

No. 13-4079

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

AMERICAN FARM BUREAU FEDERATION, et al.,

Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee.

**On Appeal from the
United States District Court for the Middle District of Pennsylvania,
Case No. 11-cv-00067-SHR**

**BRIEF *AMICI CURIAE* OF THE CITY OF NEW YORK, THE CITY OF
BALTIMORE, THE CITY OF CHICAGO, THE CITY OF LOS
ANGELES, THE CITY OF PHILADELPHIA, AND THE CITY AND
COUNTY OF SAN FRANCISCO**

ZACHARY W. CARTER,
Corporation Counsel of the City of New York
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, NY 10007
(212) 356-2320
zcarter@law.nyc.gov
sshorr@law.nyc.gov
hmeltzer@law.nyc.gov
hstein@law.nyc.gov

HILARY MELTZER,
HALEY STEIN,
SCOTT SHORR,*
of Counsel.

*Counsel of Record (Additional Counsel
Listed on Inside Cover)
Dated April 21, 2014

GEORGE NILSON
City Solicitor
WILLIAM R. PHELAN, JR.
Chief Solicitor
DANA COOPER
Environmental Counsel
Attorneys for Mayor and
City Council of Baltimore
Baltimore City Department of Law
100 Holliday Street
Baltimore, Maryland 21202
(410) 396-8393
george.nilson@baltimorecity.gov
william.phelan@baltimorecity.gov
dana.cooper@baltimorecity.gov

STEPHEN R. PATTON
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
Attorneys for the City of Chicago
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

MICHAEL N. FEUER
City Attorney
JAMES P. CLARK
Chief Deputy City Attorney
EDWARD M. JORDAN
Assistant City Attorney
Attorneys for City of Los Angeles
200 North Main Street, 7th Floor,
City Hall East
Los Angeles, California 90012-4130
(213) 978-8199

SHELLEY R. SMITH
City Solicitor
SCOTT SCHWARZ
Divisional Deputy City Solicitor
KELLY DIFFILY
Deputy City Solicitor
Counsel for The City of Philadelphia
City of Philadelphia Law Department
1101 Market Street, 5th Floor
Philadelphia, PA 19107
(215) 685-6135
Scott.Schwarz@phila.gov
kelly.diffily@phila.gov

DENNIS J. HERRERA
City Attorney
JOHN RODDY
Deputy City Attorney
Counsel for City and County of
San Francisco
Fox Plaza
1390 Market Street, 4th Floor
San Francisco, California 94102-5408
(415) 554-3986
john.s.rodgy@sfgov.org

RULE 29(a) CONSENT TO FILING

Pursuant to the Federal Rule of Appellate Procedure 29(a), *amici curiae* have obtained the consent of all parties to file this brief. All parties have consented as follows:

Appellants American Farm Bureau Federation, National Association of Home Builders, National Corn Growers Association, National Pork Producers Council, Pennsylvania Farm Bureau, The Fertilizer Institute, and U.S. Poultry & Egg Association, 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 the National Association of Clean Water Agencies, Maryland Association of Municipal Wastewater Agencies, and Virginia Association of Wastewater Agencies consent to the filing; and

Intervenor Pennsylvania Municipal Authorities Association does not oppose the filing.

RULE 29(c)(5) STATEMENT

Counsel for *amici* authored this brief in its entirety, and no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the City of New York's intention to file this brief.

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INTERESTS OF *AMICI CURIAE*

The Cities of New York, Baltimore, Chicago, Los Angeles, Philadelphia, and San Francisco (“Municipal *amici*”) submit this brief in support of: (1) the submission of the Intervenor Municipal Associations (“Intervenor”) seeking to uphold the District Court’s decision in *American Farm Bureau Federation v. EPA*, No. 1:11-cv-67 (Docket # 150) (JA 103); and (2) the adoption by the U.S. Environmental Protection Agency’s (“EPA”) of a holistic watershed approach to water quality improvements as exemplified by the Chesapeake Bay Total Maximum Daily Load (“TMDL”).

