WATERPOWER CANADA ("WPC")
RECOMMENDATIONS
FOR BILL C-68

April 26, 2019

SENATE STANDING COMMITTEE ON FISHERIES
AND OCEANS
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1 SUMMARY OF RECOMMENDATIONS

Remove the provision deeming flow to be fish habitat from the Bill

Flows are an important aspect of aquatic ecosystems and the hydropower industry understands the need to consider flow in the protection of fisheries. However, the proposed section 2(2) of the Act that deems flow to be fish habitat and was introduced in the Bill during the House proceedings, is problematic and should be removed. The Fisheries Act includes other provisions that protect flows.

Require the Minister to consult other jurisdictions that have overlapping powers before making an order on flow

We recommend the Act require the Minister to consult any jurisdiction that might have overlapping regulatory authority before making an order under subsection 34.3(2) on flows or obstructions.

Clarify or remove the designated projects provisions

The designated projects provisions of Bill C-68, as currently worded, include an unnecessarily broad prohibition against works, undertakings or activities that are part of a designated project regardless of their potential impact on fish, and those provisions are not clear. We recommend either removing them or amending the Bill to allow the Governor in Council to designate certain future works, undertakings, and activities that present a high risk of destroying habitat or killing fish, instead of designating projects.

Improve the habitat banking provisions of the Act and allow third-party banking

We recommend introducing provisions in the Act allowing third party banking and giving the power to the Governor in Council to adopt regulations to establish a system for the management of habitat credits created in relation to a conservation project, specifying how they are to be allocated, exchanged, traded, sold or cancelled.

Delay the coming into force of the changes to the Fisheries Act by a minimum of one year, until in-depth consultations on all key regulations and policies under the new provision have been completed

Regulations and policies can help the modified Fisheries Act operate in a manner that protects the sustainability of fisheries without unduly restricting other water users. If this Bill is passed by Parliament, ample time must be given to DFO to develop, in consultation with all stakeholders, sound and practical regulations and policies. It is critical that Bill C-68 does not come into force until this is done. Consultations that will have taken place before the Bill is adopted in its final form cannot be sufficient.

Ensure that a simplified approach is available to allow low-risk activities

In order to minimize the number of authorizations that will be required, we recommend that significant effort be dedicated to the development and implementation of standards and codes of practices in consultation with industry, especially during the first years after the adoption of Bill C-68.

Improve the list of factors to be taken into consideration in decision making

We recommend that the decision statement under the IAA (Bill C-69) be made one of the factors that the Minister must consider under section 34.1(1). We also recommend that the "public interest" be added to the factors the Minister must consider in subsection 34.1(1) (in a manner similar to section 6 of the current Act).
Clarify the purpose of the Act to focus it on the sustainability of fisheries and fish populations

We recommend that the purpose statement be re-drafted as follows to link its two components:
“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.”

2 INTRODUCTION

WaterPower Canada (“WPC”), formerly known as the Canadian Hydropower Association (CHA), represents both the producers of hydroelectricity as well as the service and supply businesses that support the industry. WPC appreciates the opportunity to contribute to Parliament’s consideration of Bill C-68 (“the Bill”). This paper contains our comments and suggestions to improve the legislation. It is intended to provide further details on the recommendations we presented to the Committee during our appearance on April 11, and to make additional suggestions on how to improve Bill C-68. This Bill is critically important to the hydropower industry; we have been involved throughout the review of the Fisheries Act. The Bill’s provisions will influence how members operate facilities and evaluate investments, decisions that are vital to Canada’s transition to a cleaner energy system and to the creation of good paying jobs for Canadians.

Hydropower supplies over 60% of Canada’s electricity. It is our largest generation source by far. The result is an electricity system that is one of the cleanest, most renewable, and reliable in the world. The generation of hydroelectricity produces virtually no greenhouse gas (“GHG”) emissions. It can, and must, play a central role in achieving Canada’s climate change targets.

