

## SECTION V

### SUMMARY OF FEDERAL AND STATE NPS POLLUTION CONTROL AUTHORITIES

#### SUMMARY OF SECTION V

- Summarizes the federal and state laws and regulations related to NPS pollution control

### INTRODUCTION

This section presents the various federal and state laws that relate to nonpoint source (NPS) pollution control. The programs and processes are organized by topic so they can be referenced when dealing with a particular concern. These topics are: Water quality and resources; Oregon land use planning; hazardous materials; forest, range and agriculture; fish and wildlife; and wetlands and riparian areas. Table V-1 at the end of this section summarizes which programs apply to the various categories of NPS pollution control activity. Some programs regulate activities in several categories.

The primary federal laws and regulations related to NPS pollution control are:

- Federal Clean Water Act of 1987 (known as the Clean Water Act) - PL 92-500
- Safe Drinking Water Act of 1986 (SDWA) - PL 99-339
- Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) - PL 101-508, §6217
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund")
- Resource Conservation and Recovery Act (RCRA)
- Various resource management laws for forest, range and water

Oregon laws and administrative rules apply to surface and groundwater quality, land use planning, hazardous materials, drinking water, fish and wildlife, agriculture, forestry, and water resources. All of these relate to NPS pollution management and are briefly discussed in this section.

The State of Oregon and the federal government administer a number of permit programs under provisions of the laws discussed above.

## **WATER QUALITY AND RESOURCES**

### **OREGON WATER QUALITY STATUTES AND RULES**

Oregon Revised Statute 468B contains the state laws pertaining to water pollution control for surface and ground waters and hazardous materials.

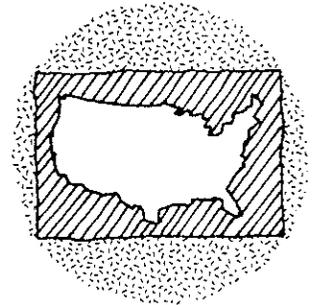
Oregon Administration Rules (OAR 340-41) provide a framework for the protection of water quality for the various river basins. Water quality standards have been established within this framework to protect designated beneficial uses. Exceptions to the protection of beneficial uses occur where natural conditions would exclude the beneficial use, where natural water quality exceeds standards (and natural background becomes the standard), or as specified by rule.

The Department of Environmental Quality (DEQ) is the state agency that administers federal and state environmental laws. These laws are translated into action through the Oregon Administration Rules (OARs) adopted by the Environmental Quality Commission (EQC), which is a five-member citizen commission whose members are appointed by the Governor subject to confirmation by the State Senate. In addition to adopting rules, the Commission also establishes policy and appoints DEQ's Director. The adopted rules for DEQ pertaining to water quality are found in OAR Chapter 340, Divisions 40 through 55.

### **FEDERAL CLEAN WATER ACT (FCWA)**

The Federal Clean Water Act (PL 92-500), as amended in 1977 and 1987, is directly related to all federal, state, and local NPS pollution control activities. Its most important NPS provisions for local governments are:

- It establishes the federal/state stormwater discharge permitting system as part of the National Pollutant Discharge Elimination System (NPDES).



- It requires total maximum daily load (TMDL) numerical limits on both point and nonpoint discharges into certain waters.

Both of these provisions are having major impacts in Oregon.

It also includes provisions that:

- Mandate facility, areawide, and watershed planning (Sections 201, 208, and 303)
- Emphasize state NPS control assessment and planning (Section 319)

### **Stormwater NPDES Permits**

Under provisions of the Federal Clean Water Act, the Oregon Department of Environmental Quality (DEQ) administers a stormwater discharge permitting program as part of the National Pollutant Discharge Elimination System (NPDES). At present, all municipalities over 100,000 population, all industrial facilities, and all construction activities covering more than 5 acres require stormwater NPDES permits. In general, the permits require the application of Most Effective Practices (MEP), which are basically NPS pollution control measures/best management practices (BMP) for municipal, industrial, and construction activities. The industrial permits issued by DEQ can serve as a valuable resource for developing an inventory of NPS pollution sources.

