

POLICY 9 Monitoring and Enforcement

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POLICY 9-1 Monitoring and Enforcement

Purpose

This policy provides information on the policies and procedures that govern the monitoring of land instruments under the *ʔaqam Amended Land Code*.

Although this policy sets out the minimum requirements the Lands Department must comply with in the monitoring of land instruments, the Lands Department may be required to do responsive monitoring in situations where they receive concerns regarding an interest holder’s use of ʔaqam lands. Responsive monitoring is not covered under this policy as the actions that will be required in responding to concerns from the public will be dependent upon the specific concern being raised and whether it relates directly to a term in the land instrument itself.

Legal Authority

The relevant authorities are as follows:

paragraphs 26.2(a), (e) and (f), 26.4, 26.5(a),(b),(d),(e) and (i), 27.2(a),(d) and (e) of the *ʔaqam Amended Land Code*; and

authority flowing from the terms of land instruments.

Paragraphs 26.2(a), (e), and (f), 26.4, 26.5(a),(b),(d),(e) and (i), 27.2(a),(d) and (e) of the *ʔaqam Amended Land Code*.

Policy

Monitoring means the act of comparing the terms of the land instrument to the actual actions of the interest holder and reporting to Council on any non-compliance.

Site inspections are integral to monitoring and refers to any action taken to verify compliance with the terms of a land instrument. This requires an employee of the Lands Department to enter the lands that are subject to the land instrument.

How is Monitoring Carried Out?

Monitoring involves the following actions to be taken by the Lands Department:

- (a) the development of a monitoring plan for monitoring and enforcement;
- (b) a review of the terms of a land instrument;
- (c) the gathering of data about the actual actions of the interest holder;
- (d) a comparison of the data on the actual actions of the interest holder to the terms of the land instrument; and
- (e) the drafting of a monitoring report for consideration by Council.

Why is Monitoring Important?

Monitoring is important so that ʔaḡam is viewed by members as upholding its duty toward members to ensure that all land instruments are managed in the best interests of ʔaḡam and that ʔaḡam lands are respected so that ʔaḡam can maintain sustainability in its land base.

The ʔaḡam Lands Department uses monitoring to:

- (a) uphold ʔaḡam's responsibilities under ʔaḡam laws and by-laws, and the terms in land instruments;
- (b) have a presence in the community to deter interest holders from non-compliance with the terms in their land instruments; and
- (c) identify non-compliance situations that require corrective action to be taken.

Who is involved in Monitoring?

The main individuals involved in monitoring are the:

- (a) Council;
- (b) Lands Department;
- (c) Lands Committee; and
- (d) Interest holders.

Priority Based Monitoring

The Lands Department must prioritize monitoring with the following principles in mind:

- (a) all items in a land instrument that involve a major risk to health, safety, lands, resources, environment or ʔaḡam liability must be monitored;
- (b) all items in a land instrument that are required by law to be monitored must be monitored;
- (c) if a land instrument is being renewed, monitoring the interest holder's compliance with the land instrument must be completed before a new land instrument is granted;
- (d) priority should be given to cases where monitoring is likely to prevent or correct problems;
- (e) priority should be given to those items in a land instrument that involve higher risks to the health, safety, lands, resources, environment or ʔaḡam liability; and

- (f) the benefits of monitoring should always outweigh the cost of non-enforcement.

Passive Monitoring

Passive monitoring refers to the monitoring of those terms in land instruments that require the interest holder to submit acceptable evidence of compliance to ųaqam within a specified timeframe, on a specified date, or following some specified event.

Passive monitoring is appropriate in circumstances where it is the interest holder's responsibility to provide documentation to ųaqam. In such circumstances, it is not ųaqam's responsibility to request that the interest holder provides the information to ųaqam. Rather, ųaqam plays a passive, responsive role.

ųaqam's responsibility in passive monitoring circumstances is to check whether the interest holder has complied with the requirement of their land instrument at the end of the specified timeframe, following the specified date, or following the specified event.

