Mining Association of Canada submission on Bill C-68, *An Act to Amend the Fisheries Act and other Acts in consequence* to the Senate Standing Committee on Fisheries and Oceans

Summary

The Mining Association of Canada (MAC) appreciates the opportunity to provide a submission to the Senate Standing Committee on Fisheries and Oceans for its study of Bill C-68, which would amend the *Fisheries Act*.

This brief builds on our long experience of the *Fisheries Act* and our analysis of Bill C-68 as amended in the House of Commons. Our conclusion is that Bill C-68 requires further adjustment. As well, the changes it would bring must be preceded by policy, guidance and regulations and supported by adequate implementation planning. Without further adjustment and good implementation, Bill C-68 would detract from the goal of improved protection of Canada’s fisheries and fish habitat and would harm Canada’s economy.

We make three requests to the Senate:

- Amend Subclause 1(10) of Bill C-68, which would create a new subsection 2(2) deeming water flow to be fish habitat. The new subsection was added by the House of Commons without adequate review. As written, it would introduce significant regulatory uncertainty and would undermine the functionality of the fish habitat provisions of the Act.

- Amend certain text in Clauses 20, 21, 22, 23 and 31 which create a new permitting scheme. As written, this scheme would divert limited departmental capacity to futile paperwork, mire project proponents in ineffective process, and restrict deployment of new provisions to promote avoidance of harm to fish habitat.

- Urge the government to plan the implementation of Bill C-68. The government must train regional staff and develop key policies, guidance, and regulations allowing routine low-risk activities to proceed prior to coming into force.
Economic activity and protection of fish habitat

No one sets out to harm fish habitat as the goal of their economic activity. The purpose of farmers is to grow food to feed Canadians. Miners produce essential materials, townships maintain safe roads for Canadians to travel, builders build houses for Canadians to live in. All would prefer to avoid harming fish habitat, and, when that is unavoidable, to minimize and offset the harm.

Safeguarding Canada’s fish habitat through compliance with the Fisheries Act will only occur if the Act is clear, practical and timely. Lack of clarity, practicality and timeliness hampers economic activity, harms fish habitat, and wastes the government’s limited resources. Bill C-68 unfortunately creates such a scenario through poor formulation of some sections. An amendment on water flow will confound interpretation of the Act’s prohibition of harm to fish habitat. A proposed designated project prohibition and permitting system will be impractical and it is unclear how it would improve habitat protection.

It is encouraging that Bill C-68 expands the tools available to Fisheries and Oceans Canada (DFO) to promote avoidance of harm to fish habitat through provisions for standards, prescribed works, prescribed waters and regulations. However, we fear that the government may rush the coming into force of the Act before these new tools are operationalized resulting in the department being overwhelmed by applications for routine low-impact works, undertakings and activities. Although the government has wisely increased DFO’s capacity there will not be sufficient capacity to devote to operationalizing the new tools to reduce the workload if coming into force of the Act is premature.

For example, routine culvert maintenance is essential to protect public safety and to avoid harm to fish habitat by allowing passage of water, extending the culvert’s lifespan, and preventing accidents. If it is not clear how to avoid harm during maintenance, harm may occur. If an authorization or permit is required through a long and complex process, maintenance may be neglected. Moreover, processing individual requests for culvert maintenance approvals would overwhelm Fisheries and Oceans Canada’s limited resources, creating impossible delays, and siphoning attention away from habitat protection and compliance promotion.

Water Flow

The House of Commons amended Subclause 1(10) of Bill C-68. Instead of repealing subsection 2(2) of the Act, subsection 2(2) was replaced with a new provision that deems the characteristics of water flow to be fish habitat:

Deeming — habitat
(2) For the purposes of this 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.
MAC does not question that the quantity and quality of water in fish habitat is a necessary aspect of the health of fish habitat. Discussion with DFO and advice from legal experts both confirm that water flow is already recognized as a characteristic of fish habitat under the Act. As such, many existing projects and facilities have minimum flow requirements based on In-Stream Flow Needs assessments completed for the species located in the region. It is also common for structures within creeks and rivers to have year-round flow requirements based on riparian or fish characteristics.

The circular framing of the amendment (the quantity of water flow necessary to sustain fish habitat is deemed to be itself fish habitat) will undermine the practical interpretation of provisions in the Act that address protection of fish habitat. The introduction of new concepts in the amendment (freshwater or estuarine ecosystems) will further hamper interpretation. This definition of the characteristics of water flow as fish habitat is open to broad interpretation and expansion of what can be defined as fish habitat. It could potentially apply to any water flow including rain runoff and various industrial, agricultural and municipal water flow locations never before considered to be fish habitat. It divorces the concept of fish habitat from the presence or use of a location by fish at any point in their life-cycle.

