



**ENVIRONMENTAL
LAW CENTRE**
UNIVERSITY OF VICTORIA



Cleaning up Coles Bay and the BC Coast: The Urgent Need for Federal Action to Address Indigenous Shellfish Issues

A Submission to the Honourable Ministers Responsible:

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Minister of Environment and Climate Change, Steven Guilbeault

Minister of Health, Mark Holland

Minister of Crown-Indigenous Relations, Gary Anandasangaree

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Any errors and omissions are the responsibility of the authors.

Table of Figures:

COVER: Pauquachin elders hold a ceremonial gathering around a sacred canoe, with a shellfish closure sign nearby, underscoring their dedication to ancestral traditions and marine conservation. (Photo: Provided by the Pauquachin First Nation)

Figure 1: “Mount Douglas Clam Bake,” depicting Coast Salish peoples gathered on the beach to participate in a clam bake at Cordova Bay: likely near the site of a WSÁNEĆ historic village called ȚEL_İĆ. Image G-04230 courtesy of the Royal BC Museum. Dated to 1900. 9

Figure 2: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Accessed September 14, 2022, online: <<https://maps.bccdc.ca/shellfish/>> [perma.cc/88C5-86WK]. 13

Figure 3: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Accessed September 14, 2022, online: <<https://maps.bccdc.ca/shellfish/>> [perma.cc/88C5-86WK]. 14

Figure 4: Pauquachin Marine Officer and closure notice on Coles Bay beach. (Photo: Holly Pattison) 16

Figure 6: Coast Salish person depicting clam digging with a wooden dibble (Dated to 1900). (Photo: Courtesy of EdwardCurtisPhotos.com)..... 21

Figure 7: Canadian Food Inspection Agency, Canadian Shellfish Sanitation Program, “CSSP_Base_Public (MapServer)” (last visited 24 May 2023) 22

Figure 8: Lummi youth dig clams at Portage Bay WA. The beach was closed in 2014 because of fecal coliform, but successfully reopened in 2019 after Pollution Identification and Correction efforts. (Photo: Kari Neumeyer, Northwest Indian Fisheries Commission)..... 33

Figure 9: Pauquachin First Nation environmental stewards partnering with Swinomish tribal members at Kiket Island, lining up to pass stones for the creation of the first newly built clam garden in living memory, created by Swinomish for the first time in approximately 200 years, in August 2022. (Photo: Dr. Marco Hatch, Western Washington University professor and Samish Tribal Member)..... 39

Figure 10: Seth Book, Skokomish Tribe water quality biologist, uses a refractometer to measure the salinity of a water sample from Hood Canal. (Photo: Tiffany Royal, Northwest Indian Fisheries Commission)..... 41

Figure 11: Pauquachin community members and youth learning together at the beach, on how to turn over beach sediments for management and history of the area in July 2022, as part of new marine youth program efforts. (Photo: Provided by the Pauquachin First Nation) 45

Figure 12: Cedar-woven clam harvesting basket with target-sized skw’lhey’ and s’axwa (Littleneck and butter clams in Hul’q’um’num language), created in the Coast Salish style by a Lummi Elder. (Photo: Dr. Marco Hatch, Samish Tribal Member and Professor at Western Washington University, 2019.) 48

Figure 13: Fisheries and Oceans Canada Map of Sanitary Closures in Saanich Peninsula..... 54

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Table of Contents

EXECUTIVE SUMMARY	5
1. INTRODUCTION	10
1.1 Shellfish Closure Impacts – Federal Mismanagement Hurts Indigenous Health.....	16
1.1.1 <i>The Effect of Shellfish Closures on Physical Health</i>	<i>17</i>
1.1.2 <i>The Effect of Shellfish Closures on Social, Cultural and Spiritual Wellbeing.....</i>	<i>18</i>
2. CANADA’S FAILURE TO PROPERLY PROTECT INDIGENOUS SHELLFISHERIES.....	23
2.1 The Canadian Shellfish Sanitation Program Fails to Correct Pollution	24
2.1.1 <i>A General Failure to Monitor Pollution and Restore Healthy Shellfish.....</i>	<i>24</i>
2.1.2 <i>Failure to Take Indigenous Use of Shellfish Seriously – Underfunding of the CSSP Has Led to Cuts in Monitoring and Restoration Efforts.....</i>	<i>26</i>
2.1.3 <i>CSSP Testing Deficiencies are Delaying the Re-Opening of Indigenous Shellfish Beaches.....</i>	<i>27</i>
2.1.4 <i>The CSSP Continues to Operate Under an Outdated Mandate – Giving More Resources for Commercial/Export Operations, Less for Traditional Indigenous Harvest</i>	<i>30</i>
2.1.5 <i>Aboriginal and Treaty Obligations</i>	<i>31</i>
2.1.6 <i>US National Shellfish Initiative/Washington Shellfish Initiative – A Model for Improvement.....</i>	<i>33</i>
3. HOW THE US FEDERAL GOVERNMENT FOSTERED SUCCESSFUL WASHINGTON STATE AND LOCAL SHELLFISH INITIATIVES	37
3.1 The Washington State Shellfish Initiative.....	40
3.2 Canada’s Jurisdiction to Act – And Examples of Analogous Ottawa Initiatives	43
4. CONCLUSION.....	46
5. RECOMMENDATIONS	47
6. EPILOGUE: THE FUNDAMENTAL QUESTION OF ENVIRONMENTAL JUSTICE AND RACISM... 49	
6.1 Applying the United Nations Declaration on the Rights of Indigenous Peoples Act	51
APPENDIX A: FISHERIES AND OCEANS CANADA MAP OF SANITARY CLOSURE IN SAANICH PENINSULA.....	54
APPENDIX B: EXAMPLES OF FEDERAL GRANTS SUPPORTING THE WASHINGTON SHELLFISH INITIATIVE	55
APPENDIX C: CASE STUDIES OF US TRIBES’ KEY ROLE IN THE WASHINGTON SHELLFISH INITIATIVE	56
6.1.1 <i>Washington State Case Studies that Put British Columbia Efforts to Shame.....</i>	<i>56</i>
6.1.2 <i>Pollution Identification and Correction Programs have Worked in Hood Canal</i>	<i>57</i>
APPENDIX D: CANADA’S JURISDICTION TO ACT AND EXAMPLES OF PREVIOUS ANALOGOUS CANADIAN INITIATIVES.....	60

Executive Summary

From time immemorial, shellfish have provided healthy food for Indigenous peoples on the BC coast. The shellfish harvest has been essential to community well-being – supporting feasting, ceremony, language, a healthy economy and thriving cultural practice. It has provided an irreplaceable opportunity for elders to teach the young about responsibilities to their relatives; how to manage marine resources according to traditional ecological knowledge; and how to cultivate, harvest, prepare, and share food.

In Pauquachin territory, the shellfish bounty was devastated in 1997 – when DFO closed Coles Bay shellfish harvesting due to sanitary pollution. In the quarter century since the Coles Bay closure, responsible governments have failed to restore the fishery and honour the Pauquachin legal rights to “carry on fisheries as formerly” in the Bay. The federal government has simply posted “harvest prohibited” signs around Coles Bay, and then essentially forgotten the problem.

In a profound injustice,¹ neither local, provincial nor federal governments have made any serious efforts to clean up the pollution. Indeed, for years federal agencies did not even bother to *monitor* pollution levels to determine if the critically important Indigenous fishery could be safely re-opened due to changed conditions.² As a cost-saving measure, the federal government halted pollution testing at Coles Bay, since it is cheaper to simply close down the essential harvest than to monitor and remediate the pollution. As a result, a generation of Pauquachin young people have grown up largely deprived of Coles Bay shellfish and the crucially important values the harvest represents.

This long-time closure of an invaluable Indigenous asset is part of a coast-wide phenomenon. Similar closures have seriously impacted the health, nutrition, food budgets, cultural practices, and community well-being of Indigenous peoples along the entire BC coast – literally hundreds of kilometres of coast have been permanently closed to shellfish harvesting because of sanitary and other pollution.³ Tragically, the failure of governments to remediate Coles Bay has been replicated all along the BC coast – in spite of the fact that in many instances cleanups can be fairly simple and cost-effective.

Indeed, in a stunning example of government indifference to Indigenous lives, federal government policy has deliberately focused pollution monitoring resources on commercial/export shellfish operations – to the detriment of monitoring Indigenous shellfisheries.⁴

¹ See “The Fundamental Question of Environmental Justice and Racism” below.

² See “CSSP’s Inadequacy in Correcting Pollution” below.

³ See the current extensive sanitary shellfish closures along the BC coast at: British Columbia Centre for Disease Control, “Biotoxin and Sanitary Contamination Closures Map for Shellfish Harvesting in British Columbia” online: <<https://maps.bccdc.ca/shellfish/>> [perma.cc/VV59-TKTZ].

⁴ See sections below entitled “The CSSP’s Inadequacy in Correcting Pollution” and “US National Shellfish Initiative/Washington Shellfish Initiative – A Model for Improvement.”

This indifference to the fate of the Indigenous shellfishery stands in sharp contrast with Washington State shellfish policy, which has been developed under the auspices of the US National Shellfish Initiative. Washington State has demonstrated that it is possible to respect Indigenous rights and promptly remediate shellfish harvesting. Responding to court decisions recognizing Tribal treaty rights, Washington State has developed an excellent model where Tribes collaborate with other governments to promptly rehabilitate vast areas of shellfish beds.

Washington State has successfully demonstrated that by setting ambitious remediation goals, regulating pollution, providing resources for proper pollution identification and correction, and collaborating with Indigenous peoples, shellfish beds can be efficiently re-opened for harvest. Thousands of acres of polluted shellfish beds have been cleaned up and re-opened there – at the same time as the shellfish contamination problem continues to deteriorate in BC.⁵ This is a profound injustice, and an international embarrassment.

We urge the Government of Canada to work with British Columbia and local governments to establish a similar *Healthy Shellfish Initiative* in Coles Bay, and all along the BC coast. We ask that your governments develop and implement a coast-wide *British Columbia Healthy Shellfish Initiative*, modelled on the Washington State program. Canada, British Columbia, and North Saanich should begin by collaborating with the Pauquachin Nation to promptly restore the Coles Bay shellfishery on the Saanich Peninsula.

Coles Bay is particularly well-suited to prompt and practical remediation – there is evidence that fixing just a handful of septic systems could address the pollution.⁶ And the success of a pilot project at Coles Bay will serve as a model for what can be accomplished along the entire coastline.

Restoring Indigenous shellfish harvesting on the BC coast provides your government with an historic opportunity. By implementing a successful *Healthy Shellfish Initiative*, government can make a tangible contribution to the nutrition, health, cultural practice, and community well-being of the Pauquachin people – and of many other BC Nations.

⁵ United States Environmental Protection Agency, “EPA issues report on health of Salish Sea” (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>> [perma.cc/57N6-HHTE].

⁶ See a complete discussion of the urgent need for – and practicality of – remediation at Coles Bay in Appendix A of our publication: Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022), online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsshellfishreport/>> [perma.cc/8GUN-9U74].

Recommendations

In order to restore and perpetuate an Indigenous Shellfish Harvest, we recommend that the Government of Canada:

1. Establish a *Federal Healthy Shellfish Initiative*, in partnership with the British Columbia Government and First Nations. The rehabilitation of Coles Bay should be immediately initiated as a pilot project and model to inform the coast-wide program.
2. Set a goal of recovering and re-opening 80% of BC shellfish beds closed for sanitary reasons by 2027. (Modelled on the goal approach of the Puget Sound Partnership).
3. Fund comprehensive Pollution Identification and Correction efforts to be carried out in collaborations with First Nations, the Province of BC, and local governments. Among other things, Canada should contribute technical assistance, research, and development of best management practices/standards.
4. Work with the Province of British Columbia to legally require that prompt and comprehensive *Pollution Identification and Correction* measures be commenced within 60 days of the detection of significant contamination of shellfish. These efforts should be Indigenous led and include Indigenous traditional knowledge, as appropriate. Clear objectives and pragmatic goals for harvest re-opening should be set.
5. Amend the mandate of the Canadian Shellfish Sanitation Program to give priority to supporting Indigenous shellfish harvesting, in light of treaty and Aboriginal rights. The new mandate should specifically prioritize environmental justice, reconciliation, and First Nations-led restoration of shellfish beds.
6. Expand water-quality testing capacity and frequency to ensure that harvesting continues to be safe – prioritizing an enhanced leadership role for First Nation Guardians and the First Nation Health Authority.
7. Increase funding for the chronically underfunded Canadian Shellfish Sanitation Program. Improve its system for monitoring sanitary shellfish pollution, as well as the system for classifying beaches as open or closed.
8. Include First Nations and their perspectives in risk management decisions – and all other aspects of program operation and implementation.
9. Collaborate on educational outreach materials and incentives for water quality improvement and shellfish restoration. (e.g., outreach to septic owners, farmers and boat owners; septic upgrade rebates to homeowners; subsidies for critical sewer line extensions).
10. Set up and support a multi-stakeholder partnership-facilitating agency to liaise between First Nations, federal and local governments, and stakeholders, modelled on the successful Puget Sound Partnership.
11. Document the historical injustice of shellfish management and its impacts on First Nations in Government’s upcoming environmental racism strategy and study.

Note: For a discussion of the complementary reforms required from British Columbia and Municipal governments, see our parallel submissions to the Province of British Columbia,⁷ and the District of North Saanich.⁸

⁷ Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022), online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialshefishreport/>> [perma.cc/8GUN-9U74].

⁸ Environmental Law Centre, 2022, *Cleaning Up Coles Bay: A Partnership for Justice and Shellfish Restoration*, online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-municipalshefishreport/>> [perma.cc/5GQ7-PCRX].



Figure 1: "Mount Douglas Clam Bake," depicting Coast Salish peoples gathered on the beach to participate in a clam bake at Cordova Bay: likely near the site of a WSÁNEĆ historic village called ƷEL,ŁĆ. Image G-04230 courtesy of the Royal BC Museum. Dated to 1900.

1. Introduction

When the tide is out, the table is set.

Traditional wisdom of W̱SÁNEĆ and other coastal peoples.⁹

For thousands of years, the harvest of shellfish has been at the centre of the lives and culture of Coast Salish and other coastal Indigenous peoples. The practice of “harvesting, sharing and/or receiving traditional marine resources,” is at the heart of what it means to be W̱SÁNEĆ.¹⁰ The sharing of marine foods – and the passing of traditional wisdom about harvest, preparation, practice and ceremony – binds the community and connects elders to youth. The landscape itself stands as striking witness to the long-time importance of shellfish to the Coast Salish. Throughout Salish territory, Indigenous clam gardens have formed beaches and seashell middens have literally shaped coastal bluffs.¹¹ These beaches and bluffs bear witness to centuries of Indigenous shellfish cultivation and harvest, feasts, ceremonies and culture.

⁹ Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12) at viii, online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> [Accessed 8 August 2023]. BOKÉCEN (Pauquachin), meaning “the land of cliffs and bluffs,” was originally part of the W̱SÁNEĆ (Saanich) Nation –also comprised of the Tsawout, Tsartlip, and Tseycum. See: Pauquachin First Nation, “About Pauquachin,” online: <<https://www.pauquachin.ca/ourhistory>> [perma.cc/BQ9W-QAPH]. Also see: “Prior to the imposition of the Douglas Treaty and the reserve system in the 1850s, the individual W̱SÁNEĆ Nations did not consider themselves to be separate from one another.” Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12) at iii, online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> [Accessed 8 August 2023].

¹⁰ Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12) at iv, online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> [Accessed 8 August 2023].

¹¹ Coles Bay shows evidence of a long-term marine ecosystem management system present in its archeological record. There are extensive shell midden beds, dark, clam shell-filled soils, which is evidence of ancient and long-term occupation by First Nations over a particular space. Additionally, review of midden shellfish sizes over an 11,500-year-old history in the Pacific Northwest indicate an intimate knowledge and management system for bivalves that was locally adjusted which persisted under intensive harvest until European contact. See: Ginevra Toniello et al, “11,500 y of human-clam relationships provide long-term context for intertidal management in the Salish Sea, British Columbia” (2019) 166:44 *Proceedings National Academy Sciences* 22106.

The archeological evidence is overwhelming and includes evidence of management of marine resources: “[t]he number of [clam] gardens, their long usage, and the labour involved in rock wall construction indicate that individual and clustered clam gardens were one of the foundation blocks of Native economy for specific coastal peoples.” Judith Williams, *Clam Gardens – Aboriginal Mariculture on Canada’s West Coast* (Vancouver: Transmontanus New Star Books, 2006) at 11; Clam gardens or sea gardens are simply one management system which are intertwined with multiple other management systems of various sizes and scales, which spanned across intertidal, oceanic, and terrestrial environments. These management systems have struggled to find legitimacy in current settler-colonial fisheries management systems placed over them. See: Darcy Matthews & Nancy Turner, “Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems” in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

But in the last several decades, Crown-authorized development has seriously damaged the Indigenous shellfish harvest on vast stretches of the Canadian coastline – primarily through sanitary and other pollution closures in response to poor water quality.

For example, in 1997, the Department of Fisheries and Oceans (DFO) closed the abundant shellfish harvesting in Coles Bay because of sanitary contamination.¹² In the quarter century since, governments have made little effort to restore the harvest – despite the profound adverse health, cultural, economic and social impacts that closure imposes on the Pauquachin community that lives at Coles Bay.¹³ The closure has deprived families of a critically important food source, inflated food budgets, and been a major blow to community nutrition and health. Equally important, the closure deprives the Nation of the enjoyment of millennia-old community gathering and feasting; of the bonds created when elders share traditional shellfish knowledge with youth; and of cultural practices, ceremony, language and art connected to shellfish harvest.

Tragically, the shellfish beds have remained closed, with no serious government effort to identify and correct the sources of pollution, and to re-open this precious resource. This situation is common all along the BC coast.

Responsibility for these shellfish closures lies with the Crown. Provincial and federal actions and omissions in authorizing, allowing, and encouraging polluting development – and failing to redress the pollution – is a grievous breach of treaty rights guaranteed to the Pauquachin in the North Saanich Douglas Treaty. The Treaty guarantees them the right to “carry on [their] fisheries as formerly.”¹⁴ Crown actions and omissions related to the shellfish harvesting closures are also a breach of Aboriginal and other rights.

On behalf of the BOKÉCEN (Pauquachin) First Nation, we ask you to act promptly and comprehensively to rectify this matter. The closure of shellfish harvesting in Coles Bay prevents

¹² See Appendix A. Also see: Fisheries and Oceans Canada, “Reasons for shellfish harvesting area closures” (2018 March 23), online: <<https://www.dfo-mpo.gc.ca/shellfish-mollusques/reasons-raisons-eng.htm#about>> [perma.cc/3B4U-9EEG]. Note that sanitary closures are distinct from biotoxin contamination closures. Sanitary closures are concerned with fecal contamination (monitored by Environment and Climate Change Canada) whereas biotoxin contamination closures are concerned with biotoxin or other microbiological concerns (monitored by the Canadian Food Inspection Agency). Through the CSSP, DFO is then responsible for responding to the data related to sanitary conditions and biotoxin conditions, to then administer closures of shellfish harvest areas and monitor harvest activities in these areas. – see: Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>> [perma.cc/5VJ3-WVQ4].

¹³ See below for a discussion of these impacts. Note that the Pauquachin historically relied heavily on shellfish in Coles Bay, but now must often rely on more distant traditional harvest sites, such as those on the Southern Gulf Islands of Pender and Saturna, see: Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12) at x, online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> [Accessed 8 August 2023].

¹⁴ See discussion below and in Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022) at 26-32, online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsheffishreport/>> [perma.cc/8GUN-9U74]. For texts of Douglas Treaties, see: Crown-Indigenous Relations and Northern Affairs, “Treaty Texts – Douglas Treaties” (2013 August 30), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100029052/1581515763202#saanichNorth>> [perma.cc/Q777-XKDW].

access to a traditional and critical food source upon which the Pauquachin Nation has relied. The closure can be remedied, and it must be remedied.

Perhaps the biggest problem is all the unmitigated pollution that governments have created, encouraged, authorized, and allowed along the coast – pollution from authorized development such as septic systems, agricultural runoff, subdivisions, municipal storm water systems, recreational and commercial boat sewage, livestock, etc.¹⁵

As a result of this authorized development, by 1997 sanitary contamination exceeded acceptable levels at Coles Bay, and DFO ordered the closure of this critically important remaining shellfishery.¹⁶ The loss of the abundant Coles Bay fishery is particularly damaging because Coles Bay is adjacent to the Pauquachin community – and previous government decisions had reduced Pauquachin access to alternative shellfish beaches.¹⁷ After settlers took up lands elsewhere in the territory and the Pauquachin were allocated the Coles Bay reserve, the abundant Coles Bay shellfish had become even more essential to the Pauquachin people.¹⁸

The 1997 closure of Coles Bay was a profound community loss.

