

By: Senator(s) Nunnelee

To: Environment Prot, Cons
and Water Res

SENATE BILL NO. 2944

1 AN ACT TO AMEND SECTION 49-2-71, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT THE ENVIRONMENTAL SELF-AUDIT PRIVILEGE IS NOT
3 AVAILABLE IN CRIMINAL CASES; TO AMEND SECTIONS 49-17-43, 49-17-427
4 AND 17-17-29, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT SELF-AUDIT
5 PENALTY MITIGATION IS NOT AVAILABLE TO CERTAIN REPEAT OFFENDERS;
6 AND FOR RELATED PURPOSES.

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

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

10 49-2-71. (1) An environmental self-evaluation report, as
11 defined in Section 49-2-2, is privileged and is not admissible in
12 any legal or investigative action in any civil * * * or
13 administrative proceeding and is not subject to any discovery
14 pursuant to the rules of civil procedure * * * or administrative
15 procedure, unless:

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

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

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

28 (ii) The person did not initiate appropriate
29 efforts to achieve compliance with the environmental law or



30 complete any necessary permit application promptly after the
31 noncompliance with the environmental law was discovered and, as a
32 result, the person did not or will not achieve compliance with the
33 environmental law or complete the necessary permit application
34 within a reasonable amount of time.

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

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

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

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

57 (a) Documents or information required to be developed,
58 maintained or reported pursuant to any environmental law or any
59 other law or regulation; or

60 (b) Documents or other information required to be made
61 available or furnished to a regulatory agency pursuant to any
62 environmental law or any other law or regulation; or



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

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

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

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

91 (b) If any party divulges all or any part of the
92 information contained in an environmental self-evaluation report
93 in violation of the provisions of paragraph (a) of this subsection
94 (3) or if any other person knowingly divulges or disseminates all
95 or any part of the information contained in an environmental



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

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

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

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

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

119 49-17-43. (1) Any person found by the commission violating
120 any of the provisions of Sections 49-17-1 through 49-17-43, or any
121 rule or regulation or written order of the commission in pursuance
122 thereof or any condition or limitation of a permit, except a
123 permit required under the Solid Wastes Disposal Law of 1974
124 (Sections 17-17-1 through 17-17-47), shall be subject to a civil
125 penalty of not more than Twenty-five Thousand Dollars
126 (\$25,000.00), for each violation, such penalty to be assessed and
127 levied by the commission after a hearing * * *. Appeals from the
128 imposition of the civil penalty may be taken to the chancery court



129 in the same manner as appeals from orders of the commission. If
130 the appellant desires to stay the execution of a civil penalty
131 assessed by the commission, he shall give bond with sufficient
132 resident sureties of one or more guaranty or surety companies
133 authorized to do business in this state, payable to the State of
134 Mississippi, in an amount equal to double the amount of any civil
135 penalty assessed by the commission, as to which the stay of
136 execution is desired, conditioned, if the judgment shall be
137 affirmed, to pay all costs of the assessment entered against the
138 appellant. Each day upon which a violation occurs shall be deemed
139 a separate and additional violation.

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

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



161 (3) Any person who violates any of the provisions of, or
162 fails to perform any duty imposed by, Sections 49-17-1 through
163 49-17-43 or any rule or regulation issued hereunder, or who
164 violates any order or determination of the commission promulgated
165 pursuant to such sections, and causes the death of fish or other
166 wildlife shall be liable, in addition to the penalties provided in
167 subsection (1) and/or (2) of this section, to pay to the state an
168 additional amount equal to the sum of money reasonably necessary
169 to restock such waters or replenish such wildlife as determined by
170 the commission after consultation with the Mississippi Commission
171 on Wildlife, Fisheries and Parks. Such amount may be recovered by
172 the commission on behalf of the state in a civil action brought in
173 the appropriate county or circuit court of the county in which
174 venue may lie.

175 (4) Any person who owns or operates facilities which,
176 through misadventure, happenstance or otherwise, cause pollution
177 necessitating immediate remedial or clean-up action shall be
178 liable for the cost of such remedial or clean-up action and the
179 commission may recover the cost of same by a civil action brought
180 in the circuit court of the county in which venue may lie. This
181 penalty may be recovered in lieu of or in addition to the
182 penalties provided in subsection (1), (2) and/or (3) of this
183 section.

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

189 (5) It is unlawful for any person to: (a) discharge
190 pollutants in violation of Section 49-17-29 or in violation of any
191 condition or limitation included in a permit issued under Section
192 49-17-29 or (b) introduce pollutants into publicly owned treatment
193 works in violation of pretreatment standards or in violation of



194 toxic effluent standards; and, upon conviction thereof, such
195 person shall be punished by a fine of not less than Two Thousand
196 Five Hundred Dollars (\$2,500.00) nor more than Twenty-five
197 Thousand Dollars (\$25,000.00) per day of violation.

