



Request for Qualifications

Legal and Regulatory Support

Date of Issue: February 9, 2018

Upper Neuse River Basin Association

P.O. Box 270

Butner, NC 27509

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REQUEST FOR QUALIFICATIONS

Project Purpose

The Upper Neuse River Basin Association (UNRBA)¹ is soliciting submittals for qualifications for legal and regulatory support from a *Service Provider* to support the UNRBA with its evaluation of alternative compliance and regulatory strategies as part of the UNRBA's reevaluation of Stage II of the Falls Lake Nutrient Management Strategy (see NCAC 15A 02B.0275 (5)). The Falls Rules, as promulgated, involve significant costs and require actions on the part of UNRBA member governments and other regulated parties that are unprecedented. In light of the potential financial impact of these rules and the importance of Falls Lake as a resource, the UNRBA secured assistance in evaluating the technical bases and regulatory framework for the Falls Rules, particularly the more costly Stage II portion of the Rules (referred to herein as the "Technical Analysis"). The UNRBA's consulting partner for the Technical Analysis was Cardno-ENTRIX (this company is now incorporated as Cardno). Cardno-ENTRIX recommended a series of monitoring programs, special studies, and water quality modeling approaches to provide a basis for future regulatory action (preliminarily identified in general terms on the UNRBA website: <https://unrba.org/reexamination>, Task 1 report). Based upon those recommendations, the UNRBA is engaged in an extensive multi-year monitoring program of both the watershed and the lake itself. The monitoring program will be completed in either 2018 or 2019 depending upon whether it is determined that either four or five complete years of monitoring are required. In 2017, the UNRBA awarded an additional contract to Cardno to initiate the modeling program, and work under that contract has been initiated. Beginning in FY 2017-2018 (July 1 to June 30), the UNRBA contracted with Brown and Caldwell to continue work on the monitoring and modeling efforts.

Submittal Instructions

Offerors must submit all submittal components in Portable Document Format (PDF) transmitted through electronic mail (email). File size is limited to 15 MB. Paper, fax and oral copies will not be accepted. PDF files should include bookmarks that link to sections to allow easy document navigation. Address the Submittal to the following email addresses:

forrest.westall@unrba.org and
forrest.westall@mcgillengineers.com

Upper Neuse River Basin Association (UNRBA)
Forrest Westall, Executive Director

In order for the UNRBA to evaluate qualifications fairly and completely, Offerors should follow the format set out herein and provide all of the information requested.

The email should contain the subject line "Legal and Regulatory Support – [Firm Name]". Submittals must be received no later than 5:00 pm EDT on March 29, 2018. See the section "Submittal Content and Format" for additional details on submittal requirements.

¹ Detailed information about the UNRBA and the projects that it has completed or in which it is currently engaged can be found at www.unrba.org.

Submittal Review Schedule

The procurement process is anticipated to follow the schedule below. **Proposers' key personnel should hold April 19-20, 2018 for interviews because the interview panel has already committed to hold interviews then and does not anticipate moving the date due to the number of UNRBA participants involved.**

Table 1 Procurement Schedule

Item	Date in 2018
RFQ release date	February 9
Deadline for submittal of questions	February 23
Answers to questions posted on UNRBA website	March 6
Due date for qualifications packages	March 29, 5 PM EDT
Shortlisted teams notified	April 12
Shortlist interviews held in Butner, NC*	April 19-20
Selected team notified	May 18

*Proposers' key personnel should hold April 19-20, 2018 for interviews.

All submitted questions must be provided to the Executive Director, via email to forrest.westall@unrba.org and forrest.westall@mcgillengineers.com, by February 23, 2018. All questions will be answered on the UNRBA website provided in footnote 1.

The UNRBA will make every effort to adhere to this schedule. Firms and other legal entities representing themselves as *Service Providers* submitting in response to this RFQ should make arrangements to provide the UNRBA with appropriate staff for the interviews.

Conditions

The UNRBA reserves the right to reject any or all submittals. The UNRBA will not pay any cost associated with the preparation, submittal, presentation, or evaluation of any statement of qualifications. All submittals and other materials submitted become the property of the UNRBA. Thereafter, submittals become public information.

