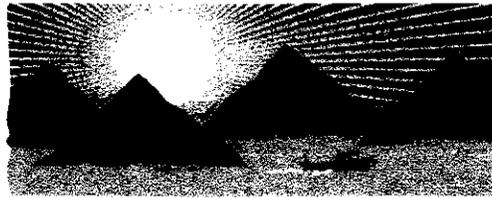


**Aleutians East Borough
Planning Commission Workshop**

AKUTAN · COLD BAY · NELSON LAGOON

ALEUTIANS EAST



BOROUGH

FALSE PASS · KING COVE · SAND POINT

Workshop: Tuesday, October 28th - 1:00 p.m.



Agenda

PLANNING COMMISSION WORKSHOP

(packet available on website www.aleutianseast.org)

Date: Tuesday, October 28, 2014

Time: Workshop: 1:00 p.m.

Location: By Teleconference in the locations below:

King Cove - AEB Office	Akutan City Office
Sand Point – AEB Office	Cold Bay city office – library
Nelson Lagoon Corp. Office	Anchorage – 3380 C Street
False Pass city office	

All communities will be provided with conference calling information for the designated location in your community.

1. Roll Call & Establishment of Quorum
2. Aleutians East Borough Resource Development Land Use Permitting System Code Enforcement Manual
3. Adjournment

**PLANNING COMMISSION
WORKSHOP**

Roll Call & Establishment of a Quorum



MEMORANDUM

To: Planning Commission Members

From: Anne Bailey, Assistant Borough Administrator

Re: Land Use Permitting Code Enforcement Manual

Date: October 20, 2014

The Aleutians East Borough (AEB), with grant funds from the Coastal Impact Assistance Program, developed a Resource Development Land Use Permitting System to oversee responsible resource use and extraction opportunities that will create local jobs and revenue while protecting community values and the environment. The Planning Commission was involved in the AEB Municipal Code (AEBMC) revision and at that time the new Resource Development Land Use Permitting System was included. On January 1, 2015, Title 40 of the code requires land use permits to be obtained for Commercial Recreation; Research; Sand, Gravel, and Rock Mining; Mineral & Coal Exploration & Small Mining Operations; Large Mining Operations; Oil & Gas; Offshore & Direct Marketing Seafood Processing; and, Onshore Seafood Processing activities. The permit application, stipulations and standard operating procedures for the permitting system have been completed and the database system is currently being developed.

The next step is to complete Task 7 of the grant, which includes developing a Standard Operating Procedure Manual for Land Use Permit Code Enforcement. This manual will include procedures for conducting field inspections and record audits to ensure compliance with the AEBMC and AEB's Land Use Permits, and for conducting enforcement action when violations are identified. Susan Harvey, Harvey Consulting LLC, and Shane Levesque, Levesque Law group, LLC, are in the process of developing the manual and have a few specific questions they would like the Planning Commission to address at the October 28, 2014 Workshop. After the Workshop, they will complete the draft which will be brought to the Planning Commission for discussion at the next meeting.

Code Enforcement Manual Questions:

1. Violation Priority.

In developing the draft manual, the consultants partitioned violations into three categories (high, medium, and low), using AEBMC principals, and priorities as a guide. Attached is a one page summary of the proposed high, medium and low priority violation breakdown. Your input is needed to ensure priorities have been correctly assigned. The High Priority Violation definition is particularly important because the consultants are proposing that all High Priority Violations would be subject to immediate enforcement via a Notice of Violation and/or abatement via court

action; whereas, Medium and Low Priority Violations would be eligible for compliance assistance.

2. Penalties.

During the approved Fee and Penalty Schedule development, the Planning Commission provided input on the amount and types of penalties. A few additional questions how to administer those penalties have surfaced when drafting the code enforcement manual.

- 2.1 The AEB has notified potential permit applicants of the requirement to submit a permit application on or before January 1, 2015. To date, no permit applications have been received. However, the Borough has received a few calls resisting the requirement to submit an application. Your input is needed as to whether the AEB Administrator should waive penalties during 2015, to provide an additional permitting program transition period, or whether penalties should commence on January 1, 2015 as originally planned.
- 2.2 The AEB Attorney recommends the Planning Commission consider only applying penalties (initially) to High Priority Violations that result in a Notice of Violation, and that Medium and Low Priority Violations be handled through a compliance assistance process that would not likely result in a penalty unless unresolved. Unresolved compliance issues may eventually result in a Notice of Violation triggering a penalty. Your input is needed on whether this proposed penalty administration process is acceptable, or whether the Planning Commission envisioned issuing penalties to Low and Medium Priority Violations as well as High Priority Violations. Pages 11 and 12 of the draft manual are provided for your review and input.
- 2.3 The consultants thought it would be useful to include additional guidance on assessing penalties in the manual. Please review pages 58 and 59 of the draft manual and provide input on this draft guidance.
- 2.4 The approved Fee & Penalty Schedule requires fee payment, but does not specify strict deadlines for penalty collection. Does the Borough wish to set strict deadlines for payment of fines assessed for permitting violations? For example, should we set a specific deadline for payment, where non-payment would trigger activation of a letter from the AEB Attorney, or turn the fine over to a collection agency, or for larger penalties prompt court action?

