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## LEGISLATIVE SUMMARY



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

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*Legislative Summary of Bill C-68*  
(Legislative Summary)

Publication No. 42-1-C68-E

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# LEGISLATIVE SUMMARY OF BILL C-68: AN ACT TO AMEND THE FISHERIES ACT AND OTHER ACTS IN CONSEQUENCE

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## 1 BACKGROUND

Bill C-68, An Act to amend the Fisheries Act and other Acts in consequence,<sup>1</sup> was introduced in the House of Commons on 6 February 2018. The bill was referred to the House of Commons Standing Committee on Fisheries and Oceans (Committee) on 16 April 2018, and reported back to the House of Commons with amendments on 30 May 2018.

The *Fisheries Act*<sup>2</sup> (the Act) is the main federal statute governing the management of Canada's fisheries resources. The Act also includes provisions for the conservation and protection of fish and fish habitat.<sup>3</sup> In 2012, numerous changes to the Act were made by the two budget implementation Acts.<sup>4</sup> However, in 2016, the Prime Minister tasked the Minister of Fisheries, Oceans and the Canadian Coast Guard (the Minister) with reviewing those 2012 changes<sup>5</sup> and implementing a "nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."<sup>6</sup> In 2017, the Committee also issued a report reviewing the 2012 changes to the Act.<sup>7</sup>

### 1.1 CHANGES MADE TO THE *FISHERIES ACT* IN 2012

#### 1.1.1 PROTECTIONS PROVIDED TO FISH AND FISH HABITAT

One of the notable changes to the Act made in 2012 placed the focus of protections on the productivity of fish, specifically those that are part of a commercial, recreational or Aboriginal fishery,<sup>8</sup> and those that support such a fishery.<sup>9</sup> The Act no longer protects all fish and fish habitat equally.

Prior to the 2012 amendments, the Act contained prohibitions against destroying fish "by any means other than fishing" and against carrying on "any work or undertaking that results in harmful alteration, disruption or destruction [HADD] of fish habitat." Both prohibitions were subject to exceptions, which allowed for these impacts to occur under certain conditions.

Those two prohibitions were replaced in 2012 by a single provision that prohibits the carrying on of "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."<sup>10</sup> The term "serious harm to fish" is defined as "the death of fish or any permanent alteration to, or destruction of, fish habitat,"<sup>11</sup> with fish habitat defined as "spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes."<sup>12</sup> The Minister, after considering four mandatory factors,<sup>13</sup> has the power to issue authorizations that allow for projects to occur that could cause serious harm to fish.

### 1.1.2 AUTHORIZATION OF PROJECTS

Changes made to the Act in 2012 include exceptions to the prohibition on serious harm that allow the Minister or the Governor in Council to prescribe projects and the conditions according to which they may be carried out or the waters in which they may be carried out, as well as to make regulations concerning these prescribed matters. Projects completed in accordance with these criteria do not require ministerial approval before they begin.<sup>14</sup>

A self-assessment tool called “Projects near water”<sup>15</sup> was developed by Fisheries and Oceans Canada (DFO) to provide guidance to project proponents and ensure compliance with the Act. The tool lists types of waterbodies, project activities and criteria for which a DFO review is not required. If the project is deemed not to require a DFO review, project proponents must nevertheless avoid causing serious harm to fish, fish habitat or aquatic species at risk.<sup>16</sup> If the project is judged to require a DFO review by the self-assessment tool, project proponents must submit a request for review.<sup>17</sup>

## 2 DESCRIPTION AND ANALYSIS

Bill C-68 amends the Act in order to

- introduce a new set of criteria for ministerial decision-making;
- include provisions that respect the rights of Indigenous peoples, take into consideration Indigenous knowledge and enable the making of agreements with Indigenous governing bodies;
- reinstate the “death of fish” and HADD of fish habitat prohibitions;
- introduce a new regulatory framework related to the authorization of projects, the establishment of standards and codes of practice, the creation of fish habitat banks by project proponents, and the establishment of a public registry;
- set up new regulatory powers for the purpose of the conservation and protection of marine biodiversity, and the proper management and control of fisheries; and
- establish an alternative measures agreements regime for persons charged with certain offences under the Act.

### 2.1 PURPOSE OF THE ACT (CLAUSE 3)

Clause 3 of Bill C-68 adds a purpose section to the Act to guide the Minister in applying its provisions (new section 2.1). The purpose encompasses the “proper management and control of fisheries, and the conservation and protection of fish and fish habitat, including by preventing pollution.”

