

FIGHTING FOR THE ENVIRONMENTAL RIGHTS OF LAKE ERIE

A community rallies to protect its lake, corporate polluters overrule city in Ohio legislature

DEBRA SIMES

The city of Toledo, Ohio approved a ballot measure in February, 2019 granting legal rights to Lake Erie in the fight to protect it from chemical-intensive agricultural pollution and contamination. Establishing a bill of rights for a body of water is a novel concept that speaks to the need to protect nature and ecological balance in the face of increasing threats to its existence. As a living entity that supports a vast array of living organisms, this approach ascribes legal rights under federal environmental protection law to natural, living systems that support life.

Lake Erie, the fourth largest of the five Great Lakes and the eleventh largest freshwater lake in the world, is once again plagued with pollution, but in this decade it is due primarily to agricultural runoff—as opposed to the raw sewage and industrial effluents that afflicted it in the mid-20th century. Concerned and weary Toledo residents sought remedies through the ballot initiative, “Lake Erie Bill of Rights,” which asked: Should Lake Erie, as an entity, have a legal right “to exist, flourish, and naturally evolve?” The ballot question asked whether the lake ought to be granted rights more typically ascribed to people. Under the measure, people are able to sue polluters on behalf of the lake, using the argument that Lake Erie’s rights have been violated.

However, before the law took effect, the Ohio legislature stepped in and passed an amendment to an unrelated budget bill to preempt the city law. According to *The Intercept* and emails obtained through a public records request, the Chamber of Commerce, working with key Republican lawmakers “slipped the amendment in an appropriations bill at the eleventh hour.” Bill Lyons, a board member of Ohio Community Rights Network is quoted in the media as saying, “This shows the influence of the Chamber of Commerce writing our laws and undermining the democracy of the people of Toledo.”

FIGHTING A HISTORY OF POLLUTION

Fifty years ago, prior to the passage of the 1972 Clean Water Act, U.S. water bodies, including the Great Lakes and their tributaries, were in big trouble. One of Lake Erie’s tributaries—the Cuyahoga River—became infamous for literally catching fire due to the sewage and industrial waste that were freely dumped into it. The early 20th century saw a rise in industrialization around the Great Lakes in which the lakes and its tributaries were used as sewers and waste disposal lagoons. According to *When Our Rivers Caught Fire*, by John Hartig, “Industry was king, and dirty rivers were considered a sign of prosperity.” That is no longer the barometer of success, but the agro-chemical sector continues to be a mighty contributor to pollution of the Great Lakes, through its production, marketing, and sales of synthetic, petrochemically derived fertilizers and pesticides.

Lake Erie has endured, in recent years, summertime algal blooms spurred by terrestrial runoff containing animal manure and synthetic fertilizers, as well as introductions of non-native fish species. The lake is also at risk of impacts from oil spills, from both vessels traversing the lake and pipelines that operate nearby. Fouling of public resources, despite real and significant progress from the 1970s through the first decade-plus of the 21st century, continues to threaten public health and the integrity of terrestrial and marine ecosystems, as well as the environmental services they provide. Currently, pollution of waterways tends to include agricultural runoff (nutrient pollution, especially phosphorous and nitrogen); pesticide contamination; and the occasional industrial (petroleum, chemical, or mining) accident or malfeasance.

Given the current administration in Washington, DC, and its goal for federal agencies of “reducing regulation,” these issues again are rising to the forefront of concern. A 2017 Gallup poll found that, across the nation, people are more concerned about water pollution than they have been in nearly two decades: In the poll, 63% of people “worry a great deal about pollution of drinking water,” and 57% “worry a great deal about pollution of rivers, lakes, and reservoirs.” (In U.S., Water Pollution Worries Highest Since 2001, Gallup, 2017)

BOX 1

Responding to a Supreme Court Decision

The Toledo effort, and a number of others around the country, owe some of their grounding to a 1972 Supreme Court ruling in *Sierra Club v. Morton*. (Roger Morton was then U.S. Secretary of the Interior.) In that case, the Sierra Club sought—and failed—to prevent development of a portion of the Sequoia National Forest; the court found, 4–3 that the Sierra Club did not have standing in the suit because it failed to show that any of its members had suffered or would suffer injury as a result of the defendant’s actions. But Justices William O. Douglas, Harry A. Blackmun, and William J. Brennan, Jr. wrote critical dissenting opinions, respectively, opining that “standing doctrine should allow environmental organizations such as the Sierra Club to sue on behalf of inanimate objects such as land;” that “when faced with new issues of potentially enormous and permanent consequences, such as environmental issues, the Court should not be quite so rigid about its legal requirements;” and that the Court should have considered the case on its merits. Justice William O. Douglas additionally wrote that “contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”

The advocacy group Toledoans for Safe Water gathered 11,000 signatures in an effort to advance the ballot initiative, which was drafted with the assistance of CELDF, the Community Environmental Legal Defense Fund. The health of Lake Erie is no small thing to Toledo-area residents, who depend on the lake for their drinking water. In 2014, the city all but closed down when the lake became so polluted with the slimy algal mats—from phosphorus runoff from upstream farms—that hospitals and stores and restaurants shuttered, and half a million people had to depend on bottled water in that year’s very hot August.

