

JAN 27 2021

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL MANAGEMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the people of the
2 State of Hawaii are entitled to have access to wastewater
3 treatment system facilities that provide affordable, reliable,
4 and sustainable services in their communities. With wastewater
5 being increasingly recognized as a valued source of renewable
6 resources, regulatory agencies urging wastewater treatment
7 facilities that treat human and animal waste to be viewed as
8 resource recovery facilities that produce water, energy, and
9 nutrients. The Water Environment Federation believes that
10 wastewater treatment plants are not waste disposal facilities,
11 but rather water resource recovery facilities that produce
12 water, energy, and recover nutrients. These facilities have the
13 potential to reduce the nation's dependence on fossil fuels
14 through the production and use of renewable energy. These
15 facilities have the potential to generate gas that can service
16 communities, biosolids that can be turned into fertilizer, and



1 reclaimed water that can be used for golf courses, agricultural
2 purposes, and landscaping.

3 In 2020, the Supreme Court held that wastewater injection
4 wells can be a regulated pollution source under the Clean Water
5 Act in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct.
6 1462. By ruling that these underground wells are "point
7 sources" for pollution, and thus require a permit for discharge,
8 this decision will have a significant impact on both public and
9 industrial underground injection wells, as well as municipally-
10 owned wastewater facilities. To comply with the ruling, Maui
11 County estimates the county will be responsible for \$2,500,000
12 in upgrades, plus additional civil penalties. These high
13 operational costs are a substantial burden for local
14 governments.

15 The legislature finds that current wastewater systems
16 throughout the State are outdated and require major upgrades and
17 the replacement of entire facilities. Estimated costs for these
18 systems are in excess of \$500,000,000 in capital improvement
19 project funds and \$1,000,000,000 in resource recovery systems
20 funding.



1 For these reasons, Hawaii's wastewater treatment systems
2 will require state-of-the-art facilities that private entities,
3 through their experience in resource recovery services,
4 technological expertise, and economies of scale, can provide
5 more economically and effectively than county governments.

6 Throughout Hawaii, county wastewater treatment departments
7 seek to explore public-private partnerships allowed under
8 section 323F-7.6, Hawaii Revised Statutes, including undertaking
9 three formal solicitation efforts to gauge the interest of
10 potential private partners both on a local and national level.
11 However, in *Konno v. County of Hawaii*, 937 P.2d 397 (1997), the
12 Hawaii supreme court held that public landfill worker positions
13 were "civil service" positions governed by merit principles and
14 thus Hawaii county violated civil service statutes and article
15 XVI, section 1 of the Hawaii constitution when it privatized its
16 landfill operations. This holding has limited Hawaii county in
17 its ability to establish an effective business model that would
18 create resource recovery systems that are regulatory compliant,
19 and environmentally and financially sound.

20 The County of Hawaii has begun to evaluate different models
21 of delivery and operation systems for wastewater resource



1 recovery. Potential partners are hesitant to work with the
2 County of Hawaii in evaluating opportunities without enabling
3 legislation that would address logistical and structural issues
4 related to these systems for wastewater resource recovery.

5 The purpose of this Act is to allow county governments to
6 have the ability to:

- 7 (1) Enter into private-public partnerships for the
8 services and transferring, or joint venturing of one
9 or more of their wastewater treatment facilities to a
10 private entity, or its wholly owned nonprofit
11 management entity, for the delivery of those services;
12 and
- 13 (2) Transfer the right and responsibility to manage,
14 operate, and provide wastewater treatment and resource
15 recovery services in those facilities to one or more
16 private entities or their nonprofit management
17 entities.

18 SECTION 2. Chapter 340B, Hawaii Revised Statutes, is
19 amended by adding a new part to be appropriately designated and
20 to read as follows:



1 "PART . PUBLIC-PRIVATE PARTNERSHIPS FOR THE DELIVERY OF
2 WASTEWATER TREATMENT AND RESOURCE RECOVERY SERVICES AT HAWAII
3 WASTEWATER TREATMENT SYSTEM FACILITIES.

4 §340B-A Definitions. As used in this part:

5 "Nonprofit management entity" means a nonprofit
6 organization duly authorized to transact business in the State,
7 the sole shareholder or member of which is the private entity,
8 whose principal purpose is to manage and operate a wastewater
9 treatment facility.

