Submission on Bill C68:

An Act to amend the Fisheries Act and other Acts in consequence

Submitted to the Standing Committee on Fisheries and Oceans
May 7, 2018

We would like to thank the Standing Committee of Fisheries and Oceans for the opportunity to share our views on *Bill C68 - An Act to amend the Fisheries Act and other Acts in consequence*. This submission reflects the views of a group of conservation and environmental organizations from across the country that has been working together on *Fisheries Act* reform for over two years.[1]

Collectively, we believe that Bill C-68 takes the government a long way toward delivering on its commitments to restore lost protections and introduce modern safeguards to the law. Further, we believe that with incremental but important amendments, the Bill can result in a strong *Fisheries Act* that will have positive impacts on the health and sustainability of native fish populations and their habitats for generations to come. As such, our submission briefly highlights what we see as positive progress on restoring and modernizing the *Fisheries Act* included in Bill C-68, and then outlines a series of amendments to further strengthen the *Fisheries Act*.

PROGRESS ON LOST PROTECTIONS AND MODERN SAFEGUARDS IN BILL C-68

Bill C-68 restored much of what was lost under changes made to the *Fisheries Act* in 2012, maintains and builds on a number of key improvements made at that time, and introduces a number of modern concepts and provisions.

Specific highlights include:

- Returning prohibitions against harmful alteration, disruption and destruction of fish habitat (HADD) and its applicability to all native fish and fisheries, as well as the prohibition on causing death of fish by means other than by fishing that were long-standing and critical foundations of the law.

- Including a Purpose, Considerations for decision-making, and Factors to inform the making of regulations that reflect key sustainability principles.

- Introduction of provisions for rebuilding depleted fish populations.

- Creation of a public registry to support the assessment of cumulative effects and to enhance transparency of decision-making.

- Strengthening provisions with respect to ecologically significant areas (ESA) to move from concept to action.

- Greater recognition of Indigenous rights and knowledge.

- A statutory review of the Act every five years to provide opportunities to adapt the law to address rapid or ongoing changes, particularly those related to climate change.

1. Note that a number of the groups signatory to this submission have also provided the committee with their own briefs and in some cases have appeared or will appear before the committee to share perspectives that support and in some cases go beyond what is included in this submission.

KEY AMENDMENTS FOR A MODERN *FISHERIES ACT*

The amendments proposed in this submission build on the progress noted above with a focus on three key elements critical to modernizing the *Fisheries Act*: 1) Rebuilding fish populations; 2) Cumulative effects; and, 3) Environmental flows and fish passage. For each element we include a short rationale for the proposed amendments followed by a box that outlines proposed additions or modification to wording in Bill C-68.

1. Rebuilding fish populations

Many of Canada's marine, diadromous and freshwater fish populations are depleted. Marine populations have declined in biomass by more than 50 percent since 1970, and currently there are 26 marine stocks listed in the critical zone of DFO's precautionary framework. As of March 2018, only three have publicly available rebuilding plans. Northern cod, which has been under a moratorium for twenty-five years is still without a rebuilding plan. Further, many recreational fish species are either in decline or maintained primarily through stocking. Of the 711 species assessed at some level of risk by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), 158 are fish, the vast majority of which are freshwater species. A modern *Fisheries Act* should result in meaningful efforts to rebuild marine and freshwater fish populations, within the context of modern fisheries management principles.

Bill C-68 includes important new provisions for rebuilding depleted fish populations; however, as currently worded they are unnecessarily discretionary and limited in terms of advancing planning and action to ensure the sustainability of fisheries. The amendments proposed below would strengthen provisions for rebuilding fish populations, bring Canada in line with leading progressive fishing nations and international fisheries law, and help drive progress on ensuring the long-term sustainability of fisheries and the populations of fish upon which they depend.

The proposed amendments address three significant shortfalls in C-68:

1. Including a duty to rebuild stocks, not just a duty to "consider whether there are measures in place";

2. Specifying the aim or target for rebuilding; and

3. Including guidance on a time frame in which rebuilding could be expected.

PROPOSED AMENDMENTS TO THIS SECTION:

Purpose of Act

2.1 The purpose of this Act is to provide ~~a framework~~ for:

a) the long term conservation and sustainable use of the fishery;

b) the proper management and control of fisheries including the rebuilding of fish stocks as necessary to healthy sustainable levels; and

c) the conservation and protection of fish and fish habitat, including by preventing pollution.

