Buffalo Environmental Law Journal

Volume 28 | Number 1 Article 2

8-1-2021

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Buffalo Environmental Law Journal
VOLUME 28 2021

LAKE ERIE BILL OF RIGHTS STRUCK DOWN: WHY THE RIGHTS OF NATURE MOVEMENT IS A NONVIABLE LEGISLATIVE STRATEGY FOR MUNICIPALITIES PLAGUED BY POLLUTION

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INTRODUCTION

Does nature have rights, and if so, who decides? The City of Toledo, Ohio affirmatively addressed each question when it passed the Lake Erie Bill of Rights (LEBOR) in February of 2019, granting multiple rights to Lake Erie. The origins of LEBOR began in 2018 when "Toledoans for Safe Water," a grassroots organization in Toledo, initiated a petition for the Lake Erie Bill of Rights to amend Toledo's city charter with the purpose of safeguarding Lake Erie from chronic pollution.[1] The citizen-led, multi-year, initiative arose as a direct response to Toledo's state-of-emergency in August 2014 when 500,000 Toledo-area residents were left without clean water for nearly three days, due to dangerously high levels of microcystin from algae blooms in Lake Erie.[2] Through their efforts, Toledoans for Safe Water collected over ten-thousand petition signatures,

[†] J.D., May 2020, University at Pittsburgh School of Law. I would like to thank Professor Grant MacIntyre and Professor Joshua Galperin of the University of Pittsburgh School of Law for encouraging and mentoring me during the drafting of this article. This publication is dedicated to my family and significant other for their constant and unwavering support throughout my time in law school.

[1] *The Lake Erie Bill of Rights Citizens Initiative*, TOLEDOANS FOR SAFE WATER, https://www.lakeerieaction.wixsite.com/safewatertoledo/lake-erie-bill-of-rights (last visited Mar. 10, 2020).

[2] Michael Wines, *Behind Toledo's Water Crisis, A Long-Troubled Lake Erie*, N.Y. TIMES, Aug. 5, 2014, at A12, https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html.

triggering a special election.[3] On February 26, 2019, Toledoans certified LEBOR as law.[4]

LEBOR granted three express rights: (1) Lake Erie's right to "exist, flourish, and naturally evolve";[5] (2) Toledoans' right to a "clean and healthy environment";[6] and (3) Toledoans' right to "self-government in their local community."[7] By granting Lake Erie with the right to "exist, flourish, and naturally evolve," LEBOR became the first law in the United States to acknowledge and grant a *distinct* ecosystem with rights and legal personhood.[8] LEBOR enforces the rights to "clean and healthy environment" and "self-government" by granting citizens with the power to bring a cause of action on behalf of Lake Erie to hold polluters strictly liable for Lake Erie's pollution, regardless of a polluters' state- or federally-issued permits.[9]

The language of LEBOR reflects the mission of the growing legal strategy in United States municipal law, known as the "rights of nature" movement, which recognizes nature as a legal entity with enforceable rights. Two legal theories cornerstone the rights of nature movement: (1) the theory that ecosystems and natural entities have the right to exist and flourish; and (2) that the people, government, and communities affected by such ecosystems are granted authority and guardianship to enforce the rights of nature in defense of the ecosystem or natural entity—similar to the structure of a parent's representation of a child's rights, or third-party represen-

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[3] OHIO CONST. art. XVIII, § 9 (stating that ten-thousand (10,000) signatures trigger a special election).

[4] *See* Jason Daley, *Toledo, Ohio, Just Granted Lake Erie the Same Legal Rights as People*, SMITHSONIAN MAG. (Mar. 1, 2019), https://www.smithsonianmag. com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603 (discussing how only 8.9% of registered voters voted in the special election and that 61% of the 8.9% of registered voters cast a ballot in support of LEBOR).

[5] TOLEDO, OHIO, MUNICIPAL CODE ch. XVII, § 254(a) (2019), *invalidated by Drewes Farm P'ship I*, 441 F. Supp. 3d 551 (N.D. Ohio 2020).

[6] *Id.* § 254(b).

[7] *Id.* § 254(c).

[8] *Rights of Lake Erie Recognized in Historic Vote*, CMTY. ENV'T LEGAL DEF. FUND (Feb. 27, 2019), https://www.celdf.org/2019/02/rights-of-lake-erie.

[9] TOLEDO, OHIO, MUNICIPAL CODE ch. XVII, § 256(b)–(c).

tation of a person otherwise incapable of representing themselves in court.[10]

For Toledoans, LEBOR's ratification signified a victory for Lake Erie and the rights of nature movement. However, immediately following the special election, Drewes Farm Partnership (Drewes Farm), a family farm located in Northwest Ohio, filed a lawsuit challenging the validity of LEBOR. Among its claims, Drewes Farm alleged that LEBOR was unconstitutional for its First, Fifth, and Fourteenth Amendment deprivation of rights to farmers and business owners, particularly for LEBOR's declaration of strict liability to any business or corporation that contributed to Lake Erie's nonpoint source pollution.[11] Drewes Farm also claimed that LEBOR was an overreach of municipal power and an intrusion on the authority of the state and federal governments.[12] After a contentious legal battle, and almost a year to the date of LEBOR's enactment, the District Court for the Northern District of Ohio ruled in favor of Drewes Farm and struck down LEBOR "*in its entirety*."[13]

Although LEBOR was the first American law to recognize the rights of a *distinct* ecosystem, LEBOR was also one of the many rights of nature municipal laws struck down by courts since the rights of nature movement gained momentum in the United States. With the unraveling of LEBOR, the question remains as to how municipalities, like Toledo, can combat persisting local environmental pollution if rights of nature laws are non-solutions to the problem. This comment explores why the rights of nature in municipal legislation is a sympathetic but nonviable legal strategy for justifiably dissatisfied and concerned citizens personally affected by

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[10] *Id.*; Jackie Flynn Mogensen, *Environmentalism's Next Frontier: Giving Nature Legal Rights*, MOTHER JONES, https://www.motherjones.com/environment/2019/07/a-new-wave-of-environmentalists-want-to-give-nature-legal-rights. (last visited Mar. 13, 2020) (discussing how rights of nature laws often work like a guardianship where the guardian can sue on behalf of the ecosystem and any damages awarded to the guardian is put into a trust dedicated to the restoration of the ecosystem).

[11] Complaint at 6, *Drewes Farm P'ship I*, 441 F. Supp. 3d 551.

[12] *Id*. at 7.

[13] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 556 (emphasis added).

pollution. Part I of this comment will address the rights of nature movement internationally and the problem of standing in the United States judicial system for distinct ecosystems and nature in general. Part II will discuss why municipalities adopt pollution ordinances and the rights of nature movement at the local level. Finally, Part III will explain how the precautionary principle in municipal legislation is a viable alternative to the rights of nature movement for municipalities to address area-specific pollution.

I. THE RIGHTS OF NATURE MOVEMENT: ORIGINS AND OVERVIEW

A. The International Embracement of the Rights of Nature

The year 2008 marked a significant shift from the theory of rights of nature into actual practice. Ecuador was the first country in the world to promulgate a constitutional provision that recognized the "rights of nature."[14] Ecuadorians voted to adopt a "bill of rights for nature" in its constitution in response to the country's rapid depletion of natural resources by multi-national companies and the rising political power of indigenous groups.[15] The Ecuador Bill of Rights declared that Nature, or "Pachamama," bears the right "to exist, persist, maintain and regenerate."[16] The amendment's broad language[17] offers comprehensive protections for Ecuadorians to

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[14] *See Press Release: Ecuador Approves New Constitution: Voters Approve Rights of Nature*, CMTY. ENV'T LEGAL DEF. FUND (Sept. 28, 2008), https://www.celdf.org/2008/09/press-release-ecuador-approves-new-constitution-voters-approve-rights-of-nature.

[15] *Id*.

[16] CONSTITUTION POLITICA DE LA REPUBLICA DEL ECUADOR, Oct. 20, 2008, ch. VII, art. 10, translated in *Rights of Nature Articles in Ecuador's Constitution*, https://www.therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf (last visited Mar. 9, 2020) ("Persons and people have the fundamental rights guaranteed in this constitution and in the international human rights instruments. Nature is subject to those rights given by this Constitution and Law").

[17] *Id.* ch. VII, art. 71 ("Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.").

defend the country's ecosystems as an advocate acting on behalf of nature.[18] Since 2008, Ecuadorian courts have upheld the constitution's rights of nature provision and ruled in favor of the Vilcabamba River. The river was even named as a plaintiff in litigation and was represented by two individuals.[19]

Similar to Ecuador's constitutional amendment, Bolivia's 2010 "Mother Earth Law" models after indigenous groups' Pachamama earth deity.[20] The Mother Earth Law recognizes nature as a sacred interdependent living system and not as discrete ecosystems.[21] Rather than explicitly granting legal personhood to ecosystems, the Mother Earth Law requires public institutions, private parties, the government, and society as a whole to conduct themselves in a way to preserve Mother Earth's "dynamic balance."[22]

Indigenous peoples' understanding of human relationships with nature continues to inspire other countries to adopt rights of nature provisions and laws. The Maori Tribe of New Zealand acted as a catalyst to New Zealand's grant of environmental personhood to

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[18] Andrew C. Revkin, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES: DOT EARTH (Sept. 29, 2008), https:/dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights.