Municipal *amici* operate and rely on municipal water and wastewater utilities that provide essential water and sewer services to over 25 million people. Given our fundamental interest in protecting our nation’s waters, we all engage in activities intended to preserve, treat, reclaim, and otherwise improve water quality.

The EPA and state environmental agencies regulate our municipal wastewater and stormwater utilities as “point sources” subject to the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) permitting program. Over the past decade, we have invested billions of dollars in Clean Water Act (“CWA”) compliance. Although only one member of Municipal *amici* (Baltimore) is located in the Chesapeake Bay watershed, we all have a powerful interest in providing the Court with urban local governments’ perspective on the

importance of the holistic watershed approach embodied in the Chesapeake Bay TMDL.

Amicus the City of New York (“New York City”), a political subdivision of the State of New York, is the largest municipal water and wastewater utility in the country. Through its Department of Environmental Protection (“NYCDEP”), it treats roughly 1.3 billion gallons of wastewater a day and, as a public water utility, supplies and distributes more than one billion gallons of drinking water each day to over nine million people. To meet these demands and ensure compliance with all statutory and regulatory requirements, NYCDEP’s nearly 6,000 employees operate and maintain an extensive source water protection program; a water system consisting of 19 reservoirs, three controlled lakes, 26 dams, 295 miles of aqueducts and 6,600 miles of water mains; and a wastewater system consisting of 7,400 miles of sewers, 95 pump stations, four Combined Sewer Overflow detention facilities, and 14 in-City wastewater treatment plants.

Amicus the City of Baltimore, a political subdivision of the State of Maryland, provides water and wastewater services to residents, businesses and industry in Baltimore’s greater metropolitan region. Approximately 1.8 million people in Baltimore City and neighboring Baltimore, Howard and Anne Arundel Counties receive high-quality drinking water every day through these services. Baltimore City also provides raw water to two other neighboring jurisdictions.

Baltimore City protects and manages three raw water reservoirs, treats and distributes 218 million gallons of water per day from three water filtration plants, and maintains 4,500 miles of water mains and 69,135 valves. Baltimore City also collects and treats wastewater generated by approximately 1.6 million people within the Baltimore metropolitan region. Operating under NPDES permits, Baltimore City treats 201 million gallons of wastewater per day at two wastewater treatment plants and maintains 1,400 miles of sanitary sewer mains and 41,590 manholes. Baltimore City also holds a Clean Water Act Municipal Separate Storm Sewer System permit which covers 1,146 miles of storm drains, 52,438 inlets, 27,561 manholes and 1,709 outfall structures.

Amicus the City of Chicago is responsible for providing water and sewer services to roughly 5.3 million people in approximately 125 communities on a daily basis, approximately 42% of the State of Illinois. Through the Chicago Department of Water Management, Chicago collects its water from two intake cribs in Lake Michigan, then treats and distributes the water through an interconnected grid of water mains running throughout the City and suburbs. The Chicago Department of Water Management also maintains 4,400 miles of city sewers and 340,000 ancillary structures (manholes, catch basins and inlets) within the sewer system.

Amicus the City of Los Angeles (“Los Angeles”), acting through its Department of Public Works - Bureau of Sanitation (“LASAN”), is responsible for operating and maintaining wastewater conveyance and treatment systems and watershed protection for over 600 square miles of service area in southern California. LASAN operates separate systems for conveying wastewater and stormwater. LASAN’s wastewater system serves roughly 4 million people with 6,700 miles of sewers and four wastewater and water reclamation plants that collectively process an average of 550 million gallons of wastewater every day. In addition, LASAN’s stormwater system includes over 1,200 miles of storm drains and over 40,000 inlets. In order to ensure compliance with the Clean Water Act and to protect the public health and the environment, LASAN has invested billions of dollars in upgrading and renewing its wastewater system, providing clean and safe waters for reuse and discharge into Santa Monica Bay, the Los Angeles River, Ballona Creek and the Dominguez Channel. Investment in stormwater runoff cleanup is also underway. Pollution from non-point sources continues in Los Angeles’ watersheds and waterways. Efforts are underway to address pollutants in an integrated watershed approach based on maximizing capture, infiltration and reuse utilizing a green strategy.

