

It is not unusual for the federal government to neglect its statutory duties under federal environmental laws; when it does, citizen suits are the primary means of ensuring that the government follows the law. Sometimes federal agencies' inaction results from lack of resources, and sometimes it results from intentionally interpreting its duties in a minimalist manner. In some cases, the government can at least plausibly argue that it has followed the law, and the dispute is over whether it has done a good enough job.

Every once in a while, government agencies have so clearly neglected their duties that they can't even argue that they have followed the law. Yesterday, U.S. District Judge William Alsup issued a [decision](#) in such a case. At issue is the Environmental Protection Agency's failure to meet the requirement in Section 108(b) of CERCLA (the Superfund law) to issue regulations requiring many businesses that handle hazardous substances to show that they are capable of paying potential future environmental cleanup costs. This concept, called "financial assurance," has been widely used in other contexts. It generally requires companies to post a bond, purchase insurance, or otherwise satisfy the government that in the event of an environmental disaster for which the company is legally responsible, the company will have in place the funding to pay for any necessary response or remediation. This reduces substantially the risk imposed on the public or on other parties. But the EPA has never issued the required regulations, the first of which were due in 1983.

The law makes sense. There are substantial polluting facilities, such as mines and coal-fired power plants, that currently do not have to guarantee financial responsibility in case of an environmental disaster. For example, a 2005 [report by the U.S. Government Accountability Office](#) found that "[s]ome mine owners have defaulted on environmental liabilities associated with their mines on multiple occasions, and the cleanup costs for these sites are being or are expected to be borne largely by taxpayers." (p. 37.)

But, as the same GAO report noted, the law has never been implemented. The EPA never issued the regulations, even though they were supposed to come out in the 1980s. (The [GAO report](#), at pages 33-39, details the requirements that EPA hasn't met, the chronology of the small efforts the agency has made toward compliance over the years, and how the regulations would serve an important role in filling gaps in financial coverage for cleanups.)

So the Sierra Club and some other environmental advocacy groups sued the EPA (and also the federal Department of Transportation, which is responsible for implementing some of the requirements). The EPA responded, first, that the plaintiffs lack standing to sue, and second, that they are suing too late. The EPA didn't contest that they have failed to issue the regulations, or that at least the first statutory requirement, that the EPA "publish notice of the classes of facilities for which financial responsibility requirements would be required

not later than three years after December 11, 1980,” involved a mandatory duty that had to be performed by a particular date. (That would be a tough argument to make!)

The court found that the plaintiffs have standing to sue the EPA, and that they didn’t bring the claim too late. As a result, the court ordered yesterday that the EPA has to take the first step required under the regulations: again, it must “publish notice of the classes of facilities for which financial responsibility requirements would be required not later than three years after December 11, 1980.” A little late – just a little.

Yesterday’s decision did not address the next question, which is whether EPA should be ordered to meet the other statutory requirements – taking the steps to actually require that the regulated facilities meet financial assurance requirements. EPA has argued that since those steps don’t have a fixed statutory deadline, the court shouldn’t order the agency to meet the requirement. 29 years since the statute was enacted seems a bit long to me, though. The court will take up these questions at a later date, assuming the EPA doesn’t change its position and start moving forward on these regulations under the new administration. For now, this court decision is a step in the right direction.