[19] *Advancing Community Rights: Rights of Nature*, CMTY. ENV'T LEGAL DEF. FUND (Sept. 4, 2020), https://www.celdf.org/advancing-community-rights/rights-of-nature [hereinafter *Advancing Community Rights*]; Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOB. ALL. FOR RTS. NATURE, https://www.therightsofnature.org/first-ron-case-ecuador (last visited Mar. 13, 2020).

[20] Lee Brann, *Promise to Pachamama: Revisiting Bolivia's Historic Law of the Rights of Mother Earth*, NATURE NEEDS HALF (Mar. 10, 2018), https://www.natureneedshalf.org/ 2018/05/promise-to-pachamama.

[21] *Ley de Derechos de la Madre Tierra*, ch II, art. 3 (Bol.) (2010), translated in *Laws of the Rights of Mother Earth*, http://www.worldfuturefund.org/Projects/Indicators/ motherearthbolivia.html (last visited Mar. 10, 2020) ("Mother Earth is a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny.").

[22] *Id*. ch. I, art. 2.

the Whanganui River and Te Urewera forest.[23] The New Zealand government relinquished its ownership of Te Urewera to the Maori Tribe for preservation purposes.[24] The Te Urewera Act of 2014 recognized the forest as its own entity and established the purpose to "preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth."[25] The Whanganui River was also designated with legal personhood for its ties to the Maori Tribe.[26] The Maori Tribe declared that the Whanganui River was intertwined to the indigenous peoples as an ancestral relative.[27] The New Zealand government codified the legal recognition of the Whanganui River based on the Maori Tribe's reasoning that a harm done the river was an inextricably harm to the Maori Tribe.[28]

Most recently, the success of New Zealand's rights of nature legislation inspired a court in the northern Indian state of Uttarakhand to grant legal recognition of rights to the Ganges and Yamuna Rivers.[29] The Ganges River and the Yamuna River, a tributary of the Ganges River, are heavily polluted with industrial and sewage waste.[30] The high court recognized the rights of the rivers in direct response to the lack of state and federal governments efforts to

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[23] Bryant Rousseau, *In New Zealand, Lands and Rivers Can Be People (Legally Speaking)*, N.Y. TIMES (July 13, 2016), https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html.

[24] *Id.*

[25] Te Urewera Act 2014, pt 1, § 4 (N.Z.), http://www.legislation.govt.nz/act/public/2014/ 0051/latest/DLM6183601.html#DLM6183604.

[26] Rousseau, *supra* note 24.

[27] *See* Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (Mar. 16, 2017), https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being.

[28] *Id*.

[29] Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, GUARDIAN (Mar. 21, 2017), https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings.

[30] Austa Somvichian-Clausen, *The World's Most Polluted River Revealed in Photos*, NAT'L GEOGRAPHIC (Apr. 12, 2017), https://www.nationalgeographic.com/news/2017/04/ganges-river-photos-giulio-di-sturco.

protect the Ganges River. The court's order referenced New Zealand's legal recognition of the Whanganui River in its decision that the Ganges River and its tributaries are "legal and living entities having the status of a legal person with all corresponding rights, duties, and liabilities."[31]

Examples of rights of nature laws in Ecuador, Bolivia, New Zealand, India, and other countries[32] motivate rights of nature advocates to change the legal framework in the United States.[33] While international countries offer several seemingly successful adoptions of the rights of nature in constitutions and legislation,[34] the rights of nature cornerstones are unrecognized in the United States judicial system and face several legal hurdles inhibiting enforcement of such laws.

B. The Problem of Standing: The Rights of Nature Movement in the United States Judicial System

The concept that nature has "rights" is not a new or foreign legal strategy in the United States. In 1972, Professor Christopher Stone defended the notion that the environment should possess legal rights in his famous law review article, "Should Trees Have Standing?"[35] Stone argued that "legal convention acting in support of some status quo" has convinced the public that the environment

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[31] Safi, *supra* note 30.

[32] Ecuador, Bolivia, New Zealand and India are only four examples of countries taking action in the name of "rights of nature." Proposals, policies, and litigation addressing the "rights of nature" continue to magnify across the globe. *See* RON Map, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, https://www.therightsofnature.org/map-of-rights-of-nature (last visited Feb. 10, 2021).

[33] *See Advancing Community Rights*, *supra* note 20.

[34] *See* Jason Daley, *India's Ganges and Yamuna Rivers Are Given the Rights of People*, SMITHSONIAN MAG. (Mar. 23, 2017), https://www.smithsonianmag.com/smart-news/ganges-and-yamuna-rivers-given-rights-people-india-180962639 (mentioning how simply granting natural ecosystems rights does not automatically grant those ecosystems greater protections).

[35] Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450–51 (1972).

cannot possess legal rights.[36] Stone's words inspired rights of nature advocates to redefine public perception of nature as more than "property" and to recognize nature as a holder of legal rights independent of a human relationship.[37] However, even with Stone's influential words, the problem remains of the U.S. legal system's recognition of nature's standing.

In the United States, litigants must be "natural persons" or artificial entities *recognized* as "legal persons" under the law.[38] Some rights of nature advocates refer to the recent Supreme Court's ruling in *Citizens United v. Fed. Election Comm'n*, a decision that granted legal personhood to corporations and the same legal rights as people, as the opening of the door to recognize other intangible entities as legal persons, such as natural entities.[39]

However, the Supreme Court addressed the concept of nature as a litigant with standing in its *Sierra Club v. Morton* decision. [40] In 1965, the Sierra Club sued Walt Disney Enterprises to cease the development of a ski resort under the theory that the proposed development would constitute an injury to the Mineral King Valley in the Sierra Nevada Mountains.[41] The U.S. Supreme Court was unpersuaded by Sierra Club's argument that natural objects have standing under the Administrative Procedure Act (5 U.S.C. 551 *et seq*.) to sue in court.[42] The Court urged the Sierra

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[36] *Id*. at 453.

[37] *Rights of Nature FAQ*, CMTY. ENV'T LEGAL DEF. FUND (Mar. 21, 2016), https://www.celdf.org/advancing-community-rights/rights-of-nature/rights-nature-faqs.

[38] *See* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., 2012) ("legal person" is defined as "a human being, or an entity that is treated in law like one").

[39] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); Tim Wall, *Mother Nature Gets Her Day in Court*, NBCNEWS.COM (Jan 27, 2012), http://www.nbcnews.com/id/46161547/ns/technology_and_science-science/t/mother-nature-gets-her-day-court/#.XpDaNy2ZNmA (discussing Earth Law Center's comparison of the grant of legal rights to nature to the legal personhood of corporations exemplified in *Citizens United*).

[40] Sierra Club v. Morton, 405 U.S. 727 (1972).

[41] *Id.* at 728–30.

[42] *Id.* at 741.

Club to amend its complaint to demonstrate how Sierra Club, and not the natural entity Mineral King Valley, would be injured.[43] Two months later, Sierra Club amended its suit to name nine private citizen plaintiffs as injured by the ski resort development, rather than the Mineral King Valley as a plaintiff to the suit.[44]

Despite the *Morton* decision ruling that nature lacked standing, in Justice William O. Douglas' dissent,[45] inspired by the words of Professor Stone, Justice Douglas advocated for a federal rule that would allow for litigation "in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."[46] Justice Douglas noted that "inanimate objects are sometimes parties in litigation" and "[s]o it should be as respects valleys, alpine meadows, rivers, lakes."[47] Justice Douglas recommended that those people that have a meaningful relationship to the ecosystem, similar to the relationship of a parent-child, "must be able to speak for the values which the river represents and which are threatened with destruction."[48]

Environmental activists commonly cite to Douglas' dissent to promote rights of nature advocacy,[49] but Justice Douglas' impassioned efforts have yet to manifest in the American judicial system. As the law currently stands, nature is neither a natural person nor recognized as a legal person. Until the Supreme Court decides, if ever, to reconsider the legal standing of nature, federal and state courts will not recognize nature's status as a legal person with rights

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[43] *See id.* at 730–41, 756–57.
[44] David Lawlor, *How the Earth Got a Lawyer*, EARTHJUSTICE, https://www.earthjustice.org/mineralking/lawyer (last visited Apr. 11, 2021).
[45] *Id.* at 742 (Douglas, J., dissenting); Stone, *supra* note 33.
[46] *Sierra Club*, 405 U.S. at 741 (Douglas, J. dissenting).
[47] *Id.* at 743.
[48] *Id.*
[49] *See* James Proffitt, *Rights of Nature: Gaining Traction Around the World While Facing Serious Opposition Almost Everywhere*, GREATLAKESNOW (Aug. 19, 2019), https://www.greatlakesnow.org/2019/08/rights-of-nature.

and rights of nature laws in the United States will remain symbolic legislation, without legal force.[50]

II. RIGHTS OF NATURE LAWS AT THE LOCAL LEVEL

A. Motivations Behind Municipal Pollution Ordinances

The question remains: if the very crux of the rights of nature movement—that nature has legally defendable rights—is problematic and unrecognized under the current United States legal regime, why has the rights of nature movement generated local momentum in the United States?