In passive monitoring, the role of the Lands Department is limited to:

- (a) ensuring that ųaqam receives evidence of compliance with the terms of land instruments within the timeframes specified in the land instruments;
- (b) comparing the terms of land instruments to the evidence provided by the interest holder;
- (c) determining whether the evidence provided is satisfactory evidence that the term of the land instrument has been complied with; and
- (d) reporting to Council on non-compliance with the terms.

Some examples of when passive monitoring may be used include:

- a lessee may be required to provide the Lands Department with a current certificate of insurance on an annual or bi-annual basis showing active insurance coverage for their property; or
- a licensee or permittee may be required to periodically (timing to be specified in the instrument) provide the Lands Department with logbooks that detail the resources taken from ųaqam lands within a specified time period.

Active Monitoring

Some terms in a land instrument may require the Lands Department to take a more assertive and proactive role in monitoring the interest holder's compliance with those terms. Some steps that may be taken in active monitoring include:

- (a) requests to the interest holder to provide the Lands Department with evidence of compliance with a term in a land instrument;
- (b) site inspections to ensure that a term in a land instrument is being complied with; or
- (c) responding to complaints or concerns from the public regarding the interest holder's use of the ųaqam lands to which he or she has a right.

Some examples of when active monitoring may be used include:

- (a) a lessee may be required, at the request of the ųaqam to provide an active certificate of insurance;
- (b) an interest holder may be required, at the request of ųaqam, to allow the Lands

Department to inspect the lands for hazardous substances;

(c) an interest holder may be required to maintain the leased lands in a specific condition and such term must be monitored; or

(d) a lessee may be required to go through an additional approval process in order to develop the land.

Monitoring of Agents, Sub-tenants and other Persons

Interest holders are responsible for monitoring their own agents, sub-tenants and other persons they allow on ʔaḡam lands under the terms of their land instrument.

Process

Developing Monitoring Plans for All Land Instruments

As soon as practical, after a land instrument is executed, the Lands Department must complete a Form 9-1-01: Monitoring Plan for each term in the land instrument.

In the Form 9-1-01: Monitoring Plan, the Lands Department must identify and create a checklist for each land instrument, specifying:

- each term that requires monitoring;
- the information that needs to be collected as evidence of compliance with each term that requires monitoring;
- the location where, or person from whom, the Lands Department may access the evidence required for monitoring;
- details regarding how the Lands Department may collect the evidence and the processes and timeframes associated with the collection of such evidence;
- due dates setting out the latest date that such evidence must be collected and assessed by;
- reminder dates for when the processes of collecting evidence must be initiated in order to ensure the evidence is collected by the due dates;
- an assignment of the person at the Lands Department responsible for collecting the evidence; and
- a way to document the receipt of the evidence by the Lands Department.

Some terms in a land instrument will not have set due dates attached to them for monitoring but may still require active monitoring and enforcement efforts to be undertaken.

Examples of such terms include terms related to:

- (a) the presence of hazardous substances;
- (b) maintenance of the land in a specific condition;
- (c) approved or restricted uses of the land; and
- (d) restriction from building improvements on the land.

Where a term in a land instrument does not have a set due date attached to it, the Lands Department must:

- (a) consider the specific term and section 4(1) of this policy when deciding on the timeframe within which the term should be followed-up;

- (b) follow up with monitoring of such terms at least once per year and more often where the Lands Department feels such monitoring is necessary based on the criteria in section 4(1) of this policy; and
- (c) if unsure about the timeframes to choose, consult with the Lands Committee or Council to determine an appropriate follow-up schedule.

All monitoring plans should be able to be picked up by anyone involved in the monitoring and enforcement of land instruments at any time and be clear as to what must happen in terms of monitoring that land instrument.

Developing and Maintaining a Bring Forward System

Each employee in the Lands Department must, in consultation with the Director of Lands and Natural Resources:

- (a) develop and maintain a bring forward system (i.e. a work planning system, calendar or reminder system) for tracking and managing deadlines in all of the monitoring plans that he or she is responsible for; and
- (b) check that bring forward system for tasks on a daily basis.

Due dates identified in all monitoring plans, and reminders for those due dates, should be entered into each employee's bring forward system to them of all upcoming and due monitoring tasks that they are individually responsible for.

