

Senate Committee on Water Policy
February 26, 1991 - Page

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These minutes contain materials which paraphrase and/or summarize
statements made during this session. Only text enclosed in quotation marks
report a speaker's exact words. For complete contents of the proceedings,
please refer to the tapes.

SENATE COMMITTEE ON
WATER POLICY

February 26, 1991Hearing Room 137
3:00 p.m. Tapes 21 - 22

MEMBERS PRESENT:Sen. Larry Hill, Chair
Sen. Wayne Fawbush
Sen. Bob Kintigh
Sen. Eugene Timms
Sen. Dick Springer, Vice-Chair (Arrived 3:55 p.m.)

STAFF PRESENT: Lisa Zavala, Committee Administrator
Bernadette Williams, Committee Assistant

MEASURES
CONSIDERED: SB 204 - Public Hearing
SB 203 - Work Session
SB 201 - Work Session

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statements made
during this session. Only text enclosed in quotation marks report a
speaker's exact words.
For complete contents of the proceedings, please refer to the tapes.

TAPE 21, SIDE A

003 CHAIR HILL: Calls the meeting to order at 3:20 p.m.. Opens
public hearing on SB 204.

(Tape 21, Side A)
SB 204 - Public Hearing
Witnesses: Bill Young, Water Resources Department
Neil Mullane, Department of Environmental Quality
Tom Simmons, Water Watch of Oregon
Tom O'Connor, League of Oregon Cities
Bill Gaffi, Association of Oregon Sewerage Agencies
Steven Hall, City of Ashland
Walt Meyer, City of Medford
Jan Boettcher, Oregon Water Resources Congress

006 BILL YOUNG, WATER RESOURCES DEPARTMENT (WRD):

Submits and summarizes written testimony on SB 204. (EXHIBIT A)

075 HILL: You see the next step on this bill is to work on some additional language? You are not asking for this bill to be passed in its current form?

078 YOUNG: No we are not.

082 KINTIGH: How do you handle this now? Isn't some of this effluent being put on land?

086 YOUNG: There is some that is applied to land and some which is subject to permits. The problem is there is no certainty in how we've tried to handle this.

092 NEIL MULLANE, DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ): Submits and summarizes written testimony on SB 204. (EXHIBIT B)

118 HILL: Is this problem specific to particular reaches or rivers, or is it universal across the state? Are we going for the no-discharge rules on all streams?

121 MULLANE: The no-discharge policy which the Environmental Quality Commission adopted is a statewide policy. Continues summary of Exhibit B.

135 HILL: Do you also take into account the possible effects on ground water?

137 MULLANE: Yes we do. In the passage of the groundwater legislation two years ago and in putting together rules, we are looking at permits as we issue them and how it might impact groundwater.

140 HILL: This is being tried in the Tualatin area? We have a problem statewide, how widespread is the use of effluent in agriculture?

153 MULLANE: Can't give you exact numbers, but putting together a list of various facilities in the state that utilize effluent for irrigation.

159 MULLANE: Continues summary of Exhibit B.

171 HILL: Do you see effluent as water? You are proposing to exempt effluent for certain uses from the need for a water right certificate. You must consider effluent water or you wouldn't need special exemption.

175 MULLANE: Effluent is waste water.

177 HILL: We are talking about water and not something other than water.

178 YOUNG: Arizona's court system defined it as neither surface water or ground water. The net effect of that was to remove it from regulation from WRD in Arizona. Other states say it

is water and available for appropriation. We are asking you to tell us if it is not water. We need a statement from the Legislature as to how we ought to be treating this material.

191 HILL: Effluent is water and that is why legislation is treating it as exempt from water rights law for certain purposes. We need to consider it within the realm of water to make it work. If it is water and now going into streams, is someone using it down river going to be upset when we take it away and exempt it from water rights?

