

STANDING COMMITTEE REPORT NO. 17-110

RE: C.B. NO. 17-83/R&D

SUBJECT: AMENDMENTS TO TITLE 25 OF THE FSM CODE
(ENVIRONMENTAL PROTECTION ACT)

MARCH 29, 2012

The Honorable Isaac V. Figir
Speaker, Seventeenth Congress
Federated States of Micronesia
Third Special Session, 2012

Dear Mr. Speaker:

Your Committee on Resources and Development, to which was referred C.B. No. 17-83, entitled:

"A BILL FOR AN ACT TO AMEND TITLE 25 OF THE CODE OF THE FEDERATED STATES OF MICRONESIA BY REPEALING CHAPTERS 1 THROUGH 4 OF SUBTITLE I IN THEIR ENTIRETY AND AMENDING CHAPTERS 5 THROUGH 7 OF SUBTITLE II BY RENUMBERING CHAPTERS 5 THROUGH 7 AS CHAPTERS 1 THROUGH 3, FOR THE PURPOSE OF REVISING AND UPDATING THE FEDERATED STATES OF MICRONESIA ENVIRONMENTAL PROTECTION ACT, AND FOR OTHER PURPOSES.",

begs leave to report as follows:

The intent and purpose of the bill are expressed in its title.

The subject bill was transmitted to Congress via Presidential Communication No. 17-165 on January 6, 2012, during the Third Regular Session of the Seventeenth Congress. C.B. No. 17-83 proposes several amendments to Title 25 of the FSM Code, which is the Environmental Protection Act. In transmitting this bill, the President has indicated that these amendments are proposed to make certain changes to the FSM Environmental Protection Act.

The act was enacted during the Trust Territory of the Pacific Islands. It should be amended to reflect the current functions and responsibilities of the National Government, especially to

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provide legal authority to the Office of Environment and Emergency Management to implement certain multilateral environmental agreements that FSM has ratified. The current MEAs that were already ratified by Congress include the following:

1. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal;
2. Montreal Protocol on Substances that Deplete the Ozone Layer;
3. Stockholm Convention on Persistent Organic Pollutants; and
4. Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes within the South Pacific Region.

Currently, title 25 of the FSM Code is comprised of two subtitles, neither of which reflects the current functions and responsibilities of the National Government in the area of environmental management and protection. In its current form title 25 duplicates many of the regulatory functions undertaken by state environmental protection agencies and does not provide the National Government with the necessary authority to implement the multilateral environmental agreements ratified by the FSM. This is an attempt to provide regulatory authority *visa vie* constitutional mandate and jurisdiction.

Proposed Amendments

The amendments to Title 25 of the FSM Code are outlined below:

1. The intent of the proposed amendment in section 1 of the bill is to repeal chapters 1 and 4 of subtitle 1 of title 25 in their entirety. Subtitle I of title 25, known as the *Trust Territory Environmental Quality Protection Act*, was originally enacted in the 1970's and it relies upon the operation of administrative bodies (the Trust Territory Environmental Protection Board and District Advisory Boards), which have not existed for at least the past thirty years. The FSM Congress intended subtitle I of title 25 to be repealed soon after the enactment of subtitle II in 1984. Subtitle II largely mirrors subtitle I, but includes updated administrative arrangements. It is not clear whether the legislative trigger for the repeal in section 708 of title 25 of the FSM Code ever occurred. Your Committee understands that subtitle I of title 25 is redundant and should be repealed.

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2. The proposed amendment in section 2 of the bill is to renumber chapters 5 through 7 as chapters 1 through 3. Your Committee recommends the proposed renumbering of chapter 5 through 7 as chapter 1 through 3 and to delete the use of the subtitle.

3. **Amendments to Section 501.** The proposed amendments here renumber section 501 as section 101 of title 25 and change 'subtitle' to 'title'. The act is still called the '*Federated States of Micronesia Environmental Protection Act*'.

