

State of North Carolina

County of Wake

**CONTRACT FOR A STUDY OF THE COSTS ASSOCIATED WITH PROVIDING NUTRIENT CONTROLS THAT ARE ADEQUATE TO OFFSET POINT SOURCE AND NONPOINT SOURCE DISCHARGES OF NITROGEN AND OTHER NUTRIENTS.**

THIS AGREEMENT, made and entered into this the 8<sup>th</sup> day of February, 2007, by and between RTI International, hereinafter referred to as the "RTI", and the Environmental Review Commission, hereinafter referred to as the "ERC", with the approval of the Legislative Services Commission established pursuant to Article 7 of Chapter 120 of the General Statutes, hereinafter referred to as the "Commission.

**WITNESSETH:**

Whereas, S.L. 2006-215 became law on 8 August 2006.

Whereas, Section 2 of S.L. 2006-215 directs the ERC, with the assistance of the Division of Water Quality of the Department of Environment and Natural Resources, to study issues related to the nutrient offset payment program and to specifically study the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen; whether nutrient offset payments should be authorized for additional nutrients, including phosphorus; and whether the nutrient offset program should be expanded to other areas of the State.

Whereas, Section 2 of S.L. 2006-215 directs the ERC to report its findings, together with any recommended legislation, to the 2007 General Assembly.

Whereas, the ERC issued a Request for Proposal on 15 December 2006, seeking a consultant to:

1. Estimate the length of time that the existing North Carolina Nutrient Offset Fee Payments Program (NOFPP) will be able to continue as a

completely self-sustaining program capable of providing adequate mitigation for the additional nitrogen loading purchased at the current cost of \$11 per pound of nitrogen.

2. Study the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen in the Neuse River Basin.
3. Study how a total nutrient offset payment fee should be determined.
4. Provide information and outline options, including the advantages and disadvantages of each option, to assist the ERC in deciding whether nutrient offset payments should be authorized for additional nutrients, including phosphorus, and whether the NOFPP should be expanded to other river basins, including the Tar-Pamlico River Basin.
5. Evaluate the ability of public entities other than the Environmental Enhancement Program (EEP) and private entities to provide nutrient offsets.
6. Prepare a comprehensive review and discussion of the types of potential nutrient mitigation efforts available.

Whereas, RTI's response has been accepted by the ERC.

Whereas, the parties to this agreement desire to reduce the terms of their agreement to writing.

**NOW THEREFORE**, for and in consideration of the mutual promises made to each other, as hereinafter set forth, the parties do hereto mutually agree as follows:

### **1. Performance of Study**

RTI shall perform services in a manner consistent with the degree of care and skill ordinarily exercised by members of the same profession and consistent with this agreement to accomplish the study described in the Request for Proposal, Appendix B. RTI agrees to perform the study as provided in RTI's response, Appendix C. In the event of a conflict of terms between this agreement, the Request for Proposal, and RTI's response, the provisions of the designated documents shall control in the following order: First, this agreement; second, the Request for Proposal; and third, RTI's response.

### **2. Contract Period and Schedule**

RTI agrees that time is of the essence in the completion of this agreement and agrees that services under this agreement are to commence on the execution date of this agreement and shall terminate on 15 May 2007, or upon the filing of the final report, whichever occurs first, unless extended or terminated as provided herein.

RTI agrees to the following reporting schedule:

First Phase Report:	26 February 2007
Presentation of draft final results:	30 April 2007
Final Report:	15 May 2007

### **3. Contract Administrator**

George F. Givens, Commission Counsel, ERC, is designated as the Contract Administrator for the ERC. The contract administrator shall be responsible for ensuring that RTI complies with the terms, conditions, and performance specifications set forth in this contract, and an evaluation of RTI's performance. The ERC has complete discretion in replacing the contract administrator with another person of its own choosing. The ERC shall notify RTI of any replacement of the contract administrator.

### **4. Availability of Funds**

The payment of compensation specified in this agreement, its continuation, or any renewal or extension thereof, is dependent upon and subject to the allocation or appropriation of funds to the ERC for the purposes set forth in this agreement.

### **5. Payments**

ERC shall make payments to RTI for its services as provided below:

- a. An invoice for the first payment of thirty percent (30%) of the contract amount twenty-seven thousand nine hundred and forty dollars (\$27,940) may be submitted by RTI upon signing of the contract. Payment shall be made within thirty (30) days of approval of the invoice by the Contract Administrator.

- b. An invoice for the second payment of thirty percent (30%) of the contract amount twenty-seven thousand nine hundred and forty dollars (\$27,940) may be submitted by RTI upon submittal of a progress report five weeks after the contract signing date. Payment shall be made within thirty (30) days of approval of the invoice by the Contract Administrator.
- c. An invoice for the third and final payment of forty percent (40%) of the contract amount thirty-seven thousand two hundred fifty-three dollars (\$37,253) may be submitted by RTI upon delivery of the final report. Payment shall be made within thirty (30) days of approval of the invoice by the Contract Administrator.