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

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

211 (a) The willfulness of the violation;

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

214 (c) Costs of restoration and abatement;

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

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

219 (f) Past performance history; and

220 (g) Whether the noncompliance was discovered and
221 reported as the result of a voluntary self-evaluation. If a
222 person discovers as a result of a voluntary self-evaluation,
223 information related to noncompliance with an environmental law and
224 voluntarily discloses that information to the department,
225 commission or any employee thereof, the commission shall, to the
226 greatest extent possible, reduce a penalty, if any, determined by



227 the commission, except for economic benefit as a result of
228 noncompliance, to a de minimis amount if all of the following are
229 true:

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

232 (ii) The person making the disclosure initiates
233 the appropriate corrective actions and pursues those corrective
234 actions with due diligence;

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

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

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

244 (vi) The noncompliance did not result in a
245 substantial endangerment threatening the public health, safety or
246 welfare or the environment; and

247 (vii) The noncompliance is not a repeat violation
248 occurring at the same facility within a period of three (3) years.
249 "Repeat violation" in this subparagraph means a second or
250 subsequent violation, after the first violation has ceased, of the
251 same statutory provision, regulation, permit condition, or
252 condition in an order of the commission.

253 (8) Any provisions of this section and chapter regarding
254 liability for the costs of cleanup, removal, remediation or
255 abatement of any pollution, hazardous waste or solid waste shall
256 be limited as provided in Section 49-17-42 and rules adopted
257 thereto.

258 **SECTION 3.** Section 49-17-427, Mississippi Code of 1972, is
259 amended as follows:



260 49-17-427. (1) Whenever the commission or an employee
261 thereof has reason to believe that a violation of any provision of
262 this chapter, or of any order of the commission, or of any
263 regulation promulgated pursuant to this chapter has occurred, the
264 commission shall initiate proceedings in the same manner as
265 provided in Sections 49-17-31 through 49-17-41, Mississippi Code
266 of 1972.

267 (2) Any person found by the commission violating any of the
268 provisions of Sections 49-17-401 through 49-17-433, or any rule or
269 regulation or written order of the commission shall be subject to
270 a civil penalty of not more than Twenty-five Thousand Dollars
271 (\$25,000.00) for each violation per day, such penalty to be
272 assessed and levied by the commission as provided in Sections
273 49-17-1 through 49-17-43, Mississippi Code of 1972.

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

- 276 (a) The willfulness of the violation;
- 277 (b) Any damage to air, water, land or other natural
278 resources of the state or their uses;
- 279 (c) Costs of restoration or abatement;
- 280 (d) Economic benefit as a result of noncompliance;
- 281 (e) The seriousness of the violation, including any
282 harm to the environment and any hazard to the health, safety and
283 welfare of the public;
- 284 (f) Past performance history; and
- 285 (g) Whether the noncompliance was discovered and
286 reported as the result of a voluntary self-evaluation. If a
287 person discovers as a result of a voluntary self-evaluation,
288 information related to noncompliance with an environmental law and
289 voluntarily discloses that information to the department,
290 commission or any employee thereof, the commission shall, to the
291 greatest extent possible, reduce a penalty, if any, determined by
292 the commission, except for economic benefit as a result of



293 noncompliance, to a de minimis amount if all of the following are
294 true:

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

297 (ii) The person making the disclosure initiates
298 the appropriate corrective actions and pursues those corrective
299 actions with due diligence;

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

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

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

309 (vi) The noncompliance did not result in a
310 substantial endangerment threatening the public health, safety or
311 welfare or the environment; and

312 (vii) The noncompliance is not a repeat violation
313 occurring at the same facility within a period of three (3) years.
314 "Repeat violation" in this subparagraph means a second or
315 subsequent violation, after the first violation has ceased, of the
316 same statutory provision, regulation, permit condition, or
317 condition in an order of the commission.

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

323 **SECTION 4.** Section 17-17-29, Mississippi Code of 1972, is
324 amended as follows:



325 17-17-29. (1) Any person found by the commission violating
326 any of the provisions of Sections 17-17-1 through 17-17-47, or any
327 rule or regulation or written order of the commission in pursuance
328 thereof, or any condition or limitation of a permit, shall be
329 subject to a civil penalty of not more than Twenty-five Thousand
330 Dollars (\$25,000.00) for each violation, such penalty to be
331 assessed and levied by the commission after a hearing. Appeals
332 from the imposition of the civil penalty may be taken to the
333 chancery court in the same manner as appeals from orders of the
334 commission. If the appellant desires to stay the execution of a
335 civil penalty assessed by the commission, he shall give bond with
336 sufficient resident sureties of one or more guaranty or surety
337 companies authorized to do business in this state, payable to the
338 State of Mississippi, in an amount equal to double the amount of
339 any civil penalty assessed by the commission, as to which the stay
340 of execution is desired, conditioned, if the judgment shall be
341 affirmed, to pay all costs of the assessment entered against the
342 appellant. Each day upon which such violation occurs shall be
343 deemed a separate and additional violation.