4. **Amendments to Section 502.** The proposed amendments here renumber section 502 as section 102 of title 25 of the FSM Code. Moreover, in subsection 1, the Federated States of Micronesia recognize severe threat posed by climate change and should make it a public policy to develop mitigation and adaptation measures that will address climate change. Furthermore, in subsection 2 of the same section, a new subsection 2(e) is added to ensure that the Federated States of Micronesia is a responsible member of the global community by complying with international legal obligations upon ratification or accession to international environment agreements. Your Committee wishes to simplify the use of some languages in the Public Policy section and will offer the necessary amendments in this report.

5. **Amendments to Section 503.** The proposed amendments here renumber section 503 as section 103, delete the use of redundant definitions under this section and add new definitions. For example, the definitions of primary or secondary drinking water regulations are deleted and the definitions of Office of Environment and Emergency Management (OEEM) and the Director of OEEM are included to replace the defunct 'Board'. Moreover, a definition of 'Exclusive Economic Zone' is added, which simply links the term to its definition in title 18 of the FSM Code.

6. The proposed amendments in sections 6 and 7 of the bill are merely technical in nature, to renumber chapter 6 as chapter 2 and to renumber the reserved sections 601-605 as sections 201-205.

7. **Amendments to Section 606.** The proposed amendments here renumber section 606 as section 206 and change the use of 'Board' to 'Office'.

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8. The proposed amendment in section 9 of the bill is to renumber the reserved section 607 as section 207.

9. **Amendments to Section 608.** The proposed amendments here renumber section 608 as section 208 and change the use of "Board" to "Office". In this current section, the Director is required to transmit a less prescriptive version of a report to the President and Congress as compared to a more prescriptive reporting provision set out in existing section 608. The report only includes: an explanation on the status and conditions of the environment of the Federated States of Micronesia, and a review of the programs and activities undertaken by the National and State governments, municipal governments and nongovernmental entities, which might have effects on the environment of the Federated States of Micronesia. Your Committee recommends a less prescriptive report as recommended.

10. **Amendments to Section 609.** The amendments here renumber section 609 as section 209 and further change the use of 'Board' to 'Office'. Moreover, the proposed amendments herein require that OEEM shall work in close cooperation with the States in the areas of environment management and protection. Furthermore, there is new language added here, which states that "radioactive, toxic chemical or other harmful substance may not be used within the jurisdiction of the Federated States of Micronesia without the express approval of the national government of the Federated States of Micronesia", and that OEEM is authorized to balance the needs for economic and social development and to adopt regulations to fulfill the public policy objectives set forth in section 102 of this act.

Your Committee understands that the proposed language added herein is already enshrined in section 2 of article 13 of the FSM Constitution. In addition, since the National Government is vested with the constitutional power to ratify international treaties, upon ratification or accession of international treaties, the National Government needs to fulfill its international obligations. Your Committee is of the view that this section contains language that prohibits importation of toxic substance into the nation. But with the geographical configuration and the shared responsibilities of the State and National Government in the protection and management of the environment of this nation, your Committee strongly recommends the OEEM to work in close cooperation with the States to fulfill the FSM Constitutional mandates, including National Government's

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international obligations and also to carry out the purposes of this title.

11. **Amendments to Section 610.** The proposed amendments here renumber section 610 as section 210 and again change 'Board' to 'Office'. The amendments offered here will substantially alter the specific powers and duties of the Office as follows:

- OEEM is given the authority to promulgate regulations to implement the requirements of four MEA's;
- OEEM is given authority to collect administrative fees as part of the permitting processes involved in implementing the MEA's;
- The requirement to adopt and implement drinking water regulations is removed (Regulating drinking water quality is a responsibility of the state governments with national standard setting by the FSM Department of Health).
- The appropriation acceptance provision removes the specific reference to the US Government (OEEM has recognized diverse assistance from other donors including many international sources);
- The requirement to maintain a pollution permitting system is removed (Regulating pollution is a responsibility of the state governments;
- The requirement to establish criteria for classifying air, land and water is removed (Land use planning is a responsibility of the state governments); and
- The requirement to conduct a study of US environmental laws is removed.