### **TMDL Requirements**

Before the enactment of the 1972 version of the Federal Clean Water Act, the states and the federal government relied on water quality standards as the basis for improving water quality. If a stream or lake did not meet the standards, the parties responsible for the pollution sources were required to clean them up. The main problem with this "water quality" approach was that it was usually difficult to determine who the responsible parties were and what part of the problem they were causing.

PL 92-500 added a "technology-based" approach in 1972. This approach requires municipal and industrial point source dischargers to provide minimum treatment facilities, regardless of the impact of the discharge on water quality. Nonpoint and point sources that still cause problems, or violations of instream state water quality standards, are to be addressed through a "water quality-based" approach. This approach involves planning, the attainment of water quality standards, and the establishment of total maximum daily loads (TMDL's) to meet



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the standards. The technology-based approach worked well for point sources, but the TMDL-based water quality approach was not rigorously implemented. In 1986, a lawsuit was filed against the U.S. Environmental Protection Agency (EPA), which resulted in an out-of-court mandate for DEQ to establish TMDL's for 13 Oregon waters.

PL 92-500 requires that:

- "...each State shall identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters."
- "...each State shall establish for the waters identified...the total maximum daily load, for those pollutants which the Administrator (of EPA) identifies...as suitable for such calculations. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

Section 303(d) of the act requires states to identify the quality of each body of water and compare it with its water quality standards. If the body of water does not meet water quality standards after the technology-based standards have been implemented, the water body is designated as "water quality limited."

For the segments or bodies of water designated as water quality limited, the states must establish a "total maximum daily load," or TMDL, which is the greatest amount of a pollutant that the water body can receive each day without violating water quality standards.

Both point and nonpoint sources must be taken into account. EPA's regulations establish two components for the TMDL:

- A "waste load allocation," which is the portion of a TMDL that is allocated to point sources of pollution.
- A "load allocation," which is the portion allocated to nonpoint sources and to natural background sources of pollution.

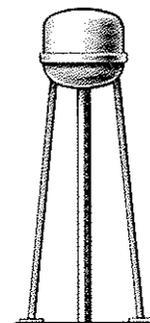
The additional controls can be placed on nonpoint and/or point sources of pollution, and the TMDL process provides for tradeoffs between point and nonpoint pollutant loadings.



## SAFE DRINKING WATER ACT OF 1986 (SDWA)

The federal Safe Drinking Water Act (PL 99-339) addresses nonpoint sources through a provision requiring states and local water agencies to establish wellhead protection zones to safeguard groundwater drinking water systems.

DEQ was designated as the lead agency for the development of Oregon's wellhead protection plan (as required under PL 99-339) in 1986. Oregon's program was initiated in 1990. It is intended to prevent the contamination of groundwater used by public water supply wells and protect drinking water supplies. Over 3,400 public water suppliers are totally or partly dependent on wells to supply community water systems. In Oregon, approximately 77 percent of the state's population uses these water supplies.



The major elements required for each state program are:

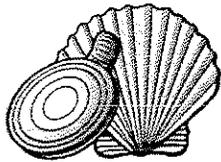
- Identification of specific duties for state and local agencies and public water suppliers
- Determination of the extent of a wellhead protection area (WHPA) around each public water supply well
- Identification of all potential sources of contamination in each WHPA
- A preventative program for management of contaminant sources
- Contingency plans for obtaining alternate drinking water supplies for each public water system in case contamination occurs
- Consideration of potential contaminant sources during the siting process for new wellfields
- Public participation

Wellhead protection will be integrated into the state's existing comprehensive groundwater protection programs, including the basin planning and the critical groundwater area program administered by the Oregon Water Resources Department and the statewide comprehensive land use planning administered by the Department of Land Conservation and Development.

## COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS (CZARA)

Congress reauthorized and amended the Coastal Zone Management Act in 1990. The amendments include new requirements for states with approved coastal management programs. Oregon has had an approved coastal program since 1977.

One of the amendments (Section 6217) requires that all states with coastal programs develop a Coastal Nonpoint Pollution Control Program (CNPCP) by July 1995. CNPCP's are to be developed jointly by state water quality and coastal resource management agencies. Their development and implementation is to involve state, federal, and local water quality, land use planning, and habitat conservation authorities.



The purpose of the CNPCP is to implement basic measures for controlling several types of NPS pollution in coastal areas. Among other things, state programs must contain NPS pollution control measures that conform with EPA guidance (*Coastal Nonpoint Pollution Control Program - Program Development and Approval Guidance*, EPA, 1993), and must implement additional control measures where necessary. States must also develop mechanisms to improve coordination among state and local programs responsible for land use, water quality, habitat protection, and public health.

Congress directed EPA to publish "...guidance for specifying management measures for sources of nonpoint pollution in coastal waters." EPA's guidance is at the center of the CNPCP. It contains measures for six NPS categories: agriculture, forestry, urban areas, marinas and recreational boating, hydromodification (channels, dams, shorelines), and wetland and riparian areas. States must implement the EPA measures or an alternative as effective as the measure, or justify why the measure is not in the state's program.

Local jurisdictions will invariably be involved in developing and implementing Oregon's coastal nonpoint program. The EPA guidance must be integrated into Oregon's state programs before they can be applied locally. For example, some measures in the EPA guidance for urban runoff and existing development may only apply inside urban growth boundaries (UGBs), but not rural sites, while measures for watershed protection, site development, construction activities, and roads, highways and bridges may eventually be applied in all areas.

The Oregon Coastal Program has coordinated an inventory of the programs that already implement some of the measures in EPA's guidance. The inventory will be used as the basis for developing Oregon's program. Although the CNPCP must contain NPS pollution control measures that are enforceable rather than merely voluntary or advisory, Oregon's program will also include measures such as education and technical assistance.



## THE EPA ROLE

Although EPA does not have any direct role in NPS pollution management in Oregon, it does have a number of indirect roles. These include:

- A veto-type power in U.S. Army Corps of Engineers' Clean Water Act Section 404 permitting
- Administration of the federal review role for statewide NPS pollution assessment and planning
- Review authority for both the SDWA and FCWA regulations
- The provision of grants to the state for certain types of NPS control activities

## OREGON DEPARTMENT OF WATER RESOURCES PROGRAMS

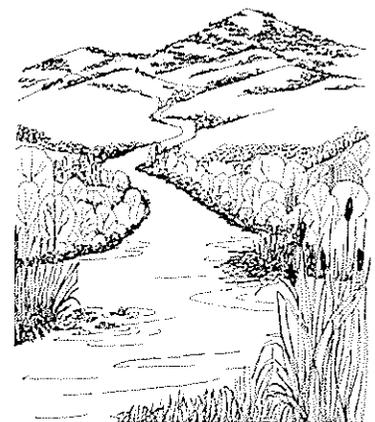
The Oregon Water Resources Department (OWRD) administers water law within the state. This function has become increasingly complex in recent years because of instream rights, water availability, and the number of protests on new applications. NPS pollution management is affected because water quality wetlands and ponds require a water right for losses due to evapotranspiration. Since the process can involve up to 2 or 3 years, a combined application for all such facilities in an entire watershed is advisable, if that approach is acceptable to OWRD for the watershed in question.

## GROUNDWATER PROTECTION

Groundwater resources receive considerable protection under provisions of the SDWA, the FCWA, Oregon's drinking water laws, and the Oregon counterparts to the SDWA and FCWA. It must be demonstrated that ponded NPS pollution control facilities (such as wetlands) will not adversely affect groundwater resources. Also involved are the wellhead protection zones provided for in the SDWA.