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



358 written complaint or commission order has first been issued for
359 the alleged violation.

360 (3) Any person who violates any of the provisions of, or
361 fails to perform any duty imposed by, Sections 17-17-1 through
362 17-17-47, or any rule or regulation issued hereunder, or who
363 violates any order or determination of the commission promulgated
364 pursuant to such sections, and causes the death of wildlife shall
365 be liable, in addition to the penalties provided in subsection (1)
366 and/or (2) of this section, to pay to the state an additional
367 amount equal to the sum of money reasonably necessary to replenish
368 such wildlife as determined by the commission after consultation
369 with the Mississippi Commission on Wildlife, Fisheries and Parks.
370 Such amount may be recovered by the commission on behalf of the
371 state in a civil action brought in the appropriate county or
372 circuit court of the county in which venue may lie.

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

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

387 (5) Any person who knowingly violates any provision of this
388 chapter or violates any order issued by the commission under the
389 authority of this chapter shall, upon conviction, be guilty of a
390 misdemeanor and shall be subject to a fine of not more than



391 Twenty-five Thousand Dollars (\$25,000.00) for each day of
392 violation or to imprisonment not to exceed one (1) year, or both.
393 Each day's violation shall constitute a separate offense.

394 (6) (a) Any person who purposely or recklessly disposes of
395 any hazardous waste in violation of this chapter which
396 contaminates a drinking water source to the extent that it is
397 unsafe for human consumption, as determined by the state agency
398 charged with the responsibility of regulating safe drinking water
399 for human consumption; or any person who purposely or recklessly
400 disposes of any hazardous waste in violation of this chapter and
401 who knows that he places another person in imminent danger of
402 death or serious bodily injury shall, upon conviction, be guilty
403 of a felony, and shall be subject to imprisonment for a term of
404 not less than one (1) year nor more than ten (10) years, and shall
405 also be subject to a fine of not less than Five Thousand Dollars
406 (\$5,000.00) nor more than Fifty Thousand Dollars (\$50,000.00) for
407 each day of violation or both fine and imprisonment. The fine
408 shall not exceed a total of One Million Dollars (\$1,000,000.00).

409 (b) For purposes of this subsection, a person acts
410 purposely with respect to a material element of an offense when:

411 (i) If the element involves the nature of his
412 conduct or a result thereof, it is his conscious object to engage
413 in conduct of that nature or to cause such a result; and

414 (ii) If the element involves the attendant
415 circumstances, he is aware of the existence of such circumstances
416 or he believes or hopes that they exist.

417 (c) For purposes of this subsection, a person acts
418 recklessly with respect to a material element of an offense when
419 he consciously disregards a substantial and unjustifiable risk
420 that the material element exists or will result from his conduct.
421 The risk must be of such a nature and degree that, considering the
422 nature and purpose of the actor's conduct and the circumstances
423 known to him, its disregard involves a gross deviation from the



424 standard of conduct that a law-abiding person would observe in the
425 actor's situation.

426 (d) This section shall not apply to any person holding
427 a permit from the Department of Environmental Quality and acting
428 within the scope of that permit.

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

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

443 (a) The willfulness of the violation;

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

446 (c) Costs of restoration and abatement;

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

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

451 (f) Past performance history; and

452 (g) Whether the noncompliance was discovered and
453 reported as the result of a voluntary self-evaluation. If a
454 person discovers as a result of a voluntary self-evaluation,
455 information related to noncompliance with an environmental law and
456 voluntarily discloses that information to the department,



457 commission or any employee thereof, the commission shall, to the
458 greatest extent possible, reduce a penalty, if any, determined by
459 the commission, except for economic benefit as a result of
460 noncompliance, to a de minimis amount if all of the following are
461 true:

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

464 (ii) The person making the disclosure initiates
465 the appropriate corrective actions and pursues those corrective
466 actions with due diligence;

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

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

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

476 (vi) The noncompliance did not result in a
477 substantial endangerment threatening the public health, safety or
478 welfare or the environment; and

479 (vii) The noncompliance is not a repeat violation
480 occurring at the same facility within a period of three (3) years.
481 "Repeat violation" in this subparagraph means a second or
482 subsequent violation, after the first violation has ceased, of the
483 same statutory provision, regulation, permit condition, or
484 condition in an order of the commission.

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



490 (10) Any person who violates Section 49-17-603, shall, in
491 addition to any other penalties, be subject to the penalties
492 provided in this section.

493 **SECTION 5.** This act shall take effect and be in force from
494 and after its passage.

