SENATE BILL NO. 2907

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

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

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

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

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

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

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

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

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

(f) "Voluntary self-evaluation" means a self-initiated internal assessment, audit, or review, not otherwise expressly
required by environmental law, of a facility or an activity at a
facility, or management systems related to a facility or an
activity. A voluntary self-evaluation shall be designed to
identify and prevent noncompliance with environmental laws, and
improve compliance with environmental laws. In addition, a
voluntary self-evaluation must be conducted by an owner or
operator of a facility or an employee of the owner or operator or
by a private contractor engaged by the owner or operator.

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

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

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

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

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

(i) The environmental self-evaluation report shows
evidence that the person for which the environmental
self-evaluation report was prepared is not or was not in
compliance with an environmental law; and
(ii) The person did not initiate appropriate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after the noncompliance with the environmental law was discovered and, as a result, the person did not or will not achieve compliance with the environmental law or complete the necessary permit application within a reasonable amount of time.

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

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

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

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

(a) Documents or information required to be developed, maintained or reported pursuant to any environmental law or any other law or regulation; or
(b) Documents or other information required to be made available or furnished to a regulatory agency pursuant to any environmental law or any other law or regulation; or 
(c) Information in the possession of a regulatory agency obtained through observation, sampling, monitoring or otherwise and which is subject to public disclosure pursuant to the Mississippi Public Records Act of 1983; or 
(d) Information obtained through any source independent of the environmental self-evaluation report; or 
(e) Documents existing prior to the commencement of and independent of the voluntary self-evaluation with the exception of evidence establishing a request for compliance assistance to the appropriate government agency or authority.

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

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

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

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

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

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

17-17-29. (1) Any person found by the commission violating any of the provisions of Sections 17-17-1 through 17-17-47, or any rule or regulation or written order of the commission in pursuance thereof, or any condition or limitation of a permit, shall be subject to a civil penalty of not more than Twenty-five Thousand Dollars ($25,000.00) for each violation, such penalty to be assessed and levied by the commission after a hearing. Appeals
from the imposition of the civil penalty may be taken to the
chancery court in the same manner as appeals from orders of the
commission. If the appellant desires to stay the execution of a
civil penalty assessed by the commission, he shall give bond with
sufficient resident sureties of one or more guaranty or surety
companies authorized to do business in this state, payable to the
State of Mississippi, in an amount equal to double the amount of
any civil penalty assessed by the commission, as to which the stay
of execution is desired, conditioned, if the judgment shall be
affirmed, to pay all costs of the assessment entered against the
appellant. Each day upon which such violation occurs shall be
deemed a separate and additional violation.

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

(3) Any person who violates any of the provisions of, or
fails to perform any duty imposed by, Sections 17-17-1 through
17-17-47, or any rule or regulation issued hereunder, or who
violates any order or determination of the commission promulgated
pursuant to such sections, and causes the death of wildlife shall
be liable, in addition to the penalties provided in subsection (1) and/or (2) of this section, to pay to the state an additional amount equal to the sum of money reasonably necessary to replenish such wildlife as determined by the commission after consultation with the Mississippi Commission on Wildlife, Fisheries and Parks. Such amount may be recovered by the commission on behalf of the state in a civil action brought in the appropriate county or circuit court of the county in which venue may lie.

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

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

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

(6) All fines, penalties and other sums recovered or collected by the commission for and in behalf of the state under this section shall be deposited in the Pollution Emergency Fund established by Sections 49-17-61 through 49-17-70, and the
commission is authorized to receive and accept, from any and all available sources whatsoever, additional funds to be deposited in such fund and expended for the purpose of remedial, clean-up or abatement actions involving the introduction of solid waste upon or into the land, air or waters of this state in violation of Sections 17-17-1 through 17-17-47, any rule or regulation or written order of the commission in pursuance thereof, or any condition or limitation of a permit.

