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FABLES OF THE CUYAHOGA: RECONSTRUCTING A HISTORY OF ENVIRONMENTAL PROTECTION

*Jonathan H. Adler**

City after city, state after state, had essentially failed in their efforts to protect their air and their water, the land, the health of their citizens. By 1970, our city skylines were so polluted that in many places it was all but impossible to see from one city skyscraper to another. . . . We had rivers that were fouled with raw sewage and toxic chemicals. One actually caught on fire. There was a very famous photograph from my teenage years of the Cuyahoga River burning. In fact, it was memorialized in a song at the time.

- Former EPA Administrator Carol Browner¹

*Cleveland, even now I can remember
'Cause the Cuyahoga River
Goes smokin' through my dreams
Burn on, big river, burn on.*

- Randy Newman²

* Assistant Professor of Law, Case Western Reserve University School of Law. An earlier version of this article was presented at the annual meeting of the Association of Private Enterprise Education, April 7-9, 2002. The author would like to thank Jonathan Entin, Roger Meiners, Andrew Morriss, Dale Nance, Robert Strassfeld, and Serina Vandegrift for comments on various drafts of this article, and give special thanks to Lisa Peters and Andrea Budd for their extensive research assistance. Any mistakes or omissions are solely those of the author.

1. Carol M. Browner, *Environmental Protection: Meeting the Challenges of the Twenty-First Century*, 25 HARV. ENVTL. L. REV. 329, 330-331 (2001).

2. RANDY NEWMAN, *Burn On*, on SAIL AWAY (Warner Bros. Records 1972). It's likely that the river's plight also inspired the band R.E.M. See R.E.M., *Cuyahoga*, on LIFE'S RICH PAGEANT

INTRODUCTION

On June 22, 1969, just before noon, an oil slick and assorted debris under a railroad trestle on the Cuyahoga River caught fire.³ The fire attracted national media attention, including stories in *Time*,⁴ and *National Geographic*.⁵ Although the 1969 fire was never broadcast, as no cameras arrived in time to film the event, its impact was immense. The image of a river ablaze was seared into the nation's emerging environmental consciousness.⁶ Environmental Protection Agency (EPA) Administrator Carol Browner probably spoke for many Americans when she said "I will never forget a photograph of flames, fire, shooting right out of the water in downtown Cleveland.

(EMD/Capitol 1986)(" Underneath the river bed we burned the river down. . . . Cuyahoga; Cuyahoga gone.").

3. *Oil Slick Fire Damages 2 River Spans*, CLEVELAND PLAIN DEALER, June 23, 1969, at C1.

4. *The Cities: The Price of Optimism*, TIME, Aug. 1, 1969, at 41. Ironically, the picture accompanying the *Time* magazine story was from the Cuyahoga River fire of 1952, not 1969.

5. *Sad, Soiled Waters: The Cuyahoga River and Lake Erie*, NAT'L GEO., Dec. 1970, at 743-44. The fire 1969 was the subject of a *New York Times* story filed on June 28. This story did not run in all editions of the paper, however, and is not available in the *New York Times* archive. See *Cleveland River So Dirty It Burns*, NEW YORK TIMES, June 28, 1969 (copy on file with National Geographic Society).

The fire even attracted international attention. See *Water Pollution – 1970, Part 2: Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, U.S. Senate, 91st Congress (1970)* at 412 (testimony of the Honorable Carl B. Stokes) [hereinafter Stokes Testimony].

6. One commentator noted the river "burned on newscasts all over the world," and became "a vivid symbol of the state of many of America's waterways." MARY GRAHAM, *THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS* 28 (1999) (quoting unnamed Cleveland State University professor). The fire has even inspired a beer. The Great Lakes Brewing Company in Cleveland, Ohio, produces a "Burning River Pale Ale."

It was the summer of 1969 and the Cuyahoga River was burning.”⁷ A river on fire was a symbol of earth in need of repair, and federal regulation was the reparative tool of choice.

That a river could become so polluted to ignite proved that state and local governments and common law environmental protections were incapable of ensuring adequate levels of environmental protection. As Drew Caputo of the Natural Resources Defense Council noted, “when the rivers are on fire, you know things are bad.”⁸ Following on the heels of several best-selling books warning of ecological apocalypse and other high-profile events such as the oil spill off the coast of Santa Barbara, the 1969 Cuyahoga fire spurred efforts to enact sweeping federal environmental legislation.⁹ Among the laws that resulted was the Federal Water Pollution Control Act of 1972, a fact noted in a recent Supreme Court opinion.¹⁰

7. Quoted in Kristina M. Tridico, *Sustainable America in the Twenty-First Century: A Critique of President Clinton's Council on Sustainable Development*, 14 J. NAT. RESOURCES & ENVTL. L. 205, 252 n.7 (1998-99).

8. Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ENVTL. REP. 10574, 10576 (1997).

9. Jack A. Seamonds, *In Cleveland, Clean Waters Give New Breath of Life*, U.S. NEWS & WORLD REP., June 18, 1984, at 68 (“Many believe the 1969 fire lit the fuse that put the bank in the nationwide campaign to clean up the environment.”); Michael Grunwald, *EPA Mulls New Water Cleanup Rule*, WASH. POST, July 13, 2002, at A1 (noting the Clean Water Act “was passed in 1972 after the Cuyahoga River caught fire in Cleveland”); John Kuehner, *30 Years Ago, Polluted Cuyahoga Had No Fish; Now They're Thriving*, CLEVELAND PLAIN DEALER, Oct. 18, 2002, at B2; Kristina M. Tridico, *Sustainable America in the Twenty-First Century: A Critique of President Clinton's Council on Sustainable Development*, 14 J. NAT. RESOURCES & ENVTL. L. 205, 252 n.7 (1998-99) (quoting Carol Browner: “An angry nation called to action, and the Clean Water Act was passed.”). See also Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA ENVTL. L.J. 75, 79 (2001).

10. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting) (“In 1969, the Cuyahoga River in Cleveland, Ohio, coated

Today, the 1969 fire is regularly referenced in discussions of environmental quality. The image endures as a symbol of rampant environmental despoliation prior to the enactment of federal environmental laws. That fires no longer burn is an oft-cited sign of environmental progress, a factoid that is repeated with “numbing predictability” in speeches commemorating Earth Day or the passage of landmark environmental legislation.¹¹ “The days of rivers bursting into flame and lakes dying are behind us,” noted EPA Administrator Browner in recent Congressional testimony.¹² The comparison between oil-covered waters aflame and comparatively clean waterways in much of the nation is “dramatic,”¹³ to say the least.

with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the Federal Water Pollution Control Act (FWPCA) Amendments of 1972”).

11. Mary Gade, *When the States Come Marching In*, 10 NAT. RESOURCES & ENV'T 3 (Winter 1996) (“As virtually every Earth Day speaker notes with numbing predictability (myself, included), the Cuyahoga River no longer burns”). *See, e.g., Building On Success – Going Beyond Regulation*, Presentation of G. Tracy Mehan, Assistant Administrator, U.S. EPA, Environmental Economics Advisory Committee, Nov. 30, 2001, available at <http://www.epa.gov/water/speeches/113001tm.html> (last visited Jan. 10, 2003) (recalling Cuyahoga River fires); Remarks by Vice President Al Gore on the 25th Anniversary of the Clean Water Act, Oct. 18, 1997, available at <http://clinton3.nara.gov/wh/eop/ovp/speeches/clean.html>. *See also The Clean Water Act at 30*, NEW YORK TIMES, Oct. 22, 2002, at A30 (“Thirty years ago the nation’s waters were in terrible shape – Lake Erie on its deathbed, Ohio’s Cuyahoga River bursting into flames, lakes streams and beaches closed to fishing and swimming. There has been great progress since then, almost entirely the result of the 1972 law.”).

12. Testimony of Carol Browner, Administrator, U.S. Environmental Protection Agency, Feb. 23, 2000, available at 2000 WL 11068367.

13. *See, e.g.,* Robert Jerome Glennon & John E. Thorson, *Federal Environmental Restoration Initiatives: An Analysis of Agency Performance and the Capacity for Change*, 42 ARIZ. L. REV. 483, 498 (2000) (“Nonetheless, the change in the nation's lakes and rivers since 1972 has been quite dramatic. In 1972, cities regularly dumped

Much of the Cuyahoga story, however, is mythology, a fable with powerful symbolic force.¹⁴ The river did burn in 1969 – as it and other rivers had burned many times before – and today the Cuyahoga and many U.S. rivers are far less polluted. But so much else of what we “know” about the 1969 fire simply is not so. The conventional narratives, of a river abandoned by its local community, of water pollution at its zenith, of conventional legal doctrines impotent in the face of environmental harms, and of a beneficent federal government rushing in to save the day, is misleading in many respects. Revisiting the context and history of the legendary Cuyahoga River fire reveals a more complex story about the causes and consequences of various institutional choices in environmental law. Like the waters of the Cuyahoga in 1969, the historical record is murky – far more so than the traditional fable suggests.

This paper revisits the fable – or rather fables – of the Cuyahoga and their implications for environmental law. The actual history of the Cuyahoga River fire raises many questions about institutional choice for pollution control. Whether the history of the Cuyahoga River supports the conventional thesis that federal command-and-control regulation was the optimal means of addressing water pollution problems in 1969 should be an open question. Told in greater detail, the story of the Cuyahoga casts doubt on the conventional justifications for the federal environmental controls enacted in the fire’s wake. The river did catch fire in 1969 – or, more properly, oil and debris floating on the river’s surface caught fire – but this was not clearly due to state and local malfeasance or a failure of common law protections. And, while federal intervention likely did acceler-

raw sewage into harbors and rivers. Industrial pollution seriously degraded many rivers. In 1969, the Cuyahoga River in Ohio literally caught fire. Today, municipal water treatment plants have all but eliminated the discharge of sewage into watercourses. End-of-the-pipe limits on toxic chemicals have significantly reduced industrial pollution.”).

14. The use of the term “fable” is deliberate, connoting a fictitious narrative that nonetheless conveys an important truth. *See, e.g.,* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 415 (10th ed. 1998) (defining a fable as “a fictitious narrative or statement: as,” among other things, “a narration intended to enforce a useful truth.”). The fables of the Cuyahoga are narratives of the river’s plight which purportedly explain the evolution of federal water pollution controls.

ate river cleanup in many parts of the country, there are still reasons to question the federal government's record with regard to the Cuyahoga, and river quality generally.

This article is not intended as a comprehensive treatment of the federalization of environmental protection, or even a complete history of the pressures that led to the enactment of the Clean Water Act. Nor does it provide an extensive comparison of federal regulation and other policy alternatives. Rather this article is an exploration of the nature of the choices our nation has made in environmental law guided by events on and around a single river. The aim is to provide additional perspective to the questions of institutional choice which underlie environmental policy, and to suggest that the decision to reallocate primary authority over water quality to the federal government was neither inevitable nor an unmitigated blessing.¹⁵

I. FABLES OF THE CUYAHOGA

The June 22, 1969 fire on the Cuyahoga is the "seminal" event in the history of water pollution control in America, helping to spur the growth of the environmental movement and the passage of national environmental legislation.¹⁶ "Never before had an image so thor-

15. Although most federal environmental statutes, including the Clean Water Act, operate on a "cooperative federalism" model, much about the implementation of these programs is anything but cooperative. *See generally* Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 *GEO. MASON L. REV.* 573, 575-582 (1998).

16. According to the EPA, "[t]he burning Cuyahoga came to symbolize for this country a century of industrialization with little or no regard for environmental consequences. It also was one of the seminal events that gave rise to the environmental movement, the creation of the EPA, and the passage of a series of laws designed to safeguard our environment, including the enactment of the Clean Water Act in 1972." U.S. Environmental Protection Agency, *Liquid Assets 2000: Good News, Bad News – The Current Condition of our Nation's Water Resources*, available at <http://www.epa.gov/ow/liquidassets/goodnews.html> (last visited Aug. 18, 2002). Prominent Clean Water Act experts also refer to the

oughly driven home the deteriorating plight of our nation's waterways," one environmental group explained on the fire's thirtieth anniversary. "The burning river mobilized the nation and became a rallying point for passage of the Clean Water Act."¹⁷ Despite its national importance as a symbol of environmental decline, the 1969 fire on the Cuyahoga was a relatively minor story in Cleveland at the time.¹⁸ For northeast Ohio, and indeed for many industrialized areas, burning rivers were nothing new, and the 1969 fire was less severe than prior Cuyahoga conflagrations. It was a little fire on a long-polluted river already embarked on the road to recovery.

Water pollution in the 1960s was a major environmental problem throughout the nation. Many rivers were declared industrial streams, used predominantly for commercial purposes and the disposal of industrial waste. Yet it would be wrong to view the fire as evidence that U.S. water quality reached its nadir in the late 1960s. In all likelihood, many measures of water quality hit rock bottom well before 1969, though the lack of comprehensive data makes it difficult to test such a claim. By 1969, efforts were already underway to reduce pollution and restore water quality in many water bodies, including the Cuyahoga. Cleveland had embarked on a long and costly cleanup effort before the Cuyahoga became a national symbol. Subsequent federal efforts received more attention – and far more credit – but it appears the tide was turning well before Congress enacted the 1972 Clean Water Act. One problem Cleveland faced was that the Cuyahoga was treated as an industrial stream, and state permits inhibited local clean up efforts. Public nuisance actions and enforcement of local pollution ordinances, in particular, were pre-

1969 fire as the "most dramatic alarm bell" that "water pollution had reached crisis proportions" and a federal Clean Water Act was necessary. ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, *THE CLEAN WATER ACT: 20 YEARS LATER* 5 (1993). *See also* David Lore, *Cuyahoga River's Cleanup Reclaims 'Hallowed Ground'*, COLUMBUS DISPATCH, Oct. 8, 2002, at 7A ("Although quickly extinguished, the fire made the Cuyahoga the national poster child for abused rivers."). *See also* sources cited at note 9.

17. American Rivers, *Anniversary of Cuyahoga River Burning*, June 21, 1999, at <http://www.amrivers.org/pressrelease/presscuyahoga6.21.99.html> (last visited Aug. 26, 2002).

18. *See infra* notes 19-23 and accompanying text.

cluded by state regulation, while federal laws protecting commercially navigable waterways went largely unenforced. Thus, insofar as the story of the Cuyahoga is to inform our views of the viability of local efforts and common law environmental protections, it illustrates that sometimes when local institutions and common law remedies failed, they may have been sabotaged or ignored.

