CANADIAN ELECTRICITY ASSOCIATION

SUBMISSION TO THE SENATE

STANDING SENATE COMMITTEE ON FISHERIES AND OCEANS (POFO)

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INTRODUCTION AND CONTEXT

The Canadian Electricity Association (CEA) appreciates the opportunity to provide feedback on Bill C-68. Founded in 1891, CEA represents a broad range of companies that generate, transmit, distribute, and market electricity to industrial, commercial, and residential customers across Canada. CEA member companies are committed to delivering reliable, affordable, and sustainable electricity to support the clean energy transition and advance Canada’s international environmental commitments.

With Bill C-68, the federal government has expressed an intention to ‘restore lost protections’ for fish and fish habitat and introduce new, modern safeguards to reflect current realities such as pollution and disruption of ecosystems.

Unfortunately, as Bill C-68 is currently drafted, the source of 62% of Canada’s clean and renewable and non-greenhouse gas emitting electricity production will be put in peril largely because of an unwarranted focus on individual level fish impacts and duplicative federal environmental flow requirements. We propose a focused set of amendments that will increase investor confidence in our sector’s ability to build good clean energy projects, while supporting the responsible management of Canada’s fisheries.

Our proposed amendments align with our constructive approach to Bill C-68 and generally aim to ensure that regulatory efforts be focused on addressing material risks to fish populations and fish habitat with a transparent and predictable process. In particular the following sections merit special consideration:

1. Purpose statement (S. 2.1)
2. Reporting of death requirements (S. 38(4))
3. Fish habitat definition (S. 1(10))
4. Provisions to manage flow (S. 34.3(2)(g))
5. Designated work prohibition (35.1 (1))

6. Adequate accompanying regulations

TOP RECOMMENDATIONS TO THE AMENDED FISHERIES ACT

I. Purpose with an Integrated Approach (S. 2.1)

The proposed purpose statement in the current version of Bill C-68 comprises of two distinct clauses, one being an objective to manage fisheries as a resource while the other may be interpreted as a clause to conserve and protect individual fish. If not corrected, this language will create conflict between the purpose of the Act and the reasonable authorization by DFO of productive activities that may incidentally kill or harm fish or fish habitat, needlessly creating scope for legal challenge. CEA believes that the protection of fish and fish habitat should be understood as a means to ensure the sustainable management of all fisheries and that this should be clearly stated in the legislature. To ameliorate these concerns, CEA recommends the following amendment.

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.

This amended purpose statement presents a coherent objective and outlines that the Act’s objective lies within the exclusive federal power to manage sustainable fisheries, rather than individual fish.

II. Burdensome Duty to Notify Requirements (S 38.4)

The proposed duty to notify provision in Bill C-68 broadens the reporting requirements necessary in the case of the death of fish. Following from the last objective, CEA believes that the reporting of the death of any fish in any circumstance is unreasonable for times where death may occur in the normal course of the responsible and licensed operation of a power plant. This clause is also unreasonable as it suggests that the death of a single fish is as significant as a major impact to fish populations and fish habitat.

We feel that this requirement is unduly burdensome and would result in unnecessarily lengthy administrative processes for both the parties that are regulated under the Act and the government officials who are responsible for enforcing it. Further, it is important to note that while the terms of a permit or authorization may address this concern, the unfortunate reality is that a variety of hydropower facilities across Canada are not currently authorized. This is due to the fact that many facilities were built before the current habitat protection provisions came into law and the current authorization process is still largely unsuited for addressing the unique circumstances of existing facilities (ie, facilities that have low impacts and few uncertainties). Due to this unfortunate reality, this provision will force companies with existing unauthorized facilities to err on the side of caution and notify the Department of Fisheries and Oceans (DFO) for each and every fish death thus inundating
their offices and DFO officials with significant administrative burden. To ameliorate this concern, CEA suggests that a definition outlining incidental take is added in to the Bill to ensure that existing facilities may be granted some level of permission to limit notifications to fish deaths that occur outside the scope of normal operational activities. This can be done by adding the following definition in Section 34(2);

**Incidental take** means death of fish caused by the normal operation of an existing work, undertaking, activity or designated project that prior to the coming into force of subsection 38(4) of this Act was constructed under the authority of:

- an Act of Parliament or an order of the Governor in Council;
- an Act of the legislature of a province or an order of the lieutenant governor in council;
- or
- an Act of the legislature of a colony of Great Britain of which at least some portion now forms part of Canada.

