Fables of the Cuyahoga: Reconstructing a History of Environmental Protection

Jonathan H. Adler

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

Part of the Environmental Law Commons

Repository Citation
Adler, Jonathan H., "Fables of the Cuyahoga: Reconstructing a History of Environmental Protection" (2002). Faculty Publications. 191.
https://scholarlycommons.law.case.edu/faculty_publications/191

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
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 Browner

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

- Randy Newman

* Assistant Professor of Law, Case Western Reserve University School of Law. An earlier version of this article was presented at the 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.


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

89
INTRODUCTION

On June 22, 1969, just before noon, an oil slick and assorted debris under a railroad trestle on the Cuyahoga River caught fire. The fire attracted national media attention, including stories in *Time*, and *National Geographic*. 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. 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.").


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.  
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 protec-
tion.  As Drew Caputo of the Natural Resources Defense Council 
noted, “when the rivers are on fire, you know things are bad.”
Following on the heels of several best-selling books warning of ecologi-
cal 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.  Among the laws 
that resulted was the Federal Water Pollution Control Act of 1972, a 
fact noted in a recent Supreme Court opinion.  

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 Af-
fer 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 na-
tionwide campaign to clean up the environment.”); Michael Grun-
wald, 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 Thriv-
ing, CLEVELAND PLAIN DEALER, Oct. 18, 2002, at B2;  Kristina M. 
Tridico, Sustainable America in the Twenty-First Century: A Cri-
tique 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 
10. Solid Waste Agency of Northern Cook County v. U.S. Army 
Corps of Engineers, 531 U.S. 159, 174-75 (2001) (Stevens, J., dis-
senting) (“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”).


Much of the Cuyahoga story, however, is mythology, a fable with powerful symbolic force. 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 accelerate 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.” 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. 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-

---

169 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.


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. The heat of the flames warped railroad ties on one of the crossings, but total damage was estimated at only $50,000. Although noted on the front page of the *Cleveland Plain Dealer*, the fire was a minor news item. The *Plain Dealer*’s story was a mere five paragraphs long and buried inside on page 11-C, 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. By contrast, earlier river fires, such as a major conflagration in 1952, were trumpeted under banner headlines. 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.*
view was just how “unremarkable” it was. Another former firefighter recalled that the small blaze “wasn’t that big a deal.”

However mild the actual fire may have been, it “gave a third-degree burn to Cleveland’s image.” 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 subsurface 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.

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. The *Cleveland Press* could only run a photo of the railroad ties warped by the heat of the flames. There

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 \textit{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 \textit{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, \textit{supra} note 9, at 79. \textit{See also}, Donna Frye, \textit{Clean Water Act after 30 Years}, \textit{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.”).

\(^{32}\) \textit{See The Cities: The Price of Optimism}, \textit{supra} note 4, at 41.

\(^{33}\) \textit{See supra} note 1 and accompanying text.

\(^{34}\) \textit{See, e.g.}, Sierra Club, \textit{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 \textit{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.

\(^{35}\) \textit{See, e.g.}, “1952 Cuyahoga River on Fire,” available at http://www.cwru.edu/artsci/engl/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, \textit{Managing the Env’t, Managing Ourselves - A History of American Environmental Policy} 224 (1999). \textit{See also}, Elizabeth Whelan, \textit{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. When the local population and industrial growth exploded in the Nineteenth Century, pollution was sure to follow. Before the end of the Civil War there were twenty refineries in the Cleveland area, including John D. Rockefeller’s Excelsior Works. Such facilities were anything but sanitary. Fires were common, and the unusable fraction of refined crude was often dumped into the river. 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.”

In 1881, Cleveland’s mayor considered the Cuyahoga “an open sewer through the center of the city” 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. 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).