A. *Burning the River Down*

Shortly before noon on June 22, oil and debris floating on the river caught fire as it drifted below two railroad trestles southeast of downtown Cleveland. Though reportedly intense – the flames are said to have been five-stories high – the blaze was under control within thirty minutes.¹⁹ The heat of the flames warped railroad ties on one of the crossings, but total damage was estimated at only \$50,000.²⁰ Although noted on the front page of the *Cleveland Plain Dealer*, the fire was a minor news item.²¹ The *Plain Dealer's* story was a mere five paragraphs long and buried inside on page 11-C,²² hardly the placement for a major news item. The fire also received scant coverage in the *Cleveland Press*, Cleveland's other daily newspaper at the time. The *Press* only ran a small photo of railroad tracks on the front page with a one paragraph caption.²³ By contrast, earlier river fires, such as a major conflagration in 1952, were trumpeted under banner headlines.²⁴ Reflecting on the 1969 fire, the most remarkable thing about it in the head of the fire department's

19. *Oil Slick Fire Damages 2 River Spans*, *supra* note 3.

20. *Id.* The fire reportedly caused \$45,000 damage to a railroad bridge owned by Norfolk & Western Railway Company, and an additional \$5,000 damage to another bridge owned by the Newburgh & South Shore Railroad Company.

21. *Id.*

22. *Id.*

23. *The Cuyahoga River Caught Fire*, CLEVELAND PRESS, June 23, 1969, at 1.

24. See, e.g., *Oil Slick Fire Ruins Flats Shipyard; Flames Hit Dry Docks, Three Tugs*, CLEVELAND PLAIN DEALER, Nov. 2, 1952, at 1.

view was just how “unremarkable” it was.²⁵ Another former fire-fighter recalled that the small blaze “wasn’t that big a deal.”²⁶

However mild the actual fire may have been, it “gave a third-degree burn to Cleveland’s image.”²⁷ The fire received national coverage in the media. The coverage in *Time* was particularly harsh, painting a grim picture of Cleveland and its burning river:

Some river! Chocolate-brown, oily, bubbling with sub-surface gases, it oozes rather than flows. “Anyone who falls into the Cuyahoga does not drown,” Cleveland’s citizens joke grimly. “He decays.” The Federal Water Pollution Control Administration dryly notes: “The lower Cuyahoga has no visible life, not even low forms such as leeches and sludge worms that usually thrive on wastes.” It is also--literally--a fire hazard. A few weeks ago, the oil-slicked river burst into flames and burned with such intensity that two railroad bridges spanning it were nearly destroyed. “What a terrible reflection on our city,” said Cleveland Mayor Carl Stokes sadly.²⁸

Although the image of the 1969 fire is supposed to have spurred the nation to action, few Americans have ever seen a picture of the infamous event. The fire was so quick that by the time local photographers arrived, the flames were out. The photo in the *Cleveland Plain Dealer* showed a fireboat spraying down a railroad trestle after the fire was under control.²⁹ The *Cleveland Press* could only run a photo of the railroad ties warped by the heat of the flames.³⁰ There

25. Roger Brown, *1969 River Blaze Scarred Image*, CLEVELAND PLAIN DEALER, June 18, 1969, at 1-B.

26. *Cleveland Balks at Celebrating 20th Anniversary of Cuyahoga River Fire*, Associated Press, June 18, 1989, available at 1989 WL 4042779.

27. Jack A. Seamonds, *In Cleveland, Clean Waters Give New Breath of Life*, U.S. NEWS & WORLD REPORT, June 18, 1984, at 68.

28. *The Cities: The Price of Optimism*, *supra* note 4, at 41.

29. See *Oil Slick Fire Damages 2 River Spans*, *supra* note 3. See also photo, available at <http://www.cwru.edu/artsci/engl/marling/60s/pages/richoux/69Realphoto.html> (last visited Jan. 9, 2003)(showing no smoke or fire visible in picture).

30. *The Cuyahoga River Caught Fire*, *supra* note 23.

may have been “considerable television news coverage”³¹ of the story, but there were no “pictures at eleven” – or on any other broadcast. No television crews arrived in time to broadcast the spectacle of a river ablaze.

There is a famous photo of the Cuyahoga River on fire. It accompanied the August 1 *Time* magazine story.³² This striking photo of a fireboat fighting a river aflame is probably the photo some Americans remember and is most likely the photo that Carol Browner referred to above.³³ It is also reproduced as “evidence” of the horrific 1969 fire.³⁴ Yet despite *Time*’s characterization, it was not a picture of the June 1969 fire at all. Rather, it was an old archive photo of the river blaze of 1952, a true inferno that caused substantial damage.³⁵ The vision of a river aflame that many Americans may associate with the 1969 fire is itself one fable of the Cuyahoga.

31. Lazarus, *supra* note 9, at 79. See also, Donna Frye, *Clean Water Act after 30 Years*, SAN DIEGO UNION-TRIBUNE, Oct. 18, 2002, at B7 (“Images of rivers burning . . . were broadcast on television and captured in photographs in newspapers and magazines.”).

32. See *The Cities: The Price of Optimism*, *supra* note 4, at 41.

33. See *supra* note 1 and accompanying text.

34. See, e.g., Sierra Club, *The Clean Water Act at 30*, October 17, 2002, http://www.sierraclub.org/currents/clean_water_act.asp (last visited October 25, 2002) (claiming that the June 1969 fire was “captured on film” alongside reproduction of 1952 photo from *Time* magazine). This was not the only error in the Sierra Club’s account. It also claims that the fire “sent flames soaring five stories high and floating past downtown Cleveland to Lake Erie.” After correspondence with the author, the text on the site was changed, and a corrected photo caption added.

35. See, e.g., “1952 Cuyahoga River on Fire,” available at <http://www.cwru.edu/artsci/engl/marling/60s/pages/richoux/50sFirePicture.html> (last visited Jan. 9, 2003). This is hardly the only mischaracterization of the 1969 fire. One environmental history claims that in 1969 the river burned for eight days! RICHARD N. L. ANDREWS, *MANAGING THE ENV’T, MANAGING OURSELVES - A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 224 (1999). See also ELIZABETH WHELAN, *TOXIC TERROR* 225 (1985) (claiming that “In 1959 [sic] the river burned for eight days, as flames fed on hosts of industrial wastes that had been carelessly discharged on a regular basis”).

B. *The Fires Last Time*

The Cuyahoga's problems were not new in the 1960s, nor had they been created overnight. Debris readily accumulated in the "crooked" river, and the slow movement of the water reduced its assimilative capacity, especially near the mouth.³⁶ When the local population and industrial growth exploded in the Nineteenth Century, pollution was sure to follow.³⁷ Before the end of the Civil War there were twenty refineries in the Cleveland area, including John D. Rockefeller's Excelsior Works.³⁸ Such facilities were anything but sanitary. Fires were common, and the unusable fraction of refined crude was often dumped into the river.³⁹ As Rockefeller recalled, "We used to burn it for fuel in distilling the oil, and thousands and hundreds of thousands of barrels of it floated down the creeks and rivers, and the ground was saturated with it, in the constant effort to get rid of it."⁴⁰

In 1881, Cleveland's mayor considered the Cuyahoga "an open sewer through the center of the city"⁴¹ but little was done to address such concerns. The city's new waterworks and sewer system, constructed after cholera outbreaks prior to the Civil War, were higher priorities than the condition of the river.⁴² As Cleveland and the surrounding area industrialized, steel mills, oil refineries, chemical

36. WILLIAM DONOHUE ELLIS, *THE CUYAHOGA* 1 (1966)(noting that as the river approaches Cleveland, it becomes "impossible crooked" and "flows still and deep," features which facilitate the accumulation of pollution and debris).

37. It is notable that between 1850 and 1860, Cleveland's population grew by over 150 percent. See *Cuyahoga River Watershed Nomination Packet*, American Heritage River Task Force for the Cuyahoga River 3 (1997).

38. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER* 78 (1998).

39. *Id.* at 101. Ironically, the "unusable" portion of crude would later find great use as gasoline.

40. *Id.*

41. *THE ENCYCLOPEDIA OF CLEVELAND HISTORY* 338 (David D. Van Tassel ed., 1996).

42. See Mary B. Stavish, *Regionalization of Cleveland's Municipal Services, 1950-1977: The Process and the Politics*, at 62-64 (1994) (unpublished Ph.D. dissertation, Case Western Reserve University) (on file with Case Western Reserve University library).

plants, paper mills, and other industrial facilities lined the Cuyahoga.⁴³ Even when plant managers sought to limit the dumping of wastes, oils, and debris into the river, spills were inevitable. City residents often complained about the foul taste and odor of the local water supply, though some saw the pollution as an acceptable sign of progress.⁴⁴ As the pollution got worse, the city chose to cope rather than to clean it up. To find cleaner water supplies the city moved its water intake cribs further out into Lake Erie, away from the spreading pollution.⁴⁵ At the same time, the city's sewer system deposited untreated wastewater directly into Lake Erie, several miles from the city.⁴⁶

43. In the nineteenth century, the shores of the Cuyahoga became the base of operations for many industrial giants, including Standard Oil, Sherwin Williams, Republic Steel and Jones & Laughlin Steel, among others. It also rapidly became the primary shipping port on the Great Lakes. *See Cuyahoga Watershed Nomination Packet*, *supra* note 37, at 6. By 1968, there were twenty-two permitted industrial facilities along the Cuyahoga which discharged their wastewater into the river. These facilities included thirteen steel mills, six chemical plants, two paper mills, and a steam electric generating station. DIVISION OF ENGINEERING, OHIO DEPARTMENT OF HEALTH, REPORT AND RECOMMENDATIONS ON WATER QUALITY FOR THE ROCKY, CUYAHOGA, CHAGRIN AND GRAND RIVERS AND THEIR TRIBUTARIES 19 (May 1968).

44. ELLIS, *supra* note 36, at 157.

("The Gilded Age began – and it seemed to run on iron and oil, which turned the Cuyahoga iron red with an iridescent scum of oilbow colors....

"There were some in carriages going over the bridge who looked down at the red and said it was a shame to dirty the river that way. But those who were right down in the waters in boats and barges and scows through the red and the rainbow were the sweetest colors a river ever had.")

45. JOHN STARK BELLAMY, *THE KILLER IN THE ATTIC: AND MORE TRUE TALES OF CRIME AND DISASTER FROM CLEVELAND'S PAST* 176 (2002); Stavish, *supra* note 42, at 64.

46. Stavish, *supra* note 42, at 66. Primary sewage treatment was not instituted until the 1910s, and secondary sewage treatment began

The first reported Cuyahoga River fires were well over a century ago. Indeed it appears that burning oil and debris in rivers was somewhat common. Due to the volume of oil in the river, the Cuyahoga was “so flammable that if steamboat captains shoveled glowing coals overboard, the water erupted in flames.”⁴⁷ According to one account, the Cuyahoga caught fire at least three times in the latter half of the 19th century, in 1868, 1883, and 1887.⁴⁸ In 1912, a spark from a passing tugboat ignited oil leaking from the Standard Oil cargo slip, triggering several explosions and a raging inferno. The ensuing conflagration killed five men and destroyed several boats.⁴⁹ A city ordinance prohibited the release of oil into the river by refineries, but it appears to have been rarely enforced, and carried only a \$10 fine.⁵⁰ In 1922, another blaze ignited near the same spot as the 1912 fire,⁵¹ and the river flared again in 1930.⁵²

As pollution increased, and refuse and debris accumulated, the risk of additional fires grew.⁵³ A 1936 report in *The Cleveland Press* noted the threat of fires sweeping through the industrial areas alongside the river, but rather than focusing on the reasons the river might catch fire in the first place, it focused on the lack of adequate fire control services.⁵⁴ Little was done. At one point in 1936 the river ignited and burned for five days.⁵⁵ Again in 1941, a patch of oil

in the 1930s, a development that placed Cleveland “in the forefront of wastewater purification at that time.” *Id.* at 67, 89.

47. CHERNOW, *supra* note 38, at 101.

48. BELLAMY, *supra* note 45, at 176-77.

49. *Oils in River Menace Lives and Property*, CLEVELAND PRESS, May 1, 1912, at 1.

50. *Id.*

51. BELLAMY, *supra* note 45.

52. *Fight Oil Fire on Cuyahoga*, CLEVELAND PRESS, April 2, 1930, at 1.

53. See Dan Williams, *Rivermen Cite Fire Peril, Ask City for Protection*, CLEVELAND PRESS, Mar. 11, 1941, at 1 (noting that city and federal agencies maintained navigability of Cuyahoga, but did not limit oil dumping or remove oil from the river).

54. Robert H. Clifford, *City's Lake and River Fronts in Constant Peril of Conflagration Without the Protection of Fire Tugs*, CLEVELAND PRESS, April 25, 1936, at 1.

55. THE ENCYCLOPEDIA OF CLEVELAND HISTORY 338 (David D. Van Tassel ed., 1996).

scum on the river surface was ignited by ash, causing \$7,500 in damage to an ore carrier.⁵⁶ Another fire burned on the river in 1948.⁵⁷ Throughout, the primary concern over the Cuyahoga was its suitability for shipping.⁵⁸ There was little concern for whether the water was drinkable or safe for recreational use.⁵⁹

Over time, the fire hazard became great enough to threaten local shipping, prompting some local response.⁶⁰ After the end of the Second World War, local businesses and the Port and Harbor Commission began to agitate for river cleanup. Oil-soaked pilings were seen as a significant threat to boats, port facilities, bridges, and other local facilities.⁶¹ In 1948, the local Chamber of Commerce also proposed regular river patrols to find and clean up oil slicks and other potential hazards.⁶² The city's Fire Captain submitted guidelines for safe gasoline storage along the river, believing the two-dozen or so industrial facilities along the river would comply.⁶³ In 1950, the department reported that 46 of 58 fire code violations had been cor-

56. Dan Williams, *Rivermen Cite Fire Peril, Ask City for Protection*, CLEVELAND PRESS, Mar. 11, 1941, at 1, 6.

57. Maxwell Riddle, *River Trip Bares Oil Waste Peril*, CLEVELAND PRESS, May 6, 1952, at 7.

58. For example, in 1957 the U.S. Army Corps of Engineers claimed the Cuyahoga was in "exceptionally good" shape because all local docks would be accessible for the shipping season. No mention was made whether the river was potable or flammable. *Cuyahoga River Seen in Good Condition*, CLEVELAND PLAIN DEALER, March 28, 1957, at 19.

59. *See id.* Cleveland's drinking water was supplied through the municipal water works, not directly from the Cuyahoga River, and there was little recreation on the river in and around Cleveland at the time.

