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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, GREAT BASIN RESOURCE  
WATCH, AMIGOS BRAVOS, and IDAHO  
CONSERVATION LEAGUE,

No. C 08-01409 WHA

Plaintiffs,

v.

STEPHEN JOHNSON, Administrator, United  
States Environmental Protection Agency, and  
MARY E. PETERS, Secretary, United States  
Department of Transportation,

**ORDER GRANTING IN  
PART AND DENYING  
IN PART MOTIONS FOR  
SUMMARY JUDGMENT**

Defendants,

and

SUPERFUND SETTLEMENTS PROJECT, RCRA  
CORRECTIVE ACTION PROJECT, AMERICAN  
PETROLEUM INSTITUTE, and TREATED  
WOOD COUNCIL,

Defendant-Intervenors.

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**INTRODUCTION**

In this environmental action alleging failure to perform nondiscretionary duties required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the parties filed cross-motions for summary judgment. For the reasons stated below, plaintiffs' motion is **DENIED IN PART** and defendants' motion is **GRANTED IN PART** on the remaining issue of EPA's duty to promulgate and impose financial assurance requirements. This action is **DISMISSED**.



1 these steps, plaintiffs assert that defendants are currently in violation of Section 108(b) and that  
2 failure, plaintiffs claim, increases the likelihood that plaintiffs' members and their environment  
3 will be exposed to unremediated releases of hazardous substances.

4 Defendants previously moved to dismiss plaintiffs' CERCLA claim for lack of  
5 subject-matter jurisdiction. That motion was denied in an order dated July 23, 2008.  
6 Defendants also moved to dismiss plaintiffs' second claim for relief under the Administrative  
7 Procedure Act. Defendants argued in their motion to dismiss that jurisdiction over the APA claim  
8 was proper only in the Court of Appeals for the District of Columbia Circuit. This Court agreed,  
9 and defendants' motion to dismiss was granted, and an order dated August 8, 2008, dismissed the  
10 APA claim in its entirety without prejudice for plaintiffs to refile in the Court of Appeals for the  
11 D.C. Circuit.

12 The parties filed cross-motions for summary judgment. An order dated February 25, 2009,  
13 granted in part and denied in part the motions. The order held that plaintiffs lacked standing to  
14 sue defendant DOT, that plaintiffs had standing to sue defendant EPA, and that plaintiffs'  
15 nondiscretionary-duty claim regarding publication of notice of classes was timely. This Court  
16 ordered EPA to identify and publish notice of classes as specified in Section 108(b)(1) by  
17 May 4, 2009. Pursuant to the parties' stipulation, the deadline was extended to July 10, 2009.  
18 The February 2009 order declined to address the merits of EPA's argument regarding its duty  
19 to promulgate and impose financial responsibility requirements, holding the issue in abeyance  
20 pending EPA's publication of notice of classes.

21 EPA has now published notice of classes. This order addresses the remaining issue  
22 of EPA's duty to promulgate and impose financial assurance requirements on the parties'  
23 cross-motions for summary judgment.

#### 24 **ANALYSIS**

25 CERCLA allows citizens to commence a civil action against EPA for failure to perform  
26 any act or duty under the Act which is not discretionary. 42 U.S.C. 9659. Thus, citizen suits may  
27 not be brought to enforce actions when the agency has discretion. EPA does not dispute that the  
28 requirement to identify and publish notice of classes under Section 108(b)(1) was a

1 nondiscretionary duty with a date-certain deadline. EPA admits that the remaining acts at issue —  
2 to promulgate and impose financial responsibility regulations pursuant to Section 108(b) of  
3 CERCLA — have not been done. Plaintiffs allege that these obligations are nondiscretionary  
4 duties.

5 Section 108(b)(1) requires EPA to promulgate financial responsibility regulations  
6 “[b]eginning not earlier than five years after December 11, 1980.” 42 U.S.C. 9608(b)(1).  
7 Once promulgated, Section 108(b)(3) provides that the regulations “shall incrementally impose  
8 financial responsibility requirements as quickly as can reasonably be achieved but in no event more  
9 than four years after the date of promulgation.” 42 U.S.C. 9608(b)(3).

10 Plaintiffs argue that the absence of a date-certain deadline does not render these duties  
11 discretionary where Section 108(b) uses language such as “shall.” *See* 42 U.S.C. 9608(b)(1);  
12 *Our Children’s Earth Foundation v. U.S. E.P.A.*, 527 F.3d 842, 847 (9th Cir. 2008).  
13 Plaintiffs contend that the use of “may” and “shall” in Section 108(b) further identifies  
14 certain acts as discretionary and others as mandatory. The nondiscretionary nature of the  
15 duty to promulgate and implement financial responsibility requirements, plaintiffs also argue,  
16 can be inferred from CERCLA’s structure and legislative history.