When choosing a reminder date, employees at the Lands Department should consider the nature of the evidence that must be collected and the processes and timeframes involved in collecting such evidence.

The bring forward system should be able to be picked up by anyone involved in the monitoring and enforcement of land instruments at any time and that person should be clear from the tasks in the bring forward system as to what they must do in terms of monitoring.

Records Keeping

Employees of the Lands Department must record in Form 9-1-01: Monitoring Plan, or elsewhere in the Lands Department file for each land instrument, all steps taken and communications pertaining to the monitoring and enforcement of that land instrument and must maintain such written records in the Lands Department file for the land instrument to which the monitoring and enforcement efforts relate.

Daily Checking of the Bring Forward System

It is the responsibility of each employee within the Lands Department, on a daily basis, to check their bring forward system for reminders and due dates.

Review Task and Acquire Evidence

When a task comes up in the bring forward system, the employee at the Lands Department who is responsible for that task must:

- (a) review the term in the land instrument that relates to the reminder or due date;
- (b) review the monitoring plan for the steps that must be completed to gather the necessary evidence required for monitoring of that term in the land instrument; and
- (c) after reviewing a task in the bring forward system and its associated monitoring plan, ensure all necessary steps are taken to acquire the evidence that is required for monitoring that term in the land instrument.

Reminder Letters

If it is cost effective and within operational abilities, the employee at the Lands Department who is responsible for the monitoring of a given task in a land instrument should send written notices to the interest holder to:

- (a) encourage self-compliance; and
- (b) advise them of upcoming requirements such as the delivery of insurance certificates, self-monitoring reports or annual payments to ʔaḡam.

Acquiring Documents That Are Required For Monitoring

Sometimes, monitoring may require the gathering of documents from an interest holder or third party.

If documents must be gathered from an interest holder, the Lands Department must check the land instrument to determine whether it sets out a process for such document gathering and if it does, follow that process.

If a land instrument does not set out a process for gathering documents from an interest holder, the Lands Department must deliver the interest holder a written request for the documents, setting out:

- (a) the type of land instrument and section number of the term in the land instrument that is being monitored;
- (b) the documents that the interest holder is required to provide the Lands Department to assist them in monitoring the term in the land instrument; and
- (c) the deadline for when the documents must be received by the Lands Department, and the Lands Department must place a copy of the written request in the file related to the land instrument.

Where time and resources are available to do so, the person at the Lands Department who sent a request for documents letter to an interest holder must consider following up with the interest holder by telephone to ensure the interest holder received the written request and confirm that the interest holder will be delivering the documents to the Lands Department within the required timeframe. Although this is not mandatory, it is recommended as the goal is to encourage compliance rather than wait until there is non-compliance. However, follow-up phone calls are a courtesy only. It is the interest holder's responsibility to comply with the terms of the land instrument.

If documents must be gathered from third parties, the person at the Lands Department who is responsible for monitoring must first ensure that the land instrument sets out that he or she can gather such documents from third parties. If it does not, the Lands Department must obtain written

permission from the interest holder to gather such documents from third parties and must place a copy of the written permission in the file related to the land instrument.

If the Lands Department must gather documents from third parties, they must follow the same processes that are set out in section 5(16) and 5(17) of this policy in making a request to the third party for documents, and in making such a request they must attach a copy of the land instrument or the written permission from the interest holder to the written request as evidence of the interest holder's consent to such information gathering.

Site Inspections

Sometimes evidence gathering may require the person at the Lands Department who is responsible for monitoring to conduct a site inspection of the location, environment, physical condition and use of the land to which the interest holder has a right. A few examples of terms that may require site inspections include terms related to:

- (a) the presence of hazardous substances;
- (b) maintenance of the land;
- (c) approved or restricted uses of the land; and
- (d) improvements on the land.

In some circumstances, the Lands Department may also wish to conduct a site inspection in response to a third party's complaint or report to the Lands Department in regard to an interest holder's use of ʔaqam lands.

If a site inspection is necessary, the person at the Lands Department responsible for monitoring must check the land instrument to determine any special steps that must be taken to gain access to the lands and if the land instrument sets out a process, that process must be followed.

