

## Frequently Asked Questions:

### Provincial Jurisdiction of British Columbia over Coastal and Ocean Matters

#### **Which order of government is responsible for regulating coasts and marine areas in British Columbia?**

All orders of government (Indigenous, federal, provincial and local) have jurisdiction in coastal and marine areas in Canadian law, and each has an important role to play in coastal and marine planning, protection management, and enforcement. Indigenous peoples also have sovereign powers over their territories and Indigenous laws apply to those territories as well as Canadian laws.

#### **In Canadian law, how far seaward does provincial jurisdiction extend?**

The boundaries for coastal provinces typically include all land to the “low tide mark” (the level reached by the tide at low water), as well as all “inland waters,” meaning the area between headlands such as bays, harbours, and coves (historically referred to as *inter fauces terrae*, “within the jaws of the land”), including the seabed in those areas.

#### **What gives the Province of BC relatively expansive coastal jurisdiction?**

The waters between Vancouver Island and the Lower Mainland have been interpreted to be “inland waters” within the Province of BC by the Supreme Court of Canada, following a reference case brought by the Province that was decided in 1984.<sup>i</sup>

This includes the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait. This gives the province the power to legislate over the seabed and waters in these areas, on subject matters within its jurisdiction.

Ownership of the seabed further north along the coast of BC remains unresolved. In practice, the provincial and federal governments effectively share jurisdiction over the waters of Dixon Entrance, Hecate Strait and Queen Charlotte Sound. In these regions, the province has designated marine protected areas adjacent to terrestrial parks. On the North and Central Coast, joint federal-provincial-Indigenous ocean management and protected area planning processes are underway.



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## What coastal and ocean activities does BC currently regulate?

The long list of provincially regulated activities includes: environmental assessments, tourism and recreation, aquaculture (marine plants, shellfish and finfish), marinas and yacht clubs, log handling, renewable energy projects, conservation and scientific research, commercial harvest of vegetation, ferries and heritage conservation. However, BC lacks a coastal management strategy and legal framework that would address the cumulative effects of these activities

## Which orders of government have jurisdiction over major ocean-based activities?

- **Fishing:** The federal government has exclusive jurisdiction over fisheries in tidal waters, subject to s. 35(1) of the Canadian Constitution.<sup>ii</sup>
- **Shipping:** The federal government has exclusive jurisdiction on navigation in all navigable waters, including interior waters, “no matter who owns the land underneath.”<sup>iii</sup> Provincial laws do apply to some aspects of shipping, however, including shipping that is strictly within the province.<sup>iv</sup>
- **Mineral and hydrocarbon resources:** The federal and provincial government each have jurisdiction over resource extraction in British Columbia's marine waters, depending on where the resources are located. The province owns undersea hydrocarbons and minerals as part of its ownership of the province's inland waters and submerged lands beneath them, which includes the area between the mainland and Vancouver Island. The federal government has authority over offshore oil and gas regulation and any undersea mining in the seabed and subsoil of the territorial sea zone, and the exclusive economic zone (EEZ).<sup>v</sup> There are, however, longstanding federal and provincial moratoriums on offshore oil and gas on the Pacific Coast.
- **Marine finfish and shellfish aquaculture:** These operations require a provincial Crown land tenure under the *Land Act* to authorize the use of the site, federal approval under the *Navigation Protection Act* and an aquaculture license under the Pacific Aquaculture Regulations of the *Fisheries Act*.<sup>vi</sup>
- **Protected areas:** All levels of government have the authority to establish protected areas in the marine and coastal areas under their jurisdiction. In BC, there are a few federal marine protected areas as well as approximately 150 provincially designated marine protected areas (although the province cannot restrict federally regulated activities like fishing in these areas). This shared jurisdiction can be harnessed to work collaboratively on marine protection planning processes, as is presently occurring with the federal, provincial and many Indigenous governments in BC's Northern Shelf Bioregion.<sup>vii</sup>

