

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

**Drewes Farms Partnership,**

Plaintiff,

v.

**City of Toledo,**

Defendant,

and

**Lake Erie Ecosystem and  
Toledoans for Safe Water, Inc.,**

Intervenor-Defendants.

No. 3:19-cv-00434-JZ

The Honorable Jack Zouhary

**Intervenor-Defendants'  
Memorandum in Support of  
Motion to Intervene**

*Oral Argument requested*

**INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO  
INTERVENE**

March 18, 2019

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1 **Statement of the Issues**

- 2 1. Have Lake Erie Ecosystem and Toledoans for Safe Water timely filed for intervention?  
3 2. Do Lake Erie Ecosystem and Toledoans for Safe Water have interests at stake in this  
4 litigation?  
5 3. Do existing parties adequately represent Lake Erie Ecosystem and Toledoans for Safe Water’s  
6 interests?  
7 4. Should the Court grant permissive intervention?

8 **Summary of the Argument**

9 Lake Erie Ecosystem has rights recognized by the Toledo City Charter, which are in  
10 jeopardy from this lawsuit. Toledoans for Safe Water, Inc., members organized and petitioned for  
11 the adoption of the Lake Erie Bill of Rights.

12 These two parties seek to intervene in this lawsuit between Drewes Farms Partnership  
13 and the City of Toledo, to defend the Lake Erie Bill of Rights. Their intervention is timely, and  
14 they have interests at stake that could be impaired by the resolution of this case. The City of  
15 Toledo has opposed the Lake Erie Bill of Rights and therefore will not adequately represent  
16 proposed intervenor-defendants’ interests in this case.

17 The Court should grant intervention by right and permissive intervention.

18 **Background**

19 **I. The Toledo water crisis and attempted solutions**

20 Nearly half a million people in northwestern Ohio awoke Saturday to a dire warning  
21 from Toledo city officials: don’t drink water from the tap. Don’t give it to pets. Don’t  
22 boil or cook with it, and restaurants should remain closed until further notice.

23 The dangers posed by the tap were grim: nausea, numbness, dizziness, diarrhea and  
24 liver damage. “Seek medical attention if you feel you have been exposed,” a  
25 city-issued notice said.

1 *Toledo's Water Crisis: 'This Is Not Over Yet'*, NBC News (Aug. 4, 2014).<sup>1</sup>

2 During the water crisis, Collin O'Mara from the National Wildlife Federation told NBC  
3 News, "There is a systemic challenge that we face out here on the Great Lakes that is actually  
4 much bigger than this one crisis. Unfortunately, this crisis could just be the tip of the iceberg  
5 unless we begin to address it." *Id.* (reporting that "officials have not mandated any [commercial  
6 fertilizer] restrictions, even though a state task force said that the amount of phosphorus from  
7 treatment plants and fertilizers needs to be scaled back by 40 percent").

8 The following year, the states of Ohio and Michigan, along with the province of Ontario,  
9 agreed to a 40% reduction in phosphorus loading into western Lake Erie by 2025. Western Basin  
10 of Lake Erie Collaborative Agreement (June 13, 2015).

11 "Decades of monitoring have led to an inescapable conclusion: phosphorus runoff,  
12 primarily from agricultural lands, is feeding explosive cyanobacterial growth in the warm,  
13 shallow waters of the western basin." National Center for Water Quality Research, Heidelberg  
14 U., website at <http://lakeeriealgae.com/>. "The Maumee watershed, which empties into the lake at  
15 Toledo, is the lake's largest source of phosphorus loading." Kurt Knebusch, "New Study will  
16 track ways to cut runoff from elevated phosphorus fields," Ohio St. News (Nov. 7, 2018).<sup>2</sup>

17 Soil science researchers have identified numerous practices that farmers can employ to  
18 reduce phosphorus runoff. *E.g.*, Tracy Turner, "Updating Ohio's Phosphorus Risk Index Is  
19 Generating Positive Initial Results," Ohio St. U. (Mar. 31, 2016).<sup>3</sup>

20 But over two years after the 2015 Collaborative Agreement, environmental advocates

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1 Available at <https://www.nbcnews.com/news/us-news/toledos-water-crisis-not-over-yet-n171751>.

2 Available at <https://news.osu.edu/new-study-will-track-ways-to-cut-runoff-from-elevated-phosphorus-fields/>.

3 Available at <https://cfaes.osu.edu/news/articles/updating-ohios-phosphorus-risk-index-is-generating-positive-initial-results>.

