



Produced Water Series, Part 2 of 4: New Mexico's Recent and Upcoming Rule Changes

By: [Chris Colclasure](#)

The rules governing produced water in New Mexico are changing. The New Mexico Oil Conservation Commission (OCC) revised its rules in September 2020 to transfer some authority to the Water Quality Control Commission (WQCC) in accordance with the 2019 Produced Water Act, known as House Bill 546. In April 2021, the OCC will consider a petition filed by WildEarth Guardians to prohibit major and minor releases of produced water and oilfield waste. See our November 2020 [summary](#). The WQCC is expected to consider rules against using untreated produced water off the oilfield and a requirement to report the composition of produced water intended for treatment and use outside the oil and gas industry.

This client alert summarizes HB 546 and the recent and upcoming rule changes.

The New Mexico Produced Water Act

The Oil Conservation Division (OCD) of the Energy, Minerals and Natural Resources Department (EMNRD) has historically regulated most aspects of produced water. Among other things the OCD issues permits for centralized and commercial surface waste management facilities, permits the injection of produced water for enhanced recovery or for disposal, and oversees motor vehicle transportation. Before House Bill 546, the OCD also regulated the use of produced water in road construction and maintenance, other construction, electric power generation and industrial uses off the oilfield.

House Bill 546 allocated authority over the discharge, handling, transport, storage, recycling, and treatment of produced water to the OCD for oilfield activities and to the WQCC for activities “unrelated to the exploration, drilling, production, treatment or refinement of oil or gas.” NMSA 1978, § 74-6-4(P).

HB 546 encourages produced water reuse and recycling. The Act redefines produced water to include other fluids: “Produced water means ~~water~~ a fluid that is an incidental byproduct from drilling for or the production of oil and gas.” NMSA 1978, § 70-13-2 (relocated from § 70-2-33). It assigns initial control of and responsibility for produced water to the working interest owners and well operator. When transferred or sold, the transferee takes responsibility for, control of, and a possessory interest in the produced water, including the right to use it and obtain proceeds for its use.

The Act clarifies that the disposition of produced water does not require a permit or other approval from the state engineer, is not an appropriation of water for beneficial use or a waste of water, and does not establish a water right. NMSA 1978, § 70-13-4. However, the New Mexico Environment Department (NMED) must issue a permit for uses regulated by the WQCC.

The Act also requires additional reporting and financial assurances, and expands OCD's enforcement authority.

The Oil Conservation Commission's 2020 Rule Revisions

The OCC revised its regulations to implement the Produced Water Act, effective October 13, 2020. The revisions are intended to be narrow legal changes conforming to the new statutory allocation of authority. The revised rules also collect data for a potential future rulemaking. The OCC strengthened environmental protections in some respects but did not adopt new substantive restrictions on the use of produced water, a decision that was criticized by environmental nongovernmental organizations (NGOs).

The OCC rule changes transferred the OCD's authority over the non-oilfield use of produced water to the WQCC. 19.15.34.2 and 19.15.34.8(A)(7), NMAC. The OCC rules now require operators to obtain a permit from NMED before using produced water in a manner regulated by the WQCC. 19.15.34.8(B)(3), NMAC.

Within 45 days after hydraulically fracturing a well, operators must file a water use report either on Form C-105, Well Completion or Recompletion Report, or Form C-103, Sundry Notice. The water use report identifies the amount of produced water and other water, categorized by salinity, that is used in hydraulic fracturing. 19.15.16.21, NMAC. This data is intended to inform future policy decisions or regulations.

Produced water for recycling or re-use must be handled and stored in a manner that protects public health, the environment, and fresh water resources. 19.15.34.8(A)(4), NMAC. This is broader than the prior language, which required "reasonable protection against contamination of fresh water."

At the request of the NMED, the rule now requires responsible parties to notify NMED of releases of produced water within OCD's jurisdiction that are detrimental to ground or surface water. 19.15.34.8(A)(6), NMAC. At the request of the Sierra Club and WildEarth Guardians, the OCC rule now prohibits the surface application of produced water on a facility under the OCD's jurisdiction. 19.15.34.8(A)(8), NMAC.

Potential Future Regulations

The NMED Water Protection Division began a stakeholder process in 2019 to develop its produced water regulations. It planned to draft regulations in 2020 but has not yet published a draft.

NMED's priorities include minimizing fresh water usage, reducing injection for disposal purposes, addressing leaks, and protecting groundwater and surface water, among others. NMED is researching methods for treating and using produced water.

The first round of NMED regulations is intended to prohibit road spreading and other uses of untreated produced water off the oilfield. These rules will also require operators to analyze and report the chemical constituents in produced water intended for treatment and use off the oilfield. NMED plans to handle this data as confidential business information. NMED will develop additional rules over time.

The environmental NGOs' positions in the OCC rulemaking signal their potential future demands. Although HB 546 aims to increase produced water reuse and recycling, many NGOs opposed the use of produced water outside or even within oil and gas operations.

Some NGOs sought more prescriptive regulations, particularly for land application. One described produced water as "toxic waste" and requested permitting, registration and tracking systems, hazardous waste training requirements for workers, and transportation rules.

Other NGOs sought a ban or limits on the use of fresh water for fracking, regulation of facilities handling produced water, increased transparency and public data, and scientific reviews of the impacts of produced water before it is used off the oilfield. Some raised concerns about radioactive materials in produced water.

New Mexico's efforts to increase recycling and reuse of produced water highlight the opportunities for these liquids to transition from a waste to a resource. However, the environmentalists' response to the OCC's 2020 rule revisions indicate that many NGOs oppose actions that increase the societal benefits of responsible oil and gas production. The next newsletter in this series will address the regulation of produced water spills, reuse and recycling in other states and at the federal level.

Please contact [Chris Colclasure](#) for more information.