207 YOUNG: The bill would attempt to outline a process to provide opportunity for people to claim injury.

219 HILL: Another aspect is the use without waste purpose of the law. If effluent is considered waste from an industrial or municipal usage, the law would require us to exempt the effluent not only from water rights laws, but also from application of use without waste upon the primary user who creates the effluent.

230 YOUNG: The term "waste" is complicated when in this discussion, because we think of waste water in the sense of effluent. In another sense, our laws have used "wastewater" for years to characterize water that someone's system may be losing.

247 TIMMS: The irrigators have a mix of both effluent and water. They are not using the total water right in irrigation at all times of the year. You want to allow them not to lose it even using effluent.

259 YOUNG: Part of the intention of the bill was to protect a user who held a water right that they weren't using because they were applying effluent.

271 TOM SIMMONS, WATERWATCH:

If effluent is water, and we believe it is, we have already set precedence in other parts of the state where we are doing this. Where we are struggling with the doctrine of prior appropriation and the implications of existing water rights and what impact this bill might have on downstream users, I think there are equally serious issues on the public interest side. The bill doesn't set up a due process for either existing users or public interest.

311 HILL: WaterWatch supports keeping the effluent out of the streams in order to reduce the pollution load in a particular stream? Do you agree to putting it to a beneficial use?

316 SIMMONS: Yes, I agree with that.

319 HILL: What if that damages instream flows?

321 SIMMONS: Our concern would be in the return flows and whether they met water quality standards. That needs to be addressed more closely in this bill; who is going to be responsible and who is going to be held accountable. There may be an adverse impact in the future on the fields that have effluent applied to it.

348 TOM O'CONNOR, LEAGUE OF OREGON CITIES:

The League, in conjunction with the Associated Oregon Sewerage Agencies, has been working with both WRD and DEQ on this concept. We are caught in the middle between the prior appropriation doctrine and the ever increasing requirements for cleaner streams.

372 HILL: Do you see this whole issue stemming from the Clean Water Act?

375 O'CONNOR: I think what has happened is that this interpretation that effluent may be water and therefore subject to the doctrine of prior appropriation situation came at a time when we as a society have moved towards other methods of treating our effluent (wetlands, fertilizer, etc.). Our concern is that those kinds of methodologies are potentially put in jeopardy by an opinion that may mean that effluent is water.

405 HILL: We think it is water, as does WRD and DEQ. I'm not sure we need to debate whether it is water or not.

414 O'CONNOR: I was simply pointing out that this is a municipality having a water right for consumptive use of water and then that water going through a system and being returned. There are streams all over the state where this is an impact.

442 BILL GAFFI, ASSOCIATION OF OREGON SEWERAGE AGENCIES, (AOSA):
Senate Bill 204 approaches two important issues:

- 1) Preserving the water rights of existing users. That is important to the viability of any re-use program.
- 2) Is effluent subject to the existing water right provisions of the law? There is a lack of clarity in how to deal with that.

Re-use has become a critical element of a lot of agencies' waste water management strategies, as well as to some basins regarding conserving water supplies.

TAPE 22, SIDE A

034 STEVEN HALL, CITY OF ASHLAND:

Submits and summarizes written testimony regarding SB 204.
(EXHIBIT C)

065 HILL: Where does the phosphorous typically come from in your system?

067 HALL: Estimating that 30-60 percent comes from laundry detergent.

072 HILL: Is there a bill addressing a statewide ban on phosphorous in detergents?

073 HALL: DEQ is proposing a bill. Continues summary of Exhibit C.

078 HILL: The current limit of the amount of phosphorus discharge

allowed is an absolute value and is set by the federal government?

080 HALL: Yes, through the Environmental Quality Commission.

081 HILL: DEQ is the immediate agency, but the federal government is setting the standard?

081 HALL: Yes.

082 KINTIGH: Is there anyway in your process to remove the phosphorous?

097 HILL: They measure the two pounds at Bear Creek or at the end of Ashland Creek?

098 HALL: It is how many pounds we put into the stream. There is a process of dividing that among non-point source (storm drainage, overland flow).

