WESTERN URBAN WATER COALITION

"For the Future of the West"

October 3, 2014

Delivered via e-mail

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Groundwater Directive Comments
USDA Forest Service
Attn: Elizabeth Berger—WFWARP
201 14th Street SW.
Washington, DC, 20250.

Re: Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560

Dear Ms. Berger:

This letter contains Western Urban Water Coalition ("WUWC") comments regarding the above referenced proposed groundwater Directive (the "Directive") published at 79 Fed. Reg. 25,815 (May 6, 2014). These comments are based on our review of the Directive and accompanying information in the Federal Register. The comment period on the Directive closes on October 3, 2014. 79 Fed. Reg. 52628 (September 4, 2014).

Created in 1992 to address the West's unique water issues, the WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in five states. The membership of the WUWC includes the following urban water utilities: Arizona – Central Arizona Project and City of Phoenix; California – East Bay Municipal Utility District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission and Santa Clara Valley Water District; Colorado – City of Aurora, City of Colorado Springs, and Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority and Truckee Meadows Water Authority; and Washington – Seattle Public Utilities.

Several WUWC members make use of National Forest System ("NFS") areas administered by the U.S. Forest Service ("USFS") for water supply purposes. These uses include the location of facilities on such lands, the use of water from such areas, the need to access water supply facilities across such lands and the use of water supply utility facilities and grounds for recreation and other multiple use activities. WUWC member properties and

responsibilities extend to groundwater rights or surface water rights affected by groundwater, and concerns regarding groundwater within and adjacent to water supply and delivery facilities. As such, WUWC members have a significant interest in the Directive.

COMMENTS:

While the Directive may be well intended, our review indicates that it is not necessary or justified under current law and the already existing state and federal mechanisms for managing and protecting groundwater resources. The Directive includes numerous provisions applicable to authorizing and maintaining water supply and delivery facilities, and we have strong concerns about the burdens, confusion, and other problems it is likely to create as proposed. We are aware that the USFS has made efforts to clarify and reassure people about the Directive's scope and interpretation in various website postings and other presentations, but we do not consider these determinative or reliable, particularly given the Directive text that has been proposed.

Accordingly WUWC requests that the Directive be withdrawn. If the USFS persists in proceeding with the Directive, any final version should be substantially revised to adequately resolve the concerns expressed in our comments below.

1. USFS Assertion of Regulatory Jurisdiction Over Groundwater is not Justified.

The Directive attempts to substantially expand USFS jurisdiction over groundwater underlying NFS lands based on very questionable legal and technical authority. The regulation of groundwater quality and quantity has been the exclusive province of the states. We are unaware of any current law that would justify the USFS to now assert regulatory jurisdiction over ground water. According to the Directive Federal Register notice, the proposal is needed to further support USFS management of watersheds. However, under the federal Clean Water Act, probably the most expansive federal law involving protection of surface water quality and watersheds throughout the United States, the U.S. Environmental Protection Agency ("EPA") has recently proposed a rule which specifically excludes ground water as being subject to federal jurisdiction under the Act. 79 Fed. Reg. 22,267, 22,193 (Apr. 21, 2014). This specific exclusion of federal jurisdiction over groundwater restates longstanding EPA policy on the topic that is based upon a well-documented determination that Congress left groundwater quality protection and regulation to the states under the Clean Water Act. Unless and until federal law is specifically changed, we see no valid support for the USFS to now assert jurisdiction over groundwater in this Directive.

2. USFS Assertion of Jurisdiction is not Supported by any Proprietary Interest in Groundwater.

Throughout the Directive, USFS appears to assume that groundwater underlying USFS lands is owned and controlled by the USFS or federal government by consistently referring to

"NFS groundwater resources". Similar to the USFS's unsupportable authority to regulate groundwater quality, a USFS assertion of a proprietary interest in groundwater is not supportable. It is the longstanding law in the western United States under various federal statutes that each state owns and controls the appropriation of surface and groundwater for recognized state beneficial uses on federal as well as other lands. There is only a limited exception to state ownership and control of water under the federal reserved water rights doctrine. The Directive appears to support the USFS's alleged proprietary interest in underlying groundwater by instructing the agency to claim a proprietary interest in groundwater under the federal reserved water rights doctrine in state adjudications. But the USFS does not limit the Directive's scope to when a federal reserved water right is at issue, and instead has the Directive apply to all NFS groundwater resources. We see no basis for such a broad claim.

With the limited exception of waters expressly or implicitly reserved by Congress, the U.S. Supreme Court has consistently recognized the longstanding rule of law in the western United States that each state owns and controls the appropriation of surface and ground water for recognized state beneficial uses on private and federal lands. *See, e.g., California v. United States*, 438 U.S. 645, 653 (1978); *United States v. New Mexico*, 438 U.S. 696, 702 (1978). Never has the Supreme Court held that Congress expressly or implicitly reserved to the USFS all ground water underlying NFS lands. On the other hand, the Supreme Court has determined that Congress did not reserve in-stream flows for fish, wildlife and recreation uses in the Organic Administration Act of 1897 (one of the authorities cited in the proposed Directive). *New Mexico*, 438 U.S. at 718. Neither the Organic Act nor any of the other statutes cited in the proposed Directive support a broad assertion of USFS ownership, control, or regulation of all groundwater underlying or connected to NFS lands. A broad assertion of federal reserved water rights to groundwater underlying USFS lands cannot be reconciled with the case law or the statutes cited in the Directive to support such a claim.

