



Environmental  
Defense  
Fund



SIERRA CLUB  
RIO GRANDE CHAPTER



Western  
Environmental  
Law Center

December 1, 2023

Sent by email: [pw.environment@env.nm.gov](mailto:pw.environment@env.nm.gov)

Ground Water Quality Bureau  
New Mexico Environment Department  
Attn: Water Reuse Regulation  
P.O. Box 5469  
Santa Fe, New Mexico 87502

Re: Comments from Amigos Bravos, Environmental Defense Fund, New Mexico Acequia Association, Rio Grande Chapter-Sierra Club, and Western Environmental Law Center on Proposed Water Reuse Regulations, Ground and Surface Water Protection – Supplement Requirements for Water Reuse at 20.6.8 NMAC

Dear Ground Water Quality Bureau:

Amigos Bravos, Environmental Defense Fund, New Mexico Acequia Association, Rio Grande Chapter-Sierra Club, and Western Environmental Law Center submit the following comments on the New Mexico Environment Department’s (“NMED”) Proposed Water Reuse Regulations, Ground and Surface Water Protection – Supplement Requirements for Water Reuse at 20.6.8 NMAC (“Draft Produced Water Reuse Regulations” or “Draft”) in accordance with NMED’s November 1, 2023 public notice. These comments replace the comments on NMED’s draft rule submitted by Rio Grande Chapter-Sierra Club and Western Environmental Law Center as part of the work of the Produced Water Advisory Council.

At the outset, we would like to thank NMED for its hard work preparing the Draft Produced Water Reuse Regulations. We strongly support the two principal goals of the Draft which are to prohibit the discharge of treated and untreated produced water to New Mexico surface and ground waters and to ensure that any demonstration projects that involve produced water do not discharge to the state’s waters and are undertaken in a manner that poses no threat to human health or the environment.

We propose certain changes to the Draft and have attached those proposed changes in redline/strikeout format. The redline/strikeout also provides explanation for many of our proposed changes. We have two overall concerns with NMED’s Draft:

First, as noted, a principal purpose of the Draft Produced Water Reuse Regulations is to prohibit the discharge of produced water, treated or untreated, to New Mexico surface and ground waters. This prohibition is appropriate in light of the potential hazards and unknown risks to human health and the environment arising from produced water. *See, e.g.,* C. Danforth, et al., An Integrative Method for Identification and Prioritization of Constituents of Concern in Produced Water from Onshore Oil and Gas Extraction, *Env't Int'l*, vol. 134 (Jan. 2020) (all-inclusive literature review screening nearly 16,000 published articles that identified 1,198 chemicals detected in produced water and found 86% of produced water chemicals lack toxicity data to complete a risk assessment).<sup>1</sup>

While we applaud NMED's proposed prohibition on the discharge of produced water to surface and ground waters, we believe NMED's proposed language at 20.6.8.400.A(2) and –(3) NMAC is not sufficiently clear. The proposed rule unnecessarily distinguishes between a discharge to ground water of *untreated* and *treated* produced water by forecasting a time in the future when New Mexico Water Quality Control Commission (Commission) rules authorize NMED to permit a discharge of *treated* produced water to ground water.<sup>2</sup> Although it is critical that research continues to fill significant knowledge gaps around the risks to human health and the environment from produced water, and the efficacy and reliability of treatment processes to properly treat constituents of concern, at present, NMED will not issue a discharge permit for discharge of treated produced water. Regulations regulate present behavior; they do not speculate about what may happen in the future. If and when NMED asserts that scientifically defensible data is available and would like to propose regulations to the Commission to authorize discharge of treated produced water to ground water, those regulations can – and should – be developed at that time. However, until such discharges are authorized, language in NMED's proposed rule contemplating a situation that does not now exist is not appropriate for rulemaking.

We therefore propose simplifying 20.6.8.400.A(2) and –(3) NMAC by combining them to correspond with 20.6.8.400.A(1) NMAC, relating to surface water, to clearly prohibit the discharge of untreated and treated produced water to ground water and not include language that has no present regulatory effect, as follows:

**20.6.8.400.A(2) Untreated and treated produced water discharges to ground water:** No person shall cause or allow untreated produced water or treated produced water to discharge so that it may move directly or indirectly into ground

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<sup>1</sup> <https://www.sciencedirect.com/science/article/pii/S0160412019319907?via%3Dihub#ab010>.

<sup>2</sup> Proposed 20.6.4.800.A(3) NMAC provides:

**(3) Treated produced water discharges to ground water:** No person shall cause or allow treated produced water to discharge so that it may move directly or indirectly into ground water, *unless the discharger has obtained a discharge permit approved by the department. Until such a time that water quality criteria based on scientifically defensible information about the composition, toxicity, fate and transport of treated produced water is adopted by the commission, the department shall not approve a discharge plan or a discharge plan modification that includes the discharge of treated produced water.* (Emphasis added.)

water. The department shall not approve a discharge permit or a discharge permit modification that includes the discharge of untreated or treated produced water.

This same comment and analysis applies to proposed 20.6.8.400.D NMAC, which prohibits NMED approval of discharge permits for treated produced water “until such a time” as “authorized applications are adopted by the commission . . . .” Again, regulations should be written to apply to current, existing circumstances, not circumstances that may or may not occur in the future. Additionally, the prohibition against discharge in this section is repetitive of 20.6.8.400.A(2) and –(3) NMAC, prohibiting the discharge of treated and untreated produced water to ground water, and are therefore unnecessary.

Second, NMED proposes adding over 40 new definitions in 20.6.8 NMAC that are not used in the body of the rule. These definitions, many of which are technical terms, may be used in a subsequent rulemaking NMED intends to hold in 2024/2025 on the reuse of domestic and industrial wastewater. Without any regulatory context for these definitions in the body of the rule, it is simply not possible to adequately assess the sufficiency, propriety, or accuracy of the definitions. Proposing definitions that are not used in the regulation is not proper rule drafting no sense and would not represent a good use of the Commission’s (or the parties’) time.

It was suggested during a Produced Water Advisory Committee meeting that the Commission could adopt definitions now and change them later during the second round of rulemaking. Revisiting the definitions also would not be a good use of the limited resources of the Commission.

NMED suggested during a Produced Water Advisory Committee meeting that some of defined terms, while not used in the proposed rule, are used in NMED guidance or policy and that is a reason to define them in rule. This, however, is not a good reason to define unused terms in a rule. Again, without context, it is not possible to analyze the adequacy of the definition for NMED guidance or policy. Moreover, if a definition for a term in guidance or policy is needed, that definition is more appropriately set forth in the guidance or policy, not in a separate rule that does not reference the guidance or policy.

Rules are intended to regulate and apply to present behavior. Definitions for reuse of domestic and industrial wastewater, that have no application to the regulations on reuse of produced water before the Commission, should not be proposed at this time, but instead should be proposed when NMED proposes the second set of regulations.

We therefore recommend deleting all definitions that are not used in the body of the rule proposed before the Commission at this time.

Thank you for again for your work, and thank you for considering our proposed changes and comments to the Draft Produced Water Reuse Regulations.

Sincerely,

*/s/ Tannis Fox*

Senior Attorney

Western Environmental Law Center

Enclosure

C w/encl.:

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