

AGREEMENT FOR A FISHERIES INFORMATION  
NETWORK (FIN)

This Agreement is made by and between the Department of Environmental Quality, Division of Marine Fisheries (“DEQ or DMF”), an agency of the State of North Carolina located at 217 West Jones Street, Raleigh, NC 27603 and Pegasystems Inc. (“Pega or Pegasystems”) One Rogers Street, Cambridge MA 02142; (hereinafter referred to as the Parties collectively, “Licensee” or “DEQ”). This Agreement is made pursuant to RFP 16-006095 issued 18 December 2014.

WITNESSETH:

Whereas, the Department of Environment and Natural Resources, Division of Marine Fisheries issued an RFP for the purpose of procuring a software license and services to replace its current Fisheries Information Network application, and

Whereas, the Department of Environment and Natural Resources was renamed as the Department of Environmental Quality by S.L. 2015-241, s. 14.30.(c), all references to “DENR” or “the Department of Environment and Natural Resources” shall be read and applied as the Department of Environmental Quality, and

Whereas, Pegasystems responded to the RFP in a timely manner, and

Whereas, the Parties have negotiated certain terms pursuant to the RFP as permitted therein and as permitted by applicable procurement rules,

Now, therefore, for and in consideration of the mutual promises and other good and valuable consideration set forth herein, the Parties agree as follows:

1. The documents comprising the contract include:
  - a. This Agreement
  - b. RFP 16-006095 issued by DEQ/DMF on 18 December 2014 (“RFP”)
  - c. Pega Master Software License, Maintenance and Professional Services Agreement (MSLSA)
  - d. Pega Cloud Agreement
  - e. Pega Cloud Hosted Services Schedule
  - f. Statement of Work #1
  
2. In the event of any inconsistency or conflict between or among the terms and conditions contained in the documents comprising this contract, any such inconsistency or conflict shall be resolved by giving precedence in the following order, except as otherwise set forth herein:
  - a. This Agreement
  - b. RFP 16-006095 issued by DEQ/DMF on 18 December 2014
  - c. Pega Master Software License, Maintenance and Professional Services Agreement
  - d. Pega Cloud Agreement
  - e. Pega Cloud Hosted Services Schedule
  - f. Statement of Work #1

3. Additional State Terms and Conditions of this Agreement

a. Merger clauses, whole agreement clauses and such other or similar clauses found within the documents comprising the Agreement as identified in ¶1 above are superseded by ¶4 of this Agreement.

b. To the extent that documents comprising the Agreement as identified in ¶1 include a “confidential” designation, the Parties acknowledge and agree that such document will be publicly available pursuant to the N.C. Public Records Act.

c. To the extent that Pega documents comprising the Agreement as identified in ¶1 include conflicts resolution or precedence of interpretation clauses exclusive to such Pega documents, precedence among the Pega documents shall be determined pursuant to those clauses.

d. Effective Date: This contract or subsequent amendment shall not become effective nor bind the State until the appropriate State purchasing authority/official or Agency official has signed the document(s), contract or amendment; the effective award date has been completed on the document(s), by the State purchasing official, and that date has arrived or passed. The State shall not be responsible for reimbursing Pega for goods provided nor services rendered prior to the appropriate signatures and the arrival of the effective date of the Contract. No contract shall be binding on the State until an encumbrance of funds has been made for payment of the sums due under the contract. The funds to pay for the amounts due under this contract are allocated and approved, and the applicable PO or POs will be issued no later than 7 days after the contract documentation has been executed.

Pega UTILIZATION OF WORKERS OUTSIDE U.S.: In accordance with N.C.G.S. §143B-1334, Customer must collect information regarding Pega’s utilization of workers outside the United States. The Parties acknowledge that such information has been provided in a separate document.

e. Notwithstanding documents comprising the Agreement as identified in ¶1 incorporation of language or terms requiring payment of late fees, attorney fees, costs of litigation or penalties (other than awards or confirmation of damages by a court or other body of comparable authority and competent jurisdiction), such terms shall have no force or effect.

