Submission to the Senate Standing Committee on Fisheries and Oceans’ review of Bill C-68 (*Fisheries Act*)

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Preamble

Manitoba Hydro is appreciative of the opportunity to provide a submission to the Senate Standing Committee on Fisheries and Oceans about Bill C-68’s proposed amendments to the *Fisheries Act*. Manitoba Hydro is supportive of the resource management and environmental stewardship objectives of the *Fisheries Act* and this submission is presented in context of our ongoing work with the fisheries management agency in Manitoba Sustainable Development Department, to ensure the sustainability of Manitoba’s fisheries.

Manitoba Hydro takes as a given in making this submission, that all parties (Fisheries and Oceans Canada, Manitoba Sustainable Development, Manitoba Hydro, various stakeholders and other development proponents) want to work cooperatively and collaboratively to fulfill their roles in the assessment of “works, undertakings and activities” and the protection and ongoing sustainability of Manitoba’s fisheries.

Essentially, we are asking the Senate to recommend that simple things should be done simply.

Summary

Manitoba Hydro fears that the current wording of Bill C-68 and its return to the prohibitions against “harmful alteration, disruption or destruction” (HADD) of fish habitat and the “killing of fish” will hinder development and operations as it previously did, with overly detailed assessments and a philosophy of protection of every fish rather than fisheries management and population sustainability.

Our experience prior to 2012 was that this approach led to extensive reviews with arbitrary decision-making criteria and resulted in “offsetting” that did not account for the level of effect on fisheries sustainability. There was a lack of process clarity that resulted in inconsistent interpretations between the various public interests and within DFO itself. This lack of certainty is contrary to responsible economic development and did not ensure resource sustainability from Manitoba Hydro’s point of view.

Of additional concern is the assertion that Bill C-68 represents a return to the pre-2012 state. This is not accurate as changes made in 2012, which will remain in the statute, arguably increased the onus on industry to ensure protection of fisheries. If Bill C-68 is approved these changes will remain and be complicated by a “Purpose” statement that will be interpreted as directing DFO to preserve all fish and fish habitat without consideration of their actual value and / or contribution to fisheries management.

This we believe will put environmental, industry and provincial interests at odds, where DFO is given little flexibility to satisfy the public’s interest in water/resource conservation.
Need for a Clear Purpose Statement

Manitoba Hydro understands that fisheries matters are subject to the jurisdiction of both Canada and Manitoba. This duality was summarized by Madame Justice Arbour in Ward v. Canada where she stated:

“Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith in substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith in substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.”

With this as understanding, Manitoba Hydro supports that the purpose of the Fisheries Act (Canada) is as stated in the proposed Section 2.1 (a) to “provide a framework for the proper management and control of fisheries...”. A statement to this effect is helpful as Manitoba Hydro is of the view that the implementation of the Fisheries Act habitat provisions prior to 2012 was inappropriately directed towards the preservation of individual fish and all fish habitat as a surrogate for fisheries protection.

However, the inclusion of Section 2.1 (b) in Bill C-68 is problematic as it states that the Fisheries Act is also “…to provide a framework for ... the conservation and protection of fish and fish habitat...” which contradicts any clarity on fishery sustainability as the target, that was gained in 2012. Thus the proposed “Purpose” statement will be interpreted by some as meaning to conserve and protect individual fish and all fish habitat. If not corrected, this language will create conflict between the purpose of the Act and the reasonable authorization by DFO of activities that may incidentally kill or harm fish or fish habitat with no effect on fisheries sustainability. This conflict creates needless scope for legal challenge.

Furthermore, the reporting of the death of any fish in any circumstance is overly onerous and should not apply for incidents where death of a fish may occur in the normal course of the responsible and previously authorized operation of a power plant. To ensure that society’s interest in the sustainability of fisheries is met, Manitoba Hydro supports the following Canadian Electricity Association suggested revision to the Purpose statement;

Section 2.1
“The purpose of this Act is to provide a framework for the proper management and control of fisheries with due consideration for the conservation and protection of fish and fish habitat, including by preventing pollution.”
If this change to the purpose statement is made, the provisions of the *Fisheries Act* can then be more clearly seen through the lens of fisheries conservation as Madame Justice Arbour described the pith and substance of the Federal role.