Amicus the City of Philadelphia (“Philadelphia”), acting through its Philadelphia Water Department (“PWD”), is responsible for supplying safe

drinking water and wastewater services across a broad area of southeastern Pennsylvania, including all of Philadelphia County, and portions of Bucks, Montgomery and Delaware Counties. The PWD water system serves roughly 1.7 million residents of the region, the wastewater system roughly 2.3 million. In addition, PWD is responsible for Philadelphia's stormwater management services, including the maintenance of the City's 2,594 miles of sewer, approximately 72,679 storm water inlets, and 164 combined sewer outfalls. In order to ensure compliance with the Clean Water Act, Philadelphia has pledged significant resources, over the next twenty-five years, to an innovative Long Term Control Plan, known as "Green City, Clean Waters." This plan, memorialized in an agreement with EPA, seeks to protect and enhance local waterways by using green infrastructure systems that assist or mimic natural processes, thereby reducing stormwater runoff and resulting sewer overflows.

Amicus the City and County of San Francisco ("San Francisco"), a consolidated charter city and county organized under the Constitution of the State of California, provides wastewater services to about 1million people, and delivers drinking water to over 2.6 million people across four counties in the Bay Area. At a cost of about \$2 billion, San Francisco constructed and operates a combined system that captures and treats almost all sewage and stormwater in San Francisco. This combined system consists of 1,000 miles of sewers, a 200 million gallon

storage transport system, and treatment facilities that provide over 450 million gallons per day of treatment capacity during rain events. San Francisco's 950 public utilities employees also operate 1250 miles of local drinking water distribution pipes, 300 miles of regional water pipelines, eight large water reservoirs, two water treatment facilities, and extensive watershed protection programs. In addition to serving its residents, San Francisco delivers water to 26 suburban water systems, most of which are also municipalities.

SUMMARY OF ARGUMENT

Municipal *amici* have long advocated a holistic approach to water quality improvements that addresses *all* sources of pollution, and not just easily-regulated point sources, as the most equitable and effective way to meet the Clean Water Act's mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act's NPDES program promotes compliance with water quality standards by imposing significant pollutant removal responsibilities on the operators of permitted facilities, such as municipal wastewater treatment plants and municipal separate storm sewer systems. Historically, non-point sources that significantly contribute to water quality impairment are often not held commensurately accountable under the Clean Water Act for their share of this pollution.

During the infancy of the Clean Water Act in the 1970s and 80s, aggressively regulating “low hanging fruit,” *i.e.*, identifiable municipal point sources with polluted discharges, was a logical, and extremely successful, approach to improving water quality. Now that municipalities have spent billions of dollars addressing and minimizing point source water pollution and these sources are at or near the limits of pollutant-reduction technology, regulators must more effectively address other – “non-point” – sources of water pollution. Simply placing increasingly stringent limits on heavily-regulated municipal utilities is not only inequitable, but doomed to fail. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (“Because of non-point source pollution, achieving the specified water quality standard in a body of water may require more stringent limitations upon point-source discharges than would otherwise be required”); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 214 (D.D.C. 2011) (“Non-point source pollution is often so extensive that it continues to impair water bodies even after technology-based effluent limitations have been fully implemented.”).

By establishing specific load allocations for both point and non-point sources, the EPA’s Chesapeake Bay TMDL takes an equitable and effective approach to improving water quality. The District Court confirmed EPA’s authority to promulgate the Chesapeake Bay TDML. Beyond impeding Clean

Water Act implementation, a reversal by this Court would signal that municipal utilities with limited resources, and which have already made significant efforts and expenditures to comply with the Clean Water Act, should continue to bear the entire burden of statutory compliance, while more significant sources of pollution continue to evade responsibility and escape meaningful participation in this vital pollution reduction effort. Most importantly, because further reductions from municipal point sources below current levels are not financially or technologically feasible, the water quality objectives for the Bay cannot be achieved without the participation of non-point sources.

