NO. 13-4079

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Plaintiffs-Appellants,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Pennsylvania, No. 1:11-cv-00067 (Hon. Sylvia H. Rambo)

CORRECTED BRIEF OF FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, CONSERVANCY OF SOUTHWEST FLORIDA, AND ST. JOHNS RIVERKEEPER AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Florida Wildlife Federation, Environmental Confederation of Southwest Florida, Conservancy of Southwest Florida, and St. Johns Riverkeeper, certifies that these corporations have no parent companies and have never issued stock.

RULE 29(a) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a) *amici curiae* may file a brief if the brief states that all parties have consented to its filing. All parties have affirmed as follows:

Appellants do not oppose the filing of this amicus brief on the condition that amici inform the Court that Appellants may seek leave for an expanded word limit in their reply brief to respond to the multiple Intervenor and amicus briefs filed in support of Appellee.

Appellee U.S. Environmental Protection Agency does not oppose the filing.

Intervenors Chesapeake Bay Foundation, Citizens for Pennsylvania's Future; Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and National Wildlife Federation consent to the filing.

Intervenors Association of Municipal Wastewater Agencies, Maryland Association of Municipal Wastewater Agencies, and National Association of Clean Water Agencies do not oppose the filing.

Intervenor Pennsylvania Municipal Authorities Association does not oppose the filing.

RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part; no party and no party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae* or their members contributed money that was intended to fund preparing or submitting this brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are leading Florida conservation organizations that have brought about major reductions in nutrient pollution of the waters of the State of Florida. They are the plaintiffs in ongoing Clean Water Act litigation regarding nutrient pollution there and have extensive experience in dealing with the relationship between EPA and the states regarding nutrient pollution. *See, e.g.*, *Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, 647 F.3 1296 (11th Cir. 2011) (requiring EPA to set numeric nutrient criteria for Florida); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (challenging state entity's backpumping of nutrient laden water into Lake Okeechobee); *Fla. Wildlife Fed'n*, 853 F. Supp.2d (same); *Fla. Wildlife Fed'n v. U.S. Envtl. Prot. Agency*, No. 4:09-cv-0089 (N.D. Fla., Tallahassee Division, Mar. 9, 2009) (challenging Lake Okeechobee tributary TMDL for nutrients); *Fla. Wildlife Fed'n v. Browner*, No. 4:98-CV-356-WS (N.D. Fla., Tallahassee Division, Apr. 22, 1998) (compelling EPA to set TMDLs for Florida waters).

Florida Wildlife Federation, Inc., is a non-profit organization established for the purpose of protecting Florida's natural resources including its lakes, streams, and estuaries. It has 14,000 members in Florida, many of whom use the waters throughout the State of Florida for canoeing, air-boating, wildlife observation, photography, personal and commercial research, sport fishing, and waterfowl

hunting. Florida Wildlife Federation focuses much of its public education and advocacy efforts on protecting Florida's waters from nutrient pollution, to ensure that harmful algal blooms do not destroy the ecosystems that its members use and enjoy.

St. Johns Riverkeeper's mission is to protect, preserve, and restore the ecological integrity of the St. Johns River watershed for current users and future generations. Riverkeeper monitors the environmental quality in the St. Johns River and its tributaries, and organizes regular boat trips for its members and citizens to learn more about the river and how they can participate in its management. With over 1,000 members using and enjoying the St. Johns River for boating, fishing, observation of birds and other wildlife, kayaking, and canoeing, the Riverkeeper is dedicated to protecting the quality of the water. Nutrient pollution has increased to the point where algal blooms are so large and severe that members do not even want to stand next to the river because of the putrid stench.

The Conservancy of Southwest Florida is a grassroots organization devoted to protecting the land, water, and wildlife of Southwest Florida. The Conservancy works to protect both the quality and quantity of Southwest Florida's water resources through education, monitoring, litigation, and preservation. The Conservancy has approximately 6,000 members residing throughout Florida. Its members use and enjoy Florida's waters for recreational and economic activities

and to observe and enjoy wildlife that rely upon these waters as habitat. Its members enjoy fishing, hunting, kayaking, canoeing, boating, and observing wildlife in and around Florida's waters, especially in Southwest Florida. As a result of its interests, the Conservancy has been a longstanding member in the ongoing litigation to protect Florida's waters from excess nutrient pollution.