If a site inspection is necessary and the land instrument does not set out a process that must be followed for the Lands Department to access the area to which the land instrument relates, the person at the Lands Department responsible for monitoring must provide the interest holder with twenty-four hours (24hrs) written notice, setting out:

- (a) that ʔaqam will be conducting a site inspection for the purpose of monitoring compliance with the terms of the land instrument;
- (b) the title and date of the land instrument to which the site inspection relates;
- (c) the date, time and location of the planned site inspection;
- (d) a request that the interest holder, or his or her representative, be present during the planned site inspection and that the interest holder advise the Lands Department of the name of the person who will be present for the site inspection; and
- (e) the name and contact details for the person at the Lands Department who is responsible for monitoring and who will be conducting the site inspection.

The person at the Lands Department responsible for a site inspection must ensure that a copy of the written notice and all communications regarding the site inspection is maintained in the Lands Department file to which the site inspection relates.

The person at the Lands Department responsible for a site inspection must, preferably in the presence of either the interest holder or the interest holder's personal representative, conduct the site inspection and complete Form 9-1-02: Site Inspection Report, and if necessary take photographs as evidence of what he or she personally witnesses during the site inspection.

The person at the Lands Department responsible for a site inspection must place a copy of the completed Form 9-1-02: Site Inspection Report and any photographs taken during the site inspection in the file related to the land instrument to which the site inspection relates.

Compliance Assessment

Once the person at the Lands Department responsible for monitoring has taken all reasonable steps to gather the evidence required for monitoring a term in a land instrument, he or she must compare the evidence gathered to the term in the land instrument and determine whether the term has been adequately complied with.

Enforcement Decision

Based on the Lands Department's compliance assessment and Policy 10-2, the Lands Department must determine which enforcement steps, if any, are required to ensure compliance with a term in a land instrument.

In some circumstances, the Lands Department may wish to consider cancelling the land instrument, in which case Policy 5-3 should be consulted.

Where the Lands Department determines that enforcement steps must be taken to ensure compliance with a land instrument, he or she must:

- (a) update the monitoring plan for that land instrument to reflect the additional enforcement steps that must be taken; and
- (b) update the bring forward system to reflect the additional enforcement steps that must be taken.

Where the Lands Department determines, in accordance with Policy 10-2, that enforcement steps must be taken to ensure compliance with the land instrument, he or she must implement such enforcement steps in a timely manner.

Reporting to the Chief Operating Officer

Whenever enforcement of an interest or licence is required, the Lands Department must provide a written report to the chief operating officer, setting out:

- (a) all shortfalls in compliance with a term in a land instrument;
- (b) the Lands Department's enforcement plan, and any actions taken to implement that plan in relation to shortfalls in compliance with a term in a land instrument; and
- (c) a copy of the updated monitoring plan related to the shortfalls in compliance with a term in an interest of licence.

Resources and Forms

Besides this policy, consult the following resources:

- Policy 6-2: Cancelling a Lease; and
- Policy 10-2: Enforcement Proceedings.

Forms

- 9-1-01 Monitoring Form
- 9-1-02 Site Inspection Report

Policy 9-2 Enforcement Proceedings

Purpose

This policy provides information on the policies and procedures which govern the enforcement of land instruments under the *ᐱᐱᐱᐱ Amended Land Code*.

Enforcement means taking the necessary steps to get interest holders to comply with the terms of their land instrument and managing those situations where an interest holder is in non-compliance.

Enforcement involves the following activities:

- (a) notices of non-compliance / demand letters;
- (b) negotiation; and
- (c) cancellation or termination of the land instrument.

Legal Authorities

The relevant authorities are as follows:

- (a) paragraphs 26.2(a), (e) and (f), 26.4, 26.5(a),(b),(d),(e) and (i), 27.2(a),(d) and (e) of the *ᐱᐱᐱᐱ Amended Land Code*; and
- (b) authority flowing from the terms of land instruments.

Policy

Who is involved in enforcement?