The UNRBA anticipates issuing one contract for this RFQ.

The UNRBA is a non-profit organization composed of local governments located in the Upper Neuse River Basin in North Carolina. By signature on their Statement of Qualifications, Offerors certify that their business practices comply with:

- a. The laws of the State of North Carolina
- b. The applicable portion of the Federal Civil Rights Act of 1964,
- c. The Equal Employment Opportunity Act and the regulations issued there under by the federal government
- d. The Americans with Disabilities Act of 1990, and the regulations issued there under by the federal government, and

- e. All terms and conditions set out in this RFQ.

The UNRBA opposes discrimination on the basis of race and sex and urges all of its contractors to provide a fair opportunity for minorities, women, and other socially and economically disadvantaged individuals as defined in 15 U.S.C. 637 to participate in their work force and as sub-contractors and vendors under UNRBA contracts.

This RFQ seeks to secure a single *Service Provider* to perform the tasks identified in the Scope of Work. An Offeror's familiarity and understanding of nutrient strategies like the Falls Rules, as well as, a demonstrated knowledge of alternative regulatory strategies that meet Clean Water Act requirements, and a proven ability to obtain approval of alternative regulatory strategies by the applicable regulatory authorities will be important factors in the UNRBA's evaluation of potential *Service Providers*.

Background

The waters of the Upper Neuse River Basin in North Carolina have challenges meeting the demands of society and the current environmental standards in place for those waters. Falls Lake is the primary source of drinking water for the City of Raleigh and its 530,000 customers and is immediately downstream of several urban centers, including the City of Durham. Constructed in the early 1980's, Falls Lake is a shallow Piedmont lake with inherent difficulty meeting water quality standards for chlorophyll-*a* because of its geology, morphology, and its topographic location below pre-existing and established land uses.

A complex set of rules, guidance, and policies governs activities in the Falls Lake watershed. The Falls Nutrient Strategy Rules overlay several previous regulations, including the Neuse River Basin Nutrient Sensitive Waters Management Strategy, the MS4 NPDES Phase I and Phase II stormwater management requirements of the Clean Water Act, and state Water Supply Watershed Protection regulations.

In 2008, the North Carolina Division of Water Quality (NC DWQ) and US Environmental Protection Agency (USEPA) placed Falls Lake on the Section 303(d) list of impaired waters because of violations of the State's water quality standards for chlorophyll-*a*, a proxy for algae. DWQ and EPA also listed Falls Lake above I-85 as impaired for turbidity in 2008.

In 2005, the North Carolina General Assembly enacted SL 2005-190 (SB 981, Clean Lakes Act), which directed the North Carolina Environmental Management Commission (EMC) to develop and adopt a nutrient management strategy to reduce nitrogen and phosphorus pollution in Falls Lake by July 1, 2008 (later extended to July 1, 2009). In 2009, the General Assembly enacted SL 2009-486 (SB 1020, Improve Upper Neuse River Water Quality), which extended the deadline again until January 15, 2011 and also allowed for a system crediting early adoption of nutrient reductions and requiring stricter sedimentation and erosion control measures in the watershed.

In 2010, recognizing that major political disagreements over water quality in Falls Lake would affect their ability to solve other critical regional problems, many impacted local governments developed a set of "Consensus Principles" to help shape the proposed rules. The principles included three fundamental agreements: (1) that any rules would need to protect Falls Lake for the purpose of water supply, (2) that additional water quality monitoring would provide useful information, and (3) that North Carolina should consider that new information before going beyond those actions necessary to protect Falls Lake for the purpose of water supply. The City of Durham, Durham County, Granville County, City of Raleigh, Wake County, Orange County,

Person County, Butner, Creedmoor, and the South Granville Water and Sewer Authority adopted the Consensus Principles in their comments on the rules. Section Nine of the Consensus Principles, which is most relevant to this RFQ, states the following:

“The process by which the proposed regulatory scheme has been developed relied on a limited data base which will be substantially enhanced by a more rigorous program of sampling, monitoring and analysis. In addition, it may not be feasible to attain all currently designated uses in the Upper Lake and attempting to do so may result in substantial and widespread economic and social impact. The EMC should therefore begin a re-examination of its nutrient management strategy for Falls Lake by January 1, 2018 [*later changed by rule to 2021*]. **The re-examination should consider, among other things, (i) the physical, chemical, and biological conditions of the Lake with a focus on nutrient loading impacts and the potential for achieving the Stage I goal by 2021** [*later changed in the final rule to 2024*] **as well as the feasibility of both achieving the Stage II reduction goals and meeting the water quality standard for chlorophyll-a in the Upper Lake, (ii) the cost of achieving, or attempting to achieve, the Stage II reduction goals and the water quality standard in the Upper Lake, (iii) the existing uses in the Upper Lake and whether alternative water quality standards would be sufficient to protect those existing uses, and (iv) the impact of the management of Falls Lake on water quality in the Upper Lake.** As the first step in the re-examination, a Scientific Advisory Board should analyze and review the information identified above along with the additional monitoring and modeling data compiled since the model was approved and should present its recommendations for changes in the Nutrient Management Strategy and its implementing rules to DWQ and the EMC by January 1, 2019 [*later changed in the final rule to 2024*]. In light of the report from the Science Advisory Board, the EMC should direct the DWQ to prepare proposed rule revisions, if any, and an updated fiscal note on Stage II by August 1, 2019 [*later changed in the final rule to 2025*]. In its development of any proposed rule revisions, DWQ shall consult with the local governments and other interested parties. Except to the extent that management measures identified as a part of Stage II are required to achieve the Stage I goal, local governments should not be required to begin implementing Stage II management measures without **a determination by the EMC of whether alternative goals and/or standards should be established for the Upper Lake.**” [emphases added]

On November 18, 2010, the EMC adopted the nutrient management rules for Falls Lake, with an effective date of January 15, 2011. The North Carolina Rules Review Commission approved the rules with minor technical language changes and the rules took permanent effect on January 15, 2011. The rules address the re-examination prior to implementing Stage II in section 15A NCAC 02B.0275. Section (5)(f) describes specific requirements of any stakeholder desiring to submit data or modeling to the NCDWQ regarding Falls Lake and the requirement to re-examine the Stage II goals. This section of the rule follows:

- (f) Recognizing the uncertainty associated with model-based load reduction targets, to ensure that allowable loads to Falls Reservoir remain appropriate as implementation proceeds, a person may at any time during implementation of the Falls nutrient strategy develop and submit for Commission approval supplemental nutrient response modeling of Falls Reservoir based on additional data collected

after a period of implementation. The Commission may consider revisions to the requirements of Stage II based on the results of such modeling as follows:

- (i) A person shall obtain Division review and approval of any monitoring study plan and description of the modeling framework to be used prior to commencement of such a study. The study plan and modeling framework shall meet any division requirements for data quality and model support or design in place at that time. Within 180 days of receipt, the division shall either approve the plan and modeling framework or notify the person seeking to perform the supplemental modeling of changes to the plan and modeling framework required by the Division;
- (ii) Supplemental modeling shall include a minimum of three years of lake water quality data unless the person performing the modeling can provide information to the Division demonstrating that a shorter time span is sufficient;
- (iii) The Commission may accept modeling products and results that estimate a range of combinations of nitrogen and phosphorus percentage load reductions needed to meet the goal of the Falls nutrient strategy, along with associated allowable loads to Falls Reservoir, from the watersheds of Ellerbe Creek, Eno River, Little River, Flat River, and Knap of Reeds Creek and that otherwise comply with the requirements of this Item. Such modeling may incorporate the results of studies that provide new data on various nutrient sources such as atmospheric deposition, internal loading, and loading from tributaries other than those identified in this Sub-item. The Division shall assure that the supplemental modeling is conducted in accordance with the quality assurance requirements of the Division;
- (iv) The Commission shall review Stage II requirements if a party submits supplemental modeling data, products and results acceptable to the Commission for this purpose. Where supplemental modeling is accepted by the Commission, and results indicate allowable loads of nitrogen and phosphorus to Falls Reservoir from the watersheds of Ellerbe Creek, Eno River, Little River, Flat River, and Knap of Reeds Creek that are substantially different than those identified in Item (3), then the Commission may initiate rulemaking to establish those allowable loads as the revised objective of Stage II relative to their associated baseline values;

The full text of NCAC 02B.0275 (5) also provides requirements for data development related to assessing Lake conditions and reporting to the EMC on progress in improving water quality under these rules. It is the UNRBA's objective with its monitoring program to see that all data collected can and will be used under the provisions of the Falls Lake Rules and for all State activities related to assessment of Falls Lake.