100 HILL: Is this considered to be a non-point?

101 HALL: This is a point source because it comes out of one pipe. Continues summary of Exhibit C.

131 KINTIGH: What is Ashland's source of water?

132 HALL: We have two sources of water. Major sources of water are the East and West forks of Ashland Creek. During the irrigation season we draw water which comes from the Cascade side and we supplement our water with that.

138 KINTIGH: You are bringing additional water into Bear Creek that wouldn't be there otherwise?

142 HALL: It would eventually end up in Bear Creek.

144 WALT MEYER, REPRESENTING CITY OF MEDFORD:

Most of state's waters are water quality limited. As communities are making decisions on how they are going to manage their waste water, they will be faced with huge investments to meet requirements which currently they are unsure about. The decisions they face right now are whether they will invest in higher levels of treatment, expansion of our waste water treatment facilities, or re-use programs. They must be assured that they won't be preempted through a process of litigation associated with a downstream users claim on the water that is currently discharged into the streams and subject to permits. The City of Medford would like to see SB 204 modified so that water is not subject to appropriations.

188 FAWBUSH: When water is appropriated for municipal use, is that appropriated in a traditional way via a water right that is subject to all the limitations and rights that every other water right is granted?

197 O'CONNOR: Yes it is the same process, but there are some differences in terms of the Abandonment Doctrine and the ability to bank water rights for the future.

206 KINTIGH: (Question addressed to Steven Hall, AOSA) Are there other chemicals in this effluent besides the nitrogen and phosphorous, good or bad?

209 HALL: The only other major concern is the chlorine, which affects toxicity relating to fish. But that would not be a problem on land. We can remove the chlorine prior to using it on land. The other concern is bio-chemical oxygen demand (bod) and suspended solids, which are also regulated. The City of Ashland has no heavy chemicals or metals in our sewage.

222 SPRINGER: Is there an overall state ban on phosphates?

225 HALL: The City of Ashland will be going through a second reading on a phosphate ban inside the city. The Rogue Valley Council of Governments has endorsed a similar plan for the whole Rogue Valley.

229 GAFFI: AOSA is supportive of a statewide phosphorous and phosphorous detergent ban.

234 HILL: For us to take any city seriously, they would have to be considering or have adopted such a ban.

243 TIMMS: What are the causes of the 600 million dollar cleanup of the Tualatin River?

249 GAFFI: The causes are fairly widespread, forestry and agricultural practices, urban development, etc. All of those sources are being addressed in a comprehensive manner in an effort to meet the low levels that are required in the Tualatin Basin.

258 HILL: Your intent is to address your city's problems. What about the other entities that produce an effluent that has selenium or other toxic agents? Do we throw everyone in the same basket and allow it to be used to irrigate fields?

273 O'CONNOR: I think all we can do at this point is address the issue that we are concerned about in terms of municipal effluent.

279 HILL: You are asking us to draw a narrow boundary around the question at this point, and that would include nitrogen and phosphorous.

283 GAFFI: Comprehensive rules relative to re-use of waste water effluent have been developed. The manner in which those issues are addressed by municipalities is usually through controlling the sources that discharge to that municipal system. There are rigorous and well developed industrial pre-treatment programs with substantial enforcement capability that is required to be in place by the federal government.

298 HILL: Before we take final action, we should schedule time for DEQ to explain how they are implementing the TMDL requirements contained in the Clean Water Act.

315 JAN BOETTCHER, OREGON WATER RESOURCES CONGRESS (OWRC):

OWRD generally endorses this type of concept due to its conservation components. However, we are concerned about the process, but willing to work on it. If it is not going to be a water right, the least significant document that can be provided to WRD to track the water would be some kind of a contractual arrangement between parties defining quantity and other requirements. The exchange medium is an area where a process can be worked out. In section 5 subsection 2, there is a conclusive presumption that could not be overcome in the notification process and would like to see changes in that area.