Historically, municipalities enacted pollution ordinances to fill any gaps left in state oversight of polluting activities.[51] For instance, prior to 1930, dozens of cities across the United States developed smoke abatement legislation to alleviate the burden of industrial smoke and smog on urban citizens unaddressed by the states.[52] In 1868, the City of Pittsburgh, Pennsylvania, passed its first air pollution ordinance to reduce coal-induced smoke,[53] but the lack of enforcement of the ordinance on the railroad industry defeated any effectiveness of the 1868 ordinance.[54] Not until 1941, and after several other weakly-enforced smoke ordinances, did Pittsburgh put the first successful smoke ordinance into effect.[55] The success of Pittsburgh's 1941 ordinance was in part because of the public outcry from increased smoke levels in Pittsburgh during

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[50] Order Denying Motion to Intervene at 5, *Drewes Farm P'ship I*, 441 F. Supp. 3d 551 (N.D. Ohio 2020); *see also* Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution, 369 P.3d 140, 145–46 (Wash. 2016).
[51] Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N, 44, 45 (1982).
[52] *Id*.
[53] Cliff I. Davidson, *Air Pollution in Pittsburgh: A Historical Perspective*, 29 J. AIR POLLUTION CONTROL ASS'N 1035, 1037 (1979).
[54] *Id.*
[55] *Id.* at 1039.

World War II.[56] Notably, the 1941 ordinance demonstrated American's growing interests in the aesthetics and health of natural surroundings, a shift towards nascent environmentalism, and the propelling activism in environmental ordinances.[57] Early municipal pollution ordinances, like Pittsburgh's smoke ordinance, attempted to curtail and control pollution, but the effectiveness of such ordinances was ultimately futile against pollution that extended beyond municipal borders. Eventually, the surge of public outcry from catastrophic environmental disasters led to the regulation of pollution at the federal level.[58]

Although not the first federal air and water pollution abatement laws, Congress ratified the Clean Air Act (CAA) in 1970[59] and the Clean Water Act (CWA) in 1972, legislation in effect to this day.[60] The CAA and CWA regulate the amount of pollution released into the environment through permitting review processes. The CAA establishes a number of permitting processes designed to carry out the goals of the CAA,[61] and is primarily implemented by states,

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[56] *Id.* (discussing how in 1937, the City of St. Louis, Missouri enacted an air pollution ordinance for smoke emissions, which influenced the City of Pittsburgh to pass the 1941 ordinance).

[57] James Longhurst, *The Significance of Pittsburgh in U.S. Air Pollution History*, AIR & WASTE MGMT. ASS'N, June 2007, at 13, 14, 16.

[58] *See* Charles Duhigg, *Clean Water Laws Neglected, at a Cost*, N.Y. TIMES (Sept. 13, 2009), https://www.nytimes.com/2009/09/13/us/13water.html (discussing the 1969 Cuyahoga River fire disaster in Cleveland that sparked environmental activism); *see* Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENV'T L. 75 (2015) (discussing the Donora Smog of 1948 in Pennsylvania that killed twenty people).

[59] Clean Air Act of 1970, 42 U.S.C. § 7401; *see generally* Ahlers, *supra* note 60 (discussing the five legislative acts in 1955, 1963, 1965, 1967 that culminated in the 1970 Clean Air Act).

[60] Clean Water Act of 1972, 33 U.S.C. § 1251; *see History of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act (June 15, 2020) (explaining the Federal Water Pollution Control Act of 1948 as the first major U.S. law to address water pollution and the substance of the 1972 amendments that comprise today's CWA).

[61] *Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act (last visited Feb. 19, 2021).

local agencies, and tribes.[62] The CWA makes it unlawful to "discharge any pollutant from a point source into navigable waters, unless a permit [is] obtained" under the National Pollutant Discharge Elimination System (NPDES).[63] Through the CWA and CAA, the federal government determines the floor of how strict a pollutant must be regulated, but states have discretion to impose, or not impose, more stringent regulations.[64]

Despite the significant increase in major environmental legislation regulating pollution, critics of the existing environmental statutory framework argue that current federal laws are inadequate safeguards against environmental harms.[65] Notably, polluters need not obtain an NPDES permit for nonpoint source pollution, or pollution from a diffuse source.[66] In 46 states, state officials are the primary regulators of crucial components of the CWA[67] and yet states traditionally shy away from nonpoint source regulation and control.[68] For example, in the case of Lake Erie, and much of the

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[62] *Permitting Under the Clean Air Act*, EPA, https://www.epa.gov/caa-permitting (Nov. 5, 2020).

[63] *Summary of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited Feb. 19, 2021).

[64] *See* ENVIRONMENTAL LAW INSTITUTE, STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT (2013), https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf (examining limitations to the Clean Water Act imposed by states); *see also Air*, ENV'T L. INST., https://www.eli.org/keywords/air-1 (last visited Mar. 14, 2020).

[65] *See* Adam Wernick, *Environmental Lawyers Seek Legal Rights for the Natural World*, THE WORLD (Dec. 2, 2017, 10:30 AM), https://www.pri.org/stories/2017-12-02/environmental-lawyers-seek-legal-rights-natural-world.

[66] *Basic Information about Nonpoint Source (NPS) Pollution*, EPA, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (Oct. 7, 2020).

[67] *Id.*; CATHERINE JANASIE, THE MANAGEMENT OF NONPOINT SOURCE POLLUTION UNDER THE CLEAN WATER ACT (2018), http://nsglc.olemiss.edu/projects/ag-food-law/files/mgt-nonpoint-source-pollution-under-cwa.pdf.

[68] LUCAS COUNTY, OHIO BOARD OF COMMISSIONERS, MOVING FORWARD: LEGAL SOLUTIONS TO LAKE ERIE'S HARMFUL ALGAE BLOOMS 6 (2015), https://co.lucas.oh.us/DocumentCenter/View/56161/Moving-Forward-Final-EDITED-9-21-2015?bidId=.

country,[69] nonpoint source nutrient pollution is the most pervasive cause of water quality problems. Excess fertilizer from urban and agricultural storm-water runoff chronically plagues Lake Erie with hazardous phosphorous, which deprives Lake Erie of oxygen and kills plants and wildlife. Even with the known harmful effects of nonpoint source pollution, Ohio's June 2014 Nonpoint Source Management Plan placed no requirements on nonpoint sources of pollution.[70] Notably the Plan was finalized only two months prior to the Toledo-area's state-of-emergency attributed to nonpoint source pollution developing algae blooms in Lake Erie.

Community frustration developed with Ohio's lack of regulation of nonpoint source polluters and the State's inaction towards Lake Erie's revitalization. The community called for municipal action, ultimately leading to the establishment of Toledoans for Safe Water and their rally for local government authority to address the Ohio's agricultural runoff problem head-on.[71] Even when Ohio created a comprehensive plan in 2019 to protect Lake Erie by investing in targeted solutions to reduce phosphorus in agricultural runoff, [72] Toledo's doubt in the state plan remains in that the state's initiative funding will be significantly cut in the wake of the COVID-19 pandemic.[73]

In the eyes of Toledoans, and other communities, municipalities speak for the will of the people, rather than the polluters, and are activists for communities facing harmful pollution. Given the history of community activism in support of municipal environmental ordinances, and the problems created by regulatory gaps in federal and state regulations, the rise of the rights of nature move-

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[69] Duhigg, *supra* note 68.

[70] *See* OHIO EPA, NONPOINT SOURCE PROGRAM: OHIO NONPOINT SOURCE MANAGEMENT PLAN UPDATE (2014), https://www.epa.ohio.gov/Portals/35/nps/NPS_Mgmt_Plan.pdf; *see also* LUCAS COUNTY, OHIO BOARD OF COMMISSIONERS, *supra* note 71, at 38–39.

[71] *See The Lake Erie Bill of Rights Citizens Initiative*, *supra* note 1.

[72] *About H2Ohio*, OHIO DEP'TS NAT. RES., AGRIC. & ENV'T PROT., http://h2.ohio.gov/about-h2ohio (last visited May 19, 2020).

[73] Caroline Llanes, *Lake Erie Bill of Rights Appeal Dropped*, MICH. RADIO (May 11, 2020), https://www.michiganradio.org/post/lake-erie-bill-rights-appeal-dropped.

ment is an unsurprising legal strategy for communities. Even with the barriers in the U.S. judicial system, community morale and outcry continue to promote the rights of nature movement in local government and support rights of nature legislation.

