

By: Representative Ellington

To: Conservation and Water Resources

HOUSE BILL NO. 1161
(As Passed the House)

1 AN ACT TO AMEND SECTION 49-2-71, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT AN ENVIRONMENTAL SELF-EVALUATION REPORT IS PRIVILEGED
3 AND NOT ADMISSIBLE IN ANY ADMINISTRATIVE PROCEEDING; TO PROVIDE
4 THAT THE PRIVILEGE IS NOT AVAILABLE IN CRIMINAL OR CIVIL CASES; TO
5 AMEND SECTION 49-17-43, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT,
6 IN DETERMINING THE AMOUNT OF A CIVIL PENALTY IN THE CASE WHERE
7 NONCOMPLIANCE HAS BEEN REPORTED AS A RESULT OF A VOLUNTARY
8 SELF-EVALUATION, THE COMMISSION ON ENVIRONMENTAL QUALITY SHALL
9 CONSIDER AS A MITIGATING FACTOR THE FACT THAT SUCH NONCOMPLIANCE
10 IS NOT A REPEAT VIOLATION; AND FOR RELATED PURPOSES.

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

12 **SECTION 1.** Section 49-2-71, Mississippi Code of 1972, is
13 amended as follows:

14 49-2-71. (1) An environmental self-evaluation report, as
15 defined in Section 49-2-2, is privileged and is not admissible in
16 any legal or investigative action in any * * * administrative
17 proceeding and is not subject to any discovery pursuant to the
18 rules of * * * administrative procedure, unless:

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

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

27 (i) The environmental self-evaluation report shows
28 evidence that the person for which the environmental
29 self-evaluation report was prepared is not or was not in
30 compliance with an environmental law; and



31 (ii) The person did not initiate appropriate
32 efforts to achieve compliance with the environmental law or
33 complete any necessary permit application promptly after the
34 noncompliance with the environmental law was discovered and, as a
35 result, the person did not or will not achieve compliance with the
36 environmental law or complete the necessary permit application
37 within a reasonable amount of time.

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

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

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

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

60 (a) Documents or information required to be developed,
61 maintained or reported pursuant to any environmental law or any
62 other law or regulation; or



63 (b) Documents or other information required to be made
64 available or furnished to a regulatory agency pursuant to any
65 environmental law or any other law or regulation; or

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

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

72 (e) Documents existing prior to the commencement of and
73 independent of the voluntary self-evaluation with the exception of
74 evidence establishing a request for compliance assistance to the
75 appropriate government agency or authority.

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

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



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

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

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

115 (6) All environmental self-evaluation reports that are
116 protected by the self-evaluation privilege created by this section
117 shall be privileged and exempt from the provisions of the
118 Mississippi Public Records Act in accordance with Section
119 25-61-11, Mississippi Code of 1972.

120 **SECTION 2.** Section 49-17-43, Mississippi Code of 1972, is
121 amended as follows:

122 49-17-43. (a) Any person found by the commission violating
123 any of the provisions of Sections 49-17-1 through 49-17-43, or any
124 rule or regulation or written order of the commission in pursuance
125 thereof or any condition or limitation of a permit, except a
126 permit required under the Solid Wastes Disposal Law of 1974
127 (Sections 17-17-1 through 17-17-47), shall be subject to a civil
128 penalty of not more than Twenty-five Thousand Dollars



129 (\$25,000.00), for each violation, such penalty to be assessed and
130 levied by the commission after a hearing as provided hereinabove.
131 Appeals from the imposition of the civil penalty may be taken to
132 the chancery court in the same manner as appeals from orders of
133 the commission. If the appellant desires to stay the execution of
134 a civil penalty assessed by the commission, he shall give bond
135 with sufficient resident sureties of one or more guaranty or
136 surety companies authorized to do business in this state, payable
137 to the State of Mississippi, in an amount equal to double the
138 amount of any civil penalty assessed by the commission, as to
139 which the stay of execution is desired, conditioned, if the
140 judgment shall be affirmed, to pay all costs of the assessment
141 entered against the appellant. Each day upon which a violation
142 occurs shall be deemed a separate and additional violation.

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

148 (b) In lieu of, or in addition to, the penalty provided in
149 subsection (a) of this section, the commission shall have power to
150 institute and maintain in the name of the state any and all
151 proceedings necessary or appropriate to enforce the provisions of
152 Sections 49-17-1 through 49-17-43, rules and regulations in force
153 pursuant thereto, and orders and permits made and issued under
154 those sections, in the appropriate circuit, chancery, county or
155 justice court of the county in which venue may lie. The
156 commission may obtain mandatory or prohibitory injunctive relief,
157 either temporary or permanent, and in cases of imminent and
158 substantial hazard or endangerment as set forth in Section
159 49-17-27, it shall not be necessary in such cases that the state
160 plead or prove: (i) that irreparable damage would result if the
161 injunction did not issue; (ii) that there is no adequate remedy at



162 law; or (iii) that a written complaint or commission order has
163 first been issued for the alleged violation.

164 (c) Any person who violates any of the provisions of, or
165 fails to perform any duty imposed by, Sections 49-17-1 through
166 49-17-43 or any rule or regulation issued hereunder, or who
167 violates any order or determination of the commission promulgated
168 pursuant to such sections, and causes the death of fish or other
169 wildlife shall be liable, in addition to the penalties provided in
170 subsection (a) and/or (b) of this section, to pay to the state an
171 additional amount equal to the sum of money reasonably necessary
172 to restock such waters or replenish such wildlife as determined by
173 the commission after consultation with the Mississippi Commission
174 on Wildlife, Fisheries and Parks. Such amount may be recovered by
175 the commission on behalf of the state in a civil action brought in
176 the appropriate county or circuit court of the county in which
177 venue may lie.

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

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

192 (e) It is unlawful for any person to: (1) discharge
193 pollutants in violation of Section 49-17-29 or in violation of any
194 condition or limitation included in a permit issued under Section



195 49-17-29 or (2) introduce pollutants into publicly owned treatment
196 works in violation of pretreatment standards or in violation of
197 toxic effluent standards; and, upon conviction thereof, such
198 person shall be punished by a fine of not less than Two Thousand
199 Five Hundred Dollars (\$2,500.00) nor more than Twenty-five
200 Thousand Dollars (\$25,000.00) per day of violation.

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

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

214 (i) The willfulness of the violation;

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

217 (iii) Costs of restoration and abatement;

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

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

222 (vi) Past performance history; and

223 (vii) Whether the noncompliance was discovered and
224 reported as the result of a voluntary self-evaluation. If a
225 person discovers as a result of a voluntary self-evaluation,
226 information related to noncompliance with an environmental law and
227 voluntarily discloses that information to the department,



228 commission or any employee thereof, the commission shall, to the
229 greatest extent possible, reduce a penalty, if any, determined by
230 the commission, except for economic benefit as a result of
231 noncompliance, to a de minimis amount if all of the following are
232 true:

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

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

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

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

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

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

250 7. The noncompliance is not a repeat violation
251 occurring at the same facility within a period of three (3) years.
252 For purposes of this subparagraph, "repeat violation" means a
253 second or subsequent violation, after the first violation has
254 ceased, of the same statutory provision, regulation, permit
255 condition or condition included in an order issued by the
256 commission.

257 (h) Any provisions of this section and chapter regarding
258 liability for the costs of cleanup, removal, remediation or
259 abatement of any pollution, hazardous waste or solid waste shall



260 be limited as provided in Section 49-17-42 and rules adopted
261 thereto.

262 **SECTION 3.** This act shall take effect and be in force from
263 and after its passage.