Yet, for the last 25 years, Government has responded to the Coles Bay pollution the same way it has responded to such pollution elsewhere on the Coast – DFO posted closure signs at the contaminated beach, and then all levels of government essentially walked away from the problem. Pauquachin were legally ordered to not utilize their Coles Bay shellfishery for a quarter century – and a generation of Pauquachin grew up with a Coles Bay closure.

The Pauquachin are not alone. Indeed, DFO and other federal agencies have closed much of the Canadian coast to shellfish harvesting because of septic and other pollution, affecting many

¹⁵ See following ELC publications that address various aspects of marine pollution and make recommendations for government action: Environmental Law Clinic, “Re-Inventing Rainwater Management – A Strategy to Protect Health and Restore Nature in the Capital Region” (2010 February), online (pdf): <https://elc.uvic.ca/wordpress/wp-content/uploads/2014/12/Re-Inventing-Rainwater-Management_2010Feb.pdf> [perma.cc/AST8-SUY8]; Environmental Law Clinic for Veins of Life Watershed Society, “Recommendations for Optimal Implementation of the Elk/Beaver Lake Watershed Management Plan (2020 October), online (pdf): <<https://elc.uvic.ca/wordpress/wp-content/uploads/2020/10/2020-01-02-Elk-Beaver-Lake-Management-Plan-Recommendations.pdf>> [perma.cc/X6MV-U356]; Environmental Law Centre Clinic, “Traffic congestion and human waste dumping in the Saanich Inlet” (2008 October 10), online: <<https://elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Abandoned-Vessels-OCT24.09.pdf>> [perma.cc/H97N-C4AT].

¹⁶ See Appendix A. Also see area 19.6 for current closure of Coles Bay here: Fisheries and Oceans Canada, “Area 19: Sanitary contamination closures” (2020 April 22), online: <https://www.pac.dfo-mpo.gc.ca/fm-gp/contamination/sani/as-19-eng.html#19.6_2765> [perma.cc/BEL4-7DB5].

¹⁷ For example, in the Gulf Islands and along Saanich Inlet. See the discussion in Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022) at 9, online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsheffishreport/>> [perma.cc/8GUN-9U74].

¹⁸ Cole Bay Indian Reserve #3 was a Pauquachin village site protected pursuant to the treaty in 1852 and surveyed as part of the Trutch survey of the North Saanich Peninsula in 1858. It is the largest of the three Pauquachin reserves. See: Indigenous and Northern Affairs Canada, “Reserves/Settlements/Villages – Pauquachin” (2019 April 9), online: <https://fnp-ppn.aadnc-aandc.gc.ca/FNP/Main/Search/FNReserves.aspx?BAND_NUMBER=652&lang=eng> [perma.cc/9ULT-EJP8].

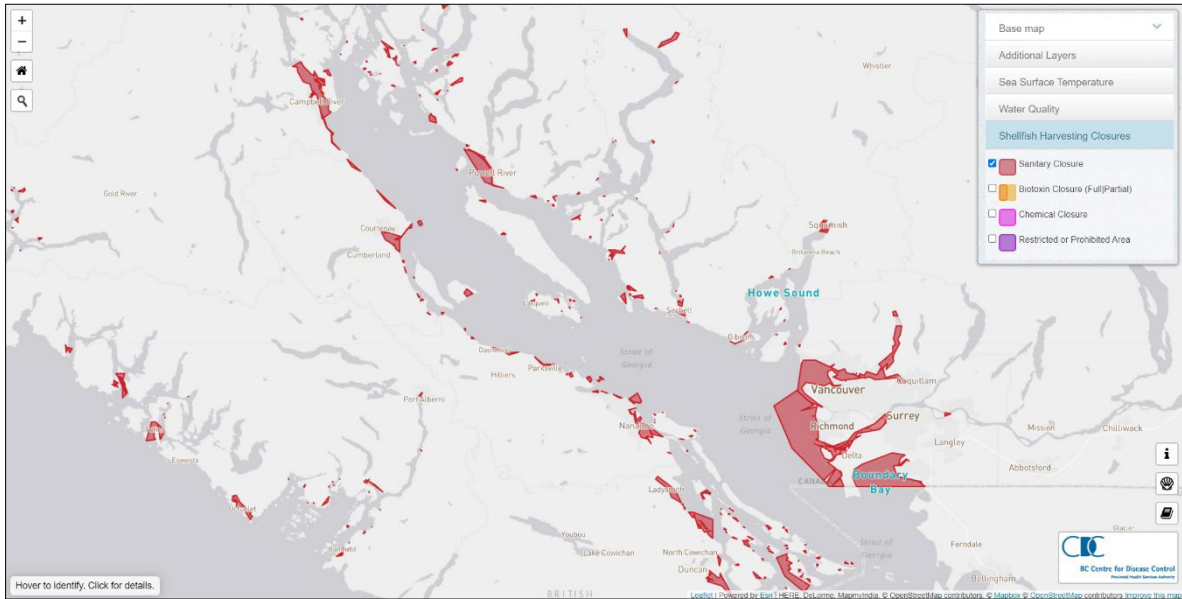


Figure 2: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Accessed September 14, 2022, online: <<https://maps.bccdc.ca/shellfish/>> [perma.cc/88C5-86WK].

Indigenous nations including the Pauquachin Nation (see Figures 1 and 2 and Appendix A below).¹⁹ But the problem is that Government has closed these shellfish beaches, and made little or no effort to restore the legal rights of Nations to carry on their fisheries “as formerly.” Clean up and restoration is clearly practical – but governments have not done the restoration work. The provincial, federal and local governments have all failed to exercise their jurisdiction to stop the pollution that halts the harvest.

The Pauquachin have paid the price. Today these treaty and Aboriginal rights violations must stop.

Fortunately, restoration of Indigenous shellfish harvesting is possible – and we have a nearby model that demonstrates that hopeful fact. Washington State has exactly the same problem of settler development contaminating shellfish beds. But Washington has acted decisively to respect treaty rights and to collaborate with Tribes to restore traditional fisheries. Indeed, many thousands of acres of Washington shellfish beds have already been rehabilitated and reopened through the collaboration of tribal, federal, state, and local governments.

In sharp contrast with British Columbia, similar treaties in Washington are being respected and fisheries are being comprehensively restored. A recent US EPA study compared shellfishery

¹⁹ Shellfish harvesting is regulated by the Canadian Shellfish Sanitary Program (CSSP): a food safety program jointly administered by the Canadian Food Inspection Agency (CFIA), Fisheries and Oceans Canada (DFO), and Environment and Climate Change Canada (ECCC) Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>> [perma.cc/5845-6GTG]. For information on how British Columbia’s shellfish beach contamination is growing worse, in sharp contrast to Washington State, see United States Environmental Protection Agency, “EPA issues report on health of Salish Sea” (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>> [perma.cc/LPS5-QV6G].

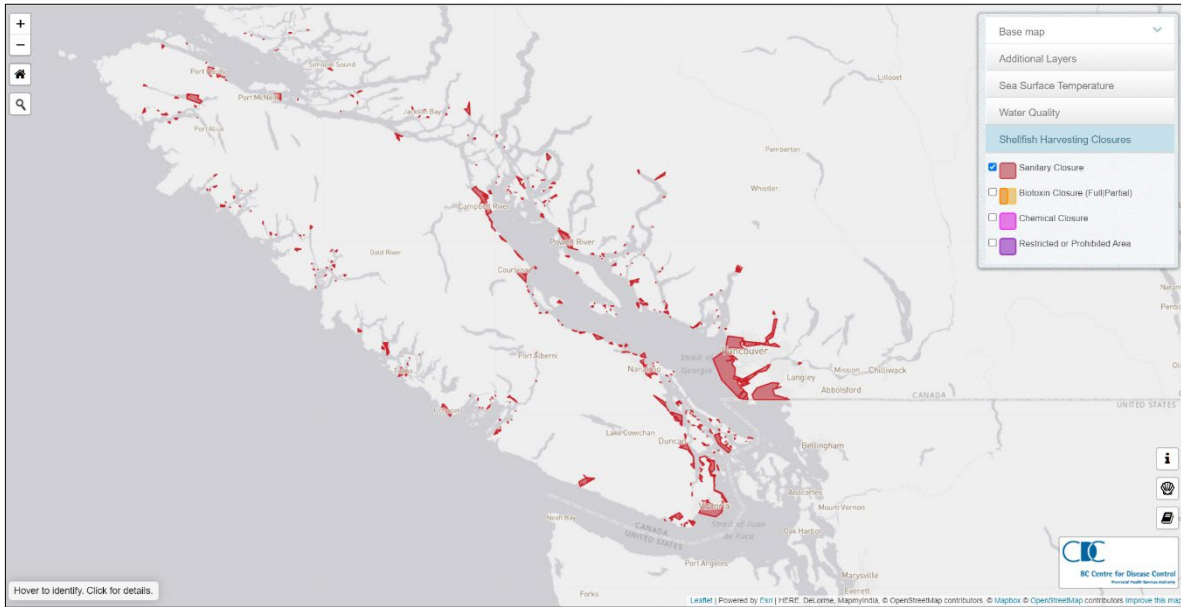


Figure 3: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Accessed September 14, 2022, online: <<https://maps.bccdc.ca/shellfish/>> [perma.cc/88C5-86WK].

health trends in the trans-border Salish Sea – and highlighted the starkly different government track records. The EPA concluded:

- in British Columbia there continues to be “an increase in closed shellfish beds” on the BC coast;
- in contrast, in Washington State over 6400 acres of shellfish beds have been “upgraded or re-opened for harvest due to improvement in water quality.”²⁰

The Peace Arch itself marks the border between two governmental policies that could not be more different. Immediately adjacent to the Peace Arch, the US Drayton Harbour shellfishery has been restored and re-opened to harvest by the US Lummi Tribe. Yet the immediately adjacent shellfishery north of the Peace Arch remains polluted and closed to harvest by the Canadian Semiahmoo Band. (See Appendix C for the full story of this embarrassment to Canada.)²¹

Canada’s failure to remediate shellfish beds has not gone unnoticed in the United States. In its 2021 Report, the US Puget Sound Partnership called for “continue[d] and enhance[d] collaboration with Canada and its Indigenous communities to ensure our recovery efforts don’t stop at the border.”²²

The key difference between shellfish management in BC and Washington State is that the latter takes treaty fishing rights seriously. In Canada, a shellfishery like Coles Bay can routinely be closed

²⁰ United States Environmental Protection Agency, “EPA issues report on health of Salish Sea” (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>> [perma.cc/B6AT-83UM].

²¹ See the discussion of the Drayton Harbour/Boundary Bay situation in Appendix C below.

²² Puget Sound Partnership, *State of the Sound Report 2021* (Olympia: Puget Sound Partnership, 2021) at 59 [emphasis added].

and left without remediation for a quarter century. In contrast, Washington State legally requires immediate action. As soon as a shellfish beach is closed for sanitary pollution, the law requires development of a specific shellfish protection program to restore harvesting within 180 days of initial closure.²³

The Canadian status quo is simply unacceptable. The current Canadian practice of closing shellfish areas without taking practical action to remediate the fishery “plays into ...an underlying politics of denial related to Indigenous issues,”²⁴ and it must stop.

Pauquachin First Nation is now leading restoration efforts at Coles Bay. But both the provincial and federal Crown must also act. The Province has jurisdiction over a high percentage of the pollution sources,²⁵ while Ottawa has core jurisdiction over fisheries, regulation of pollution affecting fisheries, and other relevant heads of federal jurisdiction.²⁶ The federal government has the jurisdiction and responsibility to support shellfish restoration – and the water quality improvements necessary to restore healthy shellfish harvests. Therefore, we ask that the federal and British Columbia governments emulate the Washington State Shellfish Initiative and its effective Pollution Identification and Correction programs, which are discussed below.

Just as President Obama’s federal leadership set the stage for Washington State’s successful shellfish restoration,²⁷ Canada should seek a similar federal-provincial partnership here. Just as Tribes have taken a leading role in the US, First Nations should play a leading role here.

A true commitment to reconciliation and respect for Aboriginal rights, treaty rights and other rights requires British Columbia and Canada to finally recognize and respect the importance of Indigenous shellfish harvesting – and commit to restoring shellfish harvesting in Coles Bay and elsewhere on the British Columbia coast.

Therefore, we ask that you collaborate with the Government of British Columbia to establish a *Canadian Healthy Shellfish Initiative* and a *Coastal Pollution Identification and Correction Program*. This could be an important and tangible step towards reconciliation with coastal Indigenous peoples.

²³ See further discussion below. Also, see: *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature* <<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>> [perma.cc/E5FH-CT2Z].

²⁴ Emma S. Norman, *Governing Transboundary Waters – Canada, the United States, and Indigenous Communities* (New York: Routledge, 2015) at 109.

²⁵ Including regulation of septic systems, livestock and agricultural run-off, storm water run-off and other pollution discussed below. Note that inadequate provincial and local regulation of septic systems and agricultural run-off is a major contributor to “sanitary closures” up and down the coast.

²⁶ See Appendix D for a discussion of relevant federal jurisdiction.

²⁷ See discussion below regarding the role of the Obama administration in initiating the US National Shellfish Initiative, which prompted state-level Shellfish Initiatives in Washington, Oregon, California, Alaska, Connecticut, Massachusetts, North Carolina, Rhode Island and along the Gulf of Mexico.



Figure 4: Pauquachin Marine Officer and closure notice on Coles Bay beach. (Photo: Holly Pattison)

1.1 SHELLFISH CLOSURE IMPACTS – FEDERAL MISMANAGEMENT HURTS INDIGENOUS HEALTH

The stated goal of the Canadian Shellfish Sanitation Program (CSSP) is “to minimize the health risks associated with the consumption of contaminated bivalve molluscan shellfish such as mussels, oysters and clams.”²⁸ Too often, simply posting “Harvesting Prohibited” signs has been seen as sufficient to “minimize the health risks.” *Yet, what has been ignored is that Indigenous peoples face significant adverse health risks when barred from harvesting shellfish.* Grave health risks such as diabetes, obesity and cardiovascular conditions are associated with the loss of country foods.

In neglecting to restore and re-open healthy shellfish beds, the Canadian Food Inspection Agency (CFIA), Environment and Climate Change Canada (ECCC) and Fisheries and Oceans Canada (DFO) have actually damaged the health of Indigenous peoples. They have not only ignored health goals of the CSSP, but also the fiduciary duty of the Crown regarding the health of Indigenous peoples.

²⁸ Government of Canada, *Canadian shellfish sanitation program (CSSP)* (2021, April 28) Online: Canadian Food Inspection Agency <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>> [perma.cc/3PZJ-LD9F].

1.1.1 The Effect of Shellfish Closures on Physical Health

The closure of the Coles Bay shellfishery has had profound health impacts on the Pauquachin First Nation. Shellfish had always been a crucial element of the varied marine food supply for coastal peoples, such that historically “famine was practically unknown among the tribes living directly on the coast.”²⁹ The closure has deprived families of a critically important food resource, inflated food budgets, and been a major blow to community nutrition and health. The physical health of the Pauquachin Nation is dependent on the ability to access and subsist on country foods like shellfish. Interviews conducted with Pauquachin members reveal that marine foods like shellfish and salmon are “a preferred and highly valued part of the Pauquachin diet,”³⁰ and “[n]utritionally, clams are a source of many health promoting factors including proteins, omega-3 fatty acids, Vitamin B-12, and various essential minerals.”³¹

In a 2015 *Pauquachin Traditional Marine Use Study*, interviews with Pauquachin members revealed that the percentage of country foods in the Pauquachin diet has drastically decreased due to cumulative effects in Saanich Inlet, including Coles Bay. Members shared that they “used to have [seafood] all the time” and “didn’t go to the store” – but that “it’s hard to go down there now” to harvest seafood.³² The lack of access to shellfish and other country foods has relegated the Pauquachin to a potentially less healthy Western diet – and has put the food security and health of the community at risk.

While governments delay restoration efforts by citing costs, Pauquachin members are forced to spend a larger portion of *their financial resources* on food because of the loss of their traditional shellfish harvest. The Nation has not only lost a source of sustenance, but a major economic resource. This results in a higher likelihood of eating cheap, less healthy convenience foods to replace the abundant fresh country foods that have been in their diet since time immemorial.

Losing access to traditional foods has profound impacts on Indigenous communities. Dr. Maki Ikemura’s testimony about potential impacts from the proposed Northern Gateway oil

²⁹ Philip Drucker, *Indians of the Northwest Coast* (New York: The Natural History Press, 1955) at 74.

³⁰ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015) at 46, online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2> [perma.cc/R7SB-L8QS].

³¹ Tricia Brown Fleming, *Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada* (Master of Environment and Sustainability, University of Saskatchewan, 2019) [unpublished] at 14.

³² Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015) at 46, online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2> [perma.cc/8FLJ-R6TB].

pipeline/shipping project on the marine food supply of Coastal Nations is instructive.³³ Dr. Ikemura has worked in many Indigenous communities and shared the example of the how the James Bay Cree suffer from high rates of diabetes and obesity – because mercury contamination in their waters had forced them to “stop their traditional diet of fish and replace it with convenience foods from the south.”³⁴ Convenience foods often lead to serious health impacts for Indigenous peoples, including diabetes, obesity, and cardiovascular disease.³⁵ A critically important study from Wiseman demonstrates that when polluted shellfish beds are closed, the cancer risk prevented is simply traded for a risk of coronary disease that is equally high, due to an increased reliance on store-bought foods.³⁶

Restoration of healthy shellfish harvesting and management is crucial to reverse adverse health impacts on Indigenous communities on the coast.

1.1.2 The Effect of Shellfish Closures on Social, Cultural and Spiritual Wellbeing

Beyond nutritional health, shellfish closures adversely impact the health of Indigenous peoples by damaging social, cultural and spiritual wellbeing. Shellfish harvesting, feasting, and sharing has been at the centre of Indigenous social and cultural well-being.

Dr. Ikemura observed that:

...harvesting and sharing traditional foods has an impact on people's health that goes beyond just the nutritional value of what's being eaten.³⁷ ... [The more] insidious and long-term

³³ Joint Review Panel for the Enbridge Northern Gateway Project – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>> [Accessed 7 August 2023].

³⁴ Joint Review Panel for the Enbridge Northern Gateway Project – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at paras 28225-28226, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>> [Accessed 7 August 2023].

³⁵ See: Makel Batal et al, “Quantifying associations of the dietary share of ultra-processed foods with overall diet quality in First Nations peoples in the Canadian provinces of British Columbia, Alberta, Manitoba and Ontario” (2017 July 25) 21:1 *Public Health Nutrition* 103-113, online: <<https://www.cambridge.org/core/journals/public-health-nutrition/article/quantifying-associations-of-the-dietary-share-of-ultraprocessed-foods-with-overall-diet-quality-in-first-nations-peoples-in-the-canadian-provinces-of-british-columbia-alberta-manitoba-and-ontario/B4D1F48A362D9925C107B563B5BEC508/share/6749cd2e46c509ab68f25bba8ed0b7b13388dfae>> [perma.cc/RCE2-KERG].

³⁶ Clare L.S. Wiseman & Frank A.P.C. Gobas (2002) Balancing risks in the management of contaminated first nations fisheries, *International Journal of Environmental Health Research*, 12:4, 331-342 at 340, DOI: 10.1080/0960312021000056438.

³⁷ Joint Review Panel for the Enbridge Northern Gateway Project – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at para 28259, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>> [Accessed 7 August 2023].

health effect [of loss of country foods] is the disruption of the social fabric in the communities.³⁸

Nourishment from the cultural, social, and spiritual aspects of managing, harvesting, eating and sharing country foods is just as important as the physical nourishment these foods provide. Tricia Brown Fleming has pointed out the importance of shellfish harvest to the holistic health of Indigenous communities:

Shellfish strongly influence way of life and are a core component of holistic health, supporting diet and nutrition, cultural traditions and interactions with the land, food security, and community cohesion.³⁹

The closure of Coles Bay shellfish harvesting destabilized and disrupted an entire traditional food system which includes the social, cultural, and educational roles involved in cultivating, stewarding, harvesting, preparing, and consuming traditional foods.⁴⁰ When management and harvesting took place, traditional knowledge essential to the maintenance of a healthy community was transferred between participants.⁴¹ That transfer of traditional knowledge from elders to youth is now disrupted, and inter-generational bonding in the community is impacted.