B. The Rise of Local Rights of Nature Laws—Examples of "Successful" Rights of Nature Municipal Laws

Before Toledo passed LEBOR, other community efforts inspired municipalities across the United States to enact municipal laws that acknowledged the rights of nature. Tamaqua Borough of Schuylkill County, Pennsylvania, was the first municipality in the United States to recognize the rights of nature.[74] The 2006 sewage sludge ordinance (Tamaqua Ordinance) banned the dumping of toxic waste sewage in the community.[75] The Tamaqua Ordinance was a response to a 2002 report by the Inspector General of the Environmental Protection Agency (EPA), which concluded that the "EPA cannot assure the public that current land application [of sewage sludge] practices are protective of human health and the environment."[76] The Tamaqua Borough Council reasoned that the Tamaqua Ordinance, which declared that "Borough residents, natural communities, and ecosystems shall be considered to be 'persons' for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems,"[77] was necessary to protect the welfare of Borough residents and the environment.[78]

The Tamaqua Ordinance served as a paradigm in the growing public shift to sustainable practices. Other communities, also frustrated with the lack of federal and state action in public health and environmental degradation, followed in the footsteps of Tama-

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[74] Erin West, *Could the Ohio River Have Rights? A Movement to Grant Rights to the Environment Tests the Power of Local Control*, ENV'T HEALTH NEWS (Feb. 4, 2020), https://www.ehn.org/ohio-river-nature-rights-2645014867.html.
[75] TAMAQUA, PA., CODE § 260-61 (2006).
[76] *Id.* § 260-57(B).
[77] *Id.* § 260-61(F).
[78] *Id.* § 260-57(E).

qua Borough.[79] Four years after the Tamaqua Ordinance, in 2010, Pittsburgh, Pennsylvania, passed an anti-fracking ordinance, which banned natural gas drilling within the city's limits.[80] The 2010 ordinance recognizes the rights of natural communities and declared that residents of Pittsburgh have the legal standing to enforce the rights of natural communities and ecosystems to "exist and flourish"[81] The Pittsburgh ordinance also emphasizes the mounting community concern with drilling operations overriding municipal majorities.[82] Rather than regulating, and thus permitting natural gas drilling, Pittsburgh's ban "embodies the interests of the community" to be free of fracking toxins and to assert self-governance.[83]

Unlike Pittsburgh's rights of nature ordinance, which outright bans natural gas drilling within city limits, Santa Monica, California, passed a "Sustainability Bill of Rights" in 2011.[84] The Sustainability Bill of Rights mandates the city to follow the Sustainable City Plan to guide decision-making that "maximize[s] environmental benefits and reduce[s] or eliminate[s] negative environmental impacts."[85] Santa Monica passed the bill to "effectuat[e] the commitments and goals already established by the Sustainable City Plan, and [to] recogniz[e] the inherent rights of the people and natural communities of the City of Santa Monica."[86] As with other rights of nature laws, the Sustainability Bill of Rights recognizes the "rights of natural communities and ecosystems within Santa Monica to exist,

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[79] Madeleine Sheehan Perkins, *How Pittsburgh Embraced a Radical Environmental Movement Popping Up in Conservative Towns Across America*, BUS. INSIDER (Jul. 9, 2017), https://www.businessinsider.com/rights-for-nature-preventing-fracking-pittsburgh-pennsylvania-2017-7 (listing several municipalities that enacted rights of nature laws since 2006).

[80] PITTSBURGH, PA., CODE § 618.01 (2010).

[81] *Id.* § 618.03(b).

[82] *Id.* § 618.01 ("The City Council recognizes that environmental and economic sustainability cannot be achieved if the rights of municipal majorities are routinely overridden by corporate minorities claiming certain legal powers.").

[83] *See id.*

[84] SANTA MONICA, CAL., ORDINANCE 2421 (CCS) (Apr. 9, 2013).

[85] *Id*.

[86] *Id*.

thrive, and evolve"[87] and grants residents of Santa Monica with legal standing to "enforce any provision of the Santa Monica Municipal Code that advances the goals identified as enforceable in the Sustainable City Plan."[88] Years after its enactment, city leaders relied on the Sustainability Bill of Rights when the city denied a well drilling ordinance, which would violate the rights of an aquifer.[89]

Tamaqua's sewage sludge ordinance, Pittsburgh's anti-fracking ordinance and Santa Monica's sustainability bill are just a few examples of the dozens of municipal laws since 2006 that incorporate language acknowledging the rights of nature.[90] However, as explored in the next section, the passage of a rights of nature law in of itself is by no means a sweeping legal victory for the rights of nature movement.

C. The Pitfalls of Local Rights of Nature Laws— Limitations of Municipal Government Powers

Rights of nature laws undeniably resonate with communities that feel as though they are "rendered powerless by the state and federal government."[91] Though revolutionary in its legal approach, lawmakers should be mindful and wary to draw broad conclusions from the "success" of rights of nature municipal laws in Tamaqua Borough, Pittsburgh, and Santa Monica. As of early 2020, neither

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[87] *Id*. § 4.75.020(c).
[88] *Id*. § 4.75.070.
[89] Alex Brown, *Cities, Tribes Try a New Environmental Approach: Give Nature Rights*, PEW (Oct. 30, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/30/cities-tribes-try-a-new-environmental-approach-give-nature-rights.
[90] *See id.* (mentioning that as of 2019 dozens of communities have enacted rights of nature provisions in municipal laws); *see also Advancing Legal Rights of Nature: Timeline*, CMTY. ENV'T LEGAL DEF. FUND, https://www.celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline (Sept. 14, 2020) (listing chronologically the timeline of rights of nature laws in United States' municipalities).
[91] TAMAQUA, PA., CODE § 260-61 (2006).

the Pittsburgh nor Santa Monica ordinance have been challenged in court. However, when challenged, rights of nature charter amendments and ordinances are routinely struck down for exceeding municipal authority.[92] This section discusses at length the recent problematic examples of municipal rights of nature laws in the United States from Grant Township of Pennsylvania, the City Spokane of Washington, and the City of Toledo of Ohio.

1. Grant Township, Pennsylvania

Grant Township (Township) of Indiana County, Pennsylvania, presently faces legal action against its rights of nature ordinance in state and federal court. In early 2014, the EPA approved the Pennsylvania General Energy Company's (PGE) conversion of a former gas well in the Township into a fracking wastewater disposal well.[93] In response, the Township enacted the "Community Bill of Rights" ordinance, which banned frack water disposal wells in the Township.[94] The Community Bill of Rights asserted the rights of natural communities and ecosystems in the Township "to exist, flourish, and naturally evolve."[95] The bill of rights not only prohibited any "corporation or government to engage in the depositing of waste from oil and gas extraction,"[96] but also allowed for the "ecosystems and natural communities within Grant Township [to] enforce their right . . . through an action brought by

[92] *See* Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 724 (2015).
[93] *See* Justin Nobel, *The Rights of Nature Movement Goes on Trial*, ROLLING STONE (Jan. 10, 2018, 7:13 PM) [hereinafter Nobel, *Rights of Nature*], https://www.rollingstone.com/politics/politics-news/the-rights-of-nature-movement-goes-on-trial-125566.
[94] Kari Andren, *Grant Township in Indiana County to Pursue Home Rule Charter*, TRIBLIVE (May 20, 2015, 12:00 AM), https://archive.triblive.com/news/grant-township-in-indiana-county-to-pursue-home-rule-charter (The Community Bill of Rights was ratified in Grant Township's Home Charter Rule in 2015).
[95] GRANT, PA., HOME RULE CHARTER art. 1, § 106 (2015).
[96] *Id.* art. 3, § 301.

Grant Township or residents . . . in the name of the ecosystem or natural community as the real party in interest."[97]

In 2014, PGE filed a federal lawsuit to overturn the ban, alleging the violation of PGE's constitutional rights and that the ban "[exceeded] the limits of governmental authority."[98] The legal organization Community Environmental Legal Defense Fund (CELDF) petitioned the court to intervene on behalf of the ecosystem and named the Little Mahoning Creek, a creek in the Township, as an intervening legal party to the action.[99] The U.S. District Court for the Western District of Pennsylvania refused to acknowledge the legal personhood of Little Mahoning Creek under its rights to "exist and flourish" stated in the Community Bill of Rights, and thus denied Little Mahoning Creek's intervening motion.[100] The District Court also overturned the wastewater depositing ban in the Community Bill of Rights.[101] In a final blow, on appeal by the CELDF, the United States Court of Appeals for the Third Circuit affirmed the District Court's decision that neither the Lake Mahoning Creek, nor any ecosystem, may be an intervening party to federal litigation, upon the serious risk of violating the Federal Rules of Civil Procedure.[102] In addition to the invalidation of the ordinance and the motion denial, a federal judge in the Western District sanctioned two CELDF attorneys for filing motions "to relitigate the denial of [the] Township's initial motion."[103]

Three years later, in 2017, Pennsylvania's Department of Environmental Protection (DEP) granted PGE's well permit under

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[97] *Id.* art. 3, § 305.

[98] Justin Nobel, *How a Small Town is Standing Up to Fracking*, ROLLINGSTONE (May 22, 2017, 3:35 PM), https://www.rollingstone.com/politics/politics-news/how-a-small-town-is-standing-up-to-fracking-117307.

[99] *See* Pa. Gen. Energy Co. v. Grant Twp., No. CV 14-209ERIE, 2018 WL 306679, at *2 (W.D. Pa. Jan. 5, 2018).

[100] *Id.* at *13.

[101] Nobel, *Rights of Nature*, *supra* note 93.

[102] *Pa. Gen. Energy Co.*, 2018 WL 306679, at *2 (explaining the Third Circuit's decision to reject the legal personhood of ecosystems).

[103] *Id.* at *2; Nobel, *Rights of Nature*, *supra* note 93.