Notwithstanding any other provision of this contract, total payment under this contract, including expenses, shall not exceed ninety-three thousand one hundred and thirty-three dollars (\$93,133) for services described in this agreement.

#### **6. Additional Contract Expenses**

The contract for the project is not a time and materials agreement. Any expenses of RTI in addition to those contracted for are the sole responsibility of RTI.

#### **7. Independent Contractor**

RTI shall be considered to be an independent contractor and shall be wholly responsible for the work to be performed and for the supervision of its employees. RTI shall hold and save the ERC harmless from any and all claims, demands, or causes of action that may be asserted due to the production activity of RTI under this contract. RTI represents that it has, or will secure at its own expense, all personnel required in performing the services under this agreement. These employees shall not be employees of, or have any individual contractual relationship with the ERC or the Legislative Services Commission.

#### **8. Key Personnel**

RTI shall not substitute key personnel designated in the RTI's response and assigned to the performance of this contract without prior written approval by the ERC. The individuals designated as key personnel for purposes of this contract are Michael Gallaher and Kathy Heller.

## **9. Subcontracting**

Work proposed to be performed under this contract by RTI or its employees shall not be subcontracted without prior written approval of the ERC.

## **10. Confidentiality**

RTI agrees to protect the confidentiality of any files, data, or other materials provided by the ERC and to restrict their use to the purpose of performing the contract. RTI shall comply with the provisions of Article 17 of Chapter 120 of the General Statutes of North Carolina regarding confidentiality between the RTI and members of the General Assembly. For purposes of this paragraph only, employees of RTI shall be considered "legislative employees" as defined in General Statute 120-129.

## **11. Care of Property**

RTI agrees to be responsible for the proper custody and care of any files or other property furnished by the ERC. RTI shall take all steps necessary to safeguard any property, including data, files, reports, or other information from loss, destruction, or erasure. Any costs or replacement expenses, or damages resulting from the loss shall be borne by RTI when the loss occurred through its negligence.

## **12. Copyright**

No deliverable items produced in whole or in part under this agreement shall be the subject of an application for copyright by or on behalf of RTI or any employee of RTI.

## **13. Advertising**

RTI agrees not to use the existence or results of the contract, or the products produced pursuant to the contract as a part of any news release or commercial advertising without the prior written approval of the ERC.

## **14. Access to Persons and Records; Public Records**

The State Auditor shall have access to persons and records as a result of all contracts or grants entered into by State agencies or political subdivisions in accordance with General Statute 147-64.7. RTI shall retain all records for a period of three years following completion of the contract.

To the extent that RTI acts on behalf of the ERC pursuant to this contract, RTI shall comply with and take any action necessary to facilitate compliance by the ERC with the provisions of Chapter 132 of the General Statutes.

#### **15. Transfer or Assignment**

This contract shall not be transferred or assigned to a third party.

#### **16. Termination and Default**

- (a) Mutual Termination. -- Upon mutual written agreement of the ERC and RTI, the contract may be terminated at any time.
- (b) ERC Termination. -- The ERC has the right to terminate the contract at its discretion with 10 days written notice. In the event of termination under this subparagraph, RTI will be paid or reimbursed an amount commensurate with work completed or expenses incurred. In the event that RTI has received funds in excess of the amount commensurate with work completed or expenses incurred, RTI shall repay the excess funds to the ERC.
- (c) RTI failure to perform. -- If, for any reason, RTI shall fail to fulfill in timely and proper manner the obligations under this agreement, the ERC shall thereupon have the right to terminate this contract by giving written notice to RTI and specifying the effective date thereof. In that event, all finished or unfinished deliverable items under this contract prepared by RTI shall, at the option of the ERC, become its property, and RTI shall be entitled to receive just and equitable compensation for any satisfactory work completed on these items. RTI shall not be relieved of liability to the ERC for damages sustained by the ERC by virtue of any breach of this agreement, and the ERC may withhold any payment due RTI for the purpose of setoff until a time that the exact amount of damages due the ERC from the breach can be determined. In case of default by RTI, the ERC may procure the services to which it is entitled under this contract from other sources and hold RTI responsible for any cost occasioned thereby.
- (d) Liability of RTI. -- In the case of termination or default, the total liability of RTI shall not exceed the total contract amount.
- (e) Acts of God, etc. -- No party to this agreement shall be deemed to be in default of any obligation hereunder if and so long as it is prevented from performing the obligation by any act of war, hostile foreign

action, nuclear explosion, riot, strikes, civil insurrection, earthquake, hurricane, tornado or other catastrophic natural event or act of God.

#### **17. General Indemnity**

RTI shall hold and save the State of North Carolina, its officers, agents, and employees harmless from liability of any kind, including liability from all claims and losses accruing to any other person, firm, or corporation furnishing or supplying work, services, materials, or supplies in connection with the performance of this contract, and from any and all claims and losses accruing to any person, firm, or corporation that may be injured or damaged by RTI in the performance of this contract and that are attributable to the negligence or intentionally tortious acts of RTI if RTI is notified in writing that the State has knowledge of a claim within 30 days after the State acquires actual knowledge of the claim. RTI represents and warrants that it shall make no claim of any kind or nature against the State's agents who are involved in the delivery or processing of RTI's goods to the State. The representation and warranty in the preceding sentence shall survive the termination or expiration of this contract.

