

WATERWAYS

A Quarterly Publication of the Iowa Drainage District Association

Volume 3, 2008

Environmental Groups petition EPA for stronger pollution standards

Environmental groups in nine states have petitioned the U.S. Environmental Protection Agency (USEPA) to establish and enforce pollution standards in the Mississippi River Basin of the Gulf of Mexico. The petition followed an announcement that this year's dead zone in the Gulf of Mexico is the second largest since measurements have been taken.

The petition was signed by eight organizations – Minnesota Center for Environmental Advocacy, Midwest Environmental Advocates, Environmental Law and Policy Center, Prairie Rivers Network, Natural Resources Defense Council, Interdisciplinary Environmental Clinic, Gulf Restoration Network and the Tulane Environmental Law Clinic. It alleges that the USEPA has neglected its responsibility to reduce pollution in the Mississippi River and Gulf of Mexico.

The petitioners claim that “the lack of oxygen in the dead zone poses a serious threat to species diversity in the Gulf and to its \$2.8 billion commercial and recreational fishing industry.”

The petitioners also allege that the damage to freshwater in the Mississippi region alters the balance of natural communities, robbing the water of oxygen and promoting the growth of toxin producing microorganisms. Therefore, these problems prevent waters from attaining the Clean Water Act “fishable/swimmable” goals.

The Gulf Hypoxia Task Force did adopt the Clean Water Action Plan (CWAP) in 2001. The USEPA stated that the CWAP is only a blueprint and the intent was to identify the major sources of nitrogen and phosphorus and the actions necessary to address them. The CWAP is not a regulatory program.

However, the activist groups want the EPA to estab-

lish a regulatory program using the latest dead zone statistics to establish urgency. The groups are demanding that EPA take action now.

The petition specifically asks that USEPA “to publish standards that were consistent from state to state that reflected criteria sufficient to achieve fishable/swimmable and satisfy the requirements of the Clean Water Act.”

Editor's Note – Apparently these groups either fail to comprehend or simply ignore the fact that the hypoxic zone in the Gulf is a result of a century and a half of man's activities in the area that drains to the Gulf and that the situation is not going to turn around overnight. The groups want action now which of course sounds great until you realize the practical application of it. Having the USEPA establish and enforce these kinds of limits would have the impact of putting federal bureaucrats in charge of farming practices in the corn belt. That would be a disaster for production agriculture.

According to Dean Lemke of IDALS who has assisted Iowa's Secretaries of Agriculture that have served on the Hypoxia Task Force since it began- “Iowa, in my opinion leads the thirty-one states of the river basin in understanding our landscapes and what approaches will be needed for non-point source nutrient reductions to address hypoxia. However, both Iowa's affected watersheds/landscapes as well as the 45% nitrogen and phosphorus reduction targets (established by the task force) are so large that it will take several decades of very aggressive activities and expenditures to meet the nutrient reduction targets, well beyond the 2015 goal of the Hypoxia Action Plan. Our best defense in Iowa is a good offense of science-based, well targeted voluntary programs that are compatible with Iowa's own food and fuel production engines.” ♣

Portions of this article reprinted from the Illinois Association of Drainage Districts Newsletter

Waterways is a quarterly publication of the Iowa Drainage District Association. Comments can be directed to the association at:

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CREP Field Specialists – Dennis Barrick, Charlie Kiepe, Jay Lynch, Lannie Miller, Bob Powers, Eddie Peterson, Ike Petersen and Mark Sandvik. (CREP field specialists work for IDDA under a contract administered by IDALS).