**Need to Address Ecological Flows**

Manitoba Hydro is also of the opinion that the addition of revised subsection 2(2), to add quantity, timing and quality of water flow to the definition of fish habitat is improper and unnecessary due to the fact that these items are already managed through a variety of provincial and interprovincial mechanisms and are already widely considered in section 34.3 of Bill C-68.

The hydropower industry believes that with a proper purpose statement to guide the level of detail in Federal *Fisheries Act* reviews and slight alterations to section 34.3 Canada could achieve its intent to conserve fisheries and the intended purpose of the revised subsection 2(2) within the bounds of water flow restrictions that are technically and economically feasible for our industry.

If maintained as is, the revised subsection 2(2) will be interpreted by some as providing for the Minister to limit the flexibility to dispatch clean power production for licensed facilities. Such a circumstance has the potential to increase generation from GHG emitting resources and would have significant financial implications for a utility. For example, a high level analysis of the financial impact of requiring that Manitoba Hydro pass 80% or more of the weekly average incoming flow (i.e. a “80% rule”) would result in a present value cost of greater than $3 billion.

To ensure practical and reasonable flow management, the Canadian Electricity Association suggests, and Manitoba Hydro concurs, that the revised fish habitat definition in Bill C-68 subsection 2(2) should be deleted and the definition of habitat from the original version of Bill C-68 should be reinstated. The original definition and proposed changes were as follows:

**Subsection 2(2)**

“fish habitat means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out life processes, including spawning grounds and nursery, rearing, food supply and migration areas”

**Rationale for Bill C-68**

To the stated issue of “lost protections” arising from the 2012 change to the *Fisheries Act*, given that the *Fisheries Act* is properly a fishery focused statute Manitoba Hydro asserts that this is overstated. Protections were not lost due to the 2012 amendment of the *Fisheries Act*. Rather a step was taken toward clarifying that the proper Federal interest is the sustainability of Canada’s inland and seacoast fisheries.
Having stated that, Manitoba Hydro is not opposed to the return to a “HADD” version of the fish habitat protection provisions provided that Bill C-68 is explicitly targeted at fish population protection and not an individual fish level of concern. Clarifying that protection is at a fish population level becomes even more important in 2019 as this new HADD version of the Fisheries Act will now be within the enhanced enforcement framework that includes a prohibition on “activities” along with works and undertakings, and that has more duties imposed on proponents than was stated in the pre-2012 Fisheries Act or the 1986 Fish Habitat Management Policy.

Conclusions

Manitoba Hydro considers that the key to providing protections for fisheries lies in the clarification of the actual purpose of the Fisheries Act and the logical and efficient application of the Fisheries Act, including upfront fisheries management agency inputs. Given that Manitoba Sustainable Development, and not DFO, sets fisheries management objectives in Manitoba, an assessment of the impacts of fish habitat changes and incidental death of fish by DFO alone is not logical.

Assessing impacts and determining offsetting targets without knowing what the fisheries uses and objectives are, amounts to arbitrary decision making. That approach in the past was expensive for proponents without measurable benefit to fisheries (as per Auditor General’s, Office of the Commissioner of the Environment report, 2009). This was Manitoba Hydro’s previous experience and continues to be a concern based on recent conversations with DFO staff.

For this reason, since the 2012 amendments to the Fisheries Act, Manitoba Hydro has been working closely with Manitoba Sustainable Development’s (MSD) Wildlife and Fisheries Branch to determine the relevant fisheries management objectives and to develop appropriate avoidance and mitigation measures for the area impacted by any “work, undertaking or activity”. In the course of those discussions, those projects that were not a fishery conservation concern were documented and undertaken with MSD’s concurrence. Projects where MSD had a concern, or were unsure of the effects, were forwarded to DFO for review or authorization. In this fashion, simple projects were done simply.

To this end, Manitoba Hydro seeks Federal leadership in the development of a jurisdictionally responsible fisheries management framework that codifies with a clear Purpose statement the rational application of Canada’s fisheries conservation interest as previously identified. With this clear statement Manitoba Hydro also suggests that Canada and Manitoba consider codifying, under Section 4.1 (1) “The Minister may enter into agreements” (in both the pre-2012 and Bill C-68 versions of the Fisheries Act), that project reviews are properly initiated with the Fisheries Management Agency and will proceed to DFO’s Fisheries Protection Program / Fish Habitat Management Program based on the Fisheries Management Agency’s determination that a fisheries conservation question or issue exists.