

Environmental Law for the Coast: New Brunswick

New Brunswick has 5,500 km of coastal shoreline that borders the Gulf of St. Lawrence and the Bay of Fundy and boasts an array of unique and important coastal ecosystems like salt marshes, sand dune systems, and eel grass meadows. These coastal ecosystems play an important role for biodiversity and protect the province from the increased risks of storm surges, coastal erosion and flooding, and sea level rise that are made more severe by climate change. The coastal interface between the land and sea is also home to a diverse mix of birds, fish, plants, and terrestrial animals, including some that are rare or endangered. These species are often impacted by human development and activities along the coast.

This volume of the East Coast Environmental Law Summary Series provides an overview of the environmental laws and policies that are relevant to New Brunswick's coasts. It is intended to be a resource that can help members of the public to protect and manage coastal resources, both on land and in the sea. This publication is best used in combination with other East Coast Environmental Law Summary Series publications and additional resources available on our website at www.ecelaw.ca.

Coastal Authorities and Jurisdiction

Who is responsible for managing the coast?

To address an environmental concern along the coast or take steps to protect and manage coastal resources, it is important to understand who is responsible and which environmental laws might apply. In New Brunswick, like in other provinces, multiple levels of government are responsible for the coastal environment, including federal, provincial, municipal, and Indigenous governments. Often, multiple levels of government are responsible at the same time.

The **Constitution Act, 1867** divides responsibilities over different matters between the federal and provincial governments; however, provincial and federal jurisdiction is also informed by pre-Confederation historical documents, international treaties, federal and provincial legislation, and Canadian court decisions. Ultimately, responsibilities over the coastal environment and associated matters are not clearly divided, and, therefore, the federal and provincial governments share responsibility. To resolve jurisdictional tensions outside of the courts, both levels of government frequently come to political arrangements and agree to disagree.

Federal Jurisdiction

The federal government has control over the marine territory that extends from the ordinary low-water mark along the coast to up to 200 nautical miles (370.4 km) out to sea.

Section 91 of the *Constitution Act, 1867* gives the federal government exclusive authority to make laws about several matters, include coastal and marine activities like fisheries, maritime navigation, and shipping, as well as the governance of federal Crown lands, which are lands owned by the federal government. Federal Crown lands include national parks, land designations under the federal *Indian Act*, and Canadian Forces bases.¹

Coastal management at the federal level is split amongst several departments, including Environment and Climate Change Canada, Fisheries and Oceans Canada, Transport Canada, and Parks Canada. The primary federal laws affecting New Brunswick's coastal waters and other coastal activities are the ***Oceans Act*** and the ***Fisheries Act***, along with their regulations.

Provincial Jurisdiction

New Brunswick has control over all the territory that made up the province at the time of Confederation. The wording used in the *Constitution Act, 1867* implies that the authority of a province is limited to its territorial boundaries.² The boundaries of New Brunswick in 1867 are still unclear and disputed today, but there may be evidence that parts of the Bay of Fundy were within the territory of New Brunswick at the time of Confederation and are therefore under the jurisdiction of the province.³ However, generally, the provincial government controls coastal lands inland from the ordinary low-water mark.

Sections 92, 92A, and 93 of the *Constitution Act, 1867* give New Brunswick exclusive authority to make laws about various matters that can affect provincial coasts, including the governance of provincial Crown lands, local works and undertakings, property rights, and matters of a local or private nature.⁴ The province also makes laws about natural resources and energy production, including sources of tidal power.⁵

The provincial departments that share primary responsibility for coastal management in New Brunswick are the Department of Agriculture and Aquaculture, the Department of Environment and Local Government, and the Department of Natural Resources and Energy Development. The primary provincial laws affecting New Brunswick's coastal waters and other coastal activities are the ***Clean Environment Act*** and the ***Clean Water Act***, along with their regulations.

Local Government Jurisdiction

Unlike federal and provincial governments, a local government's authority is not based in Canada's Constitution. Local governments, which include municipalities, regional municipalities, and rural communities, are granted jurisdiction by New Brunswick through law, primarily by the **Local Governance Act** and the **Community Planning Act**.

Local governments can play a very important role in coastal management, especially where there are gaps in federal and provincial activity. Some legal tools that local governments can use to govern the coastal environment and coastal matters include municipal plans and by-laws. A by-law is a set of rules that applies to the local area. These powers can be used to restrict, prohibit, or otherwise regulate coastal developments and activities. For example, a by-law could be used to restrict development near the coast or to designate flood-risk areas. There are times when by-laws and provincial laws, which are both aimed at environmental protection, overlap. If they do not conflict with provincial laws, by-laws may require higher levels of protection than provincial laws.

Indigenous Jurisdiction

Indigenous peoples in Canada have unique rights and jurisdiction that may apply to coastal territories and resources. Indigenous peoples assert inherent rights under their own laws and legal orders and under international law regimes such as the global human rights regime that produced the *United Nations Declaration on the Rights of Indigenous Peoples*. In addition to their inherent rights, Indigenous peoples in Canada also have unique rights that have been established under Canadian law and are protected by Canada's Constitution. Specifically, section 35 of the **Constitution Act, 1982** recognizes and affirms the Aboriginal and treaty rights of the Indigenous peoples of Canada.

As Canadian law defines these terms, "Aboriginal rights" are rights that flow from the distinctive cultural practices that First Nation and Inuit communities engaged in before contact with Europeans and that Métis communities engaged in before Europeans gained effective legal and political control in relevant areas. "Aboriginal title" is a category of Aboriginal right that deals specifically with ownership of land.⁶ "Treaty rights" are rights that flow from solemn treaty promises made to Indigenous nations by the British Crown or, more recently, the Crown as represented by Canadian governments.

Aboriginal and treaty rights may include Aboriginal title to coastal lands as well as activity-specific rights to access coastal resources, such as rights to harvest and potentially even sell resources that are found along the coasts.

The Supreme Court of Canada has determined that when the Crown knows about an asserted or established Aboriginal or treaty right and contemplates conduct (considers doing something) that could affect that right adversely (negatively), the Crown has a duty to consult the

Indigenous rights holders in question and may also have a corresponding duty to accommodate them.⁷ This means that if the Government of Canada or the Government of New Brunswick knows about an asserted or established Aboriginal or treaty right in a coastal area and wishes to approve a proposed development that could affect that right adversely, the government must first consult with the Indigenous rights holders and accommodate them if necessary.

