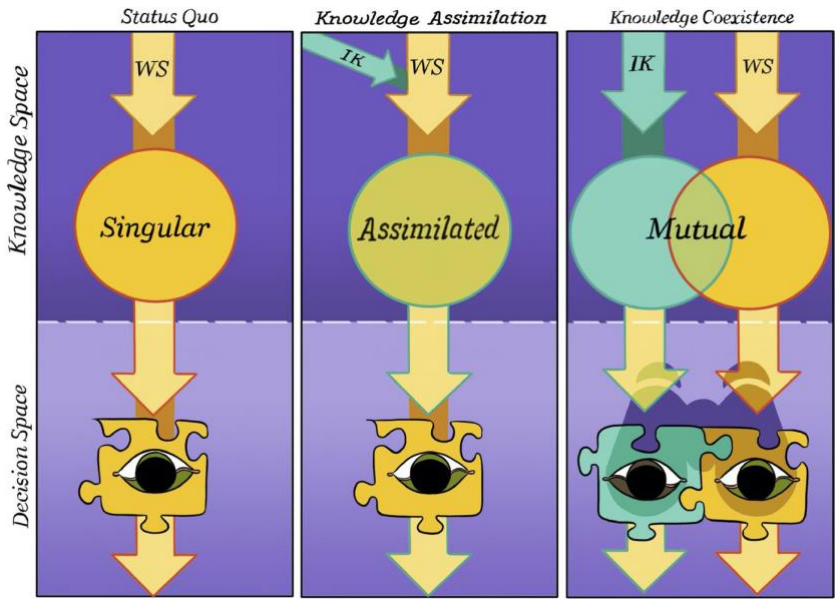
Towards knowledge co-existence in environmental regulation

BC First Nations leadership input on the draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions



BC First Nations Energy and Mining Council

November 15, 2021

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Cover illustration source:
Andrea J. Reid et al., "“Two-Eyed Seeing”: An Indigenous framework to transform fisheries research and management," Fish and Fisheries 22, no. 2 (2021), 254. https://doi.org/https://doi.org/10.1111/faf.12516.

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Executive summary

This paper was presented to First Nations community leadership for discussion on the draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (the "draft Framework"), as it relates to the Navigable Waters Act (NWA). The draft Framework contains five guiding principles for Federal Agencies when applying the Indigenous knowledge provisions in the Act:

1. Respect for Indigenous peoples and their knowledge.
2. Establish and maintain collaborative relationships with Indigenous peoples.
3. Consideration of Indigenous knowledge.
4. Respect the confidentiality of Indigenous knowledge.
5. Support capacity building to facilitate the consideration of Indigenous knowledge.

The draft Framework establishes an overarching guideline for engaging with Indigenous Peoples with respect to Indigenous knowledge. However, the principles lack detail; they are vague and incomplete. The draft Framework presents Indigenous knowledge as ancestral knowledge, to be stored and made available to Federal Agencies for regulatory decisions. It does not address the links between Indigenous knowledge, rights, and jurisdictional authority, and fails to clarify the Minister should address the full range of Indigenous knowledge and protected rights when making decisions – not just those relating to a narrow definition of navigation. There are also ethical concerns, as the draft Framework identifies "exceptions" under which Indigenous knowledge will be disclosed by Federal agencies without acquiring further consent. This contradicts OCAP (ownership, control, access, possession) principles and commitments to free, prior, and informed consent. The draft Framework does not overcome the scientifically-observed obstacles that prevent environmental regulation from meaningfully engaging Indigenous knowledge.

The framework must advocate more precise knowledge co-management practices, it must meet the standard set by the First Nations Information Governance Centre's (FNIGC) First Nations Data Governance Strategic Framework (which was commissioned by the Federal government under the 2018 budget), and it must be aligned with the First Nations Data Governance Strategy moving forward (2021 budget). It must point to reconciliation agreements and protocols to advocate that Ministers establish parallel processes to enable First Nations to make decisions about works that impact their territories. Capacity-building initiatives should focus on Indigenous knowledge production (e.g., data collection by Indigenous Guardians), not just storing ancestral knowledge. There is scope to move the Framework from its current approach of knowledge assimilation towards an approach of knowledge co-existence. If the NWA does not currently provide the scope to address these issues, so that it helps to realize Federal and Provincial commitments to the UN Declaration on the Rights of Indigenous Peoples, then further amendments to the NWA are required.

Context

The NWA was modified in 2012 and 2018 to focus narrowly on protecting navigation on waterways. The NWA restricts the building of infrastructure or "works" which could interfere with navigation. The level of Ministerial review and approval depends on how major the proposed work is, and whether the water body appears on a list of important navigable waters. In cases in which Transport Canada's approval is required,

it is required to consider the impacts of the work on Indigenous rights stipulated in section 35 of the Constitution Act, 1982. This will involve the establishment of what Transport Canada calls a "parallel process" for consultation with Indigenous nations, which could broaden the scope of the issues considered under the NWA.

The draft Framework is contextualized by Federal (Bill C-15) and Provincial (Bill 41) commitments to upholding the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada's pathways to reconciliation require strategic plans for identifying how Indigenous rights, jurisdictional authority, and forms of self-government can be upheld by First Nations in their relationships with the Crown. Indigenous peoples have the rights to govern their territories, including marine areas and waterways. These rights are recognized under Indigenous law, the Canadian constitution, common law, and international law, and have been upheld by the Supreme Court of Canada (e.g., the Tsilhqot'in decision). Some First Nations have filed Aboriginal title claims over marine territories including Heiltsuk, Haida, and Dzawada'enuxw Nations. Many First Nations also assert and/or have proven harvesting rights. The Constitution also protects Aboriginal rights and territories by imposing the duty to consult, and Canadian courts have recognized Indigenous rights to self-government.

Challenges: the duality of our existence

1. ***Reconciling different worlds:*** The draft Framework presents Indigenous knowledge and Western science as two knowledge systems. Yet it suggests that Indigenous knowledge can be combined with Western scientific knowledge to inform regulatory decisions Examples of Hishuk-ish tsawalk ("everything is one"), Triquet Island archaeological records, Heiltsuk herring management, and the revival of canoe journeys demonstrate diversity of environmental knowledge systems and their application. There is a lack of clarity about what it means in practice to consider diverse knowledge systems alongside each other; and there is a lack of specific guidance about protecting Indigenous knowledge from bias. Principles should be established to counter and guard against institutional or cultural bias in favour of Western science. Mechanisms and principles must be developed to ensure that Indigenous knowledge is used appropriately, not simply to reinforce assumptions of Western.
2. ***Respecting First Nations law and jurisdictional authority:*** Federal and provincial legislation does not override or remove the rights affirmed by s.35 of the Constitution Act, 1982. Given Federal and Provincial commitments to UNDRIP, legislation must establish consultation, cooperation, and consent processes with First Nations in their own jurisdictions. These processes should recognise cultural and intellectual property (i.e. Indigenous knowledge), and their embodiment in laws and customs of each First Nation. In many cases, the UN Declaration calls for Indigenous knowledge to be given priority, rather than simply considered alongside western science. The Canadian Bar Association (CBA) has called for Indigenous knowledge to be the *basis* for regulatory decisions in Indigenous territories. Heiltsuk Tribal Council (HTC)'s independent review of the circumstances of the Nathan E. Stewart spill in accordance with Heiltsuk law – Ğviḷás – is presented as an example. The Framework must include clear guidelines about how to support First Nations' own laws and regulatory responses to environmental issues in their navigable waters. The Framework must

clarify that the Minister will address the full range of Indigenous knowledge and protected rights – not just those relating to a narrow definition of navigation.

3. ***Who are the knowledge keepers? Towards an "ethical space of engagement":*** The draft Framework includes some important clarifications about how Indigenous knowledge will be acquired and handled. However, these acknowledgements do not constitute a commitment to OCAP (Ownership, Control, Access, Possession) in practice, nor to building ethical relationships and collaborative agreements for Indigenous knowledge management. The draft Framework refers to "exceptions" when Indigenous knowledge will be disclosed without further consent. First Nations are presented with the option of providing Indigenous knowledge (which might then be disclosed to third parties without further consent), or not providing Indigenous knowledge and therefore safeguarding their knowledge but not contributing to regulatory processes. This is an unjust scenario. An example includes the rejection of Tsleil-Waututh Nation's application for judicial review of the National Energy Board's approval of an expansion to the Trans Mountain Pipeline System. Additional principles should be developed to clarify that all Indigenous knowledge provided through a process under the Acts can only be used for the purpose provided within that process, and cannot be used or disclosed outside that purpose unless further consent is granted. Enforceable knowledge protection agreements must be developed to prevent third parties (e.g., industry) from mishandling Indigenous knowledge.

Opportunities: "pulling together"

1. ***Two-eyed seeing in governing navigable waters:*** Concepts such as "two-eyed seeing" – advocated by Mi'kmaw elder Albert Marshall – offer an *Indigenous-led* approach to balancing knowledge systems in environmental regulation. Two-Eyed Seeing has been taken up in contexts across Canada, from collaborative environmental planning in Cape Breton, to land-based summer camps in Nunavut, species-at-risk policies in Ontario, and in salmon commission submissions in British Columbia. Similar concepts exist among many First Nations, such as the Okanagan application of En'owkin (consensus-making dialogue) in water governance. Building on Indigenous concepts, context-specific principles should be established for mobilizing multiple knowledges according to: mutual needs and interests; co-development of research and knowledge generation needs; co-evaluation and community validation of knowledge applications; shared knowledge recognition and co-benefits; the establishment of long-term relationships.
2. ***Indigenous knowledge <u>is</u> science (strengthening community-based monitoring for First Nations jurisdictional authority):*** Indigenous rights and knowledges are not frozen in time. Indigenous knowledge is a living and hybrid process, upheld across generations in connection with cultural histories, spiritual systems, and current knowledge production processes. Indigenous knowledge provides at least a baseline for understanding environmental conditions in First Nations territories, and it should act as the *basis* of regulatory processes and decisions. Experiences of Indigenous-led community-based monitoring demonstrate that Indigenous knowledge *is* science being applied today in environmental management. Indigenous Guardian programs are increasingly involved in such initiatives, and pilots are underway to provide Guardians with more powers to enforce conservation rules in their territories. With Federal and Provincial commitments to Guardian

programs, the capacity-building guidelines in the draft Framework must support First Nations led community monitoring processes to generate new forms of Indigenous knowledge that can inform regulatory decision-making. This would provide the basis for First Nations to conduct the environmental assessments required to make regulatory decisions about proposed works that affect First Nations territories and navigable waters. Regulatory agreements with Guardian programs must be advocated based on government-to-government relations and robust information-sharing protocols.

3. ***Co-governance and reconciliation – building the missing pieces of engagement and consultation:*** The draft Framework lacks a clear statement about processes of engagement and free, prior and informed consent – as aligned with reconciliation. There is an opportunity to advocate clear guidelines for reaching Crown-Indigenous agreements about the role of Indigenous knowledge. Examples of the Haida Gwaii Management Council (and the recent GayG̱ahlda "Changing the Tide" Framework for Reconciliation), Coast Salish Gatherings, and the Marine Plan Partnership for the North Pacific Coast (MaPP) demonstrate the power of collaborative and shared management plans in First Nations territories. These plans are built on Indigenous knowledges as a basis. The draft Framework must guide Federal agencies towards existing reconciliation protocols; establish cultural protocols for engaging with Indigenous laws; guide Federal agencies towards Indigenous knowledge agreements with First Nations; and advocate that Federal agencies and ministers develop parallel processes that enable First Nations organizations to make regulatory decisions.

Webinar

On October 29th, 2021, the First Nations Energy and Mining Council (FNEMC) hosted an online webinar to discuss the draft Framework as it relates to the NWA. Sixty-two First Nations or First Nations organizations participated in the webinar via 132 registered attendees representing 104 communities. Prior to the webinar, a draft version of this discussion paper was circulated. Following a presentation of the discussion paper, participants provided feedback on the draft Framework based on their lived experiences. These contributions were transcribed and coded inductively in the qualitative analysis application NVivo (QSR International).

