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May 18, 2007

DRAFT RECORD OF DECISION

PROJECT NAME: Chadwick Lead Mills Remediation Project
PROJECT MUNICIPALITY: Marblehead and Salem
PROJECT WATERSHED: North Coastal
EOEA NUMBER: 13726
PROJECT PROPONENT: NL Industries, Inc.
DATE NOTICED IN MONITOR: April 11, 2007

Pursuant to the Massachusetts Environmental Policy Act (MEPA) (G.L.c.30, ss. 61-62H) and Section 11.11 of the MEPA regulations (301 CMR 11.00), I have reviewed the Notice of Project Change (NPC) submitted on this project and **propose to grant a Phase 1 Waiver** (as defined below), allowing the commencement of the Massachusetts Contingency Plan (MCP) remediation activities to proceed on the project site prior to the completion of an Environmental Impact Report (EIR) for the entire project, which encompasses the remediation of a former lead mill and a the development of a residential housing project once remediation goals have been achieved. In a separate Certificate issued today, I have laid out the issues that remain to be addressed during the permitting of the remediation project.

Project Description

The Chadwick Lead Mills Remediation Project involves the remediation of a historic lead mill site under the Massachusetts Contingency Plan (MCP). The site of the former Chadwick Lead Mills is located in Marblehead and Salem, off of Lafayette Street (Route 114). The approximately 4.4 acre remediation site consists of parcels of land owned by multiple parties. The largest portion of the site is currently owned by Glover Estates, LLC and consists of both beach and upland areas where most of the former lead mill buildings stood and lead operations were conducted. The Chadwick Lead Mills site has been listed by the Department of Environmental Protection (MassDEP) in accordance with the MCP since 1995 (DEP RTN #3-12695). Results of field investigation activities conducted at the site have documented high

concentrations of lead impacted soils and sediments on portions of the site and adjacent properties. Abutting properties, a portion of which include contaminated areas, are conservation lands of the Town of Marblehead and the City of Salem, a public bike/walking trail owned by Marblehead, and private residences along Robert Road in Marblehead.

The site is bounded by the Forest River to the west; Salem Harbor to the north; land owned by the Town of Marblehead to the east; and private residential parcels to the south. The Marblehead/Salem town boundary bisects the property in the westerly part. Coastal resource areas on the site include salt marsh, beach and coastal bank, plus a 100-foot wetlands buffer and a 200-foot Riverfront Area associated with the Forest River. A portion of the site along the coastal bank is situated within a Federal Emergency Management Agency (FEMA) 100-year floodplain and contains Land Subject to Flooding and Land Subject to Coastal Storm Flowage.

MEPA History

The project was originally submitted to MEPA in an Expanded Environmental Notification Form (EENF) in February 2006 at the same time that a separate EENF was filed by a different proponent for a housing development project on the same site. The proponent for the Lafayette Tides project (EOEA #13725) – Glover Estates, LLC proposed the development of a 44-unit multi-family housing project under the state's Comprehensive Permit (Chapter 40B) program on the project site. The proponent for the Lafayette Tides project intends to acquire the site and construct the residential development once the site has been remediated and a Class A Response Action Outcome (RAO) has been filed for the property.

While the two projects are separate, the proponents for the remediation and housing projects coordinated their efforts under the MEPA review for the purpose of giving state agencies and the public an opportunity to review any interrelated permitting issues and to undertake a comprehensive review of how both projects will impact environmental resources at the site. MEPA issued one Certificate for both projects on March 17, 2006. The Certificate on the EENFs required the preparation of combined Draft and Final Environmental Impact Reports (EIR) that address both projects.