At Pauquachin, shellfish harvesting provided the materials and occasions for key cultural practices.⁴² Restoration of the Coles Bay shellfish beds is necessary to revitalize and restore knowledge critical for maintaining healthy communities – including knowledge of:

- relationships with, and stewardship of, marine resources,

³⁸ *Joint Review Panel for the Enbridge Northern Gateway Project* – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at para 28280, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>> [Accessed 7 August 2023].

³⁹ Tricia Brown Fleming, *Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada* (Master of Environment and Sustainability, University of Saskatchewan, 2019) [unpublished] at 2.

⁴⁰ There are culturally specific ways that shellfish were harvested and prepared. One account from Philip Drucker, *Indians of the Northwest Coast* (New York: The Natural History Press, 1955) at 74: “It was the women’s duty to dig them, which in former times she accomplished with a digging stick and a large shell. In transporting them she protects herself from the salt water, by placing a mat on her back under the carrying basket. For immediate use these clams are roasted above a fire, or steam-cooked in a box. When larger quantities are being made ready for future use, the cooking is done by steaming under a covering of seaweeds and mats. The clams are then removed from the shells, and strung on sticks of a strand of bark. These are exposed for some time to the heat of a fire, and then placed in smoke until they are thoroughly cured. The very much larger horse clam is also used for food. The shells of these are 8 or 10 inches in length. It is with some difficulty that they are secured, as the clams are capable of withdrawing from the surface with considerable speed. These are cooked by steaming; and are strung on three sticks because of their size. They are then exposed to the action of fire and smoke as are the smaller clams.”

⁴¹ Darcy Matthews & Nancy Turner, “Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems” in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

⁴² Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015) at 33, online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-

- monitoring strategies for targeted traditional foods;
- conservation, based in social structures such as ceremony or stories; and
- community management of resources with specialization of roles, often held by specific members within familial lineages.

Neighbouring W̱SÁNEĆ stories reflect the central role clams played in culture. For example, the clam creation story embeds lessons from Creator on how people should live.⁴³ In a recent video, W̱SÁNEĆ Elder J, SINTEN Elliott has explained the importance of the clam creation story for such life lessons – and for the development of the SENĆOŦEN language itself.⁴⁴

Indeed, marine harvesting locations and practices “are considered sacred, and involve ritual activities borne of the W̱SÁNEĆ belief that everything in their habitat was once human and intended to demonstrate respect for these equal actors within their environment.”⁴⁵

The sharing of stories like the clam creation story is tied to place, and to cultural activities like harvesting clams. In essence, the beaches were the schools and community centres for the Pauquachin – and the closure of harvesting beaches has removed important opportunities for cultural knowledge transfer and revitalization.⁴⁶

Decimation of a way of life like shellfishing has broad impacts on the passing on of culture.

In sum, more than nutritional health is impacted by shellfish closures in the territories of Indigenous peoples. Critically important cultural, social, educational, and spiritual values vital to the sustained wellbeing of Indigenous peoples are profoundly impacted.

Too often shellfish closures have been incorrectly justified as protecting health. While short-term sanitary closures can be justified to avoid bacterial infections, we must not ignore the extreme damage that a long-term sanitary closure itself can inflict on community well being – including

[_Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2>](#)
[perma.cc/TW5M-89AN].

⁴³ SENĆOŦEN Videos, “Clam Creation English Version” (2020 May 5), online (video): *Youtube*
<https://www.youtube.com/watch?v=ZEFRo4nLNHU> [perma.cc/6SKC-KS3K].

⁴⁴ For example, the SENĆOŦEN word for ‘swam’ comes from the SENĆOŦEN word meaning ‘elusive’, alluding to the way clams hide under the surface. SENĆOŦEN Videos, “Clam Creation English Version” (2020 May 5), online (video): *Youtube*
<https://www.youtube.com/watch?v=ZEFRo4nLNHU> [perma.cc/6SKC-KS3K]. Note that the Pauquachin community has two traditional spoken and written languages: Hul’qumi’num and SENĆOŦEN. See: The Pauquachin Nation, “A Sacred Journey – Comprehensive Community Plan (2015)” at 15, online:
<<https://static1.squarespace.com/static/5e5401ebf9becf12d06ff6d9/t/5e62c9cf7d4516293d91160d/1583532508755/pauquachin-CCP-final-version-min.pdf>> [perma.cc/FS8D-S5FJ].

⁴⁵ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015) at 33, online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2> [perma.cc/FS8D-S5FJ].

⁴⁶“Passing on the stories, songs, and language of an entire culture is a difficult process that is steeped in a particular way of life,” aquaCULTURE Pictures Inc, *Ancient Sea Gardens – Mystery of the Pacific Northwest* (2005), DVD.

damage to nutrition, food budgets, health, inter-generational bonding, cultural practice and education. When shellfish beds are closed, the community grocery store is impacted. The traditional school is impacted. The place of spiritual and cultural practice is impacted. The place of community gathering and feasting is impacted. The loss to the community can be incalculable.

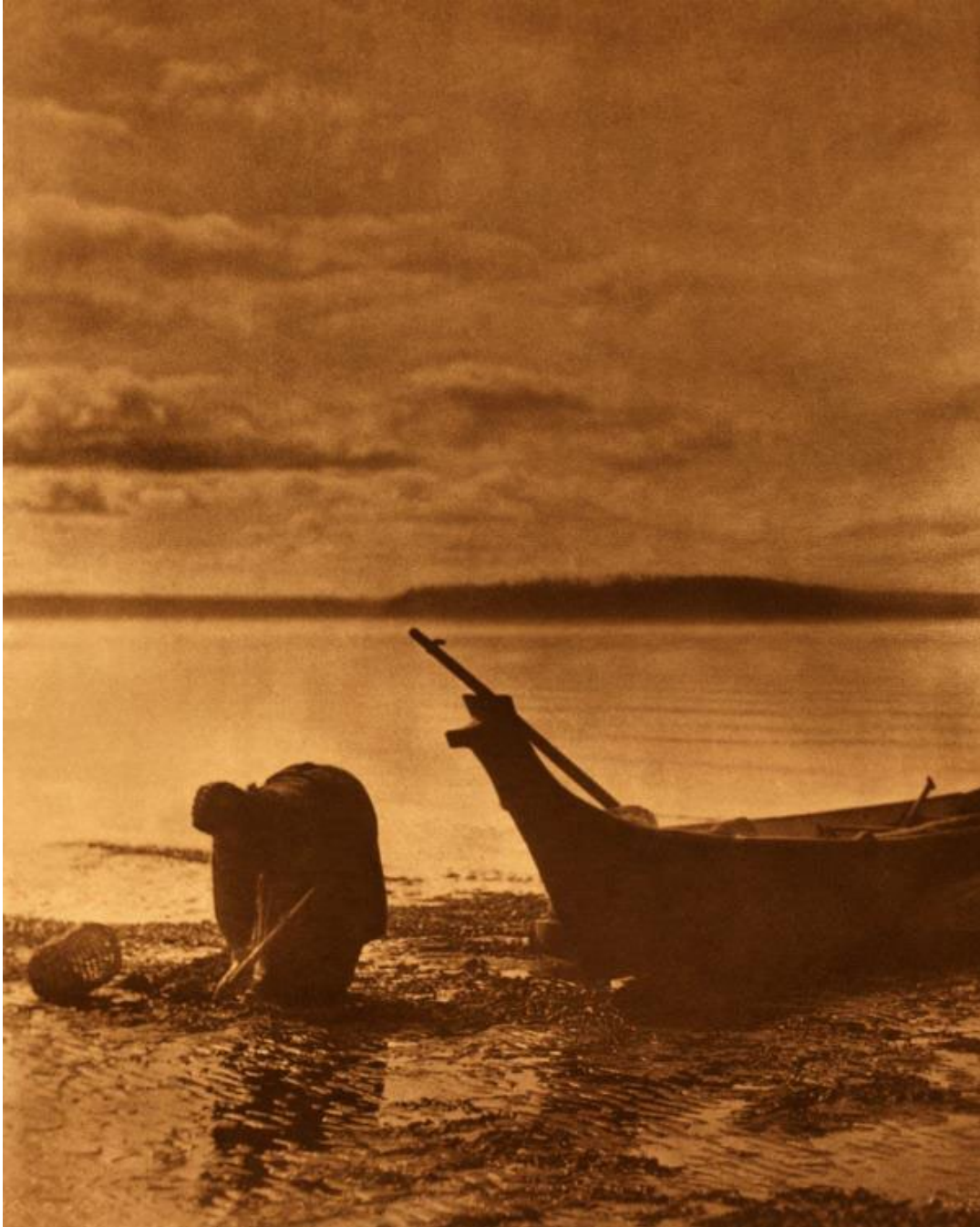


Figure 5: Coast Salish person depicting clam digging with a wooden dibble (Dated to 1900). (Photo: Courtesy of EdwardCurtisPhotos.com.)

A Note on the National Scope of the Shellfish Closure Problem

Note that this report focuses on the British Columbia coast, but similar problems occur on Canada's Atlantic coast, where there were almost 1000 sanitary shellfish closures as of May 2023.⁴⁷ See below. The Government of Canada should carry out discussions with Maritimes First Nations about their specific related concerns.⁴⁸

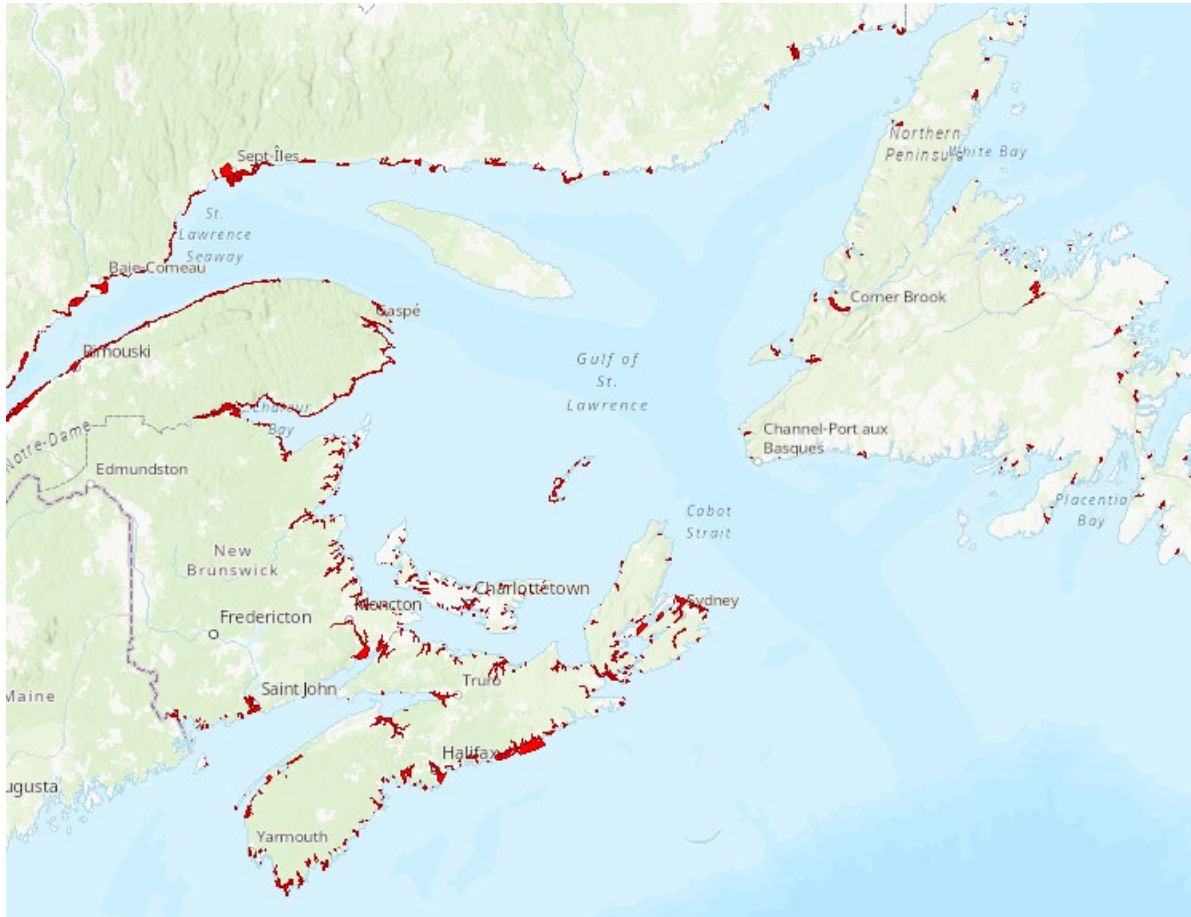


Figure 6: Canadian Food Inspection Agency, Canadian Shellfish Sanitation Program, "CSSP_Base_Public (MapServer)" (last visited 24 May 2023)

⁴⁷ Canadian Food Inspection Agency, Canadian Shellfish Sanitation Program, "CSSP_Base_Public (MapServer)" (last visited 24 May 2023), online: ArcGIS <https://www.arcgis.com/home/webmap/viewer.html?url=https%3A%2F%2Fgisp.dfo-mpo.gc.ca%2Farcgis%2Frest%2Fservices%2FCSSP_Base_Public%2FMapServer&source=sd> [perma.cc/E6RR-VART].

⁴⁸ Lawyer Derek Simon at Burchell Wickwire Bryson LLP in Halifax has done some preliminary investigation into the problem in the Maritimes.

2. Canada's Failure to Properly Protect Indigenous Shellfisheries

The Government of Canada regulates shellfish harvesting through the Canadian Shellfish Sanitation Program which is mandated to “implement controls to verify that only shellfish that meet food safety and quality standards reach domestic and international markets.”⁴⁹ The program is responsible for monitoring, classifying, and controlling areas where bivalve molluscan shellfish are harvested. The program is jointly administered by Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECC), and the Canadian Food Inspection Agency (CFIA).

Under the Canadian Shellfish Sanitation Program, responsibility is divided amongst the agencies:

- The DFO is responsible for the enforcement of closure regulations and enacting the opening and closing of shellfish harvest areas under the authority of the *Fisheries Act*. It also monitors harvest activities in closed areas. (DFO is generally responsible for management of fisheries, and licensing for shellfish fishing.)
- ECC is responsible for monitoring bacteriological water quality in shellfish harvest areas, identifying and evaluating sanitary pollution sources, and recommending the closure and opening of shellfish harvest areas.
- The CFIA maintains the marine biotoxin surveillance and control program in shellfish areas – and recommends closures and openings of shellfish harvest areas to Fisheries and Oceans Canada. (They monitor shellfish for indications of marine biotoxins resulting from algae blooms, such as red tide, which can include paralytic shellfish poison.)

The CFIA is responsible for overall CSSP coordination, the control of handling and processing of shellfish, and, liaising with foreign governments on matters relevant to shellfish sanitation.⁵⁰

⁴⁹ Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>>[perma.cc/TX5L-9QS9].

⁵⁰ The CFIA also distributes shellfish trade and export licences and verifies compliance with these licences. In general terms, through the CSSP, the federal government “implements controls to verify that only shellfish that meet food safety and quality standards reach domestic and international markets.” See: Government of Canada, *Canadian shellfish sanitation program manual*. (2022, May 3). Canadian Food Inspection Agency <<https://inspection.canada.ca/food-guidance-by-commodity/fish/canadian-shellfish-sanitation-program/eng/1527251566006/1527251566942?chap=0#c2>> [perma.cc/84SL-HFKD]. And see: Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>> [perma.cc/AUX6-FJ32]. Note that Health Canada is also responsible for establishing policies, regulations, and standards around food safety and quality around shellfish consumption. Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546> [perma.cc/TX5L-9QS9].

Unfortunately, as demonstrated below, the current CSSP is inadequate in:

- correcting pollution; and
- ensuring sustainable access to shellfish as a vital nutritional, economic, cultural, and spiritual resource.

The information below demonstrates that the federal government is clearly failing to exercise its powers in a way that respects Treaty and Aboriginal Rights of Indigenous peoples related to shellfisheries.

2.1 THE CANADIAN SHELLFISH SANITATION PROGRAM FAILS TO CORRECT POLLUTION

2.1.1 A General Failure to Monitor Pollution and Restore Healthy Shellfish

The failure of the federal government to take action to restore the Coles Bay shellfishery is not an anomaly. There is strong evidence that the federal government is *generally* failing to provide equitable and inclusive access to safe shellfish. In fact, this has been expressly articulated by many federal employees involved in the Canadian Shellfish Sanitation Program.

A recent federal government evaluation of the CSSP (*“The Horizontal Evaluation of the CSSP”*) has confirmed longstanding Indigenous concerns about federal shellfish policies. The evaluation *rendered by the people operating the program and close stakeholders* was strikingly critical. The evaluation demonstrated that:

...close to 80% of internal agency interviewees perceived that the program does not currently provide equitable and inclusive access to shellfish harvesting sites for safe consumption.⁵¹

The civil servant observations reflect a harsh reality: Once the DFO closes shellfish harvesting sites, failure to correct pollution and safeguard Indigenous harvest is commonplace. DFO closes the beach – but then federal agencies fail to monitor the water, find the pollution source, and correct it. DFO just puts up a “harvest prohibited” sign and federal agencies walk away, for endless years.

The current system for risk management hurts Indigenous communities reliant on shellfish. The system unnecessarily restricts shellfish harvesting with precautionary closures that are driven by

⁵¹ Government of Canada, *Summary of the horizontal evaluation of the Canadian shellfish sanitation program*. (2022, October 21) at “Program Delivery,” online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/summary-resume-96744-eng.html>> [perma.cc/8Q54-C89M]. Note that the Horizontal Evaluation was based on interviews with those involved in delivery of CSSP programs, including interview with 16 CFIA employees, 23 DFO employees, 21 Environment and Climate Change Canada employees and 17 chosen external interviewees.

the federal government's inadequate monitoring capacity.⁵² In too many cases, beaches have been permanently closed, in order to avoid the cost of ongoing monitoring and remediation efforts.⁵³

For example, in 1997, the DFO closed shellfish harvesting in Cole's Bay, territory of the Pauquachin Nation, because of sanitary contamination.⁵⁴ In the quarter century since, governments have made scant effort to restore the harvest – despite the profound adverse health, cultural, economic, and social impacts that closure imposes on the Pauquachin community that lives at Coles Bay.⁵⁵

This problem persists across Canada, with hundreds of kilometers perennially closed in BC alone.⁵⁶ Government has closed these shellfish beaches and made little or no effort to restore the legal rights of Nations to carry on their fisheries “as formerly.” Governments have created, encouraged, authorized and allowed pollution along our coastlines – pollution from authorized development such as septic systems, agricultural runoff, municipal storm water systems, recreational and commercial boat sewage, livestock, etc.⁵⁷ Although in many cases restoration is clearly practical,⁵⁸ governments have not done the restoration work.

The provincial, federal and local governments have all failed to exercise their jurisdiction to stop the sanitary pollution that halts the harvest. In many cases, governments have failed to continue

⁵² Tricia Brown Fleming, *Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia*, Canada (Master of Environment and Sustainability, University of Saskatchewan, 2019) [unpublished] at 51

⁵³ See the discussion below.

⁵⁴ Erich Kelch, Capital Regional District First Nations Relations, “Coles Bay Project Map: Background and Motivation; Overview of Issues”; March 5, 2020; Also see: Fisheries and Oceans Canada, “Reasons for shellfish harvesting area closures” (2018 March 23), online: <<https://www.dfo-mpo.gc.ca/shellfish-mollusques/reasons-raisons-eng.htm#about>> [perma.cc/3B4U-9EEG]. Note that sanitary closures are distinct from biotoxin contamination closures. Sanitary closures are concerned with fecal contamination (monitored by Environment and Climate Change Canada) whereas biotoxin contamination closures are concerned with biotoxin or other microbiological concerns (monitored by the Canadian Food Inspection Agency). Through the CSSP, DFO is then responsible for responding to the data related to sanitary conditions and biotoxin conditions, to then administer closures of shellfish harvest areas and monitor harvest activities in these areas – see: Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>> [perma.cc/5VJ3-WVQ4].

⁵⁵ See above for a discussion of these impacts.