ARGUMENT

A. Meaningful Regulation of Non-Point Sources Is Necessary to Meet Clean Water Act Goals

Because municipal wastewater treatment plants are comparatively easy to regulate through the NPDES program, municipalities bear a disproportionate burden in meeting water quality standards for specific water bodies. Unlike the highly regulatory NPDES program, the broader framework for dealing with water quality impairments under Section 303(d) of the Clean Water Act is a complex planning program described in detail in Appellee EPA's Response Brief. To be effective, TMDLs established for impaired waters must include allocations for the total amount of pollution entering a waterbody, known as a "load," for both point sources (implemented through the NPDES program) and

for non-point sources. Yet, despite the well-documented contributions of non-point sources to water quality impairment, TMDL development and implementation have traditionally resulted in increased point source controls through the NPDES program with little or no commensurate results in reduced non-point source contributions.

In many cases, however, a TMDL cannot be achieved without significant reductions from non-point sources. For example, phosphorus reductions needed to meet the TMDL for the twelve reservoirs in New York City's Croton water supply system cannot be achieved without non-point source reductions. Even after all necessary wastewater treatment plant upgrades are achieved, non-point sources will need to reduce phosphorus loads by 6,741 kg/year in order to meet the TMDL at these reservoirs. *See* New York State Department of Environmental Conservation, *Croton Watershed Phase II Phosphorus TMDL Implementation Plan*, (January 14, 2009), available at http://www.dec.ny.gov/docs/water_pdf/jan09crotontmdl.pdf. While New York City is undertaking a program to upgrade wastewater treatment plants for phosphorus reductions, resulting in very low effluent concentrations, these investments, by themselves, will not bring these reservoirs into compliance with their TMDL. Accordingly, New York City continues to advocate for New York

State to require substantial non-point source reductions in its implementation plans for these TMDLs.

Fundamentally, in order for TMDLs to improve water quality effectively, EPA must be allowed to establish load allocations based upon the entire range of sources contributing to impairment, as EPA did in promulgating the Chesapeake Bay TMDL.

B. Municipal Utilities Lack the Resources Necessary To Shoulder Sole Responsibility for Achieving Water Quality Improvements in Waters Impaired by Non-Point Source Pollution

State *amici* supporting the Appellants vaguely and speculatively argue that non-point source allocations in the Chesapeake Bay TMDL will somehow unfairly cause states to bear additional financial burdens. *See, e.g.*, Brief of State *Amici Curiae in Support of Reversal*, dated February 3, 2014 (“State *Amici Br.*”), at 19. However, it is the financial burden imposed on municipal utilities (and, by extension, citizen ratepayers), when reduction targets are imposed disproportionately on point sources, that is unsustainable.

Over the past decade, New York City has committed over \$22 *billion* on water and wastewater-related infrastructure and other projects. This represents well over 20% of New York City’s entire capital budget. Of that sum, New York City allocated \$15.5 billion (62%) to meet state and federal mandates, including a multi-billion dollar program to address Clean Water Act mandates for its

wastewater treatment plants and combined sewers. In addition to these mandates, New York City must also allocate funds to build storm sewers, replace storm and sanitary lines, replace or maintain aging infrastructure and equipment according to a prudent asset management review, and plan for climate resiliency. Given the enormous resources required for these projects, New York City is forced to make hard choices on how to spend its limited resources. Many of these projects must be deferred until mandated work on treatment facilities is complete.

As in most municipalities, the real burden of New York City's water and sewer expenditures falls upon City residents who pay for these services—since these costs are funded almost entirely through revenues generated from these paying water and sewer customers. Of the \$22 billion in capital commitments New York City made to meet federal and state water-related mandates in fiscal years 2002 through 2013, less than 2% came from federal and state sources.

Municipal utilities struggle to maintain affordable water and sewer rates while ensuring that revenue from water and sewer rates can cover municipal utility annual budgets. In New York City, for example, 21% of the population lives below the federal poverty level and households are still reeling from the most severe economic downturn since the Great Depression. However, due to the billions of dollars New York City has had to spend to meet state and federal clean water mandates, New York City's ratepayers have seen a 164% increase in their

water and sewer rates over the past decade. Because of continuing commitments to meet these mandates, this upward trend is expected to continue.