Crown consultation processes can play important roles in protecting Aboriginal and treaty rights in coastal areas, but they seldom lead to meaningful recognition of Indigenous jurisdiction within the lands or waters in question.

Canadian recognition of Indigenous jurisdiction may arise through rights-recognition negotiation, development of co-management agreements, and Canadian land-management regimes that return more land-management powers to First Nation governments on reserve. Litigation in court is another method that can advance Indigenous jurisdiction, although it is costly, time-consuming, and has been discouraged repeatedly by courts because it is such a difficult way to achieve rights recognition.⁸

Indigenous peoples also have laws and legal orders of their own, which are not based on Canadian laws and legal doctrines. Indigenous laws can be implemented in coastal areas in numerous ways. One example among many is the possibility of establishing Indigenous Protected and Conserved Areas (“IPCAs”), which are areas in which protection and conservation measures are Indigenous-led and shaped by Indigenous laws. The manner of establishing IPCAs varies case by case and is shaped by Indigenous needs and objectives. Mi’kmaq, Wolastoqiyik, and Peskomuhkati groups have taken steps to establish IPCAs in New Brunswick, many of which would include coastal lands.

[A Note on Private Coastal Property Rights](#)

Private individuals may own property along the coast, up to the high-water mark. In some rare circumstances, certain coastal properties may extend beyond the high-water mark into the water. These “private water lots”, which are sometimes called “pre-Confederate water lots”, were granted to private landowners prior to Confederation and remain in existence. For example, Saint John Harbour has many private water lots.

In addition, landowners have riparian rights, which are a set of limited rights to water that is immediately adjacent to owned property. These rights include the right to access the water, the right of drainage, the right to the flow of water, the right to quality of water, the right to use the water, and the right of accretion (the right to any additional land that results from natural accretion).⁹

Coastal Development

How can I protect the coast against adverse impacts caused by development?

The coast is home to many important and sometimes vulnerable coastal ecosystems and species, some of which are found exclusively within the New Brunswick's coastal areas. Examples include many of the province's beaches and salt marshes, along with rare or endangered species like the Piping Plover and Maritime Ringlet that live entirely in or rely on coastal ecosystems.¹⁰

Human development and activity can adversely impact coastal ecosystems and species and can sometimes help to protect or restore them. Human development can also be more vulnerable in coastal areas; for example, building too close to the ocean may allow salt water to contaminate well water or make buildings more susceptible to coastal flooding and erosion.

Although human development and activities are not generally prohibited in coastal areas, they often require government approval. Often, a combination of municipal by-laws and provincial and federal laws will apply, and multiple approvals from different levels of government will be required. In some cases, large developments may also require an approval after undergoing a provincial environmental impact assessment or a federal impact assessment. You can learn more about these processes in our Summary Series volume ***Environmental Impact Assessment: A Legal Toolkit for New Brunswick***. Coastal developments that may require an environmental impact assessment include aquaculture operations (see below), causeways, ports, harbours, and projects impacting two or more hectares of salt marsh.¹¹

If you are considering building or undertaking an activity in a coastal area, you should seek the appropriate permits and approvals that are required by law. If you are concerned about someone else's activity, you can inquire about whether the appropriate permits and approvals were issued. This section provides an overview of the kinds of permits and approvals that may be necessary prior to engaging in development or other activities in a coastal area.

Is a federal approval or permit required?

Certain activities, highlighted below, will trigger federal government involvement.

If the activity impacts fish or fish habitat, an approval will be required under the *Fisheries Act*.¹²

Specifically, if an activity may cause the death of fish or cause harmful alteration, disruption, or destruction of fish habitat, an approval is required.¹³ These activities may be approved by the Minister of Fisheries, Oceans, and the Canadian Coast Guard on a case-by-case basis. There is a ***Fisheries Act registry*** that allows the public to access records related to fish and fish habitat protection and pollution prevention, including authorizations and permits issued under the Act.¹⁴

If the development or activity takes place on the water and may impair maritime navigation or shipping, an approval from Transport Canada may be required under the **Navigable Waters Protection Act**.¹⁵

There are varying requirements for different types of activities that require approval under the *Navigable Waters Protection Act*. Any “minor work”, which is any activity that is specifically set out in the **Minor Works Order**, will not require review or approval, but public notice will be required for erosion-protection works, aerial cables, submarine cables, buried pipelines, outfall and water intakes, dredging, and watercourse crossing activities.¹⁶ Any “major work” will require approval. Major works are activities that are likely to substantially interfere with navigation, and they include water control structures, bridges, placement and repair of ferry cables, causeways, and aquaculture facilities.¹⁷ Additionally, any development that is in, on, over, under, through, or across any “navigable water” and would interfere with navigation and is listed in the Schedule to the *Navigable Waters Protection Act* will also require approval. Information about authorizations issued under the *Navigable Waters Protection Act* is available on an **online public registry**.

If a coastal development or activity may impact migratory birds or their eggs and nests, it will require approval under the **Migratory Birds Convention Act**. Under the Act, any development or activity that injures, harasses, or kills a migratory bird, or that destroys or damages a migratory bird egg or their nest, is prohibited, except where a permit has been issued by the Minister of Environment and Climate Change.¹⁸

If a coastal development or activity may impact a species that is listed as threatened or endangered under the federal **Species at Risk Act** or may impact the habitat of a listed species, that development or activity will require an agreement or permit from the Minister responsible for the Act.¹⁹ Information about agreements or permits issued under the *Species at Risk Act* is available on the dedicated **species at risk public registry**.

If an activity involves accommodations or services for fishing or recreational vessels, then a lease or licence may be required under the **Fishing and Recreational Harbours Act**.²⁰ Under the Act, the Minister of Fisheries, Oceans, and the Canadian Coast Guard is responsible for the management and maintenance of scheduled harbours, which are fishing or recreational harbours that are listed in regulations created under the Act.²¹ The Minister may enter into an agreement with a province or any person to undertake activities like acquiring, developing, constructing, improving, or repairing a scheduled harbour.²²

Is a provincial approval or permit required?