Factors — measures respecting fish stocks

6.1(1) In the management of fisheries, the Minister shall implement measures designed to maintain fish stocks at or above the target reference point or to healthy levels that promote the long-term sustainability of fisheries and fish habitat.

(2) If a fish stock level has declined to or below its limit reference point the Minister shall:

(a) develop and implement a plan to return the fish stock to its target reference point within a specified time period that is:

(i) as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not to exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which Canada participates dictate otherwise;

(b) if the loss or degradation of the stock's fish habitat has contributed to the fish stock's decline, develop and implement a plan to restore that fish habitat within the same specified time period and subject to the same factors as set out in subsections 6.1(2)(a)(i) and (ii) above.

6.1(3) If during or at the end of the time frame for implementing the plan referenced in subsection (2) it becomes apparent that the fish stock will not recover to a healthy sustainable level or the needs of the fishing community or the affected marine ecosystem dictate otherwise, the Minister may suspend or terminate the plan.

6.1(4) A plan referenced in subsection (2) shall be posted on the registry once it is developed. If at any point, the plan is amended, suspended or terminated pursuant to subsection (3), the Minister shall immediately post a notice on the registry respecting the change as well as the reasons for doing so.

Annual report

42.1 (1) The Minister shall, as soon as feasible after the end of each fiscal year, prepare and cause to be laid before each house of Parliament a report on the administration and enforcement of the provisions of this Act relating to fish and fish habitat protection, including the rebuilding of fish stocks and pollution prevention for that year.

2. Cumulative effects

Degradation and loss of habitat is one of the greatest threats to freshwater and diadromous fishes in Canada. Tracking, assessing and addressing cumulative effects will be critical to turning the tide on habitat loss and realizing measurable improvements in the quality and amount of fish habitat in the future. While Bill C-68 includes a number of elements dealing with impacts on fish habitat, it falls short in terms of advancing a comprehensive approach to dealing with cumulative effects.

The inability to assess and address the cumulative harm from multiple small or "low-risk" projects has long been recognized as a failure of the *Fisheries Act* and related regulations and policies. Amendments to the Act proposed in Bill C-68 are inadequate for addressing these persistent challenges. Two key opportunities to strengthen the legislative basis for assessing and addressing cumulative effects are outlined below.

1. **Broadening the information base so that the public registry captures all projects.** The proposed public registry holds great potential for capturing critical information needed to assess the cumulative effects that are negatively impacting fish and fish habitat. However, it appears that the requirement to register works, undertakings and activities in the registry applies only to large projects, leaving significant gaps in the information needed to effectively assess and address cumulative effects. The amendments to section 42.3 (1) proposed below would ensure that a comprehensive base of information is in place to effectively assess cumulative effects, and to audit, enforce and follow up on mitigation and offsetting measures.

PROPOSED AMENDMENTS TO THIS SECTION:

42.2 The Minister shall establish a public registry for the purpose of facilitating access to records relating to matters under any of sections 34 to 42.1.

Contents of registry — obligatory

42.3(1) The Minister shall publish the following records in the registry:

(a) any agreements referred to in section 4.1 that are entered into by him or her and that establish the circumstances and manner referred to in paragraph 4.1(2)(h);

(b) any standards and codes of practice established by him or her under section 34.2 and notice of projects implemented following those standards or codes of practice;

(c) any orders made by him or her under sections 34.3 and 37 or responses to requests for assessments under 34.3(7);[2]

(d) any authorizations given under paragraphs 34.4(2)(b) and (c) and 35(2)(b) and (c) and subsection 35.2(7) and any letters of advice issued by DFO;

(e) any permits issued by him or her under section 35.1;

2. 34.3(7) is a new section with the heading "Minister's obligations — request for assessment" proposed in this briefing note under Environmental Flows and Fish Passage.

