

Chemicals sued for recovery costs of both current and anticipated investigation and remediation incurred under a 1984 consent order the company had entered into with the state of Florida. The state consent order obligated Reichhold Chemicals to investigate and remediate groundwater contamination at the site.

During discovery, defendants sought from Reichhold certain documents concerning Reichhold's in-house investigation of the Pensacola site. Reichhold sought a protective order on the basis of the Self-Audit Privilege. The district court agreed with Reichhold, recognizing and applying the SAP:

The [self-audit] privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.

157 F.R.D. at 524. Adopting the Ninth Circuit's test in *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992), the court in *Reichhold* further held that the SAP required the following four-part showing:

- (1) The information claimed as privileged must result from a critical self-analysis undertaken by the party seeking the protection;
- (2) The public must have a strong interest in preserving the free flow of the type of information sought;
- (3) The information must be of a type whose flow would be curtailed if discovery was allowed, and;
- (4) The material must have been prepared with the expectation that it would be kept confidential, and it has in fact been kept confidential.

Id. at 527.

Two other aspects of the *Reichhold* decision are noteworthy. First, the court, citing language in the *Bredice* case, emphasized the privilege was "qualified" and could be overcome if one of the defendants "can demonstrate extraordinary circumstances or special need." *Id.* Although *Reichhold* did not elaborate on what would constitute such a showing, a similar standard governing the qualified privilege under the work product doctrine is set forth in the federal discovery rules and some of their state counterparts. See, e.g., Rule 26(b)(3) (documents and things prepared in anticipation of litigation are discoverable only upon a showing of "substantial need" and that party seeking materials "is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

Second, and as the above-quoted test implies, the *Reichhold* court made an important but somewhat metaphysical distinction. While it applied the SAP to Reichhold's environmental reports, records and memoranda containing "retroactive an analysis of past conduct practices and occurring and the resulting environmental consequences," it specifically declined to extend the protection to "evaluations of the potential environmental risks of a proposed course of action, made in advance of that course of action." 157 F.R.D. at 527 (emphasis added). In other words, a "looking-back" in-house audit of past conduct is protected while a "looking-forward" analysis of corrective action is not.

The *Reichhold* court disagreed with *dicta* in *Koppers Company, Inc. v. Aetna Casualty & Surety Co.*, 847 F.Supp. 360, 364 (W.D. Pa. 1994) that the SAP "does not apply to a *fortiori* to environmental reports, records and memoranda". Although the U. S. District Court for the Western District of Pennsylvania in *Koppers* acknowledged that the "rarely-recognized" SAP was based "on a policy rationale that encourages individuals to act responsibly and deliberately," it found the privilege was inapplicable to environmental in-house investigations because "that context requires strict attention to environmental affairs" and the court doubted "that today potential polluters will violate regulations requiring environmental diligence for fear of these documents being used against them tomorrow". *Id.* (As the *Reichhold* court noted, *Koppers* appeared to be addressing "pre-occurrence" reports, records and memoranda and not retroactive analyses of past environmental conduct. *Reichhold*, 157 F.R.D. at 527.)

III. LEGISLATIVE MEASURES

By the time EPA released its April 3, 1995 policy statement rejecting the SAP, 10 states (Arkansas, Colorado, Kentucky, Idaho, Illinois, Indiana, Oregon, Utah, Virginia and Wyoming) had codified some version of the Self-Audit Privilege. These statutes were designed to promote self-audits, determine violations and/or encourage voluntary disclosure of violations to the government. In 1993, Oregon passed the first SAP law. It prohibited prosecutors from using the results of voluntary in-house investigations against a company unless the firm was dilatory in investigating or invoked the privilege for a fraudulent purpose. In mid-1994, Colorado codified a version of the SAP which provides im-