There is no dedicated provincial law in New Brunswick that deals specifically with coastal development or protects the entire coast. What follows is a brief description of the key laws, regulations, and policies that govern certain coastal developments and activities. Note: there are many provincial laws that may apply to activities occurring in coastal areas, and this Summary Series cannot review them all.

The **Clean Environment Act** applies to many activities that occur on provincial Crown land and on private land. It deals with pesticide use, contaminants, coastal and wetland designations, solid waste, and other matters. The **Water Quality Regulation**, which operates under the *Clean Environment Act*, prohibits the construction and operation of any source of contaminants unless the activity has an approval from the Minister of Environment and Local Government.²³ Where an activity has received an approval, it may be subject to conditions.

The **Clean Water Act** applies to activities that impact water and water sources, including watercourses and coastal wetlands. A “watercourse” is defined as including the “bed, banks, sides and shoreline” of a river, creek, stream, spring, brook, lake, pond, reservoir, canal, ditch, or other natural or artificial channel. The definition does not include the ocean, and it may not apply to some coastal waters.²⁴

The *Clean Water Act* requires every person to have a permit before altering a watercourse or wetland, including for any activity that temporarily or permanently changes the flow of water or disturbs the vegetation or ground in a wetland.²⁵ The **Watercourse and Wetland Alteration Regulation** governs this permitting process. Under this regulation, some activities are exempted from needing a permit. Examples of activities that are exempted include: navigation, gathering food, installation of drainage tile to drain agricultural land, and harvesting of aquatic plants for recreational use.²⁶ For more information on the wetlands and watercourse alteration permitting process, you can review the province’s **Watercourse and Wetland Permitting Guidelines** and its **Watercourse Alterations and Technical Guidelines**.

The **Crown Lands and Forests Act** requires an approval or lease from the Department of Natural Resources and Energy Development for structures that are placed on submerged Crown lands, including all provincial land seaward of the average high tide mark. Various policies help to guide decisions for provincially owned coastal lands. For example, small floating docks and private moorings that do not obstruct pedestrian use of submerged lands do not require approvals, but commercial floating docks, permanent piers, and boat launches require permission from the Department.

The *Crown Lands and Forests Act* also creates Crown Waterfront Reserves, which are waterfront lands owned by the province. The **Crown Waterfront Reserves Policy** was created to guide decisions for waterfront reserves. Its objectives are to retain the reserves as public lands, safeguard their functions, and address and discourage unauthorized uses on these lands.²⁷

In addition to the various Acts and regulations, the province has at least two policies that apply to government decision-making in coastal areas. The **Coastal Areas Protection Policy** creates two coastal “zones”. Zone A includes tidal watercourses, coastal marshes, and dyked land. Activities not allowed in Zone A include certain infilling and excavation activities, dredging, beach quarrying, and construction of groynes.²⁸ Zone B extends 30 meters landward from the high-water mark. Certain activities in Zone B are restricted. Erosion control structures – like groynes, breakwaters, and retaining walls – will not be permitted below the high tide mark, in accordance with the province’s *Coastal Areas Protection Policy*.

The **New Brunswick Wetlands Conservation Policy** states that the provincial government will not support proposed activities in, or within 30 metres of, a Provincially Significant Wetland, nor will it support activities that pose a substantial risk to these wetlands. All coastal marshes and some coastal estuaries like the Tabusintac Lagoon and River Estuary are considered **Provincially Significant Wetlands**.

Is a local government approval or permit required?

Local governments have useful powers, primarily under the **Community Planning Act**, to regulate development and human activity along the coast by creating by-laws. They can use by-laws to complement or strengthen environmental protection provided by federal or provincial law or to address gaps in protection where there are no federal or provincial laws.

Local governments are governed by elected councils. Each council must create and adopt a municipal plan, which is a document that provides direction for land-use planning and sets priorities and objectives for the municipality.²⁹ A municipal plan must contain policies on matters including development and land use, conservation of the environment, control of pollution, and municipal services and facilities.³⁰ Each council must also adopt a zoning by-law, which divides the local government into zones and prescribes the conditions that developments must meet.³¹ For example, by-laws can regulate the location and placement of buildings and structures by establishing minimum setbacks or restricting their development near bodies of water; they can also regulate the excavation of materials like sand. By-laws can be used to regulate how close to the coast or vulnerable coastal ecosystems development or an activity within a municipality may occur. Before carrying out or authorizing development, a province must consider the relevant municipal plan.³²

The case of **Merzetti v The City of Saint John**³³ is a good example of how by-laws can be used for environmental protection and supplement existing provincial law. Mr. Merzetti began to develop a house on the shoreline of First Loch Lomond Lake in Saint John. The City of Saint John sought a court order that would require him to demolish or move the house at least 150 metres away from the edge of the lake. Mr. Merzetti argued that the City’s by-laws conflicted with provincial requirements under the *Clean Water Act*, which only required a 75-metre setback from the shoreline. The court found that the City of Saint John had the authority to enact by-laws that imposed conditions that are stricter than provincial regulations, and it ordered Mr. Merzetti to move or demolish the house.

Aquaculture

How is aquaculture managed along the coast?

Aquaculture involves the rearing of fish, shellfish, or marine plant species. Often, fish species are reared using “open-net” pens in coastal waters. Aquaculture can have many potentially harmful impacts on coastal environments and coastal communities. The reared fish may escape, leading to interbreeding with wild fish and the exposure of wild fish to disease. The use of medication, drugs, and chemicals may cause unwanted interactions with marine species. The large concentration of fish can result in fish feces and offal creating dead zones on the seabed or may otherwise alter, disrupt, or destroy nearby marine habitats. The open-net pens often attract birds and other animals, resulting in injury and death to these species. Finally, the physical infrastructure can cause interference with navigation, prevent other uses of the water, and cause nuisances to nearby neighbors because of the associated lights and noise.

How are the impacts of aquaculture managed?

Aquaculture in New Brunswick is governed primarily by the province under the provincial *Aquaculture Act* and the Act’s regulations and related policies. The federal government is actively involved in many aspects of aquaculture management under the *Fisheries Act* and through its powers that are relevant to navigable waters. The relationship between the province and the federal government is managed under the **Atlantic Memorandum of Understanding for the Development and Management of the Aquaculture Industry**, which was signed in 2021.