370 MULLANE: About four years ago the NW Environmental Defense Center sued the EPA over how the department was running its MPS program and particularly on how permits were issued in areas with water quality limited stream segments. Once the streams were identified, the department has to put in process the ability for us to identify the assimilative capacity of a stream; what amount of pollutants go into the stream and still meet water quality standards. We identified about 12 stream segments that we felt were water quality limited. We have been working at a rate of two per year to assess those water bodies and establish the TMDLs and work with point and non-point sources that are contributing to those problems. We have completed TMDLs on four streams segments (Tualatin, Bear Creek, Yamhill and Garrison Lake). We are establishing TMDLs on the Pudding, Columbia Slough, Coquille, and the Klamath. This year we will look at the Grande Ronde. The EPA will announce the establishment of a TMDL for docks.

456 HILL: What authority do you have to regulate those contributions to the stream's pollution load? What gives you the authority to tell a plant to stop dioxin production or to tell a city that it can't dump the effluent into the stream?

465 MULLANE: The base authority is through our statutes. Through our permit program, we are required to implement the state and federal standards regarding pollutant limits; we identify the various parameters and limit their discharge.

474 HILL: What authority does the EPA have over the state if we don't meet their expectations?

479 MULLANE: They can overfile on our action and therefore take the action. The permit we utilize to allow facilities to discharge is a national permit program.

488 HILL: Is there a decision package in your budget that deals with this?

493 MULLANE: The department had two decisions packages. One to enhance our NPDS permit program, and the other strictly for the TMDL program.

499 HILL: Do they require fee increases?

500 MULLANE: They do.

501 HILL: What is the state of those proposals in the Senate?

TAPE 21, SIDE B

032 MULLANE: We have been on the agenda twice and working on a third time.

038 HILL: If they don't get passed, will we still have a program?

040 MULLANE: I can't answer that; would have to look at the remainder of our budget. There is serious consideration that if the department is not going to have enough resources to run the TMDL program, they will look at what other program they might give up to run the program.

045 HILL: If the program was defunded, would EPA pick it up?

046 MULLANE: They would pick up a portion. They would require the state, through the permit program, to implement it.

050 HILL: We wouldn't obtain any federal resources?

050 MULLANE: That is correct.

058 HILL: Asks parties who testified and indicated an interest in working on some language to get together and do so. Closes public hearing on SB 204. Opens work session on SB 203.

(Tape 21, Side B)

SB 203 - Work Session

Witnesses: Brad Higbee, Association of Oregon Sewerage Agencies
Gary Wicks, Administrator, Building Codes Agency

084 BRAD HIGBEE, ASSOCIATION OF OREGON SEWERAGE AGENCIES:
From a public sewerage agency concern, there is essentially no evidence that there are any problems with the use of water efficient fixtures. There are probably three benefits which would cause public sewerage agencies to support this measure. 1) It would result in water savings. 2) postponement of the need to expand the capacity of a waste water treatment facility. 3) It is better and easier to treat the amount of wastewater coming to the plant if it is less diluted.

110 HILL: There are no concerns of it backing up there lines?

111 HIGBEE: No, I haven't heard any comments regarding that.

120 GARY WICKS, BUILDING CODES AGENCY:

Submits and summarizes written testimony regarding SB 203.
(EXHIBIT D)

163 WICKS: I was addressing the SB 203-1 amendments and I see that SB 203-2 nominally addresses our concerns.

177 HILL: We took your advice and amended ORS 455.610, the new section 5. That should cover residential as well as commercial.

181 WICKS: Continues summary of Exhibit D.

253 TIMMS: The private sector had no problem with the plumbing standards, why should Building Codes have a problem?

261 WICKS: I'm not suggesting there is a problem with the standards, but that the same level of detail contained in the standards proposed in SB 203 are dealt with in other codes through the rulemaking process.