The Environmental Confederation of Southwest Florida (ECOSWF) has approximately 50 members consisting of business entities, governmental agencies, and other organizations and individuals living in Southwest Florida. Organized for the purpose of conserving the natural resources of Southwest Florida, ECOSWF promotes the use of Southwest Florida's natural waterways, engages in the conservation of the State's waters, and protects the waters of Southwest Florida from harmful pollution. ECOSWF members enjoy fishing, hunting, kayaking, canoeing, boating, and observing wildlife in and around Florida's waters. ECOSWF, as another plaintiff in the numeric nutrient litigation, has been dedicated to protecting the State's waters from nutrient pollution and to ensuring that there has been sufficient EPA oversight.

If this Court were to find that EPA lacked legal authority to promulgate the Chesapeake Bay TMDL, *amici's* interests would be adversely impacted. Without federal oversight, the waters of the State of Florida would continue to degrade,

fouling the waters, killing fish and wildlife, and impairing *amici's* ability to use and enjoy the waters around the State of Florida.

INTRODUCTION

The Clean Water Act stands in the developed world as a singular achievement in preventing and abating the contamination of lakes, streams and estuaries. Its passage in 1972 stood in the shadow of degradation of public waters that was a stain on this country's international reputation: the Cuyahoga River in Ohio had caught fire, pulp and paper mills disposed of toxic black wastewater into the most convenient nearby water body, and innumerable cities and towns disposed of raw sewage by simply pumping it into the local river.[1] The heart of the Clean Water Act is the principle that the Nation's waters cannot be used – directly or indirectly – to dispose of wastes. This appeal represents a challenge to that principle.

While the Act has resulted in great strides in the vast majority of industries,[2]

[1] "Congress passed the Clean Water Act in response to widespread recognition – based on events like the 1969 burning of the Cuyahoga River in Cleveland – that our waters had become appallingly polluted." *Rapanos v. United States*, 547 U.S. 715, 809 (2006) (Stevens, J., dissenting).

[2] The "Act has largely succeeded in restoring the quality of our Nation's waters. Where the Cuyahoga River was once coated with industrial waste, '[t]oday, that location is lined with restaurants and pleasure boat slips.'" Id. (alteration in original) (quoting EPA, *A Benefits Assessment of the Water Pollution Control Programs Since 1972*, p. 1-2 (Jan. 2000), http://www.epa.gov/ost/economics/assessment.pdf).

contamination of water from industrial animal factories and industrial farming has largely eluded effective abatement.[3] When rain water drains from agricultural operations, fertilizer and manure-laden water pours into rivers and streams. The result has been a growing number of major and recurrent algae outbreaks in lakes and estuaries around the United States. The worst outbreaks and the most spirited legal battles over nutrient pollution have taken place in Florida and in the Chesapeake Bay.

Arguments have been raised by agricultural trade associations and some state Attorneys General to the effect that the states rather than EPA are more capable of handling fertilizer and manure pollution. This Amicus Brief is from four conservation organizations that have been at the center of the effort to abate fertilizer and manure pollution in Florida. The experience of that decades-long endeavor demonstrates that in Florida, the state government's response to rapidly increasing fertilizer and manure pollution has been apathy at best and opposition at worst.

[3] This "nutrient" pollution, which can also come from sewage, is a scourge on the waters it impacts, destroying entire ecosystems when it becomes so severe that harmful algae blooms vacuum up all the dissolved oxygen leaving an aquatic dead zone where the only life that can live is bacteria feeding off of the decaying algae. *See* Bay TMDL at 3 (Joint Appendix (JA) 1108).

SUMMARY OF ARGUMENT

Without federal oversight under the Clean Water Act, states have demonstrated a record of being unable to control their own water pollution. Florida waters, like those of the Chesapeake Bay, have seen a catastrophic rise in nutrient pollution over the past several decades. This nutrient pollution has had disastrous consequences – hundreds of dead manatees, thousands of dead seabirds, tens of thousands of dead fish, and water too toxic for humans to even touch. Harmful algae caused by nutrient pollution have fouled Florida's lakes, rivers, estuaries and coastal waters.

The State of Florida documented and acknowledged the problem. However, Florida caved to pressure from industry, including the industrial/agricultural interests, and failed to promulgate any meaningful protective regulations. The Clean Water Act not only authorizes, but requires, that EPA exercise oversight in Florida and elsewhere when the states fail to do their job to regulate pollution and ecosystems teeter on the edge of collapse. As is also authorized by the Clean Water Act, leading environmental organizations throughout the State of Florida – *amici* on this brief – prodded EPA to take action. *Amici* accomplished this first by bringing suit to require establishment of TMDLs, and then bringing suit to require promulgation of numeric nutrient water quality criteria. Exercise of EPA's

oversight authority has finally led to the establishment of some numeric nutrient standards in Florida.