## 2.2 CONSIDERATIONS FOR MINISTERIAL DECISION-MAKING (CLAUSES 3 AND 8)

Clause 8 of Bill C-68 repeals section 6 of the Act, which describes factors that must be taken into account by the Minister when making decisions with regard to potential harm to fish. The repealed factors include, among others, the contribution of the fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries, and the availability of measures to mitigate serious harm to fish that are part of a commercial, recreational or Aboriginal fishery.

Clause 3 sets out new factors that may be considered by the Minister when making decisions not related to authorizations, permits, orders or regulations of projects near or in water bodies (new section 2.5). These factors include, among other things,

- the application of a precautionary approach and an ecosystem approach;
- community knowledge;
- Indigenous knowledge; and
- social, economic and cultural considerations.

## 2.3 INDIGENOUS PEOPLES OF CANADA

### 2.3.1 RIGHTS OF INDIGENOUS PEOPLES (CLAUSE 3)

Clause 3 of Bill C-68 states that nothing in the Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada pursuant to section 35 of the *Constitution Act, 1982* (new section 2.3).<sup>18</sup> This provision is similar to section 2.1 of the *Oceans Act*.<sup>19</sup>

New section 2.4 also stipulates that, prior to making a decision under the Act, the Minister must consider the adverse effects that the decision may have on the rights of the Indigenous peoples of Canada.

### 2.3.2 INDIGENOUS KNOWLEDGE (CLAUSES 21 AND 40)

Clause 21 of Bill C-68 requires the Minister or the prescribed authority<sup>20</sup> to consider Indigenous knowledge that has been provided prior to issuing authorizations and permits, and making recommendations on regulations pertaining to fish and fish habitat protection (new section 34.1(1)(g)).

Clause 40 ensures that the Indigenous knowledge provided shall remain confidential, and stipulates the specific circumstances in which the Minister may disclose the information after consulting with the person or entity who provided the Indigenous knowledge, as well as with the person or entity to whom the knowledge is to be disclosed (new section 61.2).

### 2.3.3 PARTNERSHIPS WITH INDIGENOUS GOVERNING BODIES (CLAUSES 1(8), 5(1) AND 6)

Section 4.1(1) of the Act allows the Minister to enter into agreements with provinces “to further the purposes of this Act” by facilitating cooperation and enhancing communications between the parties, or by consulting the public. Clause 5(1) of Bill C-68 amends section 4.1(1) to add Indigenous governing bodies and other bodies established under a land claims agreement (e.g., a co-management body) to the list of entities the Minister can enter into agreements with for these purposes. “Indigenous governing bodies” are defined by clause 1(8) as entities “authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.”

Through a declaration of equivalent provisions, the Governor in Council can declare certain provisions of the Act or regulations not applicable in a province if that province has laws that are deemed equivalent to those provisions or regulations. Clause 6 of Bill C-68 extends the application of this declaration to the laws of Indigenous bodies that are in effect in the territories governed by these bodies (amended section 4.2(1)). This amendment is supported by the definition of “laws,” which includes “by-laws made by an Indigenous governing body” and which has been added to the interpretation section of the Act (amended section 2(1)).

## 2.4 PROTECTION OF FISH AND FISH HABITAT

### 2.4.1 FOCUS OF PROTECTION (CLAUSE 1)

Clauses 1(1) and 1(2) of Bill C-68 repeal the definitions of “commercial,” “recreational” and “Aboriginal,” in relation to a fishery, found in section 2(1) of the Act. The prohibition of “serious harm to fish” defined in section 2(2) of the Act is also repealed by clause 1(10). These definitions were introduced in the Act in 2012 to restrict the focus of fisheries protection.

The definitions of fish habitat and fishery are broadened by Bill C-68. Clause 1(5) defines fish habitat to include “water frequented by fish” and any areas on which fish depend to carry out their life processes. Clause 1(10) further specifies that 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.” Clause 1(6) (clause 1(7) in French) defines a fishery “with respect to any fish,” including, among other factors, “any of its species, populations, assemblages and stocks, whether the fish is fished or not,” and “any method of fishing used.” Thus, Bill C-68 makes all fish, whether fished or not, and all fish habitats subject to the Act and its regulations.



