# **Department of Legislative Services**

Maryland General Assembly 2021 Session

# FISCAL AND POLICY NOTE Enrolled - Revised

House Bill 991 (Delegate Gilchrist)

Environment and Transportation Education, Health, and Environmental Affairs

#### Tree Solutions Now Act of 2021

This bill temporarily alters the definition of "forest mitigation banking" under the Forest Conservation Act (FCA) to include "qualified conservation" of forests. The bill also requires a technical study to be conducted, to review changes in forest cover and tree canopy in the State. The bill also establishes State tree-planting goals, related programs and funding, and a related commission. **The bill takes effect June 1, 2021, and specified provisions terminate at the end of fiscal 2023, 2024, and 2031.** 

# **Fiscal Summary**

**State Effect:** General fund expenditures increase by \$291,600 in FY 2022, by \$195,700 in FY 2023, and by \$15.0 million annually from FY 2024 through 2031. Special fund revenues and expenditures increase by \$2.5 million annually from FY 2024 through 2031. The bill also redirects a significant amount of existing special fund expenditures (discussed below), largely in FY 2023, but also in FY 2024 through 2031. **This bill establishes mandated appropriations in FY 2024 through 2031.** 

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
SF Revenue	\$0	\$0	\$2,500,000	\$2,500,000	\$2,500,000
GF Expenditure	\$291,600	\$195,700	\$15,000,000	\$15,000,000	\$15,000,000
SF Expenditure	\$0	\$0	\$2,500,000	\$2,500,000	\$2,500,000
Net Effect	(\$291,600)	(\$195,700)	(\$15,000,000)	(\$15,000,000)	(\$15,000,000)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

**Local Effect:** Local government operations and finances are affected, as discussed below.

Small Business Effect: Potential meaningful.

# **Analysis**

#### **Bill Summary:**

Forest Mitigation Banking

The bill modifies the definition of "forest mitigation banking" under FCA to include qualified conservation. Specifically, under the bill, "forest mitigation banking" means the intentional restoration, creation, or qualified conservation of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.

"Qualified conservation" means the conservation of all or a part of an existing forest that (1) was approved on or before December 31, 2020, by the appropriate State or local forest conservation program for the purpose of establishing a forest mitigation bank and (2) is encumbered in perpetuity by a restrictive easement, covenant, or another similar mechanism recorded in the county land records to conserve its character as a forest.

The bill allows for qualified conservation completed in a forest mitigation bank to be used, by a State or local forest conservation program, as a method in establishing standards for meeting afforestation or reforestation requirements under FCA. The afforestation or reforestation credit granted for qualified conservation completed in a forest mitigation bank may not exceed 50% of the forest area encumbered in perpetuity. Credits in a mitigation bank may not be approved for debiting until qualified conservation of the mitigation bank is complete.

These forest mitigation banking provisions of the bill apply retroactively and terminate June 30, 2024.

Technical Study on Changes in Forest Cover and Tree Canopy

The Harry R. Hughes Center for Agro-Ecology (Hughes Center), in consultation with the Department of Natural Resources (DNR), the Maryland Department of the Environment (MDE), the Maryland Department of Planning (MDP), the Maryland Department of Agriculture (MDA), and the Chesapeake Bay Program (CBP), as appropriate, must conduct a technical study to review changes in forest cover and tree canopy in the State. The technical study must, to the extent practicable, include:

- a survey and mapping of (1) existing forest cover and tree canopy in the State and (2) potential afforestation and reforestation locations in the State;
- an analysis of the health and quality of forests in the State;