Analysis of the responses revealed four main themes to the discussion:

1. *Revisions to the Act:* Discussion focused on the narrowing of the Act, which limits First Nations opportunities to influence regulatory decision-making; the silos of Government agencies and complexity of regulatory frameworks, which make regulations difficult to enforce in line with First Nations knowledges and laws; and challenges of accountability, compliance, and enforcement.
2. *The role of Indigenous knowledge in environmental regulation:* Participants noted that the draft Framework reflects a narrow view of Indigenous knowledge, and it fails to address cumulative impacts. There was uncertainty about how the draft Framework can address the challenges of environmental regulation within First Nations territories.
3. *Government-to-government relations:* It is crucial that First Nations have an influence over processes of regulatory reform and the development of Indigenous knowledge frameworks. That influence must come through genuine government-to-government negotiations that incorporate

robust processes of First Nations consent and move towards joint decision-making frameworks in environmental regulation. Diverse institutional arrangements were discussed, such as First Nations committees, roundtables, and councils; joint decision-making agreements and protocols; and building on agreements among First Nations.

4. *Indigenous-led environmental monitoring:* There is a desire among many First Nations to lead the decision-making, monitoring, and enforcement of environmental regulations that affect their territories. Environmental monitoring programs have proved effective in influencing environmental regulation, but the model is still far from perfect. Participants agreed that further support for Indigenous monitoring, including for Guardian programs, is necessary to support compliance and enforcement efforts. It was noted that capacity building and funding commitments are required on a sustainable, long-term basis.

Conclusion

The current draft Framework reflects a process of knowledge assimilation. To ensure that Indigenous knowledge forms the *basis* of regulatory decisions (as recommended by the Canadian Bar Association), efforts are required to move the Framework towards knowledge coexistence.

The Framework and its guiding principles must be revised to meet the standards set by the principles and pillars contained in the First Nations Information Governance Centre's First Nations Data Governance Strategic Framework. This Strategic Framework was commissioned by the Federal government under the 2018 budget, and yet the draft Indigenous Knowledge Policy Framework does not meet the same standards.

Enclosed is a separate set of recommendations, which outline required revisions to the Framework, its specific guiding principles, and its relation to the Navigable Waters Act and broader environmental regulation.

1. Introduction

This paper was presented to First Nations community leadership for discussion on the draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (the "draft Framework"), distributed by the Impact Assessment Agency of Canada. The draft Framework has been developed as a set of guidelines for Federal Agencies involved in regulatory and decision-making processes relating to four Acts: the Impact Assessment Act; the Canadian Energy Regulator Act, the Fisheries Act; and the Canadian Navigable Waters Act. This discussion paper focuses on the Canadian Navigable Waters Act (NWA; "the Act"). **Section 2** provides further context on the draft Framework and the Act.

The draft Framework creates a series of challenges (**section 3**) and opportunities (**section 4**). The Framework presents Indigenous knowledge as ancestral knowledge to be stored and made available to Federal Agencies. But Indigenous knowledge is being produced today to uphold Indigenous laws. The draft Framework does not address the links between Indigenous knowledge, rights, and jurisdictional authority, and it provides a narrow window for when and how Indigenous knowledge can be applied. The framework must clarify that the Minister should address the full range of Indigenous knowledge and protected rights, not just those relating to a narrow definition of navigation.

There are also ethical concerns. Despite acknowledging that First Nations have control over Indigenous knowledge disclosure, the draft Framework presents an unjust option that does not meet OCAP principles and asserts control over Indigenous knowledge. The draft Framework does not overcome the scientifically observed obstacles that prevent environmental regulation from meaningfully engaging Indigenous knowledge.[1] The Framework does not meet the standards set by the principles and pillars contained in the First Nations First Nations Data Governance Strategic Framework (commissioned by the Federal government under the 2018 budget and committed to with funding in the 2021 budget).

On October 29th, 2021, the First Nations Energy and Mining Council (FNEMC) hosted an online webinar to discuss the draft Framework as it relates to the NWA. Sixty-two First Nations or First Nations organizations participated in the webinar via 132 registered attendees representing 104 communities. Participants provided feedback on the draft Framework based on their lived experiences. An analysis of these contributions is presented in **section 5**.

A set of recommendations have been drafted for revising the Framework and its application in environmental regulation (see **enclosed**). These recommendations should be the beginning – not the end – of a process for better including Indigenous knowledges and laws in environmental regulation broadly. We expect a response from the IAAC that clarifies the implementation strategy and how this strategy with be based on genuine engagement and government-to-government negotiation.

[1] Lauren E. Eckert et al., "Indigenous knowledge and federal environmental assessments in Canada: applying past lessons to the 2019 impact assessment act," *FACETS* 5, no. 1 (2020/01/01 2020), https://doi.org/10.1139/facets-2019-0039, https://doi.org/10.1139/facets-2019-0039.

2. Context

2.1. The draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions

The draft Framework has been developed to provide guidelines for Federal agency officials when applying the provisions under the four Acts. It is intended "to provide a basis for departments and agencies to develop policies and guidance tailored to each department and agency's specific operational requirements" (p1). The draft Framework is contextualized by a brief acknowledgement of reconciliation and Indigenous rights, as established in section 35 of the Constitution Act, 1982, the United Nations Declaration on the Rights of Indigenous Peoples, and the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. The draft Framework presents a commitment to the findings of the Truth and Reconciliation Commission Calls to Action (2015) and the Report of the Royal Commission on Aboriginal Peoples (1996).

The main section of the report outlines five guiding principles for Federal Agencies when applying the Indigenous knowledge provisions in the Acts:

1. Respect for Indigenous peoples and their knowledge.
2. Establish and maintain collaborative relationships with Indigenous peoples.
3. Consideration of Indigenous knowledge.
4. Respect the confidentiality of Indigenous knowledge.
5. Support capacity building to facilitate the consideration of Indigenous knowledge.

This discussion paper presents a series of challenges and opportunities relating to the five guiding principles in the draft Framework, focusing on the Canadian Navigable Waters Act.

2.2. The Canadian Navigable Waters Act

Canadian navigable waters laws used to protect both navigation and the environmental values associated with water bodies, but the current Canadian Navigable Waters Act (Navigable Waters Act or NWA) focuses narrowly on protecting navigation on waterways, reducing its ability to protect environmental, cultural and other values under the Act. Other legislation, such as the Canada Shipping Act and Oceans Act, govern questions of how and where navigation can occur.

By contrast, Indigenous relationships to the water bodies in their territories, and their corresponding constitutional rights, are far broader, including rights related to fishing and gathering, and cultural and spiritual values, in addition to navigation.

As a matter of law, the NWA defines "navigable water" narrowly, focusing on waters that are used, or reasonably likely to be used, for navigation. The narrow definition may create difficulties protecting waters that an Indigenous nation is not currently using or planning to use in the near future, although in practice, Transport Canada does look to past use by Indigenous peoples as evidence that a water body is navigable.

The NWA restricts the building of infrastructure or "works" which could interfere with navigation. Depending on how major the proposed work is, and whether the water body appears on a list of important navigable waters, the person building the work may need to apply to the Minister for approval, may need to enter into discussion with any person who complains that the work will impede navigation or may not need any government approval.

In cases in which Transport Canada's approval is required, it is required to consider the impacts of the work on Indigenous section 35 rights, significantly broadening the scope of the issues being considered. This will involve the establishment of what Transport Canada calls a "parallel process" for consultation with Indigenous nations, which could broaden the scope of the issues considered under the NWA considerably, although few details are available. In addition, in many circumstances works with the potential to impact section 35 rights may go ahead without such government involvement.

The Canadian Government's Indigenous Knowledge Policy Framework (the "Policy Framework") does not remedy the limits of the Act, and limits Indigenous communities to a reactive role in responding to applications under the NWA, rather than supporting a truly collaborative relationship.

For more information on the legal scope and function of the NWA, see the distributed legal assessment provided by Andrew Gage, West Coast Environmental Law.

2.3. Canada and BC's commitments to UNDRIP and reconciliation

In September 2007, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in the UN General Assembly. UNDRIP recognizes "the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".[2] Canada endorsed UNDRIP in 2010. But it was not until June 21, 2021, that the United Nations Declaration on the Rights of Indigenous Peoples Act (Bill C-15) received Royal Assent and came into law. This legislation "advances the implementation of the Declaration as a key step in renewing the Government of Canada's relationship with Indigenous peoples".[3] The Act means that Canadian laws must be consistent with the UN Declaration, including:

- Providing redress through effective mechanisms which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs.[4]

[2] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations (Geneva, 2007), 3.

[3] https://www.justice.gc.ca/eng/declaration/about-apropos.html

[4] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 12.

- Protecting Indigenous peoples' rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.[5]

To support reconciliation efforts, the Government of Canada has published a set of principles for maintaining relationships with Indigenous Peoples. These include recognition of rights to self-determination, including the inherent right of self-government; that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982; that treaties and agreements with Indigenous peoples are intended to be acts of reconciliation based on mutual recognition and respect; that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent; that infringement of rights in line with section 35 be assessed in relation to Indigenous perspectives; and that the unique rights, interests and circumstances of First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.[6] The Province of BC recognizes these same rights in its Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples, which are modelled on the Federal principles.[7] These principles clarify that First Nations rights, laws, customs, and perspectives must form the *basis* for decisions that are made about actions or works that affect their lands, territories, and resources.

The provincial government of British Columbia passed the Declaration on the Rights of Indigenous Peoples Act (the Declaration Act; DRIPA; Provincial Bill 41) in November 2019. The Declaration Act sets out BC's legal commitments to implementing UNDRIP and establishes the Declaration as the Province's framework for reconciliation. The Act mandates the Provincial government to update laws to align with the UN Declaration[8]. A draft Declaration Act Action Plan has been circulated for feedback. The draft Action plan creates a "road map" for government implementation, including:

- consultation and cooperation with Indigenous peoples to ensure BC laws are consistent with the UN Declaration;
- developing and implementing the action plan in consultation and cooperation with Indigenous peoples;
- reporting on progress in implementing the action plan;

[5] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 22.

[6] Minister of Justice and Attorney General of Canada, *Principles: Respecting the Government of Canada's Relationship with Indigenous Peoples*, Department of Justice Canada (Ottawa, 2018).

[7] British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples,* online (pdf): <gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf> [BC, *Draft Principles*].

[8] British Columbia, "Bill 41 – 2019: Declaration on the Rights of Indigenous Peoples Act," (2019). https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Fdata%2520-%2520ldp%2Fpages%2F41st4th%2F3rd_read%2Fgov41-3.htm.

- establishing "enabling agreements with Indigenous governing bodies, including joint or consent-based decision-making agreements that reflect free, prior and informed consent".[9]

These commitments to consultation, cooperation, and establishing enabling agreements provide the provincial context to providing First Nations input on the draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions. This provincial context, in turn, sits within Canada's commitments to UNDRIP and its guiding principles for maintaining relationships with Indigenous peoples. Across these commitments and the related Acts, Canada has set out pathways to reconciliation. However, these pathways require specific strategic plans for identifying how Indigenous rights, jurisdictional authority, and forms of self-government can by upheld by First Nations in their relationships with the Crown. This paper presents points for discussing the draft Framework considering this need to advance the practical basis for reconciliation.

2.4. Indigenous Jurisdiction and Aboriginal Rights and Title

Indigenous peoples have the rights to govern their territories, including marine areas and waterways. These rights are recognized under Indigenous law, the Canadian constitution, the common law and international law.

Indigenous Nations have governed their territories in accordance with their own laws and inherent jurisdiction for millennia. This inherent jurisdiction extends governance and law-making authority over a Nation's lands, waters, and communities. Inherent jurisdiction is often articulated and understood by Nations as a way of maintaining relationships and responsibilities to their territories, including through governance and law-making authority. This governance authority is recognized by Canada's constitution.

Indigenous Nations have authority to govern their territories pursuant to their Aboriginal and treaty rights under section 35 of the Constitution, which recognizes the land, resource and governance rights of Indigenous peoples. [10] Perhaps the strongest expression of Indigenous governance authority over territories has been by the Supreme Court of Canada in the Tsilhqot'in decision. In that decision, the Court made a declaration of Aboriginal title, concluding that Aboriginal title confers "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land." [11]

[9] British Columbia, "Declaration on the Rights of Indigenous Peoples Act: Action Plan – Draft for Consultation," (2021), https://engage.gov.bc.ca/app/uploads/sites/667/2021/06/Declaration_Act_-_Draft_Action_Plan_for_consultation.pdf.

[10] Constitution Act, 1982, supra note 70, s 35(1). Section 35 of the Constitution Act, 1982 recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."