10 "Pre-transfer facility" means a facility of a county's
11 wastewater treatment systems prior to its transformation into a
12 transferred facility.

13 "Private entity" means a business organization duly
14 authorized to transact business in the State that:

15 (1) Has a certificate of need to operate, maintain,
16 design, and construct a wastewater treatment plant,
17 and is able to demonstrate the successfulness of the
18 resource recovery program pursuant to chapter 340A; or

19 (2) Is the sole member of a nonprofit management entity.



1 "Transfer completion date" means the date specified as the
2 transfer completion date in an agreement entered into, including
3 any extensions allowed under the terms of the agreement.

4 "Transferred facility" means a wastewater treatment
5 facility within the state of Hawaii for which the right and
6 responsibility to manage, operate, and otherwise provide
7 wastewater treatment services at the facility is transferred to
8 a private entity or its nonprofit management entity pursuant to
9 this part.

10 §340B-B Transfer of rights and responsibility to manage,
11 operate, and provide wastewater treatment services in a facility
12 of the county's wastewater treatment system to a nonprofit
13 management entity. (a) Notwithstanding any other law to the
14 contrary, the mayor, or county directors of wastewater treatment
15 systems, or their designees, shall negotiate with a private
16 entity or transfer the right and responsibility to manage,
17 operate, design, construct, and implement full scale resource
18 recovery services at one or more facilities of the various
19 county wastewater treatment systems to a nonprofit management
20 entity wholly-owned by the private entity; provided that the
21 private entity shall submit a statement of interest in response



1 to a notice published by the county to submit statements of
2 interest in acquiring the right and responsibility to manage,
3 operate, design, construct, and implement full scale resource
4 recovery services at one or more facilities in the state of
5 Hawaii.

6 (b) Any agreement negotiated by the counties and entered
7 into by the private entity and counties shall, at minimum,
8 include a transfer completion date and a plan and schedule for
9 completing the transfer that includes:

10 (1) Provisions and deadlines for conducting and completing
11 due diligence;

12 (2) Provisions and a deadline to terminate the agreement
13 before a transfer is completed, at the parties'
14 respective option;

15 (3) Provisions for winding down operations at the
16 transferred facility or facilities and for terminating
17 the agreement in the event that the lease entered into
18 is terminated before the lease expires or the private
19 entity or its nonprofit management entity abandons or
20 otherwise discontinues its provision of wastewater
21 management services in a transferred facility; and



1 (4) Provisions to transfer or assign interests in
2 equipment and furnishings, including any leases for
3 the same; accounts receivable; other provider
4 agreements; business and commercial licenses and
5 registrations; intellectual property and goodwill;
6 administrative, financial, and regulatory records and
7 information; or any other interests or property of the
8 county wastewater system facility or facilities to be
9 transferred under this part, that the parties agree to
10 transfer or assign.

11 (c) On and after the transfer completion date for the
12 transfer of one or more facilities of the county wastewater
13 system to a private entity or its nonprofit management entity
14 pursuant to this part, the county shall cease to have any
15 responsibility for or control over the management and operation
16 of the facility or facilities transferred by the agreement
17 pursuant to this part and will maintain administrative
18 oversight.

19 **§340B-C Approvals required.** Any documents associated with
20 the transfer of a wastewater facility or facilities under this
21 part shall be subject to review by the corporation counsel,



1 director of environmental management, and the director of
2 finance in their capacity to advise the mayor.

3 **§340B-D Real property; terms and conditions.** (a) The
4 county shall enter into a fixed-term lease with the private
5 entity or its nonprofit management entity to rent the real
6 property, including all improvements and fixtures on the
7 property, of the wastewater system facility or facilities that
8 are to be transferred to the private entity or its nonprofit
9 management entity under this part.

10 (b) At minimum, the lease shall include the following
11 terms and conditions:

12 (1) The lease shall not be terminated other than for good
13 cause and upon a minimum of three hundred sixty-five
14 days prior written notice to ensure that the delivery
15 of wastewater services to the community will not be
16 disrupted;

17 (2) During the term of the lease, the private entity or
18 its nonprofit management entity shall have exclusive
19 control of all matters related to the management,
20 operation, and provision of wastewater treatment



1 services in the leased facilities, except as otherwise
2 set forth in the lease;

3 (3) The responsibility to oversee the performance of the
4 terms and conditions of the lease by the private
5 entity or its nonprofit management entity shall rest
6 with the county as the custodial caretaker of the real
7 property under section 46-20; and

8 (4) The county shall retain ownership of the leased
9 property throughout the term of the lease.