## WATERSHED MANAGEMENT PLANNING

With the passage of HB 2215, the Oregon Legislature created an opportunity for local, state, and federal agencies to work together with property owners, residents, and other interested parties to create a more cooperative approach to dealing with water quality and quan-



tity. The establishment of watershed councils allows for the melding of local people and resources with the technical expertise of federal and state agencies. The focus is on developing implementation programs that are based upon consensus and local action.

## **OREGON LAND USE PLANNING**

Oregon has a nationally recognized land use planning program that has won numerous awards. That system establishes a program of state goals and guidelines to be used by local governments to create each community's plans and regulations. Those plans are then reviewed by the Land Conservation and Development Commission (LCDC) for compliance with the state rules. Local jurisdictions not in compliance can lose state funds and face legal action from LCDC.

Once a plan is in compliance, changes made to the plan and/or development regulations must be consistent with the state land use goals, the Oregon Revised Statutes (ORS), and associated Oregon Administrative Rules (OAR). The state goals are included as part of the Oregon laws adopted by the Oregon Legislature. In addition, the Oregon Revised Statutes contain a number of other procedural provisions regarding public hearings, zoning requirements, land division rules, and authority for special activities granted to local governments by the legislature.

### **ORS 197**

ORS 197 establishes and provides direction to the LCDC, Department of Land Conservation and Development (DLCD), Land Use Board of Appeals, and other associated organizations. It also contains the statewide goals; provides for enforcement; and gives additional direction for activities of special interest, such as planning on federal lands, housing, destination resorts, and post-acknowledgment (for changes after the local plan has been approved by the state).

### **ORS 215**

ORS 215 focuses on county planning responsibilities. It establishes the authority to create planning commissions, the requirement to hire a planning director, code enforcement provisions, agricultural lands zoning, hearings procedures, and special requirements for land use zones.

### **ORS 227**

ORS 227 allows for and defines city planning. It authorizes planning commissions and establishes hearings procedures. It also provides special authority and responsibilities regarding solar access, truck routes, and wetlands.

## **ORS 92**

ORS 92 regulates the division of land. It establishes the basis for dividing current ownerships into lots for development by creating the definitions, procedures, surveying requirements, recording standards, and other related rules.

## **ORS 196**

ORS 196 defines wetlands, creates responsibilities for state and local agencies, and determines planning requirements for wetland and estuary management plans. It also specifies and authorizes regulations for removing materials or filling lands in or adjoining waters within Oregon.

## **OREGON ADMINISTRATIVE RULES**

The above regulations often require further clarification or need to have administrative activities established. This occurs through the creation of rules by state commissions. The LCDC adopts Oregon Administrative Rules to clarify planning activities or to establish needed processes for conducting planning inventories, determining final plans, writing ordinances, or performing other typical planning tasks.

## **DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

Many of the DLCD's activities are related to providing advice or information to local governments. While local planning activities must be consistent with state goals and rules, local governments are called upon to initiate and develop their own programs and approaches to satisfy the public's needs and interests. For example, in developing regulations for floodplains, the federal government provides model rules, information, and an insurance program that assures local governments of at least a minimum amount of flood protection. The DLCD provides an administrator who advises local planners on the rules, helps obtain the needed information, and keeps local planning offices informed about changing rules and conditions.

The DLCD has no permitting program. It coordinates with other state agencies that do issue permits, and advises local planning departments as they develop permitting systems. The DLCD also administers local planning grants. These funds are given to cities and counties that need to improve their plans or development regulations. The funds are often tied to particular programs, such as periodic review. (Every 5 to 7 years, local plans must be updated to ensure they are consistent with local issues and state standards.) They are also often tied to special priorities, such as destination resorts. (State legislation calls for more planning to foster this economic activity.) The funds are often critical for helping local governments develop new processes and projects needed to make the system work.