Studies indicate that to meet our 2030 and 2050 commitments, Canada needs to electrify the economy and further reduce GHG emissions in the electricity industry, amongst other measures. This means doubling, or even tripling, generation by 2050. This will require a major expansion of hydropower, as well as wind, solar, tidal, and geothermal sources. Canada has vast amounts of undeveloped hydroelectric resources, and our industry is up to the challenge.

Electricity is fundamental to Canadians’ quality of life. Our industry accepts responsibility for providing it in ways that do not compromise Canada’s natural environment, particularly our aquatic ecosystems. A well-designed Fisheries Act (“the Act”) can support that objective. Clarity, reliability, and timeliness of authorization processes are necessary elements of an effective Fisheries Act. Hydropower projects are capital-intensive and take a long time to build. Companies must make large investments over extended periods before they can generate revenues to begin to recover their costs. Consequently, what we need is a Fisheries Act that clearly identifies what is required of developers, ensures that decisions are balanced and timely, and provides certainty regarding existing facilities and operations, by not imposing constraints that were not contemplated at the time of the original investment.

WPC has been involved in the current review of environmental and regulatory processes from its outset. We presented our recommendations to the House Standing Committee
on Fisheries and Oceans (FOPO) during its 2016 review of the Fisheries Act, we submitted detailed recommendations to the government following the release of its Discussion Paper during the summer of 2017 and submitted a series of recommendations on potential improvements to Bill C-68 to FOPO in May 2018. In addition, we expressed our specific concerns about the new section 2(2) in letters to Ministers Leblanc and Wilkinson.

Unfortunately, few of our recommendations have been heard and Bill C-68, as introduced in the Senate, still has serious flaws and could become a significant obstacle to the successful operation and development of our industry if it is not improved. The purpose of this submission is to make recommendations that would make Bill C-68 workable for our industry.

The Bill broadens the purpose of the Fisheries Act, broadens the definition of fish habitat, reinstates and broadens the prohibitions from a previous version of the Act that were at times problematic, gives new powers to the Minister to make orders on flows, and introduces new regulatory mechanisms. This creates considerable challenges. Parliament and the government need to ensure that by restoring old provisions they are not re-introducing the flaws associated with them in the past or causing new difficulties.

WPC is pleased to note that the factors the Minister of Fisheries, Oceans and the Canadian Coast Guard (“DFO”) must consider when making key decisions will continue to be explicitly listed in the Act and that they include the potential impact on the productivity of fisheries, fish management objectives, mitigation, offset measures, and habitat banks. This should contribute to ensuring that good projects will be approved, and decisions will be more predictable and consistent. WPC also supports the efforts to make decisions more transparent through the proposed registry. In our opinion, the explicit requirement to consider the impacts of decisions on the rights of Indigenous peoples and to consider applicable Indigenous knowledge can advance reconciliation.

However, we are particularly concerned by the new Section 2(2) that deems the quantity, timing and quality of the water flow to be fish habitat, by the lack of clarity of the “designated project” provisions and by the return to a strengthened version of old prohibitions against fish habitat disruption and fish kill. These changes raise major uncertainties in our sector.

Overall, Bill C-68 needs to be improved. In addition, new regulations should be developed under the Act, after thorough consultations with stakeholders, before it comes into force. This would give our industry the confidence to continue to develop Canada’s original renewable, a non-emitting electricity source.

3 WATERPOWER CANADA’S DETAILED RECOMMENDATION FOR AMENDMENTS TO BILL C-68

3.1 PROVISIONS ON FLOWS

3.1.1 REMOVE SECTION 2 (2)

Flows are an important aspect of aquatic ecosystems. The hydropower industry understands the need to consider flow in the protection of fisheries. However, section 2(2),
which was introduced in the Bill during the House proceedings, is problematic and should be removed. The Fisheries Act already contains provisions that are sufficient to protect flows.

Section 2(2) states that "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." Section 2(2) would introduce explicit hydrological criteria (flow, water quality) in the legal definition of habitat and would distinguish flow and water quality from other parameters that characterize fish habitat such as the nature of the bottom, the abundance of food, the presence of shelter. All of these elements, and more, are normally used to characterize fish habitats.