Consistent with the Consensus Principles and beyond the formal reexamination process identified in the Falls Lake Rules, the UNRBA has performed a preliminary evaluation of potential regulatory alternatives that may better reflect the conclusions reached through the UNRBA's monitoring and modeling work.

The Falls Lake nutrient strategy implementing rules were not adopted as a result of a TMDL conducted by the State. Instead, the State used an alternate methodology and developed a nutrient sensitive waters strategy. Based on that adoption, EPA has determined that the State can show Falls Lake as an impaired waterbody with a strategy in place to address its impairments of water quality standards. The entire lake was shown to be in violation of the chlorophyll-a standard when the rules were adopted. The lower lake is now in attainment for chlorophyll-a. The part of the lake west of the I-85 causeway is also impaired for turbidity.

Project planning

Service Providers responding to this RFQ should consider how the UNRBA is proceeding with its Falls Lake Nutrient Strategy Reexamination. The UNRBA is currently engaged in a comprehensive monitoring program to support the Reexamination (background information can be found at the UNRBA website: <https://unrba.org/>, under the appropriate tabs). The monitoring program began in August 2014 and will continue for a minimum of four years, with an additional year as an option if needed to supplement data due to unusual hydrologic or weather conditions. The UNRBA may, following the current monitoring plan, continue with an ongoing monitoring program depending on its progress toward a successful reexamination and the need for continued monitoring to evaluate the modified strategy.

The fiscal year (FY) for the UNRBA runs July 1st through the following June 30th of each year. Current total monitoring program funding is \$800,000 per year. In FY 2017 the UNRBA entered into a modeling and regulatory support contract that will run parallel to the monitoring program.

The UNRBA has not yet established a budgetary line item to fund the work contemplated by this RFQ. Once the UNRBA does establish a funding schedule for this work, it is anticipated that the UNRBA and the selected *Service Provider* will negotiate a scope of work for each fiscal year. It is the general intent of the UNRBA to retain the same *Service Provider* over the period of time needed to develop and complete the strategy reexamination process. However, the UNRBA reserves the right to terminate this arrangement based on the availability of funding, changes in UNRBA's objectives and goals, or deficiencies in the performance or changes in the staffing of the *Service Provider*. Potential *Service Providers* responding to this RFQ who are selected for an interview will be asked to provide a proposed budget, including the billing rates of the team members the respondent plans to use in support of the UNRBA, for Task 1 under the Scope of Work section of this RFQ in a sealed envelope at the time of their interview. These sealed envelopes will be opened after all potential *Service Providers* selected for an interview have been interviewed.

SCOPE OF WORK

The UNRBA requires assistance from a qualified and experienced *Service Provider* to provide legal analysis and strategy options for implementing the UNRBA's goal of providing a successful re-examination of the Stage II requirements under the Falls Lake Rules and efforts to develop other appropriate regulatory options as permitted by 15A NCAC 02B .0275(5)(f) ("re-examination process"). Each strategy option provided in response to this scope of work objective must include the legal bases for each option. Further, the analysis must address the regulatory steps that are required to pursue each option and provide specific references to the statutory, regulatory and policy provisions that must be addressed before agencies are required to consider the regulatory

approach. The selected *Service Provider* must be capable of effectively presenting and advocating for the selected regulatory option before the NC Department of Environmental Quality, including the North Carolina Environmental Management Commission, and the US Environmental Protection Agency.