39. Id. at 101. Ironically, the “unsusable” portion of crude would later find great use as gasoline.

40. Id.


plants, paper mills, and other industrial facilities lined the Cuyahoga.\footnote{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. \textit{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. \textit{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).} 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.\footnote{\textit{Ellis}, supra note 36, at 157.} 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.\footnote{\textit{John Stark Bellamy, The Killer in the Attic: And More True Tales of Crime and Disaster from Cleveland’s Past} 176 (2002); \textit{Stavish}, supra note 42, at 64.} At the same time, the city’s sewer system deposited untreated wastewater directly into Lake Erie, several miles from the city.\footnote{\textit{Stavish}, supra note 42, at 66.}

43. \textit{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….}

44. \textit{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.}
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).
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 Com-
misson 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 pro-
posed 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 Protec-
tion, CLEVELAND PRESS, Mar. 11, 1941, at 1, 6.
57. Maxwell Riddle, River Trip Bares Oil Waste Peril,
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
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 govern-
ment 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.
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, a freak accident that merited little local concern, but sparked national attention because of increased environmental consciousness throughout the country. 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. 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).


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. 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.

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. The Buffalo River in upstate New York also caught fire in the 1960s. The Rouge River in Dearborn, Michigan “repeatedly caught fire” like the Cuyahoga, and a tugboat on the Schuykill burned when oil on the river’s surface was lit. 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


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).


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. 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.” Yet contrary to popular perception, Cleveland officials began river cleanup before the 1969 fire. 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.

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. 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. In 1962, the Cleveland Press reported that the river was “choked with debris” and “filthier than ever.” 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

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.
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).
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. In 1965, Ohio’s governor requested that the federal government hold a conference on Lake Erie pollution under the Federal Water Pollution Control Act. 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. 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.” Blaushild would later orchestrate litigation efforts to prompt river cleanup.

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

---

97. See, e.g., id. at 44, 55.
98. Reitze, supra note 94, at 50-1.
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.
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. 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.” 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. In early 1969, city leaders agreed to finance a program to remove oil and debris from the river. 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. 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.
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.\textsuperscript{113} The state had apparently expected to provide funding for pollution control projects, yet balked when federal support was not forthcoming.\textsuperscript{114} Congress authorized substantial sums for Lake Erie cleanup, but then failed to actually appropriate the money.\textsuperscript{115} Cleveland spent approximately $30 million on the construction of waste treatment facilities from 1967 to 1970.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{113} Adele Z. Silver, \textit{Antipollution Efforts Deceiving}, CLEVELAND PLAIN DEALER, July 10, 1969, at 15-A.

\textsuperscript{114} \textit{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).

\textsuperscript{115} \textit{Antipollution Efforts Deceiving}, \textit{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.

\textsuperscript{116} Stokes Testimony, \textit{supra} note 5, at 413.

\textsuperscript{117} \textit{Id}.

\textsuperscript{118} \textit{See} Reitze, \textit{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.” A 1972 General Accounting Office study further noted that state programs improved substantially in the late 1960s. Federal legislation encouraged greater state efforts, but only to a limited extent. “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. By 1966, every state had enacted water pollution legislation of some sort delegating responsibility to one or more state agencies. 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. 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. 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. 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. 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.

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.” Yet while pollution remained a prominent item on the


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.” 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.”

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 san-

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.
FABLES OF THE CUYAHOGA

2002]

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.
142. Letter from S.L. Frost, Deputy Director, Department of Natural Resources, to Carl B. Stokes, Mayor, City of Cleveland (July 7, 1969).
144. City Investigating Cause of River Fire, CLEVELAND PLAIN DEALER, June 24, 1969, at 4-D.
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

147. City Investigating Cause of River Fire, CLEVELAND PLAIN DEALER, June 24, 1969, at 4-D.
150. Id.
151. KEHOE, supra note 75, at 109.
FABLES OF THE CUYAHOGA

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

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. “We can usually get these industries to be good boys,” he explained – but apparently not good enough.

State water quality regulations were adopted in 1966 and amended in 1967. 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. 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.” In practice, Ohio’s system of water zoning

152. Stokes Testimony, supra note 5, at 413.
154. Id.
156. Id.
158. Id. at 52.
159. KEHOE, supra note 75, at 35.
“legitimize[d] continued pollution of our waterways by industry.”

The harbor area around Cleveland was zoned as an industrial water supply. 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. 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.” 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. Despite federal pressure to begin cleaning up Lake Erie, the state refused to enforce cleanup deadlines on most jurisdictions. Historically, Ohio residents were unwilling to pay the cost to control their own pollution, particularly that which results from untreated sewage. 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.

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.

