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The REALTOR® perspective on protection of New Brunswick wetlands



REALTORS® support the protection of New Brunswick wetlands

The real estate profession in New Brunswick is committed to improving Quality of Life by supporting growth that encourages economic vitality, provides housing opportunities, protects property owners, preserves our environment and builds communities with good schools and safe neighbourhoods.

REALTORS® believe a strong economy with employment opportunities for New Brunswickers remains the single biggest key to our quality of life. A healthy economy sustains vibrant communities for living and working. Commercial, industrial and residential growth, in turn, sustains a healthy economy.

Economic development also brings new opportunity and improved quality of life for residents by increasing jobs, tax base, purchasing power, diversity, availability of goods and services and offering community revitalization and improvement.

REALTORS® believe home ownership is the dream of most New Brunswickers, and that dream deserves a preferred place in our system of values. Home ownership contributes to community responsibility, civic, economic, business and employment stability, family security and well being. Every New Brunswicker has the right to safe, decent and affordable housing near where they work, shop and play. Having a choice of style and location is critical to increasing home ownership. Furthermore, these objectives should be met through market-driven approaches that foster a wide range of urban, suburban and rural housing choices at all price levels.

Accommodating growth relieves pressure on housing prices and provides increased opportunities for home ownership.

REALTORS® also recognize the incredible gift that New Brunswick's natural environment offers. Furthermore, we recognize that parks, open space and the environment are important to our quality of life and, therefore, the marketability of surrounding property. To maintain our quality of life and protect the environment, REALTORS® support policies that encourage conservation and wise use of natural resources.

To protect the environment effectively, REALTORS® believe government must accommodate quality commercial, industrial and residential growth using innovative planning techniques. At the same time, the government must recognize the need for a healthy economy, the importance of local decision-making, private property rights and attainable homeownership opportunities.

REALTORS® also believe that private property rights are fundamental to our free-market economic system, and will continue to recognize and protect the natural right to own property. A strong economy depends upon preserving the right to freely own, use and transfer real property.

REALTORS® believe communities flourish best when they offer a high quality of life at a reasonable cost. Liveable communities offer a variety of affordable housing choices, nearby employment opportunities, an economically viable commercial sector, good schools, safe neighbourhoods, quality public services, ample recreation and park areas, open space and efficient transportation systems.

To promote liveable communities, governments should encourage quality growth through policies that sufficiently fund transportation and infrastructure that provides the framework for a community's quality of life, and lays the essential ground work for accommodating commercial, industrial and residential growth.

Unfortunately, the wetlands portfolio as it exists today promotes conflict between some of these quality of life objectives. The uniform desire to protect wetlands, while avoiding conflict or confusion with the economic goal of development and the benefits of private property ownership, is at the centre of this presentation. Our goal is to define what the core conflicts are, and suggest ways they can be resolved.

Part of the challenge is consistency in defining a wetland in New Brunswick

It may seem like a minor point, but it is one of the core issues. The current confusion over wetland protection is the very wording used to describe what a wetland is.

The responsibility for managing and protecting wetlands in New Brunswick rests primarily with the Departments of Environment (DENV) and Natural Resources (DNR).

DENV is responsible for the legislation that provides protection for wetlands, including the *Environmental Impact Assessment Regulation (EIA)*, the *Clean Environment Act* and the *Watercourse and Wetland Alteration Regulation (WAWA)*, and the *Clean Water Act*.

To effectively manage and conserve wetlands, the government of New Brunswick developed a Wetlands Conservation Policy that was adopted in 2002 and has two main objectives:

- maintenance of wetland function; and
- stewardship, securement, education and awareness.

However, the definition of a wetland – the centre of these conservation efforts – is not consistent.

Publicly defined by the Department of Natural Resources:

Wetlands as described by on the Department of Natural Resources website:

A wetland is an area seasonally saturated by water. This creates soil conditions favourable to water-tolerant vegetation. Water does not have to be present in a wetland all of the time. Wetlands are among the most productive environments in the world. They act as nature's water purification system and stabilize the shorelines of rivers and coasts. Many species – including waterfowl, songbirds, fish, animals and plants – need this habitat to survive.