The *Service Provider* will be required to negotiate a contract and scope of work with the UNRBA for each fiscal year. For the first contract year, the UNRBA has identified the following anticipated tasks:

Task 1. Prepare a legal analysis of the regulatory options under the Clean Water Act to address nutrient reductions in the Falls Watershed.

During the first year of the contract, the *Service Provider* will develop a comprehensive legal analysis of the alternative regulatory strategies available under the Clean Water Act and State law² to address Stage II nutrient reductions that may be required for the Falls Watershed. The analysis should be developed in the context of several different State-initiated efforts that are occurring on potentially conflicting timelines and that may impact the reexamination that is being conducted by the UNRBA. These include:

1. The State is developing new nutrient criteria pursuant to a Memorandum of Agreement with US EPA (Nutrient Criteria Development Plan—work is being conducted by a Science Advisory Council and a Criteria Implementation Committee). The first category of waters under consideration is piedmont impounded rivers, such as Falls Lake. High Rock Lake has been selected to represent this category.

2. The State is also in the midst of readoption of the rules that establish water classifications and set water quality standards for protected uses. That readoption will move forward in the fall of 2019 with readoption likely by 2020.

3. In the 2016 legislative session, a new research entity (the North Carolina Policy Collaboratory) was created at the University of North Carolina to make recommendations on how to revise the current nutrient reduction strategies for both Falls Lake and Jordan Lake.

4. The State will update the Watershed Basin Plan for the Neuse River in 2019.

5. A bill was introduced in the 2017 legislative session which would have withdrawn the authority of a state agency to adopt a rule with a cost of more than \$100 million in any 5 year period of its implementation. While the bill is no longer viable, a similar legislative restriction would very likely apply to the readoption of the Falls Lake rules as the fiscal note showed impacts of more than \$1 billion in 2010.

The alternative regulatory strategies analysis is the major deliverable for the first year of the contract with the UNRBA.

Potential strategies to be considered should include at a minimum: use attainability analysis; site specific water quality standards or classifications; and variances. In the analysis, the *Service Provider* should examine among other things the past use of these strategies by US EPA and the acceptability of the strategies to US EPA, the consistency of each strategy with NC's statutory and

² For reference to a preliminary analysis of alternative regulatory options performed by a prior consultant retained by the UNRBA, see: https://unrba.org/sites/default/files/Cardno_Task_1_TM_06_21_2013_FINAL.pdf, specifically sections ES5, ES6, and main sections 5 and 6.

regulatory framework, and any limitations on the length of the time that each strategy may remain in place.

First Year Deliverables:

1. Legal analysis of the potential strategies to modify Stage II of the nutrient compliance strategy for the Falls Lake Watershed as now adopted.
2. Presentations to the UNRBA Path Forward committee or UNRBA Board of Directors as appropriate and needed.

Task 2. Develop a recommended legal strategy in light of the results of the UNRBA monitoring program, the UNRBA's watershed and lake modeling, and the UNRBA's cost-benefit analysis modeling.

The *Service Provider* will refine the alternative regulatory strategies analysis, after it receives input from the UNRBA's consultants on implementation, in consultation with the UNRBA and its Executive Director, in light of the monitoring project results and the forecast of the model outcomes to identify a recommended legal strategy. The recommended legal strategy should include steps and actions necessary to achieve the goal of a revised cost effective nutrient reduction regulatory program that is protective of the water quality of the Lake, in particular as a drinking water source for Raleigh and its merger partners, and the other protected uses for the Lake. In addition, the analysis of the legal options should provide the UNRBA with a forecast of the feasibility of the recommended course of action based on any similar situations in other states or EPA regions that have been deemed acceptable by US EPA. The *Service Provider* should demonstrate how through its past advocacy efforts, it can secure approval of the recommended strategy under the Clean Water Act and State law.

Final Deliverables:

1. A recommended Stage II regulatory strategy, with component steps and actions, that is protective of Falls Lake's protected uses, which include being a drinking water source. The *Service Provider* shall document the cost effectiveness of the recommended regulatory strategy.
2. Presentation and discussion with the UNRBA Path Forward Committee and the UNRBA.