⁵⁶ Fisheries and Oceans Canada, *Shellfish Harvesting Map* (2022) Online: Fisheries and Oceans Canada https://gisp.dfo-mpo.gc.ca/Html5Viewer/Index.html?viewer=CSSP_Public_En_Site&locale=en [perma.cc/GZP9-GMG9].

⁵⁷ See following ELC publications that address various aspects of marine pollution and make recommendations for government action: Environmental Law Clinic, “Re-Inventing Rainwater Management – A Strategy to Protect Health and Restore Nature in the Capital Region” (2010 February), online (pdf): <https://elc.uvic.ca/wordpress/wp-content/uploads/2014/12/Re-Inventing-Rainwater-Management_2010Feb.pdf> [perma.cc/AST8-SUY8]; Environmental Law Clinic for Veins of Life Watershed Society, “Recommendations for Optimal Implementation of the Elk/Beaver Lake Watershed Management Plan (2020 October), online (pdf): <<https://elc.uvic.ca/wordpress/wp-content/uploads/2020/10/2020-01-02-Elk-Beaver-Lake-Management-Plan-Recommendations.pdf>> [perma.cc/X6MV-U356]; Environmental Law Centre Clinic, “Traffic congestion and human waste dumping in the Saanich Inlet” (2008 October 10), online: <<https://elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Abandoned-Vessels-OCT24.09.pdf>> [perma.cc/H97N-C4AT].

⁵⁸ See the description of the Washington State Shellfish Initiative below.

to monitor polluted beaches to determine if ongoing closures are still warranted – or if specific remediation is needed.

These ongoing closures are imposed on the faulty premise that a shellfish closure enhances safety and health. But these closures do not necessarily equate to safety. To the contrary, the key “Horizontal Evaluation” survey of CSSP personnel and participants found that long-standing closures cause confusion and frustration. The public may not be aware of changes in the status of closures, and where closures are prolonged, they may not feel the closures are legitimate and may disregard them.⁵⁹

2.1.2 Failure to Take Indigenous Use of Shellfish Seriously – Underfunding of the CSSP Has Led to Cuts in Monitoring and Restoration Efforts

Long standing underfunding has created serious systemic issues in the CSSP. Without funding for regular monitoring, restoration, and enforcement the agencies cannot effectively manage risks to protect against contamination – and simultaneously perpetuate a shellfish harvest that is essential to Indigenous peoples.

A substantial federal government retreat from its responsibilities began during the mid-1990s, during severe federal budget cuts at the time. A fateful change in federal policy occurred in 1997 – the same year that Coles Bay was closed. **In that momentous year, CSSP cost cutting measures led to a federal government expectation that stakeholders and First Nations must assume financial responsibility for sampling and analysis to classify areas or determine their suitability for harvest. For “cost recovery” purposes, it was decided no sites would be re-evaluated, surveyed, or depurated without external funding.⁶⁰ This abandonment of federal monitoring and remediation efforts effectively deprived Indigenous communities access to equitable opportunities for regaining access or participating in the restoration of shellfish beds.**

Nearly 25 years later, underfunding continues – and is at the root of insufficient monitoring, testing and reclassification of shellfish beaches. The 2022 *Horizontal Evaluation* of the CSSP:

- identified “the CSSP is insufficiently resourced, which adds to the significant pressure on the federal partners and increases potential risks.”

⁵⁹ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) s 3.3 Online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN]. Harvesting areas may be classified as approved for harvesting, closed for all species of bivalve molluscs, closed for some species of bivalve molluscs, or unmonitored. See the legend at: Fisheries and Oceans Canada, “Shellfish Harvesting Map,” online: *Fisheries and Oceans Canada* https://gis.dfo-mpo.gc.ca/html5viewer/index.html?viewer=CSSP_Public_En_Site&locale=en [perma.cc/GZP9-GMG9]. Fisheries and Oceans Canada, *National Aquaculture Strategic Action Plan Initiative* (Ottawa: Fisheries and Oceans Canada, 2010)

⁶⁰ Environment Canada, *New Directions in Delivery of Water Quality Monitoring Requirements in Support of the Canadian Shellfish Sanitation Program Discussion Document* (1997, May), at “Cost Recovery,” online: Government of Canada Publications <https://publications.gc.ca/collections/collection_2021/eccc/en84/En84-206-1997-eng.pdf> [Accessed 7 August 2023].

- found that a staggering “87% of internal key informants said the program DOES NOT have the level of resourcing needed to be delivered as intended.” [emphasis in original]
- **identified that user-pay models present financial barriers and “shifting the costs to harvesters risks marginalizing groups with less capacity and fewer resources, which may disproportionately affect Indigenous and recreational harvesters.”⁶¹**

The *Horizontal Evaluation* identified that the capacity problem at ECCC “**has resulted in extended closures and the reduction of potentially viable approved waters.**” Pollution sources and wastewater systems are not being reassessed regularly, except in critical harvest areas, meaning the sampling frequency required by the program is not always respected. Since ECCC is the department that begins the process of re-opening a harvest area through recommended classification, lack of ECCC resources for water monitoring and pollution source assessments has been identified as a major bottleneck to CSSP delivery.⁶²

The lack of federal resources for monitoring, remediation and reclassification means that hundreds of kilometres of BC beaches remain closed – in sharp contrast to the situation in Washington State, where adequate government resources are leading to re-opening of thousands of acres of shellfish beds in recent years. (See below for discussion of the Washington State model.)

Similarly, CFIA laboratory capacity for marine biotoxin testing is reported to be at maximum capacity within current resource levels. Further, the agency is not able to add new monitoring stations and has had to decline some requests from industry to do additional testing.⁶³

2.1.3 CSSP Testing Deficiencies are Delaying the Re-Opening of Indigenous Shellfish Beaches

The 2022 CSSP *Horizontal Evaluation* identified that:

...there is an inability to assess long-term closures for potential re-opening due to the lack of water quality and biotoxin monitoring resulting from capacity constraints. This could limit Indigenous groups’ access to areas they

⁶¹ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21), s 3.2.4, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

⁶² Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) s 3.2.5, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

⁶³ They must also divert resources from other CFIA activity areas to meet increasing demands and pressures. Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) s 3.2.4, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

*depend on for FSC [food, social and ceremonial] harvest, or fresh and affordable protein.*⁶⁴

Noting insufficient federal lab capacity, the *Horizontal Evaluation* noted that the time it takes for testing and closures can now present health risks for Indigenous harvesters.⁶⁵ Interviewee comments included: “Geographic barriers exist due to reduced coverage in remote areas. Yet, those living in remote areas are most likely to rely on shellfish as a means to food security.”⁶⁶

The First Nations Health Authority (FNHA) has identified similar gaps and barriers in CSSP’s system through their “We All Take Care of the Harvest” (WATCH) initiative. They have identified several monitoring issues including:

- Monitoring being used to close areas, but not re-open them;
- It is unknown where and when sampling is happening, and by whom. Monitoring methods and data are often inaccessible;
- Sampling occurs in incorrect locations without usage of traditional knowledge to identify sampling sites;
- First Nations are not welcomed for training to sample their own waters for classification or openings. Their requests to monitor are refused without explanation; and
- How monitoring informs closures and openings is not clear. This lack of transparency leads to less accountability in government action.⁶⁷

The FNHA has identified that current gaps in monitoring lead to less harvesting:

*People avoid harvesting because they don’t trust that it’s safe. They don’t know where to find information, or they know there is no testing, or they don’t trust the testing is timely and accurate.*⁶⁸

⁶⁴ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) ss 3.4.2, 3.2.1, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

⁶⁵ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) s 3.4.2, Online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

⁶⁶ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21) at 39, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/99MN-UPWN].

⁶⁷ First Nations Health Authority WATCH, *Summary of Gaps and Barriers* (2022) FNHA

⁶⁸ First Nations Health Authority WATCH, *Summary of Gaps and Barriers* (2022) FNHA

It is important to note that the federal commitment to monitor and actively restore the Indigenous harvest has deteriorated from past practice. During the time of the Georgia Basin Ecosystem Initiative and Georgia Basin Action Plan, the CSSP's mandate included restoration.⁶⁹

A key objective of the Georgia Basin Ecosystem initiative was that:

*...productive shellfish harvesting areas are maintained and restored to ensure a sustainable shellfish resource for the benefit of commercial, recreational and First Nations users.*⁷⁰

A stated goal of the Georgia Basin Action Plan was that “sustainable land, aquatic and resource use planning and management support the conservation, protection and restoration of the environment, enhance human and social well-being, and contribute to a strengthened economy.”⁷¹ As a result:

best management practices to reduce impacts from agricultural and stormwater runoff were developed and implemented, and community-based approaches for watershed management and remediation of closed shellfish harvesting areas were advanced...

*educational tools and training to improve the operation and maintenance of on-site sewage disposal systems, reduce waste discharges from vessels, and minimize risks associated with the use of agricultural chemicals all contributed to improved stewardship of the ecosystem.*⁷²

Tragically the Georgia Basin Initiative and Georgia Basin Action Plan ended in 2009. However, it is useful to remember that the Government of Canada has set shellfish restoration goals in the past – and these goals had some historic success. The problem is that such mandates have not been maintained, and government has failed to fund adequate monitoring and restoration of beaches.

⁶⁹ Government of Canada, *The Georgia Basin Action Plan* (2018, August 9) Online: Environment Canada <<https://www.ec.gc.ca/pabg-gbap/>> [perma.cc/UF6G-BF5V].

⁷⁰ Government of British Columbia, *Engaging Local Government in the Georgia Basin Ecosystem Initiative: A day of Working Sessions on Environmental Issues* (1999, June) at 5 “Water Quality: Objective 2,” online: Province of British Columbia <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/planning-land-use/georgia_basin_workshop_proceedings.pdf> [Accessed 7 August 2023].

⁷¹ Government of Canada, *Georgia Basin Action Plan: Sustaining a healthy ecosystem and healthy communities 2003 – 2008* (2003) at “Our Common Goals,” Online : Publications du gouvernement du Canada <https://publications.gc.ca/collections/collection_2014/ec/En84-106-2003-eng.pdf> [Accessed 7 August 2023].

⁷² Government of Canada, *Georgia Basin Ecosystem Initiative - A 5-year perspective* (2003), at 7 “Achieving Clean Water,” online: Government of Canada Publications <https://publications.gc.ca/collections/collection_2014/ec/En40-11-45-2003-eng.pdf> [Accessed 7 August 2023].

The current approach has been short-sighted and has resulted in the sustained failure of the DFO to re-open shellfish beds.

2.1.4 The CSSP Continues to Operate Under an Outdated Mandate – Giving More Resources for Commercial/Export Operations, Less for Traditional Indigenous Harvest

The CSSP operates under an outdated and inadequate mandate. According to Government’s own CSSP *Horizontal Evaluation*, “the food safety mandate of the CSSP has remained consistent since 1925 and aligns with the mandates of similar programs in other international jurisdictions” and “the delivery of the CSSP’s mandate is focused on the commercial market and maintaining export.”⁷³ This mandate fails to focus adequately on recreational and First Nations fisheries, and in doing so fails to meet contemporary goals of reconciliation, and ensure inclusive access to shellfish harvesting. Under the current mandate, Government continues to struggle to incorporate Indigenous perspectives in to risk management and decision making when closing beds.

The 2022 *Horizontal Evaluation* of the CSSP identified that a mandate focused on the commercial market and maintaining export is likely insufficient. **The review found significant resources dedicated to audits to make product suitable for USA trade, but that “given that shellfish exported to the USA amounts to just 12% of Canada’s total production, it is possible that the resources dedicated to this aspect of the program is disproportionate.”**

Indeed, the report correctly identified “many Indigenous communities depend on local fish species, including shellfish, for food security”.⁷⁴ **In light of this, the disproportionate prioritization of commercial interests may constitute a case of environmental injustice. The Canadian approach appears to sharply contrast with the approach taken in New Zealand.** In New Zealand, there are two separate programs that manage commercial harvesting, and subsistence harvesting.⁷⁵ And the program for commercial harvesting is funded by industry themselves.

In summary, the federal agencies involved in the CSSP fail to effectively manage preventative health measures for shellfish. The longstanding failure to restore shellfish beds and re-open them to harvest is a result of a number of factors, including:

- outdated mandates that fail to emphasize the need to monitor and restore indigenous shellfish beds;

⁷³ Government. of Canada, *Summary of the horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21), at “Program Mandate & Evolving Context,” online: Fisheries and Oceans Canada <https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/summary-resume-96744-eng.html> [perma.cc/Z7K7-HZ94].

⁷⁴ Government of Canada, *Horizontal evaluation of the Canadian shellfish sanitation program* (2022, October 21), s 3.1, online: Fisheries and Oceans Canada <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/96744-eng.html>> [perma.cc/Z7K7-HZ94].

⁷⁵ New Zealand Ministry for Primary Industries, “*Monitoring and testing fish and seafood: NZ Government*,” (15 July 2021), online: Ministry for Primary Industries <<https://www.mpi.govt.nz/food-business/food-monitoring-surveillance/monitoring-and-testing-fish-and-seafood/>> [perma.cc/PL94-N9YN].

- prolonged underfunding;
- failure to prioritize restoration of Indigenous harvest areas commensurate with the importance of those areas; and
- inadequate monitoring resources and testing protocols.

The result of these federal deficiencies leads to closures that infringe fundamental Treaty and Aboriginal right to fish as formerly. (See below.) The infringement of these rights has profound negative consequences on the nutrition, health, culture, and community well-being of Indigenous peoples.

Note: See the “Epilogue” below for a broader discussion of the environmental justice and racism implications raised by current government shellfish policies.

2.1.5 Aboriginal and Treaty Obligations

As we argued extensively in our separate submissions to British Columbia and to North Saanich, Indigenous peoples have Aboriginal and treaty rights to carry on fisheries as formerly. Those rights are currently being infringed by the Crown. For a more complete discussion about how Aboriginal and treaty rights to shellfish are being infringed, see our submission to the Provincial Government, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation*.⁷⁶

The federal government’s key constitutional obligations to Indigenous people include Sec. 35 recognition of aboriginal and treaty rights⁷⁷ and Section 91 responsibilities for Indians, and Lands reserved for the Indians.⁷⁸ It should also be noted that the *Fisheries Act* specifically states:

This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them.

When making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the

⁷⁶ See Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022) ss 1.5, 1.6, online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsheffishreport/>> [perma.cc/8GUN-9U74].

Also see the submission to North Saanich, Environmental Law Centre, 2022, *Cleaning Up Coles Bay: A Partnership for Justice and Shellfish Restoration*, online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-municipalsheffishreport/>> [perma.cc/5GQ7-PCRX].

⁷⁷ *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s 35.

⁷⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, s 91(10), reprinted in RSC 1985, App II, No 5., s 91(24)

*rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.*⁷⁹

Therefore, when making decisions under the *Fisheries Act*, the Government of Canada must consider the effects their actions would have on Indigenous people and their rights to fish.⁸⁰

The CSSP has specifically acknowledged that the Supreme Court of Canada found that the Government of Canada owed a “fiduciary duty to provide FSC [food, social and ceremonial] harvest rights to Aboriginal groups” and that “[t]his right extends to species covered under the CSSP.”⁸¹

The implementation of an effective National Healthy Shellfish Initiative could begin to partially address the Government of Canada’s fiduciary obligation and the current infringement of Treaty and Aboriginal rights.

However, as it stands today, the CSSP does not adequately consider the rights of Indigenous people and the adverse effects on closure on their health, economic security, and cultural and spiritual practices. Although the CSSP has stated that they want to find new ways to deliver their programming for Indigenous people harvesting for food, social and ceremonial (FSC) purposes,⁸² in practice current federal policy is just to close beaches without serious remediation efforts. *Indeed, as discussed above, federal policy on remediation of polluted Indigenous shellfish beaches has gone dramatically backwards since the Georgia Basin Initiative lapsed.*

Furthermore, without access to shellfish harvesting, Indigenous groups continue to be deprived of means of subsistence and of their traditional and other economic activities, in contravention of the *United Nations Declaration on the Rights of Indigenous Peoples Act* article 20.⁸³

⁷⁹ *Fisheries Act*, *supra* note x(20), s 2.3-2.4.

⁸⁰ The *Fisheries Act* also requires that Indigenous knowledge be considered when making habitat decisions. [Government of Canada, “*Fisheries Act* updates and reconciliation with Indigenous peoples” (2019 June 21), online: <https://www.dfo-mpo.gc.ca/campaign-campagne/fisheries-act-loi-sur-les-peches/reconciliation-eng.html> [perma.cc/4GBX-89VE] [Gov of Canada, “*Fisheries Act* and reconciliation”]. Additionally, all agreements entered into by the Government of Canada under the *Fisheries Act* “must respect the rights recognized and affirmed by section 35 of the *Constitution Act, 1982.*” [*Fisheries Act*, s 4.1(9).]

⁸¹ Government of Canada (Fisheries and Oceans Canada), *Update on the Canadian Shellfish Sanitation Program (CSSP)* (January 2017) at 11, online:

<https://static1.squarespace.com/static/532c61f8e4b0d901d03ed249/t/58c33d01be6594513778a23e/1489190141489/c%29+CSSP+AMAC+Jan2017+%284%29.pdf> [perma.cc/CN2Q-NXK6] [DFO, “CSSP Update”].

⁸² Government of Canada (Fisheries and Oceans Canada), *Update on the Canadian Shellfish Sanitation Program (CSSP)* (January 2017) at 11, online:

<https://static1.squarespace.com/static/532c61f8e4b0d901d03ed249/t/58c33d01be6594513778a23e/1489190141489/c%29+CSSP+AMAC+Jan2017+%284%29.pdf> [perma.cc/CN2Q-NXK6] [DFO, “CSSP Update”].

⁸³ Article 20 of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 states: “(1) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. (2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.”

In implementing a national shellfish initiative, the Government of Canada has an opportunity to repair an ongoing deprivation of justice.



Figure 7: Lummi youth dig clams at Portage Bay WA. The beach was closed in 2014 because of fecal coliform, but successfully reopened in 2019 after Pollution Identification and Correction efforts. (Photo: Kari Neumeyer, Northwest Indian Fisheries Commission)

2.1.6 US National Shellfish Initiative/Washington Shellfish Initiative – A Model for Improvement

Fortunately, the US federal government’s National Shellfish Initiative – and the Washington State Shellfish Initiative established under its auspices – offers an alternative and successful approach that Canada should emulate. In Washington State, when shellfish contamination is detected, prompt restoration efforts are legally required – and those efforts routinely result in the reopening of healthy shellfish beds for harvest. Under the federally supported Washington State Shellfish Initiative, local tribes are ‘co-managers’ of the Initiative – following the *Boldt* and *Rafeedie* decisions, which affirmed the treaty rights to shellfish harvesting and management under the Stevens Treaties.⁸⁴

⁸⁴ The *Boldt* Decision (*United States v Washington*, 384 F Supp 312 (WD Wash 1974), aff’d, 520 F (2d) 676 (9th Cir. 1975)) and *Rafeedie* Decision (*United States v. Washington*, 86 F (3d) 1499 (9th Cir.1996)) allocated 50% of all harvestable

Washington State's approach is action oriented, unlike the approach in British Columbia. The approach to healthy shellfish harvesting in Washington begins with the Health Department "routinely sampl[ing] water around commercial and recreational shellfish growing areas to make sure it meets health standards."⁸⁵ If water quality fails to meet the health standards, then that area is restricted or closed to shellfish harvesting (deemed a classification downgrade) and Washington State takes prompt action to restore the area for harvesting. Washington State mandates by law that within 180 days **"the county authority must create a shellfish protection district and implement a program to find and correct the pollution source(s) that are causing water quality decline."**⁸⁶ Additionally, implementation of a shellfish protection program must begin just 60 days after it has been established.⁸⁷

The shellfish protection districts involve a collaboration of a range of stakeholders including the State Health Department, the federal EPA, local governments, Tribes, and community groups. Different pollution correction methods are used in each district to respond to differences in geography, potential pollution sources, political structures, and the number and type of stakeholders. The shellfish protection district remains active until they have "successfully implemented their pollution control plan which reduced pollution impacts and improved water

shellfish within the usual and accustomed grounds of a tribe, to the tribe as per the Stevens Treaties. These decisions also recognized the tribes as co-managers of commercial shellfisheries. See: Raye Evrard, "Washington Shellfish Aquaculture: Assessment of the Current Regulatory Frameworks" (2017) – thesis at the University of Washington, online:

<https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38654/Evrard_washington_02500_16923.pdf?sequence=1> [perma.cc/FB74-D7ZD]; Also see: Office of Governor Chris Gregoire, "Gov. Gregoire announces new initiative to create jobs, restore Puget Sound" (2011 December 9 – news release) , online: <<https://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=1815&newsType=1>> [perma.cc/U74Z-FN49].

