



Via email: fsm2500@fs.fed.us

August 4, 2014

Thomas Tidwell  
Chief  
U.S. Forest Service  
1400 Independence Ave., SW  
Washington, D.C. 20250

Re: Comments on U.S. Forest Service Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560, 79FR25815.

Dear Chief Tidwell:

Western Energy Alliance (the Alliance) submits the following comments on the U.S. Forest Service (USFS) Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560, referenced in 79 FR 25815. We urge the USFS to withdraw the directive as it interferes with states' rights and will add an unnecessary, duplicative, and possibly conflicting, layer of regulation to the many rules with which the oil and natural gas industry must already comply.

Western Energy Alliance represents over 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. Many of our members develop oil and natural gas on USFS lands, and they all must comply with state, tribal, EPA and BLM requirements concerning groundwater and surface water.

Our comments cover general and specific concerns in four areas: state primacy over groundwater, analysis of groundwater systems, definitions, and USFS manpower and resources.

#### **State Primacy over Groundwater**

In general, the proposed directive ignores state primacy over surface water and groundwater issues and EPA's authority over water quality through the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA). The Desert Land Act of 1877 gives states sole authority over groundwater, and where EPA has authority over surface water resources, it is typically delegated to the states and to some tribes.

The states' existing stream and groundwater laws are the result of extensive study and thoughtful consideration, and analysis by state officials of the proposed directive led to great concern with USFS's apparent intent to "manage groundwater" co-equally with states. In a letter to Sec. Vilsack, the Western Governors' Association says, "states are the

exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries.”<sup>1</sup> Mr. Patrick Tyrrell, State Engineer of Wyoming, testified to the U.S. House Committee on Natural Resources that the directive will fundamentally change federal water management and harm states’ rights.<sup>2</sup>

Finally, USFS offers no specific details or justification as to the need for the proposed directive or the regulatory gaps the USFS is trying to fill. The oil and natural gas industry is already heavily regulated with respect to surface and groundwater uses and impacts. Our members comply with tribal, state and EPA requirements that cover water use, quality and disposal. Many of the provisions in the proposed directive will result in duplicative and costly rules that provide no extra protection of groundwater resources.

Below are specific concerns the Alliance has with respect to state primacy and USFS’s requirements in the proposed directive.

#### Ref. 2560.03 - Policy

Paragraph 6f states the USFS will evaluate “applications for water rights on adjacent lands that could adversely affect NFS groundwater resources and identify any potential injury to those resources or Forest Service water rights...” How does USFS justify exerting authority over water rights or applications for water rights on non-Forest Service land?

Paragraph 9g states USFS must “follow applicable State and EPA SDWA regulations for evaluating whether a groundwater source of drinking water is under the direct influence of surface water (FSM 7420).” It is unclear when this needs to be done and who conducts this effort, states, EPA or USFS.

Paragraph 10a states USFS should “use procedures in FSM 2160 to conduct the appropriate response to contaminated groundwater or a potential threat of contamination of groundwater. Does this differ or contradict state requirements? What is meant by “potential threat of contamination” and who determines this?

Paragraph 10b discusses the use of the USFS delegated authority under CERCLA for cleanup of contaminated groundwater, but states often have their own clean-up requirements, often under RCRA, the Resource Conservation and Recovery Act. How will the NFS work with, coordinate and utilize state requirements?

#### Ref. 2561.2 – Minerals and Energy Development

This section states that USFS will ensure that all holders of written authorizations for minerals or energy development appropriately address compliance with EPA’s Underground Injection Control (UIC) Program or state equivalent to protect underground sources of drinking water. States and/or EPA already have jurisdiction for UIC wells. It is unclear why the USFS needs to “double-check” their efforts. Also, what is meant by

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<sup>1</sup> [Western Governors’ Association letter to Sec. Tom Vilsack](#), July 2014

<sup>2</sup> [Testimony of Mr. Tyrrell before the U.S. House of Representatives Committee on Natural Resources](#), June 24, 2014

“appropriately address?” In addition, this section appears to say that USFS will evaluate this issue everywhere, on and offsite of USFS lands. Clarification is needed.

#### Ref. 2561.24 – Oil and Gas Operations

Overall, this section appears to usurp the state, EPA and BLM authority over oil and natural gas activities in many areas. Paragraph 5 and 6 imply that more requirements may be needed above and beyond state, EPA and BLM requirements. Why are more requirements needed? How are state and BLM requirements inadequate? USFS provides no justification for adding another layer of requirements that will delay already long permitting times and for making it even more difficult to produce oil and natural gas on public lands.

#### Ref. 2565 – Cleanup of Contaminated Groundwater

States typically have jurisdiction over cleanup efforts, and USFS should defer to the state oil and natural gas regulatory agencies for oil and natural gas cleanup requirements. In some cases, EPA is also involved under CERCLA and SPCC (spill prevention control and countermeasures) rules. There is no need for USFS to expand its requirements in this area.

### **Analysis of Groundwater Systems**

USFS is proposing several requirements for monitoring and analysis of groundwater systems, which take a great deal of time and resources. In the Federal Register Notice, USFS proposes to require “evaluation of the potential effects of oil, gas, and coal-bed natural gas development on groundwater” without providing any limitation as to the scope of such an evaluation or the responsible party. The proposed directive also requires “a specific geological and hydrogeological assessment” for some natural gas leasing and development without justifying this considerable effort.