17 EPA argues that these obligations are discretionary, because Section 108(b) does not  
18 specify a date-certain deadline for completion of either requirement. *See Sierra Club v. Thomas*,  
19 828 F.2d 783, 791 (D.C. Cir. 1987). EPA has clarified that it does not dispute, as plaintiffs  
20 contend, that it has a duty to promulgate financial responsibility requirements under CERCLA.  
21 Rather, it contends that it has “discretion as to *when* to perform this duty” (Def. Reply Br. 16)  
22 (emphasis added). EPA also contends that CERCLA’s legislative history supports finding the duty  
23 to be discretionary because Congress rejected a proposed amendment to add a date-certain deadline  
24 for the promulgation of financial responsibility requirements. *See* H.R. Rep. 99-253(V), 99th Cong.  
25 (1st Sess. 1985); H.R. Conf. Rep. 99-962, 99th Cong. (2d Sess. 1986). Plaintiffs do not respond to  
26 EPA’s legislative-history argument.

27 This order agrees with EPA that although Section 108(b) requires EPA to promulgate  
28 financial responsibility regulations and incrementally impose such requirements, Section 108(b)

1 provides EPA with discretion as to when to promulgate such regulations. Unlike the duty to  
2 publish notice of classes, Section 108(b) does not include a date-certain deadline for the  
3 promulgation of financial responsibility regulations and the legislative history demonstrates  
4 that Congress rejected a proposed amendment to add a date-certain deadline for the promulgation of  
5 financial responsibility regulations. 42 U.S.C. 9608(b)(1); *see Sierra Club v. Thomas*, 828 F.2d at  
6 791.

7 The Ninth Circuit decision upon which plaintiffs rely is distinguishable. In *Our Children's*  
8 *Earth Foundation*, the duty to review effluent limitations under the Clean Water Act (CWA),  
9 which the court held to be nondiscretionary, included a date-certain deadline that limitations  
10 "shall be reviewed at least every five years." 33 U.S.C. 1311(d); *see* 527 F.3d at 848-49. The court  
11 further held, however, that in the review process, whether the EPA must consider a  
12 technology-based approach was discretionary where "[n]othing in the CWA specifically obligates  
13 the EPA to review the effluent guidelines and limitations using a technology-based approach.  
14 At most, the statutory provisions and legislative history are ambiguous." *Our Children's Earth*  
15 *Foundation*, 527 F.3d at 851. Here, the legislative history reveals that Congress purposely gave  
16 the government discretion as to when to promulgate financial requirement regulations so long as  
17 promulgation occurred five years after December 11, 1980.

18 This order does not adopt, as defendants urge, a bright line rule that only duties with  
19 date-certain deadlines are nondiscretionary for the purpose of citizen suits under CERCLA.  
20 The Ninth Circuit has not yet addressed this issue and as the parties acknowledge, courts are split  
21 on the classification of duties as nondiscretionary for citizen suits under other environmental laws.  
22 This order holds that the duty to promulgate and impose financial responsibility regulations under  
23 CERCLA is discretionary based on the combination of the absence of a date-certain deadline and  
24 CERCLA's legislative history.

25 With EPA's recent publication of notice of classes, plaintiffs' CERCLA claim based  
26 on EPA's failure to publish notice is moot. Plaintiffs' remaining CERCLA claim based on EPA's  
27 discretionary duty to promulgate and impose financial responsibility regulations cannot proceed  
28 because only nondiscretionary duties may be challenged in citizen suits under CERCLA. 42 U.S.C.

1 9659. This order therefore dismisses the action. As the order dismissing plaintiffs' APA claim  
2 without prejudice noted and defendants appear to concede, plaintiffs may bring an APA claim in  
3 the Court of Appeals for the D.C. Circuit alleging EPA unreasonably delayed in promulgating the  
4 financial responsibility regulations required under Section 108(b).<sup>2</sup>

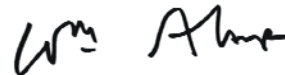
5 Having concluded that EPA's duty is discretionary, this order does not reach defendants'  
6 argument that plaintiffs may not challenge EPA's duty to incrementally impose financial  
7 responsibility requirements under Section 108(b)(3) where EPA has not yet promulgated the  
8 financial responsibility regulations.

9 **CONCLUSION**

10 For the foregoing reasons, plaintiffs' motion is **DENIED IN PART** and defendants' motion is  
11 **GRANTED IN PART** on the remaining issue of EPA's discretionary duty to promulgate and impose  
12 financial responsibility requirements. This action is **DISMISSED**.

13  
14 **IT IS SO ORDERED.**

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16 Dated: August 5, 2009.



17 WILLIAM ALSUP  
18 UNITED STATES DISTRICT JUDGE

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<sup>2</sup> Defendants note that an unreasonable delay claim under the APA may be brought when an agency has failed to perform a statutory duty that does not include a date-certain deadline (Def. Opp. 20 n.8).