

In the Weeds



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The Lake Erie Bill of Rights Ballot Initiative

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Lake Erie once again made headlines when the Ohio Supreme Court recently decided that a "Lake Erie Bill of Rights" initiative could be placed on the Toledo ballot on February 26, 2019. The decision raised alarm in Ohio's agricultural community and fears that, if passed, the measure will result in litigation for farmers in the Lake Erie watershed. In this brief, we dig into the Lake Erie Bill of Rights (LEBOR) and explain the laws that relate to this important issue.

LEBOR is a proposed amendment to the Toledo City Charter.

The "Toledoans for Safe Water" initiated the LEBOR petition to amend Toledo's city charter.¹ A "charter" is like a "constitution" in that it outlines a city's powers and how the city will function. The Ohio Constitution allows city residents to propose charter amendments through a petition process that requires signatures by 10 percent or more of the electors in order to place a proposal on the ballot.²

A look at the LEBOR petition. The LEBOR petition attempts to create a new way for Toledo citizens to protect the Lake Erie resource by granting new legal rights for Lake Erie, its ecosystem and allowing Toledo and its residents to enforce those legal rights against any government or corporation that violates them. Here's an explanation of the three primary parts of the petition:

1. *Declarations of the purpose of the petition.*

- The petition declares an immediate emergency in order to protect Lake Erie and its watershed from irreversible devastation caused by the combination of global warming and continued dumping of industrial wastes and runoff of noxious substances into the lake.
- This emergency requires shifting from current voluntary and regulatory policies to adopting laws that prohibit such activities and protect the fundamental rights of the people of Toledo. The people must assert their inherent and inalienable rights as stated in the Ohio Constitution and must extend legal rights to the natural environment.
- Since the Ohio Constitution also provides that all political power of governance is inherent in the people, the people of Toledo declare and enact a Lake Erie Bill of Rights to establish irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a

Check out this *In the Weeds* briefing for:

- An explanation of Toledo's Lake Erie Bill of Rights petition.
- What the petition says.
- Legal challenges to keep the issue off Toledo's ballot.
- "Community rights" efforts in Ohio and around the country.
- Who has rights in Lake Erie?
- Rights of corporations.
- Quick answers to frequently asked questions.

healthy environment for the residents of Toledo, and to elevate the rights of the community and its natural environment over powers claimed by certain corporations.

2. *Statements of law proposed by the petition.*

- Section 1 of the petition lays out three broad “rights” that are inherent, fundamental and unalienable, self-executing and enforceable against both public and private actors:
 - *Rights of Lake Erie Ecosystem*, which include the rights of Lake Erie and its watershed to exist, flourish, and naturally evolve.
 - *Rights to a clean and healthy environment* for the people of Toledo, which includes the right to a clean and healthy Lake Erie and Lake Erie ecosystem.
 - *Rights of local community self-government*, which include a right to a system of government that embodies self-government and protects and secures the human, civil and collective rights of the people of Toledo.
- Section 2 states two sources of “violations” of LEBOR:
 - It shall be unlawful for any corporation or government to violate the “rights” established in Section 1. A corporation includes any business entity.
 - No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity shall be deemed valid within Toledo if it would violate the prohibitions or the rights secured by LEBOR.

3. *Enforcement provisions proposed by the petition.*

- Section 3 presents how LEBOR would be enforced:
 - Any corporation or government that violates LEBOR shall be guilty of an “offense” and sentenced to pay the maximum fine allowable under State law for that violation.
 - The city of Toledo or any resident may enforce LEBOR through an action in the Lucas County Court of Common Pleas and shall be entitled to recover costs of the litigation.
 - Governments and corporations shall be strictly liable for harms and violations of rights.
 - The Lake Erie Ecosystem may enforce its rights through an action prosecuted by the City or a resident in the name of the Ecosystem. Damages shall be the cost of restoring the Ecosystem to its status previous to the acts that caused the injury, to be paid to the City.
- Section 4 states how LEBOR relates to other laws:
 - Corporations that violate LEBOR shall not possess any other legal rights that would interfere with LEBOR, including the right to assert state or federal preemptive laws.