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

(a) The willfulness of the violation;
(b) Any damage to air, water, land or other natural resources of the state or their uses;
(c) Costs of restoration and abatement;
(d) Economic benefit as a result of noncompliance;
(e) The seriousness of the violation, including any harm to the environment and any hazard to the health, safety and welfare of the public;
(f) Past performance history; and
(g) Whether the noncompliance was discovered and reported as the result of a voluntary self-evaluation. If a person discovers as a result of a voluntary self-evaluation, information related to noncompliance with an environmental law and voluntarily discloses that information to the department, commission or any employee thereof, the commission shall, to the greatest extent possible, reduce a penalty, if any, determined by the commission, except for economic benefit as a result of noncompliance, to a de minimis amount if all of the following are true:

(i) The disclosure is made promptly after knowledge of the information disclosed is obtained by the person;
(ii) The person making the disclosure initiates
the appropriate corrective actions and pursues those corrective actions with due diligence;

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

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

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

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

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

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

49-17-43. (a) Any person found by the commission violating any of the provisions of Sections 49-17-1 through 49-17-43, or any rule or regulation or written order of the commission in pursuance thereof or any condition or limitation of a permit, except a permit required under the Solid Wastes Disposal Law of 1974 (Sections 17-17-1 through 17-17-47), shall be subject to a civil penalty of not more than Twenty-five Thousand Dollars ($25,000.00), for each violation, such penalty to be assessed and levied by the commission after a hearing as provided hereinabove. Appeals from the imposition of the civil penalty may be taken to the chancery court in the same manner as appeals from orders of the commission. If the appellant desires to stay the execution of
a civil penalty assessed by the commission, he shall give bond
with sufficient resident sureties of one or more guaranty or
surety companies authorized to do business in this state, payable
to the State of Mississippi, in an amount equal to double the
amount of any civil penalty assessed by the commission, as to
which the stay of execution is desired, conditioned, if the
judgment shall be affirmed, to pay all costs of the assessment
entered against the appellant. Each day upon which a violation
occurs shall be deemed a separate and additional violation.

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

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

(c) Any person who violates any of the provisions of, or
fails to perform any duty imposed by, Sections 49-17-1 through
49-17-43 or any rule or regulation issued hereunder, or who
violates any order or determination of the commission promulgated pursuant to such sections, and causes the death of fish or other wildlife shall be liable, in addition to the penalties provided in subsection (a) and/or (b) of this section, to pay to the state an additional amount equal to the sum of money reasonably necessary to restock such waters or replenish such wildlife as determined by the commission after consultation with the Mississippi Commission on Wildlife, Fisheries and Parks. Such amount may be recovered by the commission on behalf of the state in a civil action brought in the appropriate county or circuit court of the county in which venue may lie.

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

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

(e) It is unlawful for any person to: (1) discharge pollutants in violation of Section 49-17-29 or in violation of any condition or limitation included in a permit issued under Section 49-17-29 or (2) introduce pollutants into publicly owned treatment works in violation of pretreatment standards or in violation of toxic effluent standards; and, upon conviction thereof, such person shall be punished by a fine of not less than Two Thousand
Five Hundred Dollars ($2,500.00) nor more than Twenty-five
Thousand Dollars ($25,000.00) per day of violation.

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

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

(i) The willfulness of the violation;

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

(iii) Costs of restoration and abatement;

(iv) Economic benefit as a result of noncompliance;

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

(vi) Past performance history; and

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

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

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

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

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

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

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

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

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

49-17-427. (1) Whenever the commission or an employee thereof has reason to believe that a violation of any provision of this chapter, or of any order of the commission, or of any regulation promulgated pursuant to this chapter has occurred, the commission shall initiate proceedings in the same manner as provided in Sections 49-17-31 through 49-17-41, Mississippi Code of 1972.
(2) Any person found by the commission violating any of the provisions of Sections 49-17-401 through 49-17-433, or any rule or regulation or written order of the commission shall be subject to a civil penalty of not more than Twenty-five Thousand Dollars ($25,000.00) for each violation per day, such penalty to be assessed and levied by the commission as provided in Sections 49-17-1 through 49-17-43, Mississippi Code of 1972.

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

(a) The willfulness of the violation;

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

(c) Costs of restoration or abatement;

(d) Economic benefit as a result of noncompliance;

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

(f) Past performance history; and

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

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

(ii) The person making the disclosure initiates the appropriate corrective actions and pursues those corrective actions with due diligence;
(iii) The person making the disclosure cooperates with the commission and the department regarding investigation of the issues identified in the disclosure;

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

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

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

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

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