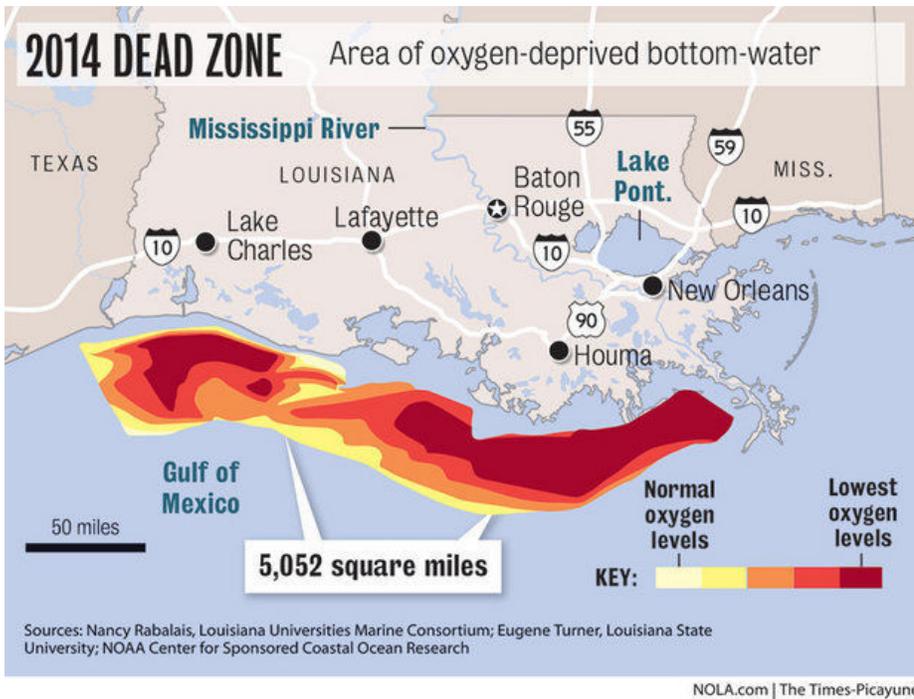


Greater New Orleans

# Federal judge to rehear arguments on forcing EPA to regulate dead zone-causing nutrients



This color-coded map shows oxygen levels in bottom waters of the Gulf of Mexico off the Louisiana coast in July 2014. 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)



[<http://connect.nola.com/staff/mschleif/index.html>] By Mark Schleifstein, NOLA.com | The Times-Picayune [<http://connect.nola.com/staff/mschleif/posts.html>]  
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A federal judge in New Orleans announced Monday (July 20) that he will consider new arguments over whether the federal [Environmental Protection Agency](http://topics.nola.com/tag/EPA/index.html) [<http://topics.nola.com/tag/EPA/index.html>] should increase its regulation of fertilizers and other nutrient pollutants that wash into the [Mississippi River](http://topics.nola.com/tag/mississippi-river/) [<http://topics.nola.com/tag/mississippi-river/>] and cause a low-oxygen "dead zone" [<http://topics.nola.com/tag/dead%20zone/index.html>] " in the Gulf of Mexico every summer.

U.S. District Judge [Jay Zainey](http://search.nola.com/jay+zainey/?date_range=all) [[http://search.nola.com/jay+zainey/?date\\_range=all](http://search.nola.com/jay+zainey/?date_range=all)] issued an order Monday setting a schedule for the submission of written arguments by the 11 environmental groups who filed the suit. The order also asks for arguments from the EPA and a variety of parties that have intervened in the case, including Louisiana and other state governments and organizations representing farmers.

The final batch of filings, responses of the environmental groups to the EPA and other organizations, will be due Feb. 15.

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Zainey said the case will then be decided on the basis of the various written arguments. No oral arguments were scheduled.

The reopening of the case follows a complicated decision on April 7 by the U.S. 5th Circuit Court of Appeals in New Orleans, which decided Zainey had to reconsider a 2013 ruling that ordered EPA to conduct a "necessity determination" of whether to put in place more stringent rules.

The appeals court said the new review had to be "extremely limited" and "highly deferential" to the agency's reasons for not wanting to adopt more stringent standards.

The environmental groups, led by the New Orleans-based Gulf Restoration Network and the national Natural Resources Defense Council, want 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 argues that it should remain responsible for determining if new rules are needed, and not the courts. But the appeals panel found the courts do have limited authority to at least review EPA's decision-making.

In filings in the original suit and as part of the appeal, EPA argued the federal Clean Water Act creates a fragile balance between the rights of individual states and the federal government to reduce pollution. The agency also argued it was correctly handling that balance by keeping to a strategy of voluntary measures aimed at reducing nutrients.

But the environmental groups point to the failure of those measures to reduce the size of the annual dead zone, which in mid-July 2014 covered 5,052 square miles - an area the size of the state of Connecticut. The five year average size of the low-oxygen zone was 5,543 square miles, almost three times larger than the goal for a reduced low-oxygen area set by the federal/state Mississippi River Gulf of Mexico Watershed Nutrient Task Force in 2001.

The task force's goal actually was to reduce the dead zone to 1,991 square miles - or 5,000 square kilometers - by 2015.

A cruise to determine the size of the 2015 dead zone is still a week away. But based on the nutrients carried by the river in May, scientists estimate it will be at least 5,483 square miles, still well above the goal.

After the April ruling, attorneys representing the environmental groups pointed out that even though Zainey's original ruling was reversed, the appeals court rejected EPA's argument that the courts couldn't review its rule-making process. The lawyers held out hope that Zainey may still order the agency to consider adopting new rules.

The appeals court told Zainey that his 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 a federal 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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