12. The proposed amendment in section 13 of the bill is merely technical, to renumber chapter 7 as chapter 2.

13. **Amendments to Section 701.** The proposed amendments herein renumber section 701 as Section 301. Furthermore, such proposed amendments authorize the Director of OEEM to enter into cooperative agreements with state agencies to assist in achieving the purposes set out in this title, to enter into cooperative agreements with agencies of the National Government in anticipation of future needs, and to authorize appropriate officers to enforce OEEM regulations relating to imports and exports of chemicals and waste. Your Committee recommends that the Director should authorize officers from relevant agencies of

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the National Government, for instance, custom officers, immigration and labor officers, quarantine officers, food safety officers and environmental health employees to assist in achieving the purposes of this title.

14. Amendments to Section 702. The proposed amendments here renumber section 702 as section 302 and change 'Board' to 'Office'. Importantly, the application of the Environmental Impact Statements (EIS) focuses on the Exclusive Economic Zone (EEZ) of the Federated States of Micronesia and boundaries of the National Capital Complex in Palikir. In the current act, the National Government and its agencies submit an environmental impact statement to the Board prior to taking any major action significantly affecting the quality of the human environment. One of the proposed amendments here requires that any person, prior to taking any major action that will significantly affect the quality of the environment of the EEZ or the National Complex at Palikir, shall submit an EIS to the OEEM. The EIS must include several requisites enumerated in the same section. Any EIS is considered a public document.

15. Amendments to Section 703. The proposed amendments here renumber section 703 as section 303 and change 'Board' to 'Director' and also change 'member' to 'officer'. The offered amendments authorize the Director of OEEM and any officer, agent, or employee authorized by the Director to enter any establishment or upon any property that are subject of any breach of this title.

Your Committee feels that the authorized officer, agent or employee should have the right to enter any establishment or upon any property and to have the right to seize any substance, materials, good or equipment that is a subject of any breach of this title.

16. Amendments to Section 704. The proposed amendments here renumber section 704 as section 304 and change 'Board' to 'Office'. Moreover, one proposed amendment is to increase the maximum daily civil penalty from \$10,000 to \$100,000. The increased amount of \$100,000 is not high by international standards.

Your Committee was informed that the increase is justified because some of the activities that may be regulated by OEEM (e.g. sea bed mining, illegal imports of hazardous waste) have

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potentially massive environmental and health consequences, therefore, the civil penalty increase justifies the environmental and health impact. The \$100,000 penalty is a maximum, not a mandatory penalty, and would only be applied in the most extreme circumstances.

17. **Amendments to Section 705.** The proposed amendments here renumber section 705 as section 305 and simply change the cross-referencing from sections 704 and 707 to the new sections 305 and 307. This provision establishes an applicable administrative procedure.

18. **Amendments to Section 706.** The proposed amendments here renumber section 706 as section 306. The offered language mirror the existing judicial review provision. Another proposed amendment is simply changing the reference from 'Board' to 'Office'.

19. **Amendments to Section 707.** The proposed amendments here renumber section 707 as section 307 and change 'Board' to 'Director'. This section penalizes any person that knowingly makes any false statement in any application, reports or records that are required under this title. Another proposed amendment is to change 'subtitle' to 'title'. Your Committee recommends that the use of 'misdemeanor' and the 'length of imprisonment of not more than six months' should be amended, as reflected in this report.

20. **Enacting a new Section 308.** A new section 308 entitled "Authorized Officers" is proposed. Pursuant to Agreements made under section 301 of this title, authorized officers who will enforce this title may include National and State government agencies.

State hearings were held on this bill in the State of Yap on October 25, 2011, in Chuuk on October 27, 2011, in Kosrae on October 31, 2011, in Pohnpei on February 8, 2012 and with the National Government on March 21, 2012. Participants at all of these hearings, including representatives of the executives and legislatures of the States, voiced general support for the bill.

Some witnesses in Yap expressed their appreciation that the National Government is taking the lead in amending Title 25 of the FSM Code because the current act is an old and

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obsolete law. By doing so, the National Government should assist the State Governments so that each State is ready to assist the National Government in fulfilling its international obligations.

