

By: Senator(s) Nunnelee

To: Environment Prot, Cons
and Water Res

SENATE BILL NO. 2907

1 AN ACT TO BRING FORWARD SECTIONS 49-2-2, 49-2-71, 17-17-29,
2 49-17-43 AND 49-17-427, MISSISSIPPI CODE OF 1972, FOR PURPOSE OF
3 AMENDING ENVIRONMENTAL SELF AUDIT PRIVILEGE TO COMPLY WITH PENDING
4 U.S. ENVIRONMENTAL PROTECTION AGENCY REQUIREMENTS; AND FOR RELATED
5 PURPOSES.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

7 SECTION 1. Section 49-2-2, Mississippi Code of 1972, is
8 brought forward as follows:

9 49-2-2. For purposes of this chapter, the following words
10 and phrases shall have the meanings ascribed herein, unless the
11 context otherwise requires:

12 (a) "Department" means the Mississippi Department of
13 Environmental Quality.

14 (b) "Commission" means the Mississippi Commission on
15 Environmental Quality.

16 (c) "Office" means an administrative subdivision of the
17 department.

18 (d) "Executive director" means the chief officer of the
19 department.

20 (e) "Environmental self-evaluation report" means any
21 document, including any audit, report, finding, communication, or
22 opinion or any draft of an audit, report, finding, communication
23 or opinion, prepared solely as a part of or in connection with a
24 voluntary self-assessment that is done in good faith, which report
25 is kept and maintained solely within the confines of the evaluated
26 party.

27 (f) "Voluntary self-evaluation" means a self-initiated
28 internal assessment, audit, or review, not otherwise expressly

29 required by environmental law, of a facility or an activity at a
30 facility, or management systems related to a facility or an
31 activity. A voluntary self-evaluation shall be designed to
32 identify and prevent noncompliance with environmental laws, and
33 improve compliance with environmental laws. In addition, a
34 voluntary self-evaluation must be conducted by an owner or
35 operator of a facility or an employee of the owner or operator or
36 by a private contractor engaged by the owner or operator.

37 (g) "Environmental law" means any federal, state or
38 local statute, rule or regulation, or any order, award, agreement,
39 release, permit, license, standard or notice from or issued by a
40 federal, state or local court, agency or governmental authority in
41 pursuance thereof.

42 SECTION 2. Section 49-2-71, Mississippi Code of 1972, is
43 brought forward as follows:

44 49-2-71. (1) An environmental self-evaluation report, as
45 defined in Section 49-2-2, is privileged and is not admissible in
46 any legal or investigative action in any civil, criminal or
47 administrative proceeding and is not subject to any discovery
48 pursuant to the rules of civil procedure, criminal procedure, or
49 administrative procedure, unless:

50 (a) The person for whom the environmental
51 self-evaluation report was prepared, irrespective of whether the
52 self-evaluation report was conducted and/or prepared by a private
53 contractor hired by the person, expressly waives the provisions of
54 this section;

55 (b) The court of record, or hearing officer, who shall
56 be neutral and independent, after in camera review, determines
57 that:

58 (i) The environmental self-evaluation report shows
59 evidence that the person for which the environmental
60 self-evaluation report was prepared is not or was not in
61 compliance with an environmental law; and

62 (ii) The person did not initiate appropriate
63 efforts to achieve compliance with the environmental law or
64 complete any necessary permit application promptly after the
65 noncompliance with the environmental law was discovered and, as a
66 result, the person did not or will not achieve compliance with the
67 environmental law or complete the necessary permit application
68 within a reasonable amount of time.

69 (iii) For the purposes of paragraphs (b)(i) and
70 (b)(ii) only, if the evidence shows noncompliance by a person with
71 more than one (1) environmental law, the person may demonstrate
72 that appropriate efforts to achieve compliance were or are being
73 taken by instituting a comprehensive program that establishes a
74 phased schedule of actions to be taken to bring the person into
75 compliance with all of such environmental laws.