Legal challenges to putting LEBOR on Toledo’s ballot. LEBOR’s road to Toledo’s special election ballot has been rocky and fraught with legal challenges that ended in a recent holding by the Ohio Supreme Court.³ An opponent of the petition argued that LEBOR exceeded Toledo’s authority and filed an action for a “writ of prohibition”—a court order that would require the Lucas County Board of Elections to remove LEBOR from the ballot. The Supreme Court did not grant the request and instead determined that the board’s decision to place LEBOR on the ballot was not unlawful because “a board of elections has no legal authority to review the substance of a proposed charter amendment and has no discretion to block the measure from the ballot based on an assessment of its suitability.” The Court pointed to past cases it had decided and the Ohio Constitution’s provision stating that if 10 percent of the voters in a municipality sign a petition, the city council must then pass an ordinance to include the proposed amendment on the ballot. According to the Court, the only responsibility of the board was to put the charter amendment on the ballot—the board has no other authority to review the content of the

charter amendment.⁴ Note that the outcome has been different for community rights provisions that are proposed as ordinances, the statutory laws that govern a city. Ohio courts have determined that the Ohio Revised Code grants a city the authority to review the substance of a ballot initiative that is introduced as an ordinance rather than as a charter amendment.⁵

The “community rights” approach behind LEBOR. LEBOR is an example of a “community rights” effort that seeks to give power back to communities. Organizations that promote community rights push for a fundamental shift in the legal system by developing new laws to protect community rights, which include the “rights of nature.” These new laws grant human rights to nature and natural objects. The Community Environmental Legal Defense Fund (CELDF), one group behind LEBOR, calls for the establishment of “rights of nature,” such as “the right of ecosystems to flourish and evolve.”⁶ Toledo’s LEBOR petition contains this same language. Since nature cannot communicate, it cannot represent itself in court or select its legal counsel. Community rights approaches remedy this problem by granting persons or organizations the right to enforce the legal rights of nature in a court of law on behalf of the natural object, which ultimately also aims to protect the rights of the community.

Legal challenges to “community rights” provisions. Even when a local community amends its charter or ordinances to include community rights language like LEBOR’s, courts have routinely refused to enforce the provisions. Academic scholarship argues that many of the community rights proposals violate long standing legal doctrines regarding federal supremacy over states, state supremacy over local governments, and constitutional rights given to corporations.⁷ The decisions are too numerous to include in this briefing, but here’s a sampling of court decisions from Ohio and around the country:

- Columbus, Ohio. A proposed ordinance (not a charter amendment) for a “Community Bill of Rights for Water, Soil, and Air Protection” stated that natural communities and ecosystems, including wetlands, streams, rivers, aquifers, and other water systems, “possess the rights to exist and flourish within the City of Columbus.” The Ohio Supreme Court determined that the proposal created a new cause of action and was beyond a city’s legislative power.⁸
- Youngstown, Ohio. Citizens proposed a “Youngstown Drinking Water Protection Bill of Rights” that created rights for ecosystems and natural communities, similar to LEBOR. The Ohio Supreme Court initially deemed that the rights were “beyond the scope of the municipality’s authority to enact.”⁹ The Court later invalidated the decision because it erred by treating the proposal as an ordinance rather than a charter amendment, which cannot be reviewed on substance, as explained above.¹⁰
- Spokane, Washington. The Washington Supreme Court agreed that a community rights amendment to Spokane’s city charter exceeded the city’s authority with respect to “administrative matters, water law, and constitutional rights.”¹¹ The amendment sought to give legal rights to the Spokane River.
- Mora County, New Mexico. CELDF drafted the “Mora County Community Water Rights and Local Self Government Ordinance,” which established community rights that sought to ban oil and gas extraction activities in the county. A federal court struck down the ordinance for violating the U.S. Constitution’s Supremacy Clause and First Amendment and conflicting with New Mexico law.¹²
- Pennsylvania. Courts have struck down many efforts to ban oil and gas development in Pennsylvania through a community rights approach. In one case, the court held that an ordinance on “Eliminating Legal Powers and Privileges from Corporations Doing Business Within Blaine Township to Vindicate the Right to Democratic Self-Governance” was preempted by state law, constituted an impermissible exercise of police power, and violated the Constitution’s Supremacy Clause.¹³

Community rights actions and attorney sanctions. Not only have community rights cases failed to succeed in court, but lawyers who have brought lawsuits under community rights provisions have been sanctioned and ordered to pay those they have sued for engaging in “harassment,” “unbridled obstruction,” and arguing “frivolous claims and defenses.”¹⁴ In a recent Pennsylvania case, the court chastised the attorneys and their organization for pursuing “a discredited and previously litigated “community rights” approach to prevent oil and gas operations” and inappropriately seeking to deny others of constitutional rights.¹⁵ In addition to making a rare award of \$52,000 in sanctions against the CELDF’s attorneys, the magistrate in the case referred CELDF’s executive director to the Disciplinary Board of the Supreme Court of Pennsylvania¹⁶ but the board did not take action against the attorney.

