

November 23, 2015

REQUEST FOR PROPOSALS

*The right to water or the use or flow of water in or from any natural stream or watercourse... shall be limited to such water as shall be reasonably required... and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.
Section 100, California Water Code*

You are invited to submit a proposal to provide technical services to the San Francisco Estuary Partnership (Partnership) to prepare a Report that provides a current assessment on the opportunities for the State of California to more broadly and periodically apply the constitutional Reasonable Use Doctrine with a focus on agricultural water use.

The Partnership has neither the legal responsibility nor background to suggest what actions the State Water Resources Control Board might pursue to more effectively apply the Reasonable Use Doctrine. However, as one of the stewards of the San Francisco Bay Delta Estuary, and as the publishers of the *2015 State of the Estuary Report*, we find our estuary is in a 'chronic state of drought' due to upstream water consumption. Several native Delta fish species are on the verge of disappearing. State water planners are concerned that water supplies for both humans and wildlife will grow ever more limited by expected climate changes.

The issue of adequate freshwater availability for the Estuary, the Delta and San Francisco Bay has been of concern to the Partnership since its creation in the late 1980s. The Partnership's Comprehensive Conservation and Management Plan, first adopted in 1992, declared its goal for Water Use to be, "Develop and implement aggressive water management measures to increase freshwater availability to the estuary." A specific action calling for an assessment of how the state is applying the Reasonable Use Doctrine is included in the Partnership's draft 2016 Comprehensive Conservation and Management Plan.

The Partnership believes that the State Board needs to apply every tool at its disposal to address the critical issues of achieving balance among beneficial uses, and one arguably underused tool is a stronger application of the existing Reasonable Use Doctrine. The purpose of this Report will be to identify and evaluate ways that the State Board could expand use of this existing water management tool within the scope of the State Board's authority and to provide proposals for the Board to consider as possible new or expanded management options.

Proposals are due in the SFEP offices no later than Friday December 18th, 2015 at the close of business, 5:00 P.M.

1. Background on the Partnership

The Partnership was created in 1987 under the Clean Water Act's Section 320, the National Estuary Program. It is an interagency cooperative effort to promote better management of the San Francisco Bay-Delta Estuary and to restore and maintain its water quality and natural resources. Representatives from the public, all levels of government, and elected officials are working together to implement the Comprehensive Conservation and Management Plan (Plan), the roadmap for restoring the Estuary's chemical, physical, and biological health. Tracking and reporting on the State of the Estuary and Plan implementation is a key component of the Partnership's mission. Under a cooperative agreement with the Environmental Protection Agency, the Association of Bay Area Governments (ABAG) is the home agency for SFEP, providing communication, technical, and administrative support for the San Francisco Estuary Partnership. Any contract resulting from this solicitation will be negotiated and administered by ABAG/SFEP.

2. Background on the Issue

In the 1935 *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* case, the California Supreme Court found that:

"What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

In January 2011, then-Delta Watermaster Craig Wilson presented a report to the State Water Resources Control Board (State Board) titled *The Reasonable Use Doctrine & Agricultural Water Use Efficiency* (2011 Delta Watermaster Report). The introduction to this 2011 publication stated:

The underlying premise of this report is that the inefficient use of water is an unreasonable use of water. Accordingly, the Reasonable Use Doctrine is available prospectively to prevent general practices of inefficient water use...

Maximizing the efficient use of water by projects that reduce consumptive water use is particularly important for the Sacramento/San Joaquin Delta. More efficient use of water upstream of the Delta can increase water flows into the Delta.

In a 2014 article [McGeorge L. Rev. 1 (2014)] entitled *In the Field and In the Stream: California Reasonable Use*, author Paul Kible concludes:

"...[T]here is a well-developed body of California law suggesting that the reasonable use/waste provisions of the California Constitution and the California Water Code can provide a proper and independent basis for courts and the State Water Board to address agricultural irrigation practices with impacts both "in the field" (such as flood irrigation, high levels of evaporation and canal spills/tail water) and "in the stream" (such as insufficient flow to

maintain water quality/salinity doctrines, instream impacts associated with particular points of diversion, and prevention of fish mortality). Moreover, at this point there is a substantial body of scientific evidence establishing high rates of water evapotranspiration on California farms (particularly in the southern Central Valley) and there is a substantial body of scientific evidence establishing the adverse impacts of fresh water diversions on instream salinity levels and native fisheries.

These two considerations, taken together, suggest that whether the State Water Board decides to act on and implement the agricultural irrigation efficiency recommendations set forth in the 2011 Delta Watermaster's report may therefore hinge more on politics rather than law. If the political will is present to act on and implement these recommendations, the State Water Board appears to be on solid legal ground to move forward. As to whether such political will exists, that remains to be seen. There are unfolding developments that may offer some insights in this regard. For instance, pursuant to California's Agricultural Water Management Planning Act, by 2013 agricultural water suppliers were required to submit agricultural water management plans to the California Department of Water Resources. These plans call for the inclusion of information about water efficiency and conservation efforts, and therefore might provide the basis for the State Water Board to further evaluate whether particular agricultural irrigation operations might qualify as unreasonable or wasteful.