[11] *Ibid* at paras 73, 115-116. The Supreme Court of Canada held that the *Forest Act,* RSBC 1995, c 157, which is defined to apply only to Crown land, ceases to apply to Aboriginal title land once that title is recognized by an agreement or court order and the land vests in the Indigenous nation.

While the Supreme Court of Canada recognized Tsilhqot'in Aboriginal title to land areas, the decision does not preclude the existence of Aboriginal title to aquatic spaces. Many Indigenous Nations claim title over marine territories, asserting a right to exclusive decision-making over their marine territories or choosing to exercise their title through collaborative management over marine territories. Some Nations have filed Aboriginal title claims over their marine territories including the Heiltsuk, Haida, and Dzawada'enuxw Nations on the Pacific coast.[12]

Many Indigenous Nations also assert or have proven Aboriginal or treaty harvesting rights within their marine territories, which should afford them governance authority with respect to those marine resources.[13]

The constitution also protects Aboriginal rights and territories by imposing the duty to consult anytime the Crown contemplates a course of action that has the potential to adversely impact Aboriginal or treaty rights, even when those rights have yet to be "proven" or otherwise resolved – including decisions regarding marine areas and waterways.[14] The Constitution also imposes a fiduciary duty on the Crown in relation to Aboriginal rights,[15] and requires Crown justification for any conduct or decision that infringes or denies Aboriginal rights.[16]

Canadian courts have also recognized the right to self-government as: a separate and distinct Aboriginal right, for example a right to self-govern in relation to a particular subject matter;[17] as an aspect of an

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[12] See Paula Quig, "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands-An Overview" (2004) 45:4 *Les Cashiers de Droit* 659; *Council of the Haida Nation v British Columbia and Canada*, (14 November 2002) Vancouver, Action No L020662 (BCSC) (Statement of Claim) (2002 Haida Nation claim asserts Aboriginal rights and title to "the land, inland waters, seabed, archipelagic waters, air space, and everything contained thereon and therein comprising Haida Gwaii" at para 4); Heiltsuk and Haida claims in *Reference re Environmental Management Act,* 2020 SCC 1 (Factum of Intervener, Council of Haida Nation) and *Attorney General for British Columbia v Attorney General for Canada,* Vancouver (31 January 2019) CA45253 (BCCA) (Factum of Intervenor, Heiltsuk First Nation) [Factum of Heiltsuk First Nation]; Judith Lavoie, "BC First Nation launches first ever case to extend Aboriginal title to ocean," *The Narwhal* (29 May 2018), online: <thenarwhal.ca/b-c-first-nation-launches-first-ever-case-to-extend-aboriginal-title-to-ocean/>; Gitga'at First Nation, "First Nation Seeks Declaration of Aboriginal Title in Challenge to Enbridge Northern Gateway Pipeline" *GlobeNewswire* (14 July 2014), online: <globenewswire.com/news-release/2014/07/14/1436108/0/en/First-Nation-Seeks-Declaration-of-Aboriginal-Title-in-Challenge-to-Enbridge-Northern-Gateway-Pipeline.html>.

[13] See for e.g. *R v Marshall*, [1999] 3 SCR 456, 1999; *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300, 2013; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; *Saanichton Marina Ltd. v Claxton,* 36 BCLR (2d) 7 (BCCA) (recognizing Douglas treaty fishing rights in marine areas).

[14] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73

[15] *Guerin v. The Queen*, 1984 CanLII 25 (SCC)

[16] *Tsilhqot'in* at para 119.

[17] *R. v. Pamajewon* ([1996] 2 S.C.R. 821

Aboriginal or treaty right, for example a right to govern in relation to specific Aboriginal or treaty rights;[18] and as a pre-existing right that continues notwithstanding the Crown's assertions of sovereignty.[19] The Courts and the Crown interpretation of Indigenous Nations' rights to self-government does not necessarily align with how Indigenous Nations understand those rights, but there is a legal basis nonetheless for Nations to exercise their right to self-government.

These forms of Indigenous jurisdiction are strengthened by other legal instruments such as the above Federal and Provincial Acts and action plans relating to UNDRIP, and the Federal and draft Provincial principles for maintaining relationships with Indigenous Peoples.

[18] *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 179 [*Nisga'a Nation*]; see also *Pastion v Dne Tha' First Nation*, 2018 FC 648 at paras 8, 20-24; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paras 34, 50; *Frank v Blood Tribe*, 2018 FC 1016 at para 69; *Chiodo v Doe*, 2018 BCSC 2078 at para 49.

[19] *R. v. Van der Peet* [1996] 2 S.C.R. 507; *Mitchell v. M.N.R*. [2001] 1 S.C.R. 911.

3. Challenges: the duality of our existence

3.1. Reconciling different worlds

The draft Framework presents Indigenous knowledge and Western science as two knowledge systems. At the same time, it suggests that Indigenous knowledge can be combined with Western scientific knowledge to inform regulatory decisions.

The draft Framework recognizes diversity among Indigenous knowledges, as "complex knowledge systems embedded in the unique cultures, languages, values, legal systems and worldviews of Indigenous peoples… Indigenous knowledge tends to be Nation/community specific and place-based, arising from Indigenous peoples' intimate relationship with their natural world" (p3). However, there is no clear room in the Framework for addressing this place-based diversity, nor the cumulative and multi-generational nature of Indigenous knowledge.

The approach to knowledge taken in the draft Framework also contradicts this recognition of diverse Indigenous knowledges. The draft Framework states that "Indigenous knowledge systems are diverse, living value systems that need to be considered alongside other knowledge, including western science (p3)… Both Indigenous knowledge and western scientific knowledge systems are equally valued and the integrity of Indigenous knowledge needs to be maintained when it is considered alongside western science" (p6). This statement implies that there is "western science" on one hand, and "Indigenous knowledge" on the other hand. If there are multiple, diverse Indigenous knowledges why are they collectively weighed against a single "western science"?

The statement also suggests that Indigenous knowledge be "considered alongside" western science. The draft Framework therefore offers no guidance for how to navigate circumstances when Indigenous knowledges and western science differ in their philosophies and implications. Take, for example, the Seven Fundamental Truths, presented in *Staying Alive, Staying the Course*.[20] The presentation of these Fundamental Truths is based on the knowledge of elders from Heiltsuk, Kwakwaka'wakw, and Haida Nations. They reflect a shared, but place-based understanding of being in the world, as validated through stories, environmental practices, maps, and language. The truths articulate a relational and connected understanding of existence and stewardship, which contrasts the Western scientific premise of humans and nature as separate entities (nature as a resource for human use). The draft Framework does not acknowledge the implications of the distinct philosophies of Indigenous and Western knowledges. Nor does it offer guidelines for how to address the issue that it may not be possible to consider Indigenous knowledges and Western scientific knowledge alongside each other in a way that is equal or fair.

[20] Frank Brown and Y Kathy Brown, *Staying the Course, Staying Alive – Coastal First Nations Fundamental Truths: Biodiversity, Stewardship and Sustainability*, Biodiversity BC (Victoria BC, 2009).

Box 1. Examples: Diverse Indigenous knowledges

Hishuk-ish tsawalk: "everything is one"

This Nuu-chah-nulth concept stresses unity. It does not imply that there is only one existence, but that all individual existence is connected. This is important for understanding relations with non-human nature among Nuu-chah-nulth and other First Nations. It is also important for understanding the basis of Indigenous knowledge and how that basis upholds law, customs, and practices. It contrasts Western scientific approaches of dividing the world into measurable and manageable components (or variables). Hishuk-ish tsawalk assumes that every change is connected to a multitude of connected transformations.[21]

Hishuk-ish tsawalk is a Nuu-chah-nulth reflects the connections that many BC First Nations have as part of the cycle of nature. These connections are based on knowledge sharing across generations, through which "we have been able to develop a sense of belonging – of being one – and with that, a growing sense of responsibility and stewardship. This transfer of knowledge affirmed that each of us is a part of the cycle of nature – connected to each other and all living things".[22]

Triquet Island and continuous environmental stewardship in navigable waters

The Heiltsuk archaeological site on Triquet Island indicates inhabitancy some 14,000 years ago. This is supported by oral histories and stories among Heiltsuk peoples, who have long referred to a surrounding area as Nulu, linked to 'Nula' meaning oldest sibling. The name identifies Triquet Island as the sites of the ancestors.[23] The sites of Namu and Nulu have been important locations for harvesting large quantities of herring since at least 7000 years ago and 2400 years ago, respectively. Heiltsuk fishers and stewards have developed specialized technologies, harvesting and management strategies, social organizations, and local economies related to Pacific herring.[24] They have been managing these navigable waters across this time, applying customary laws (see Ğviḷás, Box 2), which are now over-ridden by settler laws and Acts such as the NWA. The draft Framework fails to address the ways in which long-standing First Nations laws will be upheld in regulatory processes.

The resurgence of Indigenous canoe journeys

Canoe journeys in the waters of what is now Canada's west coast have been practiced for millennia. Knowledge of navigation routes taken through canoe journeys are connected to multi-generational relations with sacred sites and other nations. Since 1993, Coastal First Nations have revived canoe

[21] Umeek E. Richard Atleo, *Tsawalk: a Nuu-chah-nulth Worldview* (Vancouver, BC: UBC Press, 2004).

[22] Brown and Brown, *Staying the Course, Staying Alive – Coastal First Nations Fundamental Truths: Biodiversity, Stewardship and Sustainability*, 9.

[23] Frank Brown, "Our people have borne witness to climate change through deep time," 2021, https://climatechoices.ca/publications/climate-change-through-deep-time/.

[24] Alisha M. Gauvreau et al., ""Everything revolves around the herring": the Heiltsuk-herring relationship through time," *Ecology and Society* 22, no. 2 (2017), 10, https://doi.org/10.5751/ES-09201-220210, https://www.ecologyandsociety.org/vol22/iss2/art10/.

journeys to gather at a coastal location, reconnecting to Indigenous knowledges about place and navigation.[25] These journeys reflect historic relations and marine travel among coastal First Nations, which pre-date colonial settlement. Today, canoe journeys are part of processes of cultural affirmation and Indigenous revitalization.[26] Canoe journeys reflect both continuing use of navigable waters on ocean, rivers and lakes and continuing cultural significance. Canoe journeys are tied to Indigenous knowledges and reciprocal relations within nature and amongst native nations Except for dams on rivers, little prevents continued navigation by canoe. Thus, there is a gap between Indigenous knowledge of canoe navigation (and its relation to environmental stewardship and use, such as fishing) and the provisions of the NWA and the draft Framework.

In travelling the coast, First Nations ask for and receive permission to pass through neighbouring territories. The knowledge of canoe travel is a shared and relational knowledge, with safe passage assured by relationships among Nations and respecting diverse cultural norms. These aspects of diverse Indigenous knowledges are not acknowledged in the draft Framework, but they are foundational to shared governance of navigable waters among First nations (see Box 6, section 4.3).

Potential implications for the draft Framework

The draft Framework lacks guidance relating to the fundamental differences in how different knowledge systems are produced, maintained, transferred over generations, and practiced in the form of environmental management and law. There needs to be greater discussion about the process of considering Indigenous knowledges and Western knowledge alongside each other. This includes the identification of mechanisms that ensure Indigenous knowledge is used appropriately and not simply to reinforce assumptions of Western science or existing decision-making.

The Navigable Waters Act is a component of settler law, implemented within Canada's common law context. It is connected to colonial histories of making and imposing laws. This includes Maritime Law, which has evolved from early European laws governing maritime trade and disputes. First Nations laws that govern navigable waters contrast these European histories. The above example of canoe journeys demonstrates that navigable waters have been governed by multi-nation agreements and cultural protocols for centuries prior to the establishment of settler laws.

The draft Framework must include guidelines for when and how First Nations knowledge might be used as *the basis* for regulatory decisions, not simply as a complement to Western science.

3.2. Respecting First Nations law and jurisdictional authority

Federal and provincial legislation does not override or remove the rights recognized and affirmed by s.35 of the Constitution Act, 1982. Such legislation includes Federal and Provincial DRIPAs, the draft Indigenous Knowledge Policy Framework, and the Acts to which the draft Framework pertains. Section

[25] Alan Hoover, "Canoe Crossings: Understanding the Craft That Helped Shape British Columbia," *BC Studies*, no. 186 (2015).

