

110TH CONGRESS  
1ST SESSION

# S. 452

To amend title 11, United States Code, to ensure that liable entities meet environmental cleanup obligations, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 31, 2007

Ms. CANTWELL (for herself, Mrs. BOXER, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To amend title 11, United States Code, to ensure that liable entities meet environmental cleanup obligations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Cleanup Assurance and Polluter Accountability Act of  
6 2007” or the “CAPA”.

7 (b) TABLE OF CONTENTS.—The table of contents of  
8 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Findings.

Sec. 3. Definition of Administrator.

TITLE I—REQUIREMENTS FOR FINANCIAL ASSURANCE

Sec. 101. Financial assurance directives.

Sec. 102. No effect on other law.

TITLE II—RECOVERY OF COSTS IN BANKRUPTCY

Sec. 201. Extended period for review of transactions.

Sec. 202. Study and report by the National Bankruptcy Review Commission.

Sec. 203. No effect on other law.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) the Environmental Protection Agency faces  
4 considerable challenges when seeking to hold busi-  
5 nesses responsible for their environmental cleanup  
6 obligations because—

7 (A) the Comprehensive Environmental Re-  
8 sponse, Compensation, and Liability Act of  
9 1980 (42 U.S.C. 9601 et seq.) seeks to hold  
10 parties responsible for environmental damage  
11 based on the principle of “polluter pays”; but

12 (B) in some cases, parties responsible for  
13 environmental damage may file for bankruptcy  
14 protection under title 11, United States Code,  
15 under which the parties are often permitted to  
16 limit or avoid their cleanup responsibilities;

17 (2) the extent to which businesses with environ-  
18 mental liabilities terminate operations and reorga-  
19 nize under title 11, United States Code, directly af-  
20 fects the extent of cleanup costs borne by taxpayers,

1 as well as the timeliness of remediation of contami-  
2 nated sites;

3 (3) according to an August 2005 Government  
4 Accountability Office report, while more than  
5 231,000 businesses operating in the United States  
6 filed for bankruptcy protection between 1998 and  
7 2003, it is not known how many of those businesses  
8 had environmental liabilities because that informa-  
9 tion is not adequately tracked;

10 (4) the Environmental Protection Agency con-  
11 tinues to lack timely and complete information on  
12 the thousands of businesses filing for bankruptcy  
13 protection each year;

14 (5) contrary to the “polluter pays” principle,  
15 taxpayers are more frequently covering the costs of  
16 environmental cleanup because—

17 (A) potentially responsible businesses are  
18 no longer taxed for that specific purpose; and

19 (B) the backlog of sites requiring costly  
20 cleanup is growing;

21 (6) as of the date on which this Act is intro-  
22 duced in the Senate, there are 1,244 cleanup sites  
23 listed on the National Priorities List developed by  
24 the President in accordance with section  
25 105(a)(8)(B) of the Comprehensive Environmental

1 Response, Compensation, and Liability Act of 1980  
2 (42 U.S.C. 9605(a)(8)(B));

3 (7) pursuant to a congressionally requested  
4 study, the organization entitled “Resources for the  
5 Future” determined that, in 1999, the average cost  
6 to taxpayers of cleaning up a site under the Com-  
7 prehensive Environmental Response, Compensation,  
8 and Liability Act of 1980 (42 U.S.C. 9601 et seq.)  
9 was \$12,000,000;

10 (8) consistent with the principle of “polluter  
11 pays”, polluters that are responsible for cleaning up  
12 contamination, not ordinary taxpayers, should bear  
13 the costs of cleaning up a site under that Act;

14 (9) businesses commonly attempt to protect  
15 their assets using a corporate structure that limits  
16 the liability of parent corporations;

17 (10) in some cases, assets are transferred be-  
18 tween corporate affiliates (such as parent and sub-  
19 sidiary corporations) specifically for the purpose of  
20 shirking environmental liabilities;

21 (11) the Environmental Protection Agency  
22 should develop and maintain the expertise—

23 (A) to prevent the asset transfers described  
24 in paragraph (10); and

1 (B) to recover assets so transferred, to the  
2 maximum extent feasible;

3 (12) the Environmental Protection Agency has  
4 failed to implement a statutory mandate enacted in  
5 1980 to require proof of ability to pay and financial  
6 assurances for potential environmental cleanups  
7 from businesses handling hazardous substances; and

8 (13) by failing to comply with that mandate,  
9 the Environmental Protection Agency continues to  
10 subject the Superfund program under the Com-  
11 prehensive Environmental Response, Compensation,  
12 and Liability Act of 1980 (42 U.S.C. 9601 et seq.)  
13 and taxpayers in the United States to the obligation  
14 to pay enormous cleanup costs that should be borne  
15 by the responsible parties.

