA by clearly and unambiguously indicating that it will not produce a particular TMDL
2015 WL 1188522 at * 7 (citations omitted)
McLerrans reasoning is consistent with the statutes demand that each state "shall" establish TMDLs for its impaired waters 33 U S C § 1313(d)(1)(C) After all, "a state that has publicly indicated that it will not produce a TMDL has violated its statutory obligations with respect to
Page 715
that TMDL, no matter how robust its [state-wide TMDL] program otherwise is " *Id* (citing 40 C F.R § 130 2(f))

But even the *McLerran* court did not find that Washington had "constructively submitted" no TMDL for the Spokane River Washington first listed the River as impaired "nearly 20 years" earlier, and it "still contain[ed] the worst [polychlorinated biphenyl] pollution in the state " *Id* at *10 Still, the *McLerran* court concluded that "information gaps persisted such that [the state] determined that it could not confidently issue a TMDL at any point in the near future " *Id* at *8 The state "lacked sufficient scientific data and had not satisfied certain pre-submission requirements, *i e* , public notice and consultation " *Id*

Plaintiffs here have even less to go on than the court in *McLerran* did

To begin with, despite all that Ohio has done, especially recently, to ignore the problem of farmland phosphorous runoff and to evade its obligations to the citizens of Northwest Ohio, its inattention and indifference have not been with regard to the duty to develop TDMLs

The fact remains that it has been but a few months since Ohio first declared Lake Erie open waters impaired on May 4, 2018 Years of inaction following an impaired listing may reasonably prompt a court to consider whether a state has "clearly and unambiguously" abandoned its TMDL obligations *See Ohio Valley Envtl Coal , supra*, 893 F 3d at 231(addressing West Virginias plan to complete TMDLs within eight years), *Scott, supra*, 741 F 2d at 996 n 10 (remand to determine constructive submission where neither Illinois nor Indiana had submitted any TMDLs in roughly five years) Months of inaction will not

Nor can plaintiffs transform months into years by casting Ohios no-TMDL statements as part of the States broader "history" of lax environmental action (Doc 36-1, ¶ 7)

As I trust my April 11, 2018 order amply demonstrates, I am familiar with Ohios feeble CWA compliance *vis-a-vis* Lake Erie impenled Western Basin But recitation in the proposed supplemental complaint of those disheartening historical facts (*see* Doc 36-1, ¶¶ 4-5, 7, 9-15, 69-73) does not reach the demanding threshold for stating a cognizable claim for constructive submission

Again, "[t]he constructive submission doctrine rests" on the U S EPAs statutory duty to approve or disapprove a TMDL submission *Ohio Valley Envtl Coal , supra*, 893 F 3d at 229 (citing 33 U S.C § 1313(d)(2)) A state need not submit TMDLs until and unless it declares a certain water quality segment impaired Only thereafter may a states subsequent and prolonged failure to submit TMDLs ripen into "a constructive submission" of no TMDLs *Scott, supra*, 741

F 2d at 996

Having designated Lake Erie's open waters as impaired for the first time, as tardy as that may be, on May 4, 2018, Ohio still has "a long period of time" to sit on its hands before plaintiffs can plausibly allege that it has constructively submitted no TMDLs *Id* This is so, despite Ohio's dilatory approach and resulting delay in even acknowledging the impaired condition of the Western Basin. As unfortunate as that approach and delay have been, under the law as is, the hands on the TDML clock have just begun to turn. Given the current state of the law of constructive submission, I cannot conclude that Ohio has " clearly and unambiguously *refused to submit* TMDLs in violation of the Clean Water Act" in perpetuity *Ohio Valley Envtl. Coal , supra*, 893 F 3d at 231 (quoting

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Hayes, supra, 264 F 3d at 1024) (emphasis supplied)

That Ohio intends to follow the GLWQA protocol, instead of turning forthwith to developing a TMDL, does not alter my conclusion

Plaintiffs base their constructive submission claim on the Ohio EPA's TMDL statements in the Amended Submission They characterize those statements as a "definitive[ ]," "explicit refusal" to develop a TMDL addressing HABs in Lake Erie (Doc 36-1, ¶¶ 92, 5, 59).