[26] https://indiginews.com/vancouver-island/the-resurgence-of-indigenous-canoes

35 does not create rights, but "recognizes and affirms" Aboriginal rights. Given Federal and Provincial commitments to UNDRIP (see section 2.3), legislation must establish consultation and cooperation processes with First Nations in their own jurisdictions. These processes should recognise cultural and intellectual property (i.e. Indigenous knowledge) and their embodiment in laws and customs of each First Nation. As University of Victoria Law Professor, Robert Howell, put it: "only these laws can identify and describe the traditional knowledge and traditional expressions of culture".[27]

The draft Framework does not clarify how the "guiding principles" will ensure that regulatory processes uphold the Indigenous laws and jurisdictional authority that are intimately tied to Indigenous knowledge. The Framework asks Federal officials simply to "*keep in mind* the context of the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples affirmed in Section 35 of the Constitution Act, 1982, when working with Indigenous peoples to include Indigenous knowledge that is provided in project reviews and regulatory decisions" (p5, emphasis added).

Invoking section 35 of the Constitution Act potentially broadens the range of issues that Federal Agencies *must* consider when making decisions. Section 2.3 of the NWA explicitly requires the Minister, in "making a decision under this Act," to consider "any adverse effects" that the decision might have on Indigenous Rights "recognized and affirmed by section 35". This section therefore requires that the Minister consider the impact that a government decision taken under the Act will have on Indigenous rights. Consequently, Federal Agencies guided by the draft Framework must also consider such impacts in managing regulatory processes.

Together, the Act and the draft Framework link Indigenous knowledge to Indigenous Rights within Federal Agency decision-making processes. In combination with section 35, Federal Agencies may have authority to address impacts on Indigenous Rights, even if doing so would not otherwise be authorized under the NWA. However, the draft Framework misses the opportunity for establishing cultural protocols to ensure that these rights are not infringed, and for specifying any parallel process for ensuring that Indigenous knowledge is sought when appropriate.

Indigenous law is upheld by Indigenous knowledges, and both support governance systems for managing human-environment relationships in Indigenous territories. The draft Framework states that the Government of Canada recognizes Indigenous rights and perspectives (pp. 2, 4, 5, 8), but it does not clarify how the guidelines will ensure that the use of Indigenous knowledge in regulatory decisions will be used to uphold those rights.

[27] Robert G. Howell, "Cultural property and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)," *The Advocate* 79, no. 5 (2021): 721.

Box 2. Example: Ğviḷás[28]

Following the 2016 Nathan E. Stewart(NES) diesel and heavy oil spill in Heiltsuk waters, Federal and Provincial agencies failed to act quickly or decisively in taking regulatory action against Kirby Corporation (owner of the tug and barge). These agencies failed to recognize Heiltsuk jurisdiction by not seeking Heiltsuk input. Heiltsuk Tribal Council (HTC) undertook an independent review of the circumstances of the Spill to direct an adjudication in accordance with Heiltsuk law – Ğviḷás. This was done on behalf of the Nation as an exercise in self-governance and authority over their territory.

What is Ğviḷás?

"Ğviḷás means that we as Heiltsuk people derive our strength from our territory by following specific laws that govern all our relationships with the natural and supernatural world. It is the basis of Heiltsuk respect and reverence for the surrounding eco-system".[29] Heiltsuk jurisdiction is articulated in the principles of Ğviḷás. These principles are underpinned by origin stories (núyṃ̓), and have been maintained and adapted to changing conditions.

Heiltsuk continue to fulfill legal obligations to their territory, particularly relating to locations where núyṃ̓ originate. The NES spill occurred in Q̓vúqvaỷaitx̌v, which is connected to Núyṃ̓ láỷaxsxv gáḷgḷis ńálayax̌v: "the story about the beginning of time or when the world was created". Heiltsuk oral history describes a conflict between the Q̓vúqvaỷáitx̌v and a British fur trading ship, which was eventually driven from Heiltsuk territory, thus demonstrating historic application of Ğviḷás.

Why does Ğviḷás reflect jurisdictional authority?

Heiltsuk continue to practice and preserve Ğviḷás through oral and written teachings. Ğviḷás reflects a fundamental value of what it means to be Heiltsuk: to "act and say things in the right way". Ğviḷás includes guiding principles of reciprocity and respect in connection to non-human nature, and it includes norms such as Ḥaíkḷá – to make things right when needed, to make amends. The Heiltsuk adjudication report points to these norms as a requirement following the NES spill: it is incumbent upon Kirby Corporation to make things right again. Despite pleading guilty to three of nine charges, Kirby Corporation has not taken action to make things right again.[30]

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[28] This example is based on: Heiltsuk Tribal Council (2018). *Dáduqvḷá1 qn̓txv Ğviḷásax̌ - To look at our traditional laws: Decision of the Heiltsuk (Haíɬzaqv) Dáduqvḷá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill*. Bella Bella, BC: HTC.

[29] HTC, 2018, p5.

[30] The guilty pleas are related to separate counts under the Fisheries Act and the Migratory Birds Convention Act, for the fuel spill that damaged both fish and birds; and under the Pilotage Act and for failing to have a pilot aboard the vessel. https://www.cbc.ca/news/canada/british-columbia/nathan-e-stewart-spill-2016-heiltsuk-nation-sentencing-1.5213264

How does this relate to the NWA and the draft Framework?
The preservation of evolving Heiltsuk knowledges, as held in núyṃ, upholds and enables Ğviḷás. The response to the NES spill demonstrates that First Nations laws, as underpinned by Indigenous knowledges, are not consistently or adequately addressed when assessing environmental impacts in First Nations territories or breaches of Indigenous rights. The draft Framework does not address these links between Indigenous knowledge, rights, and jurisdictional authority.

Potential implications for the Framework

The framework must address the links between Indigenous knowledges, laws, and rights. If it is not clear that there is available Indigenous knowledge to consider, Agencies should look to whether Indigenous laws and rights are relevant or impacted. In such scenarios, Agencies must be guided to further enquire with impacted First Nations as to potentially relevant Indigenous knowledges.

The draft Framework currently states that Indigenous knowledge must be "taken into account, or considered, in *certain decisions* or processes *when provided*" (p4). It is not clear that a process has been established for ensuring that Indigenous knowledge is sought by relevant Agencies when appropriate. The Framework also states that "the extent of the work done to include Indigenous knowledge in these processes may vary according to the scope and scale of the project review or regulatory decision" (p4). The Framework must clarify when and where Indigenous knowledge will be sought or not. Otherwise, the Framework leaves the onus on First Nations to know when to provide knowledge, even though First Nations are often not informed about regulatory processes.

First Nations may enact their own processes to support self-governance and maintain jurisdictional authority. In response to the NES spill, for example, Heiltsuk have formed an industry partnership with Horizon Maritime, to form Heiltsuk Horizon – an initiative to turn things around and make things right in the wake of the spill. The initiative combines Heiltsuk stewardship and seafaring heritage with the marine industry expertise of Horizon Maritime, enabling a coastal protection system supported by an Indigenous Marine Response Centre.[31] The draft Framework currently ignores these scenarios where First Nations must act independently to protect their own territories.

The narrow focus on the inclusion of Indigenous knowledge within specific decision-making scenarios limits the potential for the draft Framework to help Agencies to achieve "reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on the recognition of rights, respect, co-operation, and partnership" (p2). The Framework must include clear guidelines about how to support First Nations laws and regulatory responses to environmental issues and works in their navigable waters. Given Federal and Provincial commitments to UNDRIP, legislation must establish cooperation and consent processes with First Nations relating to cultural and intellectual property (Indigenous knowledge). It is also important that the framework clarify

[31] https://heiltsukhorizon.ca

that the Minister address the full range of Indigenous knowledge and protected rights – not just those relating to a narrow definition of navigation.

3.3. Who are the knowledge keepers? Towards an "ethical space of engagement"[32]

The draft Framework includes some important clarifications about how Indigenous knowledge will be acquired and handled. Principles 4.1, 4.2, and 4.4 each overlap with ethical issues concerning how Indigenous knowledge will be used in regulatory processes. The draft Framework acknowledges "the importance of procedures to prevent the unauthorized disclosure of Indigenous knowledge and…that consent must be explicit and not assumed" (p7). The draft Framework also acknowledges "First Nations principles of ownership, control, access, and possession (OCAP) as they relate to Indigenous knowledge" (p5). It also suggests that "dialogue with Indigenous peoples is critical to understand Nation/community-specific instructions around Indigenous knowledge processes and protocols, to learn about potential effects of decisions, and inform outcomes" (p7). These acknowledgements do not constitute a commitment to OCAP in practice, nor to building ethical relationships and collaborative agreements concerning the management of Indigenous knowledge.

First, these acknowledgements do not resolve the fact that the processes related to the NWA are unlikely to meet the standards set by OCAP principles. The Act entails a private dispute resolution process regarding proposed works that might impact navigable waters (see distributed legal assessment by Andrew Gage). In this process, any party objecting to a proposed work must provide "written comments on the proposal, as it relates to navigation," within 30 days. The Builder and the party who submits the navigation-related objections have 45 days to "attempt to resolve" their disagreement. In this process, First Nations may have to divulge Indigenous knowledge to a third party (the Builder) to object to a proposed works so that it must go through a formal Ministerial approval process. In this scenario, First Nations will be divulging Indigenous knowledge to a third party who may not handle Indigenous knowledge in line with the principles set out in the draft Framework.

Second, the draft Framework contains a contradiction relating to the handling of Indigenous knowledge. On the one hand, there are the acknowledgements above, along with a statement that First Nations will guide how Indigenous knowledge may be shared (p5). On the other hand, the draft Framework clarifies that there may be certain "exceptions" when Indigenous knowledge is disclosed without consent. These exceptions include "for procedural fairness and natural justice or for use in legal proceedings" (p7). However, the draft Framework contains no explanation of the processes that will surround such disclosure. While the draft Framework acknowledges that First Nations have final authority regarding whether to submit Indigenous knowledge in the first instance, once they do decide to submit such knowledge, it can be disclosed by Federal Agencies without further consent. This implies that any submitted Indigenous knowledge becomes the property of Federal Agencies.

The above two scenarios create an unjust either/or choice for First Nations. Either:

[32] Willie Ermine, "The Ethical Space of Engagement," *Indigenous Law Journal* 6, no. 1 (2007).

A) A First Nation can decide to share Indigenous knowledge, which will be passed to Federal Agencies. The Minister/Agencies can then decide whether and how this knowledge is shared further. Having already agreed to provide their knowledge, the First Nation does not get a further say on the matter. The draft Framework does not prohibit or rule out sharing Indigenous knowledge in the future, such as about other cases relating to the NWA. According to the draft Framework, the First Nation providing the knowledge would simply be informed about such disclosure.

Or:

B) A First Nation can refuse to provide their Indigenous knowledge, meaning it will not be incorporated in the regulatory process and will not be sharable.

First Nations either submit knowledge, which is then handled by Federal Agencies as they see fit; or that First Nations do not provide knowledge and do not have the opportunities to influence regulatory processes. This is an unjust either/or option that does not meet OCAP principles, as First Nations lose control over any submitted Indigenous knowledge. This reflects an imbalance of power and an assertion of control over Indigenous knowledge, which contradicts the purpose of the Framework.

These shortcomings have been identified by the Canadian Bar Association (CBA).[33] The CBA's report confirms that it is unclear whether exceptions for the disclosure of Indigenous knowledge entail disclosure to all parties participating in the regulatory process. The CBA recommends that it should be limited to the project proponent at most, as "disclosure to all participants could render meaningless the confidentiality provision". The CBA also recommends that any conditions imposed on disclosure should be "subject to input from the Indigenous community sharing its traditional knowledge". The draft Framework provides no guidelines for First Nations input on conditions of disclosure.

Box 3. Example: unequal treatment of knowledges

Indigenous knowledge and "intellectual property"

The Assembly of First Nations has clarified that there are inconsistencies between international intellectual property rights regimes and First Nations' traditional and customary laws. First Nations communities have protocols and ceremonies for establishing who owns what knowledge and what can be done with the knowledge. These protocols are as diverse as the 200 First Nations across BC and should be at the forefront of any agreements or legal frameworks that draw on Indigenous knowledges. Only in this way can the Indigenous knowledges that uphold traditional laws across BC First Nations be strengthened and respected.[34] The draft Indigenous Knowledge Policy Framework does not include any consideration of how First Nations laws should govern the use of Indigenous knowledge that is submitted for regulatory processes. Once Indigenous knowledge is submitted, the draft Framework assumes that only non-Indigenous laws and property rights apply.