265 TIMMS: It seems that we should try and put more in statutes and less in administrative rules.

272 HILL: The Plumbing Manufacturers Institute submits letter commenting upon SB 203. (EXHIBIT E) Asks Building Codes thoughts on how do we peg it to the National Standards Institute. We currently have language that attempts to do that in Section 4; you could check the wording to achieve our intent and not using the wrong reference. In particular, Section 2, subsection 2; that would be a safety.

Section 4 allows certain exemptions from the requirements of Section 2 and 3. We want to make clear that only if someone is replacing the sewage system or the fixture itself that this would apply. These amendments apply to new fixtures only. This would allow used fixtures to be sold on the secondhand market. It is a little more of an incremental approach than the previous version of the bill. Submits and summarizes SB 203 -2 hand engrossed version. (EXHIBIT F)

382 SPRINGER: Might that include other public access facilities such as parks, etc with heavy duty fixtures.

385 HILL: Yes. A fixture specifically designed to withstand unusual abuse would include park restrooms, rest stop restrooms, and other heavy usage locations where the fixtures may be damaged or destroyed unless they have a particularly durable nature. This would key in if we cannot obtain water efficient fixtures that would meet the usage demands. Can you think of any other occasion which we might want to address an exemption.

411 WICKS: We can't think of any other reason for exemptions now. There will probably be others that come up, but if we had some general rulemaking authority we could more easily adjust the rules to deal with those kinds of problems. Our concern is that there is no general rulemaking authority and no flexibility.

438 HILL: We are giving you rulemaking authority to exempt reconstruction, alteration and repair of buildings that don't include a replacement of those fixtures. You can exempt any building that has a plumbing or sewage system that won't perform appropriately according to ANSI standards with the new fixtures. You can exempt any specialized function fixture. All historic structure fixtures. Refers to all exemptions in Section 4. We are close to exempting everything and we don't want to give it all away due to water savings.

471 FAWBUSH: Could Building Codes be more specific as to what we haven't incorporated in this bill that you are concerned about (i.e. unforeseen circumstances).

481 WICKS: We are here to argue that our conservation process works very well and is very similar to the kind of policy and direction that the legislature is trying to set out for water conservation. There is no opposition to the thrust of the bill, but we are asking for the same opportunity to do that.

045 HILL: You are questioning whether this is the preferred approach, but you agree with the intent.

046 WICKS: Absolutely.

MOTION: SEN. FAWBUSH moved to adopt SB 203-2 LC amendments as hand engrossed by staff dated 2/26/91. (EXHIBIT F)

VOTE: There being no objection, the motion carried. Sen. Timms was excused.

MOTION: SEN. FAWBUSH moved SB 203-2 to the floor with a "do pass" recommendation.

VOTE: In a roll call vote, the motion carried with all members present voting AYE. Senator Timms was excused.

(Tape 21, Side B)
SB 201 - Work Session

065 HILL: Opens work session on SB 201. An agency bill from Water Resources Department. Senator Timms has withdrawn his amendments.

089 LISA ZAVALA, SENATE WATER POLICY COMMITTEE ADMINISTRATOR: At the last public hearing and work session on SB 201, we adopted the SB 201-1 amendments. Senator Springer did raise an issue and concern about giving the Building Codes Department the authority to waive certain recording requirements for governmental entities. We did not discuss it any further, but the Department has submitted some proposed language in addition to the SB 201-1 amendments.

098 BEV HAYES, WATER RESOURCES DEPARTMENT: Submits and summarizes proposed amendments to SB 201. (EXHIBIT G)

124 HILL: You are retaining the definition of governmental entity?

126 HAYES: That is correct. You already adopted the SB 201-1 amendments, which revised the bill using current law instead adding new law to the statutes.

135 HILL: We will accept these amendments for consideration and set them over.

141 KINTIGH: What is the purpose of Section 1 and the seller telling the buyer that there is a water right and what obligations are there to the seller in case there is something not quite right in the water right?

145 HAYES: Our interest in this bill is to be able to keep our

records up to date as to who owns water rights and where. We are proposing that we be notified when a water right is transferred.