10 **§340B-E Transfer or assignment of other business assets.**

11 Provisions to transfer ownership or assign the interest of the
12 county wastewater system in some or all of the equipment and
13 furnishings of the facility or facilities transferred to the
14 private entity or its nonprofit management entity under this
15 part shall be included in the lease entered into under section
16 340B-D.

17 **§340B-F Liabilities.** (a) The counties shall be
18 responsible for any and all obligations incurred by the facility
19 or facilities to be transferred, prior to the transfer
20 completion date including any accounts payable, accrued paid
21 time off, debt, capital leases, malpractice liabilities, and



1 other obligations incurred before the transfer completion date.
2 Any and all liabilities of the pre-transfer facility that were
3 transferred to the wastewater system upon its creation by Act
4 262, Session Laws of Hawaii 1996, all liabilities of the pre-
5 transfer facility related to collective bargaining contracts
6 negotiated by the State, and the liability for all current
7 outstanding post-employment benefits of the wastewater system
8 shall remain the responsibility of the counties.

9 (b) All liabilities arising out of a transferred
10 facility's management and operation in a transferred facility,
11 on or after the transfer completion date, shall be the
12 responsibility of the private entity or its nonprofit management
13 entity.

14 **§340B-G Employment, wages, and benefits.** (a) The county
15 and the unions representing employees of the pre-transfer
16 facility or facilities shall meet to discuss the impact of a
17 transfer on the employees and the feasibility of tempering the
18 adverse effect of layoffs by amending the employees' collective
19 bargaining agreements pursuant to section 89-8.5.

20 (b) The employees working at a transferred facility shall
21 be subject to laws and regulations that apply to private sector



1 employees. The employees of a private entity or its nonprofit
2 management entity shall not be governed by state laws that apply
3 to public officers and employees of the county, including but
4 not limited to chapters 76, 89, 89A, and 89C, and any other laws
5 and regulations that govern public or government employment in
6 the State.

7 (c) The private entity or its nonprofit management entity
8 shall offer all employees of the pre-transfer facility,
9 employment for a period of , after the transfer completed
10 date.

11 (d) No employee of the county who is separated from
12 service as a result of implementation of an agreement and
13 transfer under this part shall suffer any loss of any previously
14 earned rights, benefits, or privileges.

15 (e) Subject to subsection, the private entity or its
16 nonprofit management entity shall take all reasonable steps
17 necessary to provide for the efficient transition of employees
18 from county employment to employment by the private entity or
19 its nonprofit management entity at a transferred facility.

20 **§340B-H Operating support.** (a) The private entity or its
21 nonprofit management entity to which one or more of the



1 facilities of the county wastewater system has been transferred
2 pursuant to this part may seek funds from the county for
3 operating costs as defined in section 37-62, of a transferred
4 facility by preparing a budgetary request in accordance with
5 procedures and criteria established by the director of finance.
6 In no event shall the amount requested exceed the amount
7 appropriated for the operating costs of the wastewater system
8 facility or facilities. The director of finance shall review
9 the request and may include some or all of the amount requested
10 in the administrative budget of the department of environmental
11 management. Any appropriation made in response to the request
12 shall be subject to the allotment system generally applicable to
13 all appropriations made by the county.

14 (b) To qualify to request funds from the county under this
15 section, the private entity or its nonprofit management entity
16 to which one or more of the facilities of the county wastewater
17 system has been transferred pursuant to this part shall satisfy
18 the following standards and conditions:

19 (1) Be duly authorized to transact business in the State,
20 and determined and designated to be a nonprofit
21 organization by the Internal Revenue Service;



- 1 (2) Be licensed and accredited, in accordance with
- 2 federal, state, or county statutes, rules, or
- 3 ordinances, to conduct the activities for which
- 4 funding is sought;
- 5 (3) Have a governing board whose members have no material
- 6 conflict of interest and serve without compensation;
- 7 (4) Have bylaws or policies that describe the manner in
- 8 which business is conducted, prohibit nepotism, and
- 9 provide for the management of potential conflict of
- 10 interest situations;
- 11 (5) Be in compliance with all county and state
- 12 requirements with respect to the transferred facility
- 13 and any other facility it operates;
- 14 (6) Submit tax clearances from the director of taxation
- 15 and the Internal Revenue Service to the effect that
- 16 all tax returns due have been filed and all taxes,
- 17 interest, and penalties levied or accrued against have
- 18 been paid;
- 19 (7) Submit to an annual audit, disclose revenue
- 20 projections, and prepare an annual internal
- 21 performance audit and itemized financial statements,