MAC members’ in-house legal counsel advise that the new subsection 2(2) will result in years of litigation seeking interpretation, and will undermine DFO’s efforts to implement the Act. Moreover, by greatly expanding what is defined as fish habitat, it may make the tools expanded by Bill C-68 to promote avoidance of harm to fish habitat difficult to implement.

**MAC recommendation:**

Amend Subclause 1(10) to repeal rather than replace subsection 2(2) of the Act.

[Replace lines 10 through 15 on page 3 with "(10) Subsection 2(2) of the Act is repealed."]

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**Permitting**

The pre-2012 Act included two prohibitions: a prohibition against killing of fish, and a prohibition against harm to fish habitat. The 2012 amendments combined these into a prohibition against serious harm to fish. Bill C-68 would restore the two pre-2012 prohibitions.

Clause 23 of Bill C-68 would also introduce a third prohibition in subsection 35.1(1). The new prohibition would prohibit the carrying on without a permit of any work, undertaking or activity that is part of a designated project as prescribed in regulations. A permitting scheme for designated projects would be created in Clause 21, Subclause 22(4), and Clause 23.

Subclause 20(2) would create a definition of a designated project as any that is designated by regulations.

Subclause 20(3) would create a new subsection 34(3) which would prevent the application of provisions that promote the avoidance of harm to fish habitat to works, undertakings and activities that are part of a designated project.
The clauses in Bill C-68 related to designated projects are described in more detail in the Appendix.

Taken together, these designated project provisions would result in all works, undertakings and activities that are part of a designated project to require a permit regardless of whether they avoid harming fish habitat while identical works, undertakings and activities would not require a permit. This scheme to treat works, undertakings and activities differently depending solely on the project they are associated with, rather than on their potential for harming fish or fish habitat is not science- or risk-based, is inconsistent with the purposes of the Act, and, based on our discussions with DFO, not what was intended.

The Act does not define “works, undertakings and activities” to which it applies. It is therefore unclear how a designated project could be parsed into individual works, undertakings and activities that are and are not subject to the Act in order to determine which require a permit and which do not. The provisions would have to be interpreted based on the purposes and application of the Act to make this distinction. Such interpretation will be challenging in practice and is likely to lead to confusion and litigation.

An additional impossible situation may be created by these provisions if they are deemed to apply to early stage project-related activities, such as planning, public engagement, or baseline studies. As well, the studies and information gathering required by the Impact Assessment Act (IAA) could not be undertaken if there is overlap between designation under the IAA and the Fisheries Act. The IAA (and the current Canadian Environmental Assessment Act, 2012) prohibit the government, including DFO, from making a decision until the assessment is completed, but the assessment cannot be completed without the requested studies and information, and these would require a Fisheries Act permit if deemed part of a designated project.

Unlike the IAA, the designated project provisions proposed in Bill C-68 do not include legislated timelines or outline the process for a designated project to proceed. The prohibition under the Fisheries Act would prohibit any work, undertaking or activity that is part of a designated project to proceed without a permit, regardless of potential for harm to fish or fish habitat. The IAA is carefully crafted to prohibit actions that cause an effect – it does not prohibit all actions.

Conversations with DFO officials have confirmed our interpretation of the permitting mechanisms detailed above, which has caused significant concern for the mining industry. The introduction of a complex permitting process would reduce regulatory certainty and increase the administrative burden on both DFO and the project proponent without increasing the protection of fish or fish habitat.

Further, as confirmed in these discussions, standards and Codes of Practice designed to avoid the harmful alteration, disruption or destruction of fish habitat will not be available for works, undertakings or activities associated with designated projects. As one of the stated purposes of the Act is to conserve and protect fish and fish habitat, it is not clear why these tools, introduced into the Act to avoid the harm to fish habitat, are not available for all works, activities or undertakings.
The purpose of the new designated project provisions is not obvious. The mining industry has worked closely with DFO to understand how to comply with the Act before and after the 2012 amendments. MAC has engaged with DFO and communicated to members to ensure that we understand how to avoid harm and when and how to apply for authorizations. We are struggling to understand how fish and fish habitat protection will be improved by requiring permits where harm to habitat is avoided. It appears that the only outcome will be greatly increased administrative burden to the department and to our industry.