[33] Canadian Bar Association, *Submission on Bill C-69 Impact Assessment Act*, Canadian Bar Association (Ottawa, 2018), 23.

[34] Assembly of First Nations, *Ethics in First Nations Research*, Assembly of First Nations (2009), https://www.afn.ca/uploads/files/rp-research_ethics_final.pdf.

What if a First Nation wishes to challenge a Federal agency's failure to comply with the requirement to consider Indigenous knowledge?

In 2018, the Tsleil-Waututh Nation et al. applied for judicial review of the National Energy Board's approval of an expansion to the Trans Mountain Pipeline System, which was supported by an Order in Council that accepted the Board's recommendation. The Board's report had not considered Indigenous knowledge through appropriate consultation, and yet the Board's report was used by the Governor in Council to make a decision about the approval of the project, based on the Board's recommendations. However, the Tsleil-Waututh Nation et al. application was dismissed because the Board's review is not subject to judicial review; only the final Order in Council is subject to review.

The decision to dismiss the application was made on the grounds that "The Board's decision to accept many of Trans Mountain's explanations, such as eliminating certain alternative routes for the project, was based on factual and technical considerations well within the expertise of the Board". Indigenous knowledge had not been considered as equal to the scientific and technical expertise of the National Energy Board.[35] The draft Framework does little to address these regulatory oversights and inequalities in how various knowledges are treated.

Ethical spaces of engagement

For Cree legal scholar Willie Ermine (Sturgeon Lake First Nation), an "ethical space of engagement proposes a framework as a way of examining the diversity and positioning of Indigenous peoples and Western society in the pursuit of a relevant discussion on Indigenous legal issues and particularly to the fragile intersection of Indigenous law and Canadian legal systems".[36] Citing the Constitution Act section 35 and legal decisions affirming First Nations rights, Ermine highlights that the Canadian Supreme Court has acknowledged that First Nations cultural rights arise from their belief systems, social practices, and ceremonies. First Nations rights, he argues, "must be informed by and asserted through Indigenous knowledge". The ethical space of engagement recognizes that these knowledges support alternative regulatory and governance systems, which are upheld by diverse Indigenous laws (see section 3.2). The ethical space is therefore produced when contrasting perspectives of the world come together through "engagement" – not simply when Indigenous knowledge is plugged into the existing regulatory processes of settler law. "Engagement at the ethical space", Ermine concludes, "triggers a dialogue that begins to set the parameters for an agreement to interact [that is] modeled on appropriate, ethical and human principles".[37]

Potential implications for the Framework

The draft Framework contradicts Federal commitments to establish a First Nations Data Governance Strategy, with an investment of $73.5 million over three years from 2021.[38] Ultimately, the draft

[35] https://www.eli.org/vibrant-environment-blog/traditional-ecological-knowledge-and-law-canadian-case-part-ii

[36] Ermine, "The Ethical Space of Engagement," 193.

[37] Ermine, "The Ethical Space of Engagement," 202.

[38] https://www.budget.gc.ca/2021/report-rapport/p3-en.html#218

Framework states that "clear guidance, processes and policies for the consideration of Indigenous knowledge, developed by each of the four departments or agencies, is needed to support project reviews and regulatory decisions". If this is the case, the processes and policies should be developed in consultation with First Nations, rendering the draft Framework redundant (there would be no need for the Framework if there were appropriate and collaboratively developed policies and processes in place – see section 4.3).

Such policies – or an Indigenous Knowledge Policy Framework – can only support OCAP in practice if a collaborative process of establishing Indigenous knowledge sharing agreements is pursued. This process might work towards "ethical spaces of engagement", and should build on Indigenous methodologies (see section 4.2). Indigenous Knowledge must be given with Consent by the First Nation's governing body and knowledge keepers, and Indigenous Knowledge must not become the property of the Government.

The potential implications for the draft Framework are:

1. The Framework should clarify how OCAP will be upheld in practice (not just in principle).
2. The Framework should include a clarification of the circumstances that might lead to "exceptions" in disclosing Indigenous knowledge, and it should establish guidelines for re-acquiring consent and/or offering the opportunity to withdraw consent.
3. The Framework should clarify the ethical implications concerning dispute resolution processes, whereby Indigenous knowledge might be shared with a third party (a Builder) who may not be committed to the same ethical standards of knowledge and data handling as Federal Agencies or First Nations. How will Indigenous knowledge be managed ethically in such scenarios? Clarification is required to ensure that First Nations are not caught in a dichotomous option of relinquishing knowledge ownership to participate; or not participating in regulatory processes to maintain knowledge ownership.
4. If the intention behind these exceptions is for Federal Agencies to create a manual of relevant Indigenous knowledge for regulatory decision-making, this intention – and the process underpinning it – should be made transparent and developed in collaboration with First Nations, based on Indigenous methodologies.
5. The Framework should include guidelines for reaching collaborative agreements about the use, storage, ownership, communication, and disclosure of Indigenous knowledge for environmental regulation (see section 4.3 for more on collaborative agreements).
6. Align the draft Framework with the emerging plans for a First Nations Data Governance Strategy, which was promised by the Liberal Party with an investment of $73.5 million over three years, starting in 2021-22.[39]

[39] https://www.budget.gc.ca/2021/report-rapport/p3-en.html#218

4. Opportunities: "pulling together"

The opportunity in general is to advance the practical and grounded aspects of how the inclusion of Indigenous knowledge will work for First Nations in relation to the Navigable Waters Act. How can improved inclusion of Indigenous knowledge be advanced based on First Nations experiences, so that Indigenous knowledge provides the *basis* for regulatory decisions? How can that basis lead to more just forms of environmental management in First Nations territories?

4.1. "Two-eyed seeing" in governing navigable waters

The draft Framework proposes to hold Indigenous and Western scientific knowledges alongside each other. However, it does not suggest to the relevant departments how each might develop "policies for the consideration of Indigenous knowledge" that ensure Indigenous knowledge is at least an equal basis for regulatory decisions relating to First Nations territories.

Concepts such as "two-eyed seeing" offer an Indigenous-led approach to balancing world views and knowledge systems in environmental regulation. Mi'kmaw elder, Albert Marshall, has advocated "two-eyed seeing" since 2004. The concept "refers to learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing, and to using both these eyes together, for the benefit of all… Two-Eyed Seeing further enables recognition of IK as a distinct and whole knowledge system side by side with the same for mainstream (Western) science".[40] Two-eyed seeing embraces reciprocity and mutual influence across knowledge systems, without collapsing one into the other.[41]

Two-Eyed Seeing has been taken up in contexts across Canada, from collaborative environmental planning in Cape Breton, to land-based summer camps in Nunavut, species-at-risk policies in Ontario, and in salmon commission submissions in British Columbia.[42] It is more than simply using multiple knowledge systems alongside each other, it is "about life: what you do, what kind of responsibilities you have, how you should live while on Earth… a guiding principle that covers all aspects of our lives: social, economic, environmental".[43] Reid et al. have shown how two-eyed seeing has been used in fisheries management approaches to guide decision-making processes in ways that respect and validate multiple

[40] Cheryl Bartlett, Murdena Marshall, and Albert Marshall, "Two-Eyed Seeing and other lessons learned within a co-learning journey of bringing together indigenous and mainstream knowledges and ways of knowing," *Journal of Environmental Studies and Sciences* 2, no. 4 (2012/11/01 2012): 335, https://doi.org/10.1007/s13412-012-0086-8, https://doi.org/10.1007/s13412-012-0086-8.

[41] Andrea J. Reid et al., ""Two-Eyed Seeing": An Indigenous framework to transform fisheries research and management," *Fish and Fisheries* 22, no. 2 (2021), https://doi.org/https://doi.org/10.1111/faf.12516.

[42] Bartlett, Marshall, and Marshall, "Two-Eyed Seeing and other lessons learned within a co-learning journey of bringing together indigenous and mainstream knowledges and ways of knowing."

[43] Bartlett, Marshall, and Marshall, "Two-Eyed Seeing and other lessons learned within a co-learning journey of bringing together indigenous and mainstream knowledges and ways of knowing," 336.

worldviews and realities. This process validates regulatory outcomes, as they are built on processes respect and reciprocity between knowledge systems.

Box 4. En'owkin as a similar water management concept in BC

En'owkin (or En'owkinwixw) refers to a process of consensus-making dialogue. It is a whole systems approach that encourages the exchange of diverse perspectives; it is a philosophy that nurtures voluntary co-operation and which recognizes that existing life forms have status, rights and privileges that are equal to humans, and which must be protected. En'owkin has been successful in protecting and preserving water environments for many in the Okanagan valley, partly because human and natural rights are conceived as inter-dependent.[44] It encapsulates the notion of water as siwlkw – water as a more-than-human processes relationship, rather than just a resource available for consumption.[45] First Nations across BC already have concepts for managing diverse knowledges for improved environmental governance. The opportunity exists to ensure that regulatory decisions relating to First Nations territories are taken in line with Indigenous concepts.

Recommendations

The development of an Indigenous Knowledge Policy Framework presents an opportunity to establish new forms of communication and collaboration across knowledge systems. There is an opportunity to guide Federal agencies towards decision-making processes that are *based on* Indigenous knowledge systems (not just on the incorporation of Indigenous knowledge into existing decision-making processes). The Canadian Bar Association has also advocated for decisions to be *based on* Indigenous knowledge.[46]

Developing a mutual approach to regulatory decision-making based on multiple knowledge systems would mean proving guidelines for Federal agencies that:

- Recognize Indigenous knowledges as truths that are not a footnote to Western science.
- Provide recommendations and resources for developing decision-making structures that address multiple worldviews and the implications for regulatory processes.
- Recommend practical forms of collaboration based on notions such as two-eyed seeing.
- Establishes processes of mobilizing multiple knowledges according to: mutual needs and interests; co-development of research and knowledge generation needs; co-evaluation and community validation of knowledge applications; shared knowledge recognition and co-benefits; the establishment of long-term relationships.[47]

[44] Marlowe Sam, "Oral narratives, customary laws and indigenous water rights in Canada" (PhD thesis University of British Columbia 2013).

[45] Jeannette Armstrong, "Water is Siwlkw," in *Thinking with Water*, ed. Cecilia Chen, Janine MacLeod, and Astrida Neimanis (Montreal: McGill-Queen's University Press, 2013).

[46] Canadian Bar Association, *Submission on Bill C-69 Impact Assessment Act*.

[47] Reid et al., ""Two-Eyed Seeing": An Indigenous framework to transform fisheries research and management."

4.2. Indigenous knowledge *is* science (strengthening community-based monitoring for First Nations jurisdictional authority)

The draft Framework identifies opportunities for capacity building for the storage and preservation of Indigenous knowledge. However, Indigenous knowledge and Indigenous rights are not frozen in time. Indigenous knowledge is a living and hybrid process, upheld across generations in connection with cultural histories, spiritual systems, and current knowledge production processes. In many cases, Indigenous knowledge production today weaves together ancestral knowledge, place-based experiential knowledge, and Western scientific knowledge. Revisions to the Framework should indicate support to First Nations in applying Indigenous knowledge as the *basis* of regulatory approaches. Indigenous knowledge is at least a baseline for understanding environmental conditions in First Nations territories, and should act as the basis of regulatory processes and decisions.

Box 5. Example: Community-based monitoring as Indigenous science

First Nations have centuries of experience in climate and environmental monitoring. Communities have long understood shifting weather patterns and their impacts (such as on fish and bird migrations). Geographical knowledges are evident in archaeological evidence of fish traps, demonstrating that environmental stewardship and knowledge production pre-dates European settlement. These forms of environmental knowledge are products of ongoing stewardship.[48]

These knowledges are not static; they continue to be practiced and built upon today. In recent decades, First Nations have been developing community-based monitoring (CBM) programs to protect the waters and lands within their territories against both ecological and human-induced threats. CBM focuses on Indigenous peoples' role as both knowledge holders and producers. CBM is "both a method for generating data useful for decision-making and an expression of governance itself, rooted in understandings of stewardship, kinship and responsibility".[49]

Indigenous-led CBM has been demonstrated to improve environmental protections, enhance cultural and community well-being, and build governance, community, and economic capacity. The Coastal Stewardship Network has demonstrated that Indigenous-led community-based monitoring programs provide a return on investment of 10:1 (value is produced at ten times the initial investment).[50] These benefits are enhanced when CBM is Indigenous-led, shifting First Nations from knowledge holders to knowledge producers in environmental monitoring, stewardship, and management. Indigenous peoples

[48] Brown and Brown, *Staying the Course, Staying Alive – Coastal First Nations Fundamental Truths: Biodiversity, Stewardship and Sustainability*.