76 (c) The court of record or hearing officer, who shall
77 be neutral and independent, after an in camera review, determines
78 that the privilege is being asserted for a fraudulent purpose or
79 that the environmental self-evaluation report was prepared to
80 avoid disclosure of information in an investigative,
81 administrative, or judicial proceeding that was underway, or for
82 which the person had been provided written notification that an
83 investigation into a specific violation had been initiated; or

84 (d) The court of record or hearing officer, who shall
85 be neutral and independent, determines that even if subject to the
86 privilege, it is found that a condition exists that demonstrates
87 an imminent and substantial hazard or endangerment to the public
88 health and safety or the environment.

89 (2) The self-evaluation privilege created by this section
90 does not apply to:

91 (a) Documents or information required to be developed,
92 maintained or reported pursuant to any environmental law or any
93 other law or regulation; or

94 (b) Documents or other information required to be made
95 available or furnished to a regulatory agency pursuant to any
96 environmental law or any other law or regulation; or

97 (c) Information in the possession of a regulatory
98 agency obtained through observation, sampling, monitoring or
99 otherwise and which is subject to public disclosure pursuant to
100 the Mississippi Public Records Act of 1983; or

101 (d) Information obtained through any source independent
102 of the environmental self-evaluation report; or

103 (e) Documents existing prior to the commencement of and
104 independent of the voluntary self-evaluation with the exception of
105 evidence establishing a request for compliance assistance to the
106 appropriate government agency or authority.

107 (3) (a) Upon a showing by any party, based upon independent
108 knowledge, that probable cause exists to believe that an exception
109 to the self-evaluation privilege under subsection (1) of this
110 section is applicable to an environmental self-evaluation report
111 or that the privilege does not apply to the environmental
112 self-evaluation report pursuant to the provisions of subsection
113 (2) of this section, then a court of record or hearing officer,
114 who shall be neutral and independent, may allow such party limited
115 access to the environmental self-evaluation report for the
116 purposes of an in camera review only. The court of record or the
117 hearing officer may grant limited access to all or part of the
118 environmental self-evaluation report under the provisions of this
119 subsection (3) upon such conditions as may be necessary to protect
120 the confidentiality of the environmental self-evaluation report.
121 A moving party who obtains access to an environmental
122 self-evaluation report pursuant to the provisions of this
123 subsection (3) may not divulge any information from the report
124 except as specifically allowed by the court or hearing officer.

125 (b) If any party divulges all or any part of the
126 information contained in an environmental self-evaluation report

127 in violation of the provisions of paragraph (a) of this subsection
128 (3) or if any other person knowingly divulges or disseminates all
129 or any part of the information contained in an environmental
130 self-evaluation report that was provided to such person in
131 violation of the provisions of paragraph (a) of this subsection
132 (3), such party or other person is liable for any damages caused
133 by the divulgence or dissemination of the information that are
134 incurred by the person for which the environmental self-evaluation
135 report was prepared. The court or hearing officer also may issue
136 such contempt orders and sanctions against the offending party or
137 such party's legal counsel as may be necessary to ensure
138 compliance.

139 (4) Nothing in this section limits, waives or abrogates the
140 scope or nature of any statutory or common law privilege.

141 (5) A person asserting a voluntary self-evaluation privilege
142 has the burden of proving a prima facie case as to the privilege.
143 A party seeking disclosure of an environmental self-evaluation
144 report has the burden of proving that such privilege does not
145 exist under this section.

146 (6) All environmental self-evaluation reports that are
147 protected by the self-evaluation privilege created by this section
148 shall be privileged and exempt from the provisions of the
149 Mississippi Public Records Act in accordance with Section
150 25-61-11, Mississippi Code of 1972.