**MAC recommendation:**

Amend Clauses 20, 21, 22, 23 and 31 of Bill C-68 to limit the prohibition and permitting requirements to defined works, undertakings and activities that are likely to harm fish habitat, and allow all other works, undertakings and activities to comply with the Act based on provisions that address low-impact works, undertakings and activities. [see Appendix]

Alternatively, amend Bill C-68 to remove the designated project provisions, restoring the Act to the pre-2012 prohibitions.

**Planning Implementation**

Aside from provisions related to water flow discussed in this brief, Bill C-68 would change the definition of “fish habitat” by adding the phrase “water frequented by fish”. The definition of fish habitat is fundamental to the functioning of the Act and its interpretation is therefore important to workable implementation of the Act, for both DFO and the regulated community. It is vital that DFO develop guidance, based on the extensive jurisprudence built since the fish habitat provisions were first legislated, explaining in plain language how the amendment would change past practice, or confirm that it would not change past practice.

As noted above, Bill C-68 expands the tools available to promote avoidance of harm to fish and fish habitat, and to reduce the administrative burden on the regulated community and the department of compliance for routine, low-impact projects. The tools that would be available include:

- Standards and codes of practice (Clause 21 creating section 34.2)
- Prescribed works, undertakings, activities and waters (Clause 21 creating paragraph 34.4(2)(a) and Subclause 22(2) creating paragraph 35(2)(a))
- Regulations (Clause 21 creating paragraph 34.4(2)(e) and paragraph 35(2)(e) of the Act)

Operationalizing these tools is essential for numerous works, undertakings and activities throughout Canada. As noted above, without at least a core set in place, DFO will be caught in a vicious spiral of not having enough capacity to respond to requests and applications, thus not being able to spare resources to put the tools in place. If authorizations and permits are the
only compliance options, compliance with the Act will be discouraged, economic activity will be hampered, and fish habitat will deteriorate.

Operationalizing these tools is not a monumental task if sufficient time and resources are allocated. DFO can build on the Operational Statements it developed in the past, as well as codes of practice and standards developed by provinces, professional and standards organizations and industry.

Once operationalized, these tools should be made available for all works, undertakings or activities to ensure fish and fish habitat remain protected – irrespective of whether they are associated with designated projects.

**MAC recommendations:**

Urge the government to operationalize at least a core set of compliance tools for routine low-impact projects prior to coming into force of Bill C-68;

Urge the government to publish clear guidance on what is fish habitat; and to complete training of regional staff on all changes brought by Bill C-68, prior to those changes coming into force.

**Summary of Recommendations**

- Amend Subclause 1(10) to repeal rather than replace subsection 2(2) of the Act. [Replace lines 10 through 15 on page 3 with "(10) Subsection 2(2) of the Act is repealed."]

- Amend Clauses 20, 21, 22, 23 and 31 of Bill C-68 to limit the prohibition and permitting requirements to defined works, undertakings and activities that are likely to harm fish habitat, and allow all other works, undertakings and activities to comply with the Act based on provisions that address low-impact works, undertakings and activities. [see Appendix]
  
  o Alternatively, amend Bill C-68 to remove the designated project provisions, restoring the Act to the pre-2012 prohibitions.

- Amend Bill C-68 to encourage the use of the full range of compliance tools by all works, undertakings and activities, including those that are part of designated projects.

- Urge the government to operationalize at least a core set of compliance tools for routine low-impact projects prior to coming into force of Bill C-68.

- Urge the government to publish clear guidance on what is fish habitat; and to complete training of regional staff on all changes brought by Bill C-68, prior to those changes coming into force.
Appendix – Designated Projects Provisions

The table below identifies the main clauses of Bill C-68 which define designated projects, create a prohibition applicable to works, undertakings and activities that are part of a designated project, and create a permitting mechanism for those works, undertakings and activities.

As described in the body of this submission, the problem with these provisions is that the prohibition applies to, and permits are required for, any and all components of a designated project regardless of any impact or relation to fish or fish habitat. The provisions also explicitly exclude the application of compliance mechanisms for routine activities that can avoid harm to fish or fish habitat, through the exception phrase in subsection 34(3) (Subclause 22(3)).