But what the Ohio EPA actually said is not as "definitive" as plaintiffs contend Given the complexity of the algae bloom problem, Ohio believes the best approach for solving the issues in western Lake Erie is through the collaborative process established under Annex 4 of the [GLWQA] and the Domestic Action Plans as they afford a holistic, multi-jurisdictional perspective that does not exist in a traditional TMDL process If the current collaborative processes fail to restore the designated use attainment, we recognize that a TMDL or other approach allowed by the U S EPA to addressed impaired waters under the CWA will ultimately be required (Doc 30-2, ID 9035)

This statement, even when read against the backdrop of years of inaction, does not rise to the level as needed to state a plausible claim of constructive submission - namely, of proof that a state has " clearly and unambiguously decided not to submit any TMDLs " *San Francisco BayKeeper, supra*, 297 F 3d at 883 (quoting *Hayes, supra*, 264 F 3d at 1024)

Ohio's preference for the GLWQA "collaborative process" for now simply is not the same as a clear and unambiguous statement of intent never to perform that duty It has not yet renounced the TMDL process To the contrary, the Ohio EPA "recognize[s] that a TMDL or other approach will ultimately be required" if the GLWQA does not restore Lake Erie for its designated and essential uses

Ohio's failure to explain when or how it will know if the "collaborative process" can restore or has restored the Lake is certainly troubling But its Amended Submission notes that the GLWQA has two built-in benchmarks "phosphorus reduction goals of 20 percent by 2020, and 40 percent by 2025" - though these may be "revised" based on an "adaptive management philosophy " (Doc 30-2, ID 9035) Presumably, if the State does meet these goals, it will begin TDML work in either 2020, or 2025 Even with that late start, Ohio could possibly complete the TMDL process within the U S EPA's envisioned eight- to thirteen-year timeline

As already noted, developing a TMDL is not optional. "Each State *shall* establish" a TMDL for particular pollutants as required by the CWA 33 U S C § 1313(d)(1)(C) (emphasis added) Ohio is not free to walk forever away from that process, or to follow for as long as it wants some ultimately unproductive alternative *See McLerran, supra*, 2015 WL 1188522 at * 10 ("[N]othing in the CWA provides that state may pursue [other] courses in place of, or as a means of indefinitely delaying a TMDL.") The hands on the TMDL clock will continue to turn while Ohio embarks on the course it has chosen for now

Further, skepticism about the outcome of the GLWQA approach is not unwarranted Ohio's description of what that has entailed and will entail is opaque. Success appears to depend, perhaps in no small part, on the commitment of the other jurisdictions that will be working with Ohio The prospect that come 2025 Ohio will conclude that, if such proves to be so, the GLWQA has failed is, at best, worrisome

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If that occurs, time that Ohio could spent, probably for profitably, on determining TDMLs will have been irredeemably lost.

This is even more so if Ohio continues to rely on its past, utterly failed, wastefully costly efforts to secure voluntary compliance from those who want to remain free from statutory or regulatory restraint. There is, quite simply, no reason whatsoever to believe that continued exhortation, without more, will work - or have any useful effect. Indeed, its a placebo that increases the risk of region-wide harm without the placebo's comforting effect that maybe something curative may be happening

However, with all that said, plaintiffs have not cited and I have not found any case law basis for finding constructive submission in this case and these circumstances C f , San Francisco *BayKeeper, supra,* 297 F 3d at 883 (holding that states need not submit TMDLs "simultaneously" with their biennial impaired waters lists) The lack of precedent for finding constructive submission in a case like this is telling

The unambiguous intent of Congress when it drafted the CWA is "that States remain at the front line in combating pollution " *City of Arcadia v EPA,* 411 F 3d 1103, 1106 (9th Cir 2005) In the draftsmen's view, localized state agencies are best positioned to assess waters within their boundaries, and to determine, in light of their limited resources and the degree of impairment, which TMDLs to prioritize Even the *McLerran* court recognized "state discretion" as an "[u]nquestionably important component" of the CWA 2015 WL 1188522 at *6

These statutory principles, and the constitutional doctrine of federalism they express, trump the constructive submission allegations in this case To find otherwise would extend that judge-made doctrine beyond its rigorously demanding prerequisites

The allegations in the proposed supplemental complaint do not satisfy those demands.