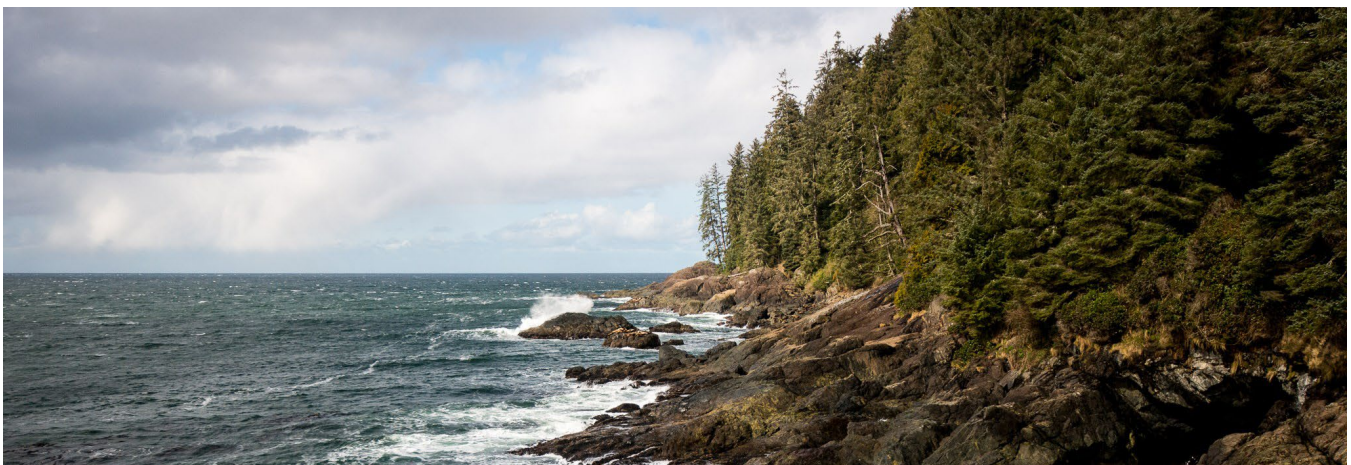


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- **Permits and authorizations:** Many marine activities and uses require provincial authorization, including tenures for wharves, marinas and renewable energy.<sup>viii</sup> While the province shares authority over many of these marine activities with the federal government, this shared jurisdiction does not prevent the province from regulating activities that are within its jurisdiction, such as the management and use of land and natural resources, and developing legal objectives for coastal and marine areas in its extensive marine “inland waters.”
- **Environmental assessments:** Both levels of government have laws requiring environmental assessments for projects, related to their legislative and proprietary jurisdiction.<sup>ix</sup>
- **Marine pollution:** Both the federal and provincial governments have the authority to regulate marine pollution. However, the province’s jurisdiction is restricted to the area it owns.<sup>x</sup> The province also cannot enact legislation that solely affects subjects of federal jurisdiction (like shipping and fishing), and cannot threaten the management and operation of subjects of federal jurisdiction.<sup>xi</sup>



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### **What order of government manages sea level rise and coastal flood risks to communities?**

The provincial government has provided guidance about the rates of expected sea level rise (0.5 m by 2050 and 1.0 m by 2100), but most local governments own and operate their own flood management infrastructure. This infrastructure, such as dikes and pumping stations, is usually located at or above the high water mark (natural boundary). As sea level rises, existing coastal habitat seaward of dikes in developed areas like the South Coast will be lost because it can't migrate landward. Nature-based approaches to flood management that could protect both ecosystems and communities usually require nearshore and foreshore elements that are outside the jurisdiction of local governments.

### **Do federal laws apply on provincial lands and waters?**

Yes, the federal government can exercise jurisdiction established by the Constitution over activities such as fishing or shipping, and federal laws will apply on provincial lands and waters.

## Do provincial laws apply on federal land and land belonging to federal Port authorities within the province?

The Province's ability to regulate activities on federal land, including Port land, is quite restricted. Some provincial laws may apply on federal land, but only to the extent that they do not interfere or conflict with federally-regulated activities on those lands.

## What jurisdictional zones exist in the ocean?

Both the *UN Convention on the Law of the Sea* and the federal *Oceans Act* divide the ocean into six maritime zones: a state's inland waters, its territorial sea, its contiguous zone, its exclusive economic zone ("EEZ"), the continental shelf, and the high seas. The federal government has jurisdiction over the seabed and subsoil of the territorial sea, which begins at the low tide mark on western Vancouver Island and extends to 12 nautical miles (nm) offshore, and the EEZ, which extends from 12nm to 200nm off shore. The province owns the lands and waters in inland waters, which includes the area between the mainland and Vancouver Island. The foreshore/coastal waters/intertidal zone and the internal waters are most relevant for provincial jurisdiction.