3. Rewarding & Recognizing Compliance.

Does the Planning Commission want to consider some type of reward or recognition system for encouraging compliance? For example, you could consider setting up a gold star point system or issue annual certificates that a Permittee could post at its place of business.

High Priority Violations: The AEBMC § 40.01.010 lists priorities for the AEB Land Use Permitting Program. Five of the highest priority elements are listed below.

- Protection of public health, safety, morals, and general welfare, as well as the historical, economic, social, and cultural interest of the Borough's residents;
- Protection of fish resources and continuation of a productive commercial fishery;
- Protection of subsistence resources;
- Identification, avoidance, and mitigation of the negative effects of development; and,
- Protection of human health and the environment by prohibiting adverse impacts of industrial pollution.

The Fee & Penalty Schedules approved by the Assembly assigns higher penalty amounts to violations that are intentional acts or omissions, or the result of gross negligence.

Present, immediate, and real risks to public health and safety, or detrimental impacts to the natural environment must be immediately abated. This may include immediate initiation of formal enforcement action proceedings. If the violation presents immediate danger or emergency, the matter should be brought to the attention of the AEB Attorney to determine whether the Borough should petition the court for injunctive relief (a court order to halt the violation).

Medium Priority Violations: Many of the potential violations identified in AEBMC § 40.01.050 and AEBMC § 40.01.010 may be classified Medium Priority. For example, a Medium Priority Violation may occur for:

- Failure to submit a land use permit application;
- Noncompliance with the terms, conditions, and permit stipulations included in an approved permit;
- Noncompliance with local, state, and federal laws, regulations, rules and orders, and requirements and stipulations;
- Noncompliance with applicable provisions of a permit, approval, or other authorization issued under the AEBMC;
- Noncompliance with the goals, objectives and policies of the Borough's Comprehensive Plan;
- Adverse impacts on the environment, natural resources, neighboring properties and communities, and on public infrastructure; and,
- Adverse impacts on subsistence and other lifestyles that exist within communities.

In general, Medium Priority Violations do not present an immediate threat to health, safety, or the environment; however, the Borough's intervention should nonetheless be prompt to remedy the violation.

Low Priority Violations ["Minor Infractions"]: All other violations that are innocuous in nature, and present no threat to health, safety, or the environment, fall within the Low Priority Violation category. It is the Borough's policy to take action on these complaints as resources allow, but to focus its efforts and resources on resolving High and Medium Priority Violations when they exist.

Borough officials who are offered a bribe or something of value during an inspection should reject the offer and should immediately notify the AEB Administrator of the problem. The AEB Administrator should consult with the AEB Attorney to on how to proceed.

1.5. Fees & Penalties

AEBMC § 40.01.060 provides the Planning Commission with the authority to propose a schedule of fees and penalties for Assembly approval. In 2013, a separate permit fee and penalty schedule was approved for each Land Use Permit type by the Planning Commission and the Assembly; a copy of each is provided in **Appendix 1** for reference.

Note to AEB Staff: The AEB Attorney (Levesque Law Group, LLC.) recommends the Borough attempt to resolve violations by first notifying the Permittee or business of the alleged violation or complaint, and request cooperation to resolve the alleged noncompliance. In this way, the AEB provides the subject of a compliant or alleged noncompliance an opportunity to clear up any misunderstanding and work cooperatively to resolve the matter, avoiding the need for both sides (Borough and subject) to enter into a protracted enforcement case, involving great expense to both parties. This way, unjustified alleged noncompliance is quickly laid to rest, and confirmed noncompliance is resolved. This process is different from the fee schedule language, and we want to confirm this approach is acceptable.

The Permit Fee & Penalty Schedule was written in an instructive manner. The schedule states that Notices of Violation and penalties “will” be issued when violations are reported to and confirmed by the Borough, or found by the Borough. During development of this SOP Manual, the Planning Commission clarified the intent of the Permit Fee & Penalty Schedule was to instruct the AEB Administrator, to issue Notices of Violation and penalties and levy automatic penalties for High Priority Violations.