Pennsylvania's 2012 Oil and Gas Act.[104] The DEP filed a Petition for Review in state court seeking declaratory relief that state laws preempt the Community Bill of Rights' prohibition on oil and gas waste fluid injection wells.[105] In its counterclaims, Grant Township alleged that the Community Bill of Rights provisions challenged by the DEP were enacted pursuant to Pennsylvania's Environmental Rights Amendment, which states that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and thus preempts the 2012 Oil and Gas Act and other statutes.[106] In 2020, the Commonwealth Court of Pennsylvania ruled that whether or not Grant Township may succeed on the merits of its constitutional claims, Grant Township may still raise this claim in defense of DEP's lawsuit.[107]

In a turn of events, in March 2020, the DEP rescinded its wastewater injection well permit to PGE.[108] The DEP refused to comment on whether the Commonwealth Court's ruling impacted the agency's decision to revoke the permit.[109] On its face, the Commonwealth Court's refusal to throw out the contested sections of the Community Bill of Rights suggests a victory for rights of nature.[110] Though Grant Township's Section 301's ban on injection well permits persists, DEP's Petition for Review was silent on

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[104] 58 PA. CONS. STAT. § 3211 (2012).
[105] Commonwealth v. Grant Twp. of Ind. Cnty., No. 126 M.D. 2017, 2020 WL 1026215, at *3-4 (Pa. Commw. Ct. Mar. 2, 2020); GRANT, PA., HOME RULE CHARTER art. III § 301 (2015).
[106] PA. CONST. art. I, § 27.
[107] *Commonwealth v. Grant Twp. of Ind. Cnty.*, 2020 WL 1026215, at *9.
[108] Laura Legere, *Pa. DEP Revokes Permit for Grant Twp. Oil and Gas Waste Well*, PITT. POST-GAZETTE (Mar. 27, 2020, 7:15 AM), https://www.post-gazette.com/business/powersource/2020/03/27/Pennsylvania-DEP-revokes-permit-oil-gas-waste-well-Grant-home-rule-charter/stories/202003260151.
[109] *See* Justin Nobel, *Nature Scores a Big Win Against Fracking in a Small Pennsylvanian Town*, ROLLING STONE (Apr. 1, 2020, 9:42 AM), https://www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159.
[110] *See id.*

Section 305, which states the rights and enforcement of Grant Township's natural community and ecosystems.[111] Rights of nature advocates should take heed that the Commonwealth Court provided no judicial review on the validity of Section 305. The Commonwealth Court's opinion neither negates nor supports the rights of nature cause. Given the ruling by the Western District of Pennsylvania and the Third Circuit, it still stands for Grant Township that its rights of nature provisions in the Community Bill of Rights are recognized as unlawful.

2. Spokane, Washington

Before LEBOR, in 2016, the City of Spokane, Washington, gathered enough signatures to put the community's rights of nature initiative, the "Community Bill of Rights," on the ballot.[112] The initiative proposed to amend the city's charter to grant the rights of water, including the Spokane River's legal right to "exist and flourish," and the rights of Spokane residents to enforce the Spokane River's rights.[113] A provision of the proposed amendment also stripped the rights of any corporation that violated the rights established in the Community Bill of Rights.[114] Spokane County, individuals, and for-profit and non-profit corporations filed a petition for declaratory judgment that the proposed amendment was unlawful.[115]

The court determined that if the initiative passed, the petitioners would face injury.[116] The initiative also exceeded the

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[111] *Commonwealth v. Grant Twp. of Ind. Cnty.*, 2020 WL 1026215, at *2–3.

[112] *See* WASH. REV. CODE § 35.22.200 (2015) ("The [city] charter may provide for direct legislation by the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city.").

[113] Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution, 369 P.3d 140, 145 (Wash. 2016).

[114] *Id*. at 146.

[115] *Id*. at 142.

[116] *Id*. at 145 ("Petitioners include a utility company and a county entity that use the Spokane River pursuant to existing state law who would certainly suffer harm if others were given conflicting water rights related to the Spokane River.").

scope of Spokane's local initiative power.[117] The court explained that "inhabitants of a municipality may enact legislation governing local affairs, [but] they cannot enact legislation which conflicts with state law."[118] The Supreme Court of Washington affirmed the trial court's reasoning that the initiative conflicted with Washington state law that "already determines the water rights for Spokane River."[119] The provision that denied corporations' rights also exceeded local initiative power because "municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court," in direct conflict with state and federal law.[120]

Finally, the Washington Supreme Court also agreed with the trial court's note that the proposed amendment was problematic because the provision dealt with an aquifer in Idaho, outside the scope of Spokane's authority.[121] The court ruled that the initiative, which granted rights to nature, empowered self-government, and stripped corporations of rights, could not be placed on the ballot for a vote.[122] Thus, even before the bill of rights could be enacted, the initiative failed to pass the legal muster necessary for Spokane to enact the charter amendment.

3. City of Toledo, Ohio

In striking down LEBOR, the District Court for the Northern District of Ohio noted several faults with LEBOR's language, including the broad and vague statements of Lake Erie's "right to exist, flourish, and naturally evolve"[123] and the community's right to a "clean and healthy environment."[124] Even if LEBOR's broad

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[117] *Id*. at 146.
[118] *Id*. at 145 (citing *Seattle Bldg. & Constr. Trades Council*, 620 P.2d 82 (Wash. 1980)).
[119] *Id*. at 146.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] TOLEDO, OHIO, MUNICIPAL CODE ch. XVII, § 254(a) (2019), *invalidated by Drewes Farm P'ship I*, 441 F. Supp. 3d 551 (N.D. Ohio 2020).
[124] *Id*. § 254(b).

language had practical meaning,[125] the court reasoned that LEBOR directly conflicted with Ohio law and exceeded Toledo's municipal authority.

Ohio affords Toledo and its other municipalities with the "authority to exercise all powers of local self-government."[126] Ohio municipalities may adopt city charters amendments approved by the majority of voters, like LEBOR, but municipalities are subject to the limitations by Ohio law and the U.S. Constitution.[127] The District Court for the Northern District of Ohio stressed that municipality's right to self-government encompasses only "the government and administration of the internal affairs of the municipality."[128] Similar to the Washington court's emphasis on the problematic nature of a municipal law that applied broadly to an aquifer beyond the borders of Spokane, Washington,[129] the court expressed concern over Toledo's attempt to enforce its authority over an ecosystem that shares its borders with dozens of municipalities, several states and a Canadian province.[130] The court thus held that Lake Erie's health is not an internal, local affair of Toledo over which it has administration.[131]

Furthermore, the court reasoned that LEBOR attempted to invalidate Ohio law, which is a "textbook example of what municipal government cannot do."[132] LEBOR stripped corporations of their constitutional right to due process by prohibiting the use of state and federal preemptive laws to challenge LEBOR.[133] LEBOR also

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[125] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 557.
[126] OHIO CONST. art. XVIII, § 3.
[127] *Id*. art. XVIII, § 9; *see also* Wendy H. Gridley, *Municipal Home Rule*, MEMBERS ONLY, Feb. 12, 2020, at 6, 7, https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/133Municipal%20Home%20Rule.pdf.
[128] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 557.
[129] Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution, 369 P.3d 140, 145 (Wash. 2016).
[130] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 557.
[131] *Id.*
[132] *Id.*
[133] TOLEDO, OHIO, MUNICIPAL CODE ch., XVII § 257 (2019), *invalidated by Drewes Farm P'ship I*, 441 F. Supp. 3d 551.

invalidated any state or federally issued permit, license, privilege, charter, or other authorization issued to a corporation that violate any of the prohibitions stated in LEBOR.[134] At the pursuit of environmental protection, LEBOR flagrantly conflicted with Ohio law in violation of its municipal powers.[135] Relying on Ohio precedent, and the failure of the rights of nature law in Grant Township, the court concluded that any law enacted by Toledo, or any other municipality, to protect Lake Erie will be void if such law conflicts with state law.[136]

Even if the court upheld the validity of LEBOR and its rights of nature and "enforcement" provisions, LEBOR required support from the state legislature. In June 2019, Ohio's budget preempted the fiscal possibility of municipalities filing litigation on behalf of Lake Erie.[137] Shortly after, in July 2019, Governor DeWine discredited LEBOR by signing a law stating that "[n]ature or any ecosystem does not have standing to participate in or bring any action in any court of common pleas,"[138] in direct contradiction to the provisions of LEBOR.[139]

In spite of state opposition and Judge Zouhary's finding that his decision was "not a close call,"[140] Toledoans for Safe Water called upon Toledo to appeal Judge Zouhary's decision to the United States Court of Appeals for the Sixth Circuit. [141] Undeniably,

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[134] *Id.* § 255(b).
[135] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 557.
[136] *See id.* (citing Mendenhall v. City of Akron, 881 N.E.2d 255 (Ohio 2008); *see also* Pa. Gen. Energy Co. v. Grant Twp., 139 F. Supp. 3d 706, 720 (W.D. Pa. 2015).
[137] Laura Johnston, *Toledo's Lake Erie Bill of Rights Is Stuck in Court—But Inspiring Environmentalists Nationwide*, CLEVELAND.COM (Dec. 16, 2019), https://www.cleveland.com/news/2019/12/toledos-lake-erie-bill-of-rights-is-stuck-in-court-but-inspiring-environmentalists-nationwide.html.
[138] H.B. 166, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).
[139] TOLEDO, OHIO, MUNICIPAL CODE ch., XVII § 257 (2019), *invalidated by Drewes Farm P'ship I*, 441 F. Supp. 3d 551.
[140] *Drewes Farms P'ship I*, 441 F. Supp. 3d at 558.
[141] Amended Notice of Appeal at 2, *Drewes Farm P'ship II*, No. 20-3368, 2020 WL 3619934 (6th Cir. Apr. 14, 2020).

the voice and passion of Toledoans for Safe Water for self-governance continues to breathes life into the rights of nature movement, despite the movement's obvious legal downfalls and Toledo's voluntary appeal withdrawal of Judge Zouhary's decision.[142]

Rights of nature advocates and Toledoans continue their fight for LEBOR's existence,[143] but ultimately, without the support of a state legislature or the judicial system, LEBOR's grant of legal personhood and rights to Lake Erie lacks the legal muster to survive.[144]

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[142] *Drewes Farm P'ship II*, No. 20-3368, at *1; Llanes, *supra* note 73, at 76 (discussing the City of Toledo's reasoning for dropping its appeal due to the city's budgetary constraints).