3. The Directive Is Likely to Create Duplicative, Burdensome, and Unnecessary Regulatory Processes.

The Directive appears to be based on the assumption that groundwater appropriation and quality are not being properly regulated by the states and so additional federal controls are needed. This assumption is erroneous, particularly in the various western states, where state water resource agencies regulate and permit the appropriation of groundwater, including groundwater underlying NFS lands. The state water resource agency processes are generally a very public procedure and allow interested parties, including the USFS, to participate in the process and raise any concerns about a potential groundwater permit. There is simply no need for a federal process to be created as suggested in the Directive to consider groundwater right appropriations which would duplicate the factors considered by state water resource administrators. Since western states generally already have comprehensive groundwater right processes in place, WUWC recommends that if the USFS moves forward with finalizing the

Directive, the Directive should be amended to exempt from its scope where groundwater appropriations are addressed under state law.

Regarding groundwater quality underlying NFS lands, western states likewise have a state environmental quality or protection agency that has the primary responsibility for groundwater quality underlying these as well as other lands. Similarly, impacts of other proposed activities on NFS lands or that otherwise require a federal authorization and which may affect groundwater are evaluated during the National Environmental Policy Act ("NEPA") process. Typically the state water quality agency participates in the NEPA process and provides its expertise on groundwater issues to ensure that federal permitting actions comply with state groundwater rules. The Directive now attempts to place the USFS in charge of these often complex groundwater issues without any claim or support that the current system does not work, and it adds numerous specific provisions regarding review, approval and denial of applications for water supply and delivery facilities as well as ongoing operations that can unjustifiably and unreasonably impair, discourage and restrict municipal water supply efforts as well as other water users. *See, e.g.*, Directive Sections 2562 to 2564. Although the Directive expresses an interest to work "cooperatively" with state agencies on groundwater issues, it appears that the Directive will have the effect of usurping state authority. The current process described above is working, with the USFS and state agencies collaborating to evaluate and mitigate projects' groundwater impacts on federal lands. There is simply no need for this Directive given this established, functioning framework. Moreover, regulatory oversight already exists over groundwater to the extent it is pumped for drinking water purposes. The Safe Drinking Water Act requires EPA and delegated states to implement source water protections and authorizes additional state safeguards for well drilling and operation. There is a real possibility that a municipality seeking to drill a drinking water well may face numerous regulatory constraints from multiple federal agencies, as well as state agencies charged with protection of groundwater quality and quantity.

WUWC members are very concerned that the proposed Directive will create a dual process for permitting that will require its members to comply with both the Directive and state groundwater requirements in addition to the existing Forest Service special use authorization and other federal requirements. Already the current permitting process on federal lands is cumbersome and can take many years to complete. The Directive will only lengthen and complicate the process, with no meaningful gain in groundwater protections. WUWC recommends that the USFS not adopt the Directive or make it clear that it is not necessary in states where there is an existing process to evaluate the impacts to groundwater and connecting surface waters on NFS lands.

4. The Directive Improperly Requires Mitigation of any Groundwater Impacts.

The Directive in its various sections indicates that the USFS must avoid, minimize, or require other mitigation of any groundwater impacts caused by USFS authorizations. We are

unaware of any law that authorizes the USFS to mandate mitigation of impacts to groundwater beyond ensuring that state requirements are achieved during the federal authorization process. WUWC members already work with state agencies to mitigate impacts to groundwater quantity and quality consistent with state laws for activities occurring on federal lands. We are very concerned that the Directive could be read to impose additional substantive obligations on WUWC members to mitigate impacts to groundwater beyond state requirements. We do not believe such a mandate is authorized under federal law. If the USFS decides to finalize the Directive, we recommend the mitigation provisions be changed to make clear that the Directive does not expand USFS authority or impose any new groundwater quality standards or remedial obligations beyond those already provided in existing law, including in particular that the Directive must not be interpreted to establish an applicable or relevant and appropriate requirement ("ARAR") in the context of remediation.

5. The Directive Includes an Erroneous Presumption that all Groundwater is Hydraulically Connected to Surface Water.

The Directive proposes that all groundwater and surface water would be assumed to be hydraulically connected, and therefore the Directive presumes that the USFS must regulate groundwater underlying USFS lands to protect surface waters. We do not believe that there is any technical or other justification for such a presumption.

Even EPA's recent scientific study on the interconnectivity between waters, which has been criticized as being over-expansive, does not support the assumption that all groundwater is hydraulically connected to all surface water. *See* EPA's Office of Research and Dev., *Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence* (September 2013). As discussed above, EPA does not consider groundwater to be regulated under the Clean Water Act. The USFS has not presented any scientific basis for the Directive's presumption, and we are aware of none, from the EPA or otherwise.