1 said, “the states and provinces have failed to offer workable solutions necessary to reduce  
2 phosphorus pollution and shrink the algal blooms.” James F. McCarty, “Lake Erie algal bloom  
3 cleanup falling short of 40 percent phosphorus reduction goal,” *The Plain Dealer* (Oct. 10,  
4 2017).<sup>4</sup> One environmental advocate “praised farmers in the Maumee River watershed who have  
5 obtained certification, and those who are employing practices that reduce phosphorus runoff such  
6 as planting cover crops, buffer zones and wetlands. But voluntary compliance isn’t sufficient to  
7 reach a significant reduction. . . . We need to say enough is enough, it’s time to get this done.  
8 Every year there’s a bloom. We need to make changes in a bigger way.” *Id.*

9 A 2017 report on policy recommendations to reduce runoff pollution noted the top two  
10 recommendations for Ohio were to ban spreading manure on frozen or saturated ground, and to  
11 require best management practices for small concentrated animal feeding operations (CAFOs).  
12 Alliance for the Great Lakes, “Rescuing Lake Erie: An Assessment of Progress,” Ohio Fact Sheet  
13 (Oct. 10, 2017).<sup>5</sup>

14 Notably, these agricultural practices that need to be reformed are caused by industrial  
15 livestock facilities, not grain and soy farmers like Drewes Farms. The problem is not farming  
16 with best practices, but factory “farms” that are not voluntarily “complying” with optional  
17 regulations. *See generally* “Follow the Manure: Factory Farms and the Lake Erie Algal Crisis,”  
18 Sierra Club Michigan Chapter (Nov. 17, 2015).<sup>6</sup>

19 **II. Toledoans for Safe Water’s efforts to effect rights-based protections for Lake Erie and**  
20 **the city’s water supply**

21 Toledoans for Safe Water, Inc. (“TSW”) came together as a grassroots citizen group in

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4 Available at <https://www.cleveland.com/metro/2017/10/lake-erie-algal-bloom-cleanup-1.html>.

5 Available at <https://greatlakes.org/2017/10/rescuing-lake-erie-assessment-progress/>.

6 Available at <https://www.sierraclub.org/michigan/follow-manure-factory-farms-and-lake-erie-algal-crisis>.

1 2016, in response to the 2014 water crisis. (Miller Decl. ¶¶ 5-6.) Toledoans for Safe Water  
2 members are Toledo residents. (Durback Decl. ¶ 1; Miller Decl. ¶ 1; Twitchell Decl. ¶ 1.)  
3 Toledoans for Safe Water member Markie Miller has a masters degree in environmental science,  
4 in large part motivated to find real solutions to restore lake Erie. (Miller Decl. ¶¶ 2-3.) Markie  
5 Miller joined the nascent Toledoans for Safe Water in 2015 as the Lake Erie Bill of Rights that  
6 the group was drafting “was something I felt could be an effective step.” (Miller Decl. ¶ 4.) Brian  
7 Twitchell, who has a bachelors degree in environmental science, joined TSW “because I believe  
8 that collective action by citizens is the only way to make meaningful change in the current  
9 political system.” (Twitchell Decl. ¶ 3.)

10 Toledoans for Safe Water recognized the cyanobacteria concentration at the root of the  
11 2014 water crisis as “caused by excessive phosphorus and nitrogen in the Lake Erie water  
12 column principally as a result of excessive nutrient loading from large-scale commercial  
13 agriculture.” (Miller Decl. ¶¶ 5, 17.) “Large scale industrial agriculture and confined animal  
14 feeding operations (“CAFOs”) that create, store, and apply manure (often in liquid form) are  
15 contributing to the problem in a major way.” (Miller Decl. ¶ 17.) Twitchell identified municipal  
16 sewer overflows and CAFOs as the likely principle causes of the cyanobacteria problem.  
17 (Twitchell Decl. ¶ 6.)

18 TSW member John Michael Durback also focused on CAFOs: “To even begin to solve  
19 the problems of contamination and decline of Lake Erie, the single largest pollution source,  
20 livestock waste from concentrated animal feeding operations, must be eliminated. Requiring  
21 farms to deconcentrate populations of livestock, or at minimum, build sewage treatment facilities  
22 to handle the waste, is also necessary. In general, there needs to be a shift from the highly  
23 unsustainable practices of huge industrial agricultural operations to the kind of farming done by  
24 many small family and organic farms whose activities don’t have an enormous detrimental



1 impact on the ecosystem.” (Durback Decl. ¶ 5.)

2 “As a response, in 2016 [Toledoans for Safe Water] members drafted and proposed the  
3 Lake Erie Bill of Rights, enumerating a range of rights for residents of the City of Toledo, such  
4 as legislating a policy of ‘rights of nature’ and citizens’ rights to a healthy environment. The  
5 proposal also contains provisions to protect and enforce those rights.” (Miller Decl. ¶ 6.)

6 Throughout 2017 and 2018, TSW members, including Bryan Twitchell, served as  
7 members of the Committee of Petitioners for the LEBORCharter Amendment and they circulated  
8 petitions to enact LEBOR into law in Toledo via initiative.” (Miller Decl. ¶ 7.)

9 “On August 6, 2018, TSW turned in part-petitions bearing approximately 10,500  
10 signatures to require placement of LEBOR on the next electoral ballot.” (Miller Decl. ¶ 8; *see*  
11 *also* Durback Decl. ¶ 3.) After two trips to the Ohio Supreme Court over whether the measure  
12 could go on the ballot, Toledoans for Safe Water succeeded in getting added to the February 26,  
13 2019, special election, which the City had called for the purpose of a vote on a different measure.  
14 (Miller Decl. ¶¶ 8-13.)