The Planning Commission clarified that while the Notice of Violation and penalty tool can be used to resolve Low and Medium Priority Violations, it would prefer the AEB Administrator first attempt to resolve Low and Medium Priority Violations using compliance assistance and complaint resolution processes (further described below). This will allow AEB to resolve most matters in a simple, efficient fashion, reserving finite enforcement resources to a limited number of cases. If those methods are unsuccessful, a Notice of Violation and associated penalty can be issued to remedy the violation. The Planning Commission also clarified that even if Low or Medium Priority Violations are resolved using compliance assistance and complaint resolution processes, there may be a need to levy a penalty if economic benefit was enjoyed thorough noncompliance or if the Borough incurred substantial cost remedying the violation.

Additionally, the Permit Fee & Penalty Schedule instructs Borough officials to issue a letter for Failure to Submit a Land Use Permit Application (where required), and to levy an automatic penalty.

In sum, the Planning Commission instructs the AEB Administrator to take the following actions:

1. **Failure to Submit a Required Land Use Permit Application Letter:** be issued in cases where an Unpermitted Entity failed to submit a Land Use Permit Application in a timely manner. The letter will provide a copy of the permit application form, and will request the application be submitted with the required permit fee, along with the penalty amount for late application.
2. **Compliance Assistance Letter:** be issued in cases where a potential or alleged Low or Medium Priority Violation is identified by (or known to) the Borough. This letter will request information to invalidate the potential or alleged violation or remedy it.
3. **Notice of Complaint Letter:** be issued in cases where an alleged Low or Medium Priority Violation complaint has been filed with the Borough, which AEB has determined to be credible. This letter will request information to invalidate the alleged violation or remedy it.

4. **Self-Reported Violation Confirmation Letter:** be issued by the Borough in response to a Self-Reported Violation. This letter confirms receipt of the Self-Reported Violation notification, documents whether the Borough agrees with the proposed remedy (or provides alternative instruction to remedy the violation), and levies a fine (if required).
5. **Notice of Violations:** be issued where: (1) a High Priority Violation has been identified and confirmed by the Borough; (2) a High Priority Violation alleged by a Complainant is determined by the Borough to be credible; (3) a Low or Medium Priority Violation warrants resolution that has not been achieved by other means; or, (4) a Low or Medium Priority Violation warrants a penalty because an economic benefit was enjoyed thorough noncompliance or the Borough incurred substantial cost remedying the violation.

There may be some Low Priority Violations the Borough decides can be resolved with a phone call, or decides there are insufficient resources to pursue. In these cases, the Borough will simply document the matter was resolved by telephone, or its decision to not pursue the matter.

While the Planning Commission instructs the AEB Administrator to first attempt to use Compliance Assistance or Complaint Notification Letters to resolve potential or alleged violations, the AEB Administrator may find the violation is significant enough, requires significant Borough resources and time to resolve, or warrants a penalty. In these cases, the AEB Administrator will take the next step of issuing a formal Notice of Violation to remedy the violation and collect a penalty.

Cases that involve a High Priority Violations should be immediately brought to the attention of the AEB Administrator and the AEB Attorney. In these instances, a Notice of Violation should be issued at a minimum; however, a more immediate court action may be necessary to abate the violation.