## 2.4.2 PROHIBITIONS REGARDING THE DEATH OF FISH AND HARMFUL ALTERATION, DISRUPTION OR DESTRUCTION OF FISH HABITAT (CLAUSES 21, 22(1) AND 31(6))

Clauses 21 and 22(1) of Bill C-68 reintroduce two standalone prohibitions, subject to exceptions, related to fish and fish habitat protection. These prohibitions replace the serious harm to fish provision in section 35(1). The two prohibitions concern the death of fish and the HADD of fish habitat:

- No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish (new section 34.4(1)).
- No person shall carry on any work, undertaking or activity that results in the HADD of fish habitat (amended section 35(1)).

Clause 31(6) of Bill C-68 also amends the Governor in Council's regulation-making powers by broadening the conservation and protection scope from strictly "spawning grounds" to "fish habitat" as a whole (amended section 43(1)(i)).

Clause 21 sets out those factors that the Minister or the prescribed authority must take into account before recommending Governor in Council regulations or before exercising powers related to authorizations, permits, orders or ministerial regulations, or authorizing a project that may contravene the above-noted prohibitions (new section 34.1(1)). These factors include the following, among others:

- whether there are measures and standards to avoid the death of fish or to mitigate the extent of their death or offset their death, and to avoid, mitigate or offset the HADD of fish habitat;
- the cumulative effects of projects; and
- Indigenous knowledge provided to the Minister.

While Bill C-68 reinstates the HADD of fish habitat prohibition, it does not define it, nor does it provide a threshold for HADD. In its review of changes made in 2012 to the Act, the Committee noted the lack of clarity provided by the serious harm prohibition and recommended the reinstatement of the HADD prohibition. Further, the Committee also stressed the need for the HADD prohibition to be more clearly defined to avoid it "being applied inconsistently" or limiting the scope of government agencies "in their management of fisheries and habitats."<sup>21</sup>

## 2.5 AUTHORIZATION OF PROJECTS IN AND NEAR WATER BODIES

Although the Act as amended by Bill C-68 prohibits projects that may result in the death of fish or HADD of fish habitat, such projects may be authorized in certain circumstances. Bill C-68 makes changes to the Act to allow for the development of formal guidance documents for certain projects and to make regulations designating those projects that require ministerial permits before being undertaken.

### 2.5.1 STANDARDS AND CODES OF PRACTICE (CLAUSE 21)

Clause 21 of Bill C-68 creates new section 34.2(1), which allows the Minister to develop standards and codes of practice to avoid or mitigate negative impacts on fish or fish habitat caused by projects deemed by DFO to be “small and routine.”<sup>22</sup> These standards and codes of practice may apply to such matters as the death of fish and HADD, the conservation and protection of fish and fish habitats and the prevention of pollution. Further, they may specify procedures in relation to projects during any phase of their life cycle (new section 34.2(2)). Clause 21 also stipulates that standards and codes of practice may be developed in collaboration with provinces, Indigenous governing bodies and other interested parties (new section 34.2(3)).

Exceptions to the prohibitions regarding the death of fish (new section 34.4(2)) and HADD of fish habitat (section 35(2)) provide for regulatory authorizations of projects with the potential to impact fish and fish habitat. Small and routine projects prescribed by regulations may proceed without prior authorization, provided they comply with standards and codes of practice that are established under the Act (new section 34.4(2)(a) and amended section 35(2)(a)). The scope of what constitute small and routine projects will only be known once regulations are published.

Future regulations will need to be assessed in order to determine whether certain municipal infrastructure works and farming projects can be considered to be small and routine projects. The Committee report released in 2017 recommended that DFO set out provisions that “act as safeguards for farmers and agriculturalists, and municipalities,” and that “permitting be expedited to allow for works that involve the restoration of damaged infrastructure and emergency works to protect people and communities.”<sup>23</sup>

A review of future regulations may also clarify whether DFO will continue to rely on self-assessments completed by project proponents to streamline the authorization process. In its study of changes made in 2012 to the Act, the Committee recommended that “any changes to habitat protection in the *Fisheries Act* must be supported by a reduced reliance on project proponent self-assessment.”<sup>24</sup>

### 2.5.2 DESIGNATED PROJECTS (CLAUSES 23, 31(6) AND 31(12))

Pursuant to clause 23, a designated project always requires a ministerial permit before it can begin (new section 35.1). DFO has indicated that designated projects are expected to be larger-scale projects and “would be identified based on their potential impact on fish and fish habitat.”<sup>25</sup>

Clause 31(6) of Bill C-68 provides for the establishment of regulations that define designated projects or classes of projects. These projects may result in the death of fish or the HADD of fish habitat (amended section 43(1)(i.5)). Pursuant to clause 31(12), regulations defining designated projects or classes of projects may also consider the fact that a “decision has been made under an Act of Parliament to subject the project to an impact assessment.”

