

By: Representative Ellington

To: Conservation and Water  
Resources

## HOUSE BILL NO. 1161

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 SECTION 49-17-43,  
4 MISSISSIPPI CODE OF 1972, TO PROVIDE THAT, IN DETERMINING THE  
5 AMOUNT OF A CIVIL PENALTY IN THE CASE WHERE NONCOMPLIANCE HAS BEEN  
6 REPORTED AS A RESULT OF A VOLUNTARY SELF-EVALUATION, THE  
7 COMMISSION ON ENVIRONMENTAL QUALITY SHALL CONSIDER AS A MITIGATING  
8 FACTOR THE FACT THAT SUCH NONCOMPLIANCE IS NOT A REPEAT VIOLATION;  
9 AND FOR RELATED PURPOSES.

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

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

13 49-2-71. (1) An environmental self-evaluation report, as  
14 defined in Section 49-2-2, is privileged and is not admissible in  
15 any legal or investigative action in any civil \* \* \* or  
16 administrative proceeding and is not subject to any discovery  
17 pursuant to the rules of civil procedure \* \* \* or administrative  
18 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



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 2.** Section 49-17-43, Mississippi Code of 1972, is amended 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



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



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.

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

(h) 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





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.