16 **SEC. 3. DEFINITION OF ADMINISTRATOR.**

17 In this Act, the term “Administrator” means the Ad-  
18 ministrator of the Environmental Protection Agency.

19 **TITLE I—REQUIREMENTS FOR**  
20 **FINANCIAL ASSURANCE**

21 **SEC. 101. FINANCIAL ASSURANCE DIRECTIVES.**

22 (a) COMPLETION OF REQUIREMENTS.—

23 (1) DEFINITIONS.—In this subsection, the  
24 terms “damages”, “hazardous substance”, and “re-  
25 sponse” have the meanings given those terms in sec-

1       tion 101 of the Comprehensive Environmental Re-  
2       sponse, Compensation, and Liability Act of 1980 (42  
3       U.S.C. 9601).

4               (2) REGULATIONS AND CLASSES OF FACILI-  
5       TIES.—

6               (A) STATEMENT OF POLICY.—In 1980,  
7       Congress directed the Administrator to promul-  
8       gate financial assurance requirements under  
9       section 108(b) of the Comprehensive Environ-  
10      mental Response, Compensation, and Liability  
11      Act (42 U.S.C. 9608(b)), but, as of the date of  
12      enactment of this Act, the Administrator has  
13      failed to promulgated those regulations.

14              (B) REGULATIONS AND CLASSES.—The  
15      Administrator shall—

16              (i) as soon as practicable after the  
17      date of enactment of this Act, but in no  
18      case later than 18 months after that date,  
19      finalize regulations under section 108(b) of  
20      the Comprehensive Environmental Re-  
21      sponse Compensation and Liability Act (42  
22      U.S.C. 9608(b));

23              (ii)(I) as soon as practicable after the  
24      date of enactment of this Act, but in no  
25      case later than 1 year after that date, pub-

1           lish in the Federal Register proposed fi-  
2           nancial assurance rules for the classes of  
3           facilities identified under clause (iii) that,  
4           as determined by the Administrator in ac-  
5           cordance with the criteria under section  
6           108(b)(1) of the Comprehensive Environ-  
7           mental Response, Compensation, and Li-  
8           ability Act of 1980 (42 U.S.C.  
9           9608(b)(1)), present the highest degree  
10          and duration of risk associated with the  
11          production, transportation, treatment, stor-  
12          age, or disposal of hazardous substances;  
13          and

14                (II) for each fiscal year thereafter,  
15          publish and promulgate additional pro-  
16          posed and final financial assurance rules  
17          for additional classes of facilities described  
18          in subclause (I), giving highest priority to  
19          classes of facilities that may contain sites  
20          at which unreimbursed response costs are  
21          greater than or equal to \$12,000,000;

22                (iii) not later than 1 year after the  
23          date of enactment of this Act, submit to  
24          Congress a report that, at a minimum—

1 (I) includes a list of not less than  
2 5 classes of facilities that the Admin-  
3 istrator determines have met the cri-  
4 teria identified in section 108(b)(1) of  
5 the Comprehensive Environmental Re-  
6 sponse, Compensation, and Liability  
7 Act of 1980 (42 U.S.C. 9608(b)(1));  
8 and

9 (II) includes a description (in-  
10 cluding the name, location, number,  
11 and costs) of response actions or po-  
12 tential response actions for which re-  
13 maining unreimbursed response costs  
14 exist, or for which the Administrator  
15 reasonably anticipates there will be  
16 unreimbursed response actions carried  
17 out under the Comprehensive Envi-  
18 ronmental Response, Compensation,  
19 and Liability Act of 1980 (42 U.S.C.  
20 9601 et seq.) as of the date of the re-  
21 port; and

22 (iv) submit to Congress an annual up-  
23 date of the report required under clause  
24 (iii) that includes additional classes of fa-  
25 cilities described in clause (iii)(I).

1           (3) NOTIFICATION OF BANKRUPTCY.—Each  
2 owner and operator of a facility that is included in  
3 class of facilities regulated under paragraph (2)(B)  
4 and that files for bankruptcy protection under title  
5 11, United States Code, shall submit to the Admin-  
6 istrator and the regional office of the Environmental  
7 Protection Agency of the region in which the facility  
8 is located a notification of the filing that includes—

9           (A) an estimate of environmental impacts  
10            (and the costs of remediating the impacts) re-  
11            sulting from activities at the facility; and

12           (B) a description of all current and former  
13            corporate relationships of the facility (such as  
14            parents, subsidiaries, partners, and affiliates),  
15            including parents, subsidiaries, partners, and  
16            affiliates located in other States or regions.

17           (4) RISK OF DEFAULT.—In promulgating the  
18 regulations described in paragraph (2)(B), the Ad-  
19 ministrator shall give priority to the development of  
20 requirements relating to owners and operators of fa-  
21 cilities or industries whose prior actions or practices  
22 indicate a high risk of default on environmental li-  
23 abilities.