11. Guidance on Assessing Penalties

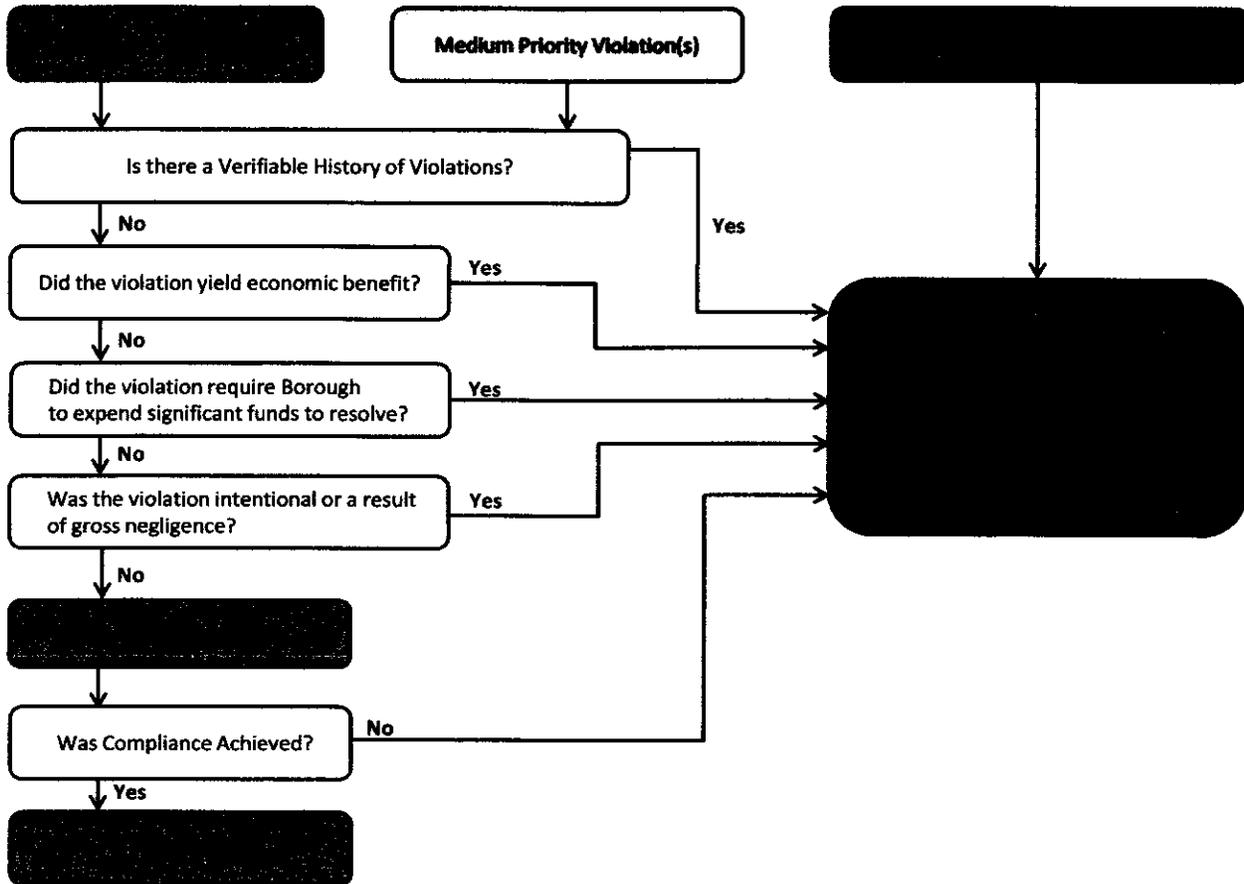
The Assembly and Planning Commission approved fee and penalty schedules that provide instruction to the AEB Administrator on the maximum penalty that can be levied for each Land Use Permit violation type (See **Appendix 1**). The AEB Administrator has the authority to use discretion when levying the ultimate penalty amount, using sound judgment. The AEB Administrator may also elevate the enforcement case to the Planning Commission for their action.

When determining the penalty amount, the AEB Administrator should consider:

- Severity, impact, frequency and characteristics of the violation;
- Significance of any actual public health or environmental impact caused by the violation;
- The Permittee or Unpermitted Entity's past performance and compliance history;
- Whether the violation occurred, despite the Permittee's good faith efforts to attempt to comply;
- The fact that all Permittees that signed the "Certification of Accuracy and Agreement to Comply, Indemnify and Hold Harmless" section of the permit application form confirmed that they have reviewed the AEB penalty schedule, agree to immediately notify AEB of any potential violations, remedy any violations on the schedule required by AEB, and pay penalties within 30 days."
- The Permittee's or Unpermitted Entity's responsiveness to the Borough's request for cooperation in resolving the noncompliance;
- The Permittee's or Unpermitted Entity's speed in resolving violations;
- Whether the violation was self-reported by the Permittee or Unpermitted Entity, reported by complaint, or discovered by the Borough;
- Whether the Permittee or Unpermitted Entity profited as a result of its violation. Non-compliant Permittees and Unpermitted Entities should not enjoy a competitive advantage over a similarly situated business that does comply with the AEBMC. Therefore, penalties may be assessed against Permitted or Unpermitted Entities even in cases where rapid and voluntary resolution is achieved, taking into account any profit or competitive advantage that stems from violations;
- Costs incurred by the Borough to remedy the non-compliance;
- The ways in which the Borough has treated violations by similarly situated entities in the past; and
- Whether the violation was an intentional act or omissions or a result of gross negligence. Intentional and reckless behaviors that result in violations may warrant a substantially higher penalty.

The Penalty Decision Making Flowchart below/or following page [check final pagination provides a graphic summary of the process.

Penalty Decision Making Flowchart



Adjournment