Therefore, it is increasingly critical that efforts to achieve the goals of the Clean Water Act fairly allocate the burdens of water quality improvement. Instead of forcing municipalities to spend their limited resources to clean up water pollution caused by non-point sources, a fair allocation would hold non-point sources financially accountable for their significant contributions to water impairment.

C. The Chesapeake Bay TMDL Does Not Improperly Intrude on Local Land Use Authority

Like the State *amici* and County *amici* supporting Appellants, the Municipal *amici* place a high value on preserving local sovereignty over land use decisions. Contrary to the erroneous claims put forth by the Appellants and their *amici*, EPA has not improperly usurped or intruded upon this inherent local authority by establishing specific load allocations for non-point sources in the Chesapeake Bay TMDL. *Pronsolino v. Nastro*, 291 F.3d 1123, 1140 (9th Cir. 2002) (establishment of TMDLs for waters impaired only by non-point source pollution did not improperly intrude upon state and local authority over land use) *cert. denied*, 539 U.S. 926 (2003).

Municipal *amici* include some of the largest local governments in the country. If the Chesapeake Bay TMDL unduly interfered with local autonomy,

Municipal *amici* would strongly oppose it. Quite the opposite, *amici* strongly support EPA establishing load allocations for both point and non-point sources.

Municipal *amici* fail to see how establishing these target reductions interferes with our sovereignty over local land use issues.

As more fully explained by EPA and Municipal Associations Intervenor in their briefs, these allocations are not *de facto* land regulations, and do not “dictate land use management decision” or “control—and potentially debilitate” sectors of the U.S. economy. *See State Amici Br.*, at FN 9, 19 and 20. Rather than dictate the activities that State and local governments must undertake, these allocations provide States information to help determine how pollutant load reductions necessary to improve water quality can be implemented.

In reality, reductions of pollution from non-point sources are achieved through a wide array of methods that do not involve land use regulation or zoning changes. For example, New York City successfully implements the voluntary Watershed Agricultural Program to manage non-point source pollution in its upstate watershed so that New York City’s water supply can continue to meet Safe Drinking Water Act requirements.¹ Operating as a partnership between New York City and the watershed farming community, the Watershed Agricultural Program

¹ New York City’s Catskill/Delaware Water Supply is the largest public water supply in the nation, and because of the exceptional quality of the source waters, also the largest to be granted a waiver from filtration under the Surface Water Treatment Rule, 40 CFR, Part 141, Subpart H. *See* <http://www.epa.gov/region2/water/nycshed/2007fad.htm>.

assists farmers with the development and implementation of voluntary pollution prevention plans. The program's dual goals are to address surface-water quality through land conservation while supporting the economic viability of agriculture and forestry in the watershed region. More than 90% of large watershed farms have enrolled in this voluntary program. Water quality monitoring has demonstrated improvements in water quality, with reductions in nutrient levels in key reservoirs.² Therefore, sensible changes in agricultural and forestry practices can play a constructive role in reducing nutrient loadings without the need to impose new local land use or zoning restrictions.

The success of New York City's cooperative approach is illustrated dramatically by its impact in the City's Cannonsville Reservoir watershed. In the 1990s, phosphorus loading, mainly due to agricultural runoff and wastewater discharges, threatened the health of the reservoir and impaired its use as a source of drinking water. New York City actively sought to eliminate and control sources of phosphorus. Addressing the various sources of phosphorus in the basin required a multi-faceted, cooperative effort that included upgrades to existing wastewater treatment plants coupled with implementation of the Watershed Agricultural

² While this program has been fortunate to achieve a 90% participation rate by large farms in the watershed, it is not reasonable to expect that a similar voluntary approach will be successful in other cases. The fact that Appellants brought this challenge to the non-binding pollution reduction targets in the Bay TMDL is ample evidence that many parties are strongly resistant to implementing measures to address their pollutant loadings.

Program and the rehabilitation, replacement, and elimination of septic systems.

These collective actions have been extremely successful in reducing phosphorus concentrations and improving water quality.