4. The provisions of the Agreement, and all Contract Documents, Exhibits and Schedules hereof constitute the entire agreement of the parties as to the matters covered and supersede any prior understanding not specifically incorporated herein as to the matters covered. No changes hereto or waiver of any of the terms hereof shall be made except in writing signed by the Parties hereto. No waiver by either the State or Pega or any failure by the other to keep or perform any covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other covenant or condition, of this Agreement. All remedies provided herein are cumulative and not exclusive of any remedies provided by law or equity. Under no circumstances shall any “shrink wrap” or “click through” license agreement or terms have any effect.

5. RFP VII, ¶6, Software License, is superseded by Pega documents identified in ¶1 and as given precedence in ¶2 above.

6. RFP VII, ¶7, Maintenance and Support Services, is superseded by Pega documents identified in ¶1 and as given precedence in ¶2 above.

7. Availability of Funds: Any and all payments to Pega are expressly contingent upon and subject to the appropriation, allocation and availability of funds to the Agency for the purposes set forth in this Contract and any Statement of Work in accordance with section 3.d of this Agreement. If this Contract or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Contract or Purchase Order also in accordance with section 3.d of this Agreement. If the term of this Contract extends into fiscal years, subsequent to that in which it is approved, such continuation of the Contract is expressly contingent upon the appropriation, allocation and availability of funds by the N.C. Legislature for the purposes set forth in the Contract. If funds to effect payment are not available, the Agency will provide written notification to Pega. If the Contract is terminated under this paragraph, Pega agrees to take back any affected deliverable work product from services provided under an applicable SOW ("Deliverables") and software not yet delivered under this Contract, terminate any services supplied to the Agency under this Contract, and relieve the Agency of any further obligation thereof. The State shall remit payment for Deliverables and services accepted prior to the date of the aforesaid notice in conformance with the payment terms.

8. Payment Terms: Notwithstanding documents comprising the Agreement as identified in ¶1 Payment terms are Net 30 days after receipt of correct invoice or acceptance of the Deliverables, whichever is later; unless a period of more than thirty (30) days is agreed in a Statement of Work. Once due, all fees are non-cancelable and non-refundable. All purchases, procurements, and similar actions shall conform to the procurement law and rules pursuant to N.C.G.S. §143B-1323.

9. RFP VII, ¶13, Acceptance Criteria is modified and superseded as follows:

a. Acceptance of Subscription licenses, and the software or services licensed, shall be in accordance with the Pega Cloud Agreement and Pega Master Software License, Maintenance and Professional Services Agreement.

b. Acceptance of maintenance and support services shall be in accordance with the Pega Cloud Agreement and Pega Master Software License, Maintenance and Professional Services Agreement.

c. Final acceptance of consulting services, Deliverables comprising functionalities and specifications identified in the RFP and successful completion of all Sprints set forth in one or more Statements of Work, i.e. outcomes of the Agile methodology is expressly conditioned upon completion of all applicable inspection and testing procedures to satisfy the mutual definition of "done" as prescribed in the Agile Scrum methodology. For the avoidance of doubt, Deliverables are described in the RFP, III, Section 10 Deliverables, Page 65.

d. Payments shall be made by Sprint upon satisfaction of the Parties' criteria of "done" set forth in each Sprint. The Parties acknowledge and agree that Sprints and Deliverables may be iterative, and that each Sprint shall incorporate agreed criteria for "done" together with a resolution process for disagreement. The Parties further

acknowledge that the Sprint payment schedule in SOW Exhibit A represents the mutually determined best estimate of the value of each Sprint, and that payment amounts may be modified by agreement as each Sprint is performed, provided that the total cost of the Sprints shall not exceed the SOW value stated therein. Such resolution process shall include an escalation path and shall be completed within ten (10) days. To the extent the RFP terms and conditions are inconsistent with this Paragraph 9, this Paragraph shall supersede the RFP terms and conditions.