[49] Nicole J. Wilson et al., "Community-Based Monitoring as the practice of Indigenous governance: A case study of Indigenous-led water quality monitoring in the Yukon River Basin," *Journal of Environmental Management* 210 (2018): 290, https://doi.org/https://doi.org/10.1016/j.jenvman.2018.01.020 http://www.sciencedirect.com/science/article/pii/S0301479718300203.

[50] Coastal Stewardship Network, *Valuing Coastal Guardian Watchmen Programs: A Business Case* (2018), https://coastalfirstnations.ca/wp-content/uploads/2019/03/Valuing-Coastal-Guardian-Watchmen-Programs-A-Business-Case.pdf.

and governments should therefore be supported to take "a lead role in all aspects of monitoring including program design, analysis and interpretation".[51]

The Federal government has committed further funding for Indigenous Guardian programs and First Nations are seeking sustainable support into the future. Given this context, Indigenous knowledge policy frameworks should build on the knowledge-producing and regulatory potential of Guardian programs and other kinds of Indigenous-led community-based monitoring. This will ensure that Indigenous knowledge is actively produced to respond to regulatory needs and processes.

A report by West Coast Environmental Law on the Guardian Watchmen program argued: "As Crown governments come to realize the value of Indigenous knowledge, and to recognize the legitimacy of legal and political authority of Indigenous jurisdictions, there is growing interest in developing partnerships between Indigenous nations and various governmental agencies. Where there is agreement over land and sea governance, the partners can work together to ensure that rules are followed. Guardian [programs] play a crucial role in implementing these partnerships".[52] There is an opportunity to advance the draft Framework to advocate such partnerships.

Recommendations

- The Framework should acknowledge that Indigenous knowledge is dynamic and being produced in diverse ways today (it is not just a historic repository).
- Indigenous knowledge-focused capacity building should also focus on building the capacity of First Nations led community monitoring processes, to generate new forms of Indigenous knowledge that can inform regulatory decision-making to deal with environmental issues that affect their territories, which includes all lands, resources and living beings. This would complement First Nations knowledge management to ensure that baselines exist for regulatory decisions. It would also provide the basis for First Nations to conduct the environmental assessments required to make regulatory decisions about proposed works that affect First Nations territories, including navigable waters.
- Given recent commitments to Indigenous Guardian programs and the formation of IPCAs in line with Federal and Provincial DRIPAs, Guardian programs should receive capacity building support to produce and provide Indigenous knowledge as the basis of regulatory processes.
- Establish regulatory agreements with Guardian programs, so that Indigenous knowledge (including its production through community-based monitoring) is managed ethically and with transparent agreements about disclosure. These regulatory agreements could empower First Nations and their Guardian programs to conduct the work that is required to protect the water

[51] Wilson et al., "Community-Based Monitoring as the practice of Indigenous governance: A case study of Indigenous-led water quality monitoring in the Yukon River Basin."

[52] Alex Kirby and Jana Kotaska, *Guardian Watchmen: Upholding Indigenous Laws to Protect Land and Sea*, West Coast Environmental Law (2018), https://wcel.org/sites/default/files/publications/gw_laws_to_protect_land_and_sea_final.pdf.

and lands of their territories. There is a lack of public expenditure available to conduct monitoring in remote areas. Building government-to-government relations and robust information-sharing protocols would enable Indigenous Guardians to conduct this essential work for the benefit of all of society and nature in Canada.

4.3. Co-governance and reconciliation: building the missing pieces of engagement and consultation

The context section of the draft Framework includes a blanket statement about the Government of Canada's commitment to reconciliation. It indicates that engagement processes and respect for the rights of Indigenous peoples are "part of" the Framework and the relationship between the Federal government and Indigenous peoples. However, there is no explicit attention to the link between Indigenous knowledges and reconciliation processes.

The Framework misses the opportunity to link to existing reconciliation frameworks and protocols (e.g., the 2009/2016 Coastal First Nations Reconciliation Protocol[53]; 2019 Tuígila "To Make a Path Forward" Agreement for Implementation of Heiltsuk Title, Rights and Self-government[54]; 2021 Haida GayGahlda "Changing the Tide" Framework for Reconciliation[55]), and to identify the importance of new reconciliation frameworks. Aligning the Framework with reconciliation protocols could establish a deeper process of Indigenous knowledges determining project reviews and regulatory decisions.

The draft Framework lacks a clear statement about processes of engagement and consultation, as aligned with reconciliation. There is a lack of clarity about the practical role that First Nations will play in regulatory processes in an on-going basis. There is an opportunity to advocate for Crown-Indigenous agreements managing Indigenous knowledge.

[53] Coastal First Nations, Haisla Nation, and Her Majesty the Queen in Right of the Province of British Columbia, Amending agreement of the reconciliation protocol, (2016). https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/coastal_first_nationas_reconciliation_protocol_amending_agreement_mar_16_17_signed.pdf

[54] Heiltsuk Nation and Her Majesty the Queen in Right of the Province of British Columbia, Tuígila Agreement for Implementation of Heiltsuk Title, Rights and Self-government, (2019). https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/heiltsuk_tuigila_agreement_signed.pdf

[55] Haida Nation, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of the Province of British Columbia, GayG̲ahlda "Changing the Tide" Framework for Reconciliation, (2021). https://www.bctreaty.ca/sites/default/files/GayGahldaChangingTideFrameworkforReconciliationAgreement_August_13_2021.pdf

Box 6. Indigenous knowledge for self-government: agreements, protocols & shared governance

Haida Gwaii Management Council

Upholding Indigenous knowledges in environmental governance can be achieved through delegated decision-making, as the case of Haida Gwaii Management Council demonstrates. The HGMC was established under the 2009 Kunst'aa guu – Kunst'aayah Reconciliation Protocol, co-signed by the Haida Nation and the Province of B.C. to facilitate joint decision-making in managing Haida Gwaii.

Government Ministers do not tend to delegate decision-making authority to third parties. The consideration of Indigenous knowledge is often therefore advisory in nature, with Ministers reserving the authority to make final decisions (despite any joint decision-making agreements).[56] This limitation is reinforced in the current draft Framework, which presents Indigenous knowledge as a repository of additional information for the Minister to consider. To address this limitation, the Framework should advocate new knowledge-sharing and co-governance agreements.

Co-governance agreements do not alter the fact that most First Nations in B.C. have not ceded control of their territory to the Crown. While disagreements will likely remain, agreements might be a first step towards a collaborative approach based on shared interests. Crown and Haida objectives of protecting Gwaii Haanas are embodied in the 1993 Gwaii Haanas agreement.[57] Recent developments indicate that agreements will be increasingly important in Crown-Indigenous relations and in governing Indigenous territories. The GayG̲ahlda "Changing the Tide" Framework for Reconciliation (Haida & BC) and the Haida Gwaii Reconciliation Act (Haida & BC) demonstrate that the HGMC approach to co-governance was a first step in advancing Haida self-government.

A similar approach could be taken to governing navigable waters in First Nations territories. Increasing numbers of reconciliation and co-management agreements in BC (see Appendix A) indicate a shift towards more meaningful government-to-government relations, which could pave the way for more regular delegation of decision-making. This will require further consultation on a case-by-case basis of government-to-government negotiations. However, the result could be a form of delegated decision-making that would empower First Nations to take regulatory and legal action when their lands and waters are impacted by proposed or actual works or environmental degradation. For example, had such a delegated form of regulation been in place, Heiltsuk could have mobilized their regulatory powers in response to the Nathan E Stewart spill in 2016.

Coast Salish Gatherings

Governing waters in First Nations territories is a collective effort. As water flows, it connects First Nations and their knowledges, cultures, and ecologies. The Coast Salish Gatherings offer one example of

[56] Philip Akins and Michael Bissonnette, *Co-governance of Marine Protected Areas in British Columbia: A Reference Report for First Nations*, MPA Co-governance Workshop Organizing Team (2020).

[57] Akins and Bissonnette, *Co-governance of Marine Protected Areas in British Columbia: A Reference Report for First Nations*.

First Nations coming together to establish governance arrangements, in the presence of Federal and Provincial government delegates. The first gathering was held in 2005, and since then the participating Tribes and Nations have met annually, committing to "working together to address shared environmental issues, drawing on a strong connection to their land, shared ancestors, and a commitment to the revitalization of their culture".[58] The Gatherings help establish governance approaches that are appropriate for the ecological and cultural regions. The Gatherings include representative from Coast Salish communities in both Canada and the USA, demonstrating that shared governance among First Nations transcends national boundaries. The gatherings act as a place for knowledge exchange, cultural reaffirmation, and the revitalization of shared identity.

The Coast Salish gatherings build on the revival of canoe journeys (see Box 1, Section 3.1). The Canoe Journeys are about transportation and information exchange, but they are also a way to maintain tradition, connections with a way of life, and a reconnection with sacred waters. The Journeys reflect a strengthening of culture and the healing of communities by rebuilding environmental knowledges through experience. The journeys rebuild partnerships on Indigenous knowledges and Indigenous shared governance.[59] The Qatuwas ("people gathering together") Festival in Bella Bella likewise emerged from this commitment to knowledge transfer among canoe nations.[60]

Marine Plan Partnership for the North Pacific Coast (MaPP)

The MaPP initiative is a marine use plan for B.C.'s North Pacific Coast, with a view to establishing a marine protected area (MPA).[61] It is a partnership between British Columbia and 17 member First Nations. The Plan is divided into four subregions, which develop plans collaboratively. For example, the Central Coast Marine Plan was developed by the Heiltsuk, Kitasoo/Xai'Xais, Nuxalk and Wuikinuxv Nations and the Province of BC, supported by an advisory committee.[62] Foundational to the process was First Nations' pre-planning, such as the gathering of internal interests, values, Indigenous knowledge, and policy perspectives. The subregional plans *proactively* combined Indigenous knowledge, local knowledge provided by public stakeholders, and biophysical and social science. The combination of these diverse knowledges helped to establish "decisions that were credible, defensible, and ensured high levels of buy-in from Nations and stakeholders".[63] Such approaches take the inclusion of Indigenous

[58] Emma S. Norman, *Governing Transboundary Waters Canada, the United States and Indigenous Communities* (London: Routledge Press, 2014).

[59] Norman, *Governing Transboundary Waters Canada, the United States and Indigenous Communities*.

[60] Frank Brown, "Qatuwas Accord" (Aboriginal tourism BC stakeholders forum, Chase, BC, 24-25th November 2014).

[61] https://www.canada.ca/en/parks-canada/news/2021/08/feasibility-assessment-for-a-proposed-national-marine-conservation-area-reserve-in-british-columbias-central-coast.html

[62] Marine Planning Partnership Initiative, *Central Coast Marine Plan*, MaPP (2015).

[63] Steve Diggon et al., "The Marine Plan Partnership for the North Pacific Coast – MaPP: A collaborative and co-led marine planning process in British Columbia," *Marine Policy* (2020/06/23/ 2020): 10, https://doi.org/https://doi.org/10.1016/j.marpol.2020.104065, https://www.sciencedirect.com/science/article/pii/S0308597X19306657.

knowledge beyond occasional incorporation into existing regulatory processes, establishing Indigenous knowledge as co-foundational to environmental management plans. The plan continues to evolve on this basis, and a key consideration for local First Nations will be how local rights and title and Indigenous knowledge are incorporated into these processes.

Recommendations

The draft Indigenous Knowledge Policy Framework should be improved by:

- Guiding Federal agencies towards existing reconciliation protocols to facilitate engagement and consultation.
- Establishing cultural protocols for engaging with Indigenous laws when making regulatory decisions about works in First Nations territories.
- Guiding Federal agencies towards agreements with First Nations about how Indigenous knowledge can prioritised as the *basis* for regulatory decisions that affect First Nations territories.
- Advocating that Federal agencies and ministers devolve decision-making to relevant First Nations organizations, when appropriate, to inform regulatory decisions.

5. BC First Nations experiences: Issues of concern raised in the October 29th Webinar

On October 29th, 2021, the First Nations Energy and Mining Council (FNEMC) hosted an online webinar to discuss the draft Framework as it relates to the NWA. Sixty-two First Nations or First Nations organizations participated in the webinar via 132 registered attendees representing 104 communities. Prior to the webinar, a draft version of this discussion paper was circulated. Following a presentation of the discussion paper, participants provided feedback on the draft Framework based on their lived experiences. These contributions were transcribed and coded inductively in the qualitative analysis application NVivo (QSR International).

