Montreal, April 17, 2019

Senator Marc Gold
Deputy Chair
Standing Senate Committee on Fisheries and Oceans
173 East Block
Senate of Canada
Ottawa, Ontario K1A 0A4

By e-mail: Marc.Gold@sen.parl.gc.ca

Re: CPEQ comments on Bill C-68 – An Act to amend the Fisheries Act and other Acts in consequence

Dear Senator Gold:

The Quebec Business Council on the Environment (CPEQ) has reviewed Bill C-68 – An Act to amend the Fisheries Act and other Acts in consequence (the bill), introduced in the House of Commons on February 6, 2018, as well as the amendments proposed during the legislative process. We are pleased to accept your invitation to provide observations.

Founded in 1992 by representatives of Quebec’s main industrial and business sectors, CPEQ is the umbrella organization that represents the Quebec business sector on environmental and sustainable development and important issues of general and common interest. It also coordinates its members’ objectives. CPEQ’s mission is to serve as a spokesperson for Quebec companies on issues related to the environment and sustainable development. CPEQ represents almost 271 of Quebec’s most important companies, as well as 32 associations, which together generate more than 300,000 direct jobs and report combined revenues of over $45 billion.

1. Background

Before presenting our comments on the bill, we believe a review of the most recent amendments to the Fisheries Act would be in order.

The adoption in 2012 of “omnibus” Bill C-38 resulted in substantial amendments to the Fisheries Act. The objective of those amendments included improving the management of threats to the sustainability and ongoing productivity of Canada’s commercial, recreational and Aboriginal fisheries. It was in that context that certain provisions governing the protection of fish habitat were amended.

Prior to the 2012 amendments, sections 32 and 35 of the Fisheries Act set out the following prohibitions:

- **Section 32**: Prohibition on destroying fish by any means other than fishing;

- **Section 35**: Prohibition on carrying on any activity that results in the harmful alteration or disruption, or the destruction of fish habitat.
These two prohibitions were replaced in 2012 with a single prohibition in section 35 that read as follows:

*No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.*

This prohibition did not specifically address the concept of “fish habitat,” which omission provoked strong reactions in 2012, with numerous stakeholders believing that the amendments would diminish the protection afforded to fish and fish habitat.

In our view, the 2012 provision was intended to align the Minister’s power with that set out in the *Constitution Act, 1867* for protecting fisheries, as opposed to fish and their environment in the broader sense. We do not feel that the change necessarily resulted in an actual reduction of protection.

2. **General comments on Bill C-68**

CPEQ notes that to a certain extent, the bill proposes to restore a regime similar to the one that existed prior to the 2012 revision of the *Fisheries Act* by extending the concept of habitat to all aquatic environments. It seeks in particular to “provide measures for the protection of fish and fish habitat with respect to works, undertakings or activities that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat, including in ecologically significant areas.”

We further note that the bill has the effect of increasing the types and overall number of authorizations that can or should be granted by the Minister. As such, CPEQ believes that the government should specify the circumstances under which the various authorizations will be required, so that companies do not go to the trouble of trying to obtain them when they are unnecessary. The administrative framework for these powers should be strengthened given that they are far too broadly defined in the bill. We will discuss this issue in more depth in our specific comments.

In addition, we note that the bill provides that regulations must be adopted for the application of certain provisions, including those relating to permits issued for designated projects (section 35.1) and for activities in ecologically significant areas (section 35.2). We believe that in order for the future regulatory framework to be properly evaluated, even before the bill is passed, the government should publish the regulations, guidelines and companion administrative documents to allow stakeholders to fully grasp the scope of the proposed changes and provide their comments and recommendations. We believe that the consultations that have taken place thus far and those that are ongoing are insufficient in this regard.

3. **Specific comments on Bill C-68**

- **Scope of the term “habitat”**

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1 Subsection 91(12).

2 The new definition of habitat in the bill is much broader in that it now includes any “water frequented by fish...” which goes well beyond the biological concept of habitat.
CPEQ notes, in subsection 2(2), that for purposes of the Act, *the quantity, timing and quality of the water flow that are necessary to sustain the freshwater or estuarine ecosystems of a fish habitat are deemed to be a fish habitat.*

We are concerned that this provision may create difficulties in terms of what constitutes damage to fish habitat, and will have further consequences down the line.