151 SECTION 3. Section 17-17-29, Mississippi Code of 1972, is
152 brought forward as follows:

153 17-17-29. (1) Any person found by the commission violating
154 any of the provisions of Sections 17-17-1 through 17-17-47, or any
155 rule or regulation or written order of the commission in pursuance
156 thereof, or any condition or limitation of a permit, shall be
157 subject to a civil penalty of not more than Twenty-five Thousand
158 Dollars (\$25,000.00) for each violation, such penalty to be
159 assessed and levied by the commission after a hearing. Appeals

160 from the imposition of the civil penalty may be taken to the
161 chancery court in the same manner as appeals from orders of the
162 commission. If the appellant desires to stay the execution of a
163 civil penalty assessed by the commission, he shall give bond with
164 sufficient resident sureties of one or more guaranty or surety
165 companies authorized to do business in this state, payable to the
166 State of Mississippi, in an amount equal to double the amount of
167 any civil penalty assessed by the commission, as to which the stay
168 of execution is desired, conditioned, if the judgment shall be
169 affirmed, to pay all costs of the assessment entered against the
170 appellant. Each day upon which such violation occurs shall be
171 deemed a separate and additional violation.

172 (2) In lieu of, or in addition to, the penalty provided in
173 subsection (1) of this section, the commission shall have the
174 power to institute and maintain in the name of the state any and
175 all proceedings necessary or appropriate to enforce the provisions
176 of Sections 17-17-1 through 17-17-47, rules and regulations in
177 force pursuant thereto, and orders and permits made and issued
178 under those sections, in the appropriate circuit, chancery, county
179 or justice court of the county in which venue may lie. The
180 commission may obtain mandatory or prohibitory injunctive relief,
181 either temporary or permanent, and in cases of imminent and
182 substantial hazard as set forth in Section 17-17-27, subsection
183 (4), it shall not be necessary in such cases that the state plead
184 or prove (a) that irreparable damage would result if the
185 injunction did not issue; (b) that there is no adequate remedy at
186 law; or (c) that a written complaint or commission order has first
187 been issued for the alleged violation.

188 (3) Any person who violates any of the provisions of, or
189 fails to perform any duty imposed by, Sections 17-17-1 through
190 17-17-47, or any rule or regulation issued hereunder, or who
191 violates any order or determination of the commission promulgated
192 pursuant to such sections, and causes the death of wildlife shall

193 be liable, in addition to the penalties provided in subsection (1)
194 and/or (2) of this section, to pay to the state an additional
195 amount equal to the sum of money reasonably necessary to replenish
196 such wildlife as determined by the commission after consultation
197 with the Mississippi Commission on Wildlife, Fisheries and Parks.
198 Such amount may be recovered by the commission on behalf of the
199 state in a civil action brought in the appropriate county or
200 circuit court of the county in which venue may lie.

201 (4) Any person creating, or responsible for creating,
202 through misadventure, happenstance, or otherwise, an immediate
203 necessity for remedial or clean-up action involving solid waste
204 shall be liable for the cost of such remedial or clean-up action
205 and the commission may recover the cost of same by a civil action
206 brought in the circuit court of the county in which venue may lie.
207 This penalty may be recovered in lieu of or in addition to the
208 penalties provided in subsection (1), (2) and/or (3) of this
209 section.

210 In the event of the necessity for immediate remedial or
211 clean-up action, the commission may contract for same and advance
212 funds from the Pollution Emergency Fund to pay the costs thereof,
213 such advancements to be repaid to the Pollution Emergency Fund
214 upon recovery by the commission as provided herein.

215 (5) Any person who knowingly violates any provision of this
216 chapter or violates any order issued by the commission under the
217 authority of this chapter shall, upon conviction, be guilty of a
218 misdemeanor and shall be subject to a fine of not more than
219 Twenty-five Thousand Dollars (\$25,000.00) for each day of
220 violation or to imprisonment not to exceed one (1) year, or both.
221 Each day's violation shall constitute a separate offense.

222 (6) All fines, penalties and other sums recovered or
223 collected by the commission for and in behalf of the state under
224 this section shall be deposited in the Pollution Emergency Fund
225 established by Sections 49-17-61 through 49-17-70, and the

226 commission is authorized to receive and accept, from any and all
227 available sources whatsoever, additional funds to be deposited in
228 such fund and expended for the purpose of remedial, clean-up or
229 abatement actions involving the introduction of solid waste upon
230 or into the land, air or waters of this state in violation of
231 Sections 17-17-1 through 17-17-47, any rule or regulation or
232 written order of the commission in pursuance thereof, or any
233 condition or limitation of a permit.