Project Change and Phase I Waiver Request

The proponent has submitted an Expanded Notice of Project Change (NPC) for the project with a request for a Phase I Waiver to allow the remediation activities to proceed prior to completion of the combined Draft and Final EIR for the remediation and housing projects. The project as outlined in the NPC consists of the remediation of those parcels encompassing the former Chadwick Mills site plus adjoining parcels in Marblehead and Salem that have been designated by MassDEP as a Tier 1C cleanup site under the MCP. The proposed project change involves the following:

1. A Notice of Noncompliance (NON) has been issued by MassDEP for the cleanup of the remediation site under the MCP. The NON requires that the remediation project be completed prior to June 2009. Due to time-of-year restrictions in the contaminated

- coastal beach area, the proponent states that remediation activities need to start in October 2007 in order for the June 2009 deadline to be met.
2. The proponent of the remediation project and the entity solely paying for remedial actions under the MCP is NL Industries, Inc., not Glover Estates, LLC. NL Industries, Inc. has completed the necessary studies in response to the scope of impact assessment, alternatives analysis and mitigation measures called for in the Certificate on the EENFs.
 3. The conditions surrounding the Lafayette Tides housing development project have changed. The proponent of the housing project has informed NL Industries, Inc. that it is not ready to proceed with the MEPA process at this time as it is awaiting the outcome of local permitting reviews and public hearings in which it is seeking permit approvals to build one of two options for housing on the site.
 4. The remediation project alone does not require a Chapter 91 license for non-water dependent uses and activities in the former tidelands area along the Forest River.

Jurisdiction

As outlined in the Certificate on the EENFs, the remediation and housing projects were subject to the preparation of a Mandatory EIR pursuant to Section 11.03(3)(a)(5) of the MEPA regulations because a Chapter 91 Waterways License was required for a new non-water dependent use occupying one or more acres of tidelands. The projects also met MEPA review thresholds for wetlands due to impacts to coastal beach and bank (301 CMR 11.03 (3)(b)(1)(a)); salt marsh (301 CMR 11.03(3)(b)(1)(c)); and regulatory floodway (301 CMR 11.03(3)(b)(1)(e)).

While it was work associated with the Chapter 91 impacts of the Lafayette Tides housing project that triggered the mandatory EIR threshold, the Secretary determined that there were enough interconnected issues related to the permitting and potential impacts from both projects that a combined set of EIR documents should be prepared. In its comments on the EENFs, MassDEP indicated that it could consider permitting the remediation project separately from the residential project if the Draft EIR provided enough information for the Department to determine that the remediation is sufficiently distinct from the Lafayette Tides project. The proponent states in the NPC that a Chapter 91 license is not required for the remediation work; MassDEP supports this statement in its comments on the NPC.

MEPA jurisdiction on the remediation project is limited to the subject matter of required or potentially required state permits. The remediation project requires the following permits and/or review: a Category II Programmatic General Permit from the United States Army Corps of Engineers (U.S. ACOE); a Chapter 91 Waterways dredging permit and 401 Water Quality Certification from the Department of Environmental Protection (MassDEP); Federal Consistency Review from the MA Office of Coastal Zone Management (CZM); and Orders of Conditions from the Salem and Marblehead Conservation Commissions.

Criteria for a Phase I Waiver

Section 11.11 of the MEPA Regulations provides that the Secretary may waive any provision or requirement of 301 CMR 11.00 not specifically required by MEPA, and may

impose appropriate and relevant conditions or restrictions, provided that the Secretary finds that strict compliance with the provision or requirement would: a) result in undue hardship to the proponent, unless based on delay in compliance by the proponent; **and** b) not serve to minimize or avoid damage to the environment.

The MEPA regulations at 301 CMR 11.11(4) state that, in the case of a partial waiver of a mandatory EIR review threshold that will allow the proponent to proceed with Phase I of the project prior to preparing an EIR, I shall base the finding required in accordance with 301 CMR 11.11(1)(b) on a determination that:

- (a) the potential environmental impacts of Phase I, taken alone, are insignificant;
- (b) ample and unconstrained infrastructure facilities and services exist to support Phase I;
- (c) the project is severable, such that Phase I does not require the implementation of any other future phase of the project or restrict the means by which potential environmental impacts from any other phase of the project may be avoided, minimized or mitigated; **and**,
- (d) the agency action on Phase I will contain terms such as a condition or restriction, so as to ensure due compliance with MEPA and 301 CMR 11.00 prior to commencement of any other phase of the project.