⁸⁵ Washington State Department of Health, "Shellfish Growing Area Restoration," online:

<<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>> [perma.cc/DPA7-G49C].

Adequate sampling frequency, scope, and capacity is crucial element of Washington State's successful approach. Meanwhile, water and shellfish testing capacity has been identified as a major challenge in British Columbia by community partners who work to restore shellfish and clam gardens.

⁸⁶ Washington State Department of Health, *Shellfish Growing Area Restoration*, (N.D) Online: Washington State Department of Health <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>> [perma.cc/BHV5-DE5F]; also see the relevant text of the Washington Code: "The county legislative authority shall create a shellfish protection district and establish a shellfish protection program developed under RCW 90.72.030 or an equivalent program to address the causes or suspected causes of pollution within one hundred eighty days after the department of health, because of water quality degradation due to ongoing nonpoint sources of pollution has closed or downgraded the classification of a recreational or commercial shellfish growing area within the boundaries of the county. The county legislative authority shall initiate implementation of the shellfish protection program within sixty days after it is established. A copy of the program must be provided to the departments of health, ecology, and agriculture. An agency that has regulatory authority for any of the sources of nonpoint pollution covered by the program shall cooperate with the county in its implementation. The county legislative authority shall submit a written report to the department of health annually that describes the status and progress of the program. If rates or fees are collected under RCW 90.72.070 for implementation of the shellfish protection district program, the annual report shall provide sufficient detail of the expenditure of the revenue collected to ensure compliance with RCW 90.72.070." - *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature*

<<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>> [perma.cc/E5FH-CT2Z].

⁸⁷ *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature*

<<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>> [perma.cc/E5FH-CT2Z].

quality.”⁸⁸ It is important to note that Tribes play a leading role in identifying and correcting the pollution sources, as demonstrated in the informative case studies found in Appendix C.

The immediate action on pollution that Washington State law requires stands in vivid contrast to the situation in Coles Bay where:

- governments have failed to act to identify and correct the pollution sources for nearly a quarter century; and
- the Department of Fisheries and Oceans did not even sample the water from 2014-2021, because the pollution source has not been removed or remediated for many years.⁸⁹

Indeed, Washington’s legislated requirement for prompt pollution correction stands in stark contrast with the *general approach* taken in Canada – where shellfish beds are commonly left closed and unmonitored without the prospect of being re-opened. In Canada it is deemed sufficient to post a “No Harvest” sign and walk away from the mess.

The Washington Shellfish Initiative has worked remarkably well. In 2011 the federally supported Puget Sound Partnership set an ambitious goal of upgrading 10,800 acres of Puget Sound shellfish beds by 2020.⁹⁰ **There was a net increase of 6,659 acres of harvestable shellfish beds between 2007 and 2020, or 62% of the 2020 target.**⁹¹

A recent US Environmental Protection Agency study noted this powerful success in Puget Sound – and contrasted it with Canadian inaction in adjacent waters of the Georgia Basin:

*Despite increasing population growth and urbanization across the region, between 2007 and 2019 over 6,400 acres of previously closed shellfish beds in Puget Sound have been upgraded or re-opened for harvesting due to improvements in water quality. However, in the Georgia Basin between 2007 and 2019, there was an increase in closed shellfish beds.*⁹²

⁸⁸ Washington State Department of Health, “Shellfish Growing Area Restoration,” online: <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>> [perma.cc/AVV9-ZXE5].

⁸⁹ The reasoning for ceasing sampling are from a Canadian Shell Sanitation Program representative’s slides at presentation given at North Saanich City Council on October 4, 2021. See: The same presentation outlined that if Environment and Climate Change Canada (ECCC) deems that an area can be re-sampled for water quality, a minimum of 15 acceptable samples are necessary to reclassify an area for harvesting – a process that could take 3 years based on the testing frequency. In the meantime, the Federal agencies/departments have instead been relying on the Capital Regional District’s monitoring data since then, to determine whether closures should continue in Coles Bay.

⁹⁰ Christopher Dunagan, “Winding Down Puget Sound’s 2020 Targets, As Approved Shellfish Acreage Keeps Going Up” (22 February 2021), online: *Puget Sound Institute* <<https://www.pugetsoundinstitute.org/2021/02/winding-down-puget-sounds-2020-targets-as-approved-shellfish-acreage-keeps-going-up/>> [perma.cc/YA5H-MYZ4].

⁹¹ See Puget Sound Info, “Area of Harvestable Shellfish Beds,” online: *Puget Sound Vital Signs* <<https://vitalsigns.pugetsoundinfo.wa.gov/VitalSignIndicator/Detail/40#>> [perma.cc/6ULQ-PYPM].

⁹² United States Environmental Protection Agency, *EPA issues report on health of Salish Sea* (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>> [perma.cc/57N6-HHTE].

In contrast to the chronic inaction at Coles Bay and elsewhere on the BC Coast, the Washington State Department of Health now claims:

*Shellfish protection districts have proven to be very effective in reversing pollution of Washington's saltwater beaches, preventing new pollution sources, and reopening shellfish areas to harvest.*⁹³

In light of the notable successes of shellfish programs in a highly similar adjacent jurisdiction, it is embarrassing that no BC programs comparable to Washington's have been established. No ambitious provincial or federal goals have been set for restoring a target number of hectares of shellfish beds by a target date. No concerted program to promptly and systematically identify and correct shellfish pollution sources exists on the BC coast. Unlike in Washington State, Indigenous-led Pollution Identification and Correction programs have not been identified "as a key strategy to protect and restore shellfish beds."⁹⁴

The compelling fact is that the Washington State approach works. The many acres of reopened harvesting areas on comparable Washington beaches make a strong case for implementing a *British Columbia Healthy Shellfish Initiative*, starting with Coles Bay.

We should learn from the process that led to the current Washington State success.

⁹³ Washington State Department of Health, "Shellfish Growing Area Restoration," online:

<<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>> [perma.cc/DPA7-G49C].

⁹⁴ Washington State Department of Health, "EPA National Estuary Program Pathogens Grant: Pollution Identification and Correction," online: *Washington State Department of Health*

<<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/EPAGrants/PathogensGrant/PIC>> [perma.cc/9BVW-N3TW].

3. How the US Federal Government Fostered Successful Washington State and Local Shellfish Initiatives

The roots of the highly successful Washington Shellfish Initiative go back to an ambitious US federal program initiated by the Obama Administration. Canada can learn much from the US National Shellfish Initiative – which spawned the current Washington state and local initiatives.

The US National Shellfish Initiative is a federal-state collaboration, where:

- The federal initiative sets a framework/blueprint for the state shellfish initiatives;
- Ample funding is provided by the federal initiative; and
- The federal government supports strong partnerships and collaborations with State, local and Tribal governments.

President Obama introduced the National Ocean Policy in 2010, with the goal of coordinating a sustainable, science-based management approach for marine resources.⁹⁵ The following year, the National Shellfish Initiative (NSI) was established as a major Ocean Policy initiative.⁹⁶ The goal of the NSI is to increase healthy bivalve shellfish populations in U.S. coastal waters through restoration activities, as well as sustainable commercial production.⁹⁷

Through the Shellfish Initiative, the federal marine fisheries agency (NOAA)⁹⁸ works with public and private partners to conduct and support shellfish restoration, conservation, and

⁹⁵ Office of the Press Secretary, “Fact Sheet: Leading at Home and Internationally to Protect Our Ocean and Coasts,” 17 June 2014, online: *The White House* <https://obamawhitehouse.archives.gov/the-press-office/2014/06/17/fact-sheet-leading-home-and-internationally-protect-our-ocean-and-coasts#> [perma.cc/5RNF-LB32]; Lindsey Ward, “The Legal and Environmental Implication of the Washington Shellfish Initiative: Is it Sustainable” (2014) 4:1 Seattle J Environmental Law 161 at 167. The policy has led to both environmental and economic objectives, based on protecting and supporting marine and coastal habitats and rebuilding wild stocks, as well as through specific aquaculture programs. Lindsey Ward, “The Legal and Environmental Implication of the Washington Shellfish Initiative: Is it Sustainable” (2014) 4:1 Seattle J Environmental Law 161 at 168-167.

⁹⁶ Raye Evrard, *Washington Shellfish Aquaculture: Assessment of the Current Regulatory Framework*, (Master’s Thesis, University of Washington, School of Marine and Environmental Affairs, 2017) at 3.

⁹⁷ National Oceanic and Atmospheric Administration, “National Shellfish Initiative,” online: *NOAA Fisheries* <<https://www.fisheries.noaa.gov/national/aquaculture/national-shellfish-initiative>> [perma.cc/76L7-HHEH].

⁹⁸ NOAA Fisheries (NOAA) is an office of the National Oceanic and Atmospheric Administration within the U.S. Department of Commerce. NOAA is responsible for stewarding American ocean resources and their habitats. It provides services grounded in science and an ecosystem-based management approach to sustainable fisheries, safe sources of seafood, recovery and conservation of protected resources, and healthy ecosystems. NOAA’s role includes assessing and predicting the status of fish stocks, setting catch limits, ensuring compliance with fisheries regulations, and reducing bycatch. (1) NOAA also works to recover protected marine species under federal fisheries management legislation (2) and the *Endangered Species Act* (3), in harmony with economic and recreational opportunities. (4) NOAA shares certain responsibilities for marine species protection with the US Fish and Wildlife Service. (5)

(1) National Oceanic and Atmospheric Administration, “About Us,” online: *NOAA Fisheries* <<https://www.fisheries.noaa.gov/about-us>> [perma.cc/B6B4-83CT].

environmental research.⁹⁹ NOAA coordinates with the EPA¹⁰⁰ to identify actions needed to implement the National Shellfish Initiative – and collaborates with States, Tribes, industry, restoration groups and academics.¹⁰¹

The National Shellfish Initiative has facilitated significant progress for shellfish health on the US coasts. The National Initiative paved the way for states to develop their own state programs to promote shellfish health and recovery and shoreline restoration. To date, nine state-level Shellfish Initiatives have been established in: Alaska, California, Connecticut, the Gulf of Mexico, Massachusetts, North Carolina, Oregon, Rhode Island, and Washington.¹⁰² The state initiatives

(2) Specifically, NOAA Fisheries is guided by the *Magnuson-Stevens Fishery Conservation and Management Act*, Pub L No 94-265, 1976 (codified as amended by the *Magnuson-Stevens Fishery Conservation and Management Reauthorization Act*, PL 109-479 (2007)). The Act promotes the long-term biological and economic sustainability of marine fisheries. To read more about the Act, see NOAA Fisheries, “Laws & Policies: Magnuson-Stevens Act,” online: <https://www.fisheries.noaa.gov/topic/laws-policies#magnuson-stevens-act> [perma.cc/76BJ-SR8D].

(3) The *Endangered Species Act* outlines the federal government’s responsibilities to protect endangered and threatened species, and critical habitats. See *Endangered Species Act of 1973*, Pub L No 93-205, 884 Stat, 1531 (codified as amended through the 108th Congress).

(4) National Oceanic and Atmospheric Administration, “About Us,” online: *NOAA Fisheries* <https://www.fisheries.noaa.gov/about-us> [perma.cc/XNZ8-5H5Q].

(5) NOAA Fisheries is responsible for endangered and threatened marine or anadromous species. The U.S. Fish and Wildlife Service is responsible for most terrestrial and freshwater species, as well as certain marine mammal species (such as sea otters and polar bears). Both share jurisdiction over several species, including Atlantic salmon. See National Oceanic and Atmospheric Administration, “Laws & Policies: Endangered Species Act,” online: *NOAA Fisheries* <https://www.fisheries.noaa.gov/topic/laws-policies#endangered-species-act> [perma.cc/RM8L-7B4W].

⁹⁹ Including research on environmental factors that affect shellfish populations and the ecosystem benefits provided by shellfish. See: National Oceanic and Atmospheric Administration, “National Shellfish Initiative,” updated 28 December 2021, online: *NOAA Fisheries* <<https://media.fisheries.noaa.gov/dam-migration/fact-sheet-national-shellfish-initiative.pdf>> [perma.cc/2A3K-4E2T].

¹⁰⁰ The United States Environmental Protection Agency (EPA) is a federal agency that works to protect human health and the environment. (1) Specifically, the EPA is tasked with ensuring that environmental risks are addressed with the best available scientific information, writing and enforcing environmental regulations, promoting environmental stewardship, and ensuring that contaminated lands are cleaned up and revitalized. The EPA provides grants to states’ and other stakeholders’ environmental programs, including for scientific research and community cleanup initiatives. The EPA also sponsors partnerships with state and local governments, industry, and non-profit organizations, with whom it shares information.

(1) United States Environmental Protection Agency, “Our Mission And What We Do,” online: *EPA* <<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>> [perma.cc/B3VG-RJXY].

¹⁰¹ National Oceanic and Atmospheric Administration, “National Shellfish Initiative,” updated 28 December 2021, online: *NOAA Fisheries* <<https://media.fisheries.noaa.gov/dam-migration/fact-sheet-national-shellfish-initiative.pdf>> [perma.cc/Z8BG-CWCS].

¹⁰² For more information on these initiatives, see: **Alaska:** Alaska Fisheries Development Foundation, Inc., “Alaska Mariculture Initiative,” online: <https://www.afdf.org/projects/current-projects/alaska-mariculture-initiative/> [perma.cc/LP9M-RRKS]; **California:** Pacific Coast Shellfish Growers Association, “California Shellfish Initiative,” online: <<https://pcsga.org/wprs/wp-content/uploads/2013/04/CA-Shellfish-Initiative.pdf>> [perma.cc/VA88-7DGM]; **Connecticut:** University of Connecticut, “Connecticut’s Marine Shellfish,” online: <<https://shellfish.uconn.edu>> [perma.cc/2RX6-SZBD]; **Gulf of Mexico:** NOAA & Sea Grant Mississippi-Alabama, “Gulf of Mexico Shellfish Initiative,” online: <https://masgc.org/assets/uploads/publications/1397/gomexsi_summary.pdf> [perma.cc/6AF6-C9P6]; **Massachusetts:** Mass Shellfish Initiative, “The Massachusetts Shellfish Initiative,” online: <http://www.massshellfishinitiative.org> [perma.cc/L4BK-7YU3]; **North Carolina:** North Carolina Oysters, “The Napa Valley of Oysters: Launching a North Carolina Shellfish Initiative,” online: <https://ncoysters.org/wp-content/uploads/2018/08/north-carolina-shellfish-initiative.pdf> [perma.cc/859H-3J2P]; **Oregon:** Pacific Coast Shellfish Growers Association, “Summary of Recommendations for the Oregon Shellfish Initiative,” online:



Figure 8: Pauquachin First Nation environmental stewards partnering with Swinomish tribal members at Kiket Island, WA, lining up to pass stones for the creation of the first newly built clam garden in living memory, created by Swinomish for the first time in approximately 200 years, in August 2022. (Photo: Dr. Marco Hatch, Western Washington University professor and Samish Tribal Member)

frame partnerships between state and federal government agencies, Tribes, shellfish aquaculture industry, and non-government entities.

<<https://pcsga.org/wprs/wp-content/uploads/2013/04/Final-Shellfish-TF-Report-Sept20161.pdf>> [perma.cc/VF4E-93AR]; **Rohde Island:** Shellfish Rohde Island, “RI Shellfish Initiative,” online: <http://www.shellfishri.com/ri-shellfish-initiative/> [perma.cc/F4VV-TBRA].

3.1 THE WASHINGTON STATE SHELLFISH INITIATIVE

In 2011, Washington became the first state to implement its own state shellfish initiative under the auspices of the national Shellfish Initiative.¹⁰³ Focused on Puget Sound, the Washington Shellfish Initiative (WSI) describes itself as:

*...an innovative partnership among Washington state government agencies, the federal government, tribes, the shellfish industry, and non-profit organizations to promote clean water commerce, create family-wage jobs, and elevate the role that the shellfish play in keeping our marine waters healthy.*¹⁰⁴

The Washington Shellfish Initiative is a comprehensive partnership that promotes economic opportunity and shellfish restoration, improves water quality, and furthers science around shellfish farming and restoration.¹⁰⁵ It is important to note that the US federal government has always been a critically important partner and funder of the Washington State Initiative.¹⁰⁶ For example:

- Federal NOAA funding contributes to research, restoration, and planning efforts conducted by Washington State’s Department of Fish and Wildlife, as well as restoration groups, Tribal co-managers, and industry.¹⁰⁷
- The US EPA provides national guidance, technical assistance, and significant funding to the shellfish restoration work done by the Puget Sound Partnership in Washington.

¹⁰³ See: National Oceanic and Atmospheric Administration, “Washington Shellfish Initiative,” online: NOAA Fisheries <https://www.fisheries.noaa.gov/west-coast/aquaculture/washington-shellfish-initiative> [perma.cc/5X5E-7F44]; Jay Inslee, “Gov Inslee’s Shellfish Initiative,” online: Washington Governor Jay Inslee <https://www.governor.wa.gov/issues/issues/energy-environment/shellfish> [perma.cc/3TH9-DN3H]. Also see: Raye Evrard, *Washington Shellfish Aquaculture: Assessment of the Current Regulatory Framework*, (Master’s Thesis, University of Washington, School of Marine and Environmental Affairs, 2017) at 4; Governor’s Legislative and Policy Office, *Washington Shellfish Initiative Phase II Work Plan*, January 2016, at 1, online: <https://www.governor.wa.gov/sites/default/files/ShellfishWorkPlan.pdf> [perma.cc/EXS4-M7SS].

¹⁰⁴ National Oceanic and Atmospheric Administration, “Washington Shellfish Initiative,” online: NOAA Fisheries <https://www.fisheries.noaa.gov/west-coast/aquaculture/washington-shellfish-initiative> [perma.cc/QLV7-6GDW].

¹⁰⁵ National Oceanic and Atmospheric Administration, “National Shellfish Initiative,” updated 28 December 2021, online: NOAA Fisheries https://media.fisheries.noaa.gov/dammigration/fact_sheet_national_shellfish_initiative.pdf [perma.cc/T9UH-LQFN].

¹⁰⁶ *Washington State Initiative White Paper* (2011), online: https://www.governor.wa.gov/sites/default/files/documents/WSI_WhitePaper2001.pdf [perma.cc/8ZDM-ZIYR]; Jay Inslee, “Gov Inslee’s Shellfish Initiative,” online: *Washington Governor Jay Inslee* <https://www.governor.wa.gov/issues/issues/energy-environment/shellfish> [perma.cc/XTM2-DVNS]; Lindsey Ward, “The Legal and Environmental Implication of the Washington Shellfish Initiative: Is it Sustainable” (2014) 4:1 Seattle J Environmental Law 161 at 162.

¹⁰⁷ *Washington State Initiative White Paper* (2011), at 3, online: https://www.governor.wa.gov/sites/default/files/documents/WSI_WhitePaper2001.pdf [perma.cc/6JWW-U5V5].



Figure 9: Seth Book, Skokomish Tribe water quality biologist, uses a refractometer to measure the salinity of a water sample from Hood Canal. (Photo: Tiffany Royal, Northwest Indian Fisheries Commission)

Specifically, the EPA provides funding through the National Estuary Program, which aims to protect and restore the water quality of nationally significant estuaries and their surrounding watershed.¹⁰⁸

- Between 2011 and 2021, the EPA’s National Estuary Program provided the Washington State Department of Health (WDOH) with over \$35 million in grants to support improved water quality around Puget Sound.¹⁰⁹ These grants have helped finance the planning and implementation of effective Pollution Identification and Correction (PIC) programs, as well as on-site septic system management programs, research, and shellfish protection districts. Combined with funding from states and local authorities, the federal funds have supported profoundly significant improvements in water quality around shellfish beds in Washington.¹¹⁰

Such federally subsidized Pollution Identification and Correction (PIC) Programs constitute “a key strategy to protect and restore shellfish beds.”¹¹¹ They are designed to avoid and/or rehabilitate

¹⁰⁸ United States Environmental Protection Agency, “Overview of the National Estuary Program,” online: [EPA https://www.epa.gov/nep/overview-national-estuary-program](https://www.epa.gov/nep/overview-national-estuary-program) [perma.cc/QEP4-DC5W].