158 KINTIGH: Is there any liability for the seller if it doesn't turn out?

161 HAYES: I believe that your amendments still include the language that says that it doesn't invalidate the instrument of conveyance executed in the transaction.

168 HILL: What would cause a person to comply if there is no liability?

169 HAYES: Because it is the law.

173 KINTIGH: What about a situation concerning the misleading of a buyer by the seller?

177 HAYES: There would be opportunity through civil suits to take action against the seller.

180 HILL: I am having second thoughts about the change of the date in the new Section 3 (verification in the year 2002). We should be looking at a shorter timeline.

196 HAYES: Our problem is that we received funding for only two positions to update our water rights records and it is physically difficult or impossible to do so without additional funding.

202 HILL: You cannot raise fees on your own; it has to be statutory?

203 HAYES: That is correct.

204 HILL: We have the hydro fee bill coming up and can consider some additional fee increases to accomplish some of the purposes of the Department.

213 TIMMS: We should have someone in the banking area find out if the failure of the seller to comply with the provisions of this section doesn't invalidate an instrument.

229 HILL: Your intent is to prevent a cloud on the title?

230 TIMMS: Yes. And if someone doesn't indicate there is a water right on the property, what problem does that create?

250 HILL: When I talked with the banker's representative, he indicated that when his member institution makes loans on agricultural land, they check for a water right. I don't think they check with WRD, except sometimes. They ask to see the certificate. He was wondering if they are taking chances on property that is worth less than it is due to water rights not being up to date.

265 TIMMS: I think the buyer should know if they are getting a valid water right.

275 HILL: This bill would require the notice sent to WRD which would give the Department an opportunity to verify.

282 HAYES: There is a current law that requires some notice from the seller to buyer of the water right that is attached to the property.

288 KINTIGH: What does WRD do if a seller tells the buyer that he had a water right when in fact he didn't?

293 HAYES: We don't view it as our role to police the use of the water right. We are primarily concerned with who is the current owner of the water right.

300 KINTIGH: If you uncover that there isn't a valid water right but the buyer thinks there is, how will the buyer find out?

303 YOUNG: It wasn't our intention when we submitted this bill to search the validity of water right, but rather that our records reflect the current ownership.

338 TIMMS: What about cases of fraudulent water rights?

345 YOUNG: There is already a statutory requirement for a seller to provide notification to a buyer if there is an existing certificate. But that is no evidence of authenticity. Title insurance companies systematically and persistently exempt the question of water rights from anything that they are insuring on there title insurance for these very reasons. Because the law says that forfeiture occurred at the time the five years happened and you could have forfeiture that is imbedded in the history that has not been or known at the time a title insurance company made judgements.

383 TIMMS: This is just a way of gathering information on what water rights are out there? It has no implication on the title insurance or the financing?

387 YOUNG: Our effort is to say that a notification of water rights ought to be built into that loop so that we can update our records of a new owner.

415 HILL: Reads ORS 537.330. To get the records up to date we need to put money into it and bye some FTEs, either through general fund or fees. Closes work session on SB 201.

456 SPRINGER: I did propose an amendment which dealt further with the issue of notice on water rights. This may not be the bill. But I hope that we have an opportunity to talk about notice that's given when there is a change in waters rights or granting of water rights.

468 HILL: Adjourns meeting at 4:15 p.m..

Submitted by,

Reviewed by,

Bernadette Williams

Lisa Zavala

EXHIBIT LOG

- A - Testimony on SB 204 - Bill Young - 1 page
- B - Testimony on SB 204 - Neil Mullane - 2 pages
- C - Testimony on SB 204 - Steven Hall - 2 pages
- D - Testimony on SB 203 - Gary Wicks - 3 pages
- E - Letter on SB 203 - Plumbing Manufacturers Inst. - 2 pages
- F - SB 203-2 Hand Engrossed Amendments - Staff - 3 pages
- G - Proposed Amendments to SB 201 - Water Resources Dept. - 1 page