234 (7) In determining the amount of any penalty under this
235 chapter, the commission shall consider at a minimum:

236 (a) The willfulness of the violation;

237 (b) Any damage to air, water, land or other natural
238 resources of the state or their uses;

239 (c) Costs of restoration and abatement;

240 (d) Economic benefit as a result of noncompliance;

241 (e) The seriousness of the violation, including any
242 harm to the environment and any hazard to the health, safety and
243 welfare of the public;

244 (f) Past performance history; and

245 (g) Whether the noncompliance was discovered and
246 reported as the result of a voluntary self-evaluation. If a
247 person discovers as a result of a voluntary self-evaluation,
248 information related to noncompliance with an environmental law and
249 voluntarily discloses that information to the department,
250 commission or any employee thereof, the commission shall, to the
251 greatest extent possible, reduce a penalty, if any, determined by
252 the commission, except for economic benefit as a result of
253 noncompliance, to a de minimis amount if all of the following are
254 true:

255 (i) The disclosure is made promptly after
256 knowledge of the information disclosed is obtained by the person;

257 (ii) The person making the disclosure initiates

258 the appropriate corrective actions and pursues those corrective
259 actions with due diligence;

260 (iii) The person making the disclosure cooperates
261 with the commission and the department regarding investigation of
262 the issues identified in the disclosure;

263 (iv) The person is not otherwise required by an
264 environmental law to make the disclosure to the commission or the
265 department;

266 (v) The information was not obtained through any
267 source independent of the voluntary self-evaluation or by the
268 department through observation, sampling or monitoring; and

269 (vi) The noncompliance did not result in a
270 substantial endangerment threatening the public health, safety or
271 welfare or the environment.

272 (8) Any provision of this section and chapter regarding
273 liability for the costs of clean-up, removal, remediation or
274 abatement of any pollution, hazardous waste or solid waste shall
275 be limited as provided in Section 49-17-42 and rules adopted
276 thereto.

277 SECTION 4. Section 49-17-43, Mississippi Code of 1972, is
278 brought forward as follows:

279 49-17-43. (a) Any person found by the commission violating
280 any of the provisions of Sections 49-17-1 through 49-17-43, or any
281 rule or regulation or written order of the commission in pursuance
282 thereof or any condition or limitation of a permit, except a
283 permit required under the Solid Wastes Disposal Law of 1974
284 (Sections 17-17-1 through 17-17-47), shall be subject to a civil
285 penalty of not more than Twenty-five Thousand Dollars
286 (\$25,000.00), for each violation, such penalty to be assessed and
287 levied by the commission after a hearing as provided hereinabove.
288 Appeals from the imposition of the civil penalty may be taken to
289 the chancery court in the same manner as appeals from orders of
290 the commission. If the appellant desires to stay the execution of

291 a civil penalty assessed by the commission, he shall give bond
292 with sufficient resident sureties of one or more guaranty or
293 surety companies authorized to do business in this state, payable
294 to the State of Mississippi, in an amount equal to double the
295 amount of any civil penalty assessed by the commission, as to
296 which the stay of execution is desired, conditioned, if the
297 judgment shall be affirmed, to pay all costs of the assessment
298 entered against the appellant. Each day upon which a violation
299 occurs shall be deemed a separate and additional violation.

300 Any person violating any provision of the Solid Wastes
301 Disposal Law of 1974 (Sections 17-17-1 through 17-17-47), any rule
302 or regulation made pursuant to that law, or any order issued by
303 the commission under the authority of that law shall be subject to
304 the penalties provided in Section 17-17-29.

