

MULTISTATE UPDATE ON PRODUCED WATER

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Western states are actively reviewing their requirements for processing, handling, and disposing of produced water. This article provides an update on recent legislative and regulatory developments in New Mexico, Texas, Utah, Wyoming, and Colorado.

I. New Mexico

New Mexico has been extremely active recently with regard to produced water laws and regulations. It passed the Produced Water Act and has considered, but so far not passed, additional laws and regulations pertaining to produced water spills and management.

A. *The New Mexico Produced Water Act*

The Oil Conservation Division (OCD) has historically regulated most aspects of produced water in the state. Among other things the OCD regulates certain oilfield waste management facilities and produced water disposal. New Mexico's 2019 Produced Water Act (NMPWA), also known as House Bill 546, alters this landscape. Before NMPWA, the OCD regulated the use of produced water in the oilfield and in various industrial uses off the oilfield. NMPWA allocated authority over most produced water in the oilfield to the OCD, and to the Water Quality Control Commission (WQCC) for activities "unrelated to the exploration, drilling, production, treatment or refinement of oil or gas." NMSA 1978, § 74-6-4(P).

NMPWA encourages produced water reuse and recycling, and redefines it to include any fluids that are incidental byproducts from drilling or 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.

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

The Oil Conservation Commission (OCC) revised its regulations to implement the NMPWA, effective October 13, 2020. The revisions are intended to be narrow legal changes conforming to the new statutory allocation of authority, for example, a formal transfer of 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. Additionally, 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.

In addition to implementing the NMPWA’s jurisdictional changes, the OCC strengthened environmental protections in some respects but mostly omitted substantive restrictions on the use of produced water, a decision that was criticized by environmental nongovernmental organizations (NGOs). The most substantive change requires produced water for recycling or re-use to 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.” Another substantive change (which was included at the express request of the Sierra Club and WildEarth Guardians) now prohibits the surface application of produced water on a facility under the OCD’s jurisdiction. 19.15.34.8(A)(8), NMAC.

Other less substantive changes amend various reporting and notification requirements. For example, responsible parties must 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. Additionally, they also implement new reporting requirements for the use of produced water in hydraulic fracturing. The OCC may use this data to inform future policy decisions or regulations.

B. Proposed but Not Adopted – Laws and Regulations Prohibiting Spills

1. Senate Bill 86

Some recent proposals have failed to advance but additional actions are anticipated in 2021. The legislature tabled Senate Bill 86, which would have prohibited spills, leaks, or other releases of oil, gas, and produced water. In addition, it would have required the use of produced water, recycled water, or treated water – not fresh water – for oil and gas well drilling and development at depths lower than protected freshwater resource zones.

2. OCC Rulemaking

Proposed bans on spills are not limited to the legislature, but are a persistent topic at the OCC. Following two petitions filed by WildEarth Guardians (WEG), the OCC has provided guidance that it wants the OCD to submit a proposed rulemaking to prohibit spills, in consultation with WEG and the New Mexico Oil and Gas Association (NMOGA). WEG originally filed its first petition (Case No. 21469) in September 2020 to prohibit spills of produced water and oilfield waste, but the petition contained procedural defects. It withdrew that petition and filed its second petition in October 2020 (Case No. 21529) to remedy the procedural defects, as well as expand the request to prohibit “major or minor releases” instead of just spills of produced water. The second petition also contained procedural defects that would have prevented WEG from presenting technical evidence at hearing in support of its case.

At the OCC’s February 25, 2021 hearing, WEG stated that it would prefer to refile to present additional technical evidence. The hearing culminated in the OCC terminating its consideration of WEG’s second petition, with the understanding that OCD would work with WEG and NMOGA to propose a rulemaking to prohibit “major or minor releases.” Depending on how quickly OCD files the petition, the hearing could be as soon as late May 2021.

Under current OCD rules, a “minor release” is an unauthorized release of 5–25 bbls or 50–500 MCF, which is not otherwise considered a major release. A “major release” is a release of any

volume that may with reasonable probability be detrimental to fresh water, or any *unauthorized* release that:

- a) is more than 25 bbls or 500 MCF of gas;
- b) results in or is the result of a fire;
- c) will probably reach a watercourse;
- d) will probably endanger public health; **or**
- e) substantially damages property or the environment.