(-) any regulations established by him or her under section 35, and notice of projects implemented following those regulations;

(f) any fish habitat restoration plan prepared under section 35.2(9); and,

(g) audits, investigations and fines issued under the fish and fish habitat protection and pollution prevention provisions.

2. **Provisions to ensure compensation for the residual harm to fish habitat caused by small or low risk projects.** Currently, proponents of small or low risk projects are issued "letters of advice" instructing them to proceed with their projects without an authorization, leaving residual harm unaddressed and resulting in significant cumulative impacts. The amendments proposed below would establish the legal foundation to effectively compensate for this residual harm to fish habitat.

PROPOSED AMENDMENTS TO THIS SECTION:

Harmful alteration, disruption or destruction of fish habitat

35 (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.

35(1.1) Any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat is an offense unless authorized pursuant to section 35(2).

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35(2.2) The Minister shall ensure compensation for all harmful alteration, disruption or destruction of fish habitat authorized, permitted or otherwise enabled pursuant to any provision in s. 35(2)

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(4) Subsection 35(2) of the Act is amended by adding the following after paragraph (e):

...

(h) the work, undertaking or activity is carried on in accordance with a letter of advice.

3. Environmental flows and fish passage

Conserving, protecting and restoring fisheries and fish habitat depends significantly on how the water that flows through rivers, streams, lakes and wetlands is managed, and on the ability of fish to access a range of habitats within aquatic ecosystems. Fish passage is a critical component of habitat governed by the *Fisheries Act*, yet to date, DFO has been unable to adequately protect fish passage across Canada. Further, reports from DFO's Canadian Science Advisory Secretariat (CSAS) stress that aquatic ecosystems and the fisheries they sustain are placed at increasing risk with increasing alteration of the natural fluctuations in water flows, the importance of providing "environmental flows" to balance the flow of water needed to sustain the health of fisheries, habitats and aquatic ecosystems with the needs of water users.[3]

During debate on Second Reading of Bill C-68 in the House of Commons, the Honorable Dominic Leblanc (Minister of Fisheries, Oceans and the Canadian Coast Guard) indicated a willingness to work with other Members of Parliament on ways to strengthen environmental flow provisions in the *Fisheries Act*.[4] The amendments proposed below would strengthen provisions for the free passage of fish and for securing the environmental flows needed for the protection of fish and fish habitat, and would enhance transparency of related decisions made by the Minster.

PROPOSED AMENDMENTS TO THIS SECTION:

Minister's order

34.3 (2) If the Minister considers that doing so is necessary to ensure the free passage of fish or the protection of fish or fish habitat, the owner or person who has the charge, management or control of an obstruction or any other thing that is detrimental to fish or fish habitat shall, on the Minister's order, within the period specified by him or her and in accordance with any of his or her specifications,

...

(f) maintain the flow of water required to permit the free passage of fish; and

(g) maintain the characteristics of the water and water flow upstream and downstream of the obstruction or thing, at all times, required for the conservation and protection of the fish and fish habitat, including

(i) the water temperature, and

(ii) the physical characteristics and chemical composition of the water flows.

Proposed new s. 34.3 (7) Based on similar provision in Impact Assessment Act

Minister's obligations — request for assessment

34.3 (7) The Minister must respond, with reasons and within the prescribed time limit, to any request that a study of an order referred to in this section be conducted. The Minister must ensure that his or her response is posted on the Internet site.

3. DFO, "Framework for Assessing the Ecological Flow Requirements to Support Fisheries in Canada", DFO Canadian Science Advisory Secretariat, Rep. 2013 / 017.
4. https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-263/hansard#9971429

CONCLUDING REMARKS

The main outcomes we hope for in a new *Fisheries Act* are measurable improvements to fish habitat; fish stocks that are recovering and are sustained over the long-term; transparent decision-making and information sharing; and resources and capacity for effective implementation. The proposed Bill C-68 reflects many of our recommendations to meet these outcomes, however could be strengthened even further with the amendments suggested above.

Canadians are interested in a strong *Fisheries Act* that will have positive impacts on the health and sustainability of fish populations and their habitats for generations to come. We would like to thank the Committee members for the opportunity to provide this input, and for working with us on our proposals to further strengthen Bill C-68.

SIGNED:

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