## LAND USE GOALS

Several statewide planning goals relate to water quality and need to be considered in developing an NPS pollution control program. The way in which the goals relate to NPS pollution control activities varies with the goal language and intent.

### Goal 3: Agricultural Lands

Agricultural practices can have a substantial effect on, and be dramatically affected by, water quality. However, local governments do not directly control routine farm activities through land use planning. Goal 3 addresses the protection of agricultural lands and provides for other related activities in the resource area, many of which do require local permits and may need to be evaluated for NPS pollution. For example, locating an auction yard in a resource zone could be permitted, but careful siting and design would substantially reduce the likelihood of introducing pollutants into streams from the parking or holding areas. SB 1010 (see Appendix A) provides a vehicle for local governments to affect agricultural practices regarding NPS pollution.

### Goal 4: Forest Lands

The management of forest lands involves a variety of activities that directly or indirectly affect water quality. The construction of access roads, use of chemicals and fuels, and assorted human activities can have a substantial impact unless properly managed. While local governments protect forest lands, it is rare that they become directly involved with forest practices, unless the work is part of a resort or other regulated commercial or residential project. Notable exceptions exist, such as the Ashland Watershed Protection Program in Jackson County, which addressed water quality impacts from timber harvesting through Section 313 of the FCWA.

### Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Areas

Because this goal deals with the protection of water areas, wetlands, watersheds, and groundwater areas, a direct connection exists between local planning efforts and NPS pollution control. These important sites must be inventoried, evaluated, and then allocated for either protection or appropriate development. This has become substantially more complex as the state and federal governments have created new wetland rules. While local government still plays a key role, they are one player in a larger team.



### **Goal 6: Air, Water, And Land Resources Quality**

Goal 6 is a clear mandate to local governments to maintain and improve the quality of the state’s water resources. This goal identifies the state’s interest in ensuring that developments approved in Oregon are consistent with the state and federal environmental quality rules. It endorses the importance of protecting the local carrying capacity of river basins, as well as preserving the resources from degradation or loss. This is the primary land use goal relating to NPS pollution control.

### **Goal 7: Areas Subject To Natural Disasters And Hazards**

Goal 7 provides for the protection of the public from natural disasters such as floods. It provides local governments an easy avenue for establishing buffers and regulations that keep potentially polluting activities away from waterways and many groundwater recharge areas. Like Goal 6, this goal provides substantive authority to address NPS pollution issues.

### **Goal 11: Public Facilities And Services**

Goal 11 calls for local governments to create public facility plans and capital improvement programs to ensure the efficient and effective delivery of public services. Like Goal 6, this provides an opportunity to guide development away from potentially hazardous areas for NPS pollution. It also allows the governments to plan for surface water facilities that protect the environment, such as sedimentation ponds or wetlands and wellhead protection areas.

### **Goal 15: Willamette River Greenway**

This goal created the Willamette River Greenway and calls for special regulation and protection activities, including land purchase, in the vicinity of the Willamette River. Special permits and controls of agricultural, timber, mining, and other activities along the river provide useful opportunities to protect and enhance water quality.

### **Goal 16: Estuarine Resources**

Estuaries must often absorb the effects of many pollutants used in the area and upstream. Because they act as a natural cleansing area, their protection is critical to the maintenance of water quality. The state’s planning and protection efforts, as well as the federal government’s coastal zone management regulations, provide important resources, guidance, and standards for preservation of these key resources.

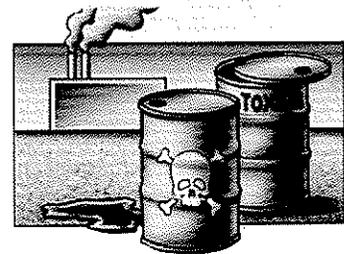
## Goal 17: Coastal Shorelands

The lands lying near coastal waters that are designated coastal shorelands have significant water-related characteristics. Many of these areas are wetlands or riparian areas that require special protection. A primary portion of Goal 17 is: "To reduce...the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands."