One can, and many undoubtedly do, lament the time already lost as the General Assembly and Executive branch turned their backs on a long-standing, persistent, and possibly worsening problem But that lost time, regardless of its length, does not count in the constructive submission calculation That is the law, and no court can go beyond what the law allows

Congress gave the states the responsibility, the obligation, and the duty to protect the

wellbeing of their residents Where the state fails to do so, it is for its citizens whose welfare is at risk - and not the courts, and certainly not the *federal* courts - to hold the states officials to account

That is the way our federal system of government is meant to work If it does not work, the citizens who want it to do so must, under our Constitution and laws, look elsewhere other than the courts to make it work.

Accordingly, like Count I, Count II of the proposed supplemental complaint fails to state a claim on which relief can be granted Granting leave to supplement under these circumstances would be futile I will therefore deny plaintiffs Rule 15(d) motion to supplement the complaint

I will also deny as moot the Lucas County Board of Commissioners motion to intervene as a party plaintiff (Doc 56) [8]

2. Defendants Counter-Motion for Summary Judgement

That leaves only defendants counter-motion for summary judgment (Doc 38), which relates to plaintiffs original APA claim - that the U S EPAs approval of Ohios first 2016 § 303(d) list was "arbitrary, capricious," or "otherwise not in accordance with law " 5 U S C § 706(2)(A)

For the reasons stated in my April 11, 2018 order, I grant the motion

Summary judgment is appropriate under Fed R Civ P 56 where the opposing party fails to show the existence of an essential element for which that party bears the burden of proof *Celotex Corp v Catrett,* 477 U S 317, 322, 106 S Ct 2548, 91 L Ed 2d 265 (1986)

To succeed on an APA claim, an essential element plaintiffs must prove is that the decision they challenge is a "final agency action " 5 U S C § 704 (*See* Doc 29, ID 9015-17) When the U S EPA withdrew its former approval of Ohios original 2016 § 303(d) list, there no longer was a final agency action for the plaintiffs to assail *See Marquette Cty Rd Commn, supra*, 188 F Supp 3d at 646-47

The reasons I gave for denying plaintiffs summary judgment motion in my April 11, 2018 order require me likewise to grant summary judgment in favor of defendants plaintiffs cannot challenge an agency decision that no longer is in effect, nor can they reframe their original claim as a CWA citizen suit as to which they did not provide the requisite pre-suit notice under 33 U S C § 1365(a)(2) (Doc 29, ID 9013-19)

Defendants are therefore entitled to summary judgment on plaintiffs initial APA claim

Conclusion

It is, therefore, ORDERED THAT 1 Defendants counter-motion for summary judgment (Doc 38) be, and the same hereby is, granted, 2 Plaintiffs motion for leave to supplement the complaint (Doc 36) be, and the same hereby is, denied, 3 The Lucas County Board of Commissioners motion to intervene (Doc 56) be, and the same hereby is, denied as moot, and 4 Defendants brief in response to plaintiffs motion for attorneys fees (Doc 57), is due October 20, 2018, plaintiffs reply in support of their motion is due November 1, 2018

So ordered

Notes

[1] When a public officer "resigns[ ] or otherwise ceases to hold office" during the pendency of a civil action against him, his "successor is automatically substituted as a party " Fed R Civ P 25(d) Wheeler and Stepp succeeded originally named defendants Scott Pruitt and Scott Kaplan

[2] Also, at the end of this order, I set a briefing schedule for plaintiffs motion for attorneys fees (Doc 57)

[3] The Agency withdrew its approval for reconsideration of the 2016 § 303(d) list on the day before plaintiffs summary judgment brief was due The effect of the Agencys failing timely to alert plaintiffs counsel that it was contemplating its action before counsel expended time and resources preparing that brief is a matter I will address once the plaintiffs motion for attorneys fees and costs is decisional

[4] On July 9, 2018, the U S EPA approved Ohios 2018 impaired waters list, which, again designated the open waters assessment units impaired. (Doc 40-1)