The **New Brunswick Wetlands Conservation Policy** was issued in July 2002. At that time, only 4% of New Brunswick's land base was classed as wetland habitat. Of those 300,000 hectares:

- 3% was coastal marsh;
- 7% covered the Saint John River floodplain wetlands;
- another 41% was freshwater inland wetland; and
- 49% was inland bog.

Mapping was also identified as a major objective at that time, although the goal was to accurately map existing wetlands in New Brunswick that met the definitions at that time. There was no stated objective to also try and project or forecast where wetland conditions may occur

Under Definitions, this document described Wetlands as follows:

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.¹

¹ *New Brunswick Wetlands Conservation Policy, Definitions, page 12*

This document also noted that “lands currently being used for agricultural purposes that are periodically ‘wet’ are not considered to be wetlands by this definition. Where these lands were previously wetland, they are considered to have been converted to alternate uses.”

In the **Clean Environment Act**, the definition of wetlands is as follows:

- (a) *either periodically or permanently, has a water table at, near or above the land's surface or that is saturated with water, and*
- (b) *sustains aquatic processes as indicated by the presence of hydric soils, hydrophytic vegetation and biological activities adapted to wet conditions;*

In the **Clean Water Act (1989)** the definition of wetlands was identical to the one published in the *Clean Environment Act*.

The general confusion over the new wetlands guidelines is also fuelled by a change in “scientific” definition or parameters of a wetland. The new mapping layer, also referred to as the “predictive “ layer, is based on a 0-15 cm potential water level, as opposed to the 0-25 cm depth in the *Clean Water Act* and the *Wetlands Conservation Policy*. In effect, this has the potential to **reduce** the amount of wetland protected by provincial legislation and regulation, which would appear to be contrary to the goals of the Ministry of the Environment.

Recommendation: That the definition of wetlands in New Brunswick be consistent in all legislation, regulatory, and public presentations, and that it specify the water table definition for property to be designated as “wetland”.

Accurate mapping is an essential tool for protection of our wetlands

As noted on the Department of Natural Resources website:

We maintain a provincial wetland inventory using aerial photography to locate wetlands one hectare or larger. The inventory may also list areas less than one hectare when they are distinct features on the landscape. These wetlands are classified into seven categories, similar to the national classification system. This inventory is an essential tool in our regulatory review and wetland protection.

The inventory issue, however, has become convoluted because of the new interactive mapping feature, or “predictive layer”, made available on the internet by Service New Brunswick.

The news release issued by Service New Brunswick on January 13, 2011 stated:

Available online through Service New Brunswick, the new application enables users to search GeoNB for wetlands or potential wetlands and analyze their proximity to other locations on the map. This will help real estate agents, land developers and potential buyers determine whether a prospective development is potentially within or close to a wetland or potential wetland.

Unfortunately the opposite has occurred. Rather than helping REALTORS® and developers, the new mapping tool introduced an element - called the “predictive layer tool” - that in a short period of time has created confusion, deterred buyers, and raised concerns among developers and municipalities that ongoing projects may be jeopardized.

This “wetlands predictive layer tool” also covers lands that do not meet any of the stated definition of wetlands; in northern New Brunswick even examples of rock outcrops are considered “wet” by the new mapping tool. Unreliable, inaccurate and speculative information – as also implied by the very term “predictive” - puts private property owners and developers at a disadvantage.

The mapping system released in January 2011 shows that vast areas of New Brunswick - including virtually all of Moncton, Saint John and Fredericton - have been denoted as potential wetlands. The sheer magnitude of the areas covered by the “predictive layer” has also fuelled public confusion over the designation.

The government will require a process for validation of the mapping overlay components before this tool can become an effective resource for property owners and developers.

In comments and statements published after the release of the government’s new interactive wetlands mapping tool, the 2010 flooding in St. Andrews is used as an example of how the new technology can be used to try and prevent similar disasters.

We would point out that flooding was due to nature – an unusual sequence of meteorological events – is similar to suggesting that much of the damage from Hurricane Juan could have been prevented by a “wetlands perspective” mapping layer. This unfortunately has only added to the confusion over the rationale and intent of the current government program to promote wetland conservation and preservation.

Unique meteorological events, or “100 year events” as they are sometimes called, such as the December 2010 storms, should not be exclusively used for rationalizing the definition or location of wetlands in New Brunswick.