60. Even though water pollution and the occasional fires posed a threat to the harbor and waterborne commerce, the federal government would not utilize its statutory authority to protect rivers and harbors until the 1960s, and would not bring any actions against companies along the Cuyahoga until months after the 1969 fire. *See infra* Part I.G.

61. Julian Griffin, *Fire Hazards Peril Cuyahoga Shipping*, CLEVELAND PRESS, Aug. 11, 1948, at 1.

62. *Id.* at 14.

63. *Id.*

rected, and that all but two companies would be in compliance with the code shortly.⁶⁴ “Industry as a whole has been very cooperative and has made or is making corrections,” reported the city’s Fire Prevention Chief, William R. Ferrie.⁶⁵ Nonetheless, fire officials concluded “the river still presents a serious fire hazard to the community” and further measures were required, including interceptors and skimmers to collect industrial waste and prevent its accumulation on the river.⁶⁶

In 1952, leaking oil from the Standard Oil Company facility was accused of creating, “the greatest fire hazard in Cleveland,” a two-inch thick oil slick on the river.⁶⁷ In spots, the slick spanned the width of the river.⁶⁸ Although many companies had taken action to limit oil seepage on the river, others failed to cooperate with fire officials.⁶⁹ It was only a matter of time before disaster struck. On the afternoon of November 1, 1952, the Cuyahoga ignited again near the Great Lakes Towing Company’s shipyard, resulting in a five-alarm fire.⁷⁰ The next morning’s *Cleveland Plain Dealer* led with a banner headline, “Oil Slick Fire Ruins Flats Shipyard.”⁷¹ Photos taken at the scene are incredible; the river was engulfed in smoke and flame. Losses were substantial, estimated between \$500,000 and \$1.5 million, including the Jefferson Avenue bridge.⁷² The only reason no one died was that it started on a Saturday afternoon, when few shipyard employees were on duty.⁷³

64. Paul Lilley, *2 Tar Firms Hit on Cuyahoga Fire Peril*, CLEVELAND PRESS, Oct. 12, 1950, at 25.

65. *Id.*

66. *Id.*

67. *Sohio Blamed for Oil Slick Fire Hazard*, CLEVELAND PRESS, May 1, 1952, at 33.

68. Maxwell Riddle, *River Trip Bares Oil Waste Peril*, CLEVELAND PRESS, May 6, 1952, at 7.

69. *Id.* (noting that “Texaco and Shell docks were perfectly clean” and the Jones & Laughlin Steel docks were “models of safety” while others were “dangerously unsafe”).

70. *Oil Slick Fire Ruins Flats Shipyard; Flames Hit DryDocks, Three Tugs*, CLEVELAND PLAIN DEALER, Nov. 2, 1952, at 1.

71. *Id.*

72. *Id.*

73. *Id.* at 19.

Compared to the 1952 inferno, the 1969 fire was nothing special,⁷⁴ a freak accident that merited little local concern, but sparked national attention because of increased environmental consciousness throughout the country.⁷⁵ That flammable materials were sometimes dumped into the river was well known, and local officials, with the help of some (though clearly not all) industry leaders sought to address the threat. More responsible firms increased their efforts to limit accidental spills, and boats were commissioned to skim the Cuyahoga to remove oil-soaked debris. Such efforts were not enough to prevent the 1969 fire, but they were a start – and as discussed below, they were only a small portion of the local cleanup efforts that began *before* the fire.

The plight of the Cuyahoga River was hardly unique. The fate of an urban, industrial river from the late 19th century through the 1950s was to be horribly polluted. So long as waterways remained open, and the channels of commerce clear, a river's condition was generally considered acceptable.⁷⁶ In the 19th century, federal pollution control efforts were focused upon maintaining the navigability

74. Environmental historian Theodore Steinberg notes that “when fire broke out yet again on the river on June 22, 1969, no one in Cleveland was probably all that surprised.” THEODORE STEINBERG, *DOWN TO EARTH: NATURE'S ROLE IN AMERICAN HISTORY* 238 (2002).

75. Opinion polls conducted in the late 1960s show a dramatic upswing in public concern about environmental issues generally, and water pollution in particular. See TERENCE KEHOE, *CLEANING UP THE GREAT LAKES: FROM COOPERATION TO CONFRONTATION* 103 (1997). During this same period, several new environmental organizations were launched. See *id.* at 111; see also JONATHAN H. ADLER, *ENVIRONMENTALISM AT THE CROSSROADS* 23-24 (1995). Subscriptions to environmental publications also increased dramatically between 1968 and 1970. See *Business Bulletin: Pollution Publication Get a Boost From Rising Worry about the Environment*, WALL ST. J., Feb. 26, 1970, at 1.

76. See *supra* note 58, at 19 (noting U.S. Army Corps of Engineers' determination that river was in “exceptionally good” condition because there were no obstructions to navigability).

of harbors and interstate waterways.⁷⁷ The River and Harbors Act of 1899 contained provisions barring the disposal of wastes into navigable waters, but it did not address most liquid wastes, which were responsible for the lion's share of water pollution.⁷⁸

As strange as it may sound to some, the Cuyahoga was also not the only site of river fires. A river leading into the Baltimore harbor caught flame on June 8, 1926.⁷⁹ The Buffalo River in upstate New York also caught fire in the 1960s.⁸⁰ The Rouge River in Dearborn, Michigan "repeatedly caught fire" like the Cuyahoga,⁸¹ and a tugboat on the Schuylkill burned when oil on the river's surface was lit.⁸² The tragedy for Cleveland was not simply that oil and debris caught flame, but that the event transpired as the nation's environmental consciousness was awakening, and searching for symbols of the burgeoning environmental crisis. A river on fire fit that bill.

C. *Cleaning the Cuyahoga*

As commonly told, indifferent state and local officials were entirely to blame for the sorry state of the Cuyahoga, and only federal intervention turned things around. A conflagration on the river was "inevitable" due to the lack of stringent federal regulation of water

77. N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part III: The Federal Effort*, 52 IOWA L. REV. 799, 803-04 (1967) [hereinafter Hines III].

78. *Id.* at 804. In the 1960s, the Rivers and Harbors Act would eventually be applied to the disposal of some liquid wastes, such as oil, gasoline, and other flammable materials. See *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

79. *River Afire Rolls under Baltimore*, CLEVELAND PLAIN DEALER, June 9, 1926, at 1.

80. UPI, *Significant Progress on Water Pollution Reported*, N.Y. TIMES, Feb. 12, 1984, at 31; see also *supra* note 79.

81. See, e.g., *United States v. Ashland Oil & Transport Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) (taking judicial notice that the Rouge and Cuyahoga Rivers had "repeatedly caught fire").

82. *Kernan v. American Dredging Co.*, 355 U.S. 426, 427 (1958) (noting tugboat "caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly flammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river").

pollution.⁸³ As recounted in one prominent environmental history, “In 1881, the mayor of Cleveland called the Cuyahoga River ‘an open sewer through the center of the city.’ It remained so until passage of the Clean Water Act in 1972.”⁸⁴ Yet contrary to popular perception, Cleveland officials began river cleanup *before* the 1969 fire.⁸⁵ The brief blaze may have prompted federal action to address water pollution, but local officials and community leaders were well aware of the Cuyahoga’s plight and had already initiated cleanup efforts, including efforts to remove flammable debris and upgrade local sewage treatment facilities. “We were already doing the things we needed to clean up things there, and then the fire happened,” recalls Ben S. Stefanski II, Utilities Director at the time of the fire.⁸⁶

It appears that the nadir of the Cuyahoga was well before the 1969 fire, perhaps around the time of the 1952 inferno. In the days following the November 1952 blaze, local business leaders demanded action by the city.⁸⁷ In October 1959, the *Cleveland Plain Dealer* trumpeted the reappearance of fish in the Cuyahoga, which suggests there had been noticeable improvement in at least some aspects of river quality, but more action was still needed.⁸⁸ In 1962, the *Cleveland Press* reported that the river was “choked with debris” and “filthier than ever.”⁸⁹ The main channel leading to the port was kept clear by the Port Commission, but little else was being done to keep the river clear and safe, causing some local government and business

83. Oliver A. Houck, *The Water, The Trees and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279, 2286 (1996).

84. PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 39 (1993).

85. Yet, as discussed *infra* notes 113-114, 132-171 and accompanying text, Ohio’s state officials were slower to act.

86. Roger Brown, *1969 River Blaze Scarred Image*, CLEVELAND PLAIN DEALER, June 18, 1969, at 1-B.

87. *See Demands Burke End Oil Fire Hazard on Cuyahoga River*, CLEVELAND PRESS, Nov. 3, 1952, at 6.

88. Sanford Watzman, *It’s True! Fish Come Back to Ol’ Cuyahoga*, CLEVELAND PLAIN DEALER, Oct. 23, 1959, at 1. It is quite remarkable, in itself, that the presence of fish in the Cuyahoga river would be considered worthy of front page treatment.

89. Harry McClelland, *Scum, Debris Make River a Fire Hazard*, CLEVELAND PRESS, Mar. 13, 1962, at 1.

leaders to respond. By 1963, the primary industrial and municipal users of the river had formed the Cuyahoga River Basin Water Quality Committee, which began conducting water quality surveillance programs.⁹⁰ Shortly thereafter, the city also hired a private scavenger vessel to remove debris in the river.⁹¹

Despite these efforts, and whatever progress they produced, a federal report issued in October 1968 identified the Cuyahoga as one of the most heavily polluted rivers in the nation.⁹² Another report noted the “gross pollution” of the river, consisting of “oil and debris, inorganic compounds from chemical- and steel-mill wastes, and excessive nutrients from untreated domestic sewage.”⁹³ The Cuyahoga was clearly “the most polluted water in the Erie basin,” and was the second greatest contributor to Lake Erie pollution.⁹⁴ As one federal official described the situation, “[t]he lower Cuyahoga River and navigation channel throughout the Cleveland area is a waste treatment lagoon. At times, the river is choked with debris, oils, scums, and floating globs of organic sludges.”⁹⁵

While the plight of the Cuyahoga River, as well as Lake Erie, had yet to become national issues, they prompted public local concern.⁹⁶ Local activists, such as David Blaushild, and journalists, such as the *Cleveland Plain Dealer*'s Robert Drake, urged immediate action on

90. See FRANK A. BUTRICO, ET AL., RECOMMENDED PROJECTS FOR POLLUTION ABATEMENT ON THE LOWER CUYAHOGA RIVER TO THE OHIO WATER DEVELOPMENT AUTHORITY 7 (Battelle Memorial Institute, December 20, 1968).

91. See *id.* at 13; U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CONFERENCE IN THE MATTER OF POLLUTION OF LAKE ERIE AND ITS TRIBUTARIES, PROCEEDINGS Vol. 4, 837-38 (Aug. 1965) (statement of Mayor Locher noting that the city was opening bids for a contract to remove debris from the river).

92. *Cuyahoga River Put Among the Most Rank*, CLEVELAND PLAIN DEALER, Oct. 3, 1968, at 10.

93. See BUTRICO, ET AL., *supra* note 90, at 1.

94. Arnold W. Reitze, Jr., *Wastes, Water and Wishful Thinking: The Battle of Lake Erie*, 20 CASE WESTERN RES. L. REV. 5, 8-10 (1968)(Cleveland contributed nine percent of the municipal waste-load entering Lake Erie; Detroit contributed 64.4 percent).

95. *Id.* at 7 (quoting George Harlow, Director, Lake Erie Program Office, Federal Water Pollution Control Administration).

96. KEHOE, *supra* note 75, at 53.

pollution matters.⁹⁷ In 1965, Ohio's governor requested that the federal government hold a conference on Lake Erie pollution under the Federal Water Pollution Control Act.⁹⁸ At the conference, Blaushild delivered over 200,000 letters and petition signatures he gathered through his car dealership calling for greater enforcement of existing pollution control laws.⁹⁹ Blaushild and other local activists were driven by a "strong sense of place" and desire to protect those areas with which "they were familiar because of residential proximity or frequent recreational use."¹⁰⁰ Blaushild would later orchestrate litigation efforts to prompt river cleanup.¹⁰¹

By 1968, Cleveland leaders apparently agreed on the need to address water pollution in the Cuyahoga.¹⁰² As city residents moved to the suburbs and industrial activity ebbed, local government officials and business leaders sought to stem the city's decline.¹⁰³ Carl Stokes, elected Mayor in 1967, pledged a greater commitment to pollution concerns than his predecessor.¹⁰⁴ In November 1968, voters approved a \$100 million bond issue to finance river cleanup and protection.¹⁰⁵ The measure passed by a two-to-one margin.¹⁰⁶

97. *See, e.g., id.* at 44, 55.

98. Reitze, *supra* note 94, at 50-1.

99. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CONFERENCE IN THE MATTER OF POLLUTION OF LAKE ERIE AND ITS TRIBUTARIES, PROCEEDINGS Vol. 4, 1068-70 (Aug. 1965). *See also* KEHOE, *supra* note 75, at 71. Blaushild even went so far as to take out full-page ads in the *Cleveland Plain Dealer*. *Id.* (picture insert).

100. KEHOE, *supra* note 75, at 53.

101. *See infra* Part I.F.

102. Cleveland's initiative was not singular. As William Hines reported in 1966, "in most states community awareness of the worsening condition of the waters has eventually generated sufficient pressure to require more effective pollution controls." N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 201 (1966).

103. *See generally, Business Now Backs Cleveland*, BUSINESSWEEK, Sept. 21, 1968, at 118.

104. Stavish, *supra* note 42, at 127-28.

105. Prior to the bond issue, it could be said that "[t]he failure to provide adequate municipal sewage treatment is almost entirely due to a lack of community interest in abating its harmful waste dis-

Among the projects financed by the bond issue were sewer system improvements, stormwater overflow controls, harbor improvement facilities, and an improved debris removal program.¹⁰⁷ City officials welcomed the vote, calling it a “mandate” for the city to clean up the river, as well as an opportunity “to ask for strict enforcement of state and federal anti-pollution laws.”¹⁰⁸ They also sought to convince state officials to locate a state water pollution control office in Cleveland at city expense. State cooperation was possible as the legislature had created the Ohio Water Development Authority several months earlier, and the governor requested that the new agency devote “specific attention” to pollution abatement projects in the Lower Cuyahoga River Basin.¹⁰⁹ In early 1969, city leaders agreed to finance a program to remove oil and debris from the river.¹¹⁰ In June, the newly created Clean Water Task Force began researching new methods for removing oil pollution from the Cuyahoga with some federal financial support.¹¹¹ One official even proposed using the money to reverse the flow of the Cuyahoga, so as to stem pollution around Cleveland and in Lake Erie, although an earlier proposal along the same lines had been rejected by federal officials.¹¹²

charges, for there are no technological problems” preventing sewage treatment. Reitze, *supra* note 94, at 9.