### 2.5.3 PROJECTS NOT DEFINED AS DESIGNATED PROJECTS (CLAUSES 21 AND 22)

For projects not defined as designated projects and for which there are no measures and standards to avoid or to mitigate the death of fish or the HADD of fish habitat, authorizations will be issued by the Minister on a case-by-case basis in accordance with sections 34.4(2)(b), 34.4(2)(c), 35(2)(b) and 35(2)(c). These authorizations will take into account the set of factors listed in new section 34.1(1).

### 2.5.4 ECOLOGICALLY SIGNIFICANT AREAS (CLAUSES 23 AND 24)

Under current section 37(1.1) of the Act, a person proposing to carry on a project in an ecologically significant area (ESA) is required to provide the Minister with materials and information relating to the project or to the water, place or fish habitat that could be affected. This section is repealed by clause 24 of the bill, and the requirement to provide information is now set out in new section 35.2(3).

Section 37(2) of the Act empowers the Minister or a designated person to impose restrictions on the proposed project. Although section 37(3)(c) authorizes the Governor in Council to make regulations regarding ESAs, no such regulations have been issued to date; this section is also repealed by clause 24.

With new section 35.2(2), the Governor in Council retains the power to designate ESAs through regulations. In addition, the Minister may recommend regulations prescribing the objectives for the conservation and protection of fish and fish habitat in an ESA (new section 35.2(10)(c)).

Clause 23 establishes a new authorization regime with respect to prohibitions on the carrying on of projects in ESAs that may result in the death of fish and HADD of fish habitat. Under new section 35.2(1), the carrying on of projects that are prescribed by regulations under new section 35.2(10)(d)) is prohibited unless authorized by the Minister. Essentially, Bill C-68 makes the authorization of projects in ESAs the exception. The Minister retains the power to impose conditions on the authorized projects to ensure that avoidance and mitigation measures are implemented to achieve the prescribed objectives for the conservation and protection of fish and fish habitat (new section 35.2(7)).

Clause 23 also requires the Minister to prepare a fish habitat restoration plan for an ESA if he or she deems such restoration necessary to meet “any prescribed objectives for the conservation and protection of fish and fish habitat” set for that ESA (new section 35.2(9)).

### 2.5.5 FISH HABITAT BANKS (CLAUSE 28)

Clause 28 of Bill C-68 enacts provisions allowing for the establishment of proponent-led fish habitat banks, which are areas of fish habitat that have been created, restored or enhanced through one or more conservation projects. A “proponent” is defined as

a person who proposes the carrying on of a conservation project in a service area<sup>26</sup> in addition to a work, undertaking or activity within an area (new section 42.01).

A proponent may be granted habitat credits<sup>27</sup> for such conservation projects. The proponent can use the accrued habitat credits to “offset the adverse effects on fish or fish habitat from the carrying on” of the proposed work, undertaking or activity in the same area (new section 42.03).

Clause 28 authorizes the Governor in Council to make regulations with respect to establishing and managing a habitat credits system, issuing certificates of validity for habitat credits and governing arrangements with proponents (new section 42.04).

## 2.6 PUBLIC REGISTRY (CLAUSE 30)

Clause 30 of Bill C-68 requires the Minister to establish a registry that will provide public access to records related to the fish and fish habitat provisions of the Act (new section 42.2). The registry will contain both obligatory and optional information on project decisions (new sections 42.3(1) and 42.3(2), respectively).

Obligatory records that will be contained in the registry comprise the following:

- agreements with provincial governments, Indigenous governing bodies and bodies established under land claims agreements to further the purpose of the Act;
- standards and codes of practice for small and routine projects;
- ministerial orders made to ensure the free passage of fish or the protection of fish or fish habitat (new section 34.3) and to prevent the death of fish, HADD of fish habitat or the deposit of deleterious substances (section 37);<sup>28</sup>
- ministerial authorizations for projects that may cause the death of fish or HADD of fish habitat;
- ministerial permits for designated projects; and
- fish habitat restoration plans for an ESA.