24           (b) REQUIREMENT OF FINANCIAL ASSURANCE.—

25            (1) FINANCIAL ASSURANCE AGREEMENTS.—

1 (A) DEFINITION OF AFFECTED PERSON OR  
2 ENTITY.—In this paragraph, the term “affected  
3 person or entity” means—

4 (i) a person entering into a settlement  
5 agreement or consent decree under section  
6 122 of the Comprehensive Environmental  
7 Response, Compensation, and Liability Act  
8 of 1980 (42 U.S.C. 9622) or the Solid  
9 Waste Disposal Act (42 U.S.C. 6901 et  
10 seq.); and

11 (ii) a treatment, storage, or disposal  
12 facility receiving a corrective action permit  
13 or order under section 3004(u) or 3008(h)  
14 of the Solid Waste Disposal Act (42  
15 U.S.C. 6924(u), 6928(h)).

16 (B) REQUIREMENT.—In addition to any  
17 other applicable financial assurance require-  
18 ments, the Administrator shall require that  
19 each affected person or entity shall—

20 (i) enter into a financial assurance  
21 agreement that reflects the degree and du-  
22 ration of risk associated with the produc-  
23 tion, transportation, treatment, storage, or  
24 disposal of hazardous substances with the  
25 Administrator as part of the final settle-

1           ment agreement, consent decree, or other  
2           arrangement; and

3           (ii) provide at the time of issuance of  
4           a settlement agreement or consent decree  
5           described in subparagraph (A)(i), or a cor-  
6           rective action permit or order described in  
7           subparagraph (A)(ii), as applicable, such  
8           financial assurances as are required under  
9           applicable law and as may be needed to  
10          cover all potential response costs and dam-  
11          ages.

12          (2) TRACKING OF SETTLEMENTS.—For each  
13          fiscal year, the Administrator shall track the number  
14          of settlements, consent decrees, corrective action  
15          permits, and orders described in paragraph (1)(A)  
16          (including those that are and are not supported by  
17          financial assurances or otherwise in compliance with  
18          paragraph (1)), including, with respect to those set-  
19          tlements, consent decrees, corrective action permits,  
20          and orders—

21                 (A) the amount of any financial assurance  
22                 relating to such a settlement, consent decree,  
23                 corrective action permit, or order;

1 (B) the estimated value of any environ-  
2 mental actions secured by the financial assur-  
3 ances;

4 (C) the name of each responsible party;  
5 and

6 (D) the name of each financial institution  
7 or other entity providing the financial assur-  
8 ance, as appropriate.

9 (3) CRITERIA FOR ACCEPTANCE OF APPRO-  
10 PRIATE FINANCIAL ASSURANCE.—In determining  
11 whether to accept financial assurances provided  
12 under paragraph (1), the Administrator shall take  
13 into consideration—

14 (A) the level of financial risk to the Fed-  
15 eral Government if liable parties default on the  
16 obligations of the parties;

17 (B) varying financial risks posed by finan-  
18 cial assurance mechanisms;

19 (C) any concerns about various forms of fi-  
20 nancial assurance; and

21 (D) such other criteria as the Adminis-  
22 trator reasonably determines could affect the  
23 amount of unreimbursed response costs of the  
24 Federal Government.

1 (c) FULL USE OF AVAILABLE ENFORCEMENT  
2 TOOLS.—In carrying out this section, the Administrator  
3 shall—

4 (1) make full use of administrative offsets and  
5 liens on assets for enforcement purposes, as appro-  
6 priate; and

7 (2) not later than 1 year after the date of en-  
8 actment of this Act, issue guidance for enforcement  
9 of the requirements of this section relating to the  
10 use of administrative offsets and asset liens.

11 (d) ADJUSTMENT OF FINANCIAL TEST OF SELF-IN-  
12 SURANCE FOR INFLATION.—In using or authorizing the  
13 use of any financial test, the Administrator shall adjust  
14 upward, to account for changes since 1982 in the Con-  
15 sumer Price Index for all-urban consumers, United States  
16 city average, as published by the Bureau of Labor Statis-  
17 tics, the dollar amount of the tangible net worth require-  
18 ment of the financial test of self-insurance accepted by the  
19 Administrator as a financial assurance mechanism from  
20 persons subject to regulation under this Act.

21 **SEC. 102. NO EFFECT ON OTHER LAW.**

22 Nothing in this title limits any obligation of a person  
23 under the Comprehensive Environmental Response, Com-  
24 pensation, and Liability Act of 1980 (42 U.S.C. 9601 et  
25 seq.) or any other provision of law.