IDDA Annual Conference

December 5, 2008

Starlite Village Hotel

Fort Dodge, Iowa

- 7:45 a.m. Registration Opens
- 8:30 a.m. IDDA Annual Business Meeting
- 9:15 a.m. Dean Lemke, Director of Water Resources, Iowa Dept. of Agriculture and Land Stewardship; "Impacts of 2008 Iowa Storm Events on Flooding, Erosion and Conservation"
- 10:15 a.m. Dr. Matt Helmers, Iowa State University; "How Does Iowa Tile Drainage affect downstream flooding?"
- 11:00 a.m. Dr. Steven Taff, University of Minnesota, Dept. of Applied Economics; "Biofuels and Drainage – Some Large Scale Considerations"
- 11:30 a.m. Sponsor Presentations
- 12:00 p.m. Buffet lunch
- 12:45 p.m. Lieutenant Governor Patty Judge (invited)
- 1:30 p.m. Adjourn

Registration forms will be mailed out as the conference gets closer or can be obtained on iowadrainage.org

Unattributed Wisdom

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Dead Zone again rivals record size

According to the Louisiana Universities Marine Consortium (LUMCON) the size of the low oxygen “dead zone” off the Louisiana/Texas coast rivals the largest ever, reported Nancy Rabalais and a team of scientists from aboard a research vessel.

The dead zone is an area in the Gulf of Mexico where seasonal oxygen levels drop too low to support most life in bottom and near-bottom waters. It is caused when phytoplankton growth, stimulated by nutrients such as nitrogen and phosphorus from the Mississippi and Atchafalaya rivers settles and decays in the bottom waters. The decomposition of these algae consumes oxygen faster than it can be replenished from the surface, leading to decreased levels of dissolved oxygen.

Hypoxia began to develop this year in early 2008 with above average Mississippi River discharge in February and near maximum flooding in April. The June floods aggravated an already worsening situation offshore. “Low oxygen conditions were present off Terrebonne and Barataria Bays since March and continued to increase through the spring and summer,” reported Nancy Rabalais of the marine consortium.

This year’s area of low oxygen was predicted by Dr. R. Eugene Turner of Louisiana State University to be the largest to date (8,800 square miles) based on the flux of nitrate/nitrogen from the Mississippi River in the May preceding the July mapping cruise. Another forecast by Dr. Donald Scavia of the University of Michigan was to fall between 8,300 and 8,700 square miles. Both forecasts are driven from high nitrate loads from the Mississippi and Atchafalaya rivers. The nitrogen loading to the Gulf of Mexico in May of this year was 37% higher than in 2007 and the highest since measurements began in 1970. “The intensive farming of more land, including crops used for biofuels, has definitely contributed to this high nitrogen loading rate,” reported Turner.

Tropical storms and hurricanes have the potential to disrupt hypoxia, which is exactly what Hurricane Dolly did as it crossed the Gulf of Mexico from Yucatan to Brownsville, Texas on July 21-23. “Hurricane Dolly’s winds and waves caused reaeration of parts of the Dead Zone, especially along its westward and shoreward edges,” said Dr. Rabalais. “If it were not for



Hurricane Dolly, the size of the dead zone would have been substantially larger.” Still, “an amazingly large area of hypoxia persisted despite the mixing from the hurricane.” A similar large area was mapped during groundfish surveys by the National Marine Fisheries Service during June 11 – July 16.

The twelve member research team of scientists and graduate students from the consortium, Louisiana State University and the University of Iowa mapped the ever present dead zone along with conducting scientific experiments and collecting data for several research and modeling programs. Funding for the research program is provided by the National Oceans and Atmospheric Administration Center for Sponsored Coastal Research, Coastal Ocean Program Grant # NA06NOS4780197 to the consortium and LSU.

The 2008 size ranks second in size, along with that of 2001, for the area of hypoxia since mapping began in 1985.

Portions of this article reprinted from the Illinois Association of Drainage Districts Newsletter

Want to learn more?

Here are some helpful websites:

<http://www.gulfhypoxia.net/news/documents/hypoxia-forecast13July2008.pdf>

http://www.cop.noaa.gov/stressors/extremeevents/hab/features/hypoxiafs_report1206.html

<http://ecowatch.ncddc.noaa.gov/hypoxia>

www.healthygulf.org/images/stories/healthywaters/dead_zone_petition.pdf



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U.S. seeks clarity on Rapanos ruling

The U.S. government, arguing that the lower courts have fallen into confusion and disagreement over federal power to protect wetlands, has urged the Supreme Court to make clear what it meant in the “highly fractured” ruling two years ago in *Rapanos v. U.S.* (04-1034) - a significant decision on the scope of the Clean Water Act.