All deliverables and written communication with the UNRBA and its members should be prepared and sent with the understanding that they are subject to the North Carolina Public Records Act. Meetings with the UNRBA may be subject to the North Carolina Open Meetings Law.

SUBMITTAL CONTENT AND FORMAT

Submittals must document that the *Service Provider* will comply with all of the provisions and conditions in this RFQ. Submittals must be signed by an individual empowered to bind the firm or legal entity submitting as a *Service Provider*.

Form, Content and Length of Statement of Qualifications

Proposers' statements of qualifications should be structured as to form, content, and length as described in this section. The statement of qualifications should provide information that allows the interview panel to understand how the proposed *Service Provider* is able to provide the services described and fulfill the needs of the UNRBA as described in this RFQ. Submittals must include the complete name and address of the firm or other legal entity applying as the *Service Provider* and the name, mailing address, email address, and telephone number of the person the UNRBA should contact regarding the submittal.

Proposals may not use less than 10 point Times New Roman font. (Other fonts are acceptable but the size should be no smaller than 10 point in Times New Roman.) Since qualification packages are to be submitted electronically, page limitations in this section refer to pages of content. The page limitations do not include front cover, back cover, section dividers, table of contents, non-collusion certification, exceptions, and conflicts of interest.

Cover Letter (Maximum of 1 page)

The submittals should contain a cover letter, signed by a principal of the *Service Provider*, indicating his or her title, that he or she has authority to submit the Statement of Qualifications on behalf of the *Service Provider*, including the cover letter. The cover letter should contain the following statement:

“The undersigned has the authority to submit this submittal on behalf of the name of company in response to the Upper Neuse River Basin Association RFQ for “Legal and Regulatory Support.”

Qualifications (Maximum of 15 pages, including all sub-items)

Firm(s) description(s)

Submittals must include a firm overview and brief description of the firm's history. Also include the complete name and address of the firm or other legal entity applying as the *Service Provider* and the name, mailing address, email address, and telephone number of the person the UNRBA should contact regarding the submittal.

Project organizational chart and description

The submittal should provide a description of the project team structure and qualifications. Senior and key members of the project team should be included in the organizational chart.

Relevant Experience

- . The submittal should demonstrate past and ongoing experience in the following areas:
 - Alternative regulatory strategies, including but not limited to: use attainability analyses, alternative compliance criteria, site specific criteria, and variances.
 - A history of obtaining approval from state and/or federal regulatory authorities for alternative regulatory strategies for 303(d) listed waters.
 - Addressing attorney-client privilege issues with a client that is an association of local governments, like the UNRBA.
 - Providing legal assistance to a client that is subject to a public records act and open meetings law similar to the laws in North Carolina.

References

The submittal should include at least three references.

Project Team Résumés (Maximum of 10 pages)

One-page resumes for each team member. The office location of each team member should be specified on the résumés. The submittal should state the role of each team member.

Non-Collusion Certification

The Upper Neuse River Basin Association prohibits collusion, which is defined as a secret agreement for a deceitful or fraudulent purpose. Include and sign the following with your submittal:

The Upper Neuse River Basin Association prohibits collusion, which is defined as a secret agreement for a deceitful or fraudulent purpose.

I, _____ affirm that I have not engaged in collusion with any UNRBA employee(s), other person, corporations or firms relating to this submittal. I understand collusive bidding is a violation of state and federal law and can result in fines, prison sentences, and civil damage awards.

Signature: _____

Exceptions

Any and all exceptions to the RFQ must be listed on an item-by-item basis and cross-referenced with the RFQ document. If there are no exceptions, Offerors must expressly state that no exceptions are taken.

Conflicts of Interest

Each submittal shall include a statement indicating whether or not the firm or any individuals that may work under contract has a possible conflict of interest (e.g., anyone working for or on behalf of the State of North Carolina, the Upper Neuse River Basin Association, or one of the UNRBA's member governments) and, if so, the nature of that potential conflict. The UNRBA Board of Directors reserves the right to use this information as selection criteria if any interest disclosed from any source could either give the appearance of a conflict or cause speculation as to the objectivity of the potential *Service Provider* in performing the work required. The Board's determination regarding any questions of conflict of interest shall be final.