160. Reitze, supra note 94, at 54.
161. Id. at 53.
162. Id. at 54.
163. Id. at 77.
164. Id. at 79.
166. See Reitze, supra note 94, at 76.
167. Id. at 78-9, 81.
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. Nonetheless, Stefanski urged the Mayor to take the necessary steps to lift the ban.

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 Cleveland – 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

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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 nu-

\textsuperscript{172} ROBERT PERCIVAL, ET AL., ENVIRONMENTAL PROTECTION: LAW, SCIENCE, AND POLICY 1018 (2d ed. 1996).
\textsuperscript{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).
\textsuperscript{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.”

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

---

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).

pears the actions were never pursued. One major problem for potential litigants was the difficulty in proving that the injury alleged was caused by the defendant’s polluting activity. 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. 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.”

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. 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.


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).
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.” 1d at §6111.01 (1968).

195. 1d. 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. 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. 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. 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.” 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.
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


\(^{203}\) 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).


upon the commissioner, “necessarily vests that officer . . . authority to find either that violations of the ordinances do or do not exist.”

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. 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. 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.

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. 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. 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.

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. 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. 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. 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-
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. In 1966, Congress made further amendments, again increasing financial authorizations.

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 million—not even double the amount approved by Cleveland voters that same year. Of that total, only approximately $6 million was slated for Ohio. Cleveland received nothing. 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. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{227} Although criticized for the practice, the Corps defended its actions as cost-justified.\textsuperscript{228}

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

\textsuperscript{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.


\textsuperscript{225} Reitze, supra note 94, at 15.

\textsuperscript{226} Id. at 35.

\textsuperscript{227} Id.

\textsuperscript{228} Id.

\textsuperscript{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.” 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. 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. After all, the federal government has asserted authority over navigable interstate waters since the nation’s inception, albeit focusing on navigability as such. 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. Unlike individual states, the federal government “has jurisdiction over a larger area and thus can deal with the problem more comprehensively.”

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, also known as the “Refuse Act,” it was unlawful to

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.
deposit “refuse” from shore into a navigable water of the United States. Refuse was defined to include all pollutants, including gasoline accidentally discharged into a navigable river, save non-point source pollution such as runoff. 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. Yet prior to the 1960s, this authority was rarely invoked.

In 1966, the Supreme Court held that the Rivers and Harbors Act prohibited the accidental release of commercially valuable substances, such as gasoline. 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. 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

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.
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.
243. Id. at 225 (quotes in original).
in our rivers and harbors is both a menace to navigation and a pollut-
ant." 244

Even if the Rivers and Harbors Act had not always been under-
stood 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 flamma-
ble 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 gov-
ernment would have had ample reason to take action. Such prosecu-
tions 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, prosecu-
tions 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 Wil-
(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, *En-
forcement 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 fed-
eral government would have been precluded from such action under

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 \textit{qui tam} actions by private citizens.\(^{252}\) The Cuyahoga River was not considered legally objectionable until it caught fire, because the state-designated use of that river was waste disposal.

\textit{\textit{Qui tam} actions by private citizens.}
northeastern Ohio chapter of the Sierra Club investigated industrial facilities and filed petitions with the Justice Department seeking additional enforcement actions. 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.” Indeed, such complaints may have helped spur enactment of federal pollution control legislation that would provide more certainty to national corporations. It is also significant that enforcement under both laws increased substantially after formation of the federal EPA in December 1970.


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

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. 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. 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 that 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-

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

In the context of air pollution, Goklany’s work raises questions about the ultimate necessity of much federal air pollution regulation. 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. 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{269} See GOKLANY, supra note 263, at 89.
\item \textsuperscript{270} Hines I, supra note 119, at 201.
\item \textsuperscript{271} Id.
\item \textsuperscript{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.
\end{itemize}
a readily observable impact on water quality.\textsuperscript{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-

\textsuperscript{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.” GOKLANE, 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).

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. 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. 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. 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” 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 coun-
try was in.

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

This article has suggested limitations or failings in the conven-
tional 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 ade-
quately the full complexity of the Cuyahoga’s history. Yet this nar-
rative – like any good fable – contains a “useful truth” and can in-
form the unending search for more perfect institutions of environ-
mental protection.