The Justice Department filed an appeal Thursday on that issue in *U.S. v. McWane, Inc., et al.* (docket 08-223). The petition, together with an appendix with Eleventh Circuit Court opinions, is now available and can be downloaded here - <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/mcwanepetition.pdf> .

The Eleventh Circuit, in a post-*Rapanos* decision last October that created a direct conflict among lower courts, ruled that the federal law’s ban on pollution into “waters of the United States” does not apply to wetlands unless they have a “significant nexus” to traditional streams. The Circuit Court found that legal formula in a separate opinion in *Rapanos* by Justice Anthony M. Kennedy, writing only for himself. That, the Eleventh Circuit said, is the only standard that governs.

The new appeal contends that the proper way to read the *Rapanos* decision is to apply the view “endorsed by eight Members of this Court in *Rapanos* - the four-Justice plurality and the four dissenters.”

The Department contended: “The court of appeals’ analysis misinterprets *Rapanos* and this Court’s precedents governing how to interpret fractured decisions; creates bizarre outcomes;...will seriously impede enforcement of the CWA; and presents an issue of exceptional importance both to the government and to the regulated community. That decision should not be permitted to stand.”

The federal appeal is one of two asking the Court to re-visit and clarify its *Rapanos* decision. The other is *Lucas v. U.S.* (07-1512), filed in early June. The Justice Department was set to respond to that petition



in late August, but, in a footnote in its *McWane* appeal, the Justice Department said that the federal case “provides a more suitable vehicle” for confronting the Clean Water Act issue.

Under that Act, no one may discharge pollutants into “navigable waters,” defined as “the waters of the United States.” The government interprets that last phrase as meaning traditional rivers and their tributaries, and wetlands that are “adjacent” to such rivers and streams.

In *Rapanos*, the four Justices supporting the main opinion, written by Justice Antonin Scalia, said the waters protected by the Act are those that are

“relatively permanent, standing or continuously flowing bodies of water” connected to traditional rivers or streams that can carry navigation, as well as wetlands with “a continuous surface connection to such water bodies.”

Justice Kennedy, however, said the Act protects wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” The four dissenters said lower courts could apply either the Scalia or Kennedy approach, although they themselves preferred the long-standing government definition that protected more wetlands from pollution.

The Eleventh Circuit, however, using the concept that Kennedy’s opinion turned out to be controlling because it provided the reasoning that created a majority for the outcome in *Rapanos*, said that that was the controlling standard. The Circuit Court thus overturned convictions under the Act for dumping large quantities of untreated industrial waste water from a pipe-making foundry in Birmingham, Ala., into a creek that flowed into other permanent streams feeding into navigable waters in the traditional sense.

In its appeal to the Supreme Court, the Justice Department said that the creek into which the waste water was discharged “flowed year-round and...fed, through

Continued on page 5 ►

perennial waters, into a traditional navigable river.

That evidence proved that the site of the discharges was part of the ‘waters of the United States’ under the standards” endorsed by the plurality and dissenters in Rapanos.

The nation’s waters, the petition said, “include innumerable perennial or relatively permanent tributaries that connect to traditional navigable waters. The health and vitality of those interconnected waters depends critically on protection of the tributary systems from pollutants that naturally wash downstream.”

Under the Kennedy “significant nexus” standard, the petition argued, juries would be asked to weigh complex scientific evidence and have to parse conflicting experts’ testimony.” This could lead to differing or directly conflicting outcomes, jury by jury, the petition contended.

The response to the government appeal was due in late September. Posted By Lyle Denniston On August 25, 2008

New CREP Field Specialist hired

IDDA recently hired Dennis Barrick as a Crep Field Specialist (CFS). IDDA is under contract with IDALS to furnish individuals to market the CREP program to landowners. Dennis is retired from the NRCS (Natural Resources and Conservation Service) and recently has been a part-time conservation specialist for the Story Soil and Water Conservation District in Nevada. He is also an amateur blacksmith who has produced items for Living History Farms. IDDA now has eight part-time CREP Field Specialists under employment contracts.