15 On March 13, 2019, the Lucas County Board of Elections certified the results of the  
16 February 26 special election. (Miller Decl. ¶ 14.) The Lake Erie Bill of Rights received 9,955  
17 votes (out of 16,215 votes cast on the measure) in the special election. (*Id.*)

18 **III. The task of restoring the Lake Erie Ecosystem is in the political branches of**  
19 **government**

20 Toledoans for Safe Water members “do not believe the City of Toledo will do an adequate  
21 job of defending LEBOR because local elected officials actively campaigned against LEBOR.”  
22 (Miller Decl. ¶ 19.) TSW member Durback has spent two and a half years observing “how our  
23 regulatory agencies and elected officials continually fail to protect our environment.” (Durback  
24 Decl. ¶ 3.) Durback adds that “State and federal regulatory agencies are captured by the very

1 industries they are supposed to regulate. Our political system allows lobbyists from the Farm  
2 Bureau to run the Ohio EPA.” (*Id.*, ¶ 6.) Twitchell adds that the State Legislature’s and Ohio  
3 EPA’s “inaction is a betrayal of the trust placed in them by the people of Ohio, and as such, they  
4 can no longer be relied upon to effect the necessary changes to bring Erie back.” ((Twitchell  
5 Decl. ¶ 7.)

6 U.S. District Judge James Carr recently agreed with the sentiment that the state is putting  
7 people at risk. In a Clean Water Act case, Judge Carr noted “Ohio’s long-standing, persistent  
8 reluctance and, on occasion, refusal, to comply with the CWA. As a result of the State’s  
9 inattention to the need, too long manifest, to take effective steps to ensure that Lake Erie (the  
10 Lake) will dependably provide clean, healthful water, the risk remains that sometime in the  
11 future, upwards of 500,000 Northwest Ohio residents will again, as they did in August 2014, be  
12 deprived of clean, safe water for drinking, bathing, and other normal and necessary uses.” *Envtl.*  
13 *Law & Policy Ctr. v. U.S. E.P.A.*, Order at 1, on Oct. 3, 2018, (N.D. Ohio, No. 3:17-cv-1514).<sup>7</sup>  
14 Judge Carr found the U.S. E.P.A.’s oversight of Ohio’s compliance with the Clean Water Act to  
15 “reflect[] an undue measure of confidence in Ohio’s willingness to evaluate the condition of  
16 Lake Erie’s open waters. Indeed, in preparing its 2016 impaired waters list, Ohio, despite its  
17 promise, gave no heed to the U.S. E.P.A.’s expectations.” *Id.* at 4. While Judge Carr  
18 “appreciate[s] plaintiffs’ frustration with Ohio’s possible continuation of its inaction,” the court  
19 ruled that it could not expedite Ohio’s compliance with the Clean Water Act. *Id.* at 8.

#### 20 **IV. The City of Toledo’s position on the Lake Erie Bill of Rights**

21 Specific to the City of Toledo, TSW member Durback declared “I am not confident that  
22 the City of Toledo will do an adequate job of defending the Lake Erie Bill of Rights (“LEBOR”)

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7 Order available at [https://www.govinfo.gov/content/pkg/USCOURTS-ohnd-3\\_17-cv-01514/pdf/USCOURTS-ohnd-3\\_17-cv-01514-1.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-ohnd-3_17-cv-01514/pdf/USCOURTS-ohnd-3_17-cv-01514-1.pdf).

1 in court because the entirety of Toledo’s political establishment came out against LEBOR. The  
2 president of City Council was vocally opposing LEBOR throughout the 2018-2019 initiative  
3 campaign.” (Durback Decl. ¶ 7.) At one of the protest hearings before the Board of Elections, the  
4 city attorney, tasked with defending the City Council’s ministerial vote to put LEBOR on the  
5 ballot, “confessed he was himself ignorant of the contents of the Charter Amendment.” (*Id.*)

6       Leading up to the February special election, the City Council President wrote an article in  
7 the Mayor’s weekly newsletter to urge residents to vote against LEBOR: “The Lake Erie issue  
8 will be before voters next week. I am 100 percent against the "Lake Erie Bill of Rights." The  
9 reason? It will immediately will go into litigation if it passes. Toledo also could end up spending  
10 taxpayer dollars to defend the law in court.” “Toledo City Council President Matt Cherry,” in  
11 City of Toledo News.<sup>8</sup>

12       Council President Cherry concluded his statement recognizing that LEBOR targets  
13 CAFOs: “I respect those who have pushed for the Lake Erie Bill of Rights since they have  
14 legitimate concerns about commercial animal-feeding operations that foul Lake Erie tributaries,  
15 but that issue should be addressed at the state or federal level.” *Id.*

## 16 **V. The Lake Erie Ecosystem as a legal entity**

17       Legal systems around the world have begun to recognize the rights of ecosystems. The  
18 leading example is Ecuador, where the people, in 2008, amended their constitution to recognize  
19 the rights of nature to exist and flourish, as well as the power of the public to enforce those  
20 rights. *See* Constitución de la Republica del Ecuador, Art. 10 (“Nature shall be the subject of  
21 those rights that the Constitution recognizes for it.”), Art. 71 (“Nature, or Pacha Mama, where  
22 life is reproduced and occurs, has the right to full respect for its existence and for the

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8 Available at <https://myemail.constantcontact.com/Toledo-Friday-News.html?soid=1126728129006&aid=LkP6b0E5Mdw>.

