

**COMMONWEALTH OF MASSACHUSETTS
BOARD OF UNDERWATER ARCHAEOLOGICAL RESOURCES
MINUTES OF PUBLIC MEETING – 28 SEPTEMBER 2006**

MEMBERS PRESENT: Marcie Bilinski (Dive Community Representative)
Kathleen Dolan (Designee of James Hanlon, Director of Environmental Law Enforcement)
Brendan Foley (Marine Archaeologist)
Terry French (Designee of John Warner, State Archivist)
John Hoagland (Dive Community Representative)
Lenny Loparto (Designee of Brona Simon, State Archaeologist)
Martha King (Director of DCR Division of Waterways)
Victor Mastone, Director (Staff for the Board)
David Trubey, Deputy Director (Staff for the Board)

MEMBERS ABSENT: Ed Bell (Designee of Brona Simon, Acting Executive Director of the Massachusetts Historical Commission)
Joseph Pelczarski (Designee of Susan Snow-Cotter, Director of Coastal Zone Management)

PROCEEDINGS:

The public meeting of the Massachusetts Board of Underwater Archaeological Resources was convened by the Director, Victor Mastone, at 1:31 PM on 28 September 2006 in the CZM Conference Room at 251 Causeway Street, Boston.

1. MINUTES

A. Minutes of 27 July 2006

Victor asked if there were any comments or corrections to the minutes of the public meeting held on 27 July 2006. There were no comments or corrections to the minutes.

Terry French moved to accept the minutes of the 27 July 2006 public meeting. John Hoagland seconded. Unanimous vote in favor. So voted.

2. DIRECTOR'S REPORT

Victor stated that the only action items on today's agenda are administrative proposals under new business. He noted he would mention Archaeology Month and another item under Outreach.

3. BOARD MEMBER REPORTS

There were no Board member reports.

4. SUBCOMMITTEE REPORTS: OUTREACH

A. Archaeology Month 2006 Event

Victor reported that for this year's participation in Massachusetts Archaeology Month, the Board would again be co-sponsoring an exhibit with the Newburyport Maritime Society. The event, entitled *What Lies Beneath* is a one –day event at the Custom House Maritime Museum on Saturday, October 14 from 10 am – 3 pm. The event will highlight the technology used by marine archaeologists to locate and investigate submerged

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archaeological sites and will include a simulated shipwreck excavation for kids and an exhibit by the Stellwagen Bank National Marine Sanctuary. Victor encouraged Board members to stop by or assist with the event.

B. Quincy Beaches and Coastal Commission

Victor reported he received a request from the Quincy Beaches and Coastal Commission to give a lecture. It will be on Thursday, October 19th, at 7 PM. He didn't know the specific location at this time.

5. OLD BUSINESS

A. James Karos

Mr. Karos presented the Board with the latest version of the photo mosaic he is developing at his site in Chelsea Creek. He reported that he has continued to add on to the mosaic and attempted to have the printers even out the color for the latest series of photos, which did not provide the results he had hoped for. He noted that he has been having a little trouble getting access to the site this fall because of the amount of tanker traffic at the petroleum facility. He hopes to finish this part of the project in the coming weeks and added that he is really enjoying the project.

David Trubey asked Mr. Karos what percentage of the wreck has been photographed and included in the mosaic. Mr. Karos replied that approximately sixty percent of the wreck is currently represented. He noted that there was an oil spill in the area a few months ago, but that the cleanup went very well.

6. NEW BUSINESS

Victor reported that he had been undertaking a number of administrative initiatives this summer. Among these are: (1) policy guidance on human remains; (2) isolated finds FAQ sheet; and (3) policy guidance for unanticipated finds (not human remains) for public projects not required to have a permit. However, in working on the third item, it occurred to him that it might be more useful to create a new permit type to deal with public projects - the special use permit. The creation of a new permit type would require a change in the regulations.

