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PDAC Submission:
*Bill C-68, An Act to amend the Fisheries Act and other Acts in consequence*

As the national voice of Canada’s mineral exploration and development community, the Prospectors & Developers Association of Canada (PDAC) takes an active interest in regulatory and policy initiatives that shape the landscape within which the minerals industry operates. To that end, PDAC has been engaged on *Bill C-68, An Act to amend the Fisheries Act and other Acts in Consequence* (Bill C-68) as it has moved through the Parliamentary process. On behalf of our 8,000 members, PDAC appreciates the opportunity to provide comments to the Senate Committee on Fisheries and Oceans related to its study of Bill C-68.

A number of factors affect the decisions made by investors about where to invest in projects, and by companies about where to explore and mine. These factors profoundly influence how often new, economically viable mineral deposits are found and whether they will be mined. In particular, regulatory efficiency and certainty play a significant role in determining investment decisions, particularly where to invest among competing jurisdictions. An unpredictable, complex, and inefficient regulatory regime will increase risk and deter investment, and consequently exacerbate the waning of Canada’s mineral industry competitiveness on the global scale. Thus, PDAC and its members take a keen interest in Bill C-68 and its forthcoming regulations and policies.

To date, PDAC has participated in the federal government’s review of environmental and regulatory processes, including the review of the *Fisheries Act*. PDAC appeared before the House of Commons Standing Committee on Fisheries and Oceans to provide testimony of our members’ experiences with the 2012 changes to the *Fisheries Act* and of our commitment to ensuring Canada’s regulatory system remains as efficient and effective as possible. We also made a submission in May 2017 in response to the Standing Committee’s report, the Review of Changes Made in 2012 to the *Fisheries Act*, the *Environmental and Regulatory Reviews Discussion Paper* in August 2017, the House of Commons Standing Committee on Fisheries and Oceans in response to Bill C-68 in May 2018, and to the *Approach to a key regulation under the proposed fish and fish habitat provisions of the Fisheries Act* consultation paper in September 2018.

Following a review of Bill C-68 and the amendments made to the Bill during the review by the House of Commons Standing Committee on Fisheries and Oceans, PDAC encourages the Senate to take the following three actions as they relate to Bill C-68:

1. Amend subsection 1(10) of Bill C-68, which presently establishes subsection 2(2) that defines all water flow as fish habitat.
2. Amend subsections 20(2), 20(3), 22(4), and 31(6), as well as section 23 – all which currently create and contribute to a new permitting scheme.
3. Plan appropriately for the implementation of Bill C-68 such that the key policies and regulations allow common activities to proceed, and to train regional staff on the amendments and their effect prior to the coming into force.

Water Flow and Fish Habitat:

On May 22, 2018 during the review of Bill C-68 at the House of Commons Standing Committee on Fisheries and Oceans, the Green Party proposed to amend subsection 2(2) of Bill C-68 by replacing it with a provision that defined the flow of water as fish habitat. In its present form, subsection 2(2) reads as follows:

“For the purposes of this [the Fisheries 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.”

The Green Party’s amendment of subsection 2(2) was approved at committee and adopted at second reading. It has since remained in Bill C-68.

PDAC understands that the consideration of the flow of water is important when describing the characteristics of healthy fish habitat. With that being said, it is important that any changes to definitions of the very nature of fish habitat that the Fisheries Act is trying to protect are clear and practical. As it is currently written, subsection 2(2) is neither.

This amendment defining water flow as fish habitat effectively expands the definition of fish habitat to the point of unreasonableness. It opens up the definition of fish habitat to very broad interpretation such that virtually any moving water source, whether rain water or industrial water, could potentially now be included and considered as water flow – which has not been the case to date. If subsection 2(2) remains in the bill as is, it would undermine how the Act is supposed to reasonably function and will undoubtedly disrupt both new and existing projects in the resource sector and beyond. This will ultimately have a significant detrimental effect on Canada’s overall competitiveness, and on a variety of sectors of the economy.

As a result of the lack of clarity and the inevitable issues on the implementation and enforcement of subsection 2(2) in a practical sense, PDAC recommends that the Senate:

- Amend subsection 1(10) of Bill C-68 such that subsection 2(2) is removed entirely, rather than replaced.