## HAZARDOUS MATERIALS

### CERCLA AND RCRA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund") and the Resource Conservation and Recovery Act (RCRA) both address hazardous materials.



CERCLA's primary value for NPS pollution managers is that it provides for the identification of sites with major hazardous materials contamination and establishes a cleanup program. The cleanup may be publicly funded if no responsible parties can be legally identified, or it may be funded by one or more parties responsible for the contamination.

RCRA is a significant source of NPS industrial/commercial site information because it provides for the licensing of all handlers of hazardous materials. Also important is its program for the removal of underground storage tanks, which often present NPS water quality problems.

### STATE HAZARDOUS MATERIALS LAWS AND REGULATIONS

Several Oregon laws and administrative rules address hazardous materials. Most implement and conform with the counterpart federal laws and regulations. The DEQ files concerning CERCLA and RCRA sites/licensees are an important resource for NPS pollution planners and managers. These files can be reviewed, and provide an excellent starting point for a pollution source inventory in a watershed.

## FOREST, RANGE, AND AGRICULTURE

The U.S. Forest Service is governed by provisions of the National Forest Management Act of 1976 (NFMA) and all other applicable federal laws. This includes Section 313 of the FCWA, which requires that federal agencies comply with local water quality requirements. (See Appendix A.) Similar provisions exist for rangeland and the Bureau of Land Management. The most important aspect of NFMA is a requirement to develop forest plans that optimize a number of resource uses, including water quality and fish.

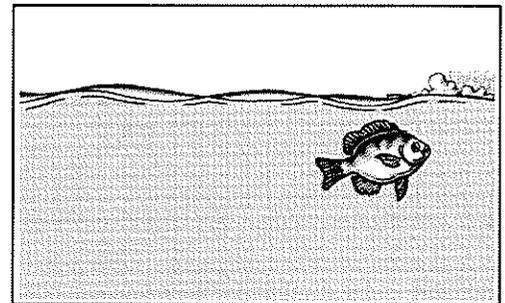
For agriculture, one of the most significant laws involves the establishment and funding for the Soil Conservation Service and its local partners, the soil and water conservation districts. Both of these organizations are important resources for addressing NPS pollution problems.

The Oregon Department of Agriculture (ODA) has new authority under SB 1010 (1993) regarding agricultural practices related to water quality. Local jurisdictions can have an important role in working with agricultural interests to reduce NPS pollution impacts.

The Oregon Department of Forestry governs forest practices under provisions of the Oregon Forest Management Act. Under current provisions of the Forest Management Act, it may be difficult for most jurisdictions to control NPS pollution impacts from state and private forest activities, except through cooperative efforts with DEQ in the administration of TMDL provisions.

## FISH AND WILDLIFE

The Oregon Department of Fish and Wildlife (ODFW) administers a number of laws and administrative rules regarding fish and wildlife. Of particular importance is the agency's role as reviewer of U.S. Army Corps of Engineers Section 404 permits and Oregon Division of State Lands (ODSL) removal-fill permits (ORS 196.800-.990) involving fill operations and wetlands. The Corps of Engineers and ODSL usually include ODFW comments as conditions of the permit. This process can be used to strengthen NPS pollution management within a watershed through coordinated planning and review. It can also be a major hurdle in the permitting process for NPS water quality facilities that are large, regional in nature, and on a stream with significant fish resources.