The following people may be involved in enforcement processes:

- (a) Council;
- (b) the Lands Department;
- (c) the Lands Committee;
- (d) interest holders; and
- (e) third parties, such as mortgagors or sub-lessees.

Enforcement Goals

As with monitoring, enforcement is aimed at ensuring compliance with land instruments. It is important that the Lands Department:

- (a) acts as required by *ᐱᐱᐱᐱ* laws and the terms of the land instruments;
- (b) encourages interest holders to comply with the terms of their land instruments; and
- (c) takes action to ensure compliance with land instruments.

The Goal is to Achieve Voluntary Compliance

Wherever possible, the Lands Department will seek interest holders voluntary compliance with the terms of a land instrument.

The Lands Department will make every effort to:

- (a) first seek enforcement through cooperation with interest holders;
- (b) first resolve disputes over compliance on an informal or cooperative basis through negotiation; and

The Lands Department must ensure there is a piece of lined paper stapled to the inside cover of each Lands Department file and Lands Department employees must document on that piece of paper the dates, times and steps for enforcement that are taken and the name and signature of the person taking the enforcement steps on behalf of the Department.

All emails and written forms of correspondence relating to the monitoring and enforcement of a land instrument must be printed out and added to the Lands Department file for that land instrument.

Process

Finding of Non-Compliance

The Lands Department must determine whether they have sufficient evidence of non-compliance with a term in the land instrument. A verbal statement made by one person about something another person said or did, that does not relate to something the person making the statement knows personally or witnessed firsthand, cannot be the only evidence of non-compliance. There must be physical evidence, or a first-hand witness account of non-compliance.

Review of Land instrument for Terms Related to Enforcement

If the Lands Department determines that sufficient evidence of non-compliance with a term in the land instrument exists, they must review the land instrument for terms that set out the process to be followed for non-compliance and, if such terms exist, they must follow the process set out in the land instrument.

Notice of Non-Compliance / Demand Letter

If the Lands Department determines that sufficient evidence of non-compliance with a term in a land instrument exists, and the terms in the land instrument do not provide for a process to follow in addressing the non-compliance, the Lands Department must:

- (a) complete Form 9-2-01: Notice of Non-Compliance;
- (b) make two (2) copies of the completed Form 9-2-01: Notice of Non-Compliance and:
 - (i) provide one (1) copy to Council; and
 - (ii) place one (1) copy in the Lands Department file to which the interest relates; and
- (c) send the original, completed Form 9-2-01: Notice of Non-Compliance to the interest holder by personal delivery or registered mail.

If the Lands Department delivers Form 9-2-01: Notice of Non-Compliance to the interest holder by personal delivery, the person from the Lands Department who delivers it must make a notation on the copy of the Form 9-2-01: Notice of Non-Compliance in the Lands Department file as follows:

I, [name of person from Lands Department], hand delivered an original, signed copy of this letter to [name of interest holder] on [date of delivery].

[Signature of person who delivered letter]

[Date of Signature]

If the Lands Department delivers Form 9-2-01: Notice of Non-Compliance to the interest holder by registered mail, they must place the receipt for the mailing in the Lands Department file.

Follow-up & Negotiation

If, within five (5) business days of delivering a Notice of Non-Compliance to the interest holder, the Lands Department does not hear anything from the interest holder, the Lands Department must follow up with the interest holder by telephone to determine whether the interest holder intends to complete the requirements set out in the Notice of Non-Compliance and if the interest holder does not intend to complete the requirements, the Lands Department must consider inviting the interest holder to have a meeting to discuss the Notice of Non-Compliance.

The Lands Department must make attempts to negotiate with the interest holder a reasonable remedy to non-compliance and if a reasonable remedy is available, the Lands Department must pursue the remedy prior to considering cancellation of the land instrument.

Cancellation of Land Instrument

Cancelling a land instrument should only be used as a last resort and in circumstances where an interest holder does not comply with their Notice of Non-Compliance and is not willing or able to comply with the terms of their land instrument.

Refer to Policies 5-3 and 6-1 for information on the policies and procedures to follow in the cancellation of a land instrument.

Form

- 9-2-01 Notice of Non-Compliance Demand Letter