Further, we believe it necessary to revise the language in section 38(4) to reference this additional incidental take definition to ensure consistency of application.

We recommend the following underlined language to clarify the intent of this provision:

38 (4) Every person shall without delay notify an inspector, a fishery officer, a fishery guardian or an authority prescribed by the regulations of the death of a fish that is not incidental take or otherwise authorized by this Act or of the serious and imminent danger of such an occurrence, if the person at any material time.

The above amendment imposes a practical solution to reduce regulatory burden while still ensuring that the appropriate protections under the Act are maintained.

III. Fish habitat definition (S. 1(10))

The revised fish habitat definition which adds ‘quality, quantity and timing’ of water flow to the definition of fish habitat is highly problematic to hydroelectric operations across Canada for a variety of reasons. The new definition broadens the interpretation to virtually include all waters frequented by fish, whether the water bodies were natural or man-made. If read strictly, this definition broadens the scope of fish habitat to include nearly any and all bodies of water in or nearby a facility (such as industrial cooling ponds which are a necessary by-product of several natural gas generating facilities and were never intended to be fish habitat).

Furthermore, this provision is completely unrealistic in the sense that the quantity and release of water by dams and other structures is determined by a variety of factors. While one of them is the protection of fish and fish habitat, there are several other factors that are of equal or even more importance such as public safety, which has always been the top priority for any of our member’s operations. For example, to ensure public safety from the dangers of floods and/or droughts, natural flow levels are
often altered. As such, there are a variety of pre-existing water management regimes that oversee water levels to protect the public. If the proposed amendment remains in the Act, there is a higher likelihood of overlapping and conflicting jurisdictional oversight regarding water use.

Hydropower technologies require constantly changing water levels and flow to carry out their normal operations and for necessary maintenance and repair. Water flows may need to be altered at any given moment to respond to emergencies if they occur. With this reality, any number of these operational realities could be seen as ‘affecting water and fish habitat’ and be considered as a contravention to the Act. Therefore, operations that have been carried out for decades would now require various timely authorizations and thus make the process largely unworkable.

Lastly, hydropower in Canada is responsible for generating over 60% of our electricity – in fact, Canada is the world’s third-largest hydropower producing nation. Hydropower, as a clean and non-GHG emitting resource, is integral to our current and future efforts to reach our country’s ambitious climate change targets. If this fish habitat provision is included in the Act, it would mean that hydropower reservoirs across the country could no longer be fully utilized. This would ultimately limit the ability of hydro power to meet baseload and peak electricity demand, which will increase reliance on other dispatchable generation assets including coal and natural gas facilities. This has the potential to materially increase GHG emissions from the electricity sector, reversing over a decade of progress in climate change mitigation.

For all the reasons listed above and more, CEA urges the government to delete subsection 1(10) of the Act and re-insert the provision as published in the first reading of Bill C-68. The original wording is as follows:

“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”

IV. Obstruction of flow provisions (S. 34.3)

The proposed section 34.3(2)(g) within Bill C-68 gives the Minister broad powers to act when an obstruction in a waterway affects fish passage or the ability to protect fish or fish habitat. Under this provision, the Minister can order the removal of an obstruction (e.g. a dam) or order a specific flow regime. She/he also has the power to require the owner of an obstruction to maintain the characteristics of water upstream of an obstruction. While we understand the desired intent for this provision, it is largely unrealistic in many cases as the owner of an obstruction will not have an ability to regulate water characteristics upstream of the obstruction.