¹⁰⁹ Puget Sound Info, “Progress Measures: Area of Shellfish Beds,” last modified 3 February 2021, online: [Puget Sound Info https://www.pugetsoundinfo.wa.gov/ProgressMeasure/Detail/40/VitalSigns](https://www.pugetsoundinfo.wa.gov/ProgressMeasure/Detail/40/VitalSigns) [perma.cc/TM2A-FS5L].

¹¹⁰ Puget Sound Info, “Progress Measures: Area of Shellfish Beds,” last modified 3 February 2021, online: [Puget Sound Info https://www.pugetsoundinfo.wa.gov/ProgressMeasure/Detail/40/VitalSigns](https://www.pugetsoundinfo.wa.gov/ProgressMeasure/Detail/40/VitalSigns) [perma.cc/TM2A-FS5L].

¹¹¹ Washington State Department of Health, “EPA National Estuary Program Pathogens Grant: Pollution Identification and Correction,” online: [Washington State Department of Health https://doh.wa.gov/community-and-environment/shellfish/epa-grants/pathogens-grant/pic](https://doh.wa.gov/community-and-environment/shellfish/epa-grants/pathogens-grant/pic) [perma.cc/58HV-28MU].

harvest closures – by identifying and correcting sources of fecal bacteria from septic systems, boat sewage, storm water run-off, and farm animal waste.¹¹² PIC programs include:

- Water quality monitoring;
- Education, outreach, and technical assistance for community members (specifically to manage septic systems, boater and recreationalist waste, and farm animal manure);
- Financial incentives, including direct incentives for landowners and others;
- Implementing agricultural best management practices; and
- Regulatory compliance.

The federal grants support Pollution Identification and Correction development and implementation – and support measures to avoid shellfish harvest closures. The federal grants are awarded to the Tribes, municipalities, local authorities, counties, conservation districts, and the state health department (in coordination with the state ecology and agriculture departments). The funding supports the development of “local, self-sustaining approach[es] to reduc[ing] fecal contamination.”¹¹³

Tribes play a leading role in identifying and correcting pollution. See Appendix C for a description of their role.

[For examples of the type of US federal grants made to support the Washington State Initiative, see Appendix B.]

The US EPA also supports Pollution Identification and Correction program planning and implementation by working with the Washington State Department of Health to “develop PIC standards and identify roles and responsibilities for local and state agencies.”¹¹⁴ PIC standards of practice help guide future funding decisions and include identifying the elements of successful PIC programs.¹¹⁵

In 2021, the EPA announced its continued support for Puget Sound recovery projects through the National Estuary Program. State, local, and Tribal partners will receive at least \$34 million in grant funds to continue Puget Sound recovery and conservation efforts – Including work on habitat protection, finding and fixing sources of pollution, cutting edge stormwater research, and tribal salmon restoration projects. This was a continuation of the \$419 million that EPA has invested in

¹¹² US Environmental Protection Agency Region 10, *EPA Geographic Funding at Work on Puget Sound Recovery* (Seattle: US Environmental Protection Agency Region 10, February 2021) at 27-28, online: EPA

<https://www.epa.gov/sites/default/files/2021-02/documents/puget-sound-geographic-funding-report-2021.pdf> [perma.cc/6QQN-ZU9L]; Lindsey Ward, “The Legal and Environmental Implication of the Washington Shellfish Initiative: Is it Sustainable” (2014) 4:1 Seattle J Environmental Law 161 at 183.

¹¹³ United States Environmental Protection Agency, “Shellfish Harvesting,” last modified June 2021, online: EPA <https://www.epa.gov/salish-sea/shellfish-harvesting> [perma.cc/R636-JKAF]; United States Environmental Protection Agency, “Puget Sound Grants Issued 2010-2015,” online: EPA <https://www.epa.gov/puget-sound/puget-sound-grants-issued-2010-2015> [perma.cc/MYS6-KCDU].

¹¹⁴ Mary Selecky, Secretary of Health, *NEP Pathogen Grant Implementation Strategy 2012 Work Plan*, (Olympia: Washington State Department of Health, 15 June 2012) at 5.

¹¹⁵ Mary Selecky, Secretary of Health, *NEP Pathogen Grant Implementation Strategy 2012 Work Plan*, (Olympia: Washington State Department of Health, 15 June 2012) at 5.

Puget Sound to restore more than 50,000 acres of general habitat and protect in excess of 150,000 acres of harvestable shellfish beds since 2006.¹¹⁶ In announcing the latest funding, the EPA clearly acknowledges that the initiative responds to Government’s treaty obligations.¹¹⁷

Note: For a fuller discussion of the US-Washington State Shellfish Initiative, see our parallel submission to the Provincial Government on this issue.^{118]}

3.2 CANADA’S JURISDICTION TO ACT – AND EXAMPLES OF ANALOGOUS OTTAWA INITIATIVES

The federal government clearly has the jurisdiction to partner with British Columbia, First Nations and stakeholders to create a Healthy Shellfish Initiative similar to the Washington State model. See Appendix D for a brief discussion of Canada’s jurisdiction to act.

Finally, a comprehensive Healthy Shellfish Initiative can build on – and learn from – previous Canadian federal initiatives. The federal government has often engaged with issues of ecological restoration, conservation, and food harvesting – by providing funding, guidelines, capacity and support for communities through various initiatives and programs. Over the years, many of these initiatives have enhanced species habitat, reintroduced species into their traditional territory, and improved water quality. The proposed Healthy Shellfish Initiative could function similarly to the initiatives that have already been undertaken by the federal government – but would focus specifically on comprehensive and coordinated actions to restore a healthy shellfish resource.

You will find pertinent examples of analogous previous Canadian federal initiatives in Appendix D, below. As demonstrated in that Appendix, the Canadian federal government has already funded a number of initiatives quite analogous to key components of a comprehensive Healthy Shellfish Initiative.

In addition to the initiatives described in Appendix D, a pioneering First Nations Health Authority (FNHA) program could be directly relevant to a new Healthy Shellfish Initiative. Health Canada and the Public Health Agency of Canada provided capacity building to the Authority by funding the WATCH (We All Take Care of the Harvest) program. This pilot program was created in response to First Nations community members identifying that the “need to know when and if shellfish were safe to harvest” was the most critical concern related to shellfish. The WATCH program is

¹¹⁶ United States Environmental Protection Agency, “EPA Announces \$34 Million in Puget Sound Funding,” press release 16 December 2021, online: EPA <https://www.epa.gov/newsreleases/epa-announces-34-million-puget-sound-funding> [perma.cc/TS52-4NLX].

¹¹⁷ United States Environmental Protection Agency, “EPA Announces \$34 Million in Puget Sound Funding,” press release 16 December 2021, online: EPA <https://www.epa.gov/newsreleases/epa-announces-34-million-puget-sound-funding> [perma.cc/TS52-4NLX].

¹¹⁸ Environmental Law Centre, 2022, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsheffishreport/>> [perma.cc/8GUN-9U74].

community driven and though it begins with a focus on biotoxin monitoring, the scope will be expanded based on needs identified by participating First Nations communities.¹¹⁹

Through the WATCH program, the First Nations Health Authority has already taken steps to develop an inclusive monitoring system that takes Indigenous viewpoints into risk management and closures. The FNHA has capacity to undertake sanitary beach surveys and provide training to communities to conduct this form of monitoring. The FNHA provides training and equipment such as microscopes, plankton nets, and meters to four WATCH communities. With these, WATCH monitors can see when toxin-producing plankton are in the water and warn harvesters that clams, crabs and other shellfish might have toxins in them.¹²⁰ A collaborative National Healthy Shellfish Initiative should clearly leverage the expertise and resources of the FNHA.

¹¹⁹ See: First Nations Health Authority, “We All Take Care of the Harvest (WATCH),” online: <<https://www.fnha.ca/what-we-do/environmental-health/watch-project>> [perma.cc/HV5A-NF2Q].

¹²⁰ First Nations Health Authority, Watch Program Overview (November 2022).



Figure 10: Pauquachin community members and youth learning together at the beach, on how to turn over beach sediments for management and history of the area in July 2022, as part of new marine youth program efforts. (Photo: Provided by the Pauquachin First Nation)

4. Conclusion

With federal partnership, a comprehensive Healthy Shellfish Initiative could have a broadly positive outcome for the revitalization of shellfish beds – and the restoration of Indigenous shellfish harvests.

5. Recommendations

In order to restore and perpetuate an Indigenous Shellfish Harvest, we recommend that the Government of Canada:

1. Establish a *Federal Healthy Shellfish Initiative*, in partnership with the British Columbia Government and First Nations. The rehabilitation of Coles Bay should be immediately initiated as a pilot project and model to inform the coast-wide program.
2. Set a goal of recovering and re-opening 80% of BC shellfish beds closed for sanitary reasons by 2027. (Modelled on the goal approach of the Puget Sound Partnership).
3. Fund comprehensive Pollution Identification and Correction efforts to be carried out in collaborations with First Nations, the Province of BC, and local governments. Among other things, Canada should contribute technical assistance, research, and development of best management practices/standards.
4. Work with the Province of British Columbia to legally require that prompt and comprehensive *Pollution Identification and Correction* measures be commenced within 60 days of the detection of significant contamination of shellfish. These efforts should be Indigenous led and include Indigenous traditional knowledge, as appropriate. Clear objectives and pragmatic goals for harvest re-opening should be set.
5. Amend the mandate of the Canadian Shellfish Sanitation Program to give priority to supporting Indigenous shellfish harvesting, in light of treaty and Aboriginal rights. The new mandate should specifically prioritize environmental justice, reconciliation, and First Nations-led restoration of shellfish beds.
6. Expand water-quality testing capacity and frequency to ensure that harvesting continues to be safe – prioritizing an enhanced leadership role for First Nation Guardians and the First Nation Health Authority.
7. Increase funding for the chronically underfunded Canadian Shellfish Sanitation Program. Improve its system for monitoring sanitary shellfish pollution, as well as the system for classifying beaches as open or closed.
8. Include First Nations and their perspectives in risk management decisions – and all other aspects of program operation and implementation.
9. Collaborate on educational outreach materials and incentives for water quality improvement and shellfish restoration. (e.g., outreach to septic owners, farmers and boat owners; septic upgrade rebates to homeowners; subsidies for critical sewer line extensions).
10. Set up and support a multi-stakeholder partnership-facilitating agency to liaise between First Nations, federal and local governments, and stakeholders, modelled on the successful Puget Sound Partnership.
11. Document the historical injustice of shellfish management and its impacts on First Nations in Government’s upcoming environmental racism strategy and study.

Note: See the “Epilogue” below for a broader discussion of the environmental justice and racism implications raised by current government shellfish policies.



Figure 11: Cedar-woven clam harvesting basket with target-sized skw'lhey' and s'axwa (Littleneck and butter clams in Hul'q'umi'num language), created in the Coast Salish style by a Lummi Elder. (Photo: Dr. Marco Hatch, Samish Tribal Member and Professor at Western Washington University, 2019.)

6. Epilogue: The Fundamental Question of Environmental Justice and Racism

Indigenous people along the coast are faced with chronic, long-term shellfish harvesting closures. Shellfish play a vital role in many Indigenous communities' "culture, history, community cohesion, food security, and economy, and continue to shape lives and a way of being."¹²¹ As a result, when those shellfish beds are closed permanently – or "temporarily" with no mechanisms to ensure their timely re-opening – Indigenous peoples face an existential threat to their culture, health, and way of life.¹²²

In many ways, the loss of shellfish to coastal Nations is analogous to the loss of buffalo to the peoples of the Prairies.

Shellfish harvest closures are the result of decisions made by local, provincial and federal governments that have failed to see and respect vital Indigenous interests. Decisions have been made to prioritize subdivision developments, septic developments, storm water infrastructure, livestock operations, marinas and other coastal developments over a critical food supply for Indigenous peoples. Worse, subsequent government decisions have been made to not regulate septic systems and other sources of pollution,¹²³ to cut budgets for monitoring of water quality and cut programs to remediate shellfish beaches.¹²⁴ The grave consequences to Indigenous people have not been seen or respected.

There can be little doubt that if governments' decisions on development and regulation stood to pollute *everyone's essential food and culture*, government decisions would have been far more careful. Among other things:

- Development of subdivisions with septic above Coles Bay would not have expanded, in the face of clear warnings that the area was inappropriate for septic;¹²⁵

¹²¹ United States Environmental Protection Agency, *Shellfish Harvesting* (2018) as cited in Tricia Brown Fleming, "Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada" (2019) at 2, online: <<https://www.epa.gov/salish-sea/shellfish-harvesting>> [perma.cc/F35W-62FS].

¹²² Deur, D., Dick, A., Recalma-Clutesi, K., & Turner, N. J., "Kwakwaka'wakw "clam gardens": Motive and agency in traditional northwest coast mariculture" (2015) *Human Ecology*, 43(2), 201 as cited in Tricia Brown Fleming, "Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada" (2019), at 2, online: <<https://doi.org/10.1007/s10745-015-9743-3>> [perma.cc/WD6B-69WS]; Donatuto, J., "When seafood feeds the spirit yet poisons the body: developing health indicators for risk assessment in a Native American fishing community" (2008) University of British Columbia, online: <<https://doi.org/10.14288/1.0066720>> [perma.cc/2S22-85TP]; Harrison, H. L., & Loring, P. A., "Urban harvests: food security and local fish and shellfish in Southcentral Alaska" (2016) *Agriculture & Food Security* 5(1), 16, online: <<https://doi.org/10.1186/s40066-016-0065-5>> [perma.cc/2JA3-DNJS]; Silver, J. J., "From fishing to farming: Shellfish aquaculture expansion and the complexities of ocean space on Canada's west coast" (2015) *Applied Geography*, 54, 110–117, <<https://doi.org/10.1016/j.apgeog.2014.07.013>> [perma.cc/R9TB-9JVJ].

¹²³ See Environmental Law Centre, 2022, *Cleaning Up Coles Bay: A Partnership for Justice and Shellfish Restoration*

¹²⁴ See the section above entitled "Failure to Take Indigenous Use of Shellfish Seriously – Underfunding of the CSSP Has Led to Cuts in Monitoring and Restoration Efforts."

¹²⁵ See Environmental Law Centre, 2022, *Cleaning Up Coles Bay: A Partnership for Justice and Shellfish Restoration*, at 25 and following.

- Septic systems would have been stringently regulated;
- money would have been found to install sewer lines and storm water filtration systems;
- water quality monitoring would have supplemented – instead of cut; and
- ample remediation programs would have been prioritized long ago.¹²⁶

But because shellfish are uniquely important to minority Indigenous people, such measures were not taken. Yet governments surely would have taken the above measures if *everyone's* staple foods and culture was being seriously damaged.

A key part of the injustice lies in government's ongoing failure to allow Indigenous peoples to participate in decisions about shellfish – to recognize Indigenous sovereignty and the right to determine environmental outcomes in their territories.¹²⁷ As demonstrated in the above submissions, Canada's current shellfish regulation regime disproportionately harms Indigenous peoples. These harms go to the heart of many Indigenous communities, involving serious impacts on the community's health, economic well-being, cultural, spiritual, and social practices, and resource management. Obviously, Indigenous harvesters should have been involved in the management and remediation of those impacts. Yet, for too long they have been excluded from such decision making.

When negative impacts on Indigenous communities is “the consequence of activities ... carried out on and near reservations with reckless disregard for the lives of [Indigenous peoples],” this has been described as “environmental racism.”¹²⁸ The problem of environmental racism is why the House of Commons recently passed Bill C-226, *A National Strategy Respecting Racism and Environmental Justice Act* – which requires development of a national strategy to promote efforts across Canada to address harms caused by environmental racism.¹²⁹

We call on the Minister of the Environment to commence implementation of Bill C-226¹³⁰ by addressing the environmental racism implicit in the abject history of BC shellfish closures that we have described.

Bill C-226 will require the Minister of Environment to develop “a national strategy to promote efforts across Canada to advance environmental justice and to assess, prevent and address environmental racism.” The strategy must include:

¹²⁶ See Environmental Law Centre, *Cleaning Up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation* (2022), online: <<https://elc.uvic.ca/publications/cleaningupcolesbay-provincialsheffishreport/>> [perma.cc/8GUN-9U74] and *Cleaning Up Coles Bay: A Partnership for Justice and Shellfish Restoration*.

¹²⁷ Tricia Brown Fleming, “Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada” (2019), at 40; citing R. Tsosie, “Indigenous people and environmental justice: The impact of climate change” (2007), *University of Colorado Law Review*, 78, 1625–1677.

¹²⁸ Daniel Brook, “Environmental Genocide: Native Americans and Toxic Waste” (1998) 57 *AM. J. of ECON & SOC*, at 105, 106.

¹²⁹ Bill C-226 has passed the House of Commons and is currently at its second reading in the Senate. The Bill's progress can be found here: <<https://www.parl.ca/legisinfo/en/bill/44-1/c-226>> [perma.cc/V3V7-SC5G].

¹³⁰ When adopted by the Senate.

- a study examining the link between race, socio-economic status, and environmental risk, and
- measures to advance environmental justice and address environmental racism.

The history of shellfish management and its tragic impacts on First Nations must be documented in the upcoming environmental racism strategy and study. Government policies on shellfish pollution and closures provide a textbook example of environmental injustice.

6.1 APPLYING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

In developing the case study of environmental racism and shellfish-related government actions, government should review its record through the lens of the *United Nations Declaration on the Rights of Indigenous Peoples*.

In 2021, the federal government passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* – which legislates that “the Government of Canada must, in consultation and cooperation with Indigenous peoples, take **all measures necessary** to ensure that the laws of Canada are consistent with *United Nations Declaration on the Rights of Indigenous Peoples*.”¹³¹ In regard to shellfish harvesting regulation, the federal government has fallen far short of taking all measures necessary to ensure that the laws are consistent with UNDRIP:

Article 18 UNDRIP

Decisions about how, when, where, whether, and for how long beaches are closed to harvesting affect the rights of Indigenous peoples who have harvested from those beaches. Until there are appropriate procedures for the participation of Indigenous people in the *decision-making* regarding the closure and re-opening of shellfish harvesting, the federal government is actively breaching the UNDRIP Article 18 decision-making rights of those Indigenous people. (See the text of Article 18 below.¹³²) The same principles apply to the decisions leading to the contamination that prompts these closures.

Article 19 UNDRIP

Canada regulates shellfish harvesting through the *Fisheries Act*, and through administrative measures of the federal government through the CSSP. Any of these regulatory actions that are taken without the “free, prior and informed consent” of the affected Indigenous peoples (obtained through consultation and cooperation in good faith through their own representative

¹³¹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14, s. 5 [emphasis added].

¹³² *United Nations Declaration on the Rights of Indigenous Peoples* (2 October 2007), A/RES/61/295, Article 18 [UNDRIP]. Article 18 states, “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

institutions), are violating the UNDRIP Article 19 rights of the affected Indigenous peoples. See Article 19 below.¹³³)

Article 20 UNDRIP

Shellfish contribute to the subsistence of many coastal First Nations. Shellfish have traditionally been an integral component of Indigenous economies. Contrary to Article 20 of UNDRIP, Canada's current approach to shellfish harvesting closures threatens First Nations' rights:

- “to be secure in the enjoyment of their own means of subsistence and development” and
- “to engage freely in all their traditional and other economic activities.” (See Article 20 below.¹³⁴)

Pursuant to Article 20, since the current shellfish closure regime deprives First Nations of their means of subsistence and development, those communities are entitled to just and fair redress.¹³⁵ In this case, just and fair redress must include adequate measures for the clean up and reopening of closed beaches – and the participation of impacted communities in future decision making.

Article 24 UNDRIP

UNDRIP also states that Indigenous individuals have a right to “the enjoyment of the highest attainable standard of physical and mental health.”¹³⁶ The current approach to sanitary closures places inequitable health burdens on these shellfish-reliant communities.

In neglecting to restore and re-open healthy shellfish beds, the Canadian Food Inspection Agency (CFIA), Environment and Climate Change Canada (ECCC) and Fisheries and Oceans Canada (DFO) have actually damaged the health of Indigenous peoples. They have not only ignored health goals of the CSSP, but also the fiduciary duty of the Crown regarding the health of Indigenous peoples, and the parallel duty owed under Article 24 of UNDRIP.¹³⁷

¹³³ UNDRIP, Article 19. Article 19 states: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

¹³⁴ UNDRIP, Article 20. Article 20 states: “Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.”