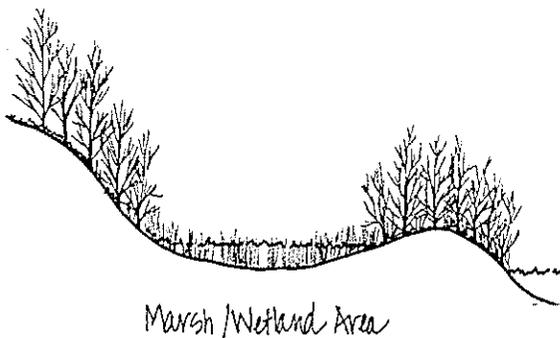


If a local jurisdiction is planning for regional, public NPS facilities, early discussions with ODFW are advisable. (Examples of regional, public NPS facilities include stormwater wetlands, sedimentation ponds, and vegetated swales that receive runoff from a number of land owners and that are owned and maintained by public agencies.) The joint development of a "fish management plan" can help in the coordination and provide ODFW with a basis for making its decisions and comments.

## WETLANDS AND RIPARIAN AREAS

### WETLANDS PERMITS (SECTION 404 OF THE FCWA) AND WATER QUALITY CERTIFICATION

Section 404 permits involve a federal/state process administered by the U.S. Army Corps of Engineers. The Oregon Division of State Lands (ODSL) administers a similar process. Most fill operations in water or wetland environments require a Section 404 permit, including NPS pollution control facilities. The process requires a minimum of 60 days after the application is submitted, and it can be considerably longer before a permit is issued.



In addition to the direct authority the Corps of Engineers and ODSL have, a number of agencies review the permit applications. These agencies include EPA, DEQ, ODFW, and the U.S. Fish and Wildlife Service. Their comments usually lead to conditions of the permit. DEQ must provide a FCWA Section 401 water quality certification indicating that water quality requirements pertinent to the project will be met.

An application can be filed with either the Corps of Engineers or ODSL, and the process is automatically synchronized. The permitting organizations meet informally as the statewide inter-agency meeting (SWIM) committee to discuss permit applications with applicants and coordinate their activities. It is advisable to meet with SWIM as early as possible to discuss the project for which a permit will be required.

### DIVISION OF STATE LANDS PERMIT

The Division of State lands inventories wetlands within the state and administers the removal-fill law (ORS 196.800-.990).

### WATER RIGHTS

A water right is required for facilities that include a long-term water surface, such as ponds or wetlands. This process is very time consuming. If the watershed involved is relatively small and the issues are legally straightforward, it is advisable to apply for a watershed coverage permit (which covers a number of facilities within a watershed).

FEDERAL AND STATE LEGAL AND REGULATORY FRAMEWORK

**TABLE V-1  
FEDERAL AND STATE AUTHORITIES RELATED TO  
NPS POLLUTION CATEGORIES**

Federal and State Authorities	NPS POLLUTION CATEGORIES				
	Agriculture	Forest Harvest	Residential	Commercial	Industrial
FCWA (PL 92-500)					
NPDES Permits - § 402			●	●	●
TMDL - §303	●	●	●	●	●
Wetlands - §404	●	●	●	●	●
DEQ WQ Cert - §401	●	●	●	●	●
SDWA - Wellhead Protection	●	○	●	●	●
CZARA - §6217	●	●	●	●	●
LCDC and Land Use					
LCDC ORS 197	○	○	○	○	○
County ORS 215	○	○	○	○	○
City ORS 227	○	○	○	○	○
Goal 3-Agricultural Lands	●	○			
Goal 4-Forest Lands	○	●			
Goal 5-Open Sp.-Nat. Areas	○	○	●	●	●
Goal 6-Air & Water Quality	●	●	●	●	●
Goal 7-Natural Disasters	○	○	●	●	●
Goal 11-Public Facilities			●	●	●
Goal 15-Willamette River	●	●	●	●	●
Goal 16-Estuarine Resources	●	●		●	●
Goal 17-Coastal Shorelands	○		●	●	●
CERCLA and RCRA	○	○	○	●	●
NFMA		●			
ODA Authorities	○				
ODFW Authorities	○	○	○	○	○
OWRD - Water Authorities	○	○	○	○	○
ODSL Authorities	●	●	●	●	●

● = Significant regulatory relationship

○ = Moderate regulatory relationship