1 including reimbursement rates, with respect to the
2 transferred facility, to the extent practicable, in
3 the same manner as described in section 323F-22; and
4 (8) Submit its annual budget with respect to a transferred
5 facility to the counties for review no later than
6 thirty days before the mayors of the county submits
7 their annual budget to the council.

8 **§340B-I Capitol project support.** (a) Without regard to
9 chapter 42F, the private entity to which one or more of the
10 facilities of the wastewater system has been transferred
11 pursuant to this part may seek funds from the county for capital
12 expenditures, as that term is defined in section 37-62, for a
13 transferred facility for each or all of the first years of
14 the lease entered into under section 340B-D. Each year's
15 request for funds shall be submitted to the director of finance
16 in accordance with procedures and criteria established by the
17 director and shall be reviewed by the director and comptroller
18 with pertinent capital planning and expenditure documents and
19 the capital planning procedures supplied by the private entity
20 or its nonprofit management entity. The director of finance may
21 include some or all of the funds requested in the executive



1 budget. Any appropriation made in response to a request shall
2 be subject to the allotment system generally applicable to all
3 appropriations made by the legislature. The county department
4 of finance shall be responsible for transferring the funds
5 allotted to the private entity or its nonprofit management
6 entity for expenditure.

7 (b) After the first years of the lease entered into
8 under section 340B-D, the nonprofit management entity and the
9 private entity shall be responsible for funding all capital
10 expenditures of the transferred facility.

11 **§340B-J Strategic commitment during term of lease. (a)**
12 The private entity shall be committed to supporting the
13 nonprofit management entity and any transferred facility that
14 seeks to improve its performance.

15 (b) The private entity and the nonprofit management entity
16 shall apply efficiencies of scale, consolidation of shared
17 services, and administrative and technological expertise to
18 improve the wastewater treatment performance of a transferred
19 facility or facilities."

20 SECTION 3. Section 89-8.5, Hawaii Revised Statutes, is
21 amended to read as follows:



1 "§89-8.5 Negotiating authority; Hawaii health systems
2 corporation. Notwithstanding any law to the contrary, including
3 section 89-6(d), the counties and the Hawaii health systems
4 corporation or any of the regional boards, as a sole employer
5 negotiator, may negotiate with the exclusive representative of
6 any appropriate bargaining unit and execute memorandums of
7 understanding for employees under its control to alter any
8 existing or new collective bargaining agreement on any item or
9 items subject to section 89-9[7]; provided that an alteration
10 that intrudes beyond the jurisdiction of the counties shall be
11 effective only if the employer of the governmental jurisdiction
12 intruded upon consents to the alteration in writing."

13 SECTION 4. The governor shall inform the president of the
14 senate and the speaker of the house of representatives of the
15 transfer completion date specified in each agreement negotiated
16 and entered into pursuant to chapter 340B, part , Hawaii
17 Revised Statutes, by sending the president and the speaker each
18 a copy of each fully executed agreement.

19 SECTION 5. In codifying the new sections added by section
20 2 of this Act, the revisor of statutes shall substitute



1 appropriate section numbers for the letters used in designating
2 the new sections in this Act.

3 SECTION 6. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 7. This Act shall take effect upon its approval;
6 provided that the amendment to section 89-8.5 in section 3 of
7 this Act shall be repealed one year after the transfer
8 completion date specified in an agreement negotiated and entered
9 into under chapter 340B, part , Hawaii Revised Statutes,
10 and section 89-8.5, Hawaii Revised Statutes, shall be reenacted
11 in the form in which it read on the day prior to the effective
12 date of this Act.

13

INTRODUCED BY: *Maurice R. Brown*



S.B. NO. 997

Report Title:

Environmental Management; County Wastewater Treatment Facilities

Description:

Allows county governments to enter into private-public partnerships for the services and transferring, or joint venturing of one or more of their wastewater treatment facilities to a private entity, or its wholly owned nonprofit management entity, for the delivery of those services.

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