The primary way that the federal government is involved in regulating aquaculture is through the federal **Aquaculture Activities Regulations**, which apply to operations that cultivate fish.³⁴ Although the federal *Fisheries Act* generally prohibits the deposit of deleterious substances into waters frequented by fish, drugs, pest control products, and biochemical oxygen demanding matter used in the operation of an aquaculture facility are exempted if the facility is operated under an aquaculture licence.³⁵ Any release of such deleterious substances must meet the conditions that are imposed by the *Aquaculture Activities Regulations*.

New Brunswick’s **Aquaculture Act** details licencing, aquaculture standards, disease prevention, and land designation, while the details pertaining to licencing are set out in the *General Regulation – New Brunswick Aquaculture Act*. In New Brunswick, no person may carry out aquaculture unless they have received a licence.³⁶ Additionally, aquaculture sites may require a lease or an occupation permit when located on provincial Crown lands.³⁷ Licences, as well as leases or permits, generally have terms or conditions that must be followed.

The *Aquaculture Act* requires the provincial Minister of Agriculture, Aquaculture and Fisheries to establish and maintain a public registry for aquaculture, but no such registry currently exists.³⁸

Decision-making for aquaculture is guided by several provincial policies, which have the primary objective of promoting development of aquaculture. The **New Brunswick Rainbow Trout Aquaculture Policy** describes the process for mitigating risk to wild trout while developing the aquaculture industry for rainbow trout. The **Bay of Fundy Marine Aquaculture Site Allocation Policy** guides provincial decisions for the allocation of marine aquaculture sites for many different species in the Bay of Fundy and is meant to account for the bay's unique environment and the need for sustainable resource development. The **Marine Aquaculture Site Allocation Policy for the East Coast of New Brunswick** guides provincial decisions for allocation of marine aquaculture sites in all tidal waters along the province's east coast and is meant to account for the area's unique ecosystem.³⁹

In addition to the authorizations required under the *Aquaculture Act*, aquaculture projects may be required to undergo a provincial environmental impact assessment. For example, an aquaculture project that withdraws water, releases waste-water, introduces non-native species into the environment, or is located in an area where there are rare, unique, or endangered species will require an environmental impact assessment.

Pollution in Coastal Areas

What can I do about land-based or marine-based pollution along the coast?

It is common for development and human activities to release pollution into the coastal environment. Pollution can damage coastal ecosystems by interfering with natural processes and harming or killing plant and animal species. It can also negatively impact human health: in particular, the health of vulnerable groups of people like children and the elderly.

Pollution can be land-based or marine-based, and the source of pollution will often dictate the appropriate response. If pollution is coming from provincial Crown land or private land, then provincial legislation will apply. If it is coming from federal Crown land, then federal legislation will apply. In many cases, regardless of the source of pollution, both a provincial and federal response may be warranted.

Canadian environmental laws generally take a regulatory approach to managing pollution. This means that both provincial and federal law generally prohibit the release of pollution into the environment unless permission is given. Even with permission, there are usually restrictions on the volume, location, and toxicity of the pollution, usually in the form of conditions on an approval.

Is the pollution the responsibility of the federal government?

If pollution or waste is released into coastal waters, it is almost certain that the federal government will be involved. In particular, the federal *Fisheries Act*, *Canadian Environmental Protection Act*, and *Canada Shipping Act* will apply.

The ***Fisheries Act*** has broad application over pollution and waste that impacts coastal waters because of the extent and reach of the federal government's authority over fisheries, and, by extension, fish and fish habitat. The federal power applies directly to fish and fish habitat in coastal waters, and it applies indirectly to the inland waters – such as streams, rivers, and estuaries – that feed into coastal waters.

Subsection 36(3) of the *Fisheries Act* is particularly important because it prohibits everyone from depositing a deleterious substance into any water that is frequented by fish, or under any conditions where the deleterious substance may enter such water.⁴⁰ The prohibition applies to all bodies of water along New Brunswick's coast.⁴¹ A deleterious substance is defined as:

- a. any substance that, if added to any water, would degrade, or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water; or

- b. any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade, or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.⁴²

It does not matter whether the deleterious substance causes the water frequented by fish to become deleterious.⁴³ It also does not matter if a person did not release the deleterious substance into an actual water body. If pollution is allowed to escape and ultimately makes its way into water, that may be sufficient to trigger liability under subsection 36(3).⁴⁴

There is a corresponding duty in the *Fisheries Act* to notify a government authority of the deposit, or reasonably expected deposit, of a deleterious substance. This duty is owed by every person who owns, or has charge, management, or control, of the deleterious substance or the work, undertaking, or activity that results or may result in a deposit.⁴⁵ Although Fisheries and Oceans Canada has general authority over the *Fisheries Act*, Environment and Climate Change Canada is responsible for this part of the Act, and so its officers are responsible.

Several regulations created under the *Fisheries Act* may be applicable to a given case of coastal pollution or waste. For example, the *Pulp and Paper Effluent Regulations* may apply to a pulp and paper mill located in a coastal area, and the *Wastewater Systems Effluent Regulations* may apply to a wastewater system located in a coastal area. While a detailed examination of all the regulations is beyond the scope of this volume, a helpful rule of thumb is that these regulations create exemptions to what is otherwise a general prohibition against depositing deleterious substances into waters frequented by fish.