e. Customer shall diligently engage in review of all Deliverables presented and all outcomes in accordance with each Sprint. In the event Customer's review of the final Deliverables, outcomes or other work contracted identifies errors, defects, faults, non-compliance with the required Deliverables and specifications of the RFP as set forth in any Sprint, Customer shall provide Pega with a detailed, written description of any matters together with references to the Deliverable, specification and Sprint. Objections shall conform to the Agile SCRUM processes, and shall be identified to Pega. Pega and Customer shall review the objections, and Pega shall provide Customer with a revised Deliverable and/or a mutually agreed upon detailed schedule, e.g. corrective action plan, for completion of a revised Deliverable, for any objections that Pega and Customer mutually determine fall within the intended scope of the Deliverable or Sprint. If the State's objections are not within the scope of the Agreement, the State may initiate a Change Order and payment for the Sprint shall be due, excepting the objections. In the event that a mutual agreement cannot be achieved between the Supplier and the Customer regarding Deliverable or Sprint schedule, or scope, the issue will be escalated according to the processes identified in the RFP, VII, ¶24, Page 85 Dispute Resolution.

f. Final acceptance at the conclusion of the project will be complete when the Agile SCRUM processes meet the definition of "done" and there are no objections pending under (e) above. Final acceptance shall result in release of any retainage amounts and the final Sprint payment.

10. Reserved

11. Governing Laws, Jurisdiction, and Venue: This Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina. The place of this Contract or purchase order, its situs and forum, shall be Wake County, North Carolina, where all matters, whether sounding in contract or in tort, relating to its validity, construction, interpretation and enforcement shall be determined. Pega agrees and submits, solely for matters relating to this Contract, to the jurisdiction of the courts of the State of North Carolina, and stipulates that Wake County shall be the proper venue for all matters.

12. RFP VII, ¶17, Confidentiality, is modified as follows: In accordance with 9 NCAC 6B.0207 and 6B.1001, the State may maintain the confidentiality of certain types of information described in N.C.G.S. §132-1 *et seq.* The State will maintain the confidentiality, with no less care than it maintains its own confidential information, of Pega's software and software documentation, including but not limited to trade secrets defined by N.C.G.S. §66-152 and other information exempted from the Public Records Act pursuant to N.C.G.S. §132-1.2. Under no circumstances shall price information be designated as confidential. Vendor may designate appropriate portions of its response as confidential, consistent with and to the extent permitted under the Statutes and Rules set forth above, by marking the top and bottom of pages containing

confidential information with a legend in boldface type "CONFIDENTIAL". By so marking any page, the Vendor warrants that it has formed good faith opinion, having received such necessary or proper review by counsel and other knowledgeable advisors that the portions marked confidential meet the requirements of the Rules and Statutes set forth above. The State may serve as custodian of Vendor's confidential information and not as an arbiter of claims against Vendor's assertion of confidentiality. If an action is brought pursuant to N.C.G.S. §132-9 to compel the State to disclose information marked confidential, the Vendor agrees that it will intervene in the action through its counsel and participate in defending the State, including any public official(s) or public employee(s). The Vendor agrees that it shall hold the State and any official(s) and individual(s) harmless from any and all damages, costs, and attorneys' fees awarded against the State in the action. The State agrees to promptly notify the Vendor in writing of any action seeking to compel the disclosure of Vendor's confidential information. The State shall have the right, at its option and expense, to participate in the defense of the action through its counsel. In any event, the State shall have no liability to Vendor with respect to the disclosure of Vendor's confidential information ordered by a court of competent jurisdiction pursuant to N.C.G.S. §132-9."

a. If the Agreement is terminated or expires, each party will return to the other, or certify in writing the destruction of all Confidential Information or property of the other, provided, however, that neither party has to delete or erase any Confidential Information that has been saved to a back-up file or electronic archiving system in accordance with such party's ordinary back-up or document retention policies or that is required for litigation, regulatory or corporate records retention reasons. For the avoidance of doubt, the parties may retain confidential information for a reasonable applicable period of time following termination that they reasonably believe in good faith is subject to disclosure under the North Carolina Public Records Act or other applicable law, provided that the retaining Party shall identify both the retained information and the authority for retaining such.