#### **18. Bankruptcy**

Upon the filing for bankruptcy or insolvency by or against RTI, the ERC may terminate the contract, and the provisions of the paragraph entitled "Termination and Default" shall apply.

#### **19. Compliance with Laws**

RTI shall comply with all laws, ordinances, codes, rules, regulations and licensing requirements that are applicable to the conduct of its business, including those of federal, state, and local agencies having jurisdiction or authority.

#### **20. Applicability of State Ethics Laws**

RTI is subject to all applicable provisions of Chapter 138A of the General Statutes, including but not limited to the prohibition on the acceptance of specified gifts from lobbyists and lobbyist's principals, the required reporting of authorized gifts from lobbyists and lobbyist's principals, identification and reporting of names of assigned personnel, and required ethics training.

#### **21. Equal Opportunity Statement**

The nondiscrimination clause contained in Section 202 of Executive Order 11246, as amended by Executive Order 11375, relative to equal employment opportunity for all persons without regard to race, color, religion, sex, age or national origin, and the rules and regulations prescribed by the United States Secretary of Labor, are incorporated herein by reference. The program for Employment of the Handicapped (Affirmative Action) Regulations issued by the Secretary of Labor of the United States in Title 20, Part 741, Chapter VI, Subchapter "C" of the Code of Federal Regulations, pursuant to the provisions of Executive Order 11758 and Section 503 of the Federal Rehabilitation Act of 1973, are incorporated herein by reference.

**22. Workers Compensation Insurance**

RTI shall obtain, pay for, and keep in force, for the duration of the contract, worker's compensation insurance, as required by the laws of North Carolina, covering all employees of RTI engaged in any work pursuant to this contract performed in the State.

**23. Amendment**

This contract may be amended only by written agreement duly executed by the ERC and RTI and approved by the Commission.

**24. Incorporations by reference**

S.L. 2006-215, is attached to this contract as Appendix A and incorporated herein by reference. The Request for Proposal issued by the ERC, entitled "Report on Costs Associated with Providing Nutrient Controls that are Adequate to Offset Point Source and Nonpoint Source Discharges of Nitrogen and Other Nutrients", is attached to this contract as Appendix B and incorporated herein by reference. RTI's response is attached to this contract as Appendix C and incorporated herein by reference.

**25. Entire agreement**

This contract, including any documents or exhibits specifically incorporated by reference, represents the entire agreement between the parties and supersedes all prior oral or written statements or agreements.

**26. Notice**

Any notice under this contract to the ERC shall be sufficient if mailed to the Legislative Services Office as indicated below:



George F. Givens, Commission Counsel  
Environmental Review Commission  
General Assembly of North Carolina  
300 North Salisbury Street  
545 Legislative Office Building  
Raleigh, NC 27603

Any notice under this contract to RTI shall be sufficient if mailed to RTI as indicated below:

Sherri Spinks  
Office of Research Contracts  
RTI International  
3040 Cornwallis Road  
Research Triangle Park, NC 27709-2194

**27. Governing Law**

This contract is made under and shall be governed and construed in accordance with the laws of the State of North Carolina.

**28. Situs**

The place of this contract, its situs and forum, shall be Wake County, North Carolina, where all matters, whether sounding in contract or tort, relating to is validity, construction, interpretation, or enforcement, shall be determined.

**29. Applicability of terms**

All promises, requirements, terms, conditions, provisions, representations, guarantees, and warranties contained herein shall survive the contract expiration or termination date unless specifically provided otherwise herein, or unless superseded by applicable Federal or State statutes of limitations.

IN WITNESS THEREOF, the parties have executed this agreement in duplicate originals, one of which is retained by each of the parties effective this the day and year first written above.

**FOR THE ENVIRONMENTAL REVIEW COMMISSION**

WITNESS:

George F. D.

BY:

Sen. Daniel G. Clodfelter  
Sen. Daniel G. Clodfelter, Cochair

WITNESS:

Cindy B. Davis

BY:

Sen. Charles W. Albertson  
Sen. Charles W. Albertson, Cochair

WITNESS:

Shirley R. MacPherson

BY:

Rep. Pryor A. Gibson III  
Rep. Pryor A. Gibson III, Cochair

**FOR RTI INTERNATIONAL**

WITNESS:

Arthur G. Enichen

BY:

Don Enichen  
Don Enichen  
Office of Research Contracts  
RTI International  
3040 Cornwallis Road  
Research Triangle Park, NC 27709-2194

**APPROVED BY**

**THE LEGISLATIVE SERVICES COMMISSION**

WITNESS:

Amy Fulk

BY:

Marc Basnight  
Marc Basnight, President Pro Tempore

WITNESS:

George F. D.

BY:

Joe Hackney  
Joe Hackney, Speaker of the House