Recommendation: That the “predictive layer” be removed from the public access map until such time as the government departments involved can verify the real geography or topography it incorporates.

If the “predictive layer” is not removed, the guidelines must be revised so the information it provides is for consultation and information purposes **ONLY**, and does not require a property owner to take any action.

Under the new framework, you are guilty until proven innocent

The regulatory mechanisms for the New Brunswick *Wetland Conservation Policy* is provided by the *Environmental Impact Assessment Regulations* (EIA), issued in 1987. The regulations detail a process through which socio-economic and environmental impacts potentially resulting from a proposed project in a designated wetlands area are identified and assessed.

In effect, EIA is a planning tool used when any individual, firm or government agency (known as a “proponent”) proposes a project in New Brunswick that falls under Schedule A of the regulations. There were changes introduced in January 2011, but these are considered to be minor in nature and not a factor in the current public controversy or confusion.

The definition or “trigger” for wetlands review in Schedule A of the EIA is “*all enterprises, activities, projects, structures, works or programs affecting two hectares or more of bog, marsh, swamp or other wetland*”.

It is the understanding of our REALTORS® that this was designed to capture projects directly infilling, or “destroying” 2 hectares or more of wetland. However, it has evolved to now be interpreted as any activity that may potentially affect a wetland greater than 2 hectares in size.

This current interpretation is very broad, and includes activities outside of the wetland that may impact the wetland itself. The result is a greater number of projects being directed into the EIA process. This means an increase in the number of wetland functional assessments, wetland compensation and added studies such as archaeological studies, or rare plant studies.

The new mapping program adds to this confusion by providing TWO layers or definitions relating to wetlands. The first is the “provincially significant wetlands layer”, which indicates the wetland areas which are known wetlands of provincial significance that have generally been identified since the mapping initiative in 2002.

The second is the new “wetlands predictive layer,” or what the Department of Natural Resources has denoted as areas that may or may not be wetlands based on the model. The two layers do not always agree, and the addition of the predictive layer and the way it was introduced has unfortunately generated confusion and raised concerns among property owners who, until now, had done everything required by law or regulation.

The “predictive layer” designation on the new mapping tool means a regional representative of the Department of the Environment must be contacted by a land owner, or buyer or seller, before it's developed or sold, to verify it is not a wetland. This presents significant challenges for real estate developers from both a timing and an economic perspective. Depending on the decision by the Department of Environment representative, it may create the need for expensive studies and delineations that may or may not be accepted by wetland specialists within the Department of Environment.

The time implications are another challenge, as delineation studies required to determine the existence of wetlands conditions must also occur in a very narrow window in the summer, which actually follows the traditional busiest time of year for the real estate and development market in the province. If it is required, the study can only be done between June 1 and Sept. 30, as the identification of plant communities is a key component to the delineation process.

There are also concerns that the Department of Environment is significantly under-staffed to adequately address the files that have been submitted under the previous guidelines. Property owners have no idea when a decision will be issued, or what kind of studies will be required.

We expect these delays will only be aggravated by the projected increase in requests from homeowners under the new mapping and wetland definition.

Recommendation: That a precise interpretation be provided to the public of what proposed activities may initiate the requirement for an EIA functional assessment, and that an assessment be required only on known or clearly designated wetlands.

Recommendation: That the Department of Environment have the necessary regional resources to ensure compliance in a timely manner.

The process for wetlands mapping is unclear

There has been little public explanation provided as to how the new “predictive layer” was developed, or what criteria were used. There also appears to have been little consultation with those active in the field in dealing with wetland and property ownership, including biologists, engineers providing delineation services, municipal representatives, and REALTORS®.

Instead, the consultation is now, “after the fact”. The map has been posted, the confusion created, and there has been no communications plan to alleviate the concerns of the stakeholders in this issue.

With the way the new mapping and guidelines were introduced, property owners who had followed all existing regulatory or legislative requirements in acquiring or developing their property “woke up” in January to discover the rules had changed.

There was no suggestion of compensation for potential drop in value as a result. There was no offer of help in getting the required Department of Environment clearance to use their land if it was now covered by “predictions” of wetland conditions.