[143] Larry Limpf, *Decision to Not Appeal LEBOR Frustrates Backers*, PRESSPUBLICATIONS.COM (May 15, 2020, 4:00 PM), http://presspublications.com/content/decision-not-appeal-lebor-ruling-frustrates-backers (discussing the Toledoans for Safe Water's mission to protect Lake Erie's watershed and the Toledo community even if Toledo dismissed its appeal defending the constitutionality of LEBOR).

[144] As the *Drewes Farm* action was pending, three individual plaintiffs filed a complaint in Lucas County Court of Common Please seeking declaratory judgment against the State of Ohio alleging that the State violated LEBOR and Article 1, Sections 1 and 2 of the Ohio Constitution by bringing suit in federal court to challenge LEBOR's validity. Ferner v. State, 159 N.E.3d 917, 919 (Ohio Ct. App. Sept. 30, 2020). The trial court did not address the merits of the claim and dismissed the action for failure to state a claim pursuant to Ohio Civ. R. 12(b)(6). *Id*. at 920–21. The appellants appealed to the Ohio Sixth District Court of Appeals, which reversed the lower court's decision and found that the plaintiffs had stated a sufficient claim pursuant to Ohio Civ. R. 12(b)(6). *Id.* at 920–21, 923–24. While the appellate court's decision allows LEBOR to fight for another day, the appellate court emphasized that its decision was merely a narrow procedural holding, and not a decision on the merits. *Id.* at 923. Although the *Drewes Farm* decision is not binding on the state courts, and there could be a chance that the trial court finds LEBOR as valid and enforceable, even the plaintiffs acknowledged that the Drewes Farm decision "likely 'killed LEBOR.'" *Id*. at 922; *see also Lake Erie Bill of Rights' Survival 'Longshot,' UT Legal Expert Says*, HANNAH CAP. COLLECTION (Nov. 6, 2020), https://www.hannah.com/DesktopDefaultPublic.aspx?type=hns&id=1GBycmMdoC0%3D&u=GCnkj4trocI%3D (discussing Kenneth Kilbert's, director of University of Toledo College of Law's Legal Institute of the Great Lakes, comments on the appellate decision in *Ferner*.).

III. WHAT IS THE ALTERNATIVE? THE "PRECAUTIONARY PRINCIPLE" AS A LEGISLATIVE STRATEGY FOR MUNICIPALITIES

The rights of nature movement attempts to overcome the limitations of state and federal environmental laws, but the cost of expensive rights of nature litigation, with little chance of success, hinders the movement.[145] Communities continue to fear for their health and the well-being of natural ecosystems, but time and time again courts across jurisdictions strike down rights of nature laws. Even though rights of nature legislation exceed municipal authority, and thus fail to pass judicial scrutiny, with consideration of the precautionary principle, municipalities still may draft and enforce legislation that curbs localized pollution.

A. The Precautionary Principle in General

The precautionary principle is a broad approach towards preventive public health and environmental protection measures in government actions, even if uncertainty exists as to whether the harm has or will occur, or to the magnitude of the harm.[146] With environmental decision-making that follows the precautionary principle, decision-makers ask whether an activity is necessary or what alternatives exists to that activity, rather than traditional decision-making reasoning in risk-based assessments, which ask what level of risk is acceptable.[147] In a traditional risk-based assessment, the probability of an activity's adverse effects is examined under a cost-benefit structure, which hinges upon the causality and level of risk of an activity's exposure to the public.[148] The risk-based

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[145] West, *supra* note 78 (discussing that as of February 2020, Grant Township owes more than $100,000 in attorney's fees to PGE).

[146] Mass. Precautionary Principle Project, *Putting Precaution into Practice: Implementing the Precautionary Principle*, SCI. & ENV'T HEALTH NETWORK (Mar. 5, 2013), https://www.sehn.org/sehn/putting-precaution-into-practice-implementing-the-precautionary-principle.

[147] *Id.*

[148] *Id.*

assessment forces the burden on the public to prove that an activity caused harm to public health or the environment.[149]

However, an essential element of the precautionary principle is the shifting burden of proof.[150] Entities engaging in a potentially harmful activity bear the burden to demonstrate the safety of an activity or product and to prevent harm to the environment and public health.[151] Thus, where there is scientific uncertainty of an activity's harmful effects, or an activity's causality to the harm, the presumption of harm favors protecting the environment and public health.[152] Another important component of the precautionary principle is the public involvement in the government's decision-making process.[153] Risk-based assessments are often limited to involvement from government agency and industry specialists and other specialized consultants.[154] The public can be involved in risk-based assessments, but with risk-based assessments, the public is not involved in the decision-making process.[155] The precautionary principle, on the other hand, demands that potentially affected parties have a say in the decision-making process of the environment and public health to create a more democratic, open, and informed process.[156]

The application of the precautionary principle in decision-making greatly varies.[157] The precautionary principle may be applied in the decision-making of new potential hazardous activities

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[149] *Id*.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *Id*.; *see also* TERRA BOWLING, FACING UNCERTAINTY: LOCAL GOVERNMENTS AND THE PRECAUTIONARY PRINCIPLE 3, http://www.precaution.org/lib/local_govts_and_pp.081224.pdf (last visited Nov. 13, 2020) (citing JOE TICKNER ET AL., *infra* note 160, at 2).
[154] JOE TICKNER ET AL., THE PRECAUTIONARY PRINCIPLE IN ACTION: A HANDBOOK 14 (1998).
[155] *Id*.
[156] *See id*. at 2.
[157] RACHEL A. MEIDL, PLASTICS AND THE PRECAUTIONARY PRINCIPLE 8 (2019), https://www.bakerinstitute.org/media/files/files/13a504a9/bi-report-090919-ces-plastics.pdf.

or currently existing hazards.[158] Also, in the face of scientific uncertainty, environmental preventive measures take many forms, including but not limited to bans, phase-outs, alternatives assessments, regulatory controls, and pre-activity testing requirements.[159] According to a Baker Institute Report, such preventive measures can be condensed into four enumerations: (1) non-preclusion; (2) a margin of safety; (3) best available technology; and (4) prohibition.[160]

First, non-preclusion refers to the fundamental principle of the precautionary principle, that scientific uncertainty of causality and level of risk of an activity shall not automatically preclude an activity's regulation if there is a potential risk of significant harm to the public health or the environment.[161] Second, with a margin of safety, regulatory controls determine a range of acceptable risk of exposure, which can include the regulation of activities with no observed or predicted adverse effects.[162] Third, the best available technology may be a government-mandated requirement for operators to minimize the risk of an activity that presents uncertainty potential for the risk of significant harm.[163] Finally, prohibition refers to measures such as bans that prohibit an activity, until the activity's operator demonstrates that the activity presents no significant risk of harm.[164]

Each enumeration has its disadvantages. Under the non-preclusion framework, regulation of activities may be permitted, but not mandated, in the face of scientific uncertainty, which leaves regulation to the discretion of the decision-makers.[165] Regulatory controls with margins of safety are instituted only after causality is determined, and thus hazard exposure has occurred and the public or

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[158] Mass. Precautionary Principle Project, *supra* note 152.
[159] TICKNER ET AL., *supra* note 160, at 4–5.
[160] MEIDL, *supra* note 163, at 1.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] *Id*.
[165] *Id*. at 5.

environment already suffered a harm.[166] Even if the best available technology is employed by the operator of a hazardous or potentially hazardous activity, that technology alone may not fully dispose of the risk.[167] Prohibitions of an activity alone, without an equitable alternative, may be unreasonable and legally impermissible given the traditional assessment of alternatives in risk-based assessments.[168]

Even with the potential disadvantages of precautionary principle enumerations, as seen in the following section, the precautionary principle provides an innovative legal approach for government bodies to adopt legally sound preventive measures that mediate environmental degradation.