A. Draft Policy Guidance on the Unanticipated Discovery of Human Remains

Victor noted that while this topic is an area clearly under MHC, State Archaeologist, authority, it has come up with respect to our permittees. He reminded the Board that Victor Ricardo thought he observed human remains in one of his video reconnaissance transects of his permit area. A significant amount of time elapsed before he brought this to the Board's attention and there were no procedures or reporting instructions in place. In addition, it is an area where Victor believes the Board's staff can be of direct technical assistance/service in a subordinate support role to MHC and where the Board needs to eliminate any confusion for its permittees and possibly project proponents. In addition to working on this with David Trubey, Vic said he had received comments from Board member Lenny Loparto, Tom Mahlstedt and Bill Stokinger at DCR, Roger Arduini at MEP, and Margaret Callanan, EOEAs Deputy General Counsel.

Lenny Loparto suggested that the document should include agency email addresses to facilitate the transmittal of digital photographs and other information particularly in the case of the medical examiner's office. Victor acknowledged Lenny's suggestion and stated that he would include that information.

Kathleen Dolan stated that the contact list should have the State Police at the top as any time human remains are found, the area is considered to be a crime scene until determined otherwise. Victor acknowledged Kathleen's comment and stated that he had listed the project director first, because in most archaeological

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projects, a crew member does not have the authority to stop work. He added that perhaps he should make a footnote on the document indicating that it is the responsibility of the finder to ensure that notification is made to the State Police. Victor proposed adding the following text delineated with an asterisk.

The finder is responsible under state law to ensure that the proper authority is notified when suspected human remains are encountered.

Marcie Bilinski moved to adopt *Policy Guidance on the Unanticipated Discovery of Human Remains*. Terry French seconded. Unanimous vote in favor. So voted.

B. Draft Frequently Asked Questions on Isolated Finds and Discovering Artifacts in Massachusetts Waters

Victor reported that he has been working with EOE's legal office on the attached draft *Frequently Asked Questions* (FAQ) sheet for isolated finds. He reminded the Board that it has an established regulation and reporting/application form dealing with isolated finds, which are handled as exceptions to the permitting process, but are subject to Board approval similar to permits. He noted the Board has probably received and approved less than 30 such isolated find applications over the past 20 years. He strongly believes the incidents of collecting, but not reporting isolated finds are significantly higher. Rather than develop a "formal" guidance document, he stated he approached this issue through a FAQ (frequently asked question) sheet. The FAQ will be attached to the Board's isolated find form and eventually added to its web page. He added that he feels he did a good job of using simple, plain language and demonstrated there is a difference between finds underwater (Board jurisdiction) and finds on land (not Board jurisdiction).

John Hoagland stated that in cases in which materials wash up on the beach from an offshore site, the Board would definitely want to be notified. Victor agreed and stated that while he thinks the language of the current document makes a strong distinction between terrestrial and submerged finds, it also leaves the door open for the Board to make jurisdictional distinctions in cases that are not so clear cut. He also noted that the new SHIPS program, once it is fully operational, will also help deal with isolated finds along the inter tidal zone. Victor emphasized that he will likely create a document that details the Board's policy regarding isolated finds at a later date, but that the FAQ document is a good place to start regarding this issue.

Lenny asked if it would make sense to change the definition of an isolated find to include artifacts rather than just a single artifact. Victor stated that if the Board makes the definition too broad, people might mistakenly consider a site to be an isolated find and not report it. He pointed out that the button collection that was designated as an isolated find earlier was an exception to the policy because there were several objects that had no archaeological context. Lenny asked Victor about the 100 year age requirement specified in the regulations for artifacts to be considered historic. Victor replied that the regulations also state that the Board can deem an artifact or site to be historically significant regardless of its age and would likely apply the National Register eligibility criterion of fifty years in such a case. He noted that the regulations do allow a bit of leeway.

Marcie Bilinski expressed her concern that this document might create some resentment among the diving community. Victor stated that he does not think it will raise concern and noted that he purposefully left the artifact age issue off the document so that people would not be making their own determinations of age/significance, but would rather leave that determination to the Board.

Brendan Foley stated that there is really no incentive for someone to report an isolated find and that in fact, there is a weak disincentive in that the Board could vote not to grant an isolated find exemption. Victor agreed and stated that he hopes the document will help the public to better understand the concept of isolated finds and increase their reporting.

Terry French moved to adopt the *Frequently Asked Questions on Isolated Finds and Discovering Artifacts in Massachusetts Waters*. Brendan Foley seconded. Unanimous vote in favor. So voted.

