John E. Baldacci

December 30, 2005

Honorable Scott Cowger, Senate Chair
Honorable Theodore Koffman, House Chair
Joint Standing Committee on Natural Resources
15 State House Station
Augusta, Maine 04333-003

Re: Report to the Legislature on LD 1592 "An Act Regarding Disposal of Dredged Materials"

Dear Senator Cowger, Representative Koffman and Members of the Natural Resources Committee,

LD 1592, An Act Regarding Disposal of Dredged Materials, was considered during the first regular session of the 122nd Legislature. The Natural Resource Committee (the Committee) voted to carry the bill over to the Second Regular Session of the 122nd to allow the involved state agencies adequate time to the issues raised in the legislation.

By letter dated June 9, 2005 to the Commissioners of the Departments of Transportation (MaineDOT) and Environmental Protection (MDEP), the Committee requested that the departments, in consultation with the Department of Marine Resources (DMR) and the State Planning Office (SPO), review the issues raised in LD 1592, as well as existing information and studies and the feasibility of regional solutions for dredged material disposal. Further, the Committee requested that the departments consider the input of other relevant state and federal agencies and stakeholders in their review. The Committee requested the departments report back their findings and recommendations, along with any suggested legislation to the Committee by January 15, 2006. The following is a summary of the departments' process, findings and recommendations:

Process

In early August, staff from MaineDOT and MDEP held an initial meeting with representatives from DMR and SPO, as well as a representative from the United States Army Corps of Engineers (USACE). The purpose of the meeting was to establish and

define the range of issues raised in the legislation and to identify other individuals and agencies that could assist in this effort. Representatives from the following associations, agencies and consulting firms were invited to attend and participate in subsequent discussions: State Representatives Jeff Kaelin and Hannah Pingree, Maine Lobstermen's Association, Maine Marine Trade Association, Maine Municipal Association, Friends of Casco Bay, Portland Waterfront Alliance, Prock Marine Services, Maine Geological Survey, and the United States Environmental Protection Agency (USEPA). The work group has met a number of times to consider the issues that were raised in the legislation.

Background

At its first meeting, the work group discussed the incident that prompted LD 1592 and related issues. In February 2005, MDEP issued a permit under the Natural Resources Protection Act (NRPA) to the proprietors of Union Wharf to conduct maintenance dredging at the berthing facility for the Maine Responder in the city of Portland. The Maine Responder is the largest in a fleet of vessels owned by the Marine Spill Response Corporation, a private business, that contracts with oil terminals to implement USEPA requirements for oil spill response and recovery services. The amount of material dredged totaled 750 cubic yards. That amount of dredged material was able to be transported in a single barge to the authorized dredged material disposal site, the Rockland Disposal Site (RDS) in Penobscot Bay. Due to cost considerations related to federal dredged material testing requirements, Union Wharf proposed to barge these materials to RDS instead of the Portland Disposal Site (PDS). This action prompted concerns in the Penobscot Bay region and led to the introduction of LD 1592.

There was acknowledgement by the work group that proposals to barge dredged material considerable distances from dredging operations is very rare. The MDEP could not identify another instance where this had occurred.

Findings of Review of Dredged Material Disposal in Coastal and Federal Waters

Dredging and the management of dredged material in the state of Maine are regulated jointly by the MDEP and USACE. Permits are required from both agencies for any dredging activity in coastal waters to ensure that marine life and water quality are protected. Applicants proposing to dredge must file a NRPA application with MDEP. State requirements for collecting and testing sediments are the same as those of the USACE, and are outlined in the federal Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters (RIM). The RIM implements the national testing guidelines under Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA) and Section 404 of the Clean Water Act (CWA). The MPRSA governs all dredged material disposal projects in New England ocean waters seaward of the territorial sea baseline, and Section 404 regulates the disposal of dredged material into waters landward of the territorial sea baseline. There are currently three federally authorized dredged material disposal sites off the coast of Maine. RDS in Penobscot Bay is a Section 404 site. PDS, outside Casco Bay,

and the Cape Arundel Disposal Site (CADS)[1] off the southern Maine Coast are MPRSA sites.

Based on decades of research and field testing, the USACE now uses a tiered approach to testing and evaluation of the material to be dredged to provide a necessary and sufficient level of analysis for each specific dredging operation. The initial tiers use existing information and relatively straightforward procedures for determining potential environmental impact of the dredged material. For example, if the material is all coarse sands and gravel which do not hold contaminants, then no further testing is required. However, if based on initial tier results more extensive evaluation is deemed prudent, then more intensive biological evaluation procedures are required. The intent of the tiered approach is to use resources efficiently by testing only as intensively as necessary to provide sufficient information for permit reviews, while avoiding unnecessary testing and associated public and private costs.