Are we to understand from this provision that the legislator’s objective is to ensure that any change to the characteristics mentioned will be seen as potentially damaging to fish habitat? If so, CPEQ believes that could lead to problems with interpretation, since in our opinion, it would be difficult to examine these elements from the perspective of the biological reality of a habitat. It would therefore be appropriate, in our opinion, to limit or even eliminate this provision.

- **Prohibition on causing the death of fish**

CPEQ is of the opinion that the bill should be amended to clarify that the objective is to protect fish populations and their habitat, rather than individual fish. Beyond the semantics, we submit that by maintaining the proposed wording, the legislator would give these provisions legal effects that are disproportionate to the government’s stated objectives.

Indeed, contrary to what some have suggested, the proposed regime is not simply a return to the pre-2012 version of section 26 of the *Fisheries Act* on works and undertakings. In the context of the fishery, an approach based on the protection of “fish” as opposed to “populations” of fish means that the accidental killing of any fish without prior authorization can be interpreted as an offence under the Act. However, the death of fish from the same population, if it can be shown not to endanger the survival of that population, should not be considered grounds for criminal proceedings, particularly when it results from the routine and diligent carrying on of works, undertakings or activities.

That said, and with all due respect for any opposing view, in our opinion, each individual fish is not essential to maintaining the fishery or the survival and well-being of its species. We believe that with respect to the Act and federal powers, the prohibition must be given a new meaning: it must provide a framework that seeks to reconcile the protection of resources with the continuation of human activities based on the use of those resources. In short, we believe that the death of a single fish should not be sufficient to suggest an impact on fishing activities, particularly when there is a system for the sustainable use of these resources in place.

Globally, the combined effects of the Act protect fish and their habitats while ensuring the sustainability of Canada’s fisheries. If they are properly protected under the Act, fisheries resources are renewable. They should be able to coexist with other human activities and the carrying on of works or undertakings.

- **Prohibition against causing the harmful alteration, disruption or destruction of fish habitat**

The reintroduction of this notion in section 35, coupled with an overly broad definition of habitat that we feel exceeds the ecological concept, has the effect of making any unauthorized destruction or damage in any waterway, regardless of the actual effect on the sustainability of the fishery, a criminal offence. CPEQ is of the opinion, however, that the Act should not jeopardize existing works, but rather support the development of compatible economic sectors in a sustainable manner.
Existing, legally constructed facilities should be deemed to be compliant with the *Fisheries Act*, unless it is clearly demonstrated that their operation causes unacceptable damage to the sustainability of a fishery as of the date of coming into force of the Act. We do not believe it appropriate to retroactively call into question the carrying on of works in situations where the surrounding or global fisheries have long ago been restored to sustainable levels and are therefore stable.

Most industrial activities that make use of water resources involve some alteration of fish habitat, fish bycatches or accidental and occasional fish deaths. The pre-2012 *Fisheries Act* regime was fraught with uncertainty, and this bill would return us to that uncertainty. First, the old regime required determining the risks of existing works. We believe, however, that the section 35 prohibition should not apply retroactively to approved or completed projects, as did the old *Policy for the Management of Fish Habitat* (October 1986). Second, the old regime unduly delayed the approval of new developments.

Consequently, the proposed wording for sections 35 and 37 will result in greater uncertainty for existing and future facilities. It could also unduly delay and/or discourage investments in projects geared toward clean growth and the achievement of climate change goals.

- **Removal of a work**

We wonder about the scope of the Minister’s power to require the removal of a work that would prevent the movement of any fish.

As drafted, this provision would make it possible to require the withdrawal of a work without giving the operator an opportunity to make a case. We believe that the scope of the Minister’s authority should be limited to situations where it is justified by the public interest, following a mediation process with the operator.

- **Authorization of designated projects**

Seeing the draft regulatory framework would allow stakeholders to fully understand the extent of this new authorization system for “designated projects.” Among other things, we wonder about the scope of the authorization for designated projects. We understand from reading the bill that proponents of such projects who have the necessary permits would not be subject to any other formalities under the Act\(^3\) (other prohibitions). Is this an accurate interpretation?

Will the authorization issued for a designated project include day-to-day activities subsequent to construction? The Act already grants powers to this effect in that the Minister can designate which works, undertakings or activities will be associated with a designated project. It would make sense to define the criteria that will guide the Minister in determining which works, undertakings or activities will be considered to be “associated” with a designated project.