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C. Draft Policy Guidance on the Discovery of Unanticipated Underwater Archaeological Resources

Victor noted he had been developing a generic policy guidance document for the discovery of unanticipated finds of underwater archaeological resources, mostly due to dredging or construction activities. This policy would be directed chiefly to projects that either do not require a MBUAR permit or have already undergone archaeological studies with a resulting determination of no adverse effect in project impact areas. Further, more often than not in the environmental review process, sufficient evidence is not found to warrant an archaeological investigation, but the Board cannot conclude the complete absence of archaeological resources. Although this would be tailored to individual project needs, Victor stressed that the policy guidance is directed toward projects subject to environmental review. He added that he would reference this guidance in the Board's comment letters rather than attach it to each letter. In the future, Victor hopes to expand this and further elaborate on procedures specific to encounter circumstances - at sea (underway), on deck (e.g., spoils barge), or at dock/onshore (e.g., beach nourishment).

Marcie Bilinski asked if such scenarios would be similar to what happened to the *YMS-114* which was by diver accounts inadvertently moved by a dredging operation. Victor stated this is the type of thing that the document is trying to address and that the document could be attached to the Board's project review comment letters. He noted although the Board certainly does not have to approve the document today, it should start thinking about this issue. He added that unanticipated discoveries would still have to be modified on a case by case basis, but that it is a good starting point.

Referring to the document, Lenny asked what happens in a case such as number six, in which a remote sensing target's National Register eligibility cannot be determined by visual inspection as the target is buried in sediment. Victor replied that the Board could require additional data on the basis that the data presented is insufficient. Marcie asked if the Board could require a major project change such as a rerouting of a pipeline, if the National Register eligibility of an unanticipated discovery could not be determined. Martha King stated that such a design change at that point in a pipeline project would be a major undertaking and would likely require the proponent to remove a large amount of the pipe from behind the particular location. Victor stated that what would likely happen in such a situation is some level of mitigation. Victor responded to Lenny's concern by changing the wording of the document to include "7b. If National Register eligibility cannot be determined in accordance with step 6, the project proponent may either undertake additional research to satisfy step 6 or exercise step 8 (avoidance).

Lenny asked whether or not the Commission on Indian Affairs should be listed on the contact list for this document as well. Victor replied that he attempted to cover potential tribal involvement by listing "others to be named based on applicable state jurisdiction", but that perhaps he should allude to them more directly by changing the contact listing to read "other applicable state jurisdictions such as tribal historic preservation officers". Lenny agreed with this change.

Terry French moved to adopt *Policy Guidance on the Unanticipated Discovery of Underwater Archaeological Resources* as amended. Kathleen Dolan seconded. Unanimous vote in favor. So voted.

D. Proposed Regulatory Changes

Victor reported that after reviewing the Board's statute and consulting with EOE's legal office, the Board could create a new class of permits to specifically address projects requiring environmental review (such as those under MEPA review) and for public planning purposes. The Board's current permit types - reconnaissance and excavation - are aimed at addressing conditions for gaining private ownership of resources as opposed to resource protection. These permits, with the underlying ownership issue, are somewhat contrary to the principles of archaeological investigations for scientific purposes associated with environmental review and public planning. Additionally, permits are granted on the basis of "demonstrable proof" of the existence of an underwater archaeological resource. This requirement has worked well for most private entity permit applications as it is a threshold to help weed out fraudulent and frivolous permit applications. This does not work well, sometimes not at all, for larger public projects at the early planning stages, especially when there is no physical evidence of a resource's existence. A new permit category would create a more appropriate framework for

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researchers and project proponents consistent with general accepted federal and state historic preservation practices and would treat terrestrial and underwater cultural resources in the same regulatory manner. In many respects, this approach is an attempt to achieve consistency with the terrestrial process, particularly the State Archaeologist's Permit.

Victor noted that in the past, the limits on permit types and numbers required an archaeological consulting firm permittee to modify (from excavation to reconnaissance) and surrender permits (limited to 2 permits) when they simultaneously had three/four active projects in Massachusetts waters. The Board had to hold a special meeting to address the firm's needs. He reminded members of the permitting issues surrounding the New Bedford Harbor Superfund Restoration Project when the proponent changed archaeological consultants. The Board could not issue a permit to the new archaeological consultant until after the previous consultant surrendered its permit. Recently, there have been two competing proposals for LNG offshore facilities in Massachusetts Bay. This may have been problematic under the Board's existing regulations given the exclusivity clause if both proponents needed a permit for the same area. Fortunately, the project areas did not overlap. Similarly, the "demonstrable proof" threshold was not appropriate for these initial archaeological research projects and precluded them from the permit process. The Board had to rely on other agencies to insure its concerns were met. Fortunately, they and both project proponents were cooperative.