Some witnesses in Chuuk questioned the power given to the Office of Environment and Emergency Management and whether this is the best advice or Congress, who represents the majority of the populace, should retain this power when it comes to allowing ship transporting hazardous waste in our waters. Also, the National Government must assist the States in any incident and to allow any individual to claim any damages or for a state to share proceeds of those penalties.

Some witnesses in Kosrae inquired about what will happen to the State if the bill becomes law and why is this bill being proposed. Your Committee explained that the States' EPA exercise certain powers in respect to environmental protection and management and the proposed bill is essential to clarify the powers of the National Government and the State Government. The only environmental issue, which is enshrined in the FSM Constitution, is that "Radioactive, toxic chemical, or other harmful substances may not be tested, stored, used, or disposed of within the jurisdiction of the Federated States of Micronesia without the expressed approval of the National Government of the Federated States of Micronesia". Some witnesses also inquired whether there will be cost to Kosrae if this bill passes. The states will not incur additional cost if the bill passes.

Some witnesses in Pohnpei inquired on who will bear the cost of conducting the Environmental Impact Statement (EIS) by a third party, whether the amount of \$100,000 is assessed on the damages caused or the cost of resources. The bill would impose the cost of preparing the EIS on the proponent but would not compel the proponent to pay an independent third party to prepare the EIS. The \$100,000 figure is a civil penalty to punish activities in breach of the law regardless of whether damage in fact occurs. Compensation for actual environmental damage may be sought through court action and would reflect the amount of damage caused, including amounts above \$100,000.

In addition, it was suggested that a program of an

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'environmental offsets' wherein developers whose projects are approved would be required to "offset" the damage caused by their development by contributing to an environmental fund, or otherwise supporting environmental protection efforts. Another suggestion was the establishment of a special environmental fund, separate from the General Fund, into which fines or penalties would be deposited. In both cases, OEEM recognizes the possible merit of such reforms, and suggests that they be given further consideration for future amendments.

Your Committee recommends the following amendments to the bill as follows:

1. Page 2, line 9, delete "anthropogenic" and insert "man-made" in lieu thereof.
2. Page 9, line 16-18, delete "(including regulator activities) of the Hyperlink".
3. Page 17, line 1, delete "~~Right of entry~~", and insert "Right of Entry and Seizure" in lieu thereof.
4. Page 17, line 2, before "Whenever" insert "(1)".
5. Page 17, between lines 7 and 8 insert the following:
 - "(2) Whenever it is necessary for the purposes of this title, the Director, or any officer, agent, or employee when duly authorized by the Director, may seize any substance, materials, goods or equipment which the Director, or any officer, agent or employee reasonably suspects is the subject of a breach of any provision of this title or regulations made pursuant to this title.
 - (3) Any substance, materials, goods or equipment seized under this section:
 - (a) shall be stored at a place, and in a manner, in accordance with a direction given by the Director; and
 - (b) may be retained until such time as the Director has been satisfied by its owner, or the person from whom it has been seized, that it is not and has not been the subject of any breach of this title or regulations made pursuant to this title
 - (4) Where it is agreed by the owner of the

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substance, materials, goods or equipment that they are the subject of a breach of this title or regulations made pursuant to this title, or where the owner has not satisfied the Director under subsection (3) within six months of the date of seizure, the substance, materials, goods or equipment may be disposed of or destroyed in a manner determined by the Director."

7. Page 20, line 20, delete "misdemeanor" and insert "felony" in lieu thereof.
8. Page 20, lines 22 and 23, delete "not more than six months" and insert "a maximum of ten years" in lieu thereof.

Conclusion

Your Committee on Resources and Development is in accord with the intent and purpose of C.B. 17-83 and recommends its passage on First reading and that it be placed on the calendar for Second and Final reading in the form attached hereto C.B. 17-83, C.D.1.

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Respectfully submitted,

/s/ Roger S. Mori
Roger S. Mori, chairman

/s/ Yosiwo P. George
Yosiwo P. George, vice chairman

/s/ Peter M. Christian
Peter M. Christian, member

Florencio S. Harper, member

/s/ Bonsiano F. Nethon
Bonsiano F. Nethon, member

/s/ David W. Panuelo
David W. Panuelo, member

/s/ Joseph J. Urusemal
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