USFS assumes that all groundwater and surface water is interconnected unless demonstrated otherwise. This assumption leads to the conclusion that USFS will manage all groundwater of any quality, quantity and depth, and the above analyses will have to cover almost any source of groundwater. This assumption also leads to an excessive regulatory overreach for the USFS and an exceedingly resource-intensive undertaking.

Often, groundwater systems are already characterized by states’ water management agencies, and states’ oil and natural gas agencies have rules for dealing with produced water brought to the surface from oil and natural gas formations. Several states also require baseline water well testing before drilling takes place to protect water well owners and oil and natural gas companies.<sup>3</sup> Because groundwater aquifers below the surface cross jurisdictional boundaries at the surface, many groundwater systems under and adjacent to USFS lands are already characterized. Where water is too deep or not of a quality to be useful, there is no purpose in doing a full analysis. Rather than duplicating these efforts, USFS should rely on the states’ ability and inherent incentives to understand and protect their groundwater resources.

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<sup>3</sup> See for example, Wyoming Oil and Gas Conservation Commission [Water Sampling and Testing Guidelines](#) and Colorado Oil and Gas Conservation Commission [Rule 609 and 318.e.\(4\)](#)

Below are specific concerns the Alliance has with respect to groundwater analysis requirements in the proposed directive.

Ref. 2560.03 - Policy

Paragraph 4d requires that “monitoring and mitigation appropriate to the scale and nature of potential effects is conducted, evaluated, and reported when authorizing a proposed use or Forest Service activity that has a significant potential to adversely affect NFS groundwater resources.” How is mitigation determined, and what is the process? What does “significant potential to adversely affect” mean and how is this determined?

Ref. 2561 - Consideration of Groundwater Resources in Forest Service Projects, Approvals and Authorizations

Paragraph 2 states that prior to implementation or approval, USFS must “assess the potential for proposed Forest Service projects, approvals, and authorizations to affect the groundwater resources of NFS lands.” Who conducts this assessment? What data and calculations are required? Also, it states that if there is a high probability for substantial impact to USFS groundwater resources, evaluation of those potential impacts is required in a manner appropriate to the scope and scale of the proposal. What is meant by “high probability for substantial impact,” and who determines this?

Ref. 2561.24 – Oil and Gas Operations

In Paragraph 3, what is meant by “non-traditional shallow natural gas leasing or development?” Clarification is needed as geological and hydrogeological assessments can be quite complex and time-consuming and not necessarily fit the true effect of the development.

### **Definitions**

The proposed directive includes a number of terms that need to be defined. For example, “substantial adverse consequences,” “adverse impacts,” “significant potential to adversely affect,” “potential for significant impacts,” “high probability for substantial impacts,” “substantial potential to adversely affect,” etc. We also point out below definitions with which we have concerns.

Ref. 2560.03 – Policy

Paragraph 5 states USFS should “prevent, minimize, or mitigate to the extent practical, adverse impacts from Forest Service actions on groundwater resources and groundwater dependent ecosystems located on NSF lands.” What does “adverse impacts” mean and how is this determined? Who and how are ecosystem impacts determined?

Paragraph 8c defines fresh water as anything with less than 10,000ppm Total Dissolved Solids (TDS). We suggest USFS use the USGS definition of “fresh water,” which is up to 1,000ppm TDS. Water containing anything close to 10,000 TDS should not be considered fresh.

Ref. 2560.05 - Definitions

High-capacity well is defined as 35 gallons/minute (gpm), which is too low. We recommend proposing 70 gpm which is consistent with several states' definition of high-capacity well.

Large water injection well is defined as having an inside diameter of > four inches. Many injection wells used by the oil and natural gas industry have an inside diameter of seven inches. Why are these wells differentiated, and what will the requirements be for them?

**USFS Manpower and Resources**

The Alliance is concerned that USFS does not have the expertise, manpower, and funding to manage the proposed directive in a timely and effective manner. Below are specific concerns the Alliance has with respect to time consuming and resource heavy requirements for USFS in the proposed directive.

Ref. 2560.03 - Policy

Paragraph 4a provides for the consideration of proposed actions upon "groundwater quantity, quality, and timing prior to approval of a proposed use." It is unclear how the USFS will conduct this effort in a timely and efficient manner to avoid costly delays.

In Paragraph 6c, it states that the USFS will "comment on proposed activities either on or off NFS lands that may adversely affect groundwater resources on NFS lands." Does USFS have the manpower, funding and time to realistically accomplish this task? Again, what does "adversely affect" mean and how is this determined?

Ref. 2561.1 – Conjunctive Uses of Groundwater and Surface Water

Paragraph 1 and 2 require clarification as to who conducts these efforts and what information is required. Will there be adequate staffing to constantly monitor dynamic hydrologic conditions in order to utilize this concept? If this effort is required to be conducted by the applicant, has the NFS evaluated the cost impacts to applicants and how will costs be minimized?

**Conclusion**

Thank you for the opportunity to comment on the proposed directive. We appreciate your consideration of the impacts USFS's actions will have on the oil and natural gas industry, which is working to safely develop energy on our public lands. We strongly suggest USFS withdraw the proposed directive and defer to the states.

Sincerely,



Ursula Rick  
Manager of Regulatory Affairs