August 21, 2014

BMP Directive Comments
USDA Forest Service
Attn: Michael Eberle—WFWARP
201 14th St. SW
Washington, D.C. 20250


Dear Mr. Eberle:

The U.S. Forest Service (USFS) has issued a proposed directive for water quality protection on National Forest System (NFS) lands (79 FR 42500, May 6, 2014). This draft directive, published for public comment, is proposed for addition to the USFS Manual and Handbook directives for national best management practices (BMPs). Because this directive potentially impacts state authority to manage water, the Western Governors’ Association (WGA) submits the following comments.

The USFS states that the purposes of the directive are to establish a national system of BMPs and associated monitoring protocols and to require their use on NFS lands in order to meet requirements of the federal Clean Water Act (Pub. L. 92-500) and corresponding state laws. As stated in the Federal Register notice for the proposed directive,

The National system of BMPs would provide a systematic approach to protect water quality from land and resource management activities taking place on National forests and grasslands and utilize suitable monitoring, and established Regional, State, Tribal and local BMPs.

STATEMENT OF INTEREST:

The WGA represents the Governors of 19 Western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western United States.
Clean water is essential to strong economies and quality of life, as the Western Governors recognize in their Policy Resolution 2014–04, *Water Quality in the West*. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.

States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. Many states also administer both point and non-point source water quality programs under delegated federal authority through the federal Clean Water Act. As a result, states have significant authorities and responsibilities that make it imperative that the Forest Service develop any policies affecting water resources in a manner that is consistent with state laws governing water allocation and water quality.

**WESTERN GOVERNORS’ ANALYSIS AND RECOMMENDATIONS:**

Western Governors appreciate the underlying goal of the proposed directive to ensure improved water quality. As written, however, the proposed directive appears to go beyond its purported goal of water quality protection, encroaching upon the states’ water resource management authority.

A major problem with the proposed directive is the lack of information it contains. The proposed directive includes general statements directing the reader to the *National Core Best Management Practices for Water Quality Management on National Forest System Lands* (hereafter, National Core BMP Technical Guide) – a document which, to WGA’s knowledge, was not developed with any public participation prior to its release. WGA’s comments largely focus on the “Water Uses Management Activities” section of that document.

**Recognition of State Authority in Water Resource Management**

As noted above, States are the primary authority for allocating, administering, protecting, and developing water resources, including water quality, and they are primarily responsible for water supply planning within their boundaries.

Statements in the National Core BMP Technical Guide’s section on “Administrative Water Developments” pose potential conflicts with state authority if they are used by USFS in its consideration of permit authorizations. Further clarification is needed regarding whether the provisions can or should be used as the basis for the Service’s evaluations of special use permits. Including water supply as a consideration in permit applications may conflict with state regulation of water supply and water rights, contrary to the federally-recognized authority of states to manage water supplies within their boundaries.
Statements that would raise concern for state authority if applied to permit authorizations include the following (statements found on page 146; emphasis added in all cases):

- “Conduct operations at water source developments in such a manner as to avoid, minimize, or mitigate adverse effects to aquatic species and habitats from water drafting;

- “Avoid or minimize effects to the waterbody or aquifer by withdrawing only the minimum amount of water sufficient to achieve administrative or resource management needs;

- “Establish limits or guidelines for water withdrawals from a lake, pond, or reservoir source based on evaluation of storage capacity and recharge and potential impacts to habitat from drafting and drawdown.”

Recognition of State Authority in Water Quality Administration under Clean Water Act

Under the federal Clean Water Act, states and the Environmental Protection Agency (EPA) work together as co-regulators. The statute gives states and tribes the option to obtain approval to implement certain federal program responsibilities. When a state has been approved to implement a program and the state is meeting minimum program requirements, it is responsible for developing, implementing and enforcing those requirements.

While one of the stated objectives of the proposed directive is to meet state water quality laws and regulations – and while the National Core BMPs allow “site-specific prescriptions” (Section 10.3) – the proposed directive must defer to state law and authority on water quality. The USFS should emphasize that in most cases, states regulate water quality and that BMPs on NFS lands are in place to meet those state-defined water quality goals.

Context – Other Water-Related Proposed Directives from USFS

The USFS has published two other proposed directives for public comment – one regarding Groundwater Resource Management and one on Ski Area Water Rights. An assumption underlying all three proposed directives is that the Service has an obligation to protect water resources beyond current state and federal efforts. As stated in an FAQ document for the Proposed Directive on groundwater,
There is a clear need for the Forest Service, in continued cooperation with the states and tribes, to take an active role in comprehensively managing the human activities that potentially affect water resources on National Forest System lands.

WGA is sensitive to the potential for this “comprehensive management” to venture into the realm of new regulatory authority for the Forest Service.

As the leading manager of water within their boundaries, states have the responsibility and authority to control and distribute the surface water and groundwater, subject to international treaties and interstate agreements and judicial decrees. Moreover, the U.S. Supreme Court held in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, (1935), that states have exclusive authority over groundwater, finding that following the Desert Land Act of 1877 “…all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories...” WGA asks for the USFS to fully recognize state authority over water resources.

WGA urges the Forest Service to consult with states in a meaningful way prior to proposing future directives or rules. This proposed directive, like many other proposals from the USFS and other federal agencies, was developed without any state consultation of which WGA is aware. For similar proposals in the future, we invite you to consult with the states prior to publishing documents in the Federal Register. This will help the Service to identify and avoid sticking points in proposed directives and rules. We invite the USFS to work through WGA, the Western States Water Council, and their member states to facilitate dialogue on ways to improve this (and any future) proposed directive.

WGA appreciates the opportunity to submit comments on this proposed directive.

Respectfully submitted,

James D. Ogsbury
Executive Director
Western Governors’ Association