106. *Voters Win Round 1 of War on Pollution*, CLEVELAND PLAIN DEALER, Nov. 7, 1968, at 9.

107. *See generally*, George R. Watkins, *Lake Erie Ain't Dead . . . But It Needs Help* on Nov. 5, CLEVELANDER, Oct. 1968, at 50-51.

108. Betty Klaric, *Passage of Clean Water Issue Is Called a Challenge to City*, CLEVELAND PRESS, Nov. 6, 1968, at A13; *Voters Win Round 1 of War on Pollution*, CLEVELAND PLAIN DEALER, Nov. 7, 1968, at 9. It is also worth noting that voters in Michigan also approved a bond issue to finance pollution control for Lake Erie. *See The People vs. Pollution*, CLEVELAND PRESS, Nov. 8, 1968, at A8.

109. *See* BUTRICO, ET AL., *supra* note 90, at 3-4.

110. *Bill is Due on Cleanup of Cuyahoga River*, CLEVELAND PRESS, Mar. 25, 1969, at D-14.

111. Department of Public Utilities City of Cleveland, Press Release, June 13, 1969.

112. William C. Barnard, *Reverse Cuyahoga, Pollution Chief Urges*, CLEVELAND PLAIN DEALER, Mar. 25, 1969, at 9-A.

The bond issue was important, but it was not a panacea. The city delayed issuance of the bonds due to unfavorable interest rates and the lack of matching funds from the state and federal governments.¹¹³ The state had apparently expected to provide funding for pollution control projects, yet balked when federal support was not forthcoming.¹¹⁴ Congress authorized substantial sums for Lake Erie cleanup, but then failed to actually appropriate the money.¹¹⁵ Cleveland spent approximately \$30 million on the construction of waste treatment facilities from 1967 to 1970.¹¹⁶ During this period, the state provided less than \$1 million in assistance, and the federal government allocated “not one dime” to help clean up the Cuyahoga.¹¹⁷ The lack of state and federal support for Cleveland’s efforts was nothing new. Mayor Stokes’ predecessor, Ralph Locher, also complained that Ohio’s cities received no financial support from the state for pollution control efforts.¹¹⁸ Indeed, throughout the 1960s, federal expenditures for pollution control were quite minor, particularly in comparison to the \$100 million approved by Cleveland’s voters.

The developments in Cleveland appear to have been part of a larger trend. The Ohio legislature enacted legislation to control water pollution in 1951. Among other things, this law created a state water pollution control board and prohibited the discharge of harmful substances into state waters absent a valid permit from the state board. William Hines reported in 1966 that “in the majority of states interest in controlling pollution has come alive in the last fifteen

113. Adele Z. Silver, *Antipollution Efforts Deceiving*, CLEVELAND PLAIN DEALER, July 10, 1969, at 15-A.

114. See Letter from James A. Rhodes, Governor, State of Ohio, to Ben S. Stefanski, Director, Department of Public Utilities (Dec. 4, 1968)(on file with Western Reserve Historical Society in Cleveland, Ohio).

115. *Antipollution Efforts Deceiving*, *supra* note 113. The practice of authorizing substantial sums for pollution control but then failing to appropriate the authorized funds would become a pattern the city would repeatedly face.

116. Stokes Testimony, *supra* note 5, at 413.

117. *Id.*

118. See Reitze, *supra* note 94, at 79. It is also a fair criticism that Ralph Locher was less concerned about river cleanup than would be his successor, Carl Stokes.

years.”¹¹⁹ A 1972 General Accounting Office study further noted that state programs improved substantially in the late 1960s.¹²⁰ Federal legislation encouraged greater state efforts, but only to a limited extent.¹²¹ “In most cases it has been local public indignation over the filth of local waters that has breathed life into the state control effort,” Hines concluded.¹²² By 1966, every state had enacted water pollution legislation of some sort delegating responsibility to one or more state agencies.¹²³ Hines found that some states’ regulatory programs were more comprehensive than others, but observed that this could largely be the result of differences in state experiences and levels of industrialization.¹²⁴ As would be expected, different states made different decisions about regulatory structure and priorities. Many states did not enforce particularly rigorous standards, and enforcement was inconsistent.¹²⁵ Much the same could be said of federal efforts to enforce then-existing federal regulations, including the provisions of the Rivers and Harbors Act of 1899 and the 1965 Federal Water Pollution Control Act.

Although reliable data on water quality in the 1960s is hard to come by, there is reason to believe that state and local efforts produced measurable, if modest, improvement in water quality in many areas. A. Myrick Freeman of Resources for the Future notes that pre-1972 state efforts were “apparently somewhat successful” at controlling water pollution: “The results of the EPA’s first National Water Quality Inventory, conducted in 1973, indicated there had been significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacte-

119. N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 234 (1966) [hereinafter Hines I].

120. U.S. General Accounting Office, *Water Pollution Abatement Program: Assessment of Federal and State Enforcement Efforts*, B-166506 (Mar. 23, 1972), at 8. The GAO study was based on a review of six state programs. *Id.* at 5-6.

121. Hines I, *supra* note 119, at 234 (noting federal encouragement “is probably not as important as is often suggested”).

122. *Id.* at 234.

123. *Id.* at 215.

124. *Id.* at 216.

125. *Id.* at 224, 227.

ria.”¹²⁶ This does not mean that additional efforts, including greater federal intervention, were unnecessary, but it does temper the general perception that state and local governments were total laggards in pollution control.

While local efforts may have been sufficient to provide some level of protection for the Cuyahoga, Lake Erie suffered the fate of any common pool resource. Absent federal involvement, any jurisdiction abutting the lake that sought to curtail its pollution could have no guarantee that other jurisdictions would take the same action. The fact contributed to the call for federal involvement, even if only to prevent states from imposing their pollution upon other jurisdictions.¹²⁷ Interestingly enough, most lake pollution came from municipalities in the region, and Cleveland was among the first to undertake efforts to clean up its act.¹²⁸

Cleveland made significant strides toward environmental improvement in 1968 and 1969. In addition to the bond issue and the creation of the Clean Water Task Force – both before the June 1969 fire – the city enacted “one of the strongest air pollution codes in the country.”¹²⁹ Yet while pollution remained a prominent item on the

126. A. Myrick Freeman, *Water Pollution Policy*, in *PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION* 114 (Paul Portney ed., 1990).

127. The control of interstate pollution, a jurisdictional “spillover” problem, is perhaps the most powerful justification for federal environmental regulation. See, e.g., Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 44 *DUKE L.J.* 931, 932 (1997) (“Given the inherent difficulties in regulation by any single state, transboundary pollution would seem to present a clear case for shifting regulatory authority from local to more centralized levels of governance.”). For a greater discussion of the justification for federal environmental regulation to curb such interstate spillover problems, see Jonathan H. Adler, *Let 50 Flowers Bloom: Transforming the States Into Laboratories of Environmental Policy*, 31 *ENVTL. L. REP.* 11284, 11298-300 (2001); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 *U. PA. L. REV.* 2341 (1996).

128. Reitze, *supra* note 94, at 81.

129. Letter from Mayor Carl B. Stokes, Mayor, City of Cleveland, to Stephen Romine, Professor, University of Colorado (October 26, 1970)(on file with Western Reserve Historical Society in Cleveland, Ohio).

city's agenda, Mayor Stokes forthrightly declared that, as Mayor, he "face[d] many more serious crises which affect the lives of my constituents to a greater degree than air and water pollution. . . . These include housing, jobs, food, clothing and the ability to live in a society free of racial hatred."¹³⁰ Mayor Stokes expressed his "hope that the amount of concern over the environmental crisis will not overshadow these more basic and in many ways more difficult social problems."¹³¹

None of this suggests that the city was blameless in the June 1969 fire. Although some of the local efforts, such as the bond initiative, were impressive, additional measures were possible, including more diligent efforts to prevent the accumulation of oil and debris in the river. Improving sewage treatment along the river was a significant step, but it would do little by itself to reduce the fire hazard. A reasonable question to ask is that if the city was so concerned about the state of the Cuyahoga, why did it not do more to address the problem, particularly the aspects of the problem which contributed to the various fires? If local citizens were so upset why were they not more aggressive at using existing legal measures to combat pollution? In particular, why were there not more efforts to use common law doctrines of private and public nuisance to address pollution concerns? It is to these questions that the article now turns.

D. *City and State*

In the wake of the June 1969 fire, many city officials pointed fingers at the state of Ohio for creating a legal regime which made it unduly difficult for the city to maintain local river quality. Specifically, officials pointed to the state water pollution permitting system which insulated permitted facilities from public nuisance actions and generally inhibited local efforts to combat pollution. Had the state been more aggressive and cooperative, local officials suggested, the Cuyahoga would have been in much better shape. State officials, for their part, accused the city of insufficient local efforts.

130. Letter from Carl B. Stokes, Mayor, City of Cleveland, to Bernard N. Sroka (August 12, 1970)(on file with Western Reserve Historical Society in Cleveland, Ohio).

131. *Id.*

Just after the June 1969 fire, Mayor Stokes announced he would petition the state for relief from upstream pollution sources.¹³² “We’ll file the lawsuit on behalf of all the citizens of Cleveland and let the courts decide,” Stokes declared.¹³³ While there are no news accounts suggesting an actual lawsuit was filed, Mayor Stokes wrote to Ohio Governor James Rhodes complaining that Cleveland had “been unable to contain” water pollution on the Cuyahoga “because the City of Cleveland has no jurisdiction over the river.”¹³⁴ Stokes alleged that “[t]he State has capriciously been circumventing the laws of Ohio by issuing licenses to polluters and making no effort to prevent the kind of occurrences” that led to the fire.¹³⁵ Despite prior requests from Cleveland to the state, “nothing ha[d] been done” to enforce water pollution controls on the Cuyahoga, Stokes charged.¹³⁶ Stokes also wrote to the Director of the Ohio Natural Resources Department, inquiring about the lack of enforcement of Ohio’s anti-litter law on the Cuyahoga.¹³⁷

State officials responded to Mayor Stokes’ complaint by citing the city’s sewer system as a major source of oil in the river, and threatened enforcement actions against the city.¹³⁸ According to the letter, the city’s “storm sewers contain oily wastes washed into them from automobile drippings on the streets and in filling stations. The sani-

132. Betty Klaric, *Stokes Promises to Lead Pollution Fight*, CLEVELAND PRESS, June 24, 1969, at D3.

133. *Id.*

134. Letter from Carl B. Stokes, Mayor, City of Cleveland, to James A. Rhodes, Governor, State of Ohio (June 24, 1969)(on file with Western Reserve Historical Society in Cleveland, Ohio). As noted *infra* notes 193-196 and accompanying text, state water pollution permits shielded polluting facilities from public nuisance actions.

135. *Id.*

136. *Id.*

137. Letter from Carl B. Stokes, Mayor, City of Cleveland, to Fred E. Morr, Director, Ohio Natural Resources Department (June 24, 1969)(on file with Western Reserve Historical Society in Cleveland, Ohio).

138. *Oil in River is Blamed on City*, CLEVELAND PLAIN DEALER, July 4, 1969, at 1. State officials had long been more concerned about pollution from municipal sewage systems than with industrial pollution.

tary sewers have oily wastes and the discharge from homes, businesses and industries.”¹³⁹ Several Cleveland companies and neighboring suburbs were also implicated in the state’s response.¹⁴⁰ The state also threatened to sanction the city and local businesses by freezing new building within the city, banning industrial expansion without adequate waste treatment, and direct legal action to close non-complying facilities.¹⁴¹ In regard to Ohio’s anti-litter law, the state’s response was equally direct, if less punitive. Deputy Director of the Department of Natural Resources S.L. Frost wrote Mayor Stokes that enforcement of the anti-litter law was the obligation of all municipal police forces under state law, and that it was Stokes’ responsibility, as Mayor, “to ensure performance of that duty.”¹⁴²

In Cleveland’s defense, local officials claimed that the fire had been caused by “highly volatile materials,” rather than the sort of oil found in the city sewers.¹⁴³ The sort of oil typically discharged from boats or flowing from city sewers was generally “low grade” and “non-inflammable in the water.”¹⁴⁴ City treatment plants complied with state requirements, city officials claimed, and a planned upgrade of local sewer facilities had been delayed by the lack of state or federal matching funds.¹⁴⁵ Local officials agreed with those from the state that several local industrial facilities were significant contributors to Cuyahoga water pollution. Yet, this was something that only state officials could do something about, as these facilities held

139. *Id.*

140. *Id.*

141. Betty Klaric, *Cleveland Is Threatened with Freeze on Building*, CLEVELAND PRESS, July 4, 1969, at 1.

142. Letter from S.L. Frost, Deputy Director, Department of Natural Resources, to Carl B. Stokes, Mayor, City of Cleveland (July 7, 1969).

143. Letter from Dr. Edward J. Martin, Director, Clean Water Task Force, to James A. Rhodes, Governor, State of Ohio (July 7, 1969); *City Water Expert Disputes State Official Over River Fire*, CLEVELAND PLAIN DEALER, July 8, 1969, at 12-A.

144. *City Investigating Cause of River Fire*, CLEVELAND PLAIN DEALER, June 24, 1969, at 4-D.

145. Letter from Dr. Edward J. Martin, Director, Clean Water Task Force, to James A. Rhodes, Governor, State of Ohio (July 7, 1969); *City Water Expert Disputes State Official Over River Fire*, CLEVELAND PLAIN DEALER, July 8, 1969, at 12-A.

state-issued permits. Writing to Ohio Governor Rhodes on July 7, 1969, Clean Water Task Force Director Edward J. Martin noted that:

All of the industries mentioned in your letter are under State Ohio Water Pollution Control Board permit [sic] to discharge wastes. The City of Cleveland has no further jurisdiction over these discharges since the State has assumed primary responsibility for enforcement in the Cuyahoga River.¹⁴⁶

The state's water pollution control board licensed industrial facilities along the river, providing potential immunity from suit. "We have no jurisdiction over what is dumped" in the river, explained Utilities Director Ben. S. Stefanski II. "The state licenses the industries and gives them legal authority to dump in the river. Actually, the state gives them a license to pollute."¹⁴⁷ Among the only times the city could take direct action against an industrial polluter was when a facility illegally discharged wastes directly into the city sewer system.¹⁴⁸ Such concerns had also been raised prior to the June 1969 fire. In December 1968, then-State Representative George Voinovich urged Ohio Governor James Rhodes to "get tough" on industrial polluters.¹⁴⁹ Ohio had "one of the best pollution controls laws in the United States," Voinovich charged, but it was not enforced.¹⁵⁰

Although state law authorized regulatory controls on polluting activity, such controls were rarely imposed with any stringency. Small businesses complained that state enforcement efforts tended to focus on minor actors, while large industrial firms could pollute with impunity.¹⁵¹ Mayor Stokes was even more critical, testifying before Congress that the state "issues water discharge permits at such a low level that industries and municipalities can virtually dump what amounts almost to pure garbage and only minimally treated effluents

146. Letter from Dr. Edward J. Martin, Director, Clean Water Task Force, to James A. Rhodes, Governor, State of Ohio (July 7, 1969).