Policy makers at all levels of government must be aware of the impact their decisions have on the rights of individual Canadians to own and enjoy real property. In the case of the launch of the “predictive layer”, there is no evidence this was given any consideration. Rather, bureaucrats have been given discretionary powers to make decisions affecting the future use of private property in vast areas where their jurisdiction previously did not apply.

In this process the rights of property owners must be recognized, and there must be a fair balance between the rights of the individual and the rights of society in general.

Adding to the confusion is the speculative nature of the mapping. Policy, whether in legislation, regulation, or a “Framework” document, must be clear and concise so property owners know what they are required to do, and why.

The Wetlands Framework document released in February 2011 describes it as follows:

“The New Brunswick Department of Environment (DENV) uses a Wetland Predictive Layer to predict the probable location of a wetland on a given property. This layer is generated from a number of sources of data and is only a predictor of a “likely probability” that a wetland is located on a particular property.”²

It is a definition that, by its very use of the word “predictor”, indicates this process is at best speculative, and not necessarily based on reality. That puts property owners in the unfair position of defending their proposed use of their property because of speculative mapping – and not real geography or topography.

Officials of the Department of Environment have been quoted as saying that said these newly designated “wetland predictive layer” areas are “regulated,” but they are not the same as conservation areas, which have more restrictive development regulations.

² *New Brunswick Wetlands Conservation Policy Operational Guidelines*, Department of Environment February 2011, page 3.

But the fact remains – property owners in areas covered by the “predictive layer” are now regulated, when in 2010 they were not. Whether the regulations are minor or restrictive, the fact it is now a regulated area – over and above local zoning requirements – will impact property values.

Recommendation: That the government through, the Department of Environment, consult with those actively involved in this area to make sure all the implications of predictive mapping are considered. This should be done through an advisory group that could include municipal officials or representatives, biologists, conservation groups, and REALTORS®.

The impact on real estate

REALTORS®, property owners and private sector businesses in New Brunswick recognize the importance of wetlands, and the need to protect them. The *Wetlands Conservation Policy* was adopted in 2002 and is considered by REALTORS® to be an adequate set of guidelines that protect our wetlands.

To date, any impact on private property ownership and commercial development has been because of the way the *Wetlands Conservation Policy* has been administered.

For properties outside of the areas currently identified as “Provincially Significant Wetlands”, the guidelines have the appearance of being enforced or implemented in a discretionary manner. Applications for permits may result in a long wait for the property owner. The issue of sufficient resources within the Department of Environment should be addressed as well as the effectiveness of the new Framework.

Applicants may also be required to hire consultants or delineators, which add thousands of dollars to the cost of a real estate transaction. Timelines are critical in any purchase, sale, or construction project, but unfortunately these are not always taken into consideration in the application process.

The new “predictive layer” introduced in January 2011 on wetlands mapping resources aggravates this situation further. The same assessment requirements that have been necessary for known wetlands now apply to areas where wetlands may also exist.

It’s arbitrary introduction and implementation is also unfair to those private property owners who had invested in real estate in full compliance with the wetlands protective regulations in effect at that time. This change to “predictive” wetland areas incorporating those properties that did not previously require assessments places an unfair regulatory burden and expense on private property owners.

REALTORS® know only too well the impact this can have. In a survey of NBREA members conducted online in the last week of February 2011, 33 per cent of respondents said they had been involved in a real estate transaction in 2010 that involved a property that already had a wetlands designation. Of those, more than half - 58 per cent - said their clients were required to get a delineation study.

It is our view that any property located within any “predicted wetland” will decrease in value. REALTORS® will face a real challenge trying to convince buyers or private property owners to invest the time required, or if required invest thousands of dollars of consulting just to determine if the land or site in question can be used for anything. Anecdotal evidence from REALTORS® is that since the new mapping feature and framework was introduced, potential buyers have stopped considering properties that are now identified as being within the “predictive” mapping layer.

It is even more confusing for potential real estate clients from out-of-province who may be considering the purchase of real estate here. Research shows 90 per cent of real estate buyers start their search on the internet, so if their search is in New Brunswick it will have to include reference to the new provincial wetlands mapping feature.

If property owners in New Brunswick are confused by the new mapping framework and definitions, imagine what someone outside the province will face trying to understand the implications as they start their search on the internet.