1 maintenance and regeneration of its life cycles, structures, functions and evolutionary processes.  
2 Every person, community or nationality will be able to demand of the public authorities  
3 compliance with the rights of nature.”), Arts. 72-74.<sup>9</sup>

4 In 2011, in a case of first impression, an Ecuadorian court enforced the constitutional  
5 rights of nature to protect the Vilcabamba River from erosion and flooding caused by the  
6 dumping of debris from the construction of a nearby road. *See Wheeler c. Director de la*  
7 *Procuraduria General Del Estado de Loja*, Acción de Protección No. 11121-2011-0010 (30 Mar.  
8 2011) (Provincial Court of Justice in Loja, Ecuador).<sup>10</sup> In another case shortly thereafter, an  
9 Ecuadorian provisional court issued an injunction to protect the rights of nature and people that  
10 were threatened by pollution from illegal gold mining operations in the region. *See Medida*  
11 *Cautelar para “la protección de los derechos de la naturaleza y la ciudadanía,”* No. 0016-2011  
12 (19 May 2011) (Twenty-Second Criminal Judge of Pichincha).

13 In addition, Bolivia and New Zealand have taken legislative action to grant legal standing  
14 to ecosystems. Bolivia passed two pioneering laws in recent years that protect the rights of  
15 nature. The first, Ley de Derechos de la Madre Tierra (“Law on the Rights of Mother Earth”),  
16 recognized the inherent rights of nature, and society’s obligation to protect and enforce those  
17 rights. *See Ley No. 071*, Dec. 21, 2010, Gaceta Oficial, Arts. 1, 5. Expanding on this law, Bolivia  
18 enacted the Ley Marco de La Madre Tierra y Desarrollo Integral Para Vivir Bien (“Framework  
19 Law on Mother Earth and Integral Development for Harmonious Living”) in 2012, which  
20 recognizes nature as a “living dynamic system” and grants nature comprehensive legal rights that  
21 are comparable to human rights. *See Ley No. 300*, Oct. 15, 2012, Gaceta Oficial, Arts. 4, 5.

22 In 2014, the New Zealand Parliament enacted a law that recognized Te Urewera National

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9 Unofficial English translation available at  
[pdba.georgetown.edu/Constitutions/Ecuador/english08.html](http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html).

10 Available in Spanish at [www.elaw.org/system/files/ec.wheeler.loja\\_.pdf](http://www.elaw.org/system/files/ec.wheeler.loja_.pdf).

1 Park with the rights of a legal person. Te Urewera Act 2014, Public Act 2014 No. 51 (27 July  
2 2014), §§ 3(9) (“Te Urewera should have legal recognition in its own right . . . .”), 11(1) (“Te  
3 Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal  
4 person.”).<sup>11</sup> Further, in 2017, the Parliament finalized a settlement between the Whanganui Iwi  
5 and the government providing for recognition of legal rights of the Whanganui River – a river  
6 significant both historically to the Iwi and nationally as New Zealand’s third longest river – to  
7 exist as an “indivisible” entity with “legal status.” See *Te Awa Tupua (Whanganui River Claims  
8 Settlement) Act 2017*, Public Act 2017, No. 7, Part 2, Subpart 2. The Act also provided for two  
9 guardians appointed by the government and the Iwi to represent the river and protect its interests.  
10 *Id.* at Part 2, Subpart 3, 20(2).

11 In Brazil, several municipalities in the State of Pernambuco have enacted laws securing  
12 legal rights of nature. In 2017, the Municipality of Bonito enacted an amendment to the organic  
13 law of the city, recognizing the right of nature to “to exist, thrive and evolve.” See Municipality  
14 of Bonito, Amendment to the Organic Law N. 01/2017, at Article 1.<sup>12</sup> In 2018, the Municipality  
15 of Paudalho similarly amended its organic law to recognize the rights of nature. See Municipality  
16 of Paudalho, Amendment to the Organic Law N. 03/2018, at Article 1.<sup>13</sup>

17 Over the past several years, courts in Colombia and India have issued decisions declaring  
18 that certain aspects of nature possess legal rights. In 2016, Colombia’s Constitutional Court  
19 recognized Rio Atrato as a “subject of rights.” See Judgment T-622 de 2016, at IV, 9.28.<sup>14</sup> The  
20 Court declared that those legal rights included right to “protection, conservation, maintenance  
21 and restoration.” *Id.* at V, Fourth. In 2018, Colombia’s Supreme Court recognized the Colombian

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11 Available at [www.legislation.govt.nz/act/public/2014/0051/latest/whole.html](http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html).