Findings

Based upon the information submitted by the proponent and after consultation with the state permitting agencies, I find that the Waiver Request has merit and that the proponent has demonstrated that the proposed project meets the standards for all waivers at 301 CMR 11.11(1). I find that strict compliance with the requirement to submit a mandatory EIR prior to completion of Phase I of the project would result in an undue hardship for the proponent. Due to time-of-year restrictions imposed by the Massachusetts Division of Marine Fisheries, the proponent is prohibited from conducting remedial activities and excavation of contaminated soil, sediment and coastal resource areas along the shoreline between February 16 and September 31. In order to meet the June 2009 deadline imposed by MassDEP deadlines in the NON, the proponent states that work in the coastal resource areas must begin by October 1, 2007. Delaying the MCP activities until the completion of a combined Draft and Final EIR for the remediation project and the housing development is likely to subject the remediation project to additional delays from potential appeals of the housing development. In addition, a delay in the remediation project due to local permitting for the housing development has the potential to prolong environmental contamination to the shoreline resource areas and public health risks that will be remedied through the MCP clean up.

I also find that compliance with the requirement to submit the EIR prior to the completion of Phase I would not serve to avoid or minimize Damage to the Environment. In accordance with 301 CMR 11.11(3), this finding is based on my determination that:

1. The potential environmental impacts of Phase I, taken alone, are insignificant;:
 - While there will be unavoidable impacts related to the excavation and remediation of contaminated materials, the site conditions pose an ongoing risk to humans and the

environment if left unremediated. The result of these remedial actions will serve to minimize Damage to the Environment as compared to present day conditions.

- The proponent has submitted a detailed alternatives analysis with the NPC to demonstrate that the remediation and restoration activities have been designed to avoid and minimize environmental impacts. In response to comments from MassDEP and CZM that the proponent's preferred alternative for coastal bank restoration is not permissible, the proponent has committed in writing to implementing an alternative that complies with the Wetlands Protection Act regulations.

The remediation project alone does not exceed a MEPA mandatory EIR threshold.

While the remediation activities exceed ENF review thresholds for wetlands, the proponent has demonstrated in the NPC and will further demonstrate in local and state wetlands and dredging permit applications that potential environmental impacts have been avoided, minimized or mitigated.

- The proponent has proposed and committed to a comprehensive Wetlands Mitigation and Monitoring Plan. The plan was developed in conjunction with, and reviewed by MassDEP, CZM, the ACOE and the Marblehead Conservation Commission and will be fully implemented as part of the remedial actions to be performed. The proponent has committed to the ongoing monitoring of wetland restoration areas. I expect these monitoring commitments to be addressed and enforced in local and state wetlands permits for the project.

The proponent has committed to extensive site controls, soil management practices, erosion and sedimentation controls, and other Best Management Practices to protect the environment and public health during the remediation activities. These measures are required under the MCP and will be closely monitored and supervised by a Licensed Site Professional.

2. Ample and unconstrained infrastructure facilities and services exist to support Phase I:

- The remediation project requires no new or special infrastructure of facilities. All remediation activities will be carried out as normal construction excavation and soil treatment activities. The project will involve typical site clearing, earth moving, excavation, in-situ soil treatment and off-site disposal of contaminated material at an approved facility. Site utilities are below ground and will be avoided such that no adverse effects will result and no special services or measures are required.

3. The project is severable, such that Phase I does not require the implementation of any other future phase of the project or restrict the means by which potential environmental impacts from any other phase of the project may be avoided, minimized or mitigated.

