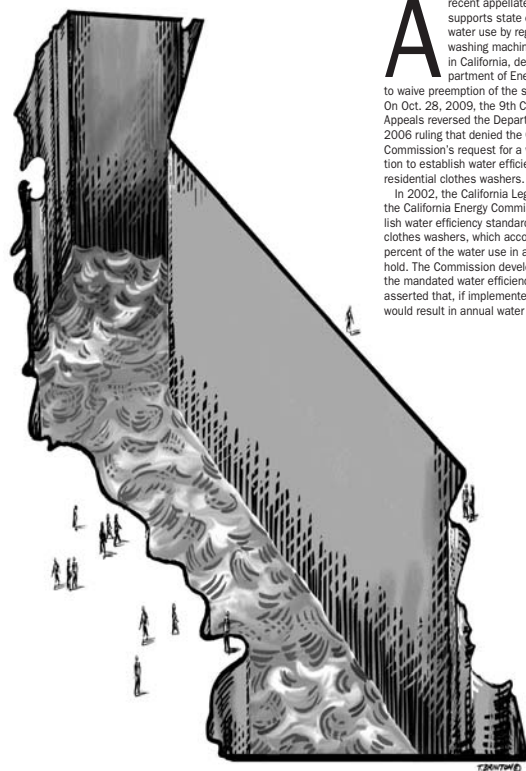


Spin on Water Efficiency Standards



A recent appellate court decision supports state efforts to reduce water use by regulating residential washing machines manufactured in California, despite a U.S. Department of Energy order refusing to waive preemption of the state regulation. On Oct. 28, 2009, the 9th Circuit Court of Appeals reversed the Department of Energy's 2006 ruling that denied the California Energy Commission's request for a waiver of preemption to establish water efficiency standards for residential clothes washers.

In 2002, the California Legislature required the California Energy Commission to establish water efficiency standards for residential clothes washers, which account for some 22 percent of the water use in a typical household. The Commission developed and adopted the mandated water efficiency standards and asserted that, if implemented, the new rules would result in annual water savings "equal to

the [c]ity of San Diego's current water usage." Initially scheduled to take effect in two phases, washers would have been required to perform to one standard by Jan. 1, 2007 and a more restrictive standard by Jan. 1, 2010.

In 2005, recognizing that the federal Energy Policy and Conservation Act expressly preempted the California Energy Commission from regulating residential (but not commercial) clothes washers, the Commission petitioned the Department of Energy for a rule waiving preemption. One year later, the Department denied the petition for the following reasons: the proposed regulations were to take effect on Jan. 1, 2007 - less than the mandatory three-year minimum waiting period between a grant of a waiver and the regulation's effective date required by the Act; the Commission did not make the requisite showing of "unusual and compelling water interest" by demonstrating that the benefits of the proposed regulations were "preferable or necessary" when measured against alternative approaches to saving water; and the proposed regulation would make top-loading washers unavailable in California.

The California Energy Commission appealed to the 9th Circuit and the California Water Association, among others, filed an *amicus curiae* brief in support of the Commission's appeal of the Department of Energy decision. The Court looked to resolve the following two issues on appeal: whether the Court had jurisdiction to hear the Commission appeal under the Act and whether the Department's action to deny the Commission's petition could be supported by any one of the Department's three stated reasons.

The Court first determined that it had jurisdiction to hear the California Energy Commission's petition for review. Thereafter, the Court addressed the Commission showing in support of a waiver of preemption and reviewed the Department of Energy's rejection of the petition under the "arbitrary and capricious" standard established by the Administrative Procedure Act.

First, the Court rejected the Department of Energy's reasoning that a waiver could not be granted if the proposed regulations adopted a timeline for implementation that did not com-

port with the Energy Policy and Conservation Act's three-year waiting period. Claiming that the California Energy Commission's evidence showing compelling state need was premised on a faulty timeline, the Department refused to consider such evidence. The Court concluded that the Department's rejection on that basis was unjustifiable.

Second, with respect to proving California's "unusual and compelling water interest," the Court concluded that the record did not support the Department of Energy's conclusion that the California Energy Commission failed to provide sufficient data and analysis from which the Department could determine whether the new standards were "preferable or necessary" compared to alternatives. Instead, the Court concluded that the Department "simply did not evaluate" the Commission's data and analysis and therefore could not rely on this second ground for denying the request for waiver.

The Court also rejected the Department of Energy's third and final basis for denying the waiver petition - that the regulations would make top-loading washers unavailable - because the Department had only offered evidence that presently-available top-loading washers would not meet the proposed standards. The Department failed to offer even a prediction that the industry could not achieve the proposed efficiency standards in three years.

As a result, the Court reversed the Department of Energy's order denying the waiver petition and remanded the matter for further proceedings.