- an analysis of the progress toward the State's commitments to expand urban tree canopy acres and plant riparian forest buffers under the 2014 Chesapeake Bay Agreement;
- an analysis of observed and projected changes in land cover and the amount of forest cover in the State due to development or other causes, using the Chesapeake Bay Phase 6 Model, Chesapeake Assessment Scenario Tool, and county and municipal forest conservation annual reports and land use plans, including the extent and nature of (1) mitigation activities involving existing forest conserved, tree planting, reforestation, or afforestation under FCA; (2) forest clearing, planting, and mitigation activity inside and outside priority funding areas and locally designated growth areas; and (3) the clearing and mitigation of forest considered to be a priority for retention and protection under FCA and in State-identified targeted ecological areas and greenways, hubs, and corridors, and the zoned density and sewer status of those areas:
- an analysis of observed and projected changes in the amount of forest cover in the State, based on (1) relevant State or local programs involving tree planting, reforestation, or afforestation and (2) the amount of forest preserved through federal, State, and local programs, including agricultural preservation, open space, conservation easement, and other land preservation programs;
- a review of forest mitigation banking in the State, including (1) capacity and location of active banks; (2) regulation of siting and creation of new banks; (3) geographic limitations on the use of mitigation banks; (4) the relationship between fee-in-lieu rates under FCA and the market for forest mitigation banks; (5) whether expanding the use of forest mitigation banks could provide water quality improvements and other beneficial results; (6) the extent to which existing forest mitigation banks are composed of forests that have been created or restored versus forests that are under qualified conservation; and (7) the effect of using qualified conservation completed in a forest mitigation bank to meet afforestation or reforestation requirements under State or local programs on the State's policy of achieving no net loss of forest; and
- a programmatic and funding review of federal, State, and local tree and forest planting programs such as (1) Marylanders Plant Trees; (2) Lawn to Woodland; (3) Backyard Buffers; (4) Conservation Reserve Enhancement Program (CREP); and (5) other programs used to further Total Maximum Daily Load (TMDL) Watershed Implementation Plans and Municipal Separate Storm Sewer System (MS4) permit compliance.

By December 1, 2023, the Hughes Center must submit a report of the findings of the technical study to the Governor and the General Assembly. The bill establishes the General Assembly's intent to review the findings and, based on the findings, to consider any legislative or other changes necessary to improve the implementation and effectiveness

of FCA, including any changes to the forest mitigation banking program in the State. Provisions relating to the technical study and report terminate June 30, 2024.

# Tree Planting Goals and Requirements

The bill's provisions relating to tree planting terminate June 30, 2031, except as otherwise specified.

The bill establishes that it is the policy of the State to support and encourage public and private tree-planting efforts, with the goal of planting and helping to maintain 5 million sustainable native trees in the State by the end of calendar 2031, as specified. It is the intent of the General Assembly that at least 500,000 of those trees be planted in an "underserved area," as defined. MDE is responsible for tracking the State's progress toward meeting these goals. MDE serves as the lead agency to receive tree data from MDA, DNR, and the Chesapeake Bay Trust (CBT), as specified. The bill establishes a 5 Million Tree Program Coordinator position within MDE. The tree program coordinator must, by December 1 annually, consolidate the tree planting data and report the State's progress toward meeting the tree planting goals to specified legislative committees.

The Governor must formally pledge the State's commitment to achieving the bill's tree planting goals through the U.S. Chapter of the World Economic Forum's One Trillion Trees Initiative.

In each fiscal year from 2023 through 2031, specified funding from the Chesapeake and Atlantic Coastal Bays 2010 Trust Fund (2010 Trust Fund) (discussed below) must be used to fund the tree program coordinator and 13 contractor positions within DNR's Forest Service to provide technical assistance, planning, and coordination related to tree plantings, tree buffer management, and forest management, including invasive vine removal, on public, private, and agricultural lands and in underserved areas. DNR must make reasonable efforts to ensure that the contractors hired pursuant to this provision reflect the geographic and demographic diversity of the State.

# Tree Planting Programs and Initiatives

*Urban Trees Program:* The bill establishes an Urban Trees Program administered by CBT. The purpose of the program is to plant native tree species in underserved areas by making grants to qualified organizations for tree-planting projects in those areas beginning in fiscal 2023. The bill specifies (1) eligible program expenses, which include personnel costs, among other things, and (2) required prioritization for awarding program grants. The program is funded by the Bay Restoration Fund's (BRF) Wastewater Account in fiscal 2023, as discussed in more detail below, and with any additional funds that may be allocated to CBT through its annual budget process. The bill also requires the Governor to

provide specified funding for the program in fiscal 2024 through 2031, as discussed below. In addition, CBT must seek federal funds and grants and donations from private sources to support the program. By October 1 annually, CBT must report to DNR and MDE regarding the grants awarded by the program during the immediately preceding fiscal year, as specified.