12 Available at <http://www.bonito.pe.leg.br/leis/lei-organica-municipal/sumario/view>.

13 Available at <https://camarapaudalho.pe.gov.br/> (Menu >Serviços>Lei orgânico).

14 Available at <http://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm>.

1 Amazon as a “subject of rights.” *See* STC4360-2018, at 14.<sup>15</sup> Also in 2018, the Administrative  
 2 Court of Boyacá in Colombia recognized the páramo region in Pisba, in the Andes, as a “subject  
 3 of rights.” *See* 15238 3333 002 2018 00016 01, at 4.6.<sup>16</sup>

4 In 2018, two tribal nations in the United States enacted rights of nature laws. The Ponca  
 5 Tribe of Oklahoma adopted a customary law finding that the “inherent rights of Nature are  
 6 inalienable.” *See* Ponca Nation of Oklahoma, Resolution #01-01092018, at Article 1(3). In  
 7 December, the White Earth band of Ojibwe, of the Minnesota Chippewa Tribe, enacted a law  
 8 recognizing legal rights of manoomin, or wild rice, a staple food with cultural and historic  
 9 significance for the Ojibwe people. This is the first rights of nature law to secure legal rights of a  
 10 specific plant species. *See* White Earth Band, Resolution No. 001-19-009.

11 Discussions about constitutional and legislative reform to enact and protect the rights of  
 12 nature are ongoing in other countries, including Australia, India, and Nepal. Civil society  
 13 organizations presented draft national legislation to Indian Prime Minister Narendra Modi’s  
 14 government, that would recognize the inherent rights of the Ganga River basin, an important yet  
 15 vastly polluted and endangered river system. *See* Shailvee Sharda, *Harish Rawat Launches*  
 16 *National Ganga Rights Campaign at Mahakumbh*, Times of India (Feb. 23, 2013)<sup>17</sup>; *see also* *The*  
 17 *Ganga Rights Act*, National Ganga Rights Movement.<sup>18</sup> As well, in 2018, civil society  
 18 organizations in Australia launched a public campaign to recognize legal rights of the Great  
 19 Barrier Reef. *See* Michelle Maloney, *Recognizing the rights of nature*, Toledo Blade, January 12,

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15 Available at <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>.

16 Available at <https://redjusticiaambientalcolombia.files.wordpress.com/2018/08/fallo-pisba.pdf> (last accessed March 7, 2019).

17 Available at [timesofindia.indiatimes.com/city/allahabad/Harish-Rawat-launches-national-Ganga-rights-campaign-at-Mahakumbh/articleshow/18647281.cms](http://timesofindia.indiatimes.com/city/allahabad/Harish-Rawat-launches-national-Ganga-rights-campaign-at-Mahakumbh/articleshow/18647281.cms).

18 [www.gangarights.org/ganga-right-act/](http://www.gangarights.org/ganga-right-act/).

1 2019.<sup>19</sup>

2 The Toledo City Charter now recognizes rights of the Lake Erie ecosystem, specifically:  
3 “Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally  
4 evolve. The Lake Erie Ecosystem shall include all natural water features, communities of  
5 organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its  
6 watershed.” LEBOR, § 1(a). In addition, the Charter provides:

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

16 *Id.*, § 3(d).

## 17 **Argument**

### 18 **I. Legal Standards for Intervention**

19 There are two forms of intervention, intervention as of right, and permissive intervention.

20 Federal Rule of Civil Procedure 24(a) addresses intervention as of right and provides in  
21 pertinent part that:

22 On timely motion, the court must permit anyone to intervene who . . . (2) claims an  
23 interest relating to the property or transaction that is the subject of the action, and is  
24 so situated that disposing of the action may as a practical matter impair or impede the  
25 movant's ability to protect its interest, unless existing parties adequately represent  
26 that interest

27 “[A] proposed intervenor must establish four factors before being entitled to intervene:

28 (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest

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19 Available at <https://www.toledoblade.com/opinion/letters-to-the-editor/2019/01/12/recognizing-the-rights-of-nature/stories/20190109100>.

1 in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may  
2 be impaired in the absence of intervention; and (4) the parties already before the court cannot  
3 adequately protect the proposed intervenor's interest.” *Coalition to Defend Affirmative Action v.*  
4 *Granholm*, 501 F.3d 775, 779 (6th Cir. 2007) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98  
5 (6th Cir. 1999)). “The applicant has the burden of demonstrating the four prongs, and the failure  
6 to satisfy any of the four prongs prevents the applicant from intervening as of right.” *Johnson v.*  
7 *City of Memphis*, 73 F.Appx. 123, 131 (6th Cir. 2003)

8 Permissive intervention is governed by FRCP 24(b)(1)(B), which provides that “[o]n  
9 timely motion, the court may permit anyone to intervene who . . . has a claim or defense that  
10 shares with the main action a common question of law or fact.”

11 “To intervene permissively, a proposed intervenor must establish that the motion for  
12 intervention is timely and alleges at least one common question of law or fact. Once these two  
13 requirements are established, the district court must then balance undue delay and prejudice to  
14 the original parties, if any, and any other relevant factors to determine whether, in the court's  
15 discretion, intervention should be allowed.” *United States v. Michigan*, 424 F.3d 438, 445 (6th  
16 Cir. 2005). Whether to permit intervention under Rule 24(b) is within the sound discretion of the  
17 court. *Id.*

## 18 **II. Lake Erie and Toledoans for Safe Water Should Be Allowed To Intervene As of Right**

### 19 **A. The Motion To Intervene Is Timely**

20 Turning to the first of the *Coalition* factors for intervention as of right—timeliness—there  
21 can be no serious assertion that this Motion is not timely. Intervention under either Rule 24(a) or  
22 Rule 24(b) must be “timely,” *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011); *Stupak-*  
23 *Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). And the determination of timeliness under



1 both types of intervention is within the discretion of the trial court. *Id.*; *Stotts v. Memphis Fire*  
2 *Dep't*, 679 F.2d 579, 582 (6th Cir. 1982). “[T]he purpose of the timeliness inquiry is to prevent a  
3 tardy intervenor from derailing a lawsuit within sight of the terminal.” *United States v. BASF-*  
4 *Inmont Corp.*, No. 93-1807, 1995 WL 234648, at \*2 (6th Cir. Apr. 18, 1995) (internal quotation  
5 marks and citation omitted).