As another example, in 2013 California Senate Bill 103 (SB 103) was adopted, which provides \$2.5 million in funding to the State Water Board "for drought-related water right and water conservation actions, including establishing and enforcing requirements to prevent the waste or unreasonable use of water..." SB 103 does not expressly call for the creation of the "reasonable water use unit" proposed in the 2011 Delta Watermaster report, but seems to provide funding and the discretion for such an undertaking by the State Water Board.

In sum, given that agricultural irrigation presently represents the lion's share of fresh water usage in California, and given the increasing instream and out of stream demands on California fresh water, the issue of agricultural water efficiency is likely to remain a central part of water debates in the state. The extent to and ways in which California reasonable use law will factor into these debates, however, is still an open question.

3. Services Required

The Contractor shall perform all aspects of the required work as described in the attached Scope of Services (Attachment 1).

4. Time Frame

This is projected to be a 6-month contract. The starting date is projected to be December 31, 2015 and the draft report is expected to be completed by February 28th, 2016; consultation and final Report development may continue until May 31,

2016. Refer to the attached Scope of Services for detailed elements.

5. Compensation

Up to \$20,000 is available through this contract for the project to develop an analysis of opportunities to better manage water through the application of the waste and unreasonable use doctrine. Contractor is responsible for payment of applicable state and federal taxes.

6. Submittal Documents Required

To provide an objective, fair review of all proposals, the submittals are to include only the following information:

- Transmittal Letter – Normal transmittal letter, covering highlights and unique features of your proposal. Any special terms and conditions of the offer should also be summarized in this portion of the proposal. Letter should include your office address. Length: One page maximum.
- Statement of Work – Provide a definitive proposal to accomplish the requirements as stated in this RFP. This must describe in detail the procedures and methods that will be used to achieve the stated goals of the project, preferably drawing on past experience and work conducted by the applicant. A proposed timeline and clear delineation of general tasks, products, and expected completion dates must also be included.
- Relevant Experiences – It is expected that this Contract will be completed by a law firm or other party with extensive experience and background in California water law. Applicants should provide a summary of relevant experience over the last 5 years. Describe the nature and quality of projects recently completed. Be specific regarding projects that are the same or similar in nature to that described in the Scope of Services. Knowledge of State laws, rules, regulations, ordinances, etc., specific to related project should be presented.
- Key Personnel – Identify principal(s) and any subcontractors, including key personnel and lead persons to be assigned to the project. Please be specific about education and background of all principals and subcontractors, as well as current or past participation recently in similar types of work. Resumes or curriculum vitae of primary lead consultants must be included. Please provide estimated time and availability of key staff for when work is to be performed. References for all principals and subcontractors and key personnel must be included.
- List of Client References – Provide a list of clients to be used as references for your work, including contact name, address, telephone number, nature of job, length of engagement, amount (e.g. 1 year, \$ 35,000).
- Budget – Proposal must include task budget to complete outlined Scope of Services (Attachment #1). The Contractor will provide billing rates for relevant personnel and any subcontractors, including overhead, fringe, and other direct

costs (including travel, equipment, etc.). Length: One page maximum.

7. Selection Procedure

A selection committee will evaluate all submitted proposals. The committee will be comprised of ABAG/SFEP staff. Each submittal will be evaluated according to the criteria below. The applicant must possess specific, substantive, and demonstrated expertise to address the scope of services. Numerical scores will be tabulated for each submittal.

- Qualifications and Experience – The Contractor will be evaluated based on the level of experience and background in performance of similar projects/programs, including past schedule and budget performance.
- Technical Approach – The Contractor will be evaluated based on the adequacy of the submitted approach to fulfill the goals and objectives of this Request for Proposal (RFP).
- Proposal – Proposals must respond to all the requirements of the RFP, and must include all information specifically required in all sections of the RFP.
- Other Factors – Additional factors may be considered in the RFP selection process, which have not been assigned point values, including the stipulation that contract award may not be made to any Contractor unless an agreement can be secured for all general and special contract provisions.

Highest ranking candidates may be invited to an interview at the San Francisco Estuary Partnership Offices, 1515 Clay Street, Suite 1400, Oakland, CA, at their own expense.

8. Contract Award

Contract award shall be made to the responsible contractor whose proposal is most advantageous to ABAG and the Estuary Partnership after evaluation, costs, and other factors are considered. Our objective is to obtain the highest-qualified contractor to achieve the proposal objective within our time frame at a reasonable cost.