B. The Precautionary Principle Applied to Municipal Environmental Legislation

Although the precautionary principle is a recognized theory, the precautionary principle was not expressly cited by a United States law until 2003.[169] The County of San Francisco, California, adopted the Precautionary Principle Policy in its Environment Code, which provides a precautionary framework for the City's Board of Supervisors in decision-making and binds board members to consider the precautionary principle when developing health and environmental ordinances and policies.[170] The San Francisco Precautionary Principle Policy is a non-preclusion enumeration of the precautionary principle to fulfill its goal of a "healthier and more just San Francisco."[171] The Precautionary Principle Policy cites that where an activity poses a risk of serious or irreversible damage to the

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[166] *Id*. at 1.
[167] *Id.*
[168] *Id.*
[169] *Precautionary Principle*, SCI. & ENV'T HEALTH NETWORK, https://www.sehn.org/precautionary-principle-understanding-science-in-regulation (last visited May 21, 2020).
[170] S.F., CAL., ENV'T CODE ch. 1 (2003).
[171] *Id*. ch.1, § 101(D).

public or environment "lack of full scientific certainty relating to cause and effect shall not be viewed as sufficient reason to postpone measures to prevent the degradation of the environment or protect human health."[172] The key elements of the Precautionary Principle Policy in environmental decision-making includes anticipatory action, the burden of the proponent to be transparent with the public and supply information on the potential human health and environmental impacts, and an alternatives assessment with consideration of cost accounting.[173]

Ordinances in San Francisco's Environment Code that apply the Precautionary Principle Policy vary in the type of preventive measures enacted to protect public health and the environment. The Tropical and Virgin Redwood Ban prohibits the City and county's use of tropical hardwood and virgin redwood and its products in an effort to reduce rainforest destruction.[174] In line with the city's efforts to the protect the rainforest, the Tropical and Virgin Redwood Ban's chapter applies the Precautionary Principle Policy to the selection of lumber and wood products used in City operations.[175] Also, in order to meet the City and County's air pollution and greenhouse gas reduction goals, the Healthy Air and Clean Transportation Program applies the Precautionary Principle Policy "to the selection of vehicles and non-vehicular motorized equipment by creating a preference for vehicles and non-vehicular motorized equipment with super ultra-low emissions, high energy efficiency or that use alternative fuels with a low carbon intensity."[176]

Furthermore, the Green Building Requirements for City Buildings ordinance (Green Building Ordinance), the Precautionary Principle Policy governs that the City consider a "full range of alternatives in order to select products and procedures that minimize harm and maximize the protection of public health and natural

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[172] *Id*. ch.1, § 101.
[173] *Id*.
[174] *See id*. ch. 8, § 800(3)–(14).
[175] *Id*. ch. 8, § 800(15).
[176] *Id*. ch. 4, § 421 (2010).

resources" in the advancement of green buildings.[177] Most recently, in 2020 and following the authority granted in the Green Building Ordinance, the City's Board of Supervisors voted in favor of a natural gas phase-out in new and significantly renovated municipal buildings.[178] Since 2003, other major and smaller municipalities successfully adopted precautionary principles policies governing decision-making for future environmental ordinances and policies.[179]

C. "Precautionary in Nature" Municipal Environmental Legislation

Although only a few select municipalities have enacted legislation adopting the precautionary principle, "precautionary" environmental laws are not new as the foundation of several federal laws are "precautionary in nature." [180] For instance, the National Environmental Policy Act requires federal agencies, prior to a federal action, to evaluate the environmental impacts of the proposed action and assess alternatives to the action.[181] Congress also intended for the CAA to have a preventive and precautionary nature. Courts have held that under the plain meaning of the CAA, the Administrator of the Environmental Protection Agency is to "err on the side of caution" in making judgments on the protection of public health and that waiting for scientific certainty will only lead to

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[177] *Id.* ch. 7, § 700 (2017).
[178] Mallory Moench, *SF Bans Natural Gas in New City Buildings, Plans All Construction Ban*, S.F. CHRON. (Jan. 19, 2020), https://www.sfchronicle.com/business/article/SF-bans-natural-gas-in-new-city-buildings-may-14984899.php.
[179] *San Francisco Precautionary Principle Ordinance Three-Year Report*, SCI. & ENV'T HEALTH NETWORK (Nov. 29, 2006), https://www.sehn.org/sehn/san-francisco-precautionary-principle-ordinance-three-year-report (listing municipalities that have adopted precautionary principle policies: Marin and Mendocino Counties, and Berkeley, California; Eugene and Portland Oregon; and Seattle, Washington).
[180] *Id.* at 2.
[181] 42 U.S.C. § 4332(C),(E).

reactive regulatory action.[182] The CWA additionally adopts the precautionary goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[183]

Similar to federal environmental laws, municipal environmental laws may have language that allude to the precautionary principle where such laws are "precautionary in nature." Particularly, in the *Drewes Farm Partnership* decision, Judge Zouhary cited to the Seventh Circuit decision, *CropLife Am., Inc v. City of Madison*, as an example where precautionary municipal environmentally focused ordinances pass legal muster.[184] In 2005, the City of Madison and Dane County of Wisconsin enacted ordinances that banned the sale and use of fertilizers with more than trace amounts of phosphorus to reduce phosphorus runoff in the algae-infested lakes and streams in the City and County.[185] Producers of lawn-care products that contained phosphorus challenged the ordinances and argued that the ordinances violated federal and state law and the Wisconsin and U.S. Constitution.[186]

The Western District of Wisconsin found that state and federal regulations of pesticides do not preempt the local regulation of fertilizers, even if the fertilizers are mixed with pesticides, so long as the regulation applies only to the fertilizer of the mixed

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[182] Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1153–54 (D.C. Cir. 1980) (discussing the inevitably of some uncertainty about air pollution health effects but that uncertainty should not diverge from the precautionary nature of the CAA); *see also* Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976) (holding that CAA's "will endanger" standard in the originally promulgated language of Section 211(c)(1)(A) was precautionary in nature because the regulation did not require proof of actual harm when determining if an emission endangered the public health and welfare. Thus, regulatory action could be taken before the threatened harm occurred).

[183] 33 U.S.C. § 1251(a) (2018).

[184] *Drewes Farm P'ship I*, 441 F. Supp. 3d 551, 557 (N.D. Ohio 2020).

[185] MADISON, WIS., ORDINANCES § 7.48(3), (6) (2010); DANE COUNTY, WIS., ORDINANCES §§ 80.05, 80.07 (2007); *see also* CropLife Am., Inc v. City of Madison (*CropLife Am., Inc. II*), 432 F.3d 732, 733 (7th Cir. 2005).

[186] CropLife Am., Inc. v. City of Madison (*CropLife Am., Inc. I*), 373 F. Supp. 2d 905, 908 (W.D. Wis. 2005).

product.[187] The court also found that neither ordinance violated the Wisconsin or U.S. Constitution.[188] On appeal, the plaintiffs only claimed that Wisconsin law preempted the ordinances.[189] Based upon the State of Wisconsin's codified definitions of "pesticide" and "fertilizer," the appellate court found that neither Madison nor Dane County exceeded municipal authority by regulating fertilizers with phosphorous within city and county limits.[190]

The language of the Madison and Dane County ordinances are silent on the application of the precautionary principle. Although the ordinances are not strict applications of the precautionary principle, the ordinances still have a precautionary disposition in the face of scientific uncertainty. For example, the ordinances' purpose is to maintain and improve the City and County's water quality and protect water resources for the health, safety, and welfare of the public.[191] The Board of Supervisors also enacted the ordinances with the understanding that, to maintain, improve, and protect the City's and County's water resources, preventive and precautionary measures must be in place to prevent water pollution and further environmental degradation.[192]

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[187] *Id*. at 908.
[188] *Id*.
[189] *CropLife Am., Inc. II*, 432 F.3d at 733.
[190] *Id.* at 735. The State Legislature clarifies: "A local government is not preempted by s. 94.701 (3) (a) from regulating the phosphorous content in weed and feed products. A weed and feed product is both a pesticide, which under s. 94.701 (3)(a), only the state can regulate, and a fertilizer, which local government can regulate. The definition of both 'pesticide' and 'fertilizer' as including a mixture of the two preserves both state regulation of pesticides and local regulation of fertilizers. The state regulates the pesticide components of the mixed products, local government the fertilizer components." WIS. STAT. § 94.64 (2017).
[191] MADISON, WIS., ORDINANCES § 7.48(1) (2010); DANE COUNTY, WIS., ORDINANCES § 80.02 (2007).
[192] Ed Treleven, *Judge Rules for Bans on Phosphorus in Fertilizer the City of Madison Instituted Such a Ban This Year Due to a Concern About Lakes' Water Quality*, WISC. STATE J. (June 16, 2005), https://madison.com/news/local/judge-rules-for-bans-on-phosphorus-in-fertilizer-the-city/article_6d1d8d50-5484-51d1-87e7-afa25ed22bbd.html (referencing a statement by Dane County Executive and

Furthermore, disputes arose as to the scientific certainty of the fertilizer's impacts on the lakes' algae blooms. The City and County Board of Supervisors found that the regulation of nutrients and contaminants entering the lakes will improve the lake water quality, suggesting that the Boards had scientific certainty.[193] The plaintiffs in *CropLife Am., Inc.* argued that the fertilizer bans would do little to alleviate algae blooms in the lake because other nonpoint source polluters were the major contributors of phosphorus runoff.[194] The plaintiffs also cited to the University of Wisconsin Turfgrass Research Center, which found that "dense grass fertilized with phosphorus improves turf better than fertilizer without phosphorus and thus, limits runoff to almost nothing."[195] However, even in the face of scientific uncertainty of the direct causal relationship between the harm and the regulated activity, the municipalities' authority to regulate activity that may contribute to a significant harm defeated the controvertible evidence.