The Clean Water Act demands that EPA step in and craft a plan – in the Chesapeake Bay's case, a TMDL – to address the ongoing problem and make sure that the respective states deliver on the promise of the Clean Water Act: clean water that protects the environment while ensuring that the people around it have a chance and opportunity to recreate in and use the waters of the United States for boating, fishing, and other recreational activities.

ARGUMENT

I. The Florida Experience Demonstrates That States Cannot Effectively Implement the Clean Water Act Without Substantial Federal Oversight

A central theme in the Amicus Brief signed onto by Florida Attorney General Bondi – on behalf of the State of Florida – is that the control and abatement of water pollution should be left up to the states. *See, e.g.*, Brief of the States of Kansas, Indiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming as *Amici Curiae* in Support of Reversal (hereinafter "States' Amicus Brief") at 17 ("EPA has intruded on States' traditional authority to manage nonpoint sources . . . . Such detailed allocations displace the 'quintessential state and local power' to determine

how best to manage the lands within their borders . . . ."); States' Amicus Brief at 19 ("The dynamics of local economies demand that pollution control implementation plans be placed in the hands of State authorities with knowledge of those dynamics, including seasonal adjustments, and a direct interest in responding appropriately."). But in the real world, a State first has to overcome the opposition of influential trade associations before any pollution controls can be developed and implemented. The recent numeric nutrient criteria litigation in Florida is illustrative of how states are simply unable to handle their own water pollution problems without EPA oversight. The State of Florida is experiencing a serious nutrient pollution problem that has caused massive and often toxic algae blooms throughout the state. Although Florida acknowledged that there was a problem – it is difficult to ignore health department warnings telling people to avoid toxic water – the State was unable to take any action until EPA stepped in. This problem was understood by the United States Congress: the Clean Water Act of 1972 was enacted in response to the notorious failures of its predecessor Act, which left pollution abatement almost entirely to the states. Robert V. Percival, *Environmental Federalism: Historical Roots And Contemporary Models*, 54 MDLR 1141, 1142 (1995) ("Congress mandated national environmental standards only after a long history of failed efforts to encourage states to act on their own.").

A. EPA Oversight Was Necessary to Force Florida to Adopt Numeric Nutrient Criteria in Order to Control Nutrient Pollution

i. Florida's Nutrient Pollution Problem

The ongoing Florida litigation demonstrates that, as in the Chesapeake Bay watershed, water pollution from industrial agriculture and other sources present a very serious problem. *See Fla. Wildlife Fed'n v. Jackson*, 853 F. Supp. 2d 1138, 1145 (N.D. Fla. 2012); Bay TMDL at 3 (JA 1108). As in the Chesapeake Bay, nutrient pollution is not a new problem in Florida. Beginning with the establishment as a new agency in the 1970's, the Florida Department of Environmental Protection (FDEP) reported increasing nutrient levels in waters of Florida throughout the State. *Fla. Wildlife Fed'n* 853 F. Supp. 2d at 1145. As FDEP continued to monitor nutrient levels, it became clear that not only had nutrient levels increased well above their baseline levels, but that they continued to increase throughout the entire State. *Id.* Along with the increase in nutrients statewide, FDEP also reported that toxic harmful algal blooms, which are triggered by an excess of nutrients, similarly continued to increase. *Id.*

In 2008 – as required under the Clean Water Act – FDEP submitted its triennial integrated report to EPA. The report revealed the extent of the problem in Florida: 1,049 miles of rivers and streams were impaired for nutrients. *Id.* An astounding 349,248 acres of lakes were impaired for nutrients, and 902 square miles of estuaries were impaired for nutrients. *Id.* The "green monster" of harmful

algae blooms was appearing everywhere. Since 2005, the "slime" outbreaks in Florida have worsened. Between 2005 to 2009, algae blooms over 100 miles long broke out along the St. Johns River. Florida Water Coalition, http://floridawatercoalition.org (last visited Apr. 3, 2014).

In 2013, an algae outbreak in the St. Lucie River killed hundreds of manatees and dolphins. Martin County had to post signs, warning the public to avoid contact with the toxic water. *Martin County Residents Warned About Toxic Algae*, The Ledger, Aug. 1, 2013, *available at* http://www.theledger.com/article/20130801/NEWS/130809937; Florida Water Coalition, http://floridawatercoalition.org (last visited Apr. 3, 2014).