Kathleen Dolan asked if the Board's limit on the number of permits it issues to a particular party has ever been thought to impede commerce. For example, she offered a scenario in which a company is big enough to handle five or six projects in state waters at one time, but with its permit limitation, the Board only allowed the firm to take on two of these projects. Victor replied that the legality of the entire set of the Board's regulations, as they exist today, has been upheld. Victor said he would prefer to wait until there is a legal challenge to this regulation before attempting to change it and added that the proposed new permit classification should alleviate this problem. Martha King echoed Kathleen's concern. Victor stated that most of the firms working in the Commonwealth do not currently have the staff to handle more than one permitted project at a time. James Karos asked Victor why the permit limitation was enacted in the first place. Victor replied that it was intended to prevent one party from essentially locking up an entire coastline for a site that is in fact contained in a much smaller area.

David Trubey asked Lenny Loparto if the Massachusetts Historical Commission imposes limits on the number of permits that can be held by one party. Lenny stated that there are no limits in the regulations, but there are other factors that are taken into consideration.

Victor said he wanted to point out that this new permit type if adopted would not have any effect on current permittees, future permittees seeking reconnaissance or excavation permits, or the sport diving public. Victor noted that in addition to review by EOE's Legal Office, he had received comments from John Hoagland. He added he also asked several outside parties, archaeologists inside/outside government, for comments and had heard back from David Robinson of the Public Archaeology Lab.

Victor proposed the Board consider discussing each of the draft regulatory revisions, agree on language, and approve them as a group. The relevant sections include sections: 2.04; 2.05; 2.06(1); 2.06(1) (c); 2.06(2) (b), (c), and (d); 2.06(3); 2.07(3); 2.12(2); and 2.13. Once the Board approves these changes, they would then go to EOE and ANF for review and approval. Assuming they are approved, the 90 day public comment period would then begin. Victor detailed the proposed changes as follows:

2.04 – add new definitions:

"Special use permit - authorization to explore for or collect underwater archaeological resources for scientific purposes associated with environmental review and public planning purposes and where underwater archaeological resources remain the property of the Commonwealth."

Lenny asked if the definition here should be consistent with that located on page 6 which includes the words "or for other scientific purposes" at the end of the sentence. Lenny suggested that this definition implies that one can acquire a special use permit independent of environmental review and public planning. Victor acknowledged Lenny's suggestion and noted that although the agency's attorney did not find a problem with this specific language, "other scientific purposes" should perhaps be added to the special use definition. He added that his intention in including "scientific purposes" was to draw a distinction between the special use permit and the

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traditional reconnaissance and excavation permits, particularly regarding the issue of resource ownership. He did not want to call the special use permit a “scientific permit” because that would imply that the reconnaissance and excavation permits are not scientific and that is not the case. Although their main purpose is not necessarily scientific research, the requirements of these permits include a research design and methodology that are based on scientific principles. Victor suggested the definition be reorganized to read “authorization to explore for or collect underwater archaeological resources associated with environmental review and public planning purposes or other scientific purposes and where underwater archaeological resources remain the property of the Commonwealth”.

2.05 – at the end, add:

“Special use permits may be issued by the Director for a provisional period not to exceed the date of the next regularly scheduled meeting of the Board where a quorum is present.” Victor explained that the purpose of this change is due the fact that when a permit comes up in the summer, it is very difficult to obtain a meeting quorum. This change would give the Director the ability to grant a special use permit which would then be ratified by the Board at its next meeting. This would not take away the Board’s power of approval, but would eliminate any significant delay in the project review process.

2.06 – at the end, add:

“, except in the case of special use permits.” Victor explained that this change is to make an exception to the demonstrable proof requirement for the issuance of permits as it is not appropriate for the special use permit.

2.06(1) -

(1) Permit Types. The Board issues three kinds of permits, one for reconnaissance, one for excavation, and one for special use.