The Committee has called for the establishment of a registry that provides public access to records related to the fish and fish habitat provisions of the Act in order to ensure that cumulative impacts of projects on fish and fish habitat are identified.<sup>29</sup> However, it is unclear whether the public registry established by Bill C-68 will capture information from projects for which there are standards and codes of practice to avoid or to mitigate negative impacts, as small and routine projects are exempt from prior authorizations.

## 2.7 FISHERIES MANAGEMENT

### 2.7.1 MANAGEMENT OF MAJOR FISH STOCKS (CLAUSES 9 AND 31(2))

Clause 9 of Bill C-68 replaces existing section 6.1 of the Act to put into effect measures respecting major fish stocks. Under new section 6.1(1), the Minister must

implement measures to maintain major fish stocks “at or above the level necessary to promote the sustainability of the stock.” This can be accomplished through integrated fisheries management plans (IFMPs). Regulations will be established to designate fish stocks that are defined as “major fish stocks.” According to DFO, “major fish stocks” are

stocks that have an annual landed value greater than \$1 million or an annual landed weight greater than 2,000 tonnes; have an Integrated Fisheries Management Plan; are highly migratory or transboundary; are of special concern according to the Committee on the Status of Endangered Wildlife in Canada; and/or have regional significance.<sup>30</sup>

It is unclear whether the “level necessary to promote the sustainability of the stock” mentioned in the bill refers to the DFO Sustainable Fisheries Framework “Cautious Zone” or “Healthy Zone.” According to that framework, stocks of a given fish species can be classified in one of the following three categories, depending on their status:

- Healthy Zone: fisheries management decisions and harvest strategies are designed to maintain fish stocks within this zone;
- Cautious Zone: decisions and strategies aim to rebuild fish stock to the Healthy Zone; and
- Critical Zone: conservation considerations prevail and the harvest rate must be kept to an absolute minimum.<sup>31</sup>

Thus, management actions for a specific fish stock depend on its status zone.

Pursuant to new section 6.1(2), if according to the Minister, it is “not feasible or appropriate, for cultural reasons or because of adverse socio-economic impacts” to implement measures to maintain a major fish stock “at or above the level necessary to promote the sustainability of the stock,” the Minister is empowered to set a limit reference point (LRP).<sup>32</sup> The Minister must then establish measures to maintain that fish stock at or above the established LRP. Bill C-68 does not explain if the LRP set by the Minister would be based on the best available scientific information.

Clause 9 also introduces new sections 6.2(1) to 6.2(5), which provide guidance on the management of depleted fish stocks. Under new section 6.2(1), if a major fish stock designated by regulations “has declined to or below its limit reference point, the Minister must develop a plan to rebuild the stock to or above that point in the affected area.” However, if according to the Minister, such a rebuilding plan could result in adverse socio-economic or cultural impacts, the Minister may amend the plan or the implementation period (new section 6.2(2)).

Clause 31(2) of the bill provides the Governor in Council with the authority to make regulations respecting the rebuilding of fish stocks (new section 43(1)(b.1)) and the restoration of fish habitat (new section 43(1)(b.2)).

In fall 2016, the Commissioner of the Environment and Sustainable Development found that for 12 of the 15 major fish stocks requiring rebuilding plans, DFO had neither plans nor timelines for developing them.<sup>33</sup> The Department has accepted the Commissioner’s recommendation for it to set out priorities, targets and timelines

for putting in place rebuilding plans. A review of future regulations pursuant to new section 43(1)(b.1) will be required in order to assess their effectiveness for rebuilding depleted fish stocks by establishing measurable priorities, targets and timelines.

## 2.7.2 FISHERIES MANAGEMENT ORDERS (CLAUSE 11)

To address threats to the conservation and protection of fish during the fishing season, DFO may issue amendments to fishing licence conditions or make variation orders.<sup>34</sup> However, the process to establish these fisheries management measures can be lengthy.<sup>35</sup> Clause 11 of Bill C-68 provides for the ability to quickly address an immediate threat to the control of fisheries and the conservation and protection of fish, including marine mammals, such as the North Atlantic Right Whale. The bill amends the Act to empower the Minister to issue temporary fisheries management orders prohibiting or limiting the fishing of one or more species (new section 9.1(1)). Such orders may also prohibit the use of certain fishing gear or vessel types.