EPA has not improperly intruded in state and local authority by establishing load allocations for non-point sources in the Chesapeake TMDL. Reducing pollution from non-point sources does not require changes in local zoning or land regulations, as significant reductions can be accomplished in line with the allocations from a TMDL through cooperative and voluntary management programs.

CONCLUSION

For the reasons presented above, this Court should affirm the judgment of the District Court.

Respectfully submitted,

ZACHARY A. CARTER
Corporation Counsel of the City of New York
Attorney for *Amicus Curiae* The City of New York
100 Church Street
New York, New York 10007
(212) 356-2320

By: /s/ Scott Shorr
SCOTT SHORR
Attorney for Amicus the
City of New York

Of Counsel

HILARY MELTZER

HALEY STEIN

sshorr@law.nyc.gov

hmeltzer@law.nyc.gov

hstein@law.nyc.gov

(continued on next page)

GEORGE NILSON
City Solicitor
WILLIAM R. PHELAN, JR.
Chief Solicitor
DANA COOPER
Environmental Counsel
Attorneys for Mayor and
City Council of Baltimore
Baltimore City Department of Law
100 Holliday Street
Baltimore, Maryland 21202
(410) 396-8393
george.nilson@baltimorecity.gov
william.phelan@baltimorecity.gov
dana.cooper@baltimorecity.gov

STEPHEN R. PATTON
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
Attorneys for the City of Chicago
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

MICHAEL N. FEUER
City Attorney
JAMES P. CLARK
Chief Deputy City Attorney
EDWARD M. JORDAN
Assistant City Attorney
Attorneys for City of Los Angeles
200 North Main Street, 7th Floor, City Hall East
Los Angeles, California 90012-4130
(213) 978-8199

SHELLEY R. SMITH
City Solicitor
SCOTT SCHWARZ
Divisional Deputy City Solicitor
KELLY DIFFILY
Deputy City Solicitor
Counsel for The City of Philadelphia
City of Philadelphia Law Department
1101 Market Street, 5th Floor
Philadelphia, PA 19107
(215) 685-6135
Scott.Schwarz@phila.gov
kelly.diffily@phila.gov

DENNIS J. HERRERA
City Attorney
JOHN RODDY
Deputy City Attorney
Counsel for City and County of San Francisco
Fox Plaza
1390 Market Street, 4th Floor
San Francisco, California 94102-5408
(415) 554-3986
john.s.rodgy@sfgov.org

CERTIFICATE OF ADMISSION

I hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit.

/s/ Scott Shorr

Scott Shorr

CERTIFICATE OF IDENTICAL BRIEFS

I hereby certify that the text of the PDF version of this brief is identical to the text of the paper copies of this brief.

/s/ Scott Shorr

Scott Shorr

CERTIFICATE OF VIRUS CHECK

I hereby certify that the anti-virus software VirusScan Enterprise Version 7.0 detected no viruses in the PDF version of this brief.

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Scott Shorr

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(B)(i)

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's Order of January 27, 2014. This brief was prepared using Microsoft Word 2003, and according to that software, it contains 3,165 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Scott Shorr

Scott Shorr

CERTIFICATE OF SERVICE

I, **Scott Shorr**, an attorney admitted to practice in this Court, and in the Courts of New York State, hereby certify that I caused to be served the foregoing **Brief for Municipal Amici Curiae** upon the person(s) and in the manner indicated below:

Electronically, Via CM/ECF:

Richard E. Schwartz, Esq.

RSchwartz@crowell.com

Counsel for Plaintiff-Appellant

John D. Gunter II, Esq.

David.Gunter2@usdoj.gov

Counsel for Defendant-Appellee

Jon Mueller, Esq.

jmueller@cbf.org

Counsel for Intervenor-Appellee

Christopher D. Pomeroy, Esq.

chris@aqualaw.com

Counsel for Intervenor-Appellee

Steven A. Hahn, Esq.

shann@hrmml.com

Counsel for Intervenor-Appellee

To my knowledge, all parties are Filing Users are registered to receive electronic notice by the Notice of Docket Activity.

/s/ Scott Shorr

Scott Shorr

New York City Law Department

Date: April 21, 2014