This RFP does not commit ABAG to award a contract. We reserve the right to reject any or all proposals received in response to this request.

We require an electronic copy of your proposal package. **Proposals are due in the SFEP offices no later than Friday December 18th, 2015 at the close of business, 5:00 P.M.** Questions may be directed to Athena Honore at (510) 622-2325.

Proposal should be sent electronically to ahonore@waterboards.ca.gov.

ATTACHMENT 1

Scope of Services

Background

This project will provide an assessment of options for the State Water Resources Control Board, with a focus on agricultural water use, which could be used to expand application of the Reasonable Use Doctrine of the State Constitution. It will include a set of recommendation as to what actions the State Board might pursue to more efficiently, effectively, and regularly apply the Reasonable Use Doctrine to future Board activities. It will provide essential background information on the current status of the State Board's application of the Doctrine; summarize recommendations that have already been brought forward as to how the Doctrine might be expanded relative to agricultural water use in California, and set forth a series of specific recommendations on what findings, actions and policies the State Board would need to pursue in order to make stronger use of this Doctrine.

Scope of Services

Task 1: Project Management and Administration

This task is anticipated to require a minimum of effort as the contract is neither large nor long. Contractor will communicate regularly via email and phone with SFEP staff and other interested parties, prepare and submit short, simple quarterly progress reports.

Task 2: Research doctrine and evaluate possible new application of doctrine.

Based on review of the Delta Watermaster's 2011 report, pertinent law journal articles, relevant case law, and possible examples from other Western States which also have the Doctrine as part of their constitutions, perform the background analysis and consider the range of recommendations regarding how the State Board might make better use of the Doctrine.

Task 3: Draft and Final Report

Under this task the draft and final written and products will be prepared and submitted.

The Contractor will be responsible for developing the final design and format of the products in consultation with SFEP staff.

Budget: Up to \$20,000 is available to complete the Scope of Work as described.

Project Schedule

The estimated project start date is December 31, 2015. The estimated end date is May 31, 2016.

Rights to Information

The Contractor shall have the right to disclose, disseminate and use, in whole or in part, any final form data and information received, collected, and/or developed under this contract, subject to inclusion of appropriate credit to the appropriate party. ABAG/SFEP shall have the right to reproduce, publish and use all data, papers, reports, charts and other documents or any part thereof in any manner and for any purposes whatsoever and to authorize others to do so.

ATTACHMENT 2

Insurance Requirements

- 1) Contractor shall, at its own expense, obtain and maintain in effect at all times during the life of this agreement the following insurance:
- 2) (a) Workers' compensation insurance as required by law.

(b) Comprehensive general liability insurance with bodily injury (including death), property damage, personal injury and advertising injury liability coverage which provides minimum limits of Five Hundred Thousand Dollars (\$500,000.00) per occurrence and minimum combined single limits coverage of One Million Dollars (\$1,000,000.00). Said comprehensive general liability policy shall also provide minimum medical payment coverage of Ten Thousand Dollars (\$10,000.00) per occurrence.

(c) Professional errors and omissions insurance with limits of \$1,000,000 and \$5,000,000 in the aggregate. If coverage is provided under a "claims made" policy, Contractor will maintain coverage from the commencement of services under this contract until the fifth anniversary of the completion of all services under the contract or termination of the contract. If coverage is provided under an "occurrence based policy", Contractor will maintain the policy throughout the period in which it renders any services under the contract.
- 3) All Contractor's insurance policies shall contain an endorsement providing that written notice shall be given to ABAG at least thirty (30) days prior to termination, cancellation or reduction of coverage in the policy or policies, and all policies shall be carried by an insurance company or companies acceptable to ABAG .
- 4) In addition, each policy or policies of insurance described in subparagraph a) through b) above shall contain an endorsement providing for inclusion of ABAG and their members, directors, officers, agents and employees as additional insureds with respect to the work or operations in connection with this agreement and providing that such insurance is primary insurance and that no insurance of ABAG will be called upon to contribute to a loss. In addition, with respect to said policy or policies of insurance, cross-liability endorsements in form and content as are usually issued by the insurer and acceptable to ABAG and shall be provided.
- 5) Promptly upon execution of this agreement, Contractor shall deliver to ABAG certificates of insurance evidencing the above insurance coverages. Such certificates shall make reference to all provisions or endorsements required herein and shall be signed on behalf of the insurer by an authorized representative thereof. Contractor agrees, upon written request by ABAG, to

make available at any time copies of such policies certified by an authorized representative of the insured.

- 6) The foregoing requirements as to types and limits of insurance coverage to be maintained by Contractor and approval of policies by ABAG are not intended to, and shall not, in any manner limit or qualify the liabilities and obligations otherwise assumed by Contractor pursuant to this agreement, including, but not limited to, liability assumed pursuant to the agreement.