305 (b) In lieu of, or in addition to, the penalty provided in
306 subsection (a) of this section, the commission shall have power to
307 institute and maintain in the name of the state any and all
308 proceedings necessary or appropriate to enforce the provisions of
309 Sections 49-17-1 through 49-17-43, rules and regulations in force
310 pursuant thereto, and orders and permits made and issued under
311 those sections, in the appropriate circuit, chancery, county or
312 justice court of the county in which venue may lie. The
313 commission may obtain mandatory or prohibitory injunctive relief,
314 either temporary or permanent, and in cases of imminent and
315 substantial hazard or endangerment as set forth in Section
316 49-17-27, it shall not be necessary in such cases that the state
317 plead or prove: (i) that irreparable damage would result if the
318 injunction did not issue; (ii) that there is no adequate remedy at
319 law; or (iii) that a written complaint or commission order has
320 first been issued for the alleged violation.

321 (c) Any person who violates any of the provisions of, or
322 fails to perform any duty imposed by, Sections 49-17-1 through
323 49-17-43 or any rule or regulation issued hereunder, or who

324 violates any order or determination of the commission promulgated
325 pursuant to such sections, and causes the death of fish or other
326 wildlife shall be liable, in addition to the penalties provided in
327 subsection (a) and/or (b) of this section, to pay to the state an
328 additional amount equal to the sum of money reasonably necessary
329 to restock such waters or replenish such wildlife as determined by
330 the commission after consultation with the Mississippi Commission
331 on Wildlife, Fisheries and Parks. Such amount may be recovered by
332 the commission on behalf of the state in a civil action brought in
333 the appropriate county or circuit court of the county in which
334 venue may lie.

335 (d) Any person who owns or operates facilities which,
336 through misadventure, happenstance or otherwise, cause pollution
337 necessitating immediate remedial or clean-up action shall be
338 liable for the cost of such remedial or clean-up action and the
339 commission may recover the cost of same by a civil action brought
340 in the circuit court of the county in which venue may lie. This
341 penalty may be recovered in lieu of or in addition to the
342 penalties provided in subsection (a), (b) and/or (c) of this
343 section.

344 In the event of the necessity for immediate remedial or
345 clean-up action, the commission may contract for same and advance
346 funds from the Pollution Emergency Fund to pay the costs thereof,
347 such advancements to be repaid to the Pollution Emergency Fund
348 upon recovery by the commission as provided above.

349 (e) It is unlawful for any person to: (1) discharge
350 pollutants in violation of Section 49-17-29 or in violation of any
351 condition or limitation included in a permit issued under Section
352 49-17-29 or (2) introduce pollutants into publicly owned treatment
353 works in violation of pretreatment standards or in violation of
354 toxic effluent standards; and, upon conviction thereof, such
355 person shall be punished by a fine of not less than Two Thousand

356 Five Hundred Dollars (\$2,500.00) nor more than Twenty-five
357 Thousand Dollars (\$25,000.00) per day of violation.

358 (f) All fines, penalties and other sums recovered or
359 collected by the commission for and in behalf of the state under
360 this section shall be deposited in the Pollution Emergency Fund
361 established under this chapter, and the commission is authorized
362 to receive and accept, from any funds and all available sources
363 whatsoever, additional funds to be deposited in such fund and
364 expended for the purpose of remedial, clean-up or abatement
365 actions involving pollution of the land, air or waters of the
366 state in violation of Sections 49-17-1 through 49-17-43, any rule
367 or regulation or written order of the commission in pursuance
368 thereof, or any condition or limitation of a permit.

369 (g) In determining the amount of any penalty under this
370 chapter, the commission shall consider at a minimum:

371 (i) The willfulness of the violation;

372 (ii) Any damage to air, water, land or other natural
373 resources of the state or their uses;

374 (iii) Costs of restoration and abatement;

375 (iv) Economic benefit as a result of noncompliance;

376 (v) The seriousness of the violation, including any
377 harm to the environment and any hazard to the health, safety and
378 welfare of the public;

379 (vi) Past performance history; and

380 (vii) Whether the noncompliance was discovered and
381 reported as the result of a voluntary self-evaluation. If a
382 person discovers as a result of a voluntary self-evaluation,
383 information related to noncompliance with an environmental law and
384 voluntarily discloses that information to the department,
385 commission or any employee thereof, the commission shall, to the
386 greatest extent possible, reduce a penalty, if any, determined by
387 the commission, except for economic benefit as a result of