- The remediation project is severable from the housing development or any future development on the site. The proponent for the remediation project is NL Industries, Inc. a separate and independent entity from Glover Estates, LLC, the current property owner and from KSS Realty Partners, the developer of the proposed housing project. NL Industries, Inc. is undertaking the remedial actions solely at its own expense and is required to complete site cleanup and closure under the MCP independent of any future development on the site.

The proponent's preferred remedial alternative for the site involves excavating contaminated soil and sediment from the site and removing the material for off-site disposal. Previously proposed post-remediation uses for the site required the relocation (capping and placing beneath engineered barrier) and re-use of excavated sediments on the upland portion of the site. The off-site disposal of contaminated material further demonstrates that the remediation project is severable from the housing development such that the remedial activities no longer require the implementation of future phases of the housing project.

- Conducting the site remediation under a Phase I Waiver will in no way alter the EIR requirements or permitting of the housing development project.
4. The Agency Action on Phase I will contain terms such as a condition or restriction in a Permit, contract or other relevant document approving or allowing the Agency Action, or other evidence satisfactory to the Secretary, so as to ensure due compliance with MEPA and 301 CMR 11.00 prior to Commencement of any other phase of the Project:
- The remediation project will apply for and receive all required local, state and federal permits prior to initiating remedial actions. These permits include a Category II PGP from the ACOE; a Chapter 91 dredge permit and 401 Water Quality Certificate from MassDEP; a Federal Consistency Determination from CZM; and Orders of Conditions from the Salem and Marblehead Conservation Commissions. The permits needed for remedial actions in coastal resource areas will ensure that all activities in resource areas, plus the requisite restoration of resources under a Wetlands Mitigation and Monitoring Plan will comply with applicable performance standards and agency conditions.
 - A Tier IC permit from MassDEP, Bureau of Waste Site Cleanup has already been issued and will stay in effect until site RAO closure is achieved. MassDEP states that the Phase I waiver and the separation of the remediation and housing development projects does not change the proponent's regulatory obligation to comply with the MCP process at the site. The proponent must still comply with the requirements of the MCP and achieve a RAO as required in 310 CMR 40.1000. The development of the housing development project requires a Chapter 91 License from MassDEP that cannot be issued before the Final EIR for the combined projects is deemed adequate. Without this permit the housing project cannot move forward and therefore there are adequate safeguards to ensure future MEPA compliance.

Conclusion

Based on these findings, it is my judgment that the Waiver request has merit and meets the tests established in Section 11.11 of the MEPA regulations. Both MassDEP and CZM have indicated support for the Phase I Waiver in comments on the NPC. The Draft Record of Decision (DROD) will be published in the next edition of the Environmental Monitor on May 23, 2007 in accordance with 301 CMR 11.15(2), which begins the public comment period. The public comment period lasts for 14 days and will end on June 6, 2007. Based on written comments received concerning the DROD, I shall issue a Final Record of Decision within seven days after the close of the public comment period, in accordance with 301 CMR 11.15(6).

I hereby **propose to grant** the waiver requested for this project, which will allow the proponent to proceed with Phase I of the project prior to preparing a mandatory Environmental Impact Report (EIR) for the entire project, subject to the above findings, and conditions, if applicable.

May 18, 2007

Date

Ian A. Bowles

Comments Received:

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| 4/26/2007 | Massachusetts Office of Coastal Zone Management |
| 5/1/2007 | Mark W. Roberts, McRoberts, Roberts & Rainer, LLP |
| 5/8/2007 | Jeffrey L. Roelofs, Anderson & Kreiger, for the Town of Marblehead |
| 5/11/2007 | Florence Denhard |
| 5/11/2007 | Sandra and Stuart Osattin |
| 5/11/2007 | Department of Environmental Protection, Northeast Regional Office |
| 5/11/2007 | Bob Fraser |
| 5/11/2007 | Daniel Garson, Woodard & Curran, for the Proponent |
| 5/14/2007 | Daniel Garson, Woodard & Curran, for the Proponent |
| 5/16/2007 | Richard Chalpin, Department of Environmental Protection, Northeast Regional Office |

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