Section 2(2) would not conform to the scientific understanding of what fish habitat is. It would represent a significant change in the legal definition of fish habitat, leading to great uncertainty. It would also lead to a new and broader interpretation of the prohibition against the harmful alteration, disruption or destruction of fish habitat (HADD) and to changes in the interpretation of other important provisions of the Fisheries Act.

Section 2(2) singles out flows from the other considerations that are normally taken into account when characterizing fish habitat. Any court, if asked to review a DFO decision or to decide what constitutes a HADD, could conclude that Parliament’s intent was that any change in flow be deemed to be a HADD unless it has been proven to have no effect on fish. But that is something that is often impossible to demonstrate. This, combined with the introduction of the term "activity" in the HADD prohibition, could mean that flow changes due to normal or emergency facility operations could require case-by-case authorization. This would make compliance with the Act nearly impossible for many hydropower facilities. It could also lead to the imposition of flow regimes on new hydroelectric facilities that would make projects with storage infeasible. The ability to manage flows in hydroelectric facilities plays a critical role in maintaining a reliable and resilient non-emitting electricity system (i.e. balancing variability in demand and supply in real-time, or storing energy from one season or year for the next).

Specific technical criteria characterizing fish habitat including flow are currently used and will continue to be used in the implementation of the Fisheries Act. In fact, under both the pre-2012 Act and the current Fisheries Act, authorization conditions under 35(2) often include flow regimes. Although flows are not specifically mentioned in the fish habitat provisions of the Act, they have always been recognized by DFO and industry as a factor that might impact the biological functions of water bodies and the productivity of habitat. Such factors however, do not lend themselves to prescriptive provisions in legislation. They are much better dealt with on a case-by-case basis at the implementation stage and through project authorizations.

3.1.2 REQUIRE THE MINISTER TO CONSULT OTHER JURISDICTIONS BEFORE MAKING ORDERS ON OBSTRUCTIONS AND FLOWS (S.34.3)

Section 34.3 will give the Minister broad powers to act when an obstruction in a waterway affects fish passage or flow in a manner detrimental to fish of fish habitat. The Minister can, among other things, order the removal of an obstruction (a dam for example) or order a specific flow regime. We understand the purpose of these provisions; however, we are
concerned about the risk of conflicting decisions by the various jurisdictions and institutions that have overlapping mandates.

Hydroelectric generating stations and other dams are regulated by provincial authorities, interprovincial management bodies, and international agreements. In some hydroelectric reservoirs, water is stored not only to produce power but also to control floods, to allow navigation, or for other uses. Hydroelectric generating stations typically are subject to water management authorities that establish constraints on flows that take into account the needs of all water users. These bodies oversee a variety of water quality parameters – such as flow, temperature, volume, and timing – that are associated with the facilities.

In order to avoid potential conflicts with other jurisdictions, we recommend the Act require the Minister to consult any jurisdiction that might have overlapping regulatory authority, before making an order under subsection 34.3(2).

Requiring the Minister to consult other overlapping flow jurisdictions before making an order under section 34.3(2) would minimize regulatory uncertainty. It would be consistent with subsection 37(4). That provision requires the Minister to consult with or consider water management from other agencies when considering the closing of a work or undertaking.

3.2 Clarify or Remove the Designated Projects Provisions

As proposed, the Fisheries Act could require the proponent of any work that is part of a "designated project" to apply a permit in order to proceed. This prohibition is too broad and imprecise. The text could be interpreted to mean that any "work, undertaking or activity" on a designated project must receive a permit, even if it were to have no impact on fish. In addition, if the word "project" – which is not defined in the Bill – were interpreted as potentially including some categories of existing facilities, it would create a major burden for the operators of such facilities. We do not believe that this is the Government's intent.

