

# Loss Control Bulletin

## Land Surveyors

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## Wetlands Delineation – Liability for Land Surveyors

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### Introduction

The requirement to show wetlands on all subdivisions in some jurisdictions raises important liability issues for land surveyors. It is well established that land surveyors are responsible for the measurement and portrayal of boundary and title evidence on Plans of Subdivision. In addition, in many jurisdictions, various regulatory acts require that watercourses and wetlands be shown on these plans. Delineation of water features such as rivers or lakes requires a land surveyor to measure to the water's ordinary edge, and is included in the various standards of practice applicable to land surveyors across the country. The delineation of wetlands, however, is often determined not by the location of an easily defined boundary but often by the type of vegetation or soil present. This could present a problem if the location of a wetland is later challenged if it is not defined appropriately. It also may not be included in the defined services covered by professional liability policies for land surveyors.

### Wetlands and Land Surveyors

Professional land surveyors practising across Canada, and throughout the Territories have all heard that claims against land surveyors and land survey firms

are generally either construction claims or title claims. Generally speaking, construction claims have been predominate in Western Canada, and title claims predominate in Eastern Canada.

In 2007, the Professional Surveyors Canada Professional Liability Insurance Committee, through ENCON Group Inc., began to see claims develop over wetland issues. While these claims at the moment are related to jurisdictions in Eastern Canada, changes to regulations regarding wetlands are being enacted in many jurisdictions across the country.

Simply put, claims arose because the land surveyor failed to show the location of wetlands on the survey plan.

In one particular claim, the survey plan was completed over 30 years ago. A lot owner started to in-fill a small wetland, but was stopped by municipal and provincial environment personnel, citing that the wetlands could not be altered. A litigious claim arose against the land surveyor in the form of a Statement of Claim for failing to show the wetlands on the Plan of Subdivision. The owner assumed that as the Plan did not show any wetlands, he was free to develop the property in any way he saw fit. The claim was for damages including costs to return the land to its previous state, loss of value, loss of enjoyment and legal costs, and fines that were assessed against the landowner. It is important to note that fines or penalties are excluded from damages under professional liability insurance coverage for land surveyors.

### What are Wetlands?

In the past, wetlands were often recognized as marshy areas where there was an obvious change from forested areas or open water. These changes could include a well-recognized tree line changing to an

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open area of rushes or other areas easily recognizable as being swamps. Current definitions being used by various municipalities or provincial departments of environment are far more specific and are sometimes dependant on specific plant and soil types.

In New Brunswick, according to the New Brunswick Wetlands Conservation Policy (2002), a wetland is:

*Land that has the water table at, near, or above the land's surface, or which is saturated for a long enough period to promote wetland or aquatic processes as indicated by hydric soils, hydrophytic vegetation, and various kinds of biological activities adapted to the wet environment.<sup>1</sup>*

This raises an important question for land surveyors. Do they have the proper training to recognize these attributes? Does it require training more appropriate for a botanist to recognize plants specific to a wetland?

### Legislation

There is a myriad of provincial and municipal regulations regarding what is to be shown on Plans of Subdivisions. Some survey acts, regulations and bylaws fail to even mention wetlands. Most regulations, generally speaking, require a land surveyor to name and identify bodies of water, water courses, and direction of flow and accurately depict the above on survey plans.

Some provincial subdivision regulations, municipal subdivision regulations and land use bylaws, however, require a land surveyor to show wetlands on preliminary, tentative and final subdivision plans. Specific jurisdictions and specific legislation may control whether wetlands should be shown on a plan or not. Municipal regulations and bylaws are at least equivalent to and may contain more stringent requirements than the corresponding provincial regulations.

In Nova Scotia, the Provincial Subdivision Regulations made under Section 270 of the *Municipal Government Act* S.N.S. 1998, c. 18 N.S. Reg. 38/99 (April 1, 1999) as amended up to N.S. Reg. 440/2008 (December 4, 2008), state the following:

### General Provisions

*For Preliminary Plans of Subdivision –*

A – Requirements

- 20(1) A person proposing to subdivide an area of land may submit to the development officer four copies of a preliminary plan of subdivision drawn to scale showing:
- (m) the general location of watercourses and wetlands;
- 20(3) Unless the information already has been submitted to the Department of Environment, the following additional information is required for proposed lots referred to in subsection (2):
- (b) the location of any watercourse, wetland, marine water body and other features that may influence the design of the on-site sewage disposal system, including any ditch, road, driveway or easement;

*For Tentative Plans of Subdivision –*

A - Requirements

- 39(2) Tentative plans of subdivision shall show the following:
- (r) the general location of watercourses, wetlands, or prominent rock formations;

*For Final Plans of Subdivision –*

A – Requirements

- 49(2) Final plans of subdivision shall show the following:
- (r) the general location of watercourses, wetlands, or prominent rock formations;
- 49(4) Unless the information already has been submitted to the Department of Environment, the following additional information is required for proposed lots referred to in subsection (3):
- (b) the location of any watercourse, wetland, marine water body and other features that may influence the design of the on-site sewage disposal system, including any ditch, road, driveway or easement; (Emphasis added)<sup>2</sup>

This is just an example of typical provincial legislation regarding subdivisions. Previous versions of this legislation contained similar wording. It is important to note that “wetland” is not defined in the Act.