Designated Projects and Permitting:

The Fisheries Act is the main federal statute managing Canadian fisheries resources and includes provisions for the conservation and protection of fish and fish habitat. The Act has been amended several times since its inception. Prior to the changes made to the Fisheries Act in 2012, the Act contained two prohibitions, which (1) prohibited against the killing of fish, and (2) prohibited against
harm to fish habitat. In 2012 the Act was amended to consolidate these two prohibitions into one, which prohibited the “serious harm to fish”. Bill C-68 seeks to restore the pre-2012 prohibitions.

In addition to reverting back to pre-2012 prohibitions, Bill C-68 would also establish a new prohibition – by amending subsection 35.1(1) – that would prohibit the carrying out without a permit of any work, undertaking, or activity that is part of a designated project as prescribed in regulations authorized by paragraph 43(1)(i.5).

As it is currently proposed, amending subsection 34(3) of the Fisheries Act so that it reads that

“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)”

is very problematic because it would result in the prevention of the application of paragraphs a, b, c, and e of subsections 34.4(2) and 35(2) to works, undertakings, and activities that are part of a designated project. These paragraphs are critical because they are the apparatus that allow works, undertakings, and activities to be carried out that would otherwise be prohibited as prescribed works, undertakings, activities and waters, authorizations, and regulations.

The end result of these changes proposed in Bill C-68 is that all works, undertakings, and activities that are part of a designated project would require a permit regardless of whether or not it is harming fish habitat. However at the same time, all works, undertakings, and activities that are identical to those in a particular designated project but are not part of a designated project would not require any such permit. Creating a system whereby works, undertakings, and activities are treated differently depending entirely on whether they are part of a designated project, as opposed to what their actual harm on fish habitat would be, is inconsistent and unreasonable.

After careful review, there is little sense in practical terms for this prohibition and it remains in conflict with the intention of the bill. Therefore, due to the inevitable issues around compliance and interpretation of the new designated project provisions, PDAC recommends that the senate amend the designated project provisions in the following way:

- Amend subsection 20(2), 20(3), 22(4), and 31(6) and section 23 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, as outlined in paragraphs a, b, c and e of subsections 34.4(2) and 35(2) of the Fisheries Act.

Coming Into Force:

In addition to the issues surrounding water flow being defined as fish habitat and the creation of a new permitting scheme around works, undertakings, and activities, there is a general concern regarding the
implementation of Bill C-68. The Bill in general is a significant shift away from not only the current Act, but also the pre-2012 Act.

When Bill C-68 was first introduced, the government had communicated that it was to serve as a measure to "restore lost protections, and incorporate modern safeguards so that fish and fish habitat are protected for future generations and so that Canada's fisheries can continue to grow Canada's economy and sustain coastal communities." The reference to "restor[ing] lost protections" is commonly recognized as reversing the changes that the previous government made to the Act in 2012, specifically altering the Act's protection for fish and fish habitat in sections 32 and 35.

PDAC is particularly concerned about the potential for a prolonged transition period that would occur as the Act goes through new interpretation and the appropriate jurisprudence builds up. A lengthy transition contributes to uncertainty as proponents are left interpreting, or operating in the absence of, clear regulations, policies, and guidelines. The Department of Fisheries and Oceans (DFO) must be prepared to handle the potential confusion and uncertainty caused by Bill C-68, but it has not yet convincingly demonstrated that it has the resources or ability to do so.

In order for an organized, predictable coming into force of Bill C-68, the DFO must make provisions to ensure that it has adequate capacity to manage the transition and to effectively execute the changes outlined in Bill C-68 prior to its coming into force. This includes but is not limited to, a trained regional presence that can handle the influx of requests on the department, appropriate staffing levels to handle requests and applications, and to develop guidance through the use of plain language on what Bill C-68 would mean compared to before its adoption.

**Conclusion:**

The Canadian mineral industry faces fierce global competition for investment and Canada is starting to fall behind its competitors in a number of areas, indicating a decline in attractiveness as a destination for mineral investment. Regulatory regimes play a significant role in determining investment decisions, particularly where to invest among competing jurisdictions. Mineral industry investment is particularly sensitive to legislative and policy changes as such changes often generate uncertainty and unpredictability. An unpredictable, complex, and inefficient regulatory regime will increase risk and deter investment, and consequently exacerbate the waning of Canada's global mineral industry competitiveness.