The result, nonetheless, would be significant delays developing new projects and the creation of an ambiguous, complicated and unwieldy regulatory environment. It would increase the regulatory workload for government and industry. But there would be no benefit to fish or fish habitat in those cases where benign activities would still have to be permitted. Moreover, the Act’s implementation would be inconsistent. The same activities would be treated differently depending upon whether they were part of a designated or non-designated project.

We believe these provisions are unnecessary and recommend removing them in the interests of simplifying, but not weakening, the Act’s operation. If some similar provisions are to replace them, they need to apply only to future activities with the potential for harm. This could be achieved by amending the Bill to allow the Governor in Council to designate certain future works, undertakings, and activities with a high risk of destroying habitat or killing fish, instead of designating entire projects. Designated works, undertakings, and activities would still require a permit (as now provided by the Bill).

Subsequent changes would also have to be made:
• Replacing the definition of “designated projects” by a similar definition of “designated works, undertakings or activities” in Section 34 (1),
• Changing the wording of the prohibition of Section 35.1 (1):
  “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).”
• Making the following change in Section 35.1(2), which gives the Minister the power to issue a permit for works, undertakings or activities that are part of a designated project:
  “35.1(2) The Minister may issue a permit to carry on any designated work, undertaking or activity that is part of a designated project and attach any conditions to it.”
• Modifying section 43 (1) i5) as follows:
  “(i.5) for the purposes of the definition of designated project works, undertakings or activities in subsection 34(1), designating project works, undertakings or activities or classes of designated project works, undertakings or activities that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat.”

3.3 IMPROVE THE HABITAT BANKING PROVISIONS OF BILL C-68 AND ALLOW THIRD-PARTY BANKING (S. 42.01 TO 42.04)
Habitat banks offer many advantages over traditional offsets and WPC is pleased to note that Bill C-68 provides them with a legal framework. Flexible and third-party habitat banks can facilitate the development of hydropower projects while ensuring that the productivity of fisheries is maintained.

We recommend introducing provisions in the Act, allowing third-party banking (credits earned through conservation projects undertaken by entities other than the proponent of the project whose impacts need to be offset), and giving the power to the Governor in Council to adopt regulations to establish a system for the management of habitat credits created in relation to a conservation project, specifying how they are to be allocated, exchanged, traded, sold or cancelled.

3.4 DELAY THE COMING INTO FORCE OF THE CHANGES TO THE ACT TO ALLOW EXTENSIVE CONSULTATIONS ON REGULATIONS AND POLICIES
Our industry remains concerned that the return to the pre-2012 prohibitions against habitat alteration and fish death in a broader and stricter form will make it extremely challenging to make the Act workable. Regulations and policies will play a critical role in ensuring that the modified Fisheries Act is implemented in a manner that respects the fundamental objective of protecting the sustainability of fisheries while allowing our water resources to be used to the benefit of all. It is thus essential that if this Bill is passed by Parliament, ample time be given to DFO to develop, in consultation with all stakeholders, sound and practical regulations and policies. It is critical that Bill C-68 does not come into force until this is done. Consultations that will have taken place before the Bill is adopted in its final form cannot be a substitute for such consultations as the stakeholders and DFO cannot know in advance the exact provisions of the future legislation.
Hence, a minimum of one year should be provided between the time the Act receives Royal Assent and the coming into force of the key provisions on fish habitat, passage and death. This minimum time should be set in a provision of the Bill.

3.5 ENSURE THAT A SIMPLIFIED PROCESS IS AVAILABLE TO ALLOW LOW IMPACT ACTIVITIES
Bill C-68 gives the Minister the power to develop standards and codes of practice to minimize fish death and habitat alteration and reduce pollution. The use of these codes and standards is essential to reduce the workload of both proponents and DFO related to the management of low impact activities. Such activities can be exempted from case-by-case authorizations as long as they are conducted in conformity with the codes and standards.

We recommend that significant effort be dedicated to the development and implementation of standards and codes of practice in consultation with industry, especially during the first couple of years after the adoption of Bill C-68.