While the issues discussed by BC First Nations leadership and their representatives were informed by the discussion paper about the draft Framework, they brought localized experiences and insights about the role of Indigenous knowledge in environmental regulation. Analysis of the responses revealed four main themes to the discussion: revisions to the Act itself; the role of Indigenous knowledge in environmental regulation; government-to-government relations; and environmental monitoring.

5.1. Revisions to the Navigable Waters Act

5.1.1. Narrowing of the Act and related Indigenous knowledge provisions

A primary concern among participants related to the revisions to the Act itself, and to processes of narrowing the scope of protections. As a participant from a First Nation in Northern BC stated:

> *I just wanted to flag our concern about the gutting of the Act, and how this government is responding to that, which is to continue more work on narrowing it. Whatever our leaders can do to return some of the guts that Harper and his cohort took out… is really important… Many of the waters that were included as*

> *navigable waters, [which was] a way for us to be consulted and accommodated, I think now there's only 2 or 3 of our waters that remain subject to the Act.*

Participants highlighted that with this narrowing of the Act, the inclusion of Indigenous knowledge becomes more constrained in terms of both scope and potential impact. Participants highlighted that Indigenous knowledge had an impact in the past, relating to proposed works that would affect navigable waters. One participant provided an example from 2016, when Indigenous knowledge was collected through traditional use studies and combined with scientific data that [their Nation] fisheries technicians had collected. Elders established a combined knowledge base upon which to justify opposition to a proposed LNG terminal. This combined knowledge base proved that the proposed location would have had major impacts on eel grass, juvenile salmon, and other marine species. It was used to successfully oppose the proposed work.

This success demonstrates that Indigenous knowledge is a hybrid, dynamic form of knowledge not just ancestral knowledge (see the Discussion Paper). It also demonstrates that previous submissions of Indigenous knowledge allowed in relation to the NWA would no longer be submissible and considered under the provisions of the Act.

As one participant commented, the draft Framework does little to address the increasing constraints placed upon Indigenous knowledge in terms of influencing regulatory outcomes:

> *When you start to see Indigenous issues being addressed in specific clauses like 2.1. and 26.2 [of the Act], it seems to me that they're limiting how it's going to be used throughout the Act. These kinds of provisions need to be inserted in the Act in a way that the Minister must address them.*

The same participant also echoed the ethical concerns stated in the Discussion Paper regarding the disclosure of Indigenous knowledge (further demonstrating that the draft Framework does not meet the standards set by the First Nations Data Governance Strategic Framework):

> *When you talk about the 5 principles [in the draft Framework], this particular Act already makes provisions for the Minister to share or disclose traditional knowledge or information. It already protects the Minister and government from any kind of legal proceedings.*

Participants were concerned that there are now fewer opportunities for Indigenous knowledge to influence regulatory decisions, while the scope of those opportunities has also narrowed. Meanwhile, Ministers and Federal agencies are protected from mishandling Indigenous knowledge. This is an unjust scenario that reproduces the status quo of knowledge assimilation and does not move regulatory processes towards knowledge co-existence (see the Discussion Paper).

Ultimately, the draft Framework does little to ensure that Indigenous knowledge acts as the *basis* of regulatory decisions affecting First Nations territories – as was called for by the Canadian Bar Association (see the Discussion Paper).[64]

5.1.2. Regulatory complexity and Indigenous laws

Participants raised the combined challenge that despite processes of narrowing the NWA, regulatory processes remain extremely complex without even adequately taking Indigenous laws into consideration. For example:

> *What inspired me to come to this workshop today is that within our own marine shipping group, that is approximately 30 - 35 coastal marine nations, we've been really struggling with how to interact with the regulatory regime. So I appreciate the comments about how complex marine regulatory regimes are… I'm really interested in how we can find a way to insert our teachings and laws [into these regimes].*

Currently, the draft Framework does not address the complexity of making regulatory decisions in First Nations territories where Indigenous laws apply (see the Discussion Paper). For participants, this gap reflects the status quo of Federal and Provincial governments not adequately considering Indigenous laws and exploring how settler law and Indigenous law can work together:

> *When are the Provincial and Federal governments going to work together with our Indigenous governments and start using our Laws, that have been put in place for thousands and thousands of years, to make sure that their laws navigate with our laws?*

Such gaps have implications for First Nations jurisdictional authority. If an Indigenous Knowledge Policy Framework does not address Indigenous laws and First Nations jurisdictional authority, it papers over the cracks of existing regulations, reproduces an unequal distribution of power, and fails to address the need for place-based regulatory decisions within First Nations territories:

> *In all my meetings, it doesn't matter what it is, health, education, forestry, fisheries, what have you - I always bring up the question about jurisdiction, and how is that going to be dealt with in our respective territories? We need our voices heard when it comes to jurisdiction around land, water, and air. And it's always the Federal government holding the key.*

Participants agreed that the draft Framework does not go far enough to address these issues:

> *State governments and industry cannot continue making unilateral decisions that affect our Indigenous territories. [We need] self-determination & free, prior, and informed consent based on our Indigenous Laws.*

5.1.3. Accountability, compliance, and enforcement

Participants stated that if an Indigenous Knowledge Policy Framework is to be applied, it needs firm commitments from Provincial and Federal governments, in terms of funding, capacity, and the required mechanisms for compliance and enforcement. For example:

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[64] Canadian Bar Association, *Submission on Bill C-69 Impact Assessment Act*, Canadian Bar Association (Ottawa, 2018), 23.

> *Sitting in my second term as Chief, I've seen a lot and I've heard a lot, but there was never a firm commitment from either government. How are we going to hold their feet to the fire, because we talk about it and do it for a year, then it disappears? Our future generations are going to pay for that. So we need firm commitment.*

One issue discussed was the way in which a lack of resourcing impacts compliance and enforcement:

> *I spoke with the Natural Resources Enforcement Officer, I asked her about what kind of resources they had here in BC. The response was when they started, there was 500 personnel for the office. The way the government is going now, they clawed back. Now they only have 75 doing the work of 500 - a total lack of resources, a total lack of enforcement, a total lack of regulation.*

Other participants agreed that "it's a C&E [compliance and enforcement] issue in many cases, where we're feeling impacts that weren't intended but the works were authorized across a variety of agencies… we deal with each of those agencies one on one". For this participant, C&E is compromised by what was termed a "siloing" of government responsibilities and agencies, where regulatory processes are detached into too many parts to be coherently or meaningfully addressed in relation to practical environmental problems. The participant shared an example relating to works on navigable waters:

> *a member of our community just recently built a dock in front of our community. And it's one that is needed, but completely out of compliance, no authorization to do the work, just went off and did the work. I don't know what happened to all these non-compliance operators. Most of the time, what I've witnessed is that authorizations are written after the fact, to accommodate a behaviour that is outside of compliance. I just wonder how much this happens elsewhere and who is keeping track of that. I think compliance and enforcement <u>across Agencies</u> [emphasis original] and how that is managed continues to offend us, like in a daily way they don't what each other is doing.*

To improve accountability, compliance, and enforcement, participants asserted that "the most important thing is how do we help the government de-silo itself" so that regulations and their enforcement address interconnected socio-ecological systems. Participants also offered suggestions and positive experiences of Indigenous-led monitoring and enforcement – see section 2.4 below.

5.2. Indigenous knowledge in regulatory processes

5.2.1. A narrow view of Indigenous knowledge and failure to address cumulative impacts

Participants noted that the draft Framework reproduces the status quo of 'resource management', rather than considering Indigenous knowledge as part of interconnected human-nonhuman systems.

> *I need to find a word in my language that is better than 'resources', because… I'm thinking that the people who are hearing this word automatically think of commodification, something that grows the Canadian economy, and everybody depends on that. But the way we look at this is what these systems are, and our place within that system, and as human beings our sacred obligation that we hold to protect the flora and the fauna and the waters and everything.*

Hence, the full scope of Indigenous knowledge is not considered in regulatory processes, which divide the world into discrete units, such as resources, consumers, etc. Interconnected Indigenous knowledges

are tied to the everyday challenges of managing broader aquatic concerns. Participants raised a number of issues that overlaps the various Acts covered by the draft Framework, but which are not addressed coherently by Federal or Provincial regulation. Examples include the following.

- The impacts of shipping, navigation, and sports fishing on aquatic spaces (including fish stocks, Indigenous livelihoods, and access to clean and safe drinking water).
- The interconnectedness of water ("water as lifeblood"), which means impacts in one place can have further consequences elsewhere (e.g., freshwater pollution can impact marine environments).
- The impacts of BC Hydro works, which increase sedimentation and render some rivers unnavigable while damaging ecosystems (e.g., exterminating salmon runs). It was noted that the NWA has not been applied to address such issues nor to facilitate river restoration.
- The cumulative effects of issues affecting navigable waters, particularly shipping. There is an unpractical disconnect between the NWA and other regulations, such as the Oceans Protection Plan. Concerns regarding the cumulative effects of marine shipping activities are frequently raised in project level impact assessments, and there have been a few regional cumulative effects assessments conducted in BC. But a more proactive approach is required to address the interactions between marine shipping activities and the valued components of specific regions and First Peoples livelihoods, as underpinned by Indigenous knowledge. The draft Framework currently lacks attention to cumulative impacts and provides no guidelines for supporting future cumulative impact assessments.

Overall, it was stressed that Provincial and Federal government agencies continue to separate regulatory issues, which contrasts First Nations perspectives of interconnected systems. Participants stressed that they still do not feel their voices, knowledges, and cultural systems are heard on these issues. For example:

> *With the climate crisis and what's happening with both the Provincial and Federal governments not listening to Indigenous peoples throughout not only BC, but in all the provinces right across Canada, is impacting the world today. What is it going to take for them to listen? And what kind of commitment are they going to show, when it comes to UNDRIP and DRIPA. And how do our laws fit into that when it comes to Indigenous knowledge?*

5.2.2. Uncertainty about how the draft Framework can address the above challenges

Given the above challenges, there was general uncertainty about the effect that any Indigenous Knowledge Policy Framework can have in terms of respecting Indigenous knowledges, cultures, and laws. For example, participants were uncertain as to how the Framework would be applied to the Act itself:

> *I was wondering if this Framework, if it's supposed to fit into this legislation, or if it's some kind of a regulation that they would be using. And if it's going to fit into the Act itself, there should be a broader discussion about the whole Act, not just one section of it. I do believe that Bill C-15 obligates the government to look more closely at how they would change the legislation to address our interests.*

There were concerns that the Framework would only be applied to the sections of the Act where Indigenous knowledge is referenced – a situation that would render the Framework rather redundant. The above quote also reflects concerns that the Act itself needs to be revisited in full; the recent reforms to the Act do not align with the stated goals of the draft Framework of better considering Indigenous knowledge and rights. The Framework does not explain how it will lead to legislative decisions and changes that uphold the Federal governments commitments embodied in Bill C-15. Participants felt that much more explanation was needed concerning how these commitments will be applied through the Framework and in relation to the four referenced Acts.