Although Madison and Dane County have not adopted the precautionary principle in their environmental decision-making process, Madison and Dane County serve as examples of how municipalities can adopt rational and justified measures with precautionary goals to curb pollution.[196]

Mayor of Madison celebrating the phosphorus-ordinances as important steps to keeping the lakes' water quality healthy).

[193] MADISON, WIS., ORDINANCES § 7.48(1) (2010); DANE COUNTY, WIS., ORDINANCES § 80.02 (2007).

[194] *RISE Fights Ban on Phosphorous-Based Fertilizers*, GPN (Feb. 11, 2005), https://www.gpnmag.com/news/rise-fights-ban-phosphorus-based-fertilizers; Milwaukee Journal Sentinel, *Measure Would Ban Phosphorus from Wisconsin Lawns*, LAWN&LANDSCAPE (Jan. 12, 2009), https://www.lawnandlandscape.com/article/measure-would-ban-phosphorus-from-wisconsin-lawns- (discussing how manure runoff and bird feces also contribute to phosphorus enriched waterways in addition to phosphorus-based fertilizer).

[195] *RISE Fights Ban on Phosphorous-Based Fertilizers*, *supra* note 200.

[196] *See CropLife Am., Inc. I*, 373 F. Supp. 2d 905, 908 (W.D. Wis. 2005).

D. Final Considerations for Municipalities Enacting Pollution-Combating Legislation

Since 2019, municipalities across the United States have drawn inspiration from LEBOR and begun the process of adopting rights of nature language in municipal ordinances. As of 2020, over a dozen Floridian cities and counties are introducing citizen ballot initiatives to pass rights of nature laws.[197] Floridians communities face a variety of blights to the environment from algae blooms in lakes and rivers, toxic red tide, and microplastic in marine life.[198] Communities suffer from foul odors, animal carcasses washing ashore, and the deterioration of natural ecosystems.[199] Like Toledo, and numerous other municipalities, Floridian communities view the rights of nature movement as necessary for the survival of ecosystems and interdependent species,[200] but face similar state law hurdles to implementing rights of nature legislation.[201]

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[197] Xander Peters, *Inside the Fight to Give Florida Rivers Legal Rights*, SOUTHERLY (Feb. 25, 2020), https://southerlymag.org/2020/02/25/inside-the-fight-to-give-florida-rivers-legal-rights; Joseph Bonasia, *Voters Approve Charter Amendment and Make Florida the Epicenter of Rights of Nature in the U.S.*, SUN SENTINEL (Nov. 9, 2020, 12:04 PM), https://www.sun-sentinel.com/opinion/commentary/fl-op-com-invading-sea-orange-county-charter-natural-rights-20201109-yehr2rulu5bi3cdf7jampdbtdm-story.html (discussing Orange County's voter approval of the Right to Clean Water Charter Amendment, also known as the Wekiva River and Econlockhatchee River Bill of Rights.).

[198] Peters, *supra* note 204.

[199] Maya Wei-Haas, *Red Tide Is Devastating Florida's Sea Life. Are Humans to Blame?*, NAT'L GEOGRAPHIC (Aug. 8, 2018), https://www.nationalgeographic.com/environment/2018/08/news-longest-red-tide-wildlife-deaths-marine-life-toxins.

[200] *See* Joseph Bonasia, *Florida Governments Should Enact Rights of Nature Laws That Will Protect the Earth and the People Living on It*, FLA. RTS. NATURE NETWORK (Apr. 10, 2020), https://www.theinvadingsea.com/2020/04/10/florida-governments-should-enact-rights-of-nature-laws-that-will-protect-the-earth-and-the-people-living-on-it.

[201] Even amidst the growing rights of nature movement, Florida's Clean Waterways Act amended Florida's Environmental Protection Act of 1971 to include: "A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a

The motivations of rights of nature advocates stem from similar motivations of precautionary principle-inspired advocates — the frustrating slow pace of sustainable solutions to pollution and the regulatory gaps left by federal and state environmental laws. Both the precautionary principle and the rights of nature movement recognize citizens' equal rights to a healthy and safe environment,[202] but each legal approach drastically differs in the method of advancing the health, safety, and welfare of the environment. While rights of nature municipal laws conflict with state and federal laws, upend constitutional rights of polluters, and exceed municipal authority by granting legal personhood to natural ecosystems, municipal laws that follow a precautionary principle policy recognize the existing regulatory nature of natural ecosystems and work within the regulatory framework to protect the public health and environment in incremental steps.

Municipalities can enact a similar precautionary principle policy to San Francisco to govern the city's decision-making in environmental laws and policy. However, municipalities should be aware of the length of the process to adopt a precautionary principle policy. For any given potential risk or hazard for which a municipality wishes to regulate, restrict or ban, a municipality would need to establish a threshold of uncertainty, evaluate all feasible alternatives, assess potential outcomes including all certain and uncertain outcomes, and develop the democratic decision-making process and criteria.[203]

If municipalities desire a more immediate approach to curbing pollution, municipalities could also adopt bans such as Madison

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plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution." Clean Waterways Act, ch. 150, § 24, 2020 Fla. Laws ch. 150, 1, at 48 (codified as amended at FLA. STAT. § 403.412(9)(a) (2020)).

[202] *See* S.F., CAL., ENV'T CODE ch. 1, § 100(D) (2003); TOLEDO, OHIO, MUNICIPAL CODE ch., XVII § 254(b) (2019), *invalidated by Drewes Farm P'ship I*, 441 F. Supp. 3d 551 (N.D. Ohio 2020).

[203] MEIDL, *supra* note 163, at 1–2.

and Dane County, which have a precautionary disposition. Once in place, municipalities may immediately limit a contributing factor to local pollution even if phosphorus bans such as the fertilizer bans "may not be the most efficacious or complete" means of protecting water quality.[204] Though the regulation of the phosphorus-based fertilizer for lawns and turfs decreases phosphorus runoff from communities, phosphorus runoff from lawns and turfs is just one of many contributing factors to the City's and County's waterway pollution, which is likely the case for other municipalities where stormwater runoff combines phosphorus from many sources and empties into bodies of water.

No matter which legislative route a municipality takes, either enacting ordinances that apply the precautionary principle or outright banning certain activities, the regulation must remain within the municipality's jurisdiction. As seen in Toledo, LEBOR exceeded municipal jurisdiction because the health of Lake Erie is not an internal local affair exclusive to Toledo's control.[205] LEBOR would have impacted parties beyond the scope of Toledo's control, including but not limited to the Drewes Farm Partnership in Wood County, a county that neighbors Toledo but is outside the bounds of Toledo's control. Therefore, if a municipality is to make any progress with environmental laws and policies, the laws and policies must fall within the municipality's authority. For example, ordinances in the San Francisco Environment Code that apply the Precautionary Principle Policy assert the regulations only upon the City and County and entities that contract with the City and County.[206] Similarly, the Madison and Dane County phosphorous ordinances expressly apply the ordinances to only the City and County, and for any city or town partially in the County if that city or town has adopted an ordinance that is at least as restrictive as the County's phosphorus-ban.[207]

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[204] *CropLife Am., Inc. I*, 373 F. Supp. 2d 905, 908 (W.D. Wis. 2005).
[205] *Drewes Farm P'ship I*, 441 F. Supp. 3d at 557.
[206] *See* S.F., CAL., ENV'T CODE chs. 2, 3, 4, 5, 7, 8, 10, 12, 13 & 14.
[207] DANE COUNTY, WIS., ORDINANCES § 80.03 (2007).

The adoption of the precautionary principle or a potentially narrow ordinance is not the immediate or wide-sweeping resolution to pollution that communities desire. However, the passionate efforts of citizen rights groups can be better utilized through valid pollution legislation, as evidenced in San Francisco, Madison, and Dane County, rather than costly and timely litigation with rights of nature laws, which are routinely struck down.

CONCLUSION

Grass roots efforts in support of the rights of nature have led to a symbolic shift in the United States judicial system. Citizens desire a dramatic change to the legal landscape, where the legal system recognizes the rights of nature are just as, if not more, important than the rights of corporations that legally pollute under state and federal laws. The trend in judicial decisions suggests that the rights of nature will not be legally recognized anytime soon. Until, and if, courts recognize the legitimacy of the rights of nature, rights of nature ordinances will continue to be symbolic dedications to environmental protection efforts, rather than enforceable means of curbing pollution.

The precautionary principle, and bans with precautionary purposes, offer an alternative approach for municipalities to take preventive measures and reduce contributions to local environmental pollution. While the rights of nature movement is a novel response to the mounting public concerns and anxiety of polluted ecosystems, communities can better spend their advocacy efforts in favor of legally sound municipal legislation that targets pollution within a municipality's borders.