**Department of Environmental Conservation**

**Testimony on HB 85**

**House Fisheries Special Committee**

**March 29, 2011**

The Department of Environmental Conservation appreciates the opportunity to provide comments on HB 85.

The Department is opposed to HB 85 for the following reasons:

1. **HB 85 requires the collection of new data from permittees that cannot be compared to any regulatory standards.**

HB 85 requires wastewater discharge permittees to collect new data and submit an annual report to the Department. For most pollutants, Alaska water quality standards are based on the concentration of a pollutant that can be present in a water body without adversely affecting aquatic life or other uses of the water body. Wastewater discharge permit limits are generally expressed as a concentration of a pollutant in the discharge.

HB 85 includes confusing terms regarding what the annual report must contain, including the “amount, nature, and description of the pollutant.” In order for permittees to report on the “amount”, they will need to collect regular flow data (which in some cases will require new equipment) and convert measured concentrations to pounds for specific time periods. Once reported, this data has no relevance to regulatory standards.

Some pollutants cannot be reported in terms of “amount”, such as fecal coliform bacteria, radioactivity, and turbidity.

Monitoring data from all significant dischargers is already collected and reported to the Department in Discharge Monitoring Reports. These reports are available to the public – they can review what pollutants are discharged and in what concentrations.

There is no net environmental benefit or public information benefit from the new data collection and reporting requirements of HB 85.

1. **HB 85 is not necessary to protect anadromous salmon from either a scientific or a perception basis.**

The Department of Environmental Conservation’s regulations prohibit mixing zones in anadromous salmon spawning areas. HB 85 would put in statute the same protections for the five species of anadromous salmon that have been part of DEC’s regulations since 1975.

While these protections are not necessary from a scientific perspective, they go beyond science to address the need to protect salmon marketing and the public perception that Alaska’s salmon are clean and healthy.

1. **There is no justification for extending the mixing zone prohibition to protect the salmon marketing effort to protect “non-salmon” fish species.**

HB 85 would prevent DEC from authorizing a mixing zone in a non-salmon fish spawning area even in cases where science can show the mixing zone will have no adverse effect on spawning. There is no justification for extending the mixing zone prohibition which is intended to protect salmon marketing efforts to non-salmon fish species. Alaska needs to encourage and support responsible community growth and development of its natural resources.

DEC’s regulations allow exceptions to the prohibition of a mixing zone in “non-salmon” spawning areas when site specific conditions show that the fish species will be protected or any adverse impacts will be mitigated as determined by habitat and fisheries biologists with the Department of Fish and Game.

Alaska’s communities and businesses should be allowed to use mixing zones if fish are protected. There is no justification for restricting responsible community growth and resource development that can comply with the state’s requirements for the growth and propagation of fish.

1. **HB 85 would prohibit mixing zones in spawning areas for lampreys and smelts.**

DEC would be prevented from authorizing a mixing zone in all anadromous fish spawning areas. Lampreys and smelts are fish species included in the definition of anadromous fish. Unlike the importance of salmon to Alaska’s social and economic wellbeing, DEC does not believe non-salmon fish species justify an absolute prohibition on mixing zones that can comply with the scientifically based water quality standards for growth and propagation of fish.

1. **HB 85 would prohibit mixing zones that have become a fish spawning area unless the discharge was from a public or private domestic wastewater facility.**

It is possible for mixing zones to become spawning areas even though spawning was not occurring when the mixing zone was first authorized. DFG has discovered fish spawning in a mixing zone previously authorized for wastewater from a drinking water utility, and in some cases for domestic wastewater facilities. Allowing mixing zones in areas that have become successful spawning areas should be allowed for any facility type, not just domestic wastewater facilities. Businesses and communities should not lose their mixing zone authorizations just because fish have started spawning in them.

1. **HB 85 includes a definition of “area” that is counter to both past and current practices by the Departments of Fish and Game and Natural Resources when determining spawning areas on both a spatial and temporal basis.**

The relative sensitivity of Alaska’s fish resources is seasonal. Impacts from responsible community and resource development can be avoided by limiting uses and activities to times of the year when the fish resources are not there or other seasonal conditions eliminate adverse impacts to the fish resources. Alaska’s resource agencies have traditionally employed “seasonal restrictions” to control development impacts to the environment.