Who has rights in Lake Erie? The State of Ohio owns the Ohio portion of Lake Erie in trust for the people of Ohio and a city cannot usurp the State’s sovereign rights in Lake Erie without the State’s express permission.¹⁷ The State of Ohio’s rights in Lake Erie stem from its inherent powers as a sovereign signatory to the United States Constitution. That is a high status for the State of Ohio, but cities lack sovereign status because cities are creatures of the state according to federal constitutional law.¹⁸ In exercising its power as a sovereign over portions of Lake Erie, Ohio designated the Ohio Department of Natural Resources as the state’s only designee “in any matter pertaining to the care, protection, and enforcement of the state’s rights” in Lake Erie.¹⁹ LEBOR attempts to claim rights from the State of Ohio and transfer them to Toledo and its residents, but there is no legal authority for doing so. Much like Ohio, the State of Michigan also holds its portion in trust for its people, and the Canadian Province of Ontario governs the portion of Lake Erie north of the international boundary.

LEBOR and the rights of corporations. LEBOR states that a government or corporation, defined as any business entity, may not violate the rights of Lake Erie and also declares that corporations “shall not possess any other legal rights that would interfere with LEBOR, including the right to assert state or federal preemptive laws.” While controversial, courts have adhered to a long line of decisions that grant “personhood” and certain constitutional rights to corporations.²⁰ Specifically, courts have determined that the U.S. Constitution’s Equal Protection Clause, which requires that the law treat all individuals in the same manner as others, applies to corporations because corporations exist to protect the interests of their owners and therefore must be able to assert those interests in litigation.²¹ LEBOR’s focus on enforcement against corporations but not individuals and its removal of legal rights for corporations appears to directly conflict with such legal precedent.

What does it all mean? The LEBOR initiative is similar to many other community rights proposals that seek to establish rights of nature that community members can protect through legal action. Such efforts have a bad track record in courts nationwide. Courts have consistently determined that the provisions conflict with longstanding constitutional principles that address the relationship between federal, state and local governments; state and local governments cannot eliminate federal rights and local governments cannot deny rights granted by the state. Community rights initiatives also conflict with legal precedent established by the U.S. Supreme Court that guarantees corporate entities constitutional rights. Finally, the State of Ohio holds rights in Lake Erie that Toledo and its residents do not have legal authority to claim. Based upon these legal precedents, it is likely that an Ohio court would not enforce or uphold a LEBOR action.

Quick answers to Frequently Asked Questions about LEBOR. We've heard many questions and concerns about the potential impacts of LEBOR on farmers, corporations and others in the Lake Erie watershed if Toledo voters approve the measure. Based upon our research, we offer the following responses to these questions:

- *"If passed, will LEBOR lead to more regulations?"* LEBOR's language does not create regulations that must be followed, nor does it attempt to give any regulatory authority to any office or organization. It purports to be "self-executing." On its own, it would only allow the City of Toledo or citizens of Toledo to bring a legal action for an alleged violation of Lake Erie's legal rights.
- *"Will this approach spread statewide?"* Community rights initiatives in Ohio have been limited to several local efforts to amend municipal charters or ordinances with community rights language. There are organizations that are willing to help other communities advance similar community rights initiatives. To our knowledge, there has not been an attempt to expand community rights on a statewide basis. Doing so would require a petition to be put on a statewide ballot or an action by the Ohio General Assembly and the administration of Governor DeWine.
- *"Could LEBOR prevent farmers from farming?"* The petition creates a legal cause of action that someone could assert against a government or corporation that violates the rights of the Lake Erie ecosystem. The remedies provided in LEBOR are for monetary damages only and do not create a right to seek an "injunction" that would prevent a farmer from farming.
- *How will LEBOR affect Toledo residents whose lawn chemicals or other discharges get into Lake Erie?* While LEBOR states that its purpose is to protect Lake Erie, it does so only by targeting the actions of governments and corporations. It does not provide a legal action to be used against individuals who violate the proclaimed rights of Lake Erie.
- *"What should I do if a lawsuit is brought against me because of LEBOR?"* Contact your attorney and insurance company as soon as possible whenever faced with a lawsuit. Depending upon the situation and your insurance coverage, it is possible that your insurance company will defend the claim to protect not only you but also the interests of its other policyholders. If your insurance provider will not defend you, you will need the services of a personal attorney. Either way, you must file an answer to the claim within 28 days.
- *"How does LEBOR relate to nuisance lawsuits like those happening in North Carolina?"* LEBOR is different than farm nuisance lawsuits, which allege that a farm's activities unreasonably interfere with the quiet use and enjoyment of another's property. The new cause of action LEBOR attempts to create is based on harm to the Lake Erie resource rather than to someone's property rights. Note also that farms sued for nuisance in North Carolina could not use the state's Right to Farm statute, which is less protective of agriculture than Ohio's Right to Farm law. An in depth explanation of the Right to Farm laws is available on the Farm Office's Ag Law Blog.²²

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¹ "The Lake Erie Bill of Rights Citizens Initiative," TOLEDOANS FOR SAFE WATER (accessed Feb. 8, 2019)

<http://lakeerieaction.wixsite.com/safewatertoledo>.

² OHIO CONSTITUTION, Article XVIII, Sections 8 and 9.

³ *State ex. rel. Abernathy v. Lucas County Board of Elections*, Slip Opinion No. 2019-Ohio-201.

⁴ OHIO CONSTITUTION, Article XVIII, Sections 8 and 9. *See also State ex. rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035. *State ex. rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035 at 10, quoting *State ex. rel. Comm. for Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 592, 693 N.E.2d 205 (1998).

⁵ *See State ex. rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035 at 4-7.

⁶ "Community Rights," COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (accessed Feb. 6, 2019) <https://celdf.org/community-rights/>.

⁷ Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 724 (2015) ("many [community rights ordinances] rest on largely untenable positions relative to supremacy and preemption, state law constructions of local government power, and corporate personhood doctrines all several centuries in the making").

⁸ *State ex. rel. Bolzenius v. Preisse*, Slip Opinion No. 2018-Ohio-3708.

⁹ *State ex. rel. Flak v. Betras*, 152 Ohio St.3d 244, 2017-Ohio-8109.

¹⁰ *See State ex. rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035 at 6-7.

¹¹ *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, No. 91551-2 (Wa. Feb. 4, 2016).

¹² *SWEPI, LP v. Mora County, New Mexico*, 81 F.Supp.3d 1075 (D. N.M. 2015).

¹³ *Range Resources – Appalachia, LLC v. Blaine Township*, 649 F.Supp.2d 412 (W.D. Pa. 2009); *Penn Ridge Coal, LLC v. Allegheny Pittsburgh Coal Co., C.A. No. 08-1452P, ECF No. 30* (W.D. Pa. Apr. 8, 2009).

¹⁴ *Pennsylvania General Energy Co., LLC v. Grant Township, C.A. No. 14-209ERIE at 24-25* (W.D. Pa. Jan. 5, 2018).

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 1, 25.

¹⁷ Ohio Attorney General Opinion No. 455, p. 661 (May 27, 1929)

<https://www.ohioattorneygeneral.gov/getattachment/2f84e380-5fd4-4ab4-ba6b-7f954bea0c5e/1929-0445.aspx>.

¹⁸ *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907).

¹⁹ Ohio Revised Code § 1506.10, "Lake Erie boundary lines."

²⁰ See Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PENN. L. REV. 95 (2014).

²¹ *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

²² Ellen Essman, "North Carolina's Smithfield Lawsuits: Could Ohio Farmers Face Similar Results?," *Ohio Agricultural Law Blog*, OHIO STATE UNIVERSITY EXTENSION FARM OFFICE (Nov. 14, 2018) <https://farmoffice.osu.edu/blog/wed-11142018-550pm/ohio-agricultural-law-blog-north-carolina-s-smithfield-lawsuits-could-ohio>.