Further, there are potential complications and risks associated with conflicting decisions of various jurisdictions and institutions with overlapping mandates. At this time, it is unclear who determines the flow of water “necessary” to permit the free passage of fish and how this is determined. Hydroelectric
dams and other generating sources are regulated by provincial authorities, interprovincial management bodies, and international agreements. These various bodies largely oversee a variety of water quality parameters (i.e. flow, temperature). To ameliorate this concern we suggest that appropriate bounds be placed on the Minister’s discretion in this section. We believe this can be done through the following amendment:

34.3 (2) (g) Maintain at all times the characteristics of the water and the water flow upstream and downstream of the obstruction or thing that are necessary the Minister considers sufficient for the conservation and protection of the fish and fish habitat including within the reasonable ability of the owner or person who has the charge, management or control of the obstruction or thing.”

i. The water temperature, and
ii. The physical characteristics and chemical composition of the water flow.

V. Carrying on Parts of a Project (S. 35.1(1))

Bill C-68’s subsection 35.1(1) states that no person shall carry on any work, undertaking or activity that is part of a designated project except in accordance with a permit. While we understand the intent for this provision, we believe that this prohibition ought not apply to parts of a project that pose no risk of death of fish or harmful alteration, disruption or destruction of fish habitat – the risks that give rise to the designation of the project. This can be corrected by the following simple amendment:

35.1 (1) No person shall carry on any work, undertaking or activity that is part of a designated project, and that may result in death of fish or in the harmful alteration, disruption or destruction of fish habitat, except in accordance with a permit issued under subsection (2).

This slight modification will ensure project proponents and facility operators are not subject to regulatory encumbrance and removes unnecessary burden to regulatory resources.

VI. Adequate Accompanying Regulations

The regulations and codes of practices that come out alongside the Act will be integral to Bill C-68’s effectiveness. Government officials, industry, and the general public will greatly benefit from a well-functioning and consistently enforced regulatory framework alongside this Act. Therefore, going forward, CEA urges the government to engage in ongoing consultations on the accompanying regulations to this Bill and ensure that the concerns raised are appropriately addressed well in advance of Bill C-68 coming into force. If sufficient clarity is not gained at this stage, proponents and DFO staff may face the same challenges that occurred during the last review of the Fisheries Act, whereby many of the required regulations were absent or misunderstood upon coming into force. CEA requests that DFO ensures proper staffing and resources are allocated to ensure a smooth transition of legislation.

SUMMARY
CEA believes that the Bill requires several pointed amendments to ensure that the stated intent of the Act is realized in clear and precise terms. In summary, our recommendations include:

- The purpose of the Act should include concurrent recognition of the management and control of fisheries through the conservation and protection of fish and fish habitat. Application of the Act should focus on fish as a population, not individuals.

- Incidental take of fish should be specifically defined to reduce the administrative burden of death notifications for existing facilities with no other viable regulatory option;

- The definition of fish habitat should not include ‘quality, quantity and timing of water flow’ to avoid jurisdictional overlap and potential implications on public safety and our climate change targets.

- Allow work associated with a permitted project, which does not pose a risk of death to fish, or harmful alteration, disruption or destruction of fish habitat, to proceed without additional regulatory consultation.

- Coming into force must be delayed until guidance, policies, regulations and training are in place.

**CONCLUSION**

CEA would like to thank the members of the Senate Standing Committee on Fisheries and Oceans for the opportunity to provide our comments and specific legal amendments on Bill C-68. We feel that the amendments proposed will help further improve and strengthen Bill C-68 to ensure longevity of our fisheries that encourages a clean energy future.

CEA has long worked with the Department of Fisheries and Oceans to ensure the protection of fish and fish habitat on behalf of all Canadians. We commit to continued collaboration to ensure we create the right conditions for economic innovation and environmental security.