Facilities that currently have an authorized mixing zone that relies upon timing restrictions to avoid spawning impacts (except those placer mines specifically addressed in HB 85) could not be re-authorized under HB 85. These facilities’ mixing zone authorizations are limited to times when spawning is not occurring. While HB 85 allows for timing restrictions for mixing zones for placer mines, it does not address other facilities that currently rely on timing restrictions to avoid spawning times. Examples of such facilities include:

* Village domestic wastewater lagoons that have a current permit and mixing zone authorization to discharge to a river when fish are not spawning will not qualify for the “grandfather” clause of HB 85, Section 2, AS 46.03.065(b). The “grandfather” clause is dependent upon an “area where spawning was not ongoing at the time of the initial authorization and the mixing zone became a spawning area after the date of the initial authorization”. These facilities may have been initially authorized to discharge to an “area” that was already a spawning “area” (defined by HB 85 as a physical location) when the mixing zone was authorized. As such, they do not qualify for the “grandfather” provision in section (b) of the bill. HB 85 would require the Department to cancel those permits and limit future permitting in similar situations without any net environmental benefit to the fish.

The alternative of treating sewage from villages to meet the water quality standards at the point of discharge would involve exorbitant construction and operation and maintenance costs that cannot be borne by the community.

* Section 4, line 15, (b) of the bill will allow a never-permitted domestic discharge to obtain a mixing zone authorization if it can be documented that spawning was not occurring when the facility began initial operation. It is unlikely that a facility that has never been permitted would have this type of documentation.

1. **HB 85 relies upon a new term, “useful life” when referring to renewal of a mixing zone authorization for a municipal wastewater facility.**

As many facilities age, they are upgraded to varying degrees from minor modifications to almost complete reconstruction. While “useful life” is used in multiple state statutes in a variety of contexts, DEC knows of no standard or criteria for determining a facility’s “useful life.” While not an insurmountable issue, the Department would need to further define the term in practice or in regulation in order to consistently apply it to the mixing zone requirements. While complete facility abandonment is clear cut, DEC would need to evaluate whether any of a wide range of facility modifications represents the end of the “useful life” of the facility and it is now considered a new facility that no longer meets the “grandfather” clause of HB 85. Examples include changes that increase or decrease the volume of discharge; decrease the toxicity of the effluent; increase the concentration of effluent; treat the wastewater using different treatment technologies; and facility maintenance and upgrades.

The “useful life” of a facility is also irrelevant to the properties and effects of a mixing zone or the methods necessary to protect fish.

1. **There is no need for Section 3 of HB 85 that requires public notice of specific permit modifications.**

HB 85 includes public notice requirements for amendments to permits for sewage system or treatment works. Current state law at AS 46.03.110 and 18 AAC 15 already requires public notice of permits and permits that involve expansion or other changes in a facility that might result in increased discharges to surface waters or might cause other environmental impacts.

1. **HB 85 is inconsistent with the current statute for protection of fish and game (AS 41.14.870), interference with salmon spawning streams and waters (AS 16.10.010), or submission of plans and specifications (AS 16.20.060).**

Alaska’s legislature has enacted a protective legal framework for all waters important to fish with additional protections for rivers, lakes and streams that are important for salmon spawning, rearing, or migration. State approval must be received from DEC, DNR, or DFG prior to the construction in, or use of waters important to fish spawning, rearing or migration.

HB 85 prohibits all mixing zones in all anadromous fish and other specifically listed fish spawning areas. However, HB 85 does not amend or repeal the provisions in other state law that permit the use of fish spawning areas if there are no adverse impacts from that use. HB 85 conflicts with current legislative policy not specifically amended or repealed by HB 85.

1. **DEC is responsible for, and must be accountable for, setting and enforcing standards for environmental protection.**

DEC has a duty under state statute to set and enforce standards for the prevention of pollution and protection of Alaska’s environment (AS 44.46.020). The legislature has also directed DEC to “determine what qualities and properties of water indicate a polluted condition actually or potentially deleterious, harmful, detrimental, or injurious to . . . aquatic life or their growth and propagation” (AS 46.03.070).

It is appropriate that the legislature hold DEC accountable for carrying out the duties and responsibilities spelled out in statute. However, we do not believe it is appropriate for the legislature to assume responsibility for carrying out the duties and responsibilities assigned to the executive branch by statute.

**Fiscal Impact**

There is a fiscal impact associated with HB 85. The Department will need to develop regulations to implement the new permittee reporting requirements; make changes to our permit data system; and produce a new annual report for posting on the web.