[5] Defendants also argue that a proposed APA claim premised on the U.S EPAs approval of Ohios Amended 2016 § 303(d) list is moot in view of the U S EPAs later approval of Ohios 2018 § 303(d) list, which the Agency issued only two months after approving the Amended 2016 submission *See* n 4, *supra* If plaintiffs were still pursuing a claim based on the substantive decision to approve, or disapprove the 2016 impaired waters list, I might agree with them *See Blue Water Baltimore v Pruitt,* 266 F Supp 3d 174, 180-81 (D D C 2017) ("In the EPAs own guidance regarding the submission of Integrated Reports, it makes clear that an Integrated Reports list of impaired waters, once approved, is a new list that *replaces* the previous list. " (citation and brackets omitted, emphasis in original)) But they are not Rather, plaintiffs allege the May 10, 2018 letter approves Ohios TMDL statements, when in fact it doesnt I accept defendants argument that there is no "requirement for states to submit TMDLs with their Section 303(d) lists or as part of an integrated report," (Doc 43, ID 9428) and that "the TMDLs themselves are not part of the integrated report" or the § 303(d) list (Doc 39, ID 9275) Having accepted those claims, I do not see how one letter, which does not approve the TMDL statements in Ohios Amended 2016 submission, is superseded and mooted by another letter that, as best I can tell, also does not approve the TMDL statements in Ohios 2018 impaired waters list. I instead conclude Count I of the proposed supplemental complaint fails to state a claim because plaintiffs have not identified the final agency action necessary to pursue an APA claim

[6] Strict "compliance with the notice and delay provisions of § 1365(b)(1)(A)" and 40 C F R § 135 3(a) is "a mandatory condition precedent to the commencement" of a CWA citizen suit. *Historic Green Springs, Inc v Louisa Cty Water Auth ,* 833 F Supp 2d 562, 565 (W D Va 2011) (quoting *Friends of the Earth, Inc v Gaston Copper Recycling Corp ,* 629 F 3d 387, 399 (4th Cir 2011)) Whether plaintiffs have satisfied these requirements is unclear Plaintiffs acknowledge they initially sent defendants notice via priority, rather than certified mail, and then sent the correct notice less than sixty days prior to seeking leave to supplement (Doc 40, ID 9309 n 3) Defendants asserted the lack of notice as a defense in their opposition to plaintiffs motion to supplement (Doc 39, ID 9286-87), but dropped that argument during a subsequent status teleconference discussion (*see* Doc 58, ID 9713-14) Ultimately, however, I need not address the notice-and-delay issue to rule on plaintiffs motion to supplement That plaintiffs proposed citizen

suit in Count II fails to state a claim is reason enough to deny the motion

[7] Alternatively, "[i]f the EPA approves the constructive submission of no TMDLs, the next step for a dissatisfied party would be to seek judicial review of the EPAs action If the EPA disapproves then it presumably would be under a mandatory duty to issue its own TMDLs " *Ohio Envtl Coal , supra*, 893 F 3d at 229 (citations, ellipsis, and brackets omitted)

[8] The Lucas County Board of Commissioners intervenor complaint largely mirrors plaintiffs proposed supplemental complaint and offers no additional facts that may assist either party in stating viable claims (Doc 56-1)

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THE 19th ANNUAL

Great Lakes Water Conference

Lake Erie Bill of Rights, PFAS, Plus More

FRIDAY, NOV. 8, 2019

The LEBOR Litigation: Comments From a Corporate Perspective

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Lake Erie Bill of Rights

Creates Three Rights (Section 1)

- Right of Lake Erie (watershed) to "exist," "flourish," and "evolve"
- Right to healthy environment
- Reaffirms right to self governance
- Defines a "violation as" anyone "who violates Section 1"

2

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Lake Erie Bill of Rights *(cont'd)*

One Prohibition (Section 2)

- Establishes no discharge limits or objective standard of liability

"(a) It shall be unlawful for any *corporation or government* to violate the rights recognized and secured by this law."

3

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Enforcement

- Imposes unspecified "maximum penalty" allowed by law and costs of restoration; no specific amounts; open-ended liability Allows enforcement by City of Toledo or citizens on behalf of Lake Erie
- Cause of action may be brought in Lucas County Common Pleas Court by City or residents of City in the name of the Lake Erie Ecosystem
- Strict Liability on "corporate" persons for damages measured by cost to restore ecosystem

4

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Some Deficiencies in LEBOR

- Beyond the municipal power to establish
  - New causes of action outside its jurisdiction
  - Jurisdiction on Common Pleas Courts
  - Standing (who speaks for the Lake – can an inanimate object = person?)
- Conflicts with State of Ohio ownership of Lake Erie as Trustee
- Nullifies state law on corporate rights
- Nullifies federal and state permits (NPDES)
- Vagueness – no standards of compliance