147. *City Investigating Cause of River Fire*, CLEVELAND PLAIN DEALER, June 24, 1969, at 4-D.

148. See, e.g., Betty Klaric, *City Sues Railroad in Oil Spill*, CLEVELAND PRESS, Sept. 10, 1969, at A11 (noting city lawsuit against railroad for discharging 52,526 gallons of oil into sewers).

149. *Stricter Pollution Policy Is Urged*, CLEVELAND PLAIN DEALER, Dec. 14, 1968, at 7.

150. *Id.*

151. KEHOE, *supra* note 75, at 109.

into the streams, the rivers, and the tributaries that lead into the lake.”¹⁵² In theory, the permit system was designed to enable industrial firms to develop and implement cost-effective pollution controls.¹⁵³ In practice, it appears that once permits were issued, industrial firms were able to pollute with impunity.¹⁵⁴

State officials acknowledged at the time that they adopted a relatively hands off approach to enforcement of permit conditions. As Dr. Emmett Arnold, chairman of the Ohio Water Pollution Control Board, told the *Cleveland Plain Dealer* several days after the fire, he was unaware of the board *ever* taking “legal action – a fine or revoking of a permit” for pollution violations.¹⁵⁵ “We can usually get these industries to be good boys,” he explained¹⁵⁶ – but apparently not good enough.

State water quality regulations were adopted in 1966 and amended in 1967.¹⁵⁷ Regulations contained seven water quality criteria categories to be used for classifying Ohio waters: public water supply; industrial water supply, aquatic life A, aquatic life B, recreation, agricultural use and stock watering, and cold water fisheries.¹⁵⁸ In theory, *all* Ohio waters were also to meet minimum standards, including being “free from floating debris, oil, scum and other floating materials” and “free from materials . . . producing color, odor or other conditions in such degree as to create a nuisance.” But this was not always the case, as evidenced by the condition of the Cuyahoga at the time. In the early 1960s, “the Ohio Water Pollution Control Board still subscribed to the idea that the use of a stream for waste disposal was legitimate, so long as it did not interfere with other accepted uses.”¹⁵⁹ In practice, Ohio’s system of water zoning

152. Stokes Testimony, *supra* note 5, at 413.

153. See U.S. DEP’T OF HEALTH, EDUCATION & WELFARE, CONFERENCE IN THE MATTER OF POLLUTION OF LAKE ERIE AND ITS TRIBUTARIES, PROCEEDINGS vol. 1, 48 (Aug. 1965) (statement of Congressman Charles A. Vanik).

154. *Id.*

155. *State Engineers Prowl River for Fire Source*, CLEVELAND PLAIN DEALER, June 25, 1969, at 9-A.

156. *Id.*

157. Reitze, *supra* note 94, at 81.

158. *Id.* at 52.

159. KEHOE, *supra* note 75, at 35.

“legitimiz[e] continued pollution of our waterways by industry.”¹⁶⁰ The harbor area around Cleveland was zoned as an industrial water supply.¹⁶¹ The industrial water supply standard was such that water classified for industrial use was unusable for any other purpose, as the condition of the Cuyahoga amply demonstrated.¹⁶² The aquatic life B standard was not much better as, despite its name, water meeting that standard could not support much aquatic life.

The actions of the state government “demonstrated that it is possible to approach the point of doing nothing to solve the problem while creating an atmosphere of action.”¹⁶³ Ohio had various programs, yet it preempted local efforts and common law remedies while failing to devote resources in water pollution control. As of 1967, Cleveland had received no state support for pollution control efforts, and was itself spending over \$1 million per year.¹⁶⁴ Despite federal pressure to begin cleaning up Lake Erie, the state refused to enforce cleanup deadlines on most jurisdictions.¹⁶⁵ Historically, Ohio residents were unwilling to pay the cost to control their own pollution, particularly that which results from untreated sewage.¹⁶⁶ Until the late 1960s, most Ohioans had other priorities. Nonetheless, it would be wrong to think that Ohio was alone. Other states in the region were no more aggressive in addressing water pollution.¹⁶⁷

Under both federal and local pressure, the state did eventually become more active in enforcement of its legal provisions. In April 1970, the Ohio Water Pollution Control Board followed through with its threat and imposed a freeze on building in Cleveland and 33 suburbs until Cleveland developed detailed plans for the construction and upgrade of regional sewers and interceptor systems.¹⁶⁸ The re-

160. Reitze, *supra* note 94, at 54.

161. *Id.* at 53.

162. *Id.* at 54.

163. *Id.* at 77.

164. *Id.* at 79.

165. See Betty Klaric, *Pollution Cleanup Delay Hit by U.S. in Lake Erie Report*, CLEVELAND PRESS, June 26, 1969, at A4.

166. See Reitze, *supra* note 94, at 76.

167. *Id.* at 78-9, 81.

168. Betty Klaric, *Building Ban Here Reflects U.S. Environmental Furor*, CLEVELAND PRESS, April, 16, 1970, at F4; Alan Horton, *City Awaits Formal Building Ban*, CLEVELAND PRESS, April 16, 1970, at F4.

sponse from Cleveland officials was less than favorable. “The state wants us to build now what was proposed in 1966 and what we think is totally inadequate today,” said city Utilities Director Ben Stefanski II.¹⁶⁹ Nonetheless, Stefanski urged the Mayor to take the necessary steps to lift the ban.¹⁷⁰

The conflict between city and state officials doubtlessly complicated cleanup efforts in the late 1960s. As might be expected, political officials were at least as interested in assigning (or avoiding) blame for the June 1969 fire as they were actually addressing pollution concerns. City officials were obviously more aware of the costs imposed by the foul state of the Cuyahoga River, and were sensitive to the outrage building in their community. While the state seems to have been indifferent, if not hostile, to local concerns about industrial pollution at the outset – at least in and around Cleveland¹⁷¹ – it eventually became more responsive to the city’s concerns as environmental protection became a more salient political concern. In the fall of 1972, shortly before passage of the Federal Water Pollution Control Act, the state created the Ohio Environmental Protection Agency, thereby unifying the state’s various environmental protection programs. With the creation of the Ohio EPA, the state also became more aggressive in addressing environmental concerns. This development suggests that Cleveland and Columbus were on their way to resolve their conflicts and cooperate on pollution control efforts before the federal government intervened.

E. Failing the Common Law

Another culprit traditionally blamed for the poor state of environmental quality prior to the enactment of federal environmental law is the common law. In particular, commentators note that common law

169. Alan Horton, *City Awaits Formal Building Ban*, CLEVELAND PLAIN DEALER, April 16, 1970, at F4.

170. Letter from Ben S. Stefanski II, Director, Department of Public Utilities, City of Cleveland, to Carl B. Stokes, Mayor, City of Cleveland (April 16, 1970).

171. Cleaning up the Cuyahoga around Cleveland was a relatively low environmental priority for the state. *See* Stokes Testimony, *supra* note 5, at 413 (noting the state ranked Cleveland 25th on the priority list for receipt of federal pollution control funds).

causes of action, such as nuisance and trespass, were unable to remedy, let alone prevent, industrial pollution to any great extent. As explained in a top-selling environmental law casebook, “one of the motivations for legislation in the area of environmental degradation has been a dissatisfaction with the capacity of the common law to mediate between individual property rights and emerging environmental harm in a manner that adequately respects modern concerns about environmental quality.”¹⁷² Another commentator observes “the common law era saw some of the most dramatic pollution episodes. It was during this time that the Cuyahoga River caught fire.”¹⁷³ This view is certainly understandable. In his seminal history of water pollution control efforts, Hines noted in 1966 that in many jurisdictions, “it ha[d] not been very long since . . . private remedies in law and equity were the mainstays of the local pollution control program.”¹⁷⁴ Yet despite the existence of such remedies, water pollution accumulated and some rivers, including the Cuyahoga, eventually burned.

There is no doubt that the common law faced – and still faces – substantial limitations in its ability to address pollution concerns.¹⁷⁵ Yet it is also likely that the common law may have gotten something of a bum rap. The history of the Cuyahoga River suggests that the inherent limitations of the common law were exacerbated by government policy. Specifically, there is reason to believe that common law actions, in particular municipal actions to abate public nui-

172. ROBERT PERCIVAL, ET AL., *ENVIRONMENTAL PROTECTION: LAW, SCIENCE, AND POLICY* 1018 (2d ed. 1996).

173. Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 *GEO. MASON L. REV.* 965, 977 (1999).

174. Hines I, *supra* note 119, at 196. *See also*, Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 *GEO. MASON L. REV.* 923 (1999); *Cf. Rights and Remedies in the Law of Stream Pollution*, 35 *VA. L. REV.* 774 (1949).

175. Of course, much the same can be said of most, if not all, regulatory programs that have been implemented in place of the common law. As one recent review of federal environmental policy concluded, “For all its accomplishments, we conclude that the pollution control regulatory system is deeply and fundamentally flawed.” J. CLARENCE DAVIES & JAN MAZUREK, *REGULATING POLLUTION* 2 (1997).

sances, could have played a more substantial role in curtailing pollution along the Cuyahoga. The Cuyahoga experience sheds light on the nature of the common law's limitations, just as it may help illuminate the strengths and weaknesses of other pollution control strategies and how they were adopted.

While private nuisance actions appear to have been reasonably effective at providing relief from acute pollution problems causing identifiable harms to specific landowners, they were not well suited to address more diffuse pollution problems. Where there were numerous contributors to the pollution it was more difficult to identify culpable defendants. On the Cuyahoga it could have been particularly difficult to identify which industrial facilities were responsible for flammable debris and oil or the material implicated in a specific fire. Similarly, some pollution problems did not satisfy the traditional requirements of private nuisance actions, particularly the identification of concrete and particularized harms suffered by the plaintiff but not by the public at large. There may not have been many private landowners along the river who could have claimed the sort of specific harm to the use and enjoyment of their property required to bring a private nuisance action (although the owners of the railroad bridges harmed in the 1969 fire would undoubtedly had sufficient basis for a cause of action had a definitive source of the flammable material been identified). The Cuyahoga's pollution had a broad effect on most of the river's users. For these reasons, William Hines concluded that "[p]rivate remedies available to persons suffering injury as a result of unreasonable water use have not proved effective in protecting the public interest."¹⁷⁶

176. Hines I, *supra* note 119, at 195. For other critiques of the use of common law to prevent pollution, see Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 586 (2002); see also Cross, *supra* note 173; Andrew Mcfee Thompson, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L. J. 1329 (1996); and Peter S. Menell, *The Limitations of Legal Institutions for Addressing Environmental Risks*, J. ECON. PERSP. 93 (1991). But see Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation*, 41 WASHBURN L.J. 515 (2002); see also THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger E. Meiners & Andrew P. Morris eds.,

Hines identified two problems with private causes of action. First, “actions based on pollution are not easy to win.”¹⁷⁷ Potential plaintiffs face numerous obstacles, from standing and the evidentiary burden to affirmative defenses and judicial reluctance to provide injunctive relief. Over time, juries may become more sympathetic to nuisance claims brought against corporate polluters, but in many jurisdictions this would not produce rapid environmental progress. Hines was also concerned that “courts are generally not well suited to perform the functions required for effective pollution control.”¹⁷⁸ “A control agency specializing in water quality problems and endowed with authority differently in kind and degree from that exercised by the courts seems essential to cope effectively with water pollution.”¹⁷⁹

It should be noted that the viability of nuisance claims varied to some extent from state to state. Indeed, private nuisance actions may have been more viable in Ohio than in some other jurisdictions at the time. Ohio courts rarely considered the reasonableness of activities giving rise to nuisance claims and Ohio courts were generally hostile to claims that polluters could acquire prescriptive rights if they had continually polluted for a sufficient amount of time before a suit was filed.¹⁸⁰ It appears courts may have been more receptive to

2000); and Meiners & Yandle, *supra* note 174; Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1009 (1996).

177. Hines I, *supra* note 119, at 197.

178. *Id.*

179. *Id.* at 201.

180. *See Survey of Ohio Law – 1955*, WESTERN RESERVE L. REV. 317-19 (June 1956). One notable exception to this rule is when the plaintiff also used the river for its own pollution discharge. *See Cleveland v. Standard Bag & Paper Co.*, 74 N.E. 206 (Ohio 1905). Although the *Standard Bag* case seems to support the argument that prescriptive easements for pollution may be obtained, at least by a public entity, the Court also repeatedly noted that the plaintiff was a paper mill, “whose contributions to the pollution of the stream would render it unfit for primary or domestic purposes.” *Id.* at 209. *Cf. Peyton v. Hammer*, 269 N.E. 2d 136, 138 (Ohio Com. Pl. 1970) (noting insofar as *Standard Bag* stood for polluter’s ability to obtain

“coming to the nuisance” arguments, however. In 1928, for example, a state court agreed to dismiss a private nuisance claim against an industrial rayon plant that had been sited before the development of nearby residential neighborhoods.¹⁸¹

Through the 1950s, Ohio courts generally applied traditional nuisance standards in water pollution cases, finding dischargers liable where the evidence showed a) an injury to the plaintiff due to substantial water contamination; b) the contamination resulted from a deliberate discharge; and c) the contamination was reasonably foreseeable.¹⁸² As reported in a treatise in 1957, in cases “involving serious pollution by reason of the discharge of sewage or industrial wastes into a stream, the Ohio courts have shown no tendency to inquire into the reasonableness of the defendant’s activity.”¹⁸³

Private nuisance suits to induce local firms to reduce pollution were considered, yet few were tried. In 1968, for example, a local environmental group called Citizens for Clean Air and Water (CCAW) approved litigation against two facilities owned by Ford Motor Company and Republic Steel.¹⁸⁴ Although CCAW received a commitment of legal assistance from the Legal Aid Society, it ap-

prescriptive rights, it was no longer the law of Ohio prior to enactment of Ohio’s 1951 Water Pollution Control Act). This clean hands requirement would likely have made it difficult for local industries to file nuisance claims against their neighbors. For a discussion of the prescription issue in other states, see Hines I, *supra* note 119, at 198.