3.6 OTHER RECOMMENDATIONS
3.6.1 CONSIDERATIONS AND FACTORS IN DECISION MAKING (S. 2.5 & 34.1(1))
Section 2.5 provides a list of things that the Minister may consider when making decisions. Section 34.1(1) enumerates the factors that the Minister must consider when making certain decisions or recommendations to the Governor in Council (“GIC”). We suggest the following improvements to these sections of the Bill:

3.6.1.1 ALIGNMENT OF DESIGNATED PROJECTS’ AUTHORIZATIONS UNDER THE FISHERIES ACT WITH DECISION STATEMENTS UNDER THE IMPACT ASSESSMENT ACT (“IAA”) – When a project, designated under the IAA, has already undergone an impact assessment (“IA”) and been approved, then the IA decision – including the terms and conditions of the Decision Statement – should inform and streamline the authorization process under the Fisheries Act.

We recommend that the decision statement under the IAA (Bill C-69) and the conditions attached to it be made one of the factors that the Minister must consider under section 34.1(1).

3.6.1.2 PUBLIC INTEREST – In the current Fisheries Act and in the IAA, as proposed in Bill C-69, the public interest is one of the factors that the decision maker needs to consider when dealing with a project or drafting regulations. As a matter of industry practice, our projects include strong measures to prevent, mitigate, and offset impacts on fish and fisheries. However, completely mitigating or offsetting all impacts is seldom possible. The residual impact must be balanced against the fact that electricity is an essential public service, as demonstrated by the degree of provincial regulation and ownership. It is in the public interest that clean electricity generation projects (which also have significant economic benefits) proceed. The government will have to decide the appropriate balance of interests in any proposal. This duty should be explicitly stated in the Act.
We recommend that the “public interest” be added to the factors the Minister must consider in subsection 34.1(1) (in a manner similar to section 6 of the current legislation).

3.6.2 CLARIFY THE PURPOSE OF THE ACT TO ENSURE THAT THE MAIN FOCUS IS ON THE SUSTAINABILITY OF FISHERIES AND FISH POPULATIONS (S. 2.1)

WaterPower Canada believes the purpose of the Fisheries Act and its prohibitions should be anchored to the principle of sustainability of commercial, recreational and Indigenous fisheries at a fish population level (and not at the individual fish level). We are concerned that the return to modified versions of the fish kill and fish habitat prohibitions could, in the assessment of the impacts of natural resources development projects, lead to implementation and enforcement practices that would put too much emphasis on the protection of individual fish and not enough on populations. An approach to limit this risk would be to clarify the purpose of the Act.

The proposed purpose statement of Bill C-68 comprises the two distinct clauses. One aims at the proper management of fisheries. The other provides for the conservation and protection of fish and fish habitat. In the context of the Fisheries Act, protection of all fish and fish habitat should not be understood as an end in itself but rather as a means to ensure the sustainable management of all fisheries. If one of the purposes of the Act is to protect all fish and fish habitat, there is an argument to be made that the objective might be both a practical impossibility and, even if it were possible, in many instances it would not be necessary to sustaining fish populations.

We recommend that the purpose statement be re-drafted as follows:

“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 purpose statement presents a coherent, realizable objective. It also has the advantage of situating the Act’s subject matter within the exclusive federal power over the fisheries (Subsection 91(12) Constitution Act).
4 CONCLUSION

Unless it is improved, Bill C-68 could become a significant obstacle to the successful operation and development of hydropower, Canada’s largest electricity source and a key asset in Canada’s fight against climate change. This submission contains recommendations for amendments that would make the Act workable for our industry.

Our top recommendation is to remove provision 2(2) deeming flow to be fish habitat. It is also essential that the Minister be required to consult jurisdictions that may have overlapping powers before making an order on flows and that the designated project provisions of the Bill be removed or clarified.

It is also critical that ample time be provided for the prudent development of regulations and policies including in-depth consultations with stakeholders once the Bill is adopted in its final form and before the coming into force of the key changes to the Act.