5

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Appeal of LEBOR filed 2/27/19 – *Drewes Farm Partnership v. City of Toledo* (U.S. D.C. N.D. Ohio, Western Division) Judge Zouhary

6

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Parties

Drewes Farms – Plaintiff	Securing Declaration of Invalidity of LEBOR
City of Toledo – Defendant	Deny all substantive claims and assert dispute is not ripe
Lake Erie - Intervenor	Support LEBOR

7

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Claims of Drewes Farms Asserted in Complaint

- Violates 1st and 14th Amendments "Right to Petition"
- Equal Protection, 14th Amendment – arbitrarily imposes all burden on "corporate" persons, not other similar actors
- Vagueness – due process – does not specify conduct
- Due Process – by pre-empting permits
- Substantive Due Process – arbitrary abuse of power
- Pre-empts state and federal laws

8

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State of Ohio Claims in Support of Drewes Farms

- The Charter Amendment Conflicts with an Contradicts the Equal Footing and Public Trust Doctrines
- The Charter Amendment is Preempted by Federal Law and Violates the Supremacy Clause of the U.S. Constitution
- State Preemption Abrogates the Charter Amendment under the Ohio Constitution
- Federal Law Delegates Water Pollution Control and Drinking Water Enforcement to the State of Ohio
- Federal Law Delegates Great Lakes Protection to the State of Ohio

9

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Judge Zouhary Denies Motion of "Toledoans for Safe Water and Lake Erie Ecosystem" to Intervenor

- Intervenors did not demonstrate a substantive interest: "An organization's interest in 'seeing that the government zealously enforces some piece of legislation that [it] supports' is not substantial, either. *Granholm*, 501 F.3d at 782."

10

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Judge Zouhary Denies Motion of "Toledoans for Safe Water and Lake Erie Ecosystem" to Intervenor *(cont'd)*

"The Nonprofit members do have a right to sue polluters under the amendment's language – but do does every other Toledo resident. Just as the *Granholm* movants had no right to intervene based on an interest shred by 'the entire Michigan citizenry,' 501 F.3d at 782, the Nonprofit has no right to intervene based on an interest shared by all Toledoans."

11

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City of Toledo has Moved to Dismiss all Plaintiff's Claims and Seeks Dismissal on Ripeness

- Plaintiff has no concrete harm and any challenge to the Charter must await enforcement by the City or a resident.

12

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What's Next?

- Rulings due on substantive motions and cross motions
- DeWine continues "voluntary approach" seeking nutrient reduction on non-command control
- DeWine announcement in March 2019 over $900 million over 10 years for water programs impacting Lake Erie
- ELPC has third suit pending – doctrine of negative declaration

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JURIST | Legal News & Research
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Lake Erie Bill of Rights: Legally Flawed But Nonetheless Important

MARCH 14, 2019 02:57:19 PM | **Kenneth Kilbert**
Edited by: **Kelly Cullen**

JURIST Guest Columnist Kenneth Kilbert, the director of the Legal Institute of the Great Lakes discusses the legal and political implications of the Lake Erie Bill of Rights . . .

Toledo, Ohio residents last month overwhelmingly **voted** in favor of the innovative **Lake Erie Bill of Rights** (LEBOR), an amendment to the city charter which declares Lake Erie has enforceable legal rights. What that vote signals may turn out to be more important to Lake Erie than the well-intentioned but legally flawed LEBOR itself.

LEBOR states that Lake Erie has the right to exist, flourish and naturally evolve, and that the people of the City of Toledo have the right to a clean and healthy environment, including a clean and healthy Lake Erie. LEBOR prohibits any corporation (defined to include any business) or government from violating these rights, and it allows the city or any resident of the city to sue in state court to enforce these rights and prohibition. The amendment further provides that Lake Erie itself may enforce its rights, as a named plaintiff and real party in interest, through a suit brought by the city or any resident of the city. A corporation or government that violates the LEBOR rights or prohibition is subject to criminal fines and strict liability for all harms resulting from its violations, including damages for the cost of restoring Lake Erie.

A law recognizing that a natural resource has enforceable legal rights is highly unusual, if not unique, in the United States. However, the concept is neither unprecedented nor new. So-called "**rights of nature**" laws have gained a foothold in some foreign nations, including Ecuador, New Zealand and Bolivia. Nearly half a century ago, Professor Christopher Stone wrote a provocative and influential law review article titled ***Should Trees Have Standing?,*** 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.

