

munity from penalties for firms which report violations. The law (Colorado S.B. 139) creates a presumption against the imposition of any type of penalty (civil, administrative or criminal) for self-reporting companies.

On March 2, 1995, Senators Mark Hatfield of Oregon and Hank Young of Colorado introduced legislation modeled after the Oregon-Colorado statutes. The bill, S. 582, has drawn increasing attention since EPA's rejection of the Self-Audit Privilege. Entitled the "Voluntary Environmental Audit Protection Act", the Hatfield-Young legislation is quite broad. It provides (with few exceptions) that environmental audit reports prepared in good faith shall "not be subject to discovery and shall not be admitted into evidence in any civil or criminal action or administrative proceeding before a Federal court or agency under Federal law."

IV. EPA'S REJECTION OF SELF-AUDIT PRIVILEGE

EPA's recent announcement rejecting the Self-Audit Privilege is the culmination of a lively and sometimes acrimonious debate which has progressed for over a year. Environmental groups, plaintiff's lawyers and prosecutors argued to EPA that a Self-Audit Privilege would effectively eliminate corporate accountability for pollution to the environment and harm to human health. Industry groups countered that the public interest would never be served by a policy which discouraged companies from identifying and addressing environmental problems and then disclosing them to authorities.

By June of last year, four states — Oregon, Colorado, Indiana and Kentucky—had enacted SAP legislation. EPA not only opposed the approach taken in these statutes, but also formally requested states which were considering SAP's to postpone passing legislation until after EPA contemplated formulating its own policy on self-audits and disclosures. See 59 *Federal Register* 31914 (June 20, 1994).

Finally, on April 3, 1995, EPA published a rather complex interim enforcement policy which can be summarized as follows: (1) companies which self-audit, remedy and disclose will *not* be entitled to a privilege or to immunity from penalties; (2) EPA will not seek criminal prosecutions of such firms if several strict criteria are met; and (3) EPA in most cases will not add punitive fines to penalties for violations for self-auditing companies. In short, EPA's policy not only eliminated hopes for the SAP, but preserved to prosecuting and enforcement officials considerable latitude to penalize companies on a case-by-case basis. In this respect, the new policy was merely a reiteration of what EPA and many of its state counterparts have been doing all along.

V. CONCLUSION

Despite optimism generated last year by the Northern District of Florida in *Reichhold Chemicals*, EPA's "interim" rejection of a Self-Audit Privilege and failure to provide real incentives to disclose the results of such investigation has created a cloud of uncertainty for regulated industries and state governments. The situation ironically has forced companies which traditionally prefer to repose regulation in the hands of state and local governments to push for federal legislation. In the meantime, companies will tend to structure self-audits carefully under the attorney-client privilege, or forego self-audits altogether. ♦