<sup>1</sup> Chessie, Joseph K.; Wetlands and Their Influence on the Profession of Land Surveying in New Brunswick, Department of Geodesy and Geomatics Engineering, University of New Brunswick, April 8, 2010.

<sup>2</sup> [http://www.canlii.org/en/ns/laws/regu/ns-reg-38-99/latest/ns-reg-38-99.html#TOC2\\_1](http://www.canlii.org/en/ns/laws/regu/ns-reg-38-99/latest/ns-reg-38-99.html#TOC2_1)

In Nova Scotia, the *Planning Act*, S.N.S. 1983, c. 9, as amended by S.N.S. 1985, 9, contained the following applicable sections:

- s. 3(s) – Watercourse is defined as meaning any lake, river, stream, ocean or other body of water
- s.54(4) – A Land Use By-Law can prohibit the erection of any structure within a specified distance of a watercourse or on land that is marshy or subject to flooding.<sup>3</sup>

There are many local municipal regulations and bylaws regulating subdivisions that include provisions regarding wetlands. It is important to note that it isn't just the current version of the various acts or regulations that applies but that which was in effect at the time the plan was registered. For a claim regarding older subdivision plans, research must be carried out into the *Land Surveyors Act* and regulations of the day, provincial subdivision regulations of the day and what municipal subdivision regulations and land use bylaws were in effect in the local jurisdiction at the time of the survey.

For example, on a recent claim it was determined that the Halifax County Municipality Subdivision By-Law in effect in 1986 applied and stated at Part 9 – Final Subdivision Application requirements, Section 9.4 (O) the following:

- 9.4 Final subdivision plans shall show the following:
- ..
  - (o) The location of any watercourse and any swamp.<sup>4</sup>

“Watercourse” is defined at Section 2.23 of this Subdivision By-Law as meaning “any lake, river, stream, ocean or other body of water.”

As is evident by the forgoing, in order for land surveyors to reduce their potential liability arising from failing to show or improperly showing wetlands on subdivisions, it is vital that land surveyors are fully aware of the many regulatory requirements set by various jurisdictions in order to properly complete these plans.

## How does this impact professional liability insurance coverage for land surveyors?

When wetlands delineation first arose as part of a claim, there was an immediate concern. What type of work is required by the land surveyor to complete this task? Is it considered to be a normal and customary activity for a land surveyor? The Errors and Omissions Insurance for Land Surveyors policy (Errors and Omissions Insurance is a form of professional liability insurance) contains the following definition for “Professional Services”:

*PROFESSIONAL SERVICES shall mean any services which were rendered or should have been rendered by the INSURED in the practice of his or her profession as a land surveyor, including without restriction the rendering of opinions, counselling and services related to measurement sensitive activities, and in as much as the INSURED may be held responsible, by his or her predecessors in business or any other person. (Emphasis added)*

It has now been determined, in the case of Nova Scotia, that in order to satisfy the regulating authorities as to the accuracy of the identification of wetlands, certain characteristics such as vegetation, soils and other features must be identified. This is outside the normal training and standards of practice applicable to land surveyors. It also might not be considered to be a measurement sensitive activity as quoted in the above-noted definition. In New Brunswick, an attempt was made to isolate the potential exposure to land surveyors by having independent wetland delineators define where wetlands were by demarcating the limits and then have land surveyors locate the limits as set by the delineators, thereby restricting the land surveyors' role to a measurement activity.

In this matter, if a land surveyor completes wetlands delineation training recognized by their local association, future wetlands delineation work will be considered to be part of the “Professional Services” as defined in the policy.

<sup>3</sup> Rogers, Roderick (Rory) H.; Stewart McKelvey, Internal Report, April 23, 2007

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## Risk Management Suggestions

Limit your liability for showing wetlands by showing wet areas on your plan. Add a note to the plan stating, "All visible wet areas have been shown on this plan. The exact location of the limit of wetland is to be determined by a wetland delineator."

**For Subdivision Plans:** Show the location of wet areas to the best of the land surveyor's ability and in accordance with recognized standards of practice and training.

**For Retracement Surveys:** Show the location of wet areas where they intersect boundary lines and the graphic location of wet areas throughout the lot.

Add the following or similar note to the plan:

"Graphic location of wet areas plotted from available mapping/aerial photography and subject to a final location survey."

It may be necessary to show all forms of "wetlands" on a plan. In order to have proper liability insurance coverage in place in the event of a future claim regarding wetlands delineation on a plan, either complete wetlands delineation training as recognized by your local governing association or have a qualified wetlands delineator complete the work.

## Conclusion

Proper attention by land surveyors to the inclusion of wetlands on Plans of Subdivision is required in many jurisdictions. Delineating wetlands other than obvious wet areas requires specific training in addition to normal standard practice for land surveyors. Professional liability insurance coverage for land surveyors for wetlands delineation services, which is managed by ENCON Group Inc., will be afforded to land surveyors who are accredited by their local governing associations as having completed such training.