The prohibition against depositing deleterious substances is distinct from other provisions in the *Fisheries Act* that prohibit activities causing death of fish or the harmful alteration, disruption, or destruction of fish habitat.⁴⁶ While those activities may be approved by the Minister of Fisheries, Oceans, and the Canadian Coast Guard on a case-by-case basis, only regulations made under the *Fisheries Act* can exempt activities that cause a deposit of a deleterious substance.⁴⁷

The federal ***Canadian Environmental Protection Act*** ("***CEPA***") deals with toxic substances and contaminants. A key part of the *CEPA* regime is the **Toxic Substances List**.⁴⁸ If a substance on this list is released into the environment, including onto coastal lands or into coastal waters, *CEPA* applies. There is a legal duty to report such a release to an enforcement officer, as well as to take measures to prevent or mitigate the release and to notify the public about the release.⁴⁹ *CEPA* has several provisions dealing specifically with land-based pollution affecting the marine environment. It allows the Minister of Environment and Climate Change to issue environmental objectives, guidelines, and codes of practice to prevent and reduce marine pollution from land-based sources, following consultation with any other affected minister.⁵⁰

CEPA is also one of the key federal laws dealing with marine-based pollution. The Act prohibits any person or ship from disposing of a substance in Canada's internal waters (excluding rivers, lakes, or other fresh waters), territorial sea, or exclusive economic zone unless the substance is a "waste or other matter" (which are substances listed in Schedule 5 of the Act) and the disposal is done in accordance with a Canadian permit.⁵¹ The Minister of Environment and Climate Change may issue a permit in accordance with regulations created under *CEPA*, following an assessment of the "waste or other matter" being proposed for disposal at sea.⁵²

The ***Canada Shipping Act*** is the other key federal law that deals with marine-based pollution. It implements most of the international shipping requirements for pollution prevention, primarily through its ***Vessel Pollution and Dangerous Chemicals Regulations***. The *Canada Shipping Act* and its regulations govern and regulate various kinds of vessel pollution, including the following:

- Ballast water: Canadian vessels and all vessels that are in Canada's internal waters or its territorial sea must use an approved ballast water management system to clean their ballast water of organisms to an international performance standard before release.⁵³
- Garbage: The discharge of garbage from ships is banned in internal waters.
- Greywater: Any discharge of drainage water from sinks, bathtubs, showers, and dishwashers must not result in deposit of solids or leave a sheen on the water.⁵⁴
- Noxious substances and dangerous chemicals: Every person or vessel is prohibited from discharging a noxious liquid substance carried in bulk, except in accordance with requirements established by regulation. These prohibitions are specific to chemical tankers.
- Oil and Oily Discharges: Every person or vessel is prohibited from discharging a prescribed pollutant – which includes oil and any oily mixture – unless the discharge is conducted in accordance with a permit issued under the *Canada Shipping Act* or *CEPA*.⁵⁵ This restriction applies to any vessel in Canadian waters, including the nearshore and internal coastal waters of New Brunswick.
- Sewage: Every person or vessel is prohibited from discharging sewage or sewage sludge, except in accordance with fecal coliform counts and other conditions imposed by section 96 of the *Vessel Pollution and Dangerous Chemicals Regulations*.⁵⁶ Discharge of untreated sewage from a vessel within 3 nautical miles of the shoreline is prohibited with few exemptions.

Any such pollution or waste coming from a ship will fall within the authority of the Canadian Coast Guard.

Is the pollution or waste the responsibility of the provincial government?

If pollution or waste is being released into a coastal area and it is coming from provincial Crown land or private land, then responsibility falls to the provincial government. This stems from the provincial government's constitutional authority over provincial Crown lands, local works and undertakings, property rights, and matters of a local or private nature.

New Brunswick's **Clean Water Act** prohibits any person from releasing a contaminant or a class of contaminants into water (including coastal water) in the following circumstances:

- it would affect the natural, physical, chemical, or biological quality of the water;
- it would endanger the health, safety, or comfort of a person or animal;
- it would cause damage to property or plants; or,
- it would interfere with transport, business, or use and enjoyment of property.⁵⁷

A “contaminant” can be a solid, liquid, gas, heat, sound, or odour that is foreign or in excess of natural amounts, affects the environment, endangers health or safety, or is designated by regulation.⁵⁸ Pesticides and waste are contaminants.

A person can release a contaminant into water if they are acting under and in compliance with authority or permission given under an Act of the provincial legislature.⁵⁹ If someone has released a contaminant into water, the Minister of Environment and Local Government may issue an order to the person who released it, requiring them to address the contamination.⁶⁰

In addition, the **Water Quality Regulation**, which operates under the *Clean Environment Act*, prohibits every person from emitting, discharging, depositing, leaving, or throwing a contaminant into the environment in any location that will cause it to directly or indirectly cause water pollution to any waters of the province, including coastal waters above the low-water mark.⁶¹ Water pollution is any alteration to a property of the waters of the province, or the addition to or removal of substances from, those waters. A contaminant causes water pollution if it makes waters: (a) harmful to public health, safety, or welfare; (b) harmful or less useful for domestic, municipal, industrial, agricultural, recreational, or other lawful uses; or (c) harmful or less useful to wildlife.⁶²

The prohibition in the *Water Quality Regulation* does not apply if an approval is granted by the Minister of Environment and Local Government. An application for approval, and the approval itself, must be in the form prescribed by the Minister. The Minister must maintain one or more registers containing these forms and must make the register(s) available for inspection at the offices of the Department of Environment and Local Government in Fredericton for the fee of one dollar.⁶³

Every person who causes the release of a contaminant that may result in water pollution, or every person who has control of a source of contaminant that causes a release, has a legal duty to immediately report that release to the provincial Minister of Environment and Local Government.⁶⁴ The Minister has broad powers to issue a Ministerial Order or take emergency measures to contain, control, and clean up the contaminant.⁶⁵

Protected Coastal Areas

What measures can be used to protect coastal land, species, or their habitats?

One way to protect the coastal environment is to identify, create, and manage protected areas. There are multiple laws that can be used to protect coastal land and the species that live in coastal habitats, and each offers different kinds and degrees of protection. Some laws prohibit or limit human activities in an area; some encourage the restoration of species, species habitats, or ecosystems; and some encourage people to interact with their environment by facilitating recreational opportunities.

Which federal laws can be used to create protected coastal areas?

The federal government can make laws that protect federal Crown land and areas below the low-water mark. It can also make laws that protect specific species, and these laws apply to provincial and private land as well; for example, we have already noted above that the *Species at Risk Act* and the *Migratory Birds Convention Act* may offer protection to certain designated species and their coastal habitats.

Two ways that coastal land can be protected federally is through the designation of marine protected areas and national parks.

The phrase “marine protected area” (“MPA”) is used generally to describe a protected area that has a marine component or that is entirely in a marine environment. The International Union for Conservation of Nature defines a protected area as a “clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.⁶⁶ There are many different ways that marine protected areas can be created, but the most common types are *Oceans Act* MPAs, National Marine Conservation Areas created under the *National Marine Conservation Areas Act*, or *Wildlife Areas* created under the *Canada Wildlife Act*.

