

By: Senator(s) Nunnelee

To: Environment Prot, Cons
and Water ResSENATE BILL NO. 2001
(As Passed the Senate)

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 TO FURTHER AMEND SECTION 17-17-29, MISSISSIPPI CODE OF 1972, TO
7 REMOVE ENVIRONMENTAL FELONY PENALTY; TO CREATE SECTION 17-17-67,
8 MISSISSIPPI CODE OF 1972, TO RECODIFY THE ENVIRONMENTAL FELONY
9 PROVISION REMOVED FROM SECTION 17-17-29, MISSISSIPPI CODE OF 1972;
10 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 civil * * * or
17 administrative proceeding and is not subject to any discovery
18 pursuant to the rules of civil procedure * * * or administrative
19 procedure, unless:

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

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

28 (i) The environmental self-evaluation report shows
29 evidence that the person for which the environmental
30 self-evaluation report was prepared is not or was not in
31 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



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

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

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

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

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

95 (b) If any party divulges all or any part of the
96 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.

(7) The admissibility of an environmental self-evaluation report in a criminal proceeding shall not waive the privilege created under this section as to civil proceedings.

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

49-17-43. (1) 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.

(2) In lieu of, or in addition to, the penalty provided in subsection (1) 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: (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 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 subsections (1) and (2) 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.

(4) 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 subsections (1), (2) and (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 above.



196 (5) It is unlawful for any person to: (a) discharge
197 pollutants in violation of Section 49-17-29 or in violation of any
198 condition or limitation included in a permit issued under Section
199 49-17-29 or (b) introduce pollutants into publicly owned treatment
200 works in violation of pretreatment standards or in violation of
201 toxic effluent standards; and, upon conviction thereof, such
202 person shall be punished by a fine of not less than Two Thousand
203 Five Hundred Dollars (\$2,500.00) nor more than Twenty-five
204 Thousand Dollars (\$25,000.00) per day of violation.

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

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

- 218 (a) The willfulness of the violation;
- 219 (b) Any damage to air, water, land or other natural
220 resources of the state or their uses;
- 221 (c) Costs of restoration and abatement;
- 222 (d) Economic benefit as a result of noncompliance;
- 223 (e) The seriousness of the violation, including any
224 harm to the environment and any hazard to the health, safety and
225 welfare of the public;
- 226 (f) Past performance history; and
- 227 (g) Whether the noncompliance was discovered and
228 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; and

(vii) The noncompliance is not a repeat violation occurring at the same facility within a period of three (3) years. "Repeat violation" in this subparagraph means a second or subsequent violation, after the first violation has ceased, as determined by the Commission on Environmental Quality, of the same statutory provision, regulation, permit condition, or condition in an order of the commission.



(8) Any provisions of this section and chapter regarding liability for the costs of cleanup, 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 3. Section 49-17-427, Mississippi Code of 1972, is amended 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; * * *

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

(vii) The noncompliance is not a repeat violation occurring at the same facility within a period of three (3) years. "Repeat violation" in this subparagraph means a second or subsequent violation, after the first violation has ceased, as determined by the Commission on Environmental Quality, of the same



statutory provision, regulation, permit condition, or condition in
an order of the commission.

(4) Any provisions of this section and chapter regarding liability for the costs of cleanup, 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 17-17-29, Mississippi Code of 1972, is amended 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, * * * 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 subsections (1) and (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 subsections (1), (2) and (3) of this section.



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

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

403 * * *

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

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

- 418 (a) The willfulness of the violation;
419 (b) Any damage to air, water, land or other natural
420 resources of the state or their uses;
421 (c) Costs of restoration and abatement;
422 (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; * * *

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

(vii) The noncompliance is not a repeat violation occurring at the same facility within a period of three (3) years.



"Repeat violation" in this subparagraph means a second or subsequent violation, after the first violation has ceased, as determined by the Commission on Environmental Quality, of the same statutory provision, regulation, permit condition, or condition in an order of the commission.

(9) Any provision of this section and chapter regarding liability for the costs of cleanup, 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.

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

SECTION 5. The following shall be codified as Section 17-17-67, Mississippi Code of 1972:

17-17-67. (1) Any person who purposely or recklessly disposes of any hazardous waste in violation of this chapter which contaminates a drinking water source to the extent that it is unsafe for human consumption, as determined by the state agency charged with the responsibility of regulating safe drinking water for human consumption; or any person who purposely or recklessly disposes of any hazardous waste in violation of this chapter and who knows that he places another person in imminent danger of death or serious bodily injury shall, upon conviction, be guilty of a felony, and shall be subject to imprisonment for a term of not less than one (1) year nor more than ten (10) years, and shall also be subject to a fine of not less than Five Thousand Dollars (\$5,000.00) nor more than Fifty Thousand Dollars (\$50,000.00) for each day of violation or both fine and imprisonment. The fine shall not exceed a total of One Million Dollars (\$1,000,000.00).

(2) For purposes of this section, a person acts purposely with respect to a material element of an offense when:



488 (a) If the element involves the nature of his conduct
489 or a result thereof, it is his conscious object to engage in
490 conduct of that nature or to cause such a result; and

491 (b) If the element involves the attendant
492 circumstances, he is aware of the existence of such circumstances
493 or he believes or hopes that they exist.

494 (3) For purposes of this section, a person acts recklessly
495 with respect to a material element of an offense when he
496 consciously disregards a substantial and unjustifiable risk that
497 the material element exists or will result from his conduct. The
498 risk must be of such a nature and degree that, considering the
499 nature and purpose of the actor's conduct and the circumstances
500 known to him, its disregard involves a gross deviation from the
501 standard of conduct that a law-abiding person would observe in the
502 actor's situation.

503 (4) This section shall not apply to any person holding a
504 permit from the Department of Environmental Quality and acting
505 within the scope of that permit.

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