Door-Knobbbers

A recent issue of NACo News had an article about “time lost to door knob people.” The article makes a point worth noting.

The author was curious as to why he always had to wait so long at the Doctor’s office when he had a specific appointment time. After all, if you have a 10:00 a.m. appointment, isn’t that when you should actually see the doctor?

The author’s daughter, who is a doctor, finally explained him the door-knob syndrome. She would see a patient who was complaining of a specific malady. The examination would be done and the appointment would be concluding. At the very end of the appointment, as the patient was getting up to leave, usually with hand on the door knob is when the doctor would hear, “Oh, there is just one more thing that I forgot to ask you about.” This “one more thing” would of course prolong the appointment, usually by a significant amount.

The author points out that we seem to be bedeviled by the door knob people. They are in front of us in the checkout line at the grocery store, drive through teller window, or at the post office.

The author, Phil Rosenberg, concludes by noting that everyone “should spend some time thinking about how you personally immunize yourself from catching this “disease.” The resulting revelations may help you to be in a better mood when the waiting is over. However, it will also help you to be in a better mood throughout your entire career.”



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Rule making on Water Quality to be considered this month

The state Environmental Protection Commission (EPC) will meet in Des Moines on October 14. On their agenda for a decision will be new rules that are designed to provide more protection for Iowa's water supplies. The rules are referred to as anti-degradation policy.



In last the last issue of "Waterways"; it was detailed how these rules might impact drainage. Currently, in your position as a drainage trustee, if you repair a drainage ditch, you are not required to get a state permit to do so. The reason for this is that drainage repairs have a specific exemption in the Iowa Administrative Code. Section 71.2 (4) of the Code states that "Ap-

proval is not required for repair and maintenance of a drainage district ditch as defined in 70.2 (455b) if the drainage area of the ditch at the proposed work is less than 100 square miles."

The problem is that if new rules are adopted on the degradation of water, the exemption would cease to exist. IDDA has been told by DNR staff that "EPA will not permit new rules to go into effect that still has the drainage exemption in place." EPA sees the language as an inconsistent application of the Clean Water Act.

DNR has also told IDDA that they do not want to get into the business of permitting drainage district repairs. It appears that we have may have a solution that will satisfy DNR, EPA and allow drainage districts to continue to perform repairs and maintenance without having to get a permit.

IDDA has worked very closely on this issue with the Two Rivers Levee and Drainage Association in south-east Iowa. Scott Power, who is their attorney, was the one who came up with this approach and helped

convince DNR that it was a workable solution for all concerned. The implementation procedures to be adopted contain the following language - "Those activities conducted in compliance with Section 404(f) of the Clean Water Act as interpreted by the Environmental Protection Agency and United States Army Corps of Engineers will be deemed to be in compliance with this State's antidegradation policy." Section 404(f) permits the "construction or maintenance of farm or stock ponds, or irrigation ditches or the maintenance of drainage ditches." It also permits the maintenance and emergency reconstruction of "dikes, dams, levees, groins, riprap, breakwaters, causeways and bridge abutments or approaches and transportation structures." That language would continue to allow "business as usual."

IDDA would like to thank Scott Power and the Two Rivers Levee and Drainage Association for all of their hard work on this issue. ♻



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Executive Director Notes

One of the many things that has occupied my time this summer and fall is that I was appointed to be a member of the Agriculture and Environment Resource Group of the Rebuild Iowa Task Force. The Rebuild Iowa group was assembled by Governor Culver to study the floods of 2008 and what needs to be done in Iowa to mitigate future flooding events.

The Ag and Environment Task Force met twice this summer and we have another meeting scheduled in mid-October. We have studied a great deal of information and listened to experts on different aspects of the floods and their aftermath.