Canada’s ***Oceans Act*** defines a MPA as a part of the internal waters, territorial sea, or exclusive economic zone that is designated to conserve or protect species, habitats, or biodiversity.⁶⁷ *Oceans Act* MPAs are designated by regulations created under the Act. These MPAs can take many years to establish in a process that involves input from multiple government departments, stakeholders, scientists, and the public to identify an initial “area of interest”. Next, regulations are drafted that identify the area for the MPA and set the rules for it. Finally, management and advisory committees are formed to monitor and manage the area.

The Musquash Estuary is an example of an *Oceans Act* MPA in New Brunswick (the only one in the province). Created by the ***Musquash Estuary Marine Protected Area Regulations*** on March 7, 2007, the Musquash Estuary MPA is a coastal MPA that includes a large estuary and corresponding tributary rivers.⁶⁸ Like all *Oceans Act* MPAs, certain activities are prohibited

within the MPA, including anything that disturbs, damages, destroys or removes any living marine organism, habitat or seabed, as well as dumping, discharge, or deposition of any substance.⁶⁹ However, there are exceptions for certain activities. For example, vessel navigation and fishing activities are generally permitted if they meet certain conditions.⁷⁰

The **National Marine Conservation Areas Act** allows Parks Canada to protect and conserve representative examples of Canada's natural and cultural marine heritage and to provide opportunities for public education and enjoyment.⁷¹ Parks Canada provides these protections by designating National Marine Conservation Areas ("NMCAs"); however, there are currently no existing or planned NMCAs in New Brunswick.

The **Canada Wildlife Act** allows the Canada Wildlife Service to protect and conserve habitat for wildlife by establishing National Wildlife Areas ("NWAs"), including NWAs with marine components, and protected marine areas.⁷² These areas are designed to preserve habitat for migratory birds and other species, with a focus on endangered species.⁷³ There are currently five NWAs in New Brunswick,⁷⁴ with three of these (the Cape Jourimain NWA, Portage Island NWA, and the Shepody NWA) in coastal areas with protected coastal ecosystems. Within these NWAs, many activities – like fishing, agricultural and industrial activities, recreational activities, operating vehicles, or generally causing damage – are prohibited except in accordance with a permit.⁷⁵

The **Canada National Parks Act** allows for the establishment of National Parks or National Park Reserves in which critical habitat is protected. No person may use or occupy public lands within a National Park, except with a permit or other approval granted under the Act or its regulations.⁷⁶ Indigenous persons may carry on harvesting of traditional renewable resources in National Park Reserves.⁷⁷ There are two National Parks in New Brunswick – the Fundy National Park and the Kouchibouguac National Park – both of which have coastal components.

Which provincial laws can be used to create protected coastal areas?

The provincial government can use its laws to protect provincial Crown lands, including bodies of water along the coast and any submerged land or seabed that is above the low-water mark. However, like the federal government, the province has laws that allow it to create protected areas like protected natural areas, parks, and wildlife refuges.

The **Protected Natural Areas Act** allows for the designation of protected natural areas, which serve to protect the biological diversity within the province, and the focus of which is protection, conservation, and management of representative ecosystems and unique, rare, and endangered species and their habitats.⁷⁸ There are two classes of protected natural areas, with each class receiving different levels of protection. People are restricted from entering or carrying on any activity in Class 1 areas, while activities in Class 2 areas are heavily restricted.⁷⁹ A permit is required before activities may occur. Several of the protected natural areas in the province are located along the coast, including Whitehorse Island PNA, St. Croix River Islands PNA, Bay du Vin Island PNA, Little Salmon River PNA, Miscou Grande Plaine PNA, and Tabusintac PNA.⁸⁰

New Brunswick's **Parks Act** enables the creation of provincial parks, which are designated areas that are set aside for use by present and future generations.⁸¹ The Act prohibits certain activities, like mining and quarrying, hunting, and trapping in provincial parks, and it prohibits damage to species in the parks. Beaches and other shoreline areas are given some protection under the Act because removal of sand and gravel from provincial parks is prohibited.⁸²

The **Fish and Wildlife Act** allows for the creation of wildlife refuges and wildlife management areas within the province.⁸³ Inside these areas, hunting, trapping, and snaring are prohibited except where done in accordance with regulations and appropriate authorization. Wildlife refuges and management areas are listed in the schedules of the *Wildlife Refuges and Wildlife Management Areas Regulation*. There are no specific protections for coastal species, but a wildlife refuge or management area could be created along the coast to protect coastal wildlife species. This protection extends to lands covered by water, such as tidal marshes, foreshore flats, bays, and coves.⁸⁴

Are there other ways to create protected coastal areas?

In addition to protected areas that are initiated and planned through government processes, there are actions that private landowners can take to protect their local coastal environments. One way to protect coastal land – and the species and habitats on that land – is to establish a conservation easement. These are agreements, created under the **Conservation Easements Act**, that are entered into voluntarily by a private landowner and an eligible body and that grant rights or impose obligations on the easement holder, land owner, or both, to protect, restore, or enhance the land.⁸⁵ Conservation easements can be temporary or permanent.

A conservation easement can be granted for several different objectives, including: conserving ecologically sensitive land, including rare or endangered plants and animals; protecting or restoring ecosystems, wildlife, or habitat; and, conserving or protecting land and water.⁸⁶ They are used to restrict activities in the present and the future. This means that even if the property is sold or passes on to a new owner, the conservation easement continues to protect the land.

Taking Action to Protect the Coast

What can I do?

There are many ways that you can take action to protect the coast. This may include taking informal steps to resolve an issue to taking formal steps like initiating a legal proceeding in court. A review of all possible options is outside the scope of this document, but what follows are some considerations.

Gather Information

If you are concerned about a proposed development or activity along the coast or want to develop in an environmentally responsible manner, you can gather information about the development or activity. Ask the following questions to help you determine what level of government is responsible, and which laws apply.

- Is the development or activity located above or below the ordinary high-water mark?
- Do legally protected species or migratory birds live in the area?
- Does the development or activity involve or impact navigation?
- Does the development or activity impact fish or fish habitat?
- Is there a coastal wetland or watercourse?
- How big is the development or the footprint of the activity that may occur?
- Will the development or activity be on privately-owned coastal land, or will it be located on provincial or federal Crown land?