Indeed, participants were concerned that the draft Framework shrouds a lack of practical commitment to upholding Indigenous rights:

> *The other concern is that policy work like this, it's just how they try to policy away their obligation to talk to us and deal with us on every authorization they issue. The impacts we feel on the ground can't necessarily be addressed by this policy work…*

Further, it was unclear to some participants how the Framework would lead to further legislative changes, which raised the question of government-to-government relations

5.3. Government-to-Government relations

5.3.1. Consultation, consent, & joint decision-making

One participant stressed that it is crucial that First Nations have an influence over processes of regulatory reform and particularly the development of Indigenous knowledge frameworks:

> *It's so important about how we go about influencing Frameworks that turn into policies that turn into laws.*

Another participant expressed frustrations at the lack of genuine government-to-government negotiations on these issues:

> *I wanted to make a comment on the discussion of traditional knowledge, and how it becomes part of policy and just important of process. I think most of you know how the process of environmental assessment works. When industry or government wants to engage in some kind of activities in territory or water, they have to go through either a Federal CIA or Provincial EAO, which is the environmental assessment office. When we receive referrals, we do a lot of in-house work to determine what the impacts are in relation to various values. In most cases, we respond back to the Federal or Provincial referral through a letter. In some cases, you have the ability to set up a meeting to discuss. You might get a thank you back, but sometimes you don't get anything…We made it very clear to the governments that this was inadequate, that they could not just send a thank you letter that they received recommendations or issues relating to the referral.*

Participants agreed that there is an imbalance of power and decision-making that has still not been addressed, despite long-standing efforts:

> *back in 2017 I was appointed to sit on the Ministry of Agriculture advisory council on fin fish aquaculture. There were a lot of discussions… I remember, Wednesday July 26 2017, we talked about the*

> *environmental and regulatory reviews in the Navigation Protection Act relating to fish and fish habitat. There was a lot said. Another meeting, Thursday September 28th 2017, BCIC 49th Annual General Assembly: Environmental assessment reform, Federal reviews, and a discussion paper. And it was the FNEMC engaging BC and Federal processes and the BC Environmental impact act. It probably goes further back than that. But looking at the books and notes that I have, these discussions have been going on for a long time.*

Questions were raised about why the same concerns have been repeatedly voiced, and yet the situation has not substantially changed. Participants advocated for concrete commitments to free, prior, and informed consent, and to long-term plans for joint decision-making. For example:

> *There should be joint decisions from Indigenous people and the Provincial and Federal governments on regulations. And the lack of that is what's happening out there in the navigable waters. And it impacts our bands, when we rely on our salmon, because it's our way of life, our quality of life [emphasis original].*

5.3.2. The potential of committees and councils

To address these issues in government-to-government relations, three participants discussed their experiences sitting on various oversight and decision-making committees. One participant was a member of an Indigenous Advisory Monitoring Committee for the Transmountain Expansion project, which was described as established "for the Indigenous folks who were noted as, quote, 'the most impacted' by this project". While acknowledging that relations are still "not perfect", the participant stressed the importance of influencing environmental regulation with Indigenous knowledge:

> *We're not yet where we want to be, but I feel really hopeful that by working within their system [Federal and Provincial systems] for now, challenging their systems, we can hopefully effect change, to a point where when this committee was first brought together, it was anticipated that there would be about 50 inspections during the construction period. Well, at last count in early summer, there have been over 100 inspections, and I whole heartedly believe that it is because this committee exists.*

Another participant shared an experience of establishing a 'solutions table' to have First Nations voices included in regulatory decisions around LNG facilities:

> *when the first LNG facility started to get some traction, started getting their permits, we established a working table. For lack of a better word, we called it a solutions table... So this solutions table gave us the opportunity to sit across the table with those bureaucrats that were making their recommendations to their line of Ministers…so make sure when you have a discussion with the Federal or Provincial governments that you have on your tongue the ability to create a solutions table so that when you have that sit down meeting with the bureaucrats, you can come to some kind of reasonable understanding about what the issues are, you can make a recommendation in a united way. Did it work for the LNG [project]? You know, it gave us a voice, that's what it did.*

These experiences demonstrate the various approaches that First Nations communities are taking to ensure their voices are heard.

> *Indigenous communities are taking varies approaches to trying to dismantle the colonial regime and help them to create a more inclusive one. I don't know how we're going to do it, but we're taking steps toward*

> *that. It might not happen in our generation, but I rest easy at night knowing that we're hear doing the work that we need to do, and that our grandchildren's grandchildren will maybe have an easier time of it.*

The fact that each First Nation must establish these processes in response to specific works or threats to their environment demonstrates that government-to-government relations and joint decision-making approaches have a long way still to go. It was noted, nonetheless, that these committees are better than being excluded entirely:

> *I always think of Chief Tyrone McNeil from Seabird, you know we were having a particularly difficult conversation with the regulator, with the proponent and he said: 'just image how in the dark we would be if we weren't here'. So I always say we're trying,*

One possible avenue for a more coordinated approach was suggested:

> *We have the BC FNEMC, we have the BC FN Fisheries Council, we have the FN Forestry Council. Why isn't there a First Nations Water Governance Council?*

A First Nations Water Governance Council could oversea marine and freshwater environments, and it could coordinate First Nations response to varied impacts, including in relation to navigable waters, shipping, oceans, rivers, drinking water, etc. It could support an Indigenous-led approach to environmental regulation within First Nations territories.

5.4. Indigenous-led environmental monitoring

A above committees demonstrate that there is a desire among many First Nations to lead the decision-making, monitoring, and enforcement of environmental regulations that affect their territories. For example, one of the committees was successful because it established an Indigenous monitoring program:

> *because we had people on the ground in the communities, bringing up really important issues that were able to help CER and whatever other Federal entities were there.*

Some participants argued that Indigenous monitoring is essential because it is place-based and tied to Indigenous knowledge:

> *Federal agencies don't understand the issues, don't realise the implications, but because we're there on the land, we see all the problems.*

However, there remain concerns about Federal and Provincial commitments to such programs, particularly in relation to capacity-building and resourcing:

> *We tried doing this Guardians up here, and the lack of funding stopped it. So with the 8 bands that we have, we're going to pay for it ourselves and move forward… Moving forward I hope that both the Provincial and Federal government commit capacity funding for such things.*

Returning specifically to the draft Indigenous Knowledge Policy Framework, one participant asked:

> *Will the Framework speak to the partnership and with funding to First Nations groups to conduct meaningful monitoring and cumulative effects studies on the BC coast?*

In its current form, the Indigenous Knowledge Policy Framework merely makes rhetorical commitments to support First Nations data storage and management. More commitments are quired to support Indigenous-led data generation for Indigenous monitoring and governance in navigable waters.

5.5. Summary

Indigenous voices are being heard louder than ever at international climate events such as the 26th UN Climate Change conference in Glasgow (31 Oct – 12 November 2021). Yet inequalities persist[65], and Indigenous and non-Indigenous advocates are highlighting the need for a greater role for Indigenous knowledge in addressing the twinned climate and ecological crisis.[66] Federal and Provincial legal commitments to align policies and laws with UNDRIP are a step in the right direction. However, they need concrete support to be given practical effect on the ground, in First Nations territories.

The draft Indigenous Knowledge Policy Framework is an important step in making Indigenous knowledge central to environmental regulation. However, the *process* of engagement, seeking consent, and using Indigenous knowledge remains a key concern for many First Nations. Participants in the webinar argued that improved processes of government-to-government engagement and negotiation are essential for a just approach to tackling climate and ecological crises:

> *Mother Earth is getting angry. That's what's happening in our world today, because of the climate crisis. I hope that the work that we do improves the quality of life for future generations, and that's why it was important for me to attend this meeting.*

Too frequently, processes of engagement are reduced to limited opportunities for feedback within tight timeframes. This has been the case with the draft Indigenous Knowledge Policy Framework. First Nations have not had sufficient time to discuss all of the implications, and they have not been involved in the process of developing an Indigenous Knowledge Policy Framework from the outset. It is insufficient simply to thank First Nations for their feedback. Participants called for genuine processes of government-to-government negotiation and co-reform processes for environmental regulations. An Indigenous Knowledge Policy Framework is a step in the right direction, but many improvements are yet to be made in terms of the *process* of engaging First Nations for the development of joint decision-making approaches that respect First Nations jurisdictional authority, as based on Indigenous knowledges and laws.

[65] "'A continuation of colonialism': indigenous activists say their voices are missing at Cop26": https://www.theguardian.com/environment/2021/nov/02/cop26-indigenous-activists-climate-crisis

[66] "Indigenous knowledge must lead climate solutions": https://www.theenergymix.com/2021/11/01/indigenous-knowledge-must-lead-climate-solutions-cop-26-opening-speaker-says/. "First Nations delegates say COP26 discussions should prioritize Indigenous knowledge": https://www.cbc.ca/news/indigenous/cop26-indigenous-climate-energy-delegates-1.6229192

6. Conclusion: from assimilation to co-existence

The draft Framework reflects a process of knowledge assimilation. It does not overcome scientifically observed obstacles that prevent environmental regulation from meaningfully engaging Indigenous knowledge.[67] To ensure that Indigenous knowledge is the *basis* of regulatory decisions (as recommended by the Canadian Bar Association[68]), the Framework must support knowledge coexistence.

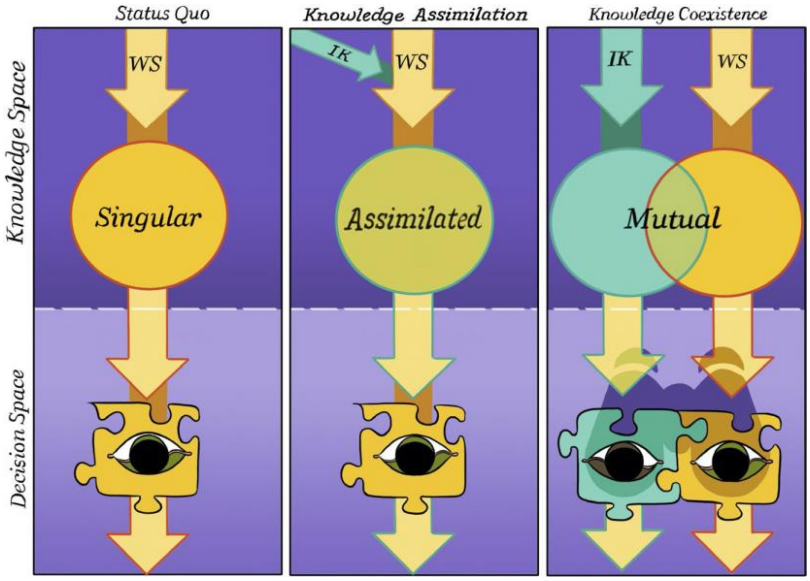

Figure 1 Two-eyed seeing and knowledge coexistence[69]

The Framework and its guiding principles must be revised to meet the standards set by the principles and pillars contained in the First Nations Information Governance Centre's First Nations Data Governance Strategic Framework.[70] This Strategic Framework was commissioned by the Federal government under the 2018 budget, and yet the draft Indigenous Knowledge Policy Framework does not meet the same standards.

Enclosed is a separate set of recommendations, which outline required revisions to the Framework, its specific guiding principles, and its relation to the Navigable Waters Act and broader environmental regulation.

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[67] Lauren E. Eckert et al., "Indigenous knowledge and federal environmental assessments in Canada: applying past lessons to the 2019 impact assessment act," *FACETS* 5, no. 1 (2020/01/01 2020), https://doi.org/10.1139/facets-2019-0039, https://doi.org/10.1139/facets-2019-0039.

[68] Canadian Bar Association, *Submission on Bill C-69 Impact Assessment Act*.

[69] Reid et al., "“Two-Eyed Seeing”: An Indigenous framework to transform fisheries research and management," 254.

[70] First Nations Information Governance Centre (FNIGC), *A First Nations Data Governance Strategy: A Response to Direction Received from First Nations Leadership, Funded through Federal Budget 2018 in Support of the New Fiscal Relationship*, FNIGC (Akwesasne, ON, 2020), https://fnigc.ca/wp-content/uploads/2020/09/FNIGC_FNDGS_report_EN_FINAL.pdf.

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Appendices

Appendix A: Additional examples of reconciliation protocols and agreements

Name	Year	Type	Signatories
CFN Reconciliation Protocol	2016	Collaboration agreement	Gitga'at, Haisla, Heiltsuk, Kitasoo/Xai'xais, Metlakatla, Wuikinuxv, Nuxalk; BC
Coastal First Nations Memorandum of Understanding - Pathway to Reconciliation: Long-Term Economic, Social, Governance and Environmental Sustainability	2020	Reconciliation MoU	Gitga'at, Gitxaala, Haida, Heiltsuk, Kitasoo, Metlakatla, Nuxalk, Wuiknuxv; BC
GayGahlda "Changing the Tide" Framework for Reconciliation	2021	Reconciliation framework	Haida; BC
Gitanyow Recognition & Reconciliation Agreement	2016	Reconciliation agreement	Gitanyow; BC
Haida Gwaii Marine Plan Implementation Agreement	2016	Implementation agreement	Haida; BC
Haida Gwaii Reconciliation Act	2021	Reconciliation Act	Haida; BC
Haíłcístut Framework Agreement for Reconciliation	2018	Reconciliation agreement	Heiltsuk; BC
Stó:lō Collaborative Stewardship Framework	2019	Collaboration agreement	Stó:lō First Nations; BC
Tuígila "To Make a Path Forward" Agreement for Implementation of Heiltsuk Title, Rights and Self-government	2019	Self-government agreement	Heiltsuk; BC; Canada