2.06(1) -

“(c) Special Use – special use permits are granted for underwater archaeological investigations associated with a project’s environmental review and public planning purposes, or other scientific purposes. Activities and techniques are subject to an archaeological research design approved by the Director. Special use permits are granted only to qualified archaeologist or an organization qualified to undertake archaeological research. All underwater archaeological resources remain the property of the Commonwealth.” Victor noted that again, the language used in this section is intended to draw a distinction between the purpose of this permit and the others and emphasize that ownership of resources located under a Special Use permit remains with the Commonwealth.

2.06(2) (b) – replace with:

“A reconnaissance or excavation permit, but not a special use permit, gives the permittee sole use of the granted site for the purposes specified in the permit to the exclusion of all other persons.”

2.06(2) (c) – at the end, add:

“There is no limit on the number of special permits issued to a qualified archaeologist or an organization qualified to undertake archaeological research.” Victor noted that he does not think the fact that a limit is not specified in this section will be a problem as he does not anticipate being overwhelmed by applications, at least not in the immediate future.

2.06(2) (d) – in the third sentence, delete the phrase “two categories of shipwreck” and replace with “three categories” and at the end, add:

“3. Area of project effect - The area of project effect is the study area as defined for environmental review and public planning purposes, or other scientific purposes. This category is restricted to use solely for special use permits.” Victor noted that this proposed change will give the Board a little more latitude in terms of the study zone and the terminology is more in line with that of the environmental review process. Additionally, it allows the Board to issue permits that are larger than the typical one nautical square mile as most of the projects subject to a Special Use permit involve irregularly shaped and larger project areas.

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2.06(3) – at the end, add:

“The provisions of this section do not apply to special use permit applications.” Victor explained that this change should alleviate the potential for conflicting claims under the Special Use permit by allowing overlapping permit areas.

2.07(3) (p) – at the end of (p), add new subsection (r):

“(r) Provisions (b), (m), (n), and (q) of this section do not apply to special use permit applications.” Victor explained that these proposed changes concern the permit application itself as certain requirements are not applicable to the special use permit. These include the requirement of a potential permittee to provide demonstrable proof of a resource, the center point of the requested permit area (as it will likely be an irregular shape), an application fee, and the financial qualifications statement (as it is typically assumed that a reputable firm will be financially able to complete the work).

Regarding the issue of application fees, John Hoagland stated that he is concerned that people will submit frivolous applications because there is no application fee to serve as a deterrent. Victor replied that even if the Board wanted to impose a fee, it is nearly an administrative impossibility at this time. Furthermore, the Board needs to maintain consistency with the Massachusetts Historical Commission which does not charge a fee for a State Archaeologist’s permit. Victor believes the fact that this permit is for specific purposes and does not allow for salvage and resource ownership should dissuade people from submitting frivolous applications.

2.12(2) – at the end, add:

“Special use permits cannot be modified into a reconnaissance or excavation permit.” Victor explained that this change is designed to prevent a permittee from locking up the large project areas permissible under a special use permit for further work (i.e. excavation) on a particular resource.

2.13 – following the third sentence, insert:

“All underwater archaeological resources recovered under a special use permit remain the property of the Commonwealth and are not subject to the provisions of this section.”

Lenny Loparto asked Victor if a special use permit holder can legally conduct research through an active reconnaissance or excavation permit area and if so, and resources are discovered, are these resources the property of the Commonwealth as the special use permit stipulates or the property of the reconnaissance or excavation permit holder. Victor replied that his understanding is that the resources would be the property of the reconnaissance or excavation permit holder as the permit area is in a sense their private property. He noted that this is currently a grey area and would likely involved property law and require further review if such a case should develop.

Martha King moved to approve the draft revisions (as amended) to the regulations in sections 2.04; 2.05; 2.06(1); 2.06(1) (c); 2.06(2) (b), (c), and (d); 2.06(3); 2.07(3); 2.12(2); and 2.13, and authorize the Director to undertake the promulgation process. John Hoagland seconded. Unanimous vote in favor. So voted.

Terry French moved to adjourn the meeting at 2:53 PM. Lenny Loparto seconded. Unanimous vote in favor. So voted.

Respectfully submitted,

Victor T. Mastone
Director