The text of the initiative begins, “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.”

RIGHTS OF NATURE—THE HISTORY

This effort, like a number of similar initiatives that have taken place in various municipalities in recent years, rests on a “Rights of Nature” argument, which says that features of the natural world have an inherent right to exist with fundamental integrity intact. With “standing”—the legal right to bring suit against an entity by virtue of enduring harm—being a critical concept to the legal and judicial system, such efforts look to establish legal status for an aspect, or aspects, of the local natural world, such as a water body, forest, fauna, flora, etc. Legal arguments in litigation brought on this basis often seek to demonstrate that current laws are inadequate to protect nature against environmental harm.

Other, similar initiatives include:

- Tamaqua Borough, Pennsylvania, approved in 2006 a Rights of Nature ordinance after it banned industry from dumping dredged minerals and sewage sludge into open pit mines. The law says that corporations “could not ‘interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage’ to them within the township.”

The health of Lake Erie is no small thing to Toledo-area residents, who depend on the lake for their drinking water. In 2014, the city all but closed down when the lake became so polluted with the slimy algal mats that half a million people had to depend on bottled water in that year's very hot August.

- In 2013, Santa Monica, California passed a law requiring the city to “recognize the rights of people, natural communities and ecosystems to exist, regenerate and flourish.”
- In Minnesota, the White Earth Band of Ojibwe recently passed a tribal law establishing the natural rights of a plant central to their culture—wild rice (*Zizania aquatica*), or manoomin, the Ojibwe term. It is the first time that a plant has been granted “personhood” in the U.S., and is understood to be establishing a foundation on which to mount opposition to an Enbridge Energy oil pipeline that would threaten waters in which local tribes have treaty rights to harvest rice, hunt, and fish.

- A similar law was adopted by a Chippewa tribal group, the 1855 Treaty Authority, that represents the beneficiaries of an 1855 land pact between the Chippewa tribes and the U.S. government.

Of course, there are opponents to Rights of Nature initiatives. In the Toledo case, opposition came primarily from large agricultural operations in the area, which shed the fertilizer runoff (which often include pesticide residues, which can cause fish kills) that feeds the toxic algae in Lake Erie, causing lethal-to-other-life algal blooms that deprive the water of oxygen. Farmers claimed that with passage of the measure thousands of farms could be sued for damages for polluting the lake and be driven out of business.

During the past decade-plus, other attempts to establish nature-based rights have been supported and guided by CELDF. The organization describes its work as “a paradigm shift, a move away from unsustainable practices that harm communities, and a move towards local self-government.” It helps communities with establishment of legal community rights, including environmental rights, worker rights, rights of nature, and democratic rights. Typically, establishment of such rights happens through the creation of local laws that seek to set out one or more of those rights as a basis for preventing activities that a community finds unacceptable—



© Shutterstock/Dennis Tongney, Jr.

most often, activities such as fracking, water pollution, unhealthy working conditions, pesticide use, or the environmental and/or labor ravages of particular industries, such as mining.

Of the Toledo ballot initiative, CELDF executive director Thomas Linzey said that the “intent of the initiative is twofold—to send a warning that the community is fed up with a lack of state and federal action to protect Lake Erie, and to force the courts to recognize that ecosystems like the lake possess independent rights to survive and be healthy. In other words, that rivers

have a right to flow, forests have a right to thrive, and lakes have a right to be clean.” CELDF says such efforts demonstrate the resolve of communities to fight environmental degradation, and send the message that some companies might better look elsewhere to do business. Supporters of Rights of Nature initiatives are, some environmentalists say, inviting a rethinking of nature and the place of humans in it. According to Mr. Linzey, “There’s no precedent for any of this. It is almost a new consciousness—that a community is not just *Homo sapiens*.”

BOX 2

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 unremittably 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.

* See complete Lake Erie Bill of Rights at <https://beyondpesticides.org/assets/media/documents/LakeErieBillOfRights.pdf>.