The Caloosahatchee River has had recurring toxigenic algae outbreaks since 2005, creating a neon-colored soup of water. The Lee County Health Department has had to post signs, warning people to keep their pets and themselves away from the water, and warning people not to eat the fish that might have been poisoned by the toxins. Florida Water Coalition, http://floridawatercoalition.org (last visited Apr. 3, 2014); Sierra Club Calusa Group, http://florida.sierraclub.org/calusa/issues/redtide.html (last visited Apr. 3, 2014).

ii. The State of Florida Found Itself Unable to Implement Effective Regulatory Action in the Face of Environmental Catastrophes Caused by Nutrient Pollution

Even though FDEP acknowledged the nutrient pollution problem, the State, unable to overcome the resistance of polluting interests, found itself unable to take action. Instead, Florida continued to rely on the same water quality standard that had proved itself to be so ineffective – an aspirational narrative "standard" that simply said that nutrient pollution should not be so severe as to cause problems. Fla. Admin. Code. R. 62-302.530(47).

As is the case with TMDLs, *see* 33 U.S.C. § 1313(d), states have primary responsibility for adopting water-quality standards and criteria. *See* 33 U.S.C. § 1251(b), 1313(c)(4). As with TMDLs, EPA must review the states' actions, and must independently determine if the state standard is "consistent with" the requirements of the Clean Water Act. *Compare* 33 U.S.C. § 1313 (d)(2), *with* 33 U.S.C. § 1313(c)(4). EPA, as early as 1998, recognized that the narrative nutrient criterion for Florida waters was insufficient, and that numeric criteria should be adopted instead to ensure the protection of Florida's waters. *Fla. Wildlife Fed'n*, 853 F. Supp. 2d at 1143.

FDEP did not disagree, and represented that it would work with all deliberate speed to develop actual (numeric) limits on manure, sewage and fertilizer pollution. By 2001, FDEP started elaborate studies and held numerous

meeting about setting standards. *Id.* at 1146. Millions of dollars were spent on research, data compilation and even more meetings were held. *Id.* However, FDEP never actually initiated rulemaking. Two years later, FDEP submitted a plan to EPA for developing numeric nutrient criteria with rulemaking starting by 2004. It missed the deadline, *id.* at 1147, and then set a deadline for two more years later – 2006 – to *initiate* rulemaking to develop numeric nutrient limits. The state missed that deadline too. *Id.* FDEP then set a new goal to initiate rulemaking four years later – in 2010. And even before the 2010 deadline was reached, FDEP extended it again to January 2011, reporting for the first time said it might take up to three years after that to finalize the rule. That would have been January, 2014, more than 15 years after EPA first reported that "narrative" standard was not working in the State of Florida. *Id.* at 1148.

iii. EPA Had to Take Action to Ensure Numeric Nutrient Criteria Enacted

Finally, in 2009, *amici* sued EPA to force the agency to do its mandatory duty under the Clean Water Act – to promptly establish new standards whenever EPA determined that a new standard is necessary. *Id.* at 1151. After vigorous pretrial skirmishes, EPA settled and entered into a consent decree that mandated that EPA develop numeric nutrient criteria for Florida's waters if the State continued to delay. *Id.* at 1152-53.

In the face of the 15 year delay and in the context of rapidly increasing toxic algae, the Florida Attorney General took "decisive" action. She sued EPA on behalf of the state of Florida in an attempt to prove that the aspirational narrative standard was effective and that new standards were not needed. *Id.* at 1154. In bringing the lawsuit, the Attorney General joined the unified front of 17 polluting industries (including several of the same trade associations that represent various industrial agriculture sectors, fertilizer sellers, and manufacturers), seeking to invalidate EPA's decision that new standards were needed. *Id.* at 1176-77.

B. EPA Oversight Has Been Necessary To Obtain Implementation of a TMDL Program in Florida

This case concerns the TMDL and load reduction allocation requirements in section 303 of the Clean Water Act. Those requirements have been extensively briefed and *amici* do not need to repeat that explanation.

Although the Clean Water Act was passed in 1972, the State of Florida had in the twenty-six ensuing years adopted only three TMDLs. In that year (1998), several conservation organizations, including Florida Wildlife Federation, sued EPA to force EPA to comply with its duty to disapprove the state's actions and to promulgate its own list of TMDLs for the State of Florida. Complaint at 10-15, *Fla. Wildlife Fed'n v. Browner*, No. 4:98-CV-356-WS (N.D. Fla., Tallahassee Division, Apr. 22, 1998). As a result, EPA agreed to enforce the Clean Water Act and promulgate TMDLs for the State of Florida if the state continued to fail to do

so. Consent Decree at 7-8, *Fla. Wildlife Fed'n v. Browner*, No. 4:98-CV-356-WS (N.D. Fla., Tallahassee Division, July 2, 1999). Recognizing that EPA would promulgate TMDLs if it continued to delay compliance with the TMDL obligation, the FDEP was again forced to comply with the statute. *See, e.g.*, Annual Report to the Court, *Fla. Wildlife Fed'n v. Browner*, No. 4:98-CV-356-WS (N.D. Fla., Tallahassee Division, Oct. 28, 2013) (detailing list of TMDLs EPA approved that the State of Florida proposed, and additional TMDLs that EPA proposed). This demonstrates again that the "cooperative federalism" principal that underlies the Clean Water Act only works when EPA enforces the Clean Water Act and ensures that the states are living up to their responsibilities. When EPA fails to play its central supervisory role, states like Florida do not implement the statute.