<table>
<thead>
<tr>
<th>Clause</th>
<th>Page</th>
<th>Text related to designated projects provisions</th>
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<tbody>
<tr>
<td>20(2)</td>
<td>15</td>
<td>34(1) designated project means a project that is designated by regulations made under paragraph 43(1)(i.5) or that belongs to a class of projects that is designated by those regulations and that consists of works, undertakings or activities, including any works, undertakings or activities that the Minister designates to be associated with the project; (projet désigné)</td>
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<td>20(3)</td>
<td>15</td>
<td>34(3) Application — Designated project (3) Any provision of this Act that applies to works, undertakings or activities also applies to the works, undertakings or activities of a designated project, except paragraphs 34.4(2)(a) to (c) and (e) and 35(2)(a) to (c) and (e).</td>
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<td>21</td>
<td>19</td>
<td>Death of fish 34.4 (1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish. Exception (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if (a) the work, undertaking or activity is a prescribed work, undertaking or activity or belongs to a prescribed class of works, undertakings or activities, as the case may be, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions; (b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister; (c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or prescribed entity and the work, undertaking or activity is carried on in accordance with the conditions set out in the authorization;</td>
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(d) the death results from the doing of anything that is authorized, permitted or required under this Act;
(e) the work, undertaking or activity is carried on in accordance with the regulations;
(f) the work, undertaking or activity is carried on in accordance with a permit issued under subsection 35.1(2), in the case of a designated project; or...

22(2)  21  35(2)
(a) the work, undertaking or activity is a prescribed work, undertaking or activity or belongs to a prescribed class of works, undertakings or activities, as the case may be, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

22(3)  21  
(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or prescribed entity and the work, undertaking or activity is carried on in accordance with the conditions set out in the authorization;

22(4)  21  
(f) the work, undertaking or activity is carried on in accordance with a permit issued under subsection 35.1(2), in the case of a designated project; or

23  22  
Designated project
35.1 (1) No person shall carry on any work, undertaking or activity that is part of a designated project except in accordance with a permit issued under subsection (2).

Issuance of permit
(2) The Minister may issue a permit to carry on any work, undertaking or activity that is part of a designated project and attach any conditions to it.

Amendment, suspension or cancellation
(3) The Minister may amend, suspend or cancel a permit issued under subsection (2).

Associated works, undertakings or activities
(4) The Minister may designate any work, undertaking or activity as a work, undertaking or activity that is associated with a designated project.

31(6)  38  43(1)
(i.5) for the purposes of the definition designated project in subsection 34(1), designating projects or classes of projects that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat;

MAC proposes four small changes to relevant clauses of Bill C-68. The proposed amendments would adjust the provisions to limit permitting requirements to designated works, undertakings and activities within a designated project, and allow all other works, undertakings and activities
within a designated project to proceed according to other compliance mechanisms provided by the Act.

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<thead>
<tr>
<th>Clause</th>
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<th>Proposed Amendment</th>
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<tr>
<td>20(2)</td>
<td>15</td>
<td>Replace lines 21 through 23 on page 15 with: “regulations and that consists of prescribed works, undertakings or activities or works, undertakings or activities”</td>
</tr>
<tr>
<td>20(3)</td>
<td>15</td>
<td>Replace lines 32 and 33 on page 15 with: “takings or activities of a designated project that are not designated works, undertakings or activities pursuant to subsection 35.1(4).”</td>
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<td>23</td>
<td>22</td>
<td>Replace line 16 on page 22 with: “or activity that is designated by the Minister to be associated with the designated project except in”</td>
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<td>23</td>
<td>22</td>
<td>Replace line 19 on page 22 with: “work, undertaking or activity designated pursuant to subsection (4) that is part of a designated”</td>
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1 The Mining Association of Canada (MAC) is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Our members account for most of Canada’s production of base and precious metals, uranium, diamonds, metallurgical coal, and mined oil sands. Canada produces over 60 minerals and metals from more than 200 mines, providing more than 400,000 direct jobs and 190,000 indirect jobs.

Canada’s mining sector has pioneered meaningful partnerships with Indigenous Peoples. Through mechanisms such as Impact Benefit Agreements, the sector has worked to involve and share the benefits of mining with Indigenous Canadians. Proportionally, the mining industry is the largest private sector employer of Indigenous Peoples, and a major partner of Indigenous businesses. The training programs, education support and job experience offered by mines open lifetime career paths for Indigenous youth, which can lead to multi-generational transformation.

Indigenous participation in the mining sector is growing significantly. Our sector’s continued contribution to economic reconciliation with Indigenous Peoples depends upon our ability to bring new mines into production.
Investment, whether foreign or domestic, is highly sensitive to unpredictability of process and timelines. Canada’s perceived attractiveness as an investment destination has been deteriorating in recent years, evidenced by, among other factors, our reduced global share of exploration spending, a halving of mining investment intentions and the relative decline of our mining supply and services sector. Legislative and policy changes create uncertainty – poor design, transition or implementation of those changes could have long-lasting consequences for mining investment in Canada. The investment community is watching closely to see how this legislation will be transitioned and implemented. There has already been a significant investment chill in international investment into Canada.