

REPORT OF CONFERENCE COMMITTEE

MR. SPEAKER AND MADAM PRESIDENT:

We, the undersigned conferees, have had under consideration the amendments to the following entitled BILL:

H. B. No. 1161: Environment; remove availability of environmental self-audit privilege in criminal and civil cases.

We, therefore, respectfully submit the following report and recommendation:

1. That the Senate recede from its Amendment No. 1.

2. That the House and Senate adopt the following amendment:

Amend by striking all after the enacting clause and inserting in lieu thereof the following:

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, * * *
22 after in camera review, determines that:

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

27 (ii) The person did not initiate appropriate
28 efforts to achieve compliance with the environmental law or
29 complete any necessary permit application promptly after the

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

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

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

49 (d) The court of record or hearing officer, after an in
50 camera review, determines that even if subject to the privilege,
51 it is found that a condition exists that demonstrates an imminent
52 and substantial hazard or endangerment to the public health and
53 safety or the environment.

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

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

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

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

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

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

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

90 (b) If any party divulges all or any part of the
91 information contained in an environmental self-evaluation report
92 in violation of the provisions of paragraph (a) of this subsection
93 (3) or if any other person knowingly divulges or disseminates all
94 or any part of the information contained in an environmental
95 self-evaluation report that was provided to such person in
96 violation of the provisions of paragraph (a) of this subsection
97 (3), such party or other person is liable for any damages caused
98 by the divulgence or dissemination of the information that are
99 incurred by the person for which the environmental self-evaluation
100 report was prepared. The court or hearing officer also may issue
101 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. (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 * * *. 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

138 a separate and additional violation.

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

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

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

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

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

188 (5) It is unlawful for any person to: (a) discharge
189 pollutants in violation of Section 49-17-29 or in violation of any
190 condition or limitation included in a permit issued under Section
191 49-17-29 or (b) introduce pollutants into publicly owned treatment
192 works in violation of pretreatment standards or in violation of
193 toxic effluent standards; and, upon conviction thereof, such
194 person shall be punished by a fine of not less than Two Thousand
195 Five Hundred Dollars (\$2,500.00) nor more than Twenty-five
196 Thousand Dollars (\$25,000.00) per day of violation.

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

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

210 (a) The willfulness of the violation;

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

213 (c) Costs of restoration and abatement;

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

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

218 (f) Past performance history; and

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

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

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

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

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

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

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

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

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

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

**Further, amend by striking the title in its entirety and
inserting in lieu thereof the following:**

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 SELF-AUDIT PENALTY
5 MITIGATION IS NOT AVAILABLE TO CERTAIN REPEAT OFFENDERS; AND FOR
6 RELATED PURPOSES.

CONFEREES FOR THE HOUSE	CONFEREES FOR THE SENATE
X _____	X _____
Greg Snowden	Alan Nunnelee
X _____	X _____
Jim Ellington	T. O. Moffatt
X _____	X _____
Billy Broomfield	Neely C. Carlton