Florida's track record confirms this conclusion. Progress was made only when EPA exercised its supervisory powers. It is ironic that the Florida Attorney General comes from a state where toxic algae outbreaks have become a pestilence and argues in this appeal that collaborative implementation programs between several states and EPA contravene the Clean Water Act. Instead of trying to solve the grave problems in Florida, Florida's main legal office has joined in the effort with polluting industries to invalidate a TMDL hundreds of miles away. This conduct reinforces the conclusion that EPA oversight is indispensable to implementation of the statute.

II. EPA's TMDL for Chesapeake Bay is Clearly Within Statutory Authority of the Clean Water Act, Because to Hold Otherwise Would Create the Absurd Result of an Ineffective Statute

EPA's TMDL in this case was clearly envisioned, and even made necessary, by the Clean Water Act. Under the Clean Water Act, states must establish, for Water Quality Limited Segments, the "total maximum daily load" for those pollutants identified by EPA pursuant to section 1314(a)(2), and "[s]uch load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). If a state fails to do so, EPA "shall, not later than thirty days after the date of such disapproval . . . establish such loads for such waters as [the administrator] determines necessary to implement the water quality standards applicable to such waters." 33 U.S.C. § 1313(d)(2).

As the District Court's opinion clearly explains, there have been several failed attempts by the Bay States to address the nutrient problem in the Chesapeake Bay. Op. 10-18 (JA 14-22). Some states have not even attempted to address the problem. Without EPA oversight, the problem would continue to go unaddressed. A detailed TMDL, setting out specific load allocations and waste load allocations, is not beyond EPA's authority when to hold otherwise would frustrate the clear intention of the Clean Water Act. Contrary to the States' arguments that the

States' alone can be trusted to prevent nutrient pollution, EPA's authority to promulgate a TMDL is triggered only when the States have *failed* to protect the water quality of a waterbody. When the states have failed, as the Bay states have with the Chesapeake Bay, and Florida has with regards to nutrient pollution throughout Florida, EPA's duty under section 1313 is to "establish such loads for such waters as [EPA] determines necessary to implement the water quality standards applicable to such waters." 33 U.S.C. § 1313(d)(2). Under the States' interpretation that this is just a *single* number, States' Amicus Brief at 11-12, no state would know what actions would need to be taken to *reach* that loading number, especially when multiple states are involved. Nor would most states act, when enacting regulations on their own could leave themselves at a competitive disadvantage compared to other states. Without EPA exercising oversight authority as it has here, no action would ever take place to clean up an impaired waterbody when a state was beholden to the polluting interests. EPA, in this case, has told the states what they need to do to address the water quality issues with the Bay, and has told them where they can and need to do to reduce nutrient inputs into the watershed. Without this plan, there would be no hope that the Bay States would actually fix the problem, and the Chesapeake Bay could, and most likely would, become a foul, decaying dead zone, lifeless except for algae outbreaks and the bacteria that feed on dead algae, destroying the livelihoods of the people who

depend on the bay, killing endangered species that rely on the Bay, thousands of birds and sea mammals, millions of fish, and rendering the Bay an anoxic dead zone.

CONCLUSION

This Court should affirm the lower court decision.

Respectfully submitted this 17th day of April, 2014.

s/Bradley Marshall
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(d) because this brief contains 3,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2010.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
3. This brief has been scanned for viruses using Kaspersky Endpoint Security 10 for Windows 10.2.1.23 and is free of viruses.
4. The hardcopies of this brief submitted to the Court to be sent today are exact copies of the version submitted electronically.
5. Under Local Rule 46.1, Bradley Marshall is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2014, I filed the foregoing brief using the Court's CM/ECF filing system. I further certify that, to my knowledge, all counsel that have appeared in this case are registered for CM/ECF and will receive service by that means.

Seven (7) copies of the foregoing will be sent to the Office of the Clerk of Court for the United States Court of Appeals for the Third Circuit via Federal Express.

s/ Bradley Marshall
Attorney