



Everything New Orleans

EPA likely won't have to adopt more stringent restrictions on nutrients in Mississippi River, appeals court rules

dead zone map 2014

This color-coded map shows oxygen levels in bottom waters of the Gulf of Mexico off the Louisiana coast. The darkest red areas, surrounded by a black line, show where the oxygen level is below 2 parts per million, which is considered hypoxia or the "dead zone." (*NOLA.com* | *The Times-Picayune*)

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A federal appeals court Tuesday (April 7) ordered a New Orleans federal judge to reconsider his ruling that the **Environmental Protection Agency** must decide whether more stringent rules are needed to curb the flow of fertilizer and other nutrient pollutants into the Mississippi River to stem the size of a **low-oxygen "dead zone"** that forms along Louisiana's coast each spring.

A three-judge panel of the **U.S. 5th Circuit Court of Appeals** sent the case back to U.S. District Judge **Jay Zainey** to reconsider his **2013 ruling that EPA must conduct a "necessity determination"** of whether to put in place more stringent rules. But it ordered the new review to be "extremely limited" and "highly deferential" to the agency's reasons for not wanting to adopt more stringent standards.

That could be the death knell for the attempt by a consortium of environmental groups, led by the New Orleans-based **Gulf Restoration Network** and the national **Natural Resources Defense Council**, to force EPA to adopt rules that would require states to force farmers and businesses to reduce the flow of nutrients into the river.

EPA has argued that it is responsible for determining whether new rules are needed, and not the courts. The appeals panel, in its ruling, found that the courts do have the authority to review EPA's decision-making, although finding that the review is limited.

EPA also has argued that the federal Clean Water Act creates a fragile balance between individual states and the federal government to reduce pollution that it was properly following in sticking to its strategy of voluntary measures aimed at reducing nutrients.

The legal challenges to EPA's thinking date back to a 2008 request by environmental groups for the agency to adopt more stringent regulations, since the existing voluntary measures implemented by states and EPA had failed to meet goals for reduction of the size of the dead zone.

In **2014, the dead zone covered 5,052 square miles** in mid-July, an area the size of the state of Connecticut. The five-year average size of the low-oxygen area was 5,543 square miles, which was almost three times larger set by the federal/state **Mississippi River Gulf of Mexico Watershed Nutrient Task Force** in 2001.

The low-oxygen conditions kill bottom-living organisms that form the food base for other species, and result in many of those other species, including shrimp, to attempt to avoid the area.

The task force had set a goal of reducing the dead zone to 1,991 square miles, or 5,000 square kilometers by 2015, largely through a series of voluntary actions to be adopted by states along the river.

In the 24-page ruling written by Judge **Patrick Higginbotham** of Texas and agreed to by Judges **Edith Brown Clement** and **Stephen Higginson**, both of New Orleans, the judges said they were largely following precedent set by the U.S. Supreme Court in its 2007 decision in *Massachusetts vs. EPA*, ordering the EPA to reconsider its decision not to regulate carbon dioxide and other greenhouse gas emissions.

Higginbotham was appointed by President Ronald Reagan, Clement by President George W. Bush, and Higginson by President Barack Obama.

Based on that ruling, the appeals court found that EPA's decision not to make a "necessity determination" that more stringent rules are needed "must be rooted in the words of" the section of the Clean Water Act governing the nutrient pollution.

And that law gives the court the authority to review that decision, it found.

Thus, while EPA argued the Clean Water act is a "'carefully crafted scheme of cooperative federalism' that would be 'placed at risk' if the courts were to 'second-guess every EPA decision not to interfere with duly promulgated State water quality standards,'" the environmental groups correctly argued that Congress wanted the courts to be able to review whether EPA was correctly following its role as a backstop to the states.

But that doesn't mean EPA doesn't have the discretion to not make a necessity determination, if its reasoning follows the law and court precedents, the judges said.

They again pointed to the Supreme Court's *Massachusetts* global warming ruling that said EPA had the right to make a "reasonable explanation" for not making the determination "if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so."

"We remand this case to the district court to decide in the first instance whether the EPA's explanation for why it declined to make a necessity determination was legally sufficient," the ruling said.

But in deciding whether EPA was "arbitrary and capricious" in its decision, Zainey must follow a standard

considering the agency's decision "at the high end of the range of deference."

And in deciding whether EPA appropriately declined to make the necessity decision, Zaine's review is limited to determining whether EPA provided "some reasonable explanation as to why it cannot or will not exercise its discretion ..."

"In light of this highly deferential standard of review, the agency's burden is slight," the ruling said, adding that when the statute sets out competing considerations for the agency to weigh in making that decision, "agencies are generally given discretion to choose how to best give effects to those mandates."

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