

The Produced Water Act

April 15, 2020

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Overview

- ▶ Purpose of the Statute
- ▶ Support for the Statute
- ▶ Status of the Law Prior to 2019
- ▶ Changes in the Law Created by the Produced Water Act
- ▶ Next Steps

Purpose of the Produced Water Act

- ▶ The Produced Water Act is intended to encourage the reuse and recycling of produced water, particularly for use within the oilfield.
- ▶ The Act creates necessary clarity to encourage investment in the recycling and reuse of produced water.
 - ▶ The Act creates a possessory interest in the produced water, which allows for transfers/conveyances and the retention of proceeds therefrom.
 - ▶ The Act outlines liability.
 - ▶ The Act allows parties to contract.
- ▶ The Produced Water Act also takes the first step in clarifying regulatory oversight for produced water use within the state.
- ▶ What the Legislature Loved About the Act: When produced water can be recycled and reused in the oilfield, less fresh water is needed for oil and gas operations.

Support

- ▶ The Produced Water Act was Widely Supported in the 2019 Session.
- ▶ Unanimously Passed by the House of Representatives; Widely Supported by the Senate.
- ▶ The bill was also supported by:
 - ▶ NMED,
 - ▶ EMNRD,
 - ▶ OSE,
 - ▶ New Mexico Farm & Livestock Bureau,
 - ▶ New Mexico Association of Commerce and Industry,
 - ▶ New Mexico Business Coalition,
 - ▶ Environmental Defense Fund,
 - ▶ Sierra Club,
 - ▶ IPANM,
 - ▶ Several Industry Members/Groups

Status of the Law Prior to 2019

- ▶ In 2004, the Oil and Gas Act was amended to give EMNRD jurisdiction over produced water uses. Unfortunately, that amendment was unclear as to the interest recycling companies could take in the water both during and after recycling.
- ▶ EMNRD had promulgated regulations to authorize recycling of produced water and allowed for the use of recycled water in oil and gas operations.
- ▶ The statutes were somewhat unclear as to NMED authority over recycling, treatment, and reuse.
- ▶ Liability seemed to remain with the O&G Operator.
- ▶ Comments were made by New Mexico Representatives during Committee Hearings that water in the Northwest could be cleaned up to “fresh water status,” but operators were afraid of potential liability. The result was injection of recycled/treated water.

The Produced Water Act - Sections 1 & 2

▶ SECTION 1: Short title.

- ▶ The Act is entitled the Produced Water Act and will be located in Chapter 70 NMSA 1978.
- ▶ We recommended the creation of a separate statute because the regulation of produced water involves the jurisdiction of several different agencies.
- ▶ Looking at one statute helps regulators, regulated parties, attorneys and courts easily identify jurisdiction.

▶ SECTION 2: Contains definitions under the Produced Water Act.

- ▶ It defines the terms “operator,” “produced water,” “recycled water,” and “treated water.”

The Produced Water Act - Section 3

- ▶ **SECTION 3: Clarifies agency jurisdiction to regulate the disposition of produced water.**
 - ▶ In 2004, the Oil and Gas Act was amended to give the New Mexico Oil Conservation Division (“NMOCD”) jurisdiction over the disposition of produced water for certain uses.
 - ▶ The 2004 amendments, however, were silent as to which agency would regulate other uses of produced water.
 - ▶ The Produced Water Act clarifies that other uses of produced water are regulated under the Water Quality Act (“WQA”). The Water Quality Control Commission (“WQCC”) is the entity that oversees administration of the WQA, and the WQCC provides and will continue to provide jurisdiction to the New Mexico Environment Department (“NMED”) to regulate issues related to the disposition of produced water. This provision clarifies this split of jurisdictional authority.

Jurisdiction Continued . . .

- ▶ **The Oil and Gas Act (Section 70-2-12 NMSA 1978)**
 - ▶ to regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water during, or for reuse in, the exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources.
- ▶ **The Water Quality Act (Section 74-6-4 NMSA 1978)**
 - ▶ The WQCC shall adopt regulations to be administered by the department of environment for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water, including disposition in road construction maintenance, roadway ice or dust control or other construction, or in the application of treated produced water to land, for activities unrelated to the exploration, drilling, production, treatment or refinement of oil or gas; and
 - ▶ may adopt regulations to be administered by the department of environment for surface water discharges.

The Produced Water Act - Section 4

- ▶ **SECTION 4: Creates a possessory interest and defines liability.**
 - ▶ Confirms that no permit is needed from the Office of the State Engineer (“OSE”) for the use of produced water, and that parties do not acquire/do not need to acquire a water right to use produced water.
 - ▶ Allows oil field entities to instead have a possessory interest in the produced water. This possessory interest includes the right to sell, convey, transport, recycle, treat and reuse the water, and to retain proceeds from these uses.
 - ▶ Clarifies that when produced water is transferred between oil field entities for recycling, treatment and reuse, the party who possesses the water will be liable for it (unless otherwise specified under a law or regulation, or legally binding contract).
 - ▶ Nothing within Section 4, however, will affect liability in actions brought by other entities or persons for claims of personal injury, death or property damage relating to exposure to produced water.
 - ▶ This Section also provides that for uses regulated under the Water Quality Act, a permit must be obtained from NMED prior to use.

The Produced Water Act - Section 5

- ▶ **SECTION 5:** Provides incentives for operators to use recycled water in oil and gas operations.
 - ▶ **Subsection A:** This subsection prohibits private parties from charging a tariff for the movement of produced water on State Surface Lands. This provision only relates to agreements between private parties - not agreements with the State. Private parties do not have a right to charge transportation tariffs for the use of state lands under grazing and surface leases. This provision is narrowly tailored and does not apply to existing agreements or to agreements for transportation services.
 - ▶ **Subsection B:** This subsection prohibits surface owners from forcing parties to purchase fresh water for oil and gas operations when recycled or treated water is available and the operator wants to use recycled or treated water. This provision does not apply to existing agreements.
 - ▶ **Subsection C:** This subsection prohibits surface owners from forcing parties to purchase fresh water, brine or brackish water when recycled or treated water is available for use. This provision is narrowly tailored and will only apply to future agreements. The idea is to promote recycling and reuse.

Next Steps - Applicability & Effective Date

- ▶ **Applicability:** Does not apply to contracts entered into prior to July 1, 2019.
- ▶ **Effective Date:** The Act went into effect July 1, 2019.
- ▶ **EMNRD:** Staff at NMOCD will engage in amendments to 19.15.34 NMAC.
- ▶ **NMED:** NMED has engaged in a stakeholder process and will eventually engage in a rulemaking proceeding before the WQCC.

Questions?