13. Termination: Any notice or termination made under this Contract shall be transmitted via US Mail, Certified Return Receipt Requested. The period of notice for termination shall begin on the day the return receipt is signed and dated.

a. The parties may mutually terminate this Contract by written agreement at any time.

b. Termination for Convenience Without Cause: The State may terminate service and indefinite quantity contracts, in whole or in part by giving thirty (30) days prior notice in writing to Pega. Pega shall be entitled to sums due as compensation for Deliverables provided and services performed in conformance with the Contract, subject to section 8 above and, for Hosted or PegaCloud Services and maintenance, for the full applicable term. In the event the Contract is terminated for the convenience of the State the Agency will pay for all work performed and products delivered in conformance with the Contract up to the date of termination.

c. Termination for Cause: In the event any goods, software, or service furnished by Pega during performance of any Contract term fails to conform to any material requirement of the Contract, and the failure is not cured within the specified time after providing written notice thereof to Pega, the State terminate the contract. The rights and

remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract. Pega shall not be relieved of liability to the State for damages sustained by the State arising from Pega's breach of this Contract; and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by Pega shall be cause for termination.

14. RESERVED.

15. RESERVED.

16. FORCE MAJEURE: Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations as a result of events beyond its reasonable control, including without limitation, fire, power failures, any act of war, hostile foreign action, nuclear explosion, riot, strikes or failures or refusals to perform under subcontracts, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

17. Assignment: ¶22 of RFP VII is amended to add the following sentence: "A transfer pursuant to N.C.G.S. §143A-6 shall not constitute an assignment."

18. The individuals signing below warrant that he or she is duly authorized by their respective Party to sign and bind said Party to the terms and conditions of this Contract.

19. Pega Master Software License, Maintenance & Professional Services Agreement (MSLSA) is amended as follows:

a. Section 2, Escrow of Source Code shall not apply.

b. Section 3(a), Maintenance is modified as follows: "The maintenance term under each License Schedule will renew for a successive annual term, at the then-current fees under such License Schedule, subject to annual adjustments upon each renewal in accordance with Section 6, unless either party . . ."

c. Section 5 is superseded in its entirety by the Agreement.

d. Section 6 shall apply to the extent it does not conflict with this Agreement.

e. Section 15(c) shall be subject to RFP VII, ¶22 as modified herein. For the avoidance of doubt, the Parties acknowledge and agree that the authority of the N.C. General Assembly and the Governor shall not be abridged.

f. Section 15(d) shall have no force or effect for such persons who seek employment with the State or who seek employment with a third party that contracts with the State wherein the State has no authority or control over such third party's hiring practices.

20. Pega Cloud Agreement

a. Section 1(b) shall be read and interpreted such that "sensitive data" shall be synonymous with "confidential data" or non-public data pursuant to the N.C. Public Records Act and other applicable law.

b. Section 1(c) is clarified such that "worldwide" shall be applied to permit Pega's personnel access to such Customer data as may be necessary or proper to perform Pega's

duties and obligations under the Agreement, provided that such data shall not be stored or maintained in data centers outside of the United States.

21. Pega Cloud Hosted Services Schedule

- a. Reserved.
- b. Section 4 shall apply to the extent it does not conflict with the Payment terms of the RFP VII, as modified herein.

The parties may mutually terminate this Contract by written agreement at any time.

Termination for Convenience Without Cause: The State may terminate service and indefinite quantity contracts, in whole or in part, subject to section 8 above, by giving thirty (30) days prior notice in writing to Pega. Pega shall be entitled to sums due as compensation for Deliverables provided and services performed in conformance with the Contract. In the event the Contract is terminated for the convenience of the State the Agency will pay for all work performed and products delivered in conformance with the Contract up to the date of termination and, for Hosted or PegaCloud Services and maintenance, for the full applicable term.

Termination for Cause: In the event any goods, software, or service furnished by Pega during performance of any Contract term fails to conform to any material requirement of the Contract, and the failure is not cured within the specified time after providing written notice thereof to Pega, the State terminate the contract. The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract. Pega shall not be relieved of liability to the State for damages sustained by the State arising from Pega’s breach of this Contract; and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by Pega shall be cause for termination.”

IN WITNESS WHEREOF, the Parties now wish to execute this Agreement by their duly authorized representatives as of the date of the last signature below.

Department of Environmental Quality

Pegasystems Inc.

\_\_\_\_\_  
By:

DocuSigned by:  
*Shawn Hoyt*  
\_\_\_\_\_  
By: 40A45968D01D4AD...

Title: \_\_\_\_\_

Title: Vice President

Date: \_\_\_\_\_

Date: 10/21/2015