Contact the Appropriate Authority

You can contact the appropriate authority or department and request more information about any approvals, permits, licences, or other authorizations that may be required or have been issued for the coastal land. This includes contacting your local municipality for information about possible municipal requirements. You may need to request information through a freedom of information request. For more information, see the **Right to Information and Protection of Privacy Act**.⁸⁷

If you believe that an offence has been committed or may be committed, you can report the suspected offence to the enforcement division of the appropriate government department(s). There may be instances where you are required to report.

Take Court Action

Sometimes, private property rights may be impacted because of environmental degradation. If you believe that the use or enjoyment of your private coastal property has been affected negatively or that environmental degradation has impacted you, or may impact you, you can contact a lawyer to discuss your concerns and explore your options.

Disclaimer

Please note that this volume cannot cover all legal issues or all options available to you, nor should it be interpreted as legal advice. While East Coast Environmental Law works hard to update its materials, some information contained in this Summary Series may become outdated as statutes, regulations, and policies are updated and amended.

East Coast Environmental Law Association

East Coast Environmental Law is a community-centered non-profit organization that is committed to sharing our legal skills with those who seek environmental and climate justice for all species and the natural systems that support those species. We advocate for progressive environmental laws and policies for Atlantic Canada, provide public legal education, and share our legal skills to support individuals, communities, and organizations that are working to prevent or redress environmental harms. We do our work by responding to community inquiries, carrying out legal and policy research, and producing materials on public interest environmental law issues in Atlantic Canada.

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The Environmental Law Summary Series

The Environmental Law Summary Series was one of the first public legal education activities undertaken by East Coast Environmental Law. Each volume of the Summary Series serves as a quick reference resource. The volumes are topical and generally address an area of interest or concern raised by communities or organizations.

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Endnotes

- ¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*“Constitution Act, 1867”*] at section 91
- ² *Ibid* at section 92.
- ³ See: Gerald V. La Forest, “Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident” (1963) 1 Can. Y.B. Int’l Law 149 at pages 150 to 156; see also Meinhard Doelle et al, “The Regulation of Tidal Energy Development off Nova Scotia: Navigating Foggy Waters” UNB LJ volume 55 at pages 40-41.
- ⁴ *Constitution Act, 1867* at section 92.
- ⁵ *Ibid* at section 92(A).
- ⁶ For more information and to read the treaties, see: New Brunswick Aboriginal Peoples’ Council, “Historic Treaties” (2022; accessed autumn, 2022), online: <<https://nbapc.org/treaties/>>
- ⁷ See: *Haida Nation v Canada*, (2004) SCC 73 and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, (2005) SCC 69.
- ⁸ The Wolastoqey Nation began a land claim in court in 2020. This would result in Canadian recognition of Indigenous jurisdiction in some areas of the coast.
- ⁹ Canadian Encyclopedic Digest, Waters and Watercourses (Ontario) III.2. (a) (Ontario) – Riparian Rights 2 – Nature and Basis of Riparian Rights (a) – General. For authorities in New Brunswick, see: *Saint John (City) v Baker* (1906) 3 NB Eq 358 and *Byron v Stimpson* (1878) 17 NBR 697, recently considered and affirmed on this point in *Erik v McDonald* (2019) ABCA 217.
- ¹⁰ For more information about endangered species that live in coastal areas of New Brunswick, see the *Species at Risk Act* or visit the dedicated Natural Resources and Energy Development website.
- ¹¹ See Schedule of the *Environmental Impact Assessment Regulation*.
- ¹² See *Fisheries Act*, RSC 1985 c F-14 [*“Fisheries Act”*] at subsection 35(1), which provides an exception for activities that are authorized by the Minister of Fisheries, Oceans, and Canadian Coast Guard or exempted by regulations made under the Act.
- ¹³ For the prohibition against activities causing death of fish, see *Fisheries Act* at subsection 34.4(1); for the prohibition against the alteration of fish habitat, see *Fisheries Act* at subsection 35(1).
- ¹⁴ This is part of amendments to the *Fisheries Act* in 2019 that are not yet in force. See: *An Act to amend the Fisheries Act and other Acts in consequence*, SC 2019 c 14 at section 30.
- ¹⁵ For more information about approvals, visit the Transport Canada webpage.
- ¹⁶ *Minor Works Order*, SOR/2021-170 at sections 9 to 39.
- ¹⁷ *Major Works Order*, SOR/2019-320 at sections 1 to 6.
- ¹⁸ *Migratory Birds Regulations*, 2022 SOR/2022-105 at subsections 5(1) and 12(1).
- ¹⁹ *Species at Risk Act*, SC 2002 c 29 at section 73.
- ²⁰ More information about the types of leases and licences required can be found in the *Fishing and Recreational Harbours Regulations*, SOR/78-767, which are created under the statute.
- ²¹ *Fishing and Recreational Harbours Act*, RSC 1985 c F-24 at sections 2 and 4.
- ²² *Ibid* at subsections 5(1), 5(2), and 5(3).
- ²³ *Water Quality Regulation*, NB Reg 82-126 at section 3.
- ²⁴ *Clean Water Act* at section 1.
- ²⁵ *Ibid* at section 15.
- ²⁶ *Watercourse and Wetland Alteration Regulation*, NB Reg 90-80 at subsection 3(3).
- ²⁷ Government of New Brunswick, “Crown Water Reserves Policy” (2011), online: <<https://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/Publications/CLM0122004.pdf>>
- ²⁸ Government of New Brunswick, “A Coastal Areas Protection Policy for New Brunswick” version 2.0 (March, 2019), online: <<https://www2.gnb.ca/content/dam/gnb/Departments/env/pdf/Water-Eau/CoastalAreasProtectionPolicy.pdf>> at pages 4-6.
- ²⁹ *Community Planning Act*, SNB 2017 c 19 at subsection 21(1).
- ³⁰ *Ibid* at subsection 24(5).
- ³¹ *Ibid* at section 53.
- ³² *Ibid* at section 22.

³³ *Merzetti v. City of Saint John*, (2005) NBCA 16.