I am glad that I was asked to do this because there is a perception out there that drainage made the flooding situation worse than it was. In reality, nothing could be further from the truth. We need to remember three things in looking at drainage as it related to this year's floods:

1. If all of the water that had been carried away in underground tile or exposed drainage ditches had instead moved across the surface of the land unabated, the damage would have been far worse
2. When you drain land, it changes the soil profile and the soil is able to hold more water
3. Drainage meant that farmers were able to dry their fields out much more quickly. This enabled them to plant a second crop in areas where the first planting had been washed away or flooded out. So the fact that their land was drained still allowed them to have a crop. If this had not been the case, the economic damages suffered would have been much greater.

One question or suggestion that was made early in the process was to somehow regulate drainage systems to slow the down water. My comment to a fellow task force member at that point was that we ought to just pass a law forbidding any rivers in Iowa from flooding and our problems would be solved. Another suggestion was that "reengineering of the tile drainage system should also address water quality issues in addition to moving water."

One of the earlier versions of the task force reports had some unkind remarks about drainage and I was able to get that wording changed. The draft report had

the following remark – "The flow of water and Iowa's drainage system is more than problematic. It must be addressed. Coupled with a combination of conservation practices, resources and incentives, the state could move forward in the near future to help alleviate, to an extent, future flooding disasters."

I responded to that draft with several questions and comments. My response was; "Frankly, I don't know what is being advocated. How is Iowa's drainage system problematic? What exactly must be addressed and by whom? What is being coupled with conservation practices? How are drainage systems going to alleviate future flooding disasters, or are they? Without an explanation of what exactly this paragraph means, I cannot support its inclusion into the report."

After I raised those concerns, the paragraph was changed as follows – "The flow of water, Iowa's drainage system and urban run-off must be addressed in a comprehensive way. Coupled with a combination of conservation practices, resources and incentives, the state could move forward in the near future to help alleviate, to an extent, future flooding disasters." I am still not sure exactly what is being contemplated here but I do feel better about the wording now.

Elsewhere in this issue is information on our upcoming annual meeting. This year's meeting will (surprise – surprise) focus on the floods of 2008. We have a very good program put together and hope you can attend. Registration forms will be mailed out as the meeting gets closer. We also have them available on our website iowadrainage.org in the meetings and conferences section.

With the start of the new IDDA fiscal year, I have once again started my member visits. Weather and health permitting, I will get to all of your counties by next summer. ☺



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Monona County case moves forward

In the spring issue of Waterways, information was provided on a case involving the New Farmers Drainage District (NFDD) in Monona County.

In the fall of 2007, the district (NFDD is a trustee run district) hired a contractor to kill weeds in one of their ditches. While the weeds were being sprayed, someone called the DNR to investigate. When the DNR field people arrived on site, some dead fish were found in the ditch. DNR concluded that the chemical being sprayed killed fish. The DNR came to the conclusion that the value of the fish was almost \$15,000.

The DNR then presented the contractor and the district with a consent order. That order contained a penalty provision of \$10,000 plus the value of the fish. Further, the district would have to “develop a vegetation control plan to prevent fish kills and submit that plan for DNR approval.” Further, NFDD would have to notify the DNR field office in Atlantic at least 72 hours prior to the application of herbicides within the drainage district for two years.

Both the district and the contractor refused to sign the consent order. The contractor is being represented by an

attorney provided by the manufacturer of the herbicide. The NFDD has retained the services of Bob Brinton out of Clarion to represent them – upon recommendation of IDDA. IDDA, through action of its governing board, has also agreed to assist the county financially in its legal defense. The board voted to allot up to \$5,000 from the Mutual Protection Fund to help the district out financially.

According to John Torbert, IDDA executive director, this case is could really be a “big deal.” “Here you have a district that did absolutely nothing wrong. It hired a professional well-respected contractor to do work that it has the legal obligation to do. We cannot have a situation where districts have to run to DNR and get permission to perform work that they are supposed to do. There is also considerable dispute as to whether the spraying had anything to do with the fish that died. We don’t believe that it did.”

The case is now starting to move forward. Attorneys have exchanged interrogatories leading up to the hearing.

IDDA will keep you posted as this very important case progresses. 🌿

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