Conservation Reserve Enhancement Program: In fiscal 2023 through 2031, inclusive, a landowner who enrolls land planted with a forested streamside buffer receives a one-time signing bonus of up to \$1,000 per acre of land enrolled in CREP. The signing bonuses must be funded through money appropriated by the Governor in the annual State budget and the BRF Wastewater Account, as specified by the bill (the funding is discussed in further detail below).

The Commission for the Innovation and Advancement of Carbon Markets and Sustainable Tree Plantings: The bill establishes a Commission for the Innovation and Advancement of Carbon Markets and Sustainable Tree Plantings. MDE and, as necessary, DNR, must provide staff for the commission. Commission members may not receive compensation, but are entitled to reimbursement for expenses, as specified. The commission must develop (1) a plan to achieve the State's carbon mitigation goal of planting 5 million native trees; (2) a plan to ensure that the planted trees are properly maintained; (3) recommendations regarding the establishment of a Maryland-based carbon offset market to support the State's tree-planting goals; and (4) recommendations on reviewing State policies to reduce and fully mitigate the clearing of trees during the construction of State highways and other transportation projects. The bill establishes requirements governing what must be included in the plans and recommendations. By October 31, 2022, the commission must report its plan and recommendations to the Governor and the General Assembly. The commission terminates June 30, 2023.

# Bay Restoration Fund

After paying for eligible costs associated with upgrading wastewater treatment plants, as specified, from BRF's Wastewater Account, MDE must transfer the following amounts in fiscal 2023: (1) \$10.0 million to CBT for the Urban Trees Program established by the bill; (2) \$2.5 million to the 2010 Trust Fund in DNR to be used for tree planting on public and private land; and (3) \$2.5 million to MDA to fund tree planting under CREP and other tree-planting programs on agricultural land, as specified.

The bill establishes restrictions on how the funds transferred to the 2010 Trust Fund can be used. Funds transferred from BRF pursuant to these provisions are supplemental to, and may not take the place of, funding that would otherwise be appropriated for the affected programs and initiatives.

#### Mandated Appropriations

In each fiscal year from 2024 through 2031, the Governor must include in the annual State budget, an appropriation of (1) \$10.0 million to CBT for the Urban Trees Program established by the bill; (2) \$2.5 million to the 2010 Trust Fund to be used for tree planting on public and private land; and (3) \$2.5 million to MDA to fund tree planting under CREP and other tree-planting programs on agricultural land, as specified.

The bill establishes restrictions on how the funds appropriated to the 2010 Trust Fund can be used. Funds appropriated to the 2010 Trust Fund are supplemental to, and may not take the place of, funding that would otherwise be appropriated for tree plantings on public and private land.

Chesapeake Bay and Atlantic Coastal Bays 2010 Trust Fund

In each fiscal year from 2023 through 2031, inclusive, \$1.25 million from the 2010 Trust Fund must be used to fund MDE's 5 Million Tree Program Coordinator position and 13 contractor positions within DNR's Forest Service.

The bill also adds DNR's Green Shores Program to the list of programs to which the BayStat Subcabinet must direct funding from the 2010 Trust Fund.

#### **Current Law:**

*Forest Conservation Act – Generally* 

The Forest Service within DNR administers FCA, but it is primarily implemented on the local level. FCA establishes minimum forest conservation requirements for land development, and local governments with planning and zoning authority are required to develop local forest conservation programs that meet or are more stringent than the requirements of FCA. FCA applies to any public or private subdivision plan or application for a grading or sediment control permit by any person, including a unit of State or local government, on areas 40,000 square feet (0.9 acres) or greater, subject to certain exceptions.

A proposed construction activity goes through a process of evaluation of existing vegetation on a site and development of a forest conservation plan for the site defining how forest area will be retained and/or afforestation or reforestation will be undertaken. If afforestation or reforestation requirements cannot be reasonably accomplished on site or off site (which can include use of off-site forest mitigation banks), payment may be made into the applicable forest conservation fund to be