3. NMED Rulemakings

NMED is developing rules to protect water quality and restrict the use of untreated produced water off the oilfield. NMED's priorities include minimizing fresh water usage, reducing injection for disposal purposes, addressing leaks, and protecting ground water 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.

NMED also plans to propose new methane and ozone regulations in early 2021 that may impact evaporation ponds. The July 20, 2020 initial draft rule proposed to require passing liquids through a tank prior to unloading into a pond to reduce VOC emissions, installing an impermeable continuous barrier or cover over "the entire surface area of the liquid," and routing emissions from the pond to a control device. NMED is revising the draft in response to public comments.

New Mexico's efforts to increase recycling and reuse of produced water highlight both the opportunities for these liquids to transition from a waste to a resource and the emerging concerns about protecting public health and the environment.

II. Texas

On January 15, 2021, the U.S. Environmental Protection Agency authorized the Texas Commission on Environmental Quality (TCEQ) to regulate discharges of produced water, hydrostatic test water, and gas plant effluent within the State of Texas and extending three miles offshore, pursuant to the Clean Water Act Section 402 (National Pollutant Discharge Elimination System). Operators may now apply to the TCEQ for a permit to discharge produced water to water within the State of Texas.

While produced water treatment remains relatively expensive, the EPA authorization should make it easier for operators in Texas to discharge treated produced water that meets applicable standards. In addition, State Senator Charles Perry introduced Senate Bill 601 to create the Texas Produced Water Consortium to study the economics and technology of beneficial uses of produced water.

III. Utah

The Utah Division of Air Quality, EPA Region 8, and the Ute Indian Tribe jointly published a November 2020 white paper on produced water disposal facility emissions. The air agencies concluded, based on sampling data, that emissions from produced water skim ponds and evaporation ponds were nearly ten times greater than previously reported. The agencies are currently evaluating industry comments. While Utah has not announced specific policy or regulatory changes, the state has identified produced water ponds as a significant source of ozone precursor emissions.

IV. Wyoming

WDEQ's Air Quality Division, in collaboration with the Utah State University and GSI Environmental, Inc., developed an emissions estimation tool called the Wyoming Pond Emissions Calculator (WYPEC). WDEQ published draft guidance in October 2020 for permitting air emissions from new and existing ponds and pits at oilfield waste disposal facilities. Under the draft guidance, new facilities must obtain air permits before construction. Existing facilities would have to collect samples and potentially apply for air permits.

V. Colorado

The Colorado Oil and Gas Conservation Commission (COGCC) "mission change" rulemaking includes several new requirements affecting produced water that took effect on January 15, 2021. COGCC 800 and 900 Series Rules. The COGCC intends to track produced water "from cradle to grave." New requirements include:

- Analyzing produced water for radium and other constituents.
- Elimination of a provision that allowed disposal of produced water by roadspraying on lease roads outside sensitive areas in certain circumstances.
- Minimizing air emissions from pits and prohibiting pits above certain emissions limits. Certain pits used for produced water reuse or recycling are exempt.
- Expanded requirements to submit waste management plans, which may include reuse and recycling plans.
- Fencing and netting for all new and some existing pits.
- Additional requirements for approval of injection wells.
- Seismic monitoring of certain Class II UIC wells.

The Board of Health adopted a new Regulation 20 governing Technologically Enhanced Naturally Occurring Radioactive Material (TENORM), including produced water and other non-exempt exploration and production waste meeting threshold concentrations of radioactive substances, effective January 14, 2021. Wastes subject to the rule require a TENORM determination and may be subject to registration or a specific radioactive materials license. The rule becomes enforceable on July 14, 2022, to allow operators time to characterize materials and come into compliance.

VI. Conclusion

Produced water regulations are rapidly evolving. Successfully managing produced water as a resource, rather than a waste, will become increasingly important to operators' bottom lines.