181. *Industrial Fibre Co. v. State*, 166 N.E. 418 (Ohio Ct. App. 1928). That the argument adopted by the court could readily be used to defend oil refineries and other industrial facilities was immediately noted by the business press. See W.C. Platt, *Business Protected from Encroachment of Residences*, NAT’L PETROLEUM NEWS, Mar. 21, 1928, at 30.

182. See CHARLES C. CALLAHAN, *PRINCIPLES OF WATER RIGHTS LAW IN OHIO* § 35 (1957).

183. *Id.* The Callahan treatise does note one 1952 case in which reasonableness was a factor. *Id.* (citing *Ratcliffe v. Indian Hill Acres*, 113 N.E. 2d 30 (Ohio Ct. App. 1952)).

184. Betty Klaric, *Citizens May Sue Polluters*, CLEVELAND PRESS, Dec. 3, 1968, at A4; Robert G. McGruder, *Pollution Foes Hit Ford Republic*, CLEVELAND PLAIN DEALER, Dec. 4, 1968, at 9-D.

pears the actions were never pursued.¹⁸⁵ One major problem for potential litigants was the difficulty in proving that the injury alleged was caused by the defendant's polluting activity.¹⁸⁶ Identifying contributors to local pollution problems should have been feasible. In 1968 a federal report identified specific facilities as the source of specific amounts of pollution in Lake Erie.¹⁸⁷ This suggests that at least some specific polluters could have been targeted. The primary pollution problems on the Cuyahoga were the result of numerous sources, however. As Hines observed, "[w]here the polluted state of a stream results from the cumulative effect of the discharges of carried effluents from several different points, it is nearly impossible to prove that a particular polluter is responsible for the damage."¹⁸⁸

Even had local landowners been able to identify which companies along the river were responsible for the pollution, they would have had a hard time satisfying the traditional requirements for a private nuisance claim. In order to bring such a claim, a plaintiff must a) have suffered material harm that is b) different from the harm suffered by the public generally.¹⁸⁹ Thus, even if polluting activity was causing environmental harm in a given location, there may not be any private party capable of filing suit. In the case of the Cuyahoga, for example, it may have been difficult for local landowners to identify a specific material harm suffered due to the accumulation of oil and chemicals in the water that was not shared by the public at large. Only those landowners, such as the railroads perhaps, that suffered discrete material harm due to pollution – perhaps such as railroad

185. Betty Klaric, *Legal Aid Society Joins Pollution Fight*, CLEVELAND PRESS, Dec. 6, 1968, at B13. Some nuisance claims against industrial firms were filed, however, and would occasionally result in out of court settlements. In one case, an industrial plant settled with a neighboring car dealer alleging that air pollution from the plant damaged vehicles and equipment. *See, e.g.,* Bus Bergen, *One Firm Pays Another \$47,500 for Pollution Harm – A First Here*, CLEVELAND PRESS, Dec. 14, 1968, at C2.

186. Hines I, *supra* note 119, at 198. *See also* Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 415 (1997).

187. *Cuyahoga River Put Among the Most Rank*, CLEVELAND PLAIN DEALER, Oct. 3, 1968, at 10.

188. Hines I, *supra* note 119, at 198.

189. *Id.* at 197-98.

owners whose property was damaged by the various river fires – would have been able to bring a private nuisance claim. Even then, a private nuisance claim would have been difficult given the prevailing condition of the river. Insofar as a nuisance represents “a right thing in the wrong place,” the industrial facilities along the Cuyahoga were more akin to pigs in the barnyard than pigs in the parlor.¹⁹⁰

Private nuisance actions against much Cuyahoga pollution would have been difficult, if not impossible. Public nuisance actions, on the other hand, should have been viable, at least in some instances. Under state law at the time, water pollution was generally considered a public nuisance.¹⁹¹ This would imply that individuals, or at least local government officials, could file common law actions against polluting companies and facilities for unreasonably interfering in the public’s rights in the Cuyahoga.¹⁹² Under Ohio law, however, industrial facilities discharging effluent into public waters pursuant to a valid permit from the state Water Pollution Control Board could not be charged with creating a public nuisance.¹⁹³ Ohio law declared that it was illegal to “cause pollution . . . of any waters of the state, or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state.”¹⁹⁴ Such actions were declared public nuisances, “except in

190. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)(describing a nuisance as “merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard”). See also Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 409 (1997) (“Location is almost everything in nuisance law. . . . The vast majority of activities are lawful in the abstract, but become nuisances per accidens ‘by reason of their location, or by the reason of the manner in which they are constructed, maintained, or operated.’”(quoting *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 687 (N.C. 1953)).

191. Reitze, *supra* note 94, at 64.

192. *Id.* at 64. The Restatement of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (1979).

193. OHIO REV. CODE ANN. § 6111.04 (1968).

194. *Id.* Pollution was defined as “the placing of any noxious or deleterious substances in any waters of the state or affecting the

such cases where the water pollution control board has issued a valid and unexpired permit.”¹⁹⁵ As Arnold Reitze noted in his 1968 review of Lake Erie pollution, “[c]ommon law actions for water pollution abatement are not common and perhaps the protection afforded by the permit system is the reason.”¹⁹⁶ Common law may not have been the perfect tool with which to combat water pollution, but it may have been more effective had it been allowed to operate.¹⁹⁷

F. *Suing the City*

The severity of the legal obstacles to local cleanup efforts were demonstrated in litigation initiated by local environmental activists to force greater pollution control on the Cuyahoga River. In the absence of effective private nuisance remedies, local environmental advocates sought to force greater pollution control efforts by city

properties of any waters of the state in a manner which renders such waters harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, or industrial or agricultural purposes, or for recreation.” *Id.* at §6111.01 (1968).

195. *Id.* at § 6111.04 (1968).

196. Reitze, *supra* note 94, at 64.

197. See Roger Meiners, et al., *Burning Rivers, Common Law, and Institutional Choice*, in *THE COMMON LAW AND THE ENVIRONMENT* 61 (Roger E. Meiners & Andrew P. Morriss eds., 2000)(noting “the river burned because common law rights that might have precluded its conversion to an industrial dump were blunted by the Ohio legislature”). It would be an exaggeration to claim that the permits shielded polluters from *all* common law actions. See *id.* at 61; see also Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing and Environmental Protection*, 12 *DUKE ENV. L. & POL’Y F.* 39, 76 (2001). The state water pollution law had a savings clause specifically preserving equity and common law rights. OHIO REV. CODE ANN. § 6111.08 (1968). Given the explicit preemption of public nuisance suits, this provision would likely have preserve private nuisance claims, had such claims been viable. It is also worth noting that there was at least some question as to whether state pollution control laws preempted other local regulatory actions. See, e.g., *Soap & Detergent Association v. Akron: Some Legal Difficulties in Local Efforts to Control Pollution*, 1 *ENVTL. L. REP.* 10043 (1971).

officials. In May 1965, several residents of Cleveland brought suit to force the city to enforce local pollution control ordinances against industrial facilities that were polluting the Cuyahoga river and its tributaries.¹⁹⁸ In the alternative, the plaintiffs sought to force the city to abate the industrial pollution as a public nuisance. In their petition for a writ of mandamus, the plaintiffs identified several industrial facilities along the Cuyahoga which, plaintiffs alleged, discharged waste into the river.¹⁹⁹ The plaintiffs maintained that the city was derelict in its responsibilities to enforce local pollution control ordinances and generally to investigate and enjoin nuisances created by polluting activity on the river.

Although city officials would begin to aggressively support environmental cleanup measures during the course of the litigation, the city actively defended itself from the suit.²⁰⁰ The city maintained that plaintiffs had no legal basis to seek a writ requiring enforcement of city ordinances. The city argued, among other things, that enforcement of its municipal ordinances against the polluting firms would be “improper because of existing state licenses.”²⁰¹ In its brief to the Court of Common Pleas, the city maintained “[t]he City is powerless to enforce its own municipal ordinances because said ordinances are in direct conflict with state statutes on the same sub-

198. See *Blaushild Pollution Suit to Be Pushed*, CLEVELAND PRESS, Feb. 28, 1969, at 12-A.

199. Petition for Writ of Mandamus, *Bar Realty Corp. v. Locher*, Case No. 813769, at 5-7. (Court of Common Pleas, Cuyahoga County, Aug. 10, 1970).

200. The change appears to have occurred with the change in political administrations from that of Mayor Locher to that of Mayor Stokes.

201. Summation Brief of Defendants-Respondents, *Bar Realty Corp. v. Locher*, Case No. 813769, at 2. (Court of Common Pleas, Cuyahoga County, Aug. 10, 1970). The city also maintained that enforcement actions against one company, the Cuyahoga Meat Company was unnecessary because it deposited its wastes into the Cleveland sewers, not the Cuyahoga. *Id.*

ject; as such they are unenforceable.”²⁰² In Ohio, where municipal ordinances and state laws conflict, the state laws are supreme.²⁰³

The trial court granted a supplemental writ further directing city officials to “manage and supervise the elimination, control or regulation of any matter relating to the pollution” of local water bodies and to investigate the extent to which various firms, including but not limited to those identified by plaintiffs, were violating Cleveland’s local pollution ordinances.²⁰⁴ This judgment was affirmed by the appellate court.²⁰⁵

The city appealed the case to the Supreme Court of Ohio maintaining, among other things, that the plaintiffs could not obtain a writ of mandamus forcing city officers to enforce police regulations against specific parties and that such actions were preempted by state regulation. In particular, the city argued that industrial permits issued by the state Water Pollution Control Board granted licenses to emit industrial wastes into the Cuyahoga, and that the city was powerless to prevent this pollution. The Ohio Supreme Court eventually upheld this argument, leaving local officials and environmental advocates little ability to force river cleanup.

At the time of the suit, Cleveland’s municipal ordinance required the city’s Commissioner of the Division of Water Pollution control “to manage and supervise the elimination, control or regulation of any matter relating to the pollution of water-courses, rivers, streams or lakes bounding upon or within the city.”²⁰⁶ As interpreted by the Supreme Court, the ordinance granted the commissioner a requisite amount of discretion to determine whether water pollution needed to be controlled in a given case. The ordinance, by conferring a duty

202. Summation Brief of Defendants-Respondents, *Bar Realty Corp. v. Locher*, Case No. 813769, at 2. (Court of Common Pleas, Cuyahoga County, Aug. 10, 1970).

203. Under Article XVIII § 3 of the Ohio Constitution, municipalities only have the authority to adopt “local police, sanitary and other similar regulations as are not in conflict with General Laws.” See also *Anderson v. Brown*, 233 N.E. 2d 864 (Ohio 1968) (municipality may not prohibit action permitted or licensed by the state); and *Village of Struthers v. Sokol*, 149 N.E. 519 (Ohio 1923).

204. *Bar Realty Corp. v. Locher*, Case No. 813769 (Court of Common Pleas, Cuyahoga County, Aug. 10, 1970).

205. *Bar Realty Corp. v. Locher* (Ohio Ct. App. June 16, 1971).

206. *Bar Realty Corp. v. Locher*, 283 N.E.2d 164, 194 (Ohio 1972).

upon the commissioner, “necessarily vests that officer . . . authority to find either that violations of the ordinances do or do not exist.”²⁰⁷ In other words, whether the pollution constituted a public nuisance that required abatement was a question to be answered by the commissioner in the exercise of his discretion. Despite the rampant pollution in the river at the time, the Supreme Court held that plaintiffs failed to show that the commissioner had abused his discretion in failing to seek additional controls on local polluting industries.²⁰⁸ Further, the Court found it completely acceptable for local officials to defer to the pollution control efforts (or lack thereof) of the state Water Pollution Control Board.²⁰⁹ In other words, whether the Cuyahoga would be protected from industrial pollution was a decision to be made by the state. Area residents, local officials, even those whose common law rights were violated by industrial pollution, had few viable options other than to convince state officials to change their policies or, perhaps, to encourage the federal government to intervene.²¹⁰

G. *Where Was Uncle Sam?*

It is odd that states are routinely characterized as the laggards in pollution control efforts when the federal government debated – but failed to enact – meaningful water pollution control legislation for decades.²¹¹ State programs were far from perfect – quite far, in the case of Ohio – but at least there were state programs that sought to stem the rising tide of water pollution. Although the federal government had already asserted its interest in the maintenance of navigable waterways and the protection of water quality, and enacted policies premised upon this interest, it devoted minimal resources for their implementation. There was substantial interest in water quality

207. *Id.* at 194.

208. *Id.* at 195.

209. *Id.*

210. Testifying before Congress in 1970, Mayor Stokes did just that, calling upon Congress to enact federal legislation so that the city would have more control over local water quality. *See Stokes Testimony*, *supra* note 5; *see also Meiners, et al.*, *supra* note 197, at 62.

211. This history is recounted in Hines III, *supra* note 77, at 805-19.

in Congress, and water pollution measures were routinely introduced beginning in the late Nineteenth Century, but relatively few measures were enacted.²¹² At the same time, the federal government failed to use the tools at its disposal to assist states and local communities to combat the pollution of rivers such as the Cuyahoga.²¹³ Criticism of pre-1969 state efforts should not obscure the federal government's failure to act to protect the nation's waters.

In 1948, Congress enacted federal legislation to assist and support state and local water pollution control efforts. This act provided for technical assistance from the Surgeon General and Public Health Service, but provided little real financial support to state and local governments.²¹⁴ Indeed, the law only authorized \$1 million per year in annual appropriations, and Congress failed to appropriate any of the authorized funds during the first year the law was in effect.²¹⁵ From 1950 to 1952 Congress authorized a substantial amount of money for pollution control, \$83.4 million – but Congress only appropriated a fraction of the authorized funds, \$9.4 million.²¹⁶ Additional federal measures were enacted in 1956 and 1961.

Congress substantially reformed pollution control efforts with the Water Quality Act of 1965. Among other things, this law, created a Federal Water Pollution Control Administration in the Department of Health, Education, and Welfare; increased authorizations for construction grants to \$150 million (with a maximum of \$4.8 million for any one project); authorized \$20 million for research and develop-

212. Between 1886 and 1972, water pollution legislation was introduced in all but six sessions of Congress. *Id.* at 803 (legislation introduced in all but six sessions from 1886-1966); *and* Houck, *supra* note 83, at 2286 (water pollution legislation introduced every year from 1966 to 1972).