Legal Validity of LEBOR

Lake Erie in recent years has been plagued by **harmful algal blooms** (HABs) caused by excessive nutrient loading to the lake and its tributaries, resulting in ecologic and economic damage and threatening public health. LEBOR purports to provide another legal tool in the fight to protect Lake Erie from HABs and nutrient pollution, going beyond environmental statutes and common law claims such as public nuisance and the public trust doctrine. In my view, however, LEBOR suffers from multiple legal flaws that likely will thwart its good intentions. Let me highlight just a few.

- LEBOR creates a cause of action to be heard in the Lucas County Court of Common Pleas, an Ohio state trial court. But LEBOR, as an amendment to the City of Toledo charter, is merely a municipal law. A municipality cannot create a new cause of action in state court.
- According to LEBOR, no permit or authorization issued by a federal or state entity is valid in Toledo if it would violate rights under LEBOR; corporations which violate LEBOR cannot assert preemption by state or federal laws as a defense; and state laws are valid in Toledo only to the extent they do not conflict with the terms of LEBOR. So, for example, under LEBOR a corporation sued with violating the rights

of a clean and healthy Lake Erie by discharging pollutants into a Lake Erie tributary could not defend itself on the basis the discharge of pollutants was authorized by a Clean Water Act permit issued by Ohio EPA or U.S. EPA. LEBOR impermissibly turns principles of preemption and the Supremacy Clause on their heads. Municipal law cannot trump state or federal law.

- The rights of nature asserted in LEBOR cover the entire Lake Erie watershed, which extends far beyond the City of Toledo borders to include much of northern Ohio, parts of four other states (Indiana, Michigan, New York and Pennsylvania), and a significant portion of the province of Ontario, Canada. A municipality in one state cannot extra-territorially make law for other states and nations.

A farm **filed** a lawsuit against the City of Toledo the day after the election challenging LEBOR as unlawful, asserting multiple claims under the U.S. Constitution and various Ohio state laws. More litigation over LEBOR is likely to follow. That LEBOR will withstand such legal challenges and be enforced is questionable at best.

The Importance of LEBOR

So why do I think the vote for LEBOR is nonetheless important? Because it signals that the people of Toledo – in the immortal words of the Howard Beale character in the classic film *Network* – are mad as hell and they're not going to take it anymore.

Lake Erie was a polluted mess prior to the enactment of the federal **Clean Water Act** in 1972. But largely due to that statute's regulation of industrial and municipal point source polluters, Lake Erie became demonstrably cleaner. Since the turn of this century, though, HABs have been growing increasingly prevalent in Lake Erie. The thick green scum has been particularly troublesome in the western basin near Toledo, which is the shallowest and warmest part of the lake and receives the most nutrient loading. The excessive algae adversely impacts recreation, tourism, fishing, lakefront property values, and aquatic life. Perhaps most importantly, HABs can produce toxins that can cause illness or even death to humans. In August 2014, nearly half a million persons in the Toledo area were **left without safe public drinking water** for 2 ½ days when elevated levels of the toxin microcystin were detected in the city's drinking water system.

Scientists say that the principal cause of the HABs in Lake Erie is excess nutrients entering the lake and its tributaries, primarily from agricultural stormwater runoff of manure and fertilizer. The solution, they agree, is to significantly reduce the amount of nutrients entering the lake, especially from agricultural runoff. Unfortunately, the

federal Clean Water Act does not regulate nonpoint source pollution such as agricultural runoff; instead, regulation of agricultural runoff is left to state law. But Ohio, like many farm states, traditionally has been reluctant to regulate agricultural pollution. And nearly five years after the Toledo drinking water crisis, not much has changed. Ohio legislators and agencies have done little to regulate agricultural runoff, and HABs continue to choke Lake Erie every summer or fall.

Last month's vote for LEBOR signals that the people of Toledo are tired of waiting for their state government to take action, so they are trying to take matters into their own hands. Hopefully, Ohio's elected officials, and the agency personnel they appoint, will get the message: Either take action to reduce nutrient loading to Lake Erie by regulating agricultural runoff, or the people of Toledo – and the many other voters in Ohio who care about Lake Erie — will cast their ballots in the next election against those who failed to take the steps needed to solve the HABs problem in Lake Erie.

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