- **Prohibition on releasing a deleterious substance**

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\(^3\) If the prohibitions set out in subsections 34.4(2) and 35(2) and described above do not apply to works, undertakings and activities included in a designated project if they comply with the permit issued, the scope of the prohibitions in these two subsections will depend on the list of projects or classes of projects that will be designated by regulation under subparagraph 43(1)(i.5).
It is important to take a global look at the protections already provided by the law when considering the usefulness of the proposed amendments. We recall that the prohibition in subsection 36(3) against depositing a deleterious substance also serves to protect fish habitat. Since the scope of this provision is broad and already provides significant protection of fish habitat, amendments covering the harmful alteration, disruption or destruction of fish habitat appear to be unnecessary.

- **The concept of activity**

By including the concept of “activity,” the bill proposes a more binding regime than the one that existed prior to 2012. We believe the bill should provide a means of permitting low-risk activities to be carried on within reasonable timeframes without unnecessarily subjecting a host of routine activities to the authorization process, or at least not the day-to-day activities of existing works. If the bill is not amended to address this, administrative frameworks will be required to mitigate the technical impracticability that could result from the bill. The point is not to create a fish charter, but rather a general law that is statutory and criminal in nature and that will govern activities that are truly likely to interfere with fisheries. The prohibitions must be realistic and relevant to such a context.

- **Administrative frameworks**

Should the government decide not to clarify the scope of the bill such that it protects fisheries rather than fish, we believe that at the very least there should be guidelines to ensure that the provisions relating to the protection of individual fish are not applied systematically or out of context.

Under the 2012 regime, proponents had the advantage of not requiring ministerial approval if, prior to carrying out any activities, they undertook a self-assessment that demonstrated the absence of any impact on fish mortality. The self-assessment was the most positive element of the 2012 amendments. We believe the bill should continue to provide a streamlined process for low-risk projects.

This mechanism would reduce the number of authorizations issued and lighten the administrative burden for the department. It would also bring planned undertakings to the attention of the department, enabling it to assess the broader impacts of any that are considered in isolation to be of low risk to fish. The project proponent should not have to wait for departmental approval before proceeding, however. For example, we would support the idea of having this self-assessment provided to the department beforehand in order to make the mechanism more transparent. In addition, the bill could impose a time limit for the Minister to respond following the filing of certain information, after which the proponent would be allowed to proceed.

In addition, we understand that section 34.2 on standards and codes of practice confers specific powers on the Minister that could be used to establish such a practical framework for the carrying on of works, undertakings or activities. Is this the department’s intention?

Knowing the content of these standards and other codes of practice will also be essential for understanding the scope of the proposed revision. Before establishing these standards and codes, the Minister may consult with any provincial government, any Indigenous governing body, any government department or agency or any persons interested in the protection of fish or fish habitat and the prevention of pollution.
CPEQ submits that the representatives of the sectors of activity that will be most concerned by the application of these standards and codes of practice should be party to such consultations.

- **Ecologically significant areas**

We note that the bill proposes the creation of another type of authorization for carrying on a project in an ecologically significant area.

CPEQ wonders about the potential scope of the concept of “ecologically significant areas” introduced in the bill. We understand that these areas will be identified on a case-by-case basis. We reiterate here our general comments that the government should publish draft regulations as soon as possible.

- **Habitat reserves (clause 28 enacting section 42.02)**

CPEQ would like to point out that pursuant to the *Fisheries Act*, businesses have already created fish habitat banks, which have been designated using the criteria established in 2007.

We note that under the bill, it would be possible for the Minister to establish a system for the creation, allocation and management of habitat credits for proponents in relation to conservation projects. There would be a new certification mechanism for validating these credits. Here again, it is difficult at this stage to assess the regime that will be put in place until such time as the implementing regulations have been made public.

In addition, it appears that proponents could only use their certified habitat credits in respect of a fish habitat bank within a service area to offset the adverse effects from the carrying on of a work, undertaking or activity authorized in that area.

CPEQ believes it is essential that fish habitat banks recognized under the old criteria be maintained, and that the value of the offset be established according to the rules in place at the time of their creation. We also feel that the government must consider the duration of the effects of the habitat bank prior to its use as an offset project.

It would also be important, in our opinion, for the government to specify how it plans to define the value of the offset for habitat banks created following adoption of the bill.