213. There is also evidence that federal activity actually contributed to the local pollution problem, particularly in Lake Erie. *See, e.g.,* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CONFERENCE IN THE MATTER OF POLLUTION OF LAKE ERIE AND ITS TRIBUTARIES, PROCEEDINGS Vol. 1, 32-37 (Aug. 1965) (statement of Congressman Charles A. Vanik on U.S. Army Corps of Engineers' practice of depositing dredged material from Cuyahoga River into Lake Erie).

214. *See* Hines III, *supra* note 77, at 811-12.

215. *Id.* at 811, 813. The law also provided for loans to state and local governments to finance infrastructure improvements.

216. *Id.* at 813.

ment on pollution control; required the adoption of state water quality standards and authorized federal standards where states failed to act; and modestly extended federal enforcement authority.²¹⁷ In 1966, Congress made further amendments, again increasing financial authorizations.²¹⁸

In the 1950s and 1960s, federal appropriations for pollution control were quite small. Even when substantial sums were authorized, the money was rarely appropriated. By the later 1960s, federal expenditures increased, but the federal government's financial commitment to environmental concerns was still rather small, particularly in comparison to the 1968 Cleveland bond issue. Federal spending and loans for water purification and pollution control in 1968 totaled \$190 million²¹⁹ – not even double the amount approved by Cleveland voters that same year. Of that total, only approximately \$6 million was slated for Ohio.²²⁰ Cleveland received nothing.²²¹ While Congress authorized \$700 million for water projects for fiscal 1968-69, only \$214 million was appropriated, and of that Ohio received a scant \$9 million.²²² Federal officials spoke regularly about the need to improve the nation's water quality, but their talk was backed by minimal action.

The relative lack of federal financing for local pollution control efforts in the 1960s reflected the low priority that federal officials placed on environmental concerns. In prior decades, it could be argued that Congress' failure to appropriate money represented the traditional view that federal government should focus federal resources on truly national concerns, leaving state and local governments to fund state and local projects, including river cleanup. Yet in the 1960s the federal government appropriated tremendous sums to pay for community development and other Great Society programs. Congress had overcome its reluctance to spend money on local matters where Congress deemed it important enough to do so.

217. *Id.* at 829-30.

218. *Id.* at 837-38.

219. Reitze, *supra* note 94, at 68.

220. *Id.*

221. Stokes Testimony, *supra* note 5, at 413 (“even though [Cleveland] has over the last four years spent \$30 million on construction of waste treatment facilities not one dime of that has come from the Federal Government”).

222. Stavish, *supra* note 42, at 129.

Environmental cleanup was simply not yet a sufficient priority at the national level. The severity of local pollution problems was more readily apparent at the local level, so the pressure for environmental cleanup largely remained a local phenomenon.²²³

The federal government's historical lack of concern for environmental contamination is reflected not only in the lack of appropriations, but also in the operation of federal facilities and the implementation of federal programs. In November 1965, President Johnson ordered all federal installations to provide secondary waste treatment at a minimum.²²⁴ Despite this decree, federal facilities remained a substantial pollution problem. In 1966, 237 federal installations continued to discharge insufficiently treated waste into domestic waters.²²⁵

The U.S. Army Corps of Engineers also contributed to the pollution of Lake Erie, depositing contaminated dredge from the bottom of the Cuyahoga into Lake Erie on a regular basis. The Corps dumped over one million cubic yards per year from the Cuyahoga and Cleveland's outer harbor each year in the late 1960s.²²⁶ The 1965 Federal Water Pollution Control Act aimed to force the Corps to clean up its act, but by 1968 there had been no progress on this front, and the Corps "continue[d] to dump highly polluted wastes into areas of Lake Erie still relatively undefiled."²²⁷ Although criticized for the practice, the Corps defended its actions as cost-justified.²²⁸

In December 1970, the federal government notified the City of Cleveland that it was violating state and federal water quality standards.²²⁹ This prompted an angry retort from Mayor Stokes, who

223. For a discussion of the importance of local knowledge in identifying and addressing environmental concerns, see Adler, *Let 50 Flowers Bloom*, *supra* note 127, at 11,286.

224. Prevention, Control, and Abatement of Water Pollution by Federal Activities, Exec. Order. No. 11,258, 40 Fed. Reg. 14,483 (1965) *rev'd* Exec. Order. No. 11,288, 31 Fed. Reg. 6,857 (1965).

225. Reitze, *supra* note 94, at 15.

226. *Id.* at 35.

227. *Id.*

228. *Id.*

229. Letter from William D. Ruckelshaus, Administrator, Environmental Protection Agency, to Carl Stokes, Mayor, City of Cleveland (December 9, 1970).

accused newly appointed EPA Administrator William Ruckelshaus of engaging in “a cheap political plot” and ignoring “the outrageous, atrocious failure of his federal government to put a dime into Cleveland’s sewer program.”²³⁰ Stokes further noted that Cleveland had taken greater action than most other Great Lakes cities and that the city’s financial commitment to abating water pollution, exemplified by the \$100 million bond issue, rivaled that of the federal government nationwide.²³¹ In Stokes’ view, the federal government had been more deficient in meeting its obligations than had the city of Cleveland.

It is also possible to argue that the federal government was derelict in discharging its statutory obligations to protect the navigability of waters used in interstate commerce.²³² After all, the federal government has asserted authority over navigable interstate waters since the nation’s inception, albeit focusing on navigability as such.²³³ The case for federal intervention in environmental matters is also particularly strong where, as in the case with many navigable waters, the environmental concern in question stretches across multiple political boundaries.²³⁴ Unlike individual states, the federal government “has jurisdiction over a larger area and thus can deal with the problem more comprehensively.”²³⁵

Federal legislation prohibiting the deposit of refuse into navigable waterways and harbors sat in the U.S. Code for decades before the federal government made any effort to enforce such provisions against polluting activities. Under the federal Rivers and Harbors Act of 1899,²³⁶ also known as the “Refuse Act,”²³⁷ it was unlawful to

230. Statement of Mayor Carl B. Stokes, National League of Cities, Atlanta, Georgia, December 10, 1970.

231. *Id.*

232. In this regard I am referring to waters *actually used* in interstate commerce, not those waters that *could be used* or might otherwise fall within more expansive interpretations of the federal government’s jurisdiction, such as that at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

233. Reitze, *supra* note 94, at 49.

234. *See supra* note 127, and source cited therein.

235. Reitze, *supra* note 94, at 77.

236. Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1151 (codified at 33 U.S.C. §§401 *et seq.*).

deposit “refuse” from shore into a navigable water of the United States.²³⁸ Refuse was defined to include all pollutants, including gasoline accidentally discharged into a navigable river, save non-point source pollution such as runoff.²³⁹ The act provided for both criminal sanctions, as well as private actions for damages if a polluting company failed to observe the requisite amount of care.²⁴⁰ Yet prior to the 1960s, this authority was rarely invoked.²⁴¹

In 1966, the Supreme Court held that the Rivers and Harbors Act prohibited the accidental release of commercially valuable substances, such as gasoline.²⁴² In *United States v. Standard Oil*, an oil company was prosecuted for illegally discharging aviation fuel into the St. Johns River after a shut-off valve was “accidentally” left open.²⁴³ Rejecting the argument that commercially valuable material could not be considered “refuse” under the Act, the Court held that “Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence

237. WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 252 (2d ed. 1994).

238. 33 U.S.C. § 407. This provision of the act provides, among other things, that “[i]t shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.” *Id.* It similarly prohibits depositing refuse along the banks of a navigable river “Where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed.” *Id.*

239. *See, e.g., United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

240. 33 U.S.C. § 411, 412. *See also Reitze, supra* note 94, at 62.

241. The federal government also failed to utilize the enforcement provisions of other pre-1972 federal statutes, such as those provided under the 1956 and 1965 federal water pollution control statutes.

242. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

243. *Id.* at 225 (quotes in original).

in our rivers and harbors is both a menace to navigation and a pollutant.”²⁴⁴

Even if the Rivers and Harbors Act had not always been understood to prohibit such pollution,²⁴⁵ the Supreme Court’s decision in *Standard Oil* provided ample justification for federal prosecution of refineries and other industrial facilities along the Cuyahoga that were discharging or otherwise allowing oil and other potentially flammable substances to pollute the river. Indeed, given that the fire risk on the river was clearly recognized as a potential obstruction to the river’s navigability and use in interstate commerce, the federal government would have had ample reason to take action. Such prosecutions would not have addressed many aspects of the water pollution problem at the time. Invocation of the Refuse Act would have done little to remedy inadequate sewage treatment. Nonetheless, prosecutions under this law could well have helped to address the problem of waste oil, debris, and other flammable materials. In other words, enforcing the longstanding federal prohibition on dumping refuse into navigable waters could well have prevented the 1969 Cuyahoga fire, if not any of the earlier fires as well.²⁴⁶

Only after the June 1969 fire became a national *cause celebre* was the condition of the Cuyahoga “objectionable” to federal officials.²⁴⁷

244. *Id.*

245. For a discussion of earlier interpretations of the Act, see William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 772-74 (1971).

246. According to David Hodas, in 1969 “the government could only bring enforcement actions against those dischargers that it could show had caused the river to ignite.” David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd when Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1554 (1995). While it is clear that the federal government failed to bring any enforcement actions against facilities polluting the Cuyahoga prior to the June 1969 fire, it is unclear why the federal government would have been precluded from such action under the Rivers and Harbors Act given the holding in *United States v. Standard Oil*, 384 U.S. 224 (1966).

247. See ZYGMUNT J.B. PLATER, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 510 (1998) (noting “The Cuya-

After the fire received national media attention, the federal government sprang into action, invoking both the Rivers and Harbors Act of 1899 and the 1965 water quality law against polluting firms. In August, the U.S. Department of the Interior invoked the 1965 act for the first time, threatening six industrial firms with prosecution if they did not curtail their pollution.²⁴⁸ Among those charged were several steel facilities on the Cuyahoga, including plants operated by Republic Steel Corporation and Jones & Laughlin Steel Company.²⁴⁹ Several additional prosecutions were threatened in May 1970.²⁵⁰ Although the cumbersome nature of enforcement proceedings under the act may have discouraged the federal government from filing many suits, it is unlikely that factor fully explains the failure to utilize the act until 1970. It seems more likely that changes in enforcement were a response to political pressure for more federal involvement in pollution control efforts, brought about by increased public attention to environmental matters.

Between October 1, 1969 and April 15, 1970, the U.S. Department of Justice initiated sixty-six prosecutions under the Rivers and Harbors Act.²⁵¹ Additional prosecutions were spurred by Congressional pressure and the filing of *qui tam* actions by private citizens.²⁵² The

hoga River was not considered legally objectionable until it caught fire, because the state-designated use of that river was waste disposal.”). In a bit of understatement, the General Accounting Office reported in 1972 that “Prior to 1970 the Federal Government did not make maximum use of its enforcement authority.” U.S. General Accounting Office, *Water Pollution Abatement Program: Assessment of Federal and State Enforcement Efforts*, B-166506 (Mar. 23, 1972), at 9.

248. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 45 (1970).

249. *Water Polluters Who Fail to Act Face Federal Suit*, N.Y. TIMES, Sept. 4, 1969, at 1. The citations prompted some cleanup, but civil and criminal charges were later filed against Jones & Laughlin Steel. See *U.S. Sues LTV's J&L Alleging Water Pollution by Plant in Cleveland*, WALL ST. J., Dec. 31, 1970, at 9.

250. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 45 (1970).

251. Rodgers, *supra* note 245, at 792-93.

252. *Id.* at 768. See also U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT OPERATIONS, CONSERVATION AND

northeastern Ohio chapter of the Sierra Club investigated industrial facilities and filed petitions with the Justice Department seeking additional enforcement actions.²⁵³ Corporations long used to the U.S. Army Corps of Engineers' loose enforcement of the law's permitting requirements were understandably dismayed. One corporate representative complained that "the use of the archaic 1899 law is disruptive to the orderly improvement of water quality and provides propaganda to be used to undermine the effectiveness of the State and Federal programs."²⁵⁴ Indeed, such complaints may have helped spur enactment of federal pollution control legislation that would provide more certainty to national corporations.²⁵⁵ It is also significant that enforcement under both laws increased substantially after formation of the federal EPA in December 1970.²⁵⁶

NATURAL RESOURCES SUBCOMMITTEE, 91ST CONG., 2D SESSION, *QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS* (Comm. Print. 1970).

253. KEHOE, *supra* note 75, at 123.

254. Rodgers, *supra* note 245, at 773 (quoting statement of Samuel Lenher, Vice President, E.I. DuPont de Nemours & Co. before Senate Subcommittee on Air & Water Pollution, 1970).

255. This is implied in Houck, *supra* note 83, at 2289-90 (citing Lenher testimony). See also James MacGregor, *Companies Complain that Pollution Laws Conflict, Change Often*, WALL ST. J., Dec. 23, 1970, at 1. While the evidence on this point is ambiguous, it is well-established that some industry groups supported the enactment of federal environmental legislation to provide greater regulatory certainty or to preempt other, more intrusive, regulatory regimes. See, e.g., E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985). For a broader discussion of industry efforts in support of federal regulation that could provide economic or other benefits, see Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in *POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN* 1-30 (Terry L. Anderson ed., 2000).

256. U.S. General Accounting Office, *Water Pollution Abatement Program: Assessment of Federal and State Enforcement Efforts*, B-166506 (Mar. 23, 1972), at 9.

Two years later, Congress enacted the Federal Water Pollution Control Amendments of 1972, the law that is conventionally referred to as the “Clean Water Act” today.²⁵⁷ This law helped address water pollution in the Cuyahoga and in many areas by, among other things, creating the National Pollutant Discharge Elimination System. The imposition of strict technology standards on many industries undoubtedly accelerated the rate of cleanup in some areas.²⁵⁸ Yet it is important to remember that prior to 1972 the federal government had potentially powerful tools to address at least some aspects of the nation’s water pollution problems, and to address, in particular, the sorts of pollution which directly led to the June 1969 fire. This does not mean that the 1972 Clean Water Act was unnecessary or unwise. It could, however, modulate one’s views of the need for the sort of legislation that Congress eventually adopted.