1 **TITLE II—RECOVERY OF COSTS**  
 2 **IN BANKRUPTCY**

3 **SEC. 201. EXTENDED PERIOD FOR REVIEW OF TRANS-**  
 4 **ACTIONS.**

5 Section 548 of title 11, United States Code, is  
 6 amended by adding at the end the following:

7 “(f) The trustee may avoid any transfer of an interest  
 8 of the debtor in an asset that was made during the 10-  
 9 year period preceding the date of the filing of the petition,  
 10 if—

11 “(1) the debtor had, on or after the date on  
 12 which such transfer was made, environmental liabil-  
 13 ities under section 107(a) of the Comprehensive En-  
 14 vironmental Response, Compensation, and Liability  
 15 Act of 1980 (42 U.S.C. 9607(a)); and

16 “(2) the debtor made such transfer with actual  
 17 intent to hinder, delay, or defraud any person with  
 18 respect to any such liability under that Act (42  
 19 U.S.C. 9601 et seq.).”.

20 **SEC. 202. STUDY AND REPORT BY THE NATIONAL BANK-**  
 21 **RUPTCY REVIEW COMMISSION.**

22 (a) STUDY.—

23 (1) INCONSISTENCIES BETWEEN BANKRUPTCY  
 24 AND ENVIRONMENTAL LAWS.—

25 (A) ACTION BY ADMINISTRATOR.—

1 (i) IN GENERAL.—Not later than 1  
2 year after the date of enactment of this  
3 Act, the Administrator, in consultation  
4 with the Department of Justice, shall sub-  
5 mit to Congress a report that recommends  
6 methods to substantially strengthen the  
7 ability of the United States to secure as-  
8 sets needed to pay for response costs at  
9 sites contaminated with hazardous sub-  
10 stances.

11 (ii) PUBLIC NOTICE AND COMMENT.—  
12 The Administrator shall provide public no-  
13 tice and an opportunity for comment relat-  
14 ing to the report under clause (i) for a pe-  
15 riod of not less than 60 days.

16 (B) ACTION BY NATIONAL BANKRUPTCY  
17 REVIEW COMMISSION.—The National Bank-  
18 ruptcy Review Commission (referred to in this  
19 section as the “Commission”) shall reconvene  
20 and evaluate the interaction between title 11,  
21 United States Code, and the Comprehensive  
22 Environmental Response, Compensation, and  
23 Liability Act of 1980 (42 U.S.C. 9601 et seq.),  
24 and specifically recommend what actions could  
25 be taken, consistent with the report submitted

1 under subparagraph (A), to substantially  
2 strengthen the ability of the United States to  
3 secure assets needed to pay for response costs  
4 at sites contaminated with hazardous sub-  
5 stances by addressing—

6 (i) the challenges that the Environ-  
7 mental Protection Agency faces when at-  
8 tempting to hold bankrupt and other fi-  
9 nancially distressed businesses responsible  
10 for their cleanup obligations; and

11 (ii) the fact that the nature of envi-  
12 ronmental damage and cleanup gives com-  
13 panies significant time to reorganize their  
14 business structures to maximize corporate  
15 benefits and minimize potential environ-  
16 mental liabilities.

17 (2) USE OF GAO REPORT.—In conducting the  
18 study under paragraph (1)(B), the Commission shall  
19 take into consideration the work of the Government  
20 Accountability Office in its August 2005 report on  
21 the subject of inconsistencies between title 11,  
22 United States Code, and the Comprehensive Envi-  
23 ronmental Response, Compensation, and Liability  
24 Act of 1980 (42 U.S.C. 9601 et seq.).

25 (b) REPORT.—

1           (1) TIMING.—Not later than 18 months after  
2 the date of enactment of this Act, the Commission  
3 shall submit to Congress a report on the results of  
4 the study conducted under this section.

5           (2) CONTENT.—The report submitted under  
6 paragraph (1) shall contain a detailed statement of  
7 the findings and conclusions of the Commission, to-  
8 gether with any recommendations for methods to  
9 substantially strengthen the ability of the United  
10 States to secure assets needed to pay for response  
11 costs at sites contaminated with hazardous sub-  
12 stances.

13          (c) OTHER AUTHORITY.—In carrying out this sec-  
14 tion, the Commission may—

15           (1) conduct public meetings at which testimony  
16 and other evidence may be taken, the minutes of  
17 which shall be made available upon request and pay-  
18 ment of photocopying and mailing expenses; and

19           (2) obtain official data from any Federal agen-  
20 cy, department, or court necessary to the implemen-  
21 tation of its duties.

22          (d) AUTHORIZATION OF APPROPRIATIONS.—There is  
23 authorized to be made available to the Commission to  
24 carry out this section, \$1,500,000, to remain available  
25 until expended.

1 **SEC. 203. NO EFFECT ON OTHER LAW.**

2       Nothing in this title or any amendment made by this  
3 title limits any obligation of a person under any other pro-  
4 vision of law.