The range of possible tests under both Sections 404 and 103 jurisdictions is identical. However, review under Section 404 provides regulators with a greater degree of flexibility to match the amount and types of testing to the conditions of the individual project. If the regulators believe that bioassays and bioaccumulation tests are important to reach a decision on a Section 404 project, then they will be required. Essentially, Section 404 has more flexibility in the review process to employ professional judgment, weight-of-evidence and reason than does Section 103. Review under Section 103 is extremely rigid, requiring biological assays in virtually all cases, regardless of how clean the material is. When initial tier testing has shown sediment to be acceptable for disposal, subsequent bioassay and bioaccumulation tests have never contradicted the initial tier testing and shown it to be in error.

There are a number of factors that contribute to the overall cost of conducting a private dredging operation. The primary considerations are the amount of material to be dredged, the amount of testing that will be required, the choice of a disposal site, and the travel distance to the disposal site (if ocean disposal). The choice of a disposal site and the specifics of the dredge site will determine the level of testing requirements. The costs for testing dredged material range from a couple of thousand dollars per sample for bulk sediment/chemical testing to between 40 and 50 thousand dollars for biological testing. In a situation where RDS, regulated under Section 404, is the preferred disposal option, the USACE would assess the dredged material utilizing their tiered approach. With the exception of the dredged material from the Union Wharf project, all of the dredged material disposed at RDS since its designation as an authorized disposal site has come from dredging operations in the Penobscot Bay/Mid Coast Region.

Data indicates that bulk sediment/chemical testing for the Union Wharf dredging project demonstrated that the material to be disposed met federal and state standards for disposal at RDS. However, disposal of that dredged material at PDS would have

[1] CADS received interim but not final approval as a federally approved disposal site for dredged material. This interim approval expires in 2010. State and federal agencies have had preliminary discussions about the process for federal designation of a site to replace CADS.

required additional biological testing of the material due to the rigidity of the regulations. In instances of small dredging operations, the relative cost of conducting biological testing is a very significant (>$50,000) percentage of the total budget. If this had been a large project, the incremental costs of testing would have been relatively small. For dredge operations in which the amount of dredged material can be accommodated in a single dredge scow, the feasibility of disposal at a Section 404 site increases in relation to the increased testing costs for disposal at a Section 103 site.

Dredging Project Data

From January, 2000 until early spring of 2005, the MDEP and the USACE have processed 50 applications for dredging operations along the coast of Maine. Of these, 12 were conducted for the maintenance of Federal Navigation Channels, with the remaining 38 for private projects. The materials from the12 Federal Navigational Projects were disposed at RDS (3), CADS (2), other ocean disposal sites (5), and on 2 projects, the material was utilized for beach nourishment. The average amount of dredged material from these projects was approximately 60,000 cubic yards, compared to Union Wharf's project of 750 cubic yards. Of the 38 private dredging operations during this period, 7 utilized PDS, 13 utilized RDS, 1 utilized CADS, 11 utilized upland disposal[2], and in 6 instances, the material was disposed of at other ocean sites. The average size of these projects was 12,000 cubic yards. Most of the private projects were to accommodate boat yards and berthing areas for commercial activities.

Review of Issues Raised in LD 1592

Under present law, all dredging and dredged material disposal projects must receive a NRPA permit. An NRPA permit may only be issued if the proposed dredging project meets Water Quality Standards. Water Quality Certification is the means by which MDEP ensures that disposal of dredged materials is compatible with Maine's Water Classification Standards.

LD 1592 would remove the current exemption under 38 M.R.S.A. Section 413, subsection 2-C (Waste Discharge Law) for the disposal of dredged material for projects permitted by USACE under the CWA (Section 404) and MPRSA (Section 103) and Maine's own NRPA. If that were to occur, applicants for dredging operations would require an additional permit from the MDEP with no gain in environmental protection. In addition, MDEP's waste discharge licensing program is not set up for a one time or infrequent disposal operation. Discharge licenses are written for daily, weekly and monthly effluent limits. The work group considered whether by adding this permit, the state might be able to exert more control over the process and concluded that the state already has adequate authority to require additional testing when necessary through existing NRPA permitting and Water Quality Certification.

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[2] Upland disposal may represent a viable option for some small dredge operations with limited amounts of dredged material. The disposal of dredged material in this manner is regulated under the MDEP's Solid Waste Rules for Beneficial Uses.