6 This lawsuit is nowhere near its “terminal.” This Motion is being filed prior to the rule  
7 day for the sole Defendant, the City of Toledo, to answer DFP’s lawsuit. Assessing this Motion  
8 against the Sixth Circuit factors respecting timeliness,<sup>20</sup> neither Lake Erie nor TSW are  
9 prejudicing any other parties’ rights or options at this juncture of the litigation. The intervention  
10 motion is timely.

#### 11 **B. Lake Erie and TSW Have Significant Legal Interests In The Case**

12 Turning to the second *Coalition* factor, the proposed intervenors have a significant legal  
13 interest in the subject matter of the case. Lake Erie’s stake in this controversy is at the heart of  
14 LEBOR. In the preamble to LEBOR, the People of the City of Toledo assert as follows:

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

20 The factors are: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor’s failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

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

7            Moreover, the passage of LEBOR by the electors established both that the Lake Erie  
8 Ecosystem has enforceable rights of existence on which the citizens depend, and that Toledo's  
9 citizens have a right to a clean and healthy environment and the power under LEBOR to enforce  
10 those rights:

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

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

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

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

28 LEBOR § 1. Thus Lake Erie, which is accorded the rights of nature by LEBOR, and TSW, via  
29 members' declarations, have timely manifested significant core interests in the outcome of this  
30 litigation.

31            The interest of the Lake Erie Ecosystem reposes in its right to exist, flourish, and  
32 naturally evolve, as denominated in LEBOR. And TSW's three member declarations assert legal,  
33 environmental, and practical interests in upholding the rights of the Lake Erie Ecosystem.

1           The Sixth Circuit “subscribe[s] to a rather expansive notion of the interest sufficient to  
2 invoke intervention of right,” *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (prospective  
3 minority applicants had substantial interest in action challenging University of Michigan's  
4 admissions policy, and corresponding right to intervene in the litigation); *Michigan State AFL-*  
5 *CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). For example, an intervenor need not have the  
6 standing necessary to initiate a lawsuit. *See Miller*, 103 F.3d 1240; *Purnell v. City of Akron*, 925  
7 F.2d 941, 948 (6th Cir. 1991). The Sixth Circuit also has “cited with approval decisions of other  
8 courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.”  
9 *Miller*, 103 F.3d at 1245. “The inquiry into the substantiality of the claimed interest is necessarily  
10 fact-specific.” *Id.* Petitioning intervenors must show “a direct, significant legally protectable  
11 interest” in the subject matter of the litigation, *United States v. Detroit Int'l Bridge Co.*, 7 F.3d  
12 497, 501 (6th Cir. 1993), sufficient “to make it a real party in interest in the transaction which is  
13 the subject of the proceeding.” *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425  
14 F.3d 309, 317 (6th Cir. 2005) (citation omitted). But “that ‘interest’ is to be construed liberally.”  
15 *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987).

16           Regarding the allowance of intervenor status to citizen organizations when they have  
17 been involved in shaping the act under challenge, the Sixth Circuit concurs with the Ninth  
18 Circuit’s view that interested organizations are to be accorded status to defend administrative  
19 decisions or new legislation:

20           “While none of our cases have addressed the significance to be accorded a proposed  
21 intervenor's interest in the validity of legislation, the Ninth Circuit has adopted a  
22 broader rule that a public interest group that is involved in the process leading to  
23 adoption of legislation has a cognizable interest in defending that legislation. *See*  
24 *Idaho Farm Bureau Fed'n v. Babbitt*,<sup>21</sup> 58 F.3d 1392, 1397 (9th Cir. 1995);

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21 Idaho Conservation League and Committee for Idaho's High Desert were granted intervenor status in a challenge to listing of the Bruneau Hot Springs Snail to federal Endangered Species list. They had previously commented on the proposed listing and had sued to force

1 *Sagebrush Rebellion, Inc. v. Watt*,<sup>22</sup> 713 F.2d 525, 527 (9th Cir. 1983); *see also State*  
2 *of Idaho v. Freeman*,<sup>23</sup> 625 F.2d 886 (9th Cir. 1980). *Idaho Farm Bureau* supports our  
3 conclusion in this case that the rules governing intervention are “construed broadly in  
4 favor of the applicants.” 58 F.3d at 1397 (citing *United States v. Oregon*, 913 F.2d  
5 576, 587 (9th Cir. 1990), *cert. denied*, *Makah Indian Tribe v. United States*, 501 U.S.  
6 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991)). There, the intervening public  
7 interest group had been involved in a separate suit in a matter related to the issues in  
8 controversy.”