Finally, it is essential that this offset system be harmonized with existing provincial regimes so that its application does not result in the imposition of numerous offset measures for a single project. In Quebec, under a new regime introduced on June 16, 2017, in the *Environment Quality Act*, authorization for a project causing the loss of wetlands or bodies of water may be conditional on the implementation of compensation measures, whether through payment of a financial contribution or the creation or enhancement of wetlands or bodies of water. A similar regime also exists under the *Act respecting the conservation and development of wildlife* for the loss of wildlife habitat, including fish habitat. This regime is currently being reviewed by the Quebec National Assembly. Both regimes already have linking mechanisms to ensure that the loss of wetlands that constitute fish habitat does not lead to the imposition of two offsets under these two regimes. It is important that a project that has caused a loss of habitat not be subject to multiple offsets under separate regimes.

- **Consulting Indigenous peoples (clause 21 enacting section 34.2)**
CPEQ notes that the bill provides in new subsection 34.2(3) that before establishing any standards and codes of practice, the Minister may consult with any provincial government, any Indigenous governing body, any government department or agency or any persons interested in the protection of fish or fish habitat and the prevention of pollution.

CPEQ recognizes the appropriateness of such consultations. However, we caution the government with regard to the mechanism for implementing this measure. In fact, to address the oft-repeated claim from Indigenous people that they have felt rushed in the context of different consultations, it would be wise to clarify that Indigenous people will be consulted in cases of concern to them.

- **Science and the knowledge of Indigenous peoples**

We note from the new section 2.5 that the bill specifically provides that when making a decision, the Minister may consider scientific information and traditional knowledge of Indigenous peoples of Canada that has been provided to the Minister.

CPEQ recognizes the value of using the traditional knowledge of Indigenous peoples. We believe that as part of its reconciliation efforts with Indigenous peoples, it would be appropriate for the Government of Canada to clarify how it intends to reconcile traditional knowledge of Indigenous peoples, or even community knowledge, with scientific knowledge.

Moreover, should we understand the term “community,” as used here, to include both Indigenous communities and municipalities? It would be appropriate, in our view, to limit the concept of “communities.”

- **Agreement to further the purpose of the Act**

Pursuant to subsection 4.1(1), the Minister may enter into an agreement to further the purpose of the Act with the government of a province, an Indigenous governing body or any body, including a co-management body, established under a land claims agreement. Under Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, some mechanisms, including substitution of the impact assessment process, are only possible with Indigenous governing bodies that are “jurisdictions” within the meaning of that Act (paragraph 33(1)(c)), which guarantees that these governing bodies do indeed have the necessary powers. CPEQ wonders why Bill C-68 does not include such precision.

- **Intersection of sex and gender with other identity factors (clause 3 enacting section 2.5)**

In addition to traditional Indigenous knowledge, the new section 2.5 states that when making a decision, the Minister may consider the intersection of sex and gender with other identity factors.

CPEQ wonders about the methodology that will be used to determine the impacts of the intersection of sex and gender with other identity factors. In this regard, we would point out that the document published by Status of Women Canada entitled “GBA: Gender-Based Analysis Plus” did not provide an explanation.
We therefore feel that prior to the coming into force of the Act, guidelines and references should be established that explain how this element will be assessed.

**Conclusion**

While we believe that the protection of fish habitat is ensured by the current provisions aligned with the constitutional powers over fisheries, we recognize that the text of the Act, if improved to reflect our comments (in particular to clarify that section 35 is aimed at protecting fish populations) could be a new starting point. We believe these adjustments must be considered from the outset, however. The next *Fisheries Act* should not jeopardize the carrying on of existing works on the basis of vague criteria, but rather serve as a framework for the development of economically compatible sectors in a sustainable manner.

CPEQ would also point out that for the consultations to be effective, even before the bill is passed, the government should publish the regulations, guidelines and administrative documents so that stakeholders can understand the scope of the proposed revision and provide feedback.

The 2012 regime had the advantage of not subjecting all activities to an approval process as long as the proponent conducted a self-assessment demonstrating the absence of impacts. We believe the Act should continue to provide a streamlined process for such low-risk projects and activities. We propose a mechanism that would be both less burdensome and more transparent than that of 2012.

We believe that certain terms, such as “ecologically significant areas” and “designated projects” require clarification, which could be provided through the simultaneous publication of the implementing regulations.

We are also of the opinion that the government should set out the terms and conditions for the arbitration process in certain situations (e.g., removal of works through a ministerial decision) and provide guidelines and references to explain how the intersection of sex and gender with other identity factors will be evaluated.

Finally, we reiterate that modernizing the Act should not impact on the recognition of existing habitat banks.

We hope that you will find these comments helpful.

Yours sincerely,

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