Fisheries management orders may only be in effect for a maximum period of 45 days (new section 9.3(1)); however, the Minister may renew an order for a term that does not exceed 45 days (new section 9.3(2)). A fisheries management order may provide that it applies only to a particular class of persons who fish using a particular method or who use a fishing vessel of a particular class, and to holders of a particular class of licence (new section 9.1(3)).

## 2.7.3 INDEPENDENCE OF THE COMMERCIAL INSHORE FLEET (CLAUSES 3, 11 AND 31)

In 2007, DFO adopted the Policy for Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries (PIIFCAF) to "ensure that [commercial] inshore fish harvesters remain independent, and that the benefits of fishing licences flow to the fisher and to Atlantic coastal communities."<sup>36</sup> One purpose of PIIFCAF is to strengthen the existing Fleet Separation and Owner-Operator policies.<sup>37</sup> The Fleet Separation Policy keeps ownership of the fish harvesting sector separate from the processing sector by preventing processing companies from acquiring the fishing licences of inshore vessels (those measuring less than 19.8 m or 65 ft.). The Owner-Operator Policy requires the holders of licences for inshore vessels to be present on the boat during fishing operations. Similar policies have not been established in Canada's Pacific fisheries.

Clause 3 of Bill C-68 reinforces PIIFCAF by adding social, economic and cultural factors, and the preservation or promotion of the independence of licence holders in commercial inshore fisheries to the list of criteria that the Minister may consider when making a decision under the Act (new sections 2.5(g) and 2.5(h)).<sup>38</sup>

In addition, clause 11 of the bill amends section 9 of the Act to give the Minister the authority to suspend or cancel licences if it is determined that the licence holder has entered into an agreement that contravenes any provision of the Act or the regulations (new section 9(1)(b)). This clause is likely an attempt to address the issue of Controlling Agreements and prevent court challenges with respect to PIIFCAF, such

as *Kirby Elson v. Canada (Attorney General)*.<sup>39</sup> Controlling Agreements circumvent PIIFCAF and allow someone other than the licence holder, such as a fish processing corporation, to control or influence the licence holder's decision to submit a request to DFO for a licence transfer.<sup>40</sup>

Clause 31 of Bill C-68 also includes provisions to allow the Governor in Council to make regulations respecting the following matters, among others:

- the management of fisheries for social, economic or cultural purposes (amended section 43(1)(a));
- the circumstances when the licence holder or the operator named in the licence is required to personally carry on the activity authorized by the licence (new section 43(1)(d.1));
- the issuance, suspension and cancellation of licences to holders or applicants that are parties to an agreement that contravene any provision of the Act or the regulations (new section 43(1)(f)); and
- the use and control of the rights and privileges under a licence, including the prohibition on the transfer of the use and control of those rights and privileges except under certain conditions (new section 43(1)(g.01)).

## 2.8 MARINE BIODIVERSITY PROTECTION

### 2.8.1 MARINE REFUGES (CLAUSE 32)

Clause 32 of Bill C-68 empowers the Minister to make regulations “for the purposes of conservation and protection of marine biodiversity” for any area in Canadian fisheries waters (new section 43.3(1)). These regulations support the creation of area-based biodiversity conservation measures. Restrictions to fishing activities within these areas include:

- prohibiting fishing of one or more species, populations, assemblages or stocks of fish;
- prohibiting the use of certain types of fishing gear and vessels; and
- prescribing classes of persons or vessels to whom the restrictions apply (i.e., including or excluding certain fisheries from the prohibitions depending on the conservation objectives).

Certain area-based conservation measures qualify internationally as “other effective area-based conservation measures” (OEABCMs) and contribute to Canada’s achievement of marine conservation Aichi Target 11 under the United Nations *Convention on Biological Diversity*.<sup>41</sup> Such a measure must meet five criteria to be recognized as an OEABCM, including being “entrenched in legislation or regulation,” or providing “clear evidence that the measure is intended for the long term.”<sup>42</sup>

Some fishery closures established by regulations under section 43(1)(m) for the purpose of protecting fish, mammals and their habitat fall within the category of OEABCMs; these zones are deemed by DFO to be marine refuges.<sup>43</sup> However, these closures are “not designed to address long-term biodiversity goals, and could be changed or cancelled at any time.”<sup>44</sup> With new section 43.3, Bill C-68 introduces provisions to formally establish marine refuges that meet OEABCM criteria.