Although the California Energy Commission request for waiver was not granted at this juncture, the 9th Circuit's reversal offers significant support for efforts undertaken by California's water utilities to address what the 9th Circuit itself calls California's "worsening" water crisis. The decision appears to reflect the Court's dissatisfaction with the Department of Energy's failure to meaningfully consider California's need to pursue water use efficiency measures. On remand, the Department, under the Obama administration, is likely to take a more favorable view of state regulations such as the Commission's appliance water efficiency standards. A waiver of federal preemption would lend support to the efforts of California's state agencies and water utilities to promote both water and energy conservation, including the replacement of water-inefficient appliances inside the home.



Mar R. Lane is an attorney in the San Francisco office of Nossaman. She represents investor-owned public utilities in rate cases, rulemakings and other matters before the California Public Utilities Commission. She can be reached at (415) 438-7296 or mlane@nossaman.com.

Defining Safety in the Workplace

Employment law practitioners are accustomed to working with a certain cadre of documents, including the beloved employee handbook, confidentiality agreement, arbitration agreement and the other documents that help define the rules between employer and employee. However, more often than not, clients do not have a written Injury Illness Prevention Program (IIPP) as required by Cal-OSHA, even if an employer has just one employee.

To motivate clients to finish the half-complete IIPP that has lingered in your file for much too long, many workers' compensation carriers require that insureds have a written IIPP at the time of the application or when the policy is renewed.

However, because carriers often require an IIPP, they will offer the client a sample IIPP, which the employer can use. Although having any written policy is probably better than nothing in terms of defending a Cal-OSHA citation, trying to cram businesses into a one-size-fits-all IIPP can be a recipe for disaster.

The first step is to assess what category the employer falls into. Is the employer considered high hazard? Seasonal? Agricultural? This determination will impact the structure of the IIPP.

There are two ways an employer can become high hazard: either the employer's business is a high hazard industry (and is on the annual high hazard list issued by Cal-OSHA) or the employer's workers compensation rating is more than 125 percent (sometimes called 1.25).

Either way, a high hazard employer is not just more likely to have a pop-in visit by Cal-OSHA, but must also have extra bells and whistles in their IIPP. Cal-OSHA's last high hazard policy memo mentioned that their focus for high hazard employers would include residential construction and employers who work with scaffolding, among others. Clients such as small construction companies are more likely to wind up under Cal-OSHA's microscope.

Cal-OSHA also has a model IIPP that practitioners can use as framework. Aside from the practical benefit that Cal-OSHA inspectors are more likely to respond to a document that closely mirrors their model policy, employers can use the model policy as a way to limit their exposure under a Cal-OSHA citation because this gives the employer grounds to establish "good faith," which can help reduce the fine amount.

Further, an IIPP must identify the individual responsible for the overall program. This individual is not just the person in charge of distributing the document to employees, but the one responsible for problems with the program generally. Sometimes it is appropriate for human resources to take on the role of IIPP administrator. Other times, it might be more appropriate to designate a high level production manager or an employee best equipped to discuss safety issues.

A valid IIPP must indicate how the employer will enforce safety rules. One of the most common mistakes employers make is failing to consistently discipline employees for safety violations. Not only does disciplining for safety violations help validate the employer's IIPP, it also helps maintain a culture in the workplace that policy violations are not tolerated, whether it is violation of a no harassment policy, a no discrimination policy or safety policies.

Although there are many types of IIPPs that lawyers are ready, will-



A good safety consultant knows the micro-industry their client works in and understands the applicable safety regulations.

The gap emerges when the lawyer is not in a position to assess the equipment or processes used by the client and therefore cannot identify the applicable regulations, since many of the regulations are equipment-specific.

Working in tandem with a safety consultant can be a good solution when dealing with a client whose business is outside of the lawyer's usual knowledge. Most often this comes up with clients who are heavy in manufacturing. It is not particularly helpful when lawyers (like me) can only look at the client's machinery and say "that looks scary."

The goal of the process is to have a written document that not only meets Cal-OSHA's standards but also accurately reflects the employer's safety practices. While there are many tools that a practitioner can rely on to help bolster the IIPP, the most reliable tool is a lawyer's common sense.

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Meghan B. Clark is a partner at Nordman Cormany Hair & Compton. She serves on the board of counselors for California Lutheran University and is the vice chair of the East Ventura County Employer's Advisory Council. Clark may be reached at mclark@enchc.com.

ing and able to help create, general employment lawyers should be wary of stepping into the role of safety consultant when drafting or assisting with the preparation of an IIPP, as the lawyer may not be familiar with the specific regulations that apply to the employer's industry.

Cal-OSHA's industry specific regulations are written in eight-point font, with single spaced, double-sided pages, which fill up a two inch binder.