388 noncompliance, to a de minimis amount if all of the following are
389 true:

390 1. The disclosure is made promptly after knowledge
391 of the information disclosed is obtained by the person;

392 2. The person making the disclosure initiates the
393 appropriate corrective actions and pursues those corrective
394 actions with due diligence;

395 3. The person making the disclosure cooperates
396 with the commission and the department regarding investigation of
397 the issues identified in the disclosure;

398 4. The person is not otherwise required by an
399 environmental law to make the disclosure to the commission or the
400 department;

401 5. The information was not obtained through any
402 source independent of the voluntary self-evaluation or by the
403 department through observation, sampling or monitoring; and

404 6. The noncompliance did not result in a
405 substantial endangerment threatening the public health, safety or
406 welfare or the environment.

407 (h) Any provisions of this section and chapter regarding
408 liability for the costs of clean-up, removal, remediation or
409 abatement of any pollution, hazardous waste or solid waste shall
410 be limited as provided in Section 49-17-42 and rules adopted
411 thereto.

412 SECTION 5. Section 49-17-427, Mississippi Code of 1972, is
413 brought forward as follows:

414 49-17-427. (1) Whenever the commission or an employee
415 thereof has reason to believe that a violation of any provision of
416 this chapter, or of any order of the commission, or of any
417 regulation promulgated pursuant to this chapter has occurred, the
418 commission shall initiate proceedings in the same manner as
419 provided in Sections 49-17-31 through 49-17-41, Mississippi Code
420 of 1972.

421 (2) Any person found by the commission violating any of the
422 provisions of Sections 49-17-401 through 49-17-433, or any rule or
423 regulation or written order of the commission shall be subject to
424 a civil penalty of not more than Twenty-five Thousand Dollars
425 (\$25,000.00) for each violation per day, such penalty to be
426 assessed and levied by the commission as provided in Sections
427 49-17-1 through 49-17-43, Mississippi Code of 1972.

428 (3) In determining the amount of any penalty under this
429 chapter, the commission shall consider at a minimum:

430 (a) The willfulness of the violation;

431 (b) Any damage to air, water, land or other natural
432 resources of the state or their uses;

433 (c) Costs of restoration or abatement;

434 (d) Economic benefit as a result of noncompliance;

435 (e) The seriousness of the violation, including any
436 harm to the environment and any hazard to the health, safety and
437 welfare of the public;

438 (f) Past performance history; and

439 (g) Whether the noncompliance was discovered and
440 reported as the result of a voluntary self-evaluation. If a
441 person discovers as a result of a voluntary self-evaluation,
442 information related to noncompliance with an environmental law and
443 voluntarily discloses that information to the department,
444 commission or any employee thereof, the commission shall, to the
445 greatest extent possible, reduce a penalty, if any, determined by
446 the commission, except for economic benefit as a result of
447 noncompliance, to a de minimis amount if all of the following are
448 true:

449 (i) The disclosure is made promptly after
450 knowledge of the information disclosed is obtained by the person;

451 (ii) The person making the disclosure initiates
452 the appropriate corrective actions and pursues those corrective
453 actions with due diligence;

454 (iii) The person making the disclosure cooperates
455 with the commission and the department regarding investigation of
456 the issues identified in the disclosure;

457 (iv) The person is not otherwise required by an
458 environmental law to make the disclosure to the commission or the
459 department;

460 (v) The information was not obtained through any
461 source independent of the voluntary self-evaluation or by the
462 department through observation, sampling or monitoring; and

463 (vi) The noncompliance did not result in a
464 substantial endangerment threatening the public health, safety or
465 welfare or the environment.

466 (4) Any provisions of this section and chapter regarding
467 liability for the costs of clean-up, removal, remediation or
468 abatement of any pollution, hazardous waste or solid waste shall
469 be limited as provided in Section 49-17-42 and rules adopted
470 thereto.

471 SECTION 6. This act shall take effect and be in force from
472 and after its passage.