New Mexico Environment Department Seeks Comments on Proposed Produced Water Rules That Limit Nearly All Re-Use

Adam Rankin

Partner
505.954.7294
Santa Fe
agrankin@hollandhart.com

Michael Feldewert

Senior Counsel
505.988.4421
Santa Fe
mfeldewert@hollandhart.com

Paula Vance

Associate
505.954.7286
Santa Fe
PMVance@hollandhart.com

Insight — November 6, 2023

On November 1, 2023, the New Mexico Environment Department's Ground Water Quality Bureau (NMED-GWB) published its long-awaited proposed regulations for produced water reuse that is “unrelated to the exploration, drilling, and production, treatment, or refinement of oil or gas.” The New Mexico Produced Water Act, one of the first such Acts passed in the country, was passed in 2019. On November 1, 2023, new proposed rules will regulate reuse of produced water for purposes outside of oil and gas.

The proposed regulations cover three separate categories of wastewater: (1) domestic; (2) industrial; and (3) produced water. Potential options for reuse of wastewaters depend on the categorized source of the water. For example, “domestic reuse” dictates that “wastewater that originated from domestic sources following appropriate treatment may be used for various applications such as irrigation.”

“Produced water” within the meaning of the proposed regulations has been categorized as both a “water contaminant” and a “water toxic” within the meaning of New Mexico water quality statutes and regulations. That vastly limits the options for reuse of produced water in contexts outside of oil and gas production. If passed, such prohibited reuse options would include assisting New Mexico in meeting its compact delivery requirements under the Pecos River Compact, augmenting depleted groundwater supplies in the State, and other efforts to reduce the use of precious potable water supplies.

Importantly, the proposed regulations also affect both surface and groundwater permitting schemes in New Mexico. The regulations prohibit outright the discharge of even **treated** produced water to any surface water and “den[ies] the certification of any federal permit proposing to discharge” treated produced water to a surface water, even where the discharge meets or exceeds the water quality standards in the receiving water body.

The proposed regulations appear to allow the discharge of treated produced water to groundwater via an approved Discharge Permit (DP) and discharge plan. However, the regulations go on to state, “[u]ntil such a time that that water quality criteria based on scientifically defensible information about . . . produced water is adopted by the [Water Quality

Cristina Mulcahy

Of Counsel
505.954.3679
Santa Fe
camulcahy@hollandhart.com

Control] Commission, the department shall **not** approve" a DP or discharge plan that "includes discharge of produced water." Accordingly, in practice the proposed regulations also prohibit the discharge of **treated** produced water to groundwater.

The proposed regulations, however, do allow for "demonstration projects" with produced water. These "demonstration projects" cannot under any circumstances discharge treated produced water to either surface or groundwater but—paradoxically—are still subject to notice and approval process of treated produced water through the NMED-GWB. Generally, such notice and approvals are only required under the New Mexico Water Quality Act where there exists an "intent" to discharge a water contaminant either directly or indirectly into groundwater. In addition, the results of any such "demonstration projects," including, but not limited to, all "research results and lab analyses of water contaminants in [ ] untreated and treated produced water" must be submitted to the NMED-GWB, without exception.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.