9 *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245-1246 (6th Cir. 1997). In *Miller*, the  
10 Michigan Chamber of Commerce sought intervenor status to defend a campaign contribution-  
11 limitations law, passage of which it had supported. The Sixth Circuit found that:

12 The evidence shows that the Chamber was (1) a vital participant in the political  
13 process that resulted in legislative adoption of the 1994 amendments in the first  
14 place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party  
15 which is adverse to the challenging union in the political process surrounding  
16 Michigan state government's regulation of practical campaign financing, and (4) an  
17 entity also regulated by at least three of the four statutory provisions challenged by  
18 plaintiffs. Admittedly, the intervention issue raised in this appeal is a close one, but in  
19 view of the facts unique to this particular case, and in the belief that close cases  
20 should be resolved in favor of recognizing an interest under Rule 24(a), we hold that  
21 the Chamber has a substantial legal interest in this litigation.

22 *Id.* at 1246-1247. *See also Washington State Building & Construction Trades v. Spellman*, 684  
23 F.2d 627, 630 (9th Cir. 1982), *cert. denied sub nom. Don't Waste Washington Legal Defense*  
24 *Foundation v. Washington*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983) (public interest  
25 group was entitled as a matter of right to intervene in an action challenging the legality of a  
26 statewide initiative which it had sponsored). The Ninth Circuit stated that “Rule 24 traditionally  
27 has received a liberal construction in favor of applications for intervention.” *Id.* at 630.

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U.S. Fish and Wildlife Service to issue a final rule listing the snail. Their request to intervene  
on the side of FWS to defend the listing was then granted.

22 The Audubon Society granted intervention as of right in challenge to federal government  
designation of Snake River Birds of Prey National Conservation Area in Idaho, a designation  
for which it had advocated.

23 National Organization for Women granted intervention as of right in suit challenging  
procedures for ratification of the proposed Equal Rights Amendment to the Constitution of  
the United States, a cause which the organization had championed.

1 Similarly, Toledoans for Safe Water directly sponsored LEBOR. Its members wrote the  
2 proposed legislation and circulated petitions gathering signatures for its ballot placement. TSW  
3 members made up the legal sponsorship to litigate in support of LEBOR. In their Declarations,  
4 Twitchell, Durback, and Miller describe their respective deeds as members of TSW in collecting  
5 literally hundreds of signatures to place LEBOR on the Ballot. Twitchell Decl., ¶ 3; Durback  
6 Decl., ¶ 3. Bryan Twitchell served as one of the five-members of the legal committee sponsoring  
7 the LEBOR petition that sued in the Ohio Supreme Court to put LEBOR on the ballot, and  
8 defended as respondent-intervenors in that Court to keep LEBOR on the ballot. Miller Decl., ¶ 7.  
9 Durback, Twitchell and Miller have environmental science backgrounds and possess a grasp of  
10 the scientific principles which underlie the ongoing algae contamination and pollution problems  
11 afflicting Lake Erie. As citizens, they're part of the potential plaintiff class which may invoke  
12 LEBOR to enforce the rights of nature conferred on the Lake Erie Ecosystem. Their member  
13 declarations illustrate TSW's unique legal interests needed for intervention as of right.

14 **C. The Intervenors Will Experience Impairment Of Their Interests If Excluded**

15 In the Sixth Circuit, a would-be intervenor must show only that impairment of its  
16 substantial legal interest is possible if intervention is denied. *Purnell v. City of Akron*, 925 F.2d  
17 941, 948 (6th Cir. 1991). This burden is minimal. An adverse ruling in the district court would  
18 cut off the rights of the Lake Erie Ecosystem to be recognized in the legal system. Moreover,  
19 Intervenors' right under LEBOR to litigate in the future against polluters, on behalf of Lake Erie  
20 would be curtailed.

21 Under LEBOR, three potential classes of plaintiffs may seek to enforce the rights of the  
22 Lake Erie Ecosystem. One is the City of Toledo. LEBOR § 3(b). The others are the Ecosystem  
23 and "any resident of the City." *Id.* TSW asserts, through its members, the rights of City residents

1 and Lake Erie to bring enforcement actions on the authority of LEBOR. The City of Toledo may  
2 make its own decisions as to how to protect its right to sue under LEBOR § 3(b), but does not  
3 have the power to compromise or protect the separate and distinct right of Toledo residents to sue  
4 for enforcement. TSW seeks participation as representative of potential plaintiffs.

5 **D. The City of Toledo Cannot Adequately Represent Intervenors' Interests**

6 Although a would-be intervenor shoulders the burden with respect to establishing  
7 that its interest is not adequately protected by the existing parties to the action, this burden “is  
8 minimal because it is sufficient that the movant[ ] prove that representation *may* be inadequate.”  
9 *Linton*, 973 F.2d at 1319 (Emphasis added); *Trbovich v. UMWA*, 404 U.S. 528, 539, 92 S.Ct. 630,  
10 636, 30 L.Ed.2d 686 (1972) (Burden of proof is minimal; it is sufficient that the movants prove  
11 that representation may be inadequate).