³⁴ Note: Fisheries and Oceans Canada has proposed a federal Aquaculture Act, but there is currently no indication on when such an Act might be created or if it would apply to New Brunswick.

³⁵ *Fisheries Act* at subsection 36(4)(c) and *Aquaculture Activities Regulations*, SOR/2015-177 at sections 2 and 3. An aquaculture licence may include an authorization or licence issued by the provincial government.

³⁶ *Aquaculture Act*, SNB 2019 c 40 at subsection 48(1).

³⁷ For more information, see the dedicate Department of Agriculture, Aquaculture and Fisheries [webpage](#).

³⁸ *Aquaculture Act* at subsection 12(1). The registry shall contain information prescribed by regulation.

³⁹ Government of New Brunswick, “Marine Aquaculture Site Allocation Policy for the East Coast of New Brunswick” (no date), online: <<https://www2.gnb.ca/content/dam/gnb/Departments/10/pdf/Services/Aquaculture/EastCoastSiteAllocationPolicy.pdf>> at page 3.

⁴⁰ *Fisheries Act* at subsection 36(3).

⁴¹ See the definition of “Canadian fisheries water” in the *Fisheries Act* at subsection 2(1).

⁴² *Fisheries Act* at subsection 34(1).

⁴³ See: *R v MacMillan Bloedel (Alberni) Ltd* [1979] 4 WWR, 654, 47 CCC (2d) 118 (BCCA), which was affirmed recently in *R v University of British Columbia*, (2020) BCSC 1126, 165 WCB (2d) 254, and in New Brunswick in *R v Gemtec Limited*, (2007) NBQB 199.

⁴⁴ See: *R. v. Western Stevedoring Co.* (1984) 13 CELR 159, recently affirmed in *R v Gibson Energy ULC*, (2019) ABPC 191 and in *R v 3853942 Canada Inc et al dba Saputo Dairy Products Canada*, (2017) BCPC 298.

⁴⁵ *Fisheries Act* at subsection 38(5).

⁴⁶ For the prohibition against activities causing death of fish, see *Fisheries Act* at subsection 34.4(1); for the prohibition against the alteration of fish habitat, see *Fisheries Act* at subsection 35(1).

⁴⁷ *Fisheries Act* at section 36(4).

⁴⁸ For the full list of toxic substances listed, see Schedule 1 of the *Canadian Environmental Protection Act, 1999*, SC 1999 c 33 [“CEPA”].

⁴⁹ *CEPA* at subsection 95(1).

⁵⁰ *Ibid* at subsection 121(1).

⁵¹ *Ibid* at subsection 125(1).

⁵² See Schedule 6 of *CEPA*.

⁵³ See: *Ballast Water Regulations*, SOR/2021-120, at subsection 4(1).

⁵⁴ *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69 at subsection 131.1(4).

⁵⁵ *Canada Shipping Act, 2001*, SC 2001 c 26 at section 187 and *Vessel Pollution and Dangerous Chemicals Regulations* at section 4.

⁵⁶ *Vessel Pollution and Dangerous Chemicals Regulations* at section 95.

⁵⁷ See *Clean Environment Act*, RSNB 1973 c C-6 at subsection 5.3(1) and the *Clean Water Act*, SNB 1989 c C-6.1 at section 12(1).

⁵⁸ For the definition of “contaminant”, see the *Clean Water Act* at section 1.

⁵⁹ *Clean Water Act* at section 12(1).

⁶⁰ *Ibid* at section 15(1).

⁶¹ *Water Quality Regulation*, NB Reg 82-126 at section 3.

⁶² *Ibid* at subsection 2(1).

⁶³ *Ibid* at section 27.

⁶⁴ *Ibid* at subsection 11(2).

⁶⁵ *Clean Environment Act* at section 5.

⁶⁶ International Union for the Conservation of Nature, “Guidelines for applying the IUCN protected area management categories to marine protected areas” (2019) 2nd Edition, online: <<https://portals.iucn.org/library/node/48887>>.

⁶⁷ *Oceans Act*, SC 1996 c 31 at subsection 35(1).

⁶⁸ *Musquash Estuary Marine Protected Area Regulations*, SOR/2006-354. For more information, see the dedicated Fisheries and Oceans Canada [webpage](#).

⁶⁹ *Ibid* at subsection 3(1).

⁷⁰ *Ibid* at section 4.

⁷¹ *National Marine Conservation Areas Act*, SC 2002 c 18 at subsection 4(1).

- ⁷² *Canada Wildlife Act*, RSC 1985 c W-9 at subsections 3 and 4.1(1).
- ⁷³ *Ibid* at sections 8 and 9(1).
- ⁷⁴ *Wildlife Area Regulations*, CRC c 1609 at Schedule 1, Part 2. For more information, see the New Brunswick section of the dedicated Environment and Climate Change Canada [webpage](#).
- ⁷⁵ *Ibid* at subsection 3(1).
- ⁷⁶ *Canada National Parks Act*, SC 2000 c 32 at section 13 and *National Parks General Regulations* SOR/78-213 at sections 7 and 7.1.
- ⁷⁷ *Canada National Parks Act* at sections 39 and 40.
- ⁷⁸ *Protected Natural Areas Act*, SNB 2003 c P-19.01 at section 3.
- ⁷⁹ *Ibid* at sections 11 and 12.
- ⁸⁰ Whitehorse Island and St. Croix River Islands are both Class 1 natural protected areas.
- ⁸¹ *Parks Act*, RSNB 2011 c 202 at section 3.
- ⁸² See the *General Regulation* NB Reg 85-104 (created under the *Parks Act*) at section 18.
- ⁸³ *Fish and Wildlife Act*, SNB 1980 c F-14.1 at subsections 118(1)(d) and (e).
- ⁸⁴ *Wildlife Refuges and Wildlife Management Areas Regulation*, NB Reg 94-43 at section 2.
- ⁸⁵ *Conservation Easements Act*, RSNB 2011 c 130 at section 2.
- ⁸⁶ *Ibid* at section 3.
- ⁸⁷ You can access the [dedicated webpage](#) for freedom to information requests: Government of New Brunswick, “Right to Information and Protection of Privacy”, (no date) accessed autumn 2022, online: https://www2.gnb.ca/content/gnb/en/departments/finance/office_of_the_chief_information_officer/content/rti.html