## 2.8.2 CETACEANS IN CAPTIVITY (CLAUSES 15 AND 31(7))

Clause 15 of Bill C-68 prohibits fishing for a cetacean with the intent of keeping it in captivity (new section 23.1(1)). This clause codifies a long-standing Canadian practice since DFO “has not issued a licence authorizing the capture of a cetacean for public display purposes since the early 1990s.”<sup>45</sup> Clause 15 also provides for ministerial discretion to grant exceptions, including when the cetacean is injured, in distress or is in need of care (new section 23.1(2)).

Clause 31(7) of Bill C-68 empowers the Governor in Council to make regulations regarding the import of fish which, as defined in section 2(1) of the Act, includes cetaceans (amended section 43(1)(j)).

## 2.9 ENFORCEMENT: ALTERNATIVE MEASURES AGREEMENTS (CLAUSE 47)

Clause 47 of Bill C-68 allows for the use of alternative measures agreements (AMAs) through new sections 86.1 to 86.96. AMAs are entered into between an attorney general (federal or provincial) and an alleged offender to provide an alternative to a potentially long court process for persons charged with offences under the Act. Upon entering into an AMA, any court proceedings’ charges in respect of the offence alleged are stayed and eventually cancelled. AMAs may only be used if a number of conditions are met (new section 86.2), including the following:

- There is sufficient evidence to proceed with a charge;
- The alleged offence is not an obstruction under section 62 or a false statement under section 63; and
- The alleged offender accepts responsibility for the alleged offence and the outcome of the facilitation.

AMAs require actions to be taken to remedy the impacts of the offence. New section 86.96 stipulates that it is an offence to contravene an AMA.

## 2.10 REVIEW OF THE ACT (CLAUSE 49)

Clause 49 of Bill C-68 provides for a five-year review of the Act by the committee of the Senate, of the House of Commons or of both Houses that is designated or established for that purpose (new section 92).



## 2.11 TRANSITIONAL PROVISIONS (CLAUSES 53(1) TO 53(3))

### 2.11.1 COMPLETE APPLICATION FOR AUTHORIZATION OF A PROJECT SUBMITTED BEFORE BILL C-68'S ENTRY INTO FORCE

Clause 53(1) stipulates that if an application for the issuance of an authorization for the carrying on of a project that results in serious impacts to fish habitat was made before the bill comes into force, and the applicant has received notification that the application is complete, then the ministerial authorization process, as established by the Act before Bill C-68 comes into force, applies. Ministerial authorizations issued before the bill comes into force will also be deemed as delivered under the amended Act.

### 2.11.2 INCOMPLETE APPLICATION FOR AUTHORIZATION OF A PROJECT SUBMITTED BEFORE BILL C-68'S ENTRY INTO FORCE

According to clause 53(2), if the applicant receives the notice from the Minister that the application is incomplete before the bill comes into force, the applicant must then provide the Minister with the required information no later than 180 days after the entry into force of Bill C-68. If the applicant receives the notice from the Minister on the day on which the bill comes into force or after the bill comes into force, the required information must be provided no later than 180 days after the day on which the applicant receives the notice.

Clause 53(3) provides for the application of the ministerial authorization process, as established by the Act before Bill C-68 comes into force, if the required information is received from the applicant within the time period referred to in clause 53(2) and the application is deemed complete by the Minister. However, if the application is still considered incomplete, the ministerial authorization is deemed to have been refused.

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## NOTES

1. [Bill C-68, An Act to amend the Fisheries Act and other Acts in consequence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament.
2. [Fisheries Act](#), R.S.C. 1985, c. F-14.
3. Justice Canada, [A Practical Guide to the Fisheries Act and to the Coastal Fisheries Protection Act](#).
4. [Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures](#) (short title: Jobs, Growth and Long-term Prosperity Act), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament (S.C. 2012, c. 19); and [Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures](#) (short title: Jobs and Growth Act, 2012), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament (S.C. 2012, c. 31). See also Fisheries and Oceans Canada [DFO], [The Fisheries Protection Provisions of the Fisheries Act: Before and after the 2012/2013 Amendments](#). The amendments entered into force in November 2013.
5. DFO, [Consultation on Let's Talk Fish Habitat](#).