While the Directive allows an applicant to rebut this presumption on a case-by-case basis by developing site-specific information, such as hydrogeological studies, we are concerned that overcoming this presumption will require substantial and costly studies, and that even then the USFS may decline to accept the rebuttal. Accordingly, we do not believe such a presumption is warranted in the Directive and urge that it be deleted.

6. The Directive is Overly Broad, Extending to State and Municipal Prerogatives and to Water Supply and Delivery Facilities That Do Not Concern Groundwater Under NFS Lands

There are many factors or considerations within the Proposed Directive that we request be given deference to States or water supply agencies because they implicate water supply planning, policy decisions and water rights. For instance, Section 2562.1(3), which applies to authorizations for all water supply facilities, not just those affecting groundwater use or quality,

would have the Forest Service review an applicant's water conservation strategies. It requires that all water suppliers submit "water conservation strategies to limit total water withdrawals from NFS lands (FSM 2451.21h) deemed appropriate by the authorized officer...." Section 2562.1(1) directs Forest Service staff to "encourage" all water users to turn to technology to meet water supply needs when water quality in an existing source has become degraded – without regard to whether the existing water source, or a National Forest water source proposed to replace degraded supplies, is surface or groundwater.

These and other considerations and factors in the Directive are extended to proposals and facilities that are unrelated to groundwater resources that we believe should be removed. Specifically, sections 2562 and 2563 of the Proposed Directive address water supply facilities in a manner that could delay, encumber, or even disallow critical water supply projects, contrary to the basic water supply mission and purpose of National Forests under the Organic Act and Multiple Use-Sustained-Yield Act. *See, e.g.,* Section 2563.3(1). Section 2562.1(2) requires that applicants for any land use authorization involving water supply facilities, not just those involving ground water use or affecting ground water quality, provide evaluations to the Forest Service of "all other reasonable alternatives" to use of NFS lands. Section 2563.3(1) mandates denial of permission to build pipelines on NFS lands if building on NFS land would cost less than building elsewhere. This section draws no connection between the directive and protection of ground water supplies.

Sections 2562.1(2) and 2563.3(1) also fail to recognize the equal if not paramount interest in providing safe and reliable public drinking water supplies. While efforts may be appropriate in some circumstances to avoid NFS lands, there are times when crossing NFS lands is the best alternative because it reduces overall potential impacts to the environment, for example, in the case when a pipeline route would be substantially shorter and more direct going through NFS lands or have less impacts on human health and the environment by avoiding urban areas. Any final Directive should recognize the competing public interest in water supplies, as well as other essential public services.

Section 2563.3(2) then lays out additional information required to be submitted for authorization of pipelines that cross NFS lands and divert water from other lands, including information allowing the USFS to evaluate the potential of the proposed pipeline to affect "neighboring non-NFS water supplies" — in other words water supplies off the National Forest. Again, no connection is drawn between the evaluation of impacts on "non-NFS water supplies" and protection of any NFS groundwater.

Additionally, Directive Sections 2562 and 2563 imply that regional NFS staff may have discretion to amend provisions of existing special use permits. If this provision is not removed, any final Directive should specify the authority and limits for exercise of such discretion, and ensure that there is an appeal process for any permit amendments.

In sum, these and other provisions in the Directive have the clear potential, without need or justification, to add substantial burdens, restrictions, and complexity to permitting and operation of existing water supply and delivery facilities on or adjacent to NFS land that may require a USFS renewal or other authorization, as well as applications for new facilities. These provisions duplicate or encroach upon planning and decision making belonging to state and municipal water agencies and suppliers. If the USFS proceeds to a final Directive, it is imperative that all such redundant and overly broad, overreaching provisions be deleted, and that the Directive be clearly limited to those actions on NFS lands that directly affect groundwater resources on NFS lands.

7. The Directive Requires a Formal Rule-Making Process to be Binding Direction.

We appreciate some comments made by the USFS during the public comment period suggesting that Directive is not intended to create a new regulatory regime. However, the Directive risks being read as establishing new mandates that USFS employees must follow in providing authorizations to WUWC members. We are also concerned that third parties opposing activities on federal lands will rely upon the Directive to further delay the permitting process during NEPA review or thereafter by claiming that the USFS failed to comply with the Directive. If the USFS intends that the Directive become binding direction, the agency needs to go through a formal rule-making process under the federal Administrative Procedure Act before mandating new laws and requirements in an area that has historically been and remains subject to state jurisdiction. If the USFS does not intend the Directive to have the force and effect of a federal regulation or binding direction, it should make that clear in any final version that the Directive is only guidance and not mandatory for Forest Service officials or others to follow.

In sum, WUWC believes that the Directive is beyond USFS authority and otherwise not legally supportable or necessary. We request that the USFS withdraw it. Should the USFS move forward with the Directive, we request you carefully consider our comments and requested changes before finalizing the Directive. Thank you for considering these comments.

Sincerely,

David Modeer, Chair
Western Urban Water Coalition

cc: Perkins Coie LLP
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