12 “One is not required to show that the representation will in fact be inadequate. For  
13 example, it may be enough to show that the existing party, who purports to seek the same  
14 outcome will not make all of the prospective intervenor's arguments. *See Forest Conservation*  
15 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir.1995),” quoted in  
16 *Michigan State AFL-CIO v. Miller*, 103 F.3d at 1247-1248; *Grutter v. Bollinger*, 188 F.3d 394,  
17 400-01 (6th Cir.1999) (quoting *Miller*, 103 F.3d at 1247).

18 The public record of the City’s strong opposition to LEBOR establishes that the City  
19 cannot and will not adequately represent the interests TSW seeks to represent for the Lake and  
20 the people. In particular, the Intervenors proffer several legal arguments the City is unlikely to  
21 advance and might even actively oppose:

22 ● As specified in their Motion to Dismiss, proffered with this Motion to Intervene, DFP is  
23 a general partnership and accordingly does not possess standing to sue.

1           • Even if DFP has standing, it has not established injury-in-fact because it alleges only  
2 disagreement with the policy represented by LEBOR, not that the policy has caused it any but  
3 speculative harm.

4           • The Lake Erie Bill of Rights endows the Lake Erie Ecosystem with “rights of nature,”  
5 the unique concept that “Lake Erie, and the Lake Erie watershed, possess the right to exist,  
6 flourish, and naturally evolve.” LEBOR § 1(a). The City of Toledo is unlikely to argue the  
7 validity of this concept in American jurisprudence. TSW’s members, in consultation with  
8 counsel, initiated and voted the concept into law and are prepared to advance arguments in  
9 support of Rights of Nature.

10          • The City has consented to a preliminary injunction in this case, suspending the effect  
11 of LEBOR. (Docket #9). TSW would have opposed it strenuously.

12          • TSW will argue that under Ohio Const. Art. I, § 2, the citizens of Toledo “have the right  
13 to alter, reform, or abolish the same, whenever they may deem it necessary.” It is doubtful that  
14 the City of Toledo will seek application of Art. I, § 2 to support LEBOR’s legality.

15           “[T]hat there is a slight difference in interests between the [proposed intervenors] and  
16 the supposed representative does not necessarily show inadequacy, if they both seek the same  
17 outcome. . . . However, interests need not be wholly “adverse” before there is a basis for  
18 concluding that existing representation of a “different” interest may be inadequate.” *Jansen v.*  
19 *City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (quoting *Nuesse v. Camp*, 385 F.2d 694,  
20 703, 128 U.S.App.D.C. 172 (D.C. Cir. 1967)). The Intervenors have shown more than a “slight”  
21 difference in their approach as compared to that of the City, certainly enough to demonstrate that  
22 the City will not adequately represent their interests in upholding the lawfulness of LEBOR. The  
23 Lake Erie Ecosystem and TSW have timely brought their Motion; have demonstrated a  
24 distinctive interest in the litigation; and have shown that their interests will be impaired if they

1 are denied intervenor status. They have established entitlement to intervention in these  
2 proceedings as of right.

3 **III. Alternatively, Lake Erie and TSW Should Be Allowed To Permissively Intervene**

4 Under FRCP 24(b), the Court may permissively allow anyone to intervene who files a  
5 timely motion and “has a claim or defense that shares with the main action a common question  
6 of law or fact.” Fed.R.Civ.P. 24(b)(1)(B). “Once these two requirements are established, the  
7 district court must then balance undue delay and prejudice to the original parties, if any, and any  
8 other relevant factors to determine whether, in the court’s discretion, intervention should be  
9 allowed.” *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). Permissive intervention  
10 under Rule 24(b) is within the sound discretion of the court. *Id.*

11 Since the Intervenor-Defendants have brought their Motion extremely early in this litigation, before  
12 the City of Toledo has answered, neither DFP nor the City can realistically assert any prejudice.  
13 Intervenor-Defendants’ challenges to the bases for this litigation, and their arguments in favor of a finding of  
14 lawfulness of the Lake Erie Bill of Rights, are tied to the common goal upholding the  
15 enforceability of LEBOR by the City and TSW. However, the approaches of TSW and the City  
16 diverge at key points, and accordingly, TSW and Lake Erie Ecosystem should be granted leave to  
17 permissively intervene in these proceedings on the side of the City to assert their unique points  
18 and authorities.

19 **Conclusion**

20 Proposed Intervenor-Defendants respectfully request the Court grant their motion to  
21 intervene by rights, and leave for permissive intervention, to defend their interests in this lawsuit.

Respectfully submitted this Eighteenth Day of March, 2019.

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1 **Certificate of Memorandum Length**

2 Pursuant to Local Rule 7.1(f), this brief does not exceed 20 pages, as this case is currently  
3 unassigned to a track.

Dated: March 18, 2019.

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1 **Certificate of Service**

2 I certify that I electronically filed this document with the Clerk of the Court for the  
3 United States District Court for the Northern District of Ohio by using the Court's CM/ECF  
4 system on March 18, 2019.

5 The other parties are Filing Users and are served electronically by the Notice of Docket  
6 Activity.

Dated: March 18, 2019

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