If the intent of the legislation was to eliminate what appeared to be a double standard in the testing protocols and to establish uniform testing requirements for dredged material disposal along the coast of Maine, there is really only one course to follow, and that is to require Section 404 sites to be managed exactly like the MPRSA sites, with inflexible and expensive testing. Alternatively, changing MPRSA testing requirements to the more flexible Section 404 process would need to be addressed at the federal level, and therefore would be an arduous and lengthy process. Members of the work group concluded that making state requirements for Section 404 and Section 103 disposal reviews the same would most assuredly have unintended consequences for all small dredging operations statewide, regardless of volume or lack of contamination. Small dredge operations in Penobscot Bay and elsewhere along the coast that support lobster fleets, like the Corea Lobster Coop, would suffer and the environment would not gain. Rather, the work group was unanimous that the state needs to do a better job educating the public on how dredging decisions are made, what testing is done, what the results mean and why state agencies are confident that the process is sufficiently monitored and managed to avoid unacceptable impacts.

The legislation would also require each municipality along the coast to develop a disposal plan for the disposal of dredged material. The work group identified a number of problems that the legislation presented, they are:

- There are a very small number of private dredge operations in any given year and a limited number of municipalities with areas that may require dredging;
- There is no assurance that a municipality would limit disposal to an adjacent disposal site as opposed to designating any authorized site that meets state and federal requirements as acceptable. In addition, there is the potential for conflict and inconsistency among plans, and the bill specifies no mechanism for coordinated planning and action by adjoining or neighboring towns;
- Municipalities may lack the capacity to develop such plans and the bill makes no provision for providing potentially needed financial or technical assistance; and
- There was general consensus on the work group that the municipal role and interest in this issue are unclear. Disposal of dredged materials takes place outside of municipal boundaries in state or federal waters. As contrasted with solid waste management, the municipality has no territorial involvement and no role in the management of ocean disposal sites.

For these reasons, the work group does not recommend adoption of either of the bill's proposals.

Recommendations

The work group did identify a number of actions that would benefit the state and coastal communities in which dredging operations occur. MDEP and MaineDOT agree with these findings and make the following recommendations:

- ***Establish regularly scheduled meetings among state and federal agencies and other interested individuals representing private and public entities as well as marine interests***. State agencies have met regularly to establish dredging priorities for Federal Navigational Channels. In addition, state and federal agencies involved in dredged material management have recently established a regular schedule for meetings to discuss overall dredging management issues. The work group recommends formally establishing a Dredge Work Group, and that its meetings be expanded to include private and public individuals representing municipal, commercial and marine interests. Oversight of the Work Group would be under the purview of the Land and Water Resources Council (LWRC). This would be consistent with the National Dredging Team/Regional Dredging Team initiative to create state or project-specific stakeholder groups to improve coordination on dredging projects.

- ***Continue discussions with federal agencies, most importantly the USEPA, over the testing requirements for the disposal of dredged material at Section 103 disposal sites*.** Initial discussions with USEPA and the USACE have focused on the regulatory and policy behind the testing. However, the workgroup believes that further discussions are important. The focus in these discussions would be to explore possibilities for establishing the tiered testing protocol currently employed by the USACE, establishing waivers for biological testing requirements for small dredge projects or other options to lessen the burden on small dredge projects while ensuring adequate protection of the marine resources. The workgroup recommends that the state agencies consider bringing this issue to the state's congressional delegation to facilitate those discussions.

- ***Reinforce a strong role for state agencies, principally DMR, in reviewing specific testing requirements for individual dredge operations***. This was also thought to be a routine topic for discussions at the Dredge Work Group meetings discussed above. The work group expressed an interest in ensuring an opportunity for the public to access and provide comments to the reviewing agencies on information and issues related to project specific testing requirements.

- ***Revisit the <u>Dredging Management Action Plan</u> (DMAP) recommendations.*** Although not directed by LD 1592, a number of members of the workgroup identified the need to continue discussions on the recommendations contained in the DMAP, developed for the MaineDOT in 2002. The DMAP was prepared by a consultant to identify solutions to insure that Maine's coastal waterways are dredged in a safe, economic, and environmentally sound manner. The consultant's work was overseen by the DMAP Oversight Committee, which was comprised of a broad spectrum of state and federal agencies, private and public interests, including marine and commercial interests. The workgroup suggests that MaineDOT and other state and federal agencies resume discussions on the recommendations in the DMAP.

The staff of MaineDOT and MDEP looks forward to partnering with others in implementing the workgroup's recommendations. They are available at your request to discuss the findings and recommendations in this letter.

Sincerely,

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David A. Cole, Commissioner	David P. Littell, Acting Commissioner
Dept. of Transportation	Dept. of Environmental Protection