This could lead to an erosion of the tax base, especially in rural areas, and be detrimental to the government’s own objective of reasoned economic development. Real estate is an important economic engine in New Brunswick;

each residential transaction contributes an average of \$19,000 to the local economy through the purchase of furniture and appliances, or services for cleaning or renovations.³

Because any impediment can impact the assessed value of a property, this type of speculative layer will NOT meet the stated objective of helping local government in their long-term planning.

³ Clayton and Associates study for the Canadian Real Estate Association, 2009

What is expected in existing regulations for protecting wetlands

Once a wetland delineation report is completed, and a proponent wants to work in or within 30 metres of a wetland, a functional assessment is typically required. The functional assessment includes a qualitative assessment of ten components:

- water quality protection;
- wildlife and fish habitat;
- vegetation diversity;
- shoreline protection;
- soils;
- hydrology;
- groundwater recharge and discharge;
- aesthetics, recreation, education and other cultural features

The challenge for private property owners and developers in the current scenario is again in the implementation. Our interpretation of the *Wetland Conservation Policy* is that it strives for no net loss of function, and the Department of Environment has interpreted this to mean size=function.

This means that currently, if you affect X hectares of wetland, you have to compensate at a ratio of 2X or more, regardless of whether a loss of function to the impacted wetland is thought to have occurred. Until the time comes when we can determine what, if any function, is affected by a proposed activity, the Department of Environment requires compensation for all activities in a wetland based on the project footprint.

REALTORS® have encountered situations where the report provided by the expert indicated that the wetland in question was already low-function, or highly degraded. However, compensation was required at the same ratio as a pristine, non-impacted wetland.

This leads to frustration on all sides. The property owners have to spend money on compensation when, based on the opinion of the professional, there is no loss in function. Because of their understanding of the intent, the professional providing the assessment service is not following the *Wetland Conservation Policy*. It can also be frustrating for the regulators because there is no clear methodology to determine wetland function and subsequently no reasonable compensation program.

Please note this is not an environmental challenge restricted to New Brunswick. A basic internet search of compensation requirements and functional assessment approaches shows it is an issue and regulatory challenge for most jurisdictions in North America.

We understand that the Department of Environment is working towards a policy or interpretation that will standardize the way functional assessments are conducted, and that these will provide technical guidelines for the experts who do these assessments. However, unless there is some consultation with the designated experts who work to implement the guidelines, there will be similar implementation struggles to those experienced with the new mapping and new framework.

Recommendation: The government must clarify the terms and conditions for “triggering” or the requirement of an assessment under the *Environmental Impact Assessment Regulation* for wetlands to mean infilling or destroying a wetland area of 2 hectares or more.

Recommendation: Complete the requirements for the Functional Assessment so that there is one clear and precise process for all regions of the province, and do so in consultation with the designated experts who prepare the field reports.

Recommendation: Link the compensation guidelines to the analysis provided in the functional assessment, and that it include the option of no compensation required if it has been determined there is no loss in function of the designated wetlands area.

About the New Brunswick Real Estate Association

The New Brunswick Real Estate Association (NBREA) represents more than 1,000 REALTORS®.

The association serves its members through a variety of educational programs, publications and special services. The NBREA through private legislation provides all pre-licensing real estate courses and continuing education. The Association also co-regulates the industry in partnership with the Department of Justice.

Most REALTORS® in New Brunswick are also members of one of the four local real estate Boards, which provide local professional services including the Multiple Listing Service®, or MLS®. The MLS® trademark is held by the Canadian Real Estate Association, and is licensed to these individual Boards and REALTORS® for their use in the trading of real estate. The MLS® is developed and paid for by REALTORS®.

REALTOR® is also a national trademark, which identifies real estate professionals who are members of the Canadian Real Estate Association and subscribe to high standards of professional service and a strict code of ethics.

The New Brunswick Real Estate Association and its member REALTORS® are committed to the philosophy of enhancing the quality of life in the province, and its communities. This philosophy incorporates ensuring economic vitality, preserving the environment, protecting property owners, and building better communities.

REALTORS® have always been active in their communities, and the Quality of Life program ensures NBREA reflects that work.

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