6. Prime Minister of Canada, [\*Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter\*](#), 19 August 2016.
7. House of Commons, Standing Committee on Fisheries and Oceans [FOPO], [\*Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries\*](#), Sixth Report, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, February 2017.
8. *Fisheries Act*, s. 2(1).
9. *Ibid.*, s. 6.
10. *Ibid.*, s. 35(1).
11. *Ibid.*, s. 2(2).
12. *Ibid.*, s. 2(1).
13. *Ibid.*, s. 6. The factors to be considered are as follows:
  - the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
  - fisheries management objectives;
  - whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery or that support such a fishery; and
  - the public interest.
14. *Ibid.*, ss. 35(3) and 43(1)(i.1), for the purpose of s. 35(2)(a).
15. DFO, [\*Projects near water\*](#).
16. DFO, [\*Measures to avoid causing harm to fish and fish habitat including aquatic species at risk\*](#).
17. DFO, [\*Figure 2. Summary of the development proposal review and decision-making process\*](#), *Fisheries Protection Policy Statement*, October 2013.
18. [\*Rights of the Aboriginal Peoples of Canada\*](#), Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
19. [\*Oceans Act\*](#), S.C. 1996, c. 31.
20. A prescribed authority is a person or entity designated by regulation for a specific role in the administration of a provision of the Act.
21. FOPO (2017), Recommendation 3, p. 13
22. DFO, [\*Better management of projects\*](#).
23. FOPO (2017), Recommendations 8 and 10, p 15.
24. FOPO (2017), Recommendation 18, p. 20.
25. DFO, *Better management of projects*.
26. A “service area” is defined as follows:

the geographical area that encompasses a fish habitat bank and one or more conservation projects and within which area a proponent carries on a work, undertaking or activity.
27. A “habitat credit” is defined as “a unit of measure that is agreed to between any proponent and the Minister under section 42.02 that quantifies the benefits of a conservation project.”

28. For a definition of “deleterious substance,” see *Fisheries Act*, ss. 34(1)(a)–34(1)(e).
29. FOPO (2017), Recommendation 20, p. 21.
30. Office of the Auditor General of Canada, [Sustaining Canada's Major Fish Stocks – Fisheries and Oceans Canada](#), Report 2 in *Reports of the Commissioner of the Environment and Sustainable Development – Fall 2016*.
31. DFO, [Overview Of The Precautionary Approach Framework's Rebuilding Plan Guidelines](#).
32. DFO defines the limit reference point as follows:  
  

The limit reference point marks the boundary between the cautious and critical zones. When a fish stock level falls below this point, there is a high probability that its productivity will be so impaired that serious harm will occur. The limit reference point is established based on the best available scientific information.

See DFO, [A Fishery Decision-Making Framework Incorporating the Precautionary Approach](#).
33. Office of the Auditor General of Canada (2016).
34. DFO, “Current process to address threats,” [Protecting biodiversity and addressing threats](#). Variation orders are fisheries management measures including fishery openings and closures, fishing quotas or limits on the size or weight of fish.
35. Ibid.
36. DFO, [Policy for Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries](#).
37. According to DFO, these policies have become less effective over the years, having been “eroded by the use of Controlling Agreements, which have transferred the effective control of licences to a third party, while the name on the licence remains the same.” See DFO, [Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries](#) [PIIFCAF].
38. DFO, [Supporting independent fishers](#).
39. [Elson v. Canada \(Attorney General\)](#), 2017 FC 459 (CanLII). See also Sarah Campbell and Daniel Watt, [Sink or Swim: The Challenge to DFO's Ban on Controlling Agreements Continues in Kirby Elson v. Canada \(Attorney General\)](#), McInnes Cooper, 7 June 2017.
40. PIIFCAF requires commercial inshore fishers to sign declarations stating whether they were parties to a Controlling Agreement with a third party, such as a fish processor. If they were party to a Controlling Agreement, they had until 12 April 2014 to be free of such an agreement, failing which their licences would not be renewed. See DFO, [New Measures to Further Enforce PIIFCAF Policy](#); and DFO, [PIIFCAF – Information note](#).
41. DFO, [The origins of “other effective area-based conservation measures”](#). See also UN Environment, “[Aichi Biodiversity Targets](#),” *Convention on Biological Diversity* (entered into force on 29 December 1993).
42. DFO, “[Other effective area-based conservation measures: Creating marine refuges in Canada](#),” Backgrounder.
43. DFO, [List of marine refuges](#).
44. DFO, “Marine refuges,” [Protecting biodiversity and addressing threats](#).
45. Senate, Standing Committee on Fisheries and Oceans, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 2 March 2017 (Sylvie Lapointe, Acting Assistant Deputy Minister, Ecosystems and Fisheries Management).