The conventional view criticizes state and local governments for failing to act to control water pollution. As already noted, state and local efforts in the 1960s were making environmental progress, and there is reason to believe that such efforts would pick up steam in the years to come. Before 1969, many localities, including Cleveland, had already embarked on a long, difficult road to reverse the course of local pollution trends. Their initial efforts were insufficient, and industrial waters such as the Cuyahoga would remain polluted for some time, but state and local efforts represented a significant start. Before asking why state and local governments did such a poor job in addressing environmental concerns in the post-World War II decades, one could just as easily ask why the federal government failed to discharge its few responsibilities and commitments with regard to interstate navigable waters. When considering why the Cuyahoga River burned in 1969, it seems there should be enough blame to go around.

II. RECONSTRUCTION OF THE FABLE

The conventional fables of the Cuyahoga may impart useful lessons about the need for environmental protection, but they are inaccurate in many crucial respects. They sensationalize the June 1969 fire and underestimate the potential for institutional arrangements

257. 33 U.S.C. §§ 1251-1385 (1994).

258. See Freeman, *supra* note 126.

other than federal command-and-control regulation to address water pollution concerns. The simple story of *the* fire must yield to the far more complicated history of pollution on the Cuyahoga River.

The Cuyahoga River burned in 1969, but the river's plight was likely improving at the time. The city of Cleveland could not stop its river from burning one last time, but it had begun to make substantial investments to restore the Cuyahoga. Common law causes of action did not sufficiently discipline polluters along the river to prevent rampant pollution, but the cause of action most suited to the Cuyahoga's plight was preempted under state law.²⁵⁹ The state of Ohio may have allowed pollution in the Cuyahoga to accumulate, but the state had also begun to consider additional pollution control methods, just as many states across the nation were beginning to address their pollution concerns. Federal assistance helped to address the chronic problem of Cuyahoga pollution, but federal neglect of long-standing legal obligations and failure to consider the environmental impacts of its own actions may also have played a role. The Federal Water Pollution Control Amendments of 1972 certainly accelerated the rate of environmental cleanup in many of the nation's waters, but there is also reason to suspect that the die was cast, and the nation would have demanded greater levels of environmental protection even had Congress failed to act.

The 1969 fire was a catalyst for change because it was the right event at the right time. It was neither an impressive fire, nor one with a significant ecological impact. It may have signified widespread ecological degradation, but it did not represent a continuing decline in water quality. As noted above, it appears water quality was improving in much of the nation, at least for some measures.²⁶⁰ Yet because the nation's ecological consciousness was aroused, the fire provoked a strong political response. "What the uproar over the Cuyahoga River fire of 1969 proved – since the river also had caught fire in the 1930s and 1950s without much comment – is that the af-

259. It is also worth recalling that the use of nuisance actions in interstate waters, perhaps such as Lake Erie, would later be preempted by federal legislation. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

260. *See* FREEMAN, *supra* note 126, and accompanying text.

fluent society does not want to be the effluent society,” notes environmental analyst Steven Hayward.²⁶¹

In the 1950s, let alone the 1910s or 1930s, environmental issues did not yet rank with concerns for economic development, technological progress, and addressing other social ills. “Employment, basic nutrition, adequate housing, and avoidance of contagious diseases were seen as far more valuable at the margin than clean water in a river lined by productive factories.”²⁶² This was due, in no small part, to a combination of factors, including relative public ignorance about environmental matters, including the health impacts of pollution, as well as a widespread belief that some pollution was an acceptable price for industrial progress. Insofar as environmental protection was an item on the public agenda, concern focused on sanitation and drinking water, not the recreational or aesthetic values of waterways. As public concern for environmental values increased, however, it appears that all societal institutions began to address these concerns, and it is not clear that the federal government should be privileged as the most beneficent of the available institutions.

Environmental analyst Indur Goklany presents a hypothesis about air pollution trends that could well explain much of the history of water pollution on the Cuyahoga. Goklany notes that pollution trends, and the drive to federalize pollution control, “must be viewed in the broader context of the social, economic, technological, and political factors that affect the generation and control” of pollution.²⁶³ Specifically, it is important to distinguish between pollution trends before and after the period “during which a substance . . . gains sufficient notoriety to be perceived as a . . . pollutant by the public and, perhaps more importantly, by policymakers.”²⁶⁴ Trends prior to this “period of perception” are not indicative of the institutional capability of those institutions primarily responsible for pollu-

261. Steven Hayward, *Crossroads, It's Earth Day*, MILWAUKEE JOURNAL SENTINEL, April 22, 2001.

262. “Employment, basic nutrition, adequate housing, and avoidance of contagious diseases were seen as far more valuable at the margin than clean water in a river lined by productive factories.” Meiners et al., *supra* note 197, at 59-60.

263. INDUR GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* 3 (1999).

264. *Id.* at 3.

tion control at the time, as such institutions were not yet called upon to address such concerns. Only after the period of perception begins can we evaluate the extent to which a given institutional arrangement or combination of arrangements failed to address the environmental concern in question.²⁶⁵ Even then some caution is warranted, as the failure of one institutional arrangement can only be assessed in comparison to the likely success of other potential arrangements.²⁶⁶

In the context of air pollution, Goklany's work raises questions about the ultimate necessity of much federal air pollution regulation.²⁶⁷ Specifically, he notes that trends in air pollution began to improve after the period of perception for each air pollutant, but in many cases prior to the enactment of federal legislation. Such trends are consistent with the Environmental Kuznets Curve documented in much economic literature.²⁶⁸ As populations become wealthier, both their willingness and ability to pay for environmental protection increase dramatically. At the same time, increases in development

265. As Goklany explains, "Prior to such recognition, one cannot expect any societal action – whether at the local, state, or federal level – designed specifically to reduce the presence of the substance in the environment. Thus, trends (or lack thereof) before that time tell us little about a particular level of jurisdiction's sensitivity to, or ability to deal with, environmental pollution per se." *Id.*

266. Comparative institutional analysis avoids what is often referred to as the "nirvana" problem in which an obviously imperfect institutional arrangement is compared with a hypothesized ideal norm. As Harold Demsetz explains, this approach attempts "to assess which alternative *real* institutional arrangement seems best able to cope with the . . . problem." Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969) (emphasis added).

267. See generally GOKLANY, *supra* note 263, chapter 6. Goklany argues that "long before the federal government essentially took over air pollution control in the United States, matters had begun to improve, especially for the pollutants associated with excess mortality during the air pollution episodes of the 1940s, 50s and 60s (TSP and SO₂)" *Id.* at 94.

268. For a summary of the environmental Kuznets Curve literature, see Bruce Yandle, Maya Vijayaraghavan & Madhusudan Bhattarai, *The Environmental Kuznets Curve: A Primer*, PERC RESEARCH STUDY 02-01 (May 2002).

tends to coincide with increases in technological capabilities and the accumulation of scientific and other knowledge which may reveal heretofore unknown aspects of environmental problems, further heightening the desire for change.²⁶⁹

The history of water pollution on the Cuyahoga River is consistent with Goklany's hypothesis. As Hines noted in 1966, "[p]ublic interest in safeguarding the quality of water in a state has generally paralleled the economic development of the state."²⁷⁰ Increased development leads to increased water use and pollution. Over time, these pressures, combined with the increased wealth generated by economic development, lead to greater public awareness about, and demand for, pollution control and environmental protection more generally. At the same time, "[a]s public awareness of the seriousness of the pollution problem increases, the ability of special interest groups to sidetrack reform efforts decreases markedly."²⁷¹ While the environmental problems that plagued Cleveland and other cities are obvious in hindsight, the nature and extent of these problems were not always readily apparent at the time.²⁷² Indeed, much information about the severity of pollution in Lake Erie, and its ecological effect, was not known until the late 1960s. This makes it more difficult to place the exclusive blame for local pollution on states, local governments, the inadequacy of common law remedies, or any other institution one hopes would address environmental concerns.

As the Lower Cuyahoga River Basin developed in the late nineteenth century, local residents were primarily concerned with economic development and its material benefits. What pollution was obvious at the time was viewed as an attendant, and likely worthwhile, cost of industrial production. Over time, the pollution worsened and local populations grew more affluent. Both trends increased the demand for cleanup, at least for those pollutants that had

269. See GOKLANY, *supra* note 263, at 89.

270. Hines I, *supra* note 119, at 201.

271. *Id.*

272. It is also worth noting that many parts of the nation were dealing with other "environmental" problems, such as the provision of clean drinking water and the control of diseases such as cholera and typhoid, that were understandably viewed as more urgent than the occasional fire on an industrialized stretch of river. See Meiners, et al., *supra* note 197, at 60.

a readily observable impact on water quality.²⁷³ The period of perception for certain wastes in the river may well have been triggered by some of the earlier fires, perhaps the major blaze of 1952. As perception developed, citizens and community groups became increasingly interested in repairing the river. This perception developed first at the local level, as local individuals had greater knowledge about the plight of the river and the real consequences of an unprotected Cuyahoga.

The evidence suggests that the local period of perception occurred well before 1969, when local efforts to restore and protect the Cuyahoga began. Local efforts were hampered, by institutional limitations of the common law, as well as by state regulations which inhibited Cleveland's ability to address the problem directly, such as through public nuisance actions. Both the state and federal governments were relatively unresponsive to local concerns at this time because, while the problems of the Cuyahoga were abundantly clear to locals and experts, the relevant state and national policymaking communities had not yet reached their respective period of perception. Indeed, the pattern of federal enforcement (or lack thereof) of the Rivers and Harbors Act suggests that it was not until the June 1969 fire that the period of perception was reached at the federal level.

There is no doubt that the Cuyahoga River was horribly polluted for much of the Twentieth Century. Industrialization and regional population growth increased the demand for waste disposal in local waters, and environmental concerns had yet to emerge on the public's agenda. Drinking water and sanitation were pressing concerns early on, and the city responded. However strange it may seem today, the ecological health of the Cuyahoga River or Lake Erie would not arouse significant public concern until many decades later, at which point the pollution problems were severe and would require years – if not decades – to redress. For these reasons, it makes no more sense to blame state and local governments for the gross pollu-

273. As Goklany notes, “since the timing of a transition depends upon the specific pollutant (or indicator) and the relative social, economic, and environmental costs and benefits of addressing that pollutant (or indicator), it is possible for a society, a group, or an individual to be simultaneously be to the left of the environmental transition for one pollutant but to the right of another.” GOKLANY, *supra* note 263, at 95.

tion of this period than it makes sense to blame the federal government or any other institutional force. The river was polluted, in large part, because there was not yet sufficient public demand to see it cleaned up.

When the demand for greater pollution control emerged, various institutions all began to meet this demand in various ways, struggling their way up the learning curve to address the environmental plight of the river. Cleaning the Cuyahoga was a dramatic undertaking of the sort that had not been contemplated prior to the 1960s. Thus it was inevitable that early cleanup and control efforts would be insufficient and occasionally fail. There is no reason to believe that policy makers at any level of government would get it “right” on their first attempt. When judging a given institutional arrangement’s success, or lack thereof, it is important to compare it against the potential alternatives, and not the aspiration of perfection.²⁷⁴

That there was a growing demand for greater environmental protection in the late 1960s and early 1970s does not mean that the adoption of centralized federal regulatory measures was either inevitable or desirable. As Tseming Yang notes, “it is highly unlikely that the public and political pressures that led to the creation of the environmental regulatory system in the first place would have simply dissipated if Congress and the President had not acted.”²⁷⁵ Rather, this desire for greater environmental protection would have been channeled toward other ends, potentially resulting in greater state and local regulation, the removal of regulatory obstacles to public nuisance actions and greater local initiative, the evolution of common law doctrines to accommodate the needs of environmental litigation, or the adoption of measures designed to supplement and enhance traditional common law protections. There is no reason to believe that the adoption of federal command-and-control regula-

274. The presumption that an alternative regulatory arrangement will yield a perfect outcome if only the proper ideals are enshrined into law is a common pathology of environmental politics. See generally David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, *THE COMMON LAW AND THE ENVIRONMENT* 8-9 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

275. Tseming Yang, *Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been*, 41 *WASH. L.J.* 607, 618 (2002).

tions was the only means of providing the level of environmental protection demanded by an ecologically awakened public.

It is quite possible to conceive of alternative regulatory frameworks that could have been developed to complement and build upon common law environmental protections and those state and local programs which were more successful.²⁷⁶ The administrative state is not without its problems and there are many aspects of the common law framework that make it well suited to address certain aspects of environmental problems.²⁷⁷ Measures to reinforce property rights, ensure the vitality of private and public nuisance actions, and perhaps to provide scientific, technical and financial support to state and local agencies may have been a viable alternative.²⁷⁸ As the fables of the Cuyahoga River fires illustrate, policymakers may have been too quick to dismiss the potential of such alternatives.

CONCLUSION

As the evidence presented here suggests, it is not clear that the 1969 fire can be labeled a product of the “common law era”²⁷⁹ as common law remedies were preempted or limited in important respects. Nor can blame for the 1969 fire be laid at the feet of local indifference. Many factors conspired to contribute to the Cuyahoga’s sorry condition, defying the effort to construct a simple, unambiguous narrative. Federal legislation was no doubt enacted due to dissatisfaction with the status quo, but that dissatisfaction was not necessarily with the common law proper, or even with the common law as it could have been. Rather it was a dissatisfaction with the institutional structure that had allowed for a particular environmental legacy. The new federal legislation was also the product of dissatis-

276. See Schoenbrod, *supra* note 274.

277. See *supra* note 176 and citations therein.

278. The potential for such alternative approaches to environmental policy are explored in Adler, *Stand or Deliver*, *supra* note 197, at 69-82 (discussing property-based environmental protection); and Adler, *Let 50 Flowers Bloom*, *supra* note 127 (discussing the benefits of state and local environmental policies). See generally Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 23 HARV. J.L. & PUB. POL’Y 653 (2001).

279. Cross, *supra* note 173, at 977.

faction with existing state efforts, with the indeterminacy of the permitting system (or lack thereof) under the Rivers and Harbors Act, and the horrendous environmental condition much of the country was in.

These conclusions are somewhat tentative. While it is relatively easy to identify the failings of existing fables, it is difficult to construct an alternative narrative that does not present problems of its own. History, unlike a fable, is nuanced and complex. The historical record surrounding the 1969 Cuyahoga River fire is open to various interpretations. There are many threads which may be woven together to generate many different fables. Some will be more consistent with the data than others. None will be a perfect fit.

This article has suggested limitations or failings in the conventional fables of the Cuyahoga, and tentatively presents an alternative narrative to explain the fate of Ohio's crooked river. This narrative, like the others, may be a fable. As such, it may fail to represent adequately the full complexity of the Cuyahoga's history. Yet this narrative – like any good fable – contains a “useful truth” and can inform the unending search for more perfect institutions of environmental protection.