¹³⁵ See the text of UNDRIP, Article 20, above.

¹³⁶ UNDRIP, Article 24 states: “...(1) Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services, (2) Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.”

¹³⁷ Indigenous health can be understood as a constitutional right through the framework of Aboriginal rights. [Derek Kornelsen, Yvonne Boyer, Josee Lavoie, and Judith Dwyer, “Reciprocal accountability and fiduciary duty: implications for indigenous health in Canada, New Zealand and Australia” (2015/2016) Australian Law Review Vol 19 No 2, at 23.] The Constitution Act, 1982, and Canadian jurisprudence affirms that the Crown owes Indigenous people honourable and fiduciary duties. [See, for example, Manitoba Métis Federation Inc v Canada (Attorney General), 2013 SCC 14 at para 65; Guerin v The Queen, [1984] 2 SCR 335; R v Sparrow, [1990] 1 SCR 1075; Delgamuukw v British Columbia, [1997] 3 SCR 1010; Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11, s.35.]

Article 32 UNDRIP

Canada's current approach to shellfish regulation does not incorporate or uphold Indigenous peoples' priorities and strategies for the development/use of the foreshore and shellfish, as required by Article 32(1) of UNDRIP. (Rather, as discussed above, "the delivery of the CSSP's mandate is focused on the commercial market and maintaining export."¹³⁸) Under Article 32(1), Indigenous peoples must be included in determining priorities when addressing shellfish closures.¹³⁹ Furthermore, the approval of any project that contributes to the ongoing and cumulative pollution of shellfish beaches requires the free, prior and informed consent of the affected Indigenous people under Article 32(2) of UNDRIP.¹⁴⁰

The appropriate measures to mitigate adverse impacts from shellfish closures must include a robust plan for the prompt and safe reopening of closed beaches. It must do so in a way that fosters and respects the outcomes of informed decision-making by impacted Indigenous peoples.

Indigenous health care is within federal jurisdiction according to the Constitution Act 1982 s. 91(24), which states that the legislative authority of the federal government extends to "Indians, and Lands reserved for the Indians." [Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11, s.91(24).] Scholars have argued that the Crown has a fiduciary obligation to respect/protect an Indigenous right to health care. [Derek Kornelsen, Yvonne Boyer, Josee Lavoie, and Judith Dwyer, "Reciprocal accountability and fiduciary duty: implications for indigenous health in Canada, New Zealand and Australia" (2015/2016) Australian Law Review Vol 19 No 2, at 23.; See also the following for a discussion of the existence of Indigenous rights to health within the colonial legal framework: Yvonne Boyer, "Moving aboriginal health forward: discarding Canada's legal barriers" (2014), Purich Publishing Limited, Saskatoon, SK, at 128-140.]

¹³⁸ Fisheries and Oceans Canada, "Summary of the horizontal evaluation of the Canadian shellfish sanitation program," (2022, October 21), online: <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/22-23/summary-resume-96744-eng.html>> [perma.cc/2PEM-W7D9].

¹³⁹ UNDRIP, Article 32. Article 32 states: "... (1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."

¹⁴⁰ UNDRIP, Article 32. Article 32 states: "... (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

APPENDIX A: Fisheries and Oceans Canada Map of Sanitary Closure in Saanich Peninsula

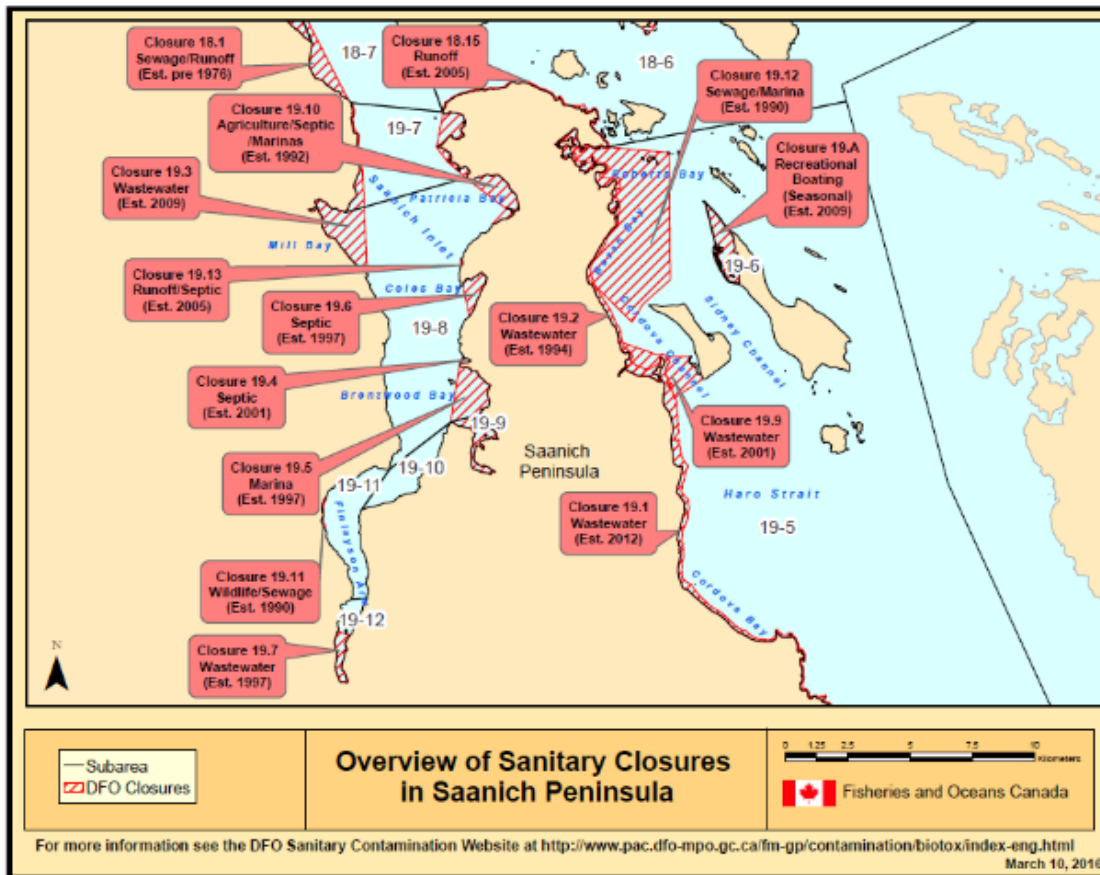


Figure 12: Fisheries and Oceans Canada Map of Sanitary Closures in Saanich Peninsula

APPENDIX B: Examples of Federal Grants Supporting the Washington Shellfish Initiative

Table 1: EPA grants to support PIC development and implementation and avoid shellfish harvest closures in Puget Sound more generally.

Date	Grant Name	Funds (USD)	Activities
2010-2015	Puget Sound Grants ¹⁴¹	At least \$6 million	<ul style="list-style-type: none"> Water quality protection and restoration Shellfish bed recertification Evaluate pollution risks Implement watershed management practices to reduce urban/land use impacts on shellfish beds Calculate stormwater volumes to incorporate into watershed protection goals Identify and correct sources of fecal pollution Correct stormwater runoff issues Provide homeowners with non-interest septic system repair loan programs Correct failing on-site sewage systems Outreach and monitoring program to increase landowners' awareness of high fecal colloform bacteria levels
2011-2017	NEP Strategic Initiative Lead Organization ¹⁴²	At least \$900,000 (approx. 30% of at least \$3 million)	<ul style="list-style-type: none"> Prevent, reduce, and control pathogens from sewage/wastewater treatment discharge and agricultural production Restore shellfish growing areas, avoid shellfish closures Address knowledge gaps regarding impacts of pathogens on shellfish and shellfish habitat Encourage inter-agency and partner coordination Provide on-site sewage system management support Help shellfish harvesters and consumers make informed harvesting decisions
2016-2020	Strategic Initiatives Awards ¹⁴³	At least \$21 million	<ul style="list-style-type: none"> "Protect and recover shellfish beds by increasing enforcement of existing regulations and programs and preventing pollution through incentives."
Total		At least \$27.9 million	

¹⁴¹ United States Environmental Protection Agency, "Puget Sound Grants Issued 2010-2015," online: <https://www.epa.gov/puget-sound/puget-sound-grants-issued-2010-2015> [perma.cc/55NB-SVVS].

¹⁴² Mary Selecky, Secretary of Health, *NEP Pathogen Grant Implementation Strategy 2012 Work Plan*, (Olympia: Washington State Department of Health, 15 June 2012) at 1, 3, 6-9, online: <https://doh.wa.gov/sites/default/files/legacy/Documents/4400/332-132-EPA-Grant-Strategy.pdf> [perma.cc/72LS-9BZS]; United States Environmental Protection Agency, "Puget Sound Lead Organization Funding 2011-2017," online: <https://www.epa.gov/puget-sound/puget-sound-lead-organization-funding-2011-2017> [perma.cc/YBE9-3RQY].

¹⁴³ United States Environmental Protection Agency, "Puget Sound Strategic Initiatives Funding 2016-2020," online: <https://www.epa.gov/puget-sound/puget-sound-strategic-initiatives-funding-2016-2020> [perma.cc/L5YN-G5ZU].

APPENDIX C: Case Studies of US Tribes' Key Role in the Washington Shellfish Initiative

6.1.1 Washington State Case Studies that Put British Columbia Efforts to Shame

The difference that the Washington State programs can make can be seen by comparing shellfish harvesting conditions for:

- the Lummi Tribe in and around Drayton Harbor WA;¹⁴⁴ and
- the Semiahmoo Band in Semiahmoo Bay, immediately north in Canada (see figure below).

Both peoples reside within the Boundary Bay Basin, and have traditionally relied upon shellfish, which have been subject to pollution over the years. For the Semiahmoo Tribe in Canada, shellfish harvesting in their waters is still unhealthy and illegal – while the Lummi Tribe just next door in the US, is now able to safely harvest shellfish because of State restoration efforts. The different laws in Washington and BC create these radically different outcomes.

Just south of the Canadian-American border, near Blaine is Drayton Harbor. Drayton Harbor experienced shellfish harvesting closures in the 1980s and 1990s. A pollution identification and correction program documented that 128 of 400 septic systems tested in Drayton Harbor “were found to be failing or were suspected of problems.”¹⁴⁵ However, after extensive collaboration, community involvement, tracking and addressing pollution sources, 575 acres were conditionally re-opened to harvest in 2004. An additional 235 more acres were upgraded in 2016, allowing Drayton Harbor to reopen for year-round shellfish harvesting for commercial, tribal, and recreational harvest.¹⁴⁶ As a result of monitoring and restoration, the Lummi tribe have been able to return to harvesting for cultural and commercial purposes. The Lummi Nation manages fisheries and leads study efforts related to water quality standards and shellfish consumption.¹⁴⁷

¹⁴⁴ Betsy Peabody, “Engaging the community in Drayton Harbor’s comeback story” (Presentation delivered at the Salish Sea Ecosystem Conference, Seattle, Washington, 2018), [unpublished]; Christopher Dunagan, “Bringing the shellfish back: How Drayton Harbor overcame a legacy of pollution” (07 March 2017), online: *Encyclopedia of Puget Sound* <<https://www.eopugetsound.org/magazine/is/drayton-shellfish>> [https://perma.cc/YW5S-7FH2].

¹⁴⁵ Christopher Dunagan, “Bringing the shellfish back: How Drayton Harbor overcame a legacy of pollution” (07 March 2017), online: *Encyclopedia of Puget Sound* <<https://www.eopugetsound.org/magazine/is/drayton-shellfish>> [perma.cc/X4KM-TCFC].

¹⁴⁶ Betsy Peabody, “Engaging the community in Dr Engaging the community in Drayton Harbor on Harbor's comeback st s comeback story” (2018 April 6) Presentation at the 2018 Salish Sea Ecosystem Conference, online (pdf): <<https://cedar.www.edu/cgi/viewcontent.cgi?article=2867&context=ssec>> [perma.cc/F8T2-B5RV].

¹⁴⁷ See: Lummi Indian Business Council, “Lummi Seafood Consumption Study,” online: <<https://www.lummi-nsn.gov/Website.php?PageID=180>> [perma.cc/8S97-TLZY] and the Lummi Nation also manages their own fisheries, including shellfish, see: Lummi Indian Business Council, “Fisheries Management,” online: <<https://www.lummi-nsn.gov/Website.php?PageID=102>> [perma.cc/CL5P-CXPP].

By contrast, just north in Canada the Semiahmoo First Nation has been subject to DFO closures of shellfish harvesting sites close to their community, **since 1962**.¹⁴⁸ This shellfish harvesting closure – and the following arrest of Semiahmoo members for harvesting shellfish in 1997 – drove the creation of a “Shared Waters Alliance” of Indigenous leaders, community members, and government officials in 1999.¹⁴⁹ Despite the efforts of that group to monitor and clean up the bay, the Canadian shellfish beds have not been re-opened.

The success of the cleanup at Drayton Harbor just south of the Peace Arch – and the ongoing difficulties encountered by Semiahmoo First Nation just north of the Peace Arch – present a stark contrast of both laws and environmental results.

6.1.2 Pollution Identification and Correction Programs have Worked in Hood Canal

The Hood Canal Regional Pollution Identification and Correction (PIC) Program is a successful initiative which “works to protect and restore water quality, particularly to clean up and prevent fecal pollution from human and animal waste that threatens public health and our economy.”¹⁵⁰ Partners of the Hood Canal Regional PIC Program include the Skokomish and Port Gamble S’Klallam Tribes, local county health jurisdictions, conservation districts within the counties of Mason, Kitsap, and Jefferson, storm water programs, educators and the Hood Canal Coordinating Council.¹⁵¹ The Hood Canal Regional PIC Program monitors for septic system leakages, investigates and finds the source. “This work is essential to maintain and improve water quality by reducing bacterial and nutrient pollution sources.”¹⁵²

¹⁴⁸ Emma S Norman, *Governing Transboundary Waters – Canada, the United States, and Indigenous Communities* (New York: Routledge, 2015) at 105.

¹⁴⁹ Shared Waters Alliance consists of representatives from government, First Nations, and community groups from Canada and the US who are focused on the shared waters of Boundary Bay. However, the Shared Waters Alliance shut down in 2011. Perhaps spurred by the US success just south of the border, the Alliance began working again since 2018 to re-engage and re-initiate their work on recovering the shellfish harvest for the Semiahmoo Nation. The group has been monitoring water quality; however, the Canadian shellfish beds have not been cleaned up or re-opened. See: Shared Waters, “History,” online: <<https://sites.google.com/view/shared-waters/about/history>> [perma.cc/DV82-FMAS]. Currently the group is monitoring water quality and meeting multiple times a year to develop and refine an action plan. Additionally, Canadian authorities have successfully identified a variety of sources of pollution that can be addressed. Sources of closures in the Georgia Basin in order of decreasing magnitude are (1) ferries, wharfs, marinas, docks and vessel traffic – 37%, (2) septic tank and sewage leaks – 14%, (3) nonpoint source pollution – 14%, (4) wastewater treatment plants – 13%, (5) agriculture and fish farms – 11%, (6) float homes – 6%, and (7) other sources – 5%. United States Environmental Protection Agency, “Shellfish Harvesting” (2021 June), online: <<https://www.epa.gov/salish-sea/shellfish-harvesting>> [perma.cc/6GMP-WF4G].

¹⁵⁰ Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>> [perma.cc/Q9N5-MJWV].

¹⁵¹ Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>> [perma.cc/Q9N5-MJWV].

¹⁵² Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>> [perma.cc/Q9N5-MJWV].

The Skokomish Tribe has worked with other partners to assess and improve water quality – specifically by assessing shoreline drainages and identifying bacterial “hotspots.”¹⁵³ Seth Book of the Skokomish Tribe Natural Resources Water Quality Department, stresses the importance of having Skokomish Tribe staff monitor septic and agricultural pollution across the territory. Skokomish Tribe staff:

- Identify and monitor individual septic problems and inform health authorities about where problems exist.
- Work with landowners to facilitate pump-out and maintenance of their septic systems.
- Facilitate the offering of monetary rebates to those pumping out their septic systems and getting filters.
- Monitor and identify sources of agricultural waste pollution and potential remedies.
- Identify creative and cost-effective practical solutions like community septic systems.¹⁵⁴

The Port Gamble S’Klallam Tribe also was an active partner in the planning, development, and research stages of the Hood Canal Regional PIC Program. For example, the Tribe led separately funded water quality research to address data gaps.¹⁵⁵ The Port Gamble S’Klallam Tribe also developed their own outreach and education materials to raise awareness about the PIC goals amongst tribal members and college and grade school students.¹⁵⁶

Hood Canal Coordinating Council has acknowledged that the partnership with the Port Gamble S’Klallam Tribe and the Skokomish Tribe was highly valuable because the Tribe’s:

*...science and technical staff conducted research and tested investigative techniques to find tools to identify fecal pollution sources in areas where traditional PIC [Pollution Identification and Correction] methods have not been successful.*¹⁵⁷

¹⁵³ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at 2, online:

https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf [perma.cc/4FR7-AGGP].

¹⁵⁴ Personal communications with Seth Book, Skokomish Indian Tribe Natural Resources.

¹⁵⁵ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at 10, online:

https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf [perma.cc/4FR7-AGGP].

¹⁵⁶ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at 12, online:

https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf [perma.cc/4FR7-AGGP].

¹⁵⁷ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at 13, online:

https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf [perma.cc/4FR7-AGGP].

A representative success was celebrated last year at Hoodspout, Washington. Thanks to implementation of the Hood Canal Regional PIC and strategies such as incentives for landowners to maintain septic systems, the State Health Department re-opened 66 acres for shellfish harvesting. This was an area that had been closed for the last 45 years – long preventing local Tribes from accessing a critical traditional food source.¹⁵⁸

Such success has been widespread along much of Hood Canal. Indeed, the region of Lower Hood Canal is now listed as an inactive Shellfish Protection District – because of the District’s success at combatting pollution.¹⁵⁹

Similarly, adjacent to the Lower Hood Canal Shellfish Protection District, Annas Bay remediation has been remarkably successful. In 2006, 300 acres of shellfish beds in that Bay – one of the largest clam harvesting areas in Hood Canal – were closed to harvest due to pollution from on-site septic systems, storm-water discharge, agricultural source and wildlife.¹⁶⁰ The local county’s public health unit worked closely with the Skokomish Tribe and the local conservation district to come up with a *Pollution Identification and Correction* plan that “successfully reduced fecal coliform contamination in Annas Bay by identifying four failing septic systems and assisting homeowners with corrective actions.”¹⁶¹ The 300 acres of shellfish beds were re-opened for harvest in 2008¹⁶²

¹⁵⁸ Christopher Dunagan, “A Mile of Shellfish Beach Near Hoodspout Has Been Declared Safe for Harvesting” (12 May 2021), online: *Puget Sound Institute* <<https://www.pugetsoundinstitute.org/2021/05/a-mile-of-shellfish-beach-near-hoodspout-has-been-declared-safe-for-harvesting/>> [perma.cc/V69W-RC3U].

¹⁵⁹ Because it has “successfully implemented [its] pollution control plan which reduced pollution impacts and improved water quality.” Washington State Department of Health, “Shellfish Growing Area Restoration,” online: <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>> [perma.cc/DPA7-G49C].

¹⁶⁰ Barbara Clark, “\$142K Grant Will Help Clean Up Water Pollution Problems,” *Kitsap Sun* (2006 Feb 21), online: <<http://archive.kitsapsun.com/news/local/142k-grant-will-help-clean-up-water-pollution-problems-ep-423696649-359499641.htm>> [perma.cc/4T69-QMQA].

¹⁶¹ Mason County Public Health, “Final Project Report for Skokomish Annas Bay Restoration Study” (2008 July 1) at 14, online: <https://masoncountywa.gov/health/environmental/water-quality/reports/annas-bay/annas_bay_final_report_2008.pdf> [perma.cc/CM74-X9VY].

¹⁶² Washington State Department of Health, “Annas Bay Shellfish Protection District – General Information and Funding,” online: <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration/ShellfishProtectionDistrictsLibrary/OrganizedbySPD/AnnasBaySPD>> [perma.cc/T3VT-KRSV].