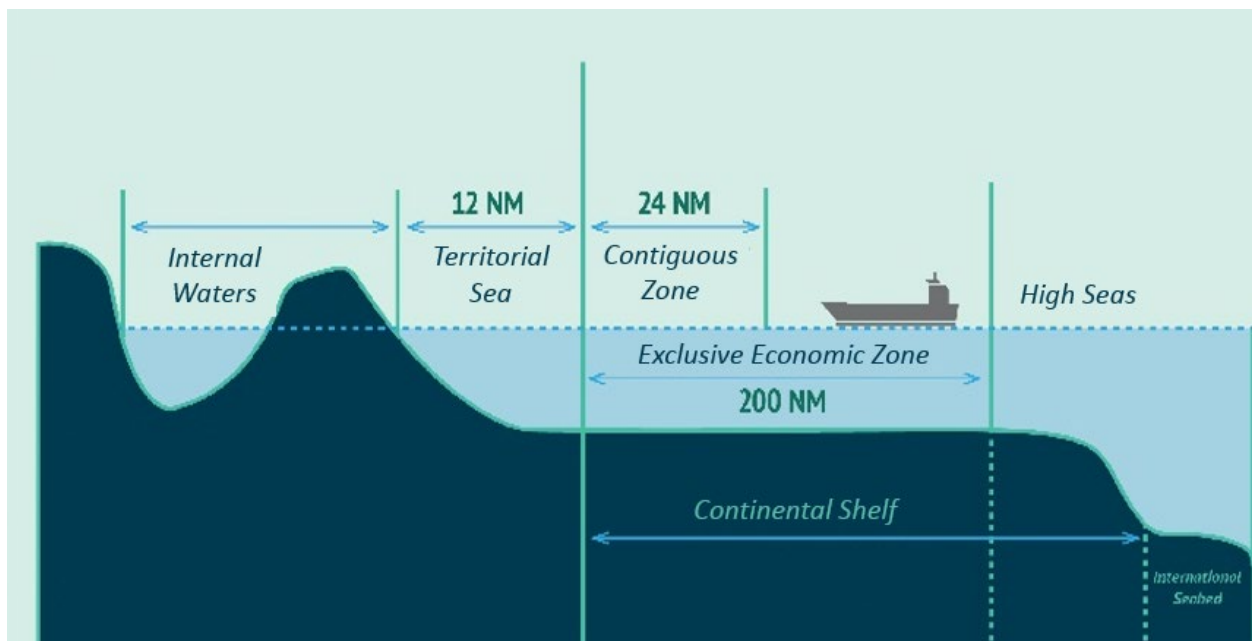


Diagram from the Asia Maritime Transparency Initiative (adapted from the original).<sup>xii</sup>

<sup>i</sup> Reference re: *Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388 at 2.

<sup>ii</sup> *British Columbia (Attorney General) v. Canada (Attorney General)* (1913), 15 D.L.R. 308 (Jud. Com. of Privy Coun.), affirming (1913) 47 S.C.R. 493.

<sup>iii</sup> *St-Denis de Brompton (Municipality) v Filteau*, [1986] R.J.Q. 2400 (QC Court of Appeal) at para 31.

<sup>iv</sup> *Island Tug & Barge Ltd v Communication, Energy and Paperworkers Union, Local 601* 2003 BCCA 247.

<sup>v</sup> *Reference re Offshore Mineral Rights (British Columbia)*, [1967] SCR 792.

<sup>vi</sup> R.S.B.C. 1996, c. 245, and BC-FLNRO, Land Use Operational Policy-- Aquaculture, June 2011; R.S.C. 1985, c. N-22; SOR/2010-270. See Alexander Ross Clarkson, "The jurisdiction to regulate aquaculture in Canada" (2014); <https://aptnnews.ca/2018/06/02/b-c-first-nation-files-aboriginal-title-claim-challenging-fish-farms-in-their-territory/>

<sup>vii</sup> <https://mpanetwork.ca/bcnorthernshelf/whats-happening/>

<sup>viii</sup> <http://www.dfo-mpo.gc.ca/oceans/publications/pg-gp/page02-eng.html>

<sup>ix</sup> *BC Environmental Assessment Act*, S.B.C. 2002, c. 43; *Canadian Environmental Assessment Act 2012*, S.C. 2012, c. 19, s. 52.

<sup>x</sup> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401; *Constitution Act, 1867*, ss 92(5), (13).

<sup>xi</sup> *Reference re Environmental Management Act*, 2020 SCC 1, *aff'g* 2019 BCCA 181.

<sup>xii</sup> <https://amti.csis.org/maritime-zones/>