APPENDIX D: Canada’s Jurisdiction to Act and Examples of Previous Analogous Canadian Initiatives

A national initiative to stop the pollution of shellfish clearly falls within the jurisdiction of the Government of Canada. The Government of Canada possesses broad constitutional powers to protect the health and sustainability of shellfish – and to stop the pollution of the shellfishery. These powers include the jurisdiction to legislate concerning Sea Coast and Inland Fisheries,¹⁶³ Navigation and Shipping,¹⁶⁴ and Marine Pollution generally.¹⁶⁵

As part of the federal government’s core obligation to regulate pollution of fisheries, the federal Department of Fisheries and Oceans manages fish and fish habitat through the *Fisheries Act*,¹⁶⁶ And the Supreme Court of Canada has made it clear that any “measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power.”¹⁶⁷

The *Fisheries Act* itself articulates the central role of pollution prevention in the Act’s purpose:

*The purpose of this Act is to provide a framework for... the conservation and protection of fish and fish habitat, including by preventing pollution.*¹⁶⁸

The *Fisheries Act* already has extensive provisions to prohibit the direct or indirect release of deleterious substances into fish-bearing waters,¹⁶⁹ and these need to be strengthened and stringently enforced, as part of a comprehensive Healthy Shellfish Initiative. It is important to note that the Government of Canada routinely plays a key role *coordinating* federal, provincial, and

¹⁶³ *Constitution Act, 1867 (UK)*, s 91(12).

¹⁶⁴ *Constitution Act, 1867 (UK)*, s 91(10). Federal legislative jurisdiction over shipping is also highly pertinent to shellfish pollution. The federal government has jurisdiction to regulate vessel discharge of sewage and other pollutants, which commonly leads to shellfish closures. See the *Canada Shipping Act, 2001* provisions on pollution prevention and response (Parts 8 and 9), and the *Vessel Pollution and Dangerous Chemicals Regulation*. Also see: Government of Canada, “Human waste containment requirements for vessels – Questions and answers” (2019 July 19), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/questions-and-answers/eng/1563470479199/1563470589053>> [perma.cc/4M96-4TEJ].

¹⁶⁵ *Constitution Act, 1867*, s 91 (“Peace, Order and Good Government” Power); see *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*]. This case established federal jurisdiction over marine pollution in both federal and provincial waters.

¹⁶⁶ *Fisheries Act*, RSC 1985, c F-14, s 36.

¹⁶⁷ See *Ward v Canada (Attorney General)*, 2002 SCC 17 [Ward]; *Comeau’s Sea Foods Ltd v Canada (Minister of Fisheries & Oceans)*, [1997] 1 SCR 12, 1991 CarswellNat 10 at para 43

¹⁶⁸ *Fisheries Act*, RSC 1985, c F-14, s 2.1(b).

¹⁶⁹ See *Fisheries Act*, RSC 1985, c F-14, s 34 and following. Since much pollution of shellfish originates from upland areas, it is important to note that the *Fisheries Act* prohibition against the deposit of deleterious substances into fish bearing waters applies to pollution that flows indirectly from land and eventually leads to water frequented by fish.”

[Government of Canada, *Frequently asked questions: Fisheries Act pollution prevention provisions at*: <<https://www.canada.ca/en/environment-climate-change/services/managing-pollution/fisheries-act-registry/frequently-asked-questions.html>> [Accessed 8 August 2023].

territorial government agencies under the *Fisheries Act* to implement “habitat protection and pollution prevention provisions.”¹⁷⁰ Since shellfish pollution is often diffuse – and originates from areas under different jurisdictions – an enhancement of this federal *coordination* role is essential. It is essential that there be coordination of federal, provincial, local and Indigenous laws (e.g., provincial and local septic and pollution regulations, farm and animal waste regulations, *Fisheries Act* regulations, CCSP rules, boat sewage regulations, pet waste regulation, etc.).

In addition, much of what is needed from the federal government is not dependent on constitutional legislative jurisdiction. As the US has done, the federal government can accomplish much by providing resources for other governments, First Nations governments, landowners and stakeholders to act. The federal government can play a key role in funding remedial programs (e.g., upgrading of municipal sewage and storm water systems, funding of individual septic upgrades, naturalizing of streambanks to enhance runoff filtration, construction of water purifying wetlands and rain gardens, etc.) It can also play a key role in facilitating research, education, guidelines, standards and financial cleanup incentives to landowners.

Some relevant previous examples of analogous federal initiatives are described below.

Examples of Previous Canadian Initiatives That May Be Useful Models

West Coast Shellfish Sector Strategic Action Plan

Under the National Aquaculture Strategic Action Plan initiative,¹⁷¹ Canada initiated the *West Coast Shellfish Sector Strategic Action Plan*. The West Coast Shellfish Sector Strategic Action Plan

¹⁷⁰ Government of Canada, “Compliance and enforcement policy for habitat and pollution provisions of Fisheries Act: chapter 3” (2013 July 24), online: <<https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/publications/compliance-enforcement-policy-fisheries-act/chapter-3.html>> [Accessed 8 August 2023] [Gov of Canada, “Fisheries Act Compliance and Enforcement.”]

Federal coordination may include designating enforcement officials at each level of government as Fishery Officers or Fishery Inspectors who are in charge of enforcing the provisions of the *Fisheries Act*. [Gov of Canada, “Fisheries Act Compliance and Enforcement.” [See *Fisheries Act*, sections 5 & 38.] Additionally, the Minister of Fisheries, Oceans and the Canadian Coast Guard (*Minister*) may enter agreements with provincial and/or Indigenous governments to further the purpose of *Fisheries Act*, including: “Facilitating cooperation between the parties to the agreement, including facilitating joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs.” [*Fisheries Act*, s 4.1(1)]

For example, in creation of integrated coastal management plans, DFO coordinates inter-agency collaboration of agencies of the Government of Canada, provincial and territorial governments, Indigenous organizations, and other affected persons and groups. [*Oceans Act*, s. 31.]

¹⁷¹ The National Aquaculture Strategic Action Plan Initiative (NASAPI) was an initiative of the Canadian Council of Fisheries and Aquaculture Ministers that ran from 2011-2015, with the goal of addressing the lack of a “national overarching strategic approach to [aquaculture’s] sustainable development.”

NASAPI was developed in the context of the 1999 federal-provincial Agreement on Interjurisdictional Cooperation with Respect to Fisheries and Aquaculture. [The Agreement on Interjurisdictional Cooperation with Respect to Fisheries and Aquaculture was endorsed by federal and provincial/territorial governments in 1999 to coordinate the approach to developing “fisheries and aquaculture policies and objectives.”]

included action items to address the Shellfish Sanitation Program.¹⁷² Specifically, the Plan included action items addressing **challenges from sewage outfall (raw wastewater) which may contaminate shellfish growing areas**. These action items included:¹⁷³

- Identifying “strategies to prevent the release of untreated municipal effluents close to shellfish growing areas, and optimiz[ing] short-term monitoring”;
- Re-assessing “rules governing dumping of sewage/wastes from fishing vessels operating close to shellfish operations”; and
- Identifying and implementing “mitigation measures and standards to help address municipal wastewater and runoff issues.”

The Plan also included action items to modernize the Canadian Shellfish Sanitary Program (CSSP), including developing better communication and information sharing for CSSP shellfish area closure management processes. Modernizing the CSSP would also involve producing a plan to improve the CSSP program, through more efficient testing and updating water quality sampling standards, etc.¹⁷⁴

Finally, the Plan addressed federal and provincial shellfish health management regimes by proposing a regional or provincial **Shellfish Health Management Strategy** to coordinate shellfish

NASAPI addressed environmental protection, social well-being, and economic prosperity in the context of fish and shellfish aquaculture in Canada by identifying actions for federal and provincial/territorial governments and other stakeholders, including Aboriginal groups and industry. NASAPI was implemented by the Federal Provincial Aquaculture MOU Management Committees, with the Canadian Council of Fisheries and Aquaculture Ministers Committee taking a leadership role for actions with a national scope.

[See Fisheries and Oceans Canada, National Aquaculture Strategic Action Plan Initiative (Ottawa: Fisheries and Oceans Canada, 2010) at 5, 8, 9, and Government of Canada, “National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan,” 16 December 2020, online: Government of Canada <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4].

The principal strategic objectives developed through NASAPI included the following:

- Governance: streamlined and harmonized regulatory and management regimes based on science, including a review of federal and provincial on-site inspection requirements and to modernize CSSP;
- Social license and reporting: develop a more transparent information gathering and sharing system and engaging Aboriginal groups in aquaculture development; and
- Productivity and competitiveness: coordinate fish and shellfish health management under the Fisheries Act, including improving access to financing. [Fisheries and Oceans Canada, National Aquaculture Strategic Action Plan Initiative (Ottawa: Fisheries and Oceans Canada, 2010) at 7, 10-11.]

¹⁷² Government of Canada, “National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan,” 16 December 2020, online: *Government of Canada* <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4].

¹⁷³ Government of Canada, “National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan,” 16 December 2020, online: *Government of Canada* <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4].

¹⁷⁴ Government of Canada, “National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan,” 16 December 2020, online: *Government of Canada* <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4].

health management. This proposed strategy included developing a plan to create shellfish management zones and developing a National Shellfish Health Database.¹⁷⁵

Previous Coastal Restoration and Aquatic Habitat Restoration Funds

The proposed Healthy Shellfish Initiative would be focused on restoration of coastal aquatic habitats. The Federal government has long contributed funds towards the *restoration of coastal aquatic habitats*. In May 2017, Fisheries and Oceans Canada launched the Oceans Protection Plan.¹⁷⁶ One component of this plan, the Coastal Restoration Fund, aimed to provide 75 million dollars over 5 years to support projects which help restore coastal aquatic habitats.¹⁷⁷ The purpose of this plan is to identify and respond to restoration priorities, rehabilitate aquatic habitats, and contribute to long-term sustainability.¹⁷⁸ The plan seeks to fulfill these purposes by engaging with Indigenous and community groups.¹⁷⁹ Although projects being funded are not yet completed, there has been evidence of success of the Coastal Restoration Fund, as measures are being put into place to restore coastal areas.¹⁸⁰ In addition to the Coastal Restoration Fund, the Government of Canada has launched the Aquatic Habitat Restoration Fund, an accommodation measure that responds to the concerns of Indigenous groups regarding the impact of development on fish and fish habitats.¹⁸¹ The goal of the fund is to increase the capacity of Indigenous groups to protect and restore aquatic habitats affected by the cumulative effects of development, and includes the protection, enhancement, and restoration of aquatic species' habitat.¹⁸²

¹⁷⁵ Government of Canada, "National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan," 16 December 2020, online: *Government of Canada* <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4]. Potential contributors to addressing these challenges included the DFO, Provinces, Environment Canada, the Canadian Food Inspection Agency, Transport Canada, Industry, and other stakeholders. [Government of Canada, "National Aquaculture Strategic Action Plan Initiative: West Coast Shellfish Sector Strategic Action Plan," 16 December 2020, online: Government of Canada <https://www.dfo-mpo.gc.ca/aquaculture/lib-bib/nasapi-inpasa/shellfish-west-mollusques-ouest-eng.htm#_Toc276194597> [perma.cc/N5W3-E3E4].

¹⁷⁶ Government of Canada (Fisheries and Oceans Canada), "Coastal Restoration Fund" (2019), online: <<https://www.dfo-mpo.gc.ca/oceans/crf-frc/description-eng.html>> [perma.cc/WCZ9-LLBD].

¹⁷⁷ Government of Canada (Fisheries and Oceans Canada), "Coastal Restoration Fund" (2019), online: <<https://www.dfo-mpo.gc.ca/oceans/crf-frc/description-eng.html>> [perma.cc/WCZ9-LLBD].

¹⁷⁸ Coastal Restoration Fund, Government of Canada, Fisheries and Oceans Canada, 2019. Available at: <<https://www.dfo-mpo.gc.ca/oceans/crf-frc/description-eng.html>> [perma.cc/WCZ9-LLBD].

¹⁷⁹ Government of Canada (Fisheries and Oceans Canada), "Coastal Restoration Fund" (2019), online: <<https://www.dfo-mpo.gc.ca/oceans/crf-frc/description-eng.html>> [perma.cc/WCZ9-LLBD].

¹⁸⁰ Government of Canada (Fisheries and Oceans Canada), "Evaluation of the Coastal Restoration Fund" (26 June 2020), online: <<https://www.dfo-mpo.gc.ca/ae-ve/evaluations/20-21/crf-frc-eng.html#4.1>> [perma.cc/GMC7-GLXS]. During year one of implementation of the program, approximately 50 percent of funding recipients developed mitigation and restoration strategies. During second and third years of CRF, recipients have been implementing their restoration plans. It is early to understand the full impact of the CRF, but there is evidence that projects are on track to achieve their expected results.

¹⁸¹ Government of Canada, "Aquatic Habitat Restoration Fund" (26 January 2021), online: <<https://www.canada.ca/en/campaign/trans-mountain/what-is-tmx/the-decision/background11/aquatic-habitat-restoration-fund.html>> [Accessed 8 August 2023].

¹⁸² Government of Canada, "Aquatic Habitat Restoration Fund" (26 January 2021), online: <<https://www.canada.ca/en/campaign/trans-mountain/what-is-tmx/the-decision/background11/aquatic-habitat-restoration-fund.html>> [Accessed 8 August 2023].

Initiatives Supporting Indigenous Groups to Monitor Impacts and Restore Habitats

The proposed Healthy Shellfish Initiative seeks to increase collaborative monitoring capacity of the shellfish beds in the pursuit of being able to eventually reopen shellfish harvesting. The government has worked with certain Indigenous groups in the past, pursuant to government initiatives, to support the monitoring of cumulative impacts on marine life. In particular, the Salish Sea Initiative aims to support Indigenous groups to monitor the cumulative impacts of human activities on local marine ecosystems and responds to concerns regarding such impacts.¹⁸³ It operates with the goal of increasing scientific, technical, and monitoring capacity within Indigenous groups.¹⁸⁴

As described in the report above, a recent First Nations Health Authority (FNHA) program could be directly relevant to a new Healthy Shellfish Initiative and the need for collaboration with Nations on monitoring and restoration efforts. Health Canada and the Public Health Agency of Canada have provided funding for their WATCH (We All Take Care of the Harvest) program, which has already taken steps towards developing an inclusive monitoring system that incorporates Indigenous viewpoints into risk management and closure issues.

The proposed Healthy Shellfish Initiative seeks to restore shellfish habitat to a state that is healthy for harvesting. The federal government has often funded initiatives related to the restoration of other aquatic species. For example, the federal government has funded 70 percent of the current British Columbia Salmon Restoration and Innovation Fund, which functions under the Salmonid Enhancement Program.¹⁸⁵ This fund was established in 2019 to help rebuild salmon habitats through community level projects.¹⁸⁶ Within the first year, the fund has reported over 955,000 square meters of fish habitat restored.¹⁸⁷ A Healthy Shellfish Initiative could guide restoration efforts – and could result in similar success for shellfish habitat.

The proposed Healthy Shellfish Initiative would seek to address water quality issues that compromise shellfish beds. In the past, the federal government has funded initiatives that aim to address poor water quality and ecosystem health. For example, the Federal government is

¹⁸³ Government of Canada, “Salish Sea Initiative” (22 July 2021), online: <<https://www.canada.ca/en/campaign/trans-mountain/what-is-tmx/the-decision/backgrounder11/salish-sea-initiative.html>> [Accessed 8 August 2023].

¹⁸⁴ Government of Canada, “Salish Sea Initiative” (22 July 2021), online: <<https://www.canada.ca/en/campaign/trans-mountain/what-is-tmx/the-decision/backgrounder11/salish-sea-initiative.html>> [Accessed 8 August 2023].

¹⁸⁵ Government of Canada, “British Columbia Salmon Restoration and Innovation Fund” (10 Nov 2021), online: <<https://www.dfo-mpo.gc.ca/fisheries-peches/initiatives/fish-fund-bc-fonds-peche-cb/index-eng.html>> [perma.cc/WGR4-47UV]; Government of Canada, “Salmonid Enhancement” (4 June 2021), online: <<https://www.pac.dfo-mpo.gc.ca/sep-pmvs/enhancement-augmentation-eng.html>> [perma.cc/L5WM-KEF9]. The salmonid enhancement program is designed to rebuild vulnerable salmon stocks, provide harvest opportunities, work with indigenous communities, and improve fish habitat as to sustain salmon populations.

¹⁸⁶ Government of Canada, “Conservation and stewardship” (29 June 2021), online: <<https://www.dfo-mpo.gc.ca/campaign-campagne/pss-ssp/conservation-eng.html>> [perma.cc/S3RE-GBHQ].

¹⁸⁷ Government of Canada, “British Columbia Salmon Restoration and Innovation Fund” (10 Nov 2021), online: <<https://www.dfo-mpo.gc.ca/fisheries-peches/initiatives/fish-fund-bc-fonds-peche-cb/index-eng.html>> [perma.cc/XR93-R3VB]; Government of Canada, “Salmonid Enhancement” (4 Jun 2021), online: <<https://www.pac.dfo-mpo.gc.ca/sep-pmvs/enhancement-augmentation-eng.html>> [perma.cc/8TER-NYB2].

currently engaged in the Great Lakes Protection Initiative – which helps restore areas of concern within the Great Lakes and seeks to reduce the release of harmful pollutants.¹⁸⁸

Initiatives Supporting Indigenous Harvest of Traditional Foods

The proposed Healthy Shellfish Initiative would contribute to revitalizing the harvesting of traditional food sources for Indigenous communities. The government has previously funded initiatives that support the harvest of traditional food sources. For example, the Harvesters Support Grant currently provides \$40 million over 5 years for the purpose of supporting traditional harvesting and hunting in Northern isolated communities.¹⁸⁹ This grant includes the provision of funding for the maintenance of harvesting sites.¹⁹⁰

Initiatives for Ecological Enhancement and Cultural Restoration Initiatives

The proposed Healthy Shellfish Initiative would contribute to the ecological restoration of an important cultural practice of coastal Indigenous peoples. By pursuing a plan to restore healthy shellfish, the government would assist Indigenous cultural reconnection.

In the past, the government has engaged in projects that pursue the twin goals of ecological enhancement and cultural restoration. For example, Parks Canada committed \$6.4 million to facilitating a 2017-2022 pilot project to reintroduce bison in Banff National Park.¹⁹¹ The Banff National Park Bison Reintroduction Project was undertaken for the purpose of ecological restoration and cultural reconnection.¹⁹² To date, the project has successfully released a herd of 31 plains bison into the backcountry of Banff National Park.¹⁹³

Parallels can be drawn between the central importance of bison to the peoples of the Rockies/Prairies and the central importance of shellfish to peoples on the coasts. Both should be fully restored.

¹⁸⁸ Government of Canada, “Funding for Great Lakes Protection” (27 Jan 2022), online: <<https://www.canada.ca/en/environment-climate-change/services/great-lakes-protection/funding.html>> [Accessed 8 August 2023].

¹⁸⁹ Government of Canada, “Support for traditional hunting and harvesting” (10 Nov 2021), online: <<https://www.nutritionnorthcanada.gc.ca/eng/1586274027728/1586274048849>> [perma.cc/YYP5-RT7Y].

¹⁹⁰ Government of Canada, “Support for traditional hunting and harvesting” (10 Nov 2021), online: <<https://www.nutritionnorthcanada.gc.ca/eng/1586274027728/1586274048849>> [perma.cc/YYP5-RT7Y].

¹⁹¹ Government of Canada (Parks Canada), “Banff National Park Bison Reintroduction Project” (2018), online: <<https://www.canada.ca/en/parks-canada/news/2018/08/banff-national-park-bison-reintroduction-project.html>> [Accessed 8 August 2023].

¹⁹² Among other purposes. See: Government of Canada (Parks Canada), “Banff National Park Bison Reintroduction Project” (2018), online: <<https://www.canada.ca/en/parks-canada/news/2018/08/banff-national-park-bison-reintroduction-project.html>> [Accessed 8 August 2023].

¹⁹³ Government of Canada, Parks Canada, “Banff National Park Bison Reintroduction Project” (2018), online: <<https://www.canada.ca/en/parks-canada/news/2018/08/banff-national-park-bison-reintroduction-project.html>> [Accessed 8 August 2023].

In a project directly relevant to shellfish, the federal government has already funded clam garden/sea garden restoration work in the Gulf Islands National Park, with the goal of ecological enhancement and cultural restoration.¹⁹⁴

¹⁹⁴ Government of Canada, “Sea Garden Restoration. Gulf Islands National Park Reserve” (14 June 2022), online: <<https://parks.canada.ca/pn-np/bc/gulf/nature/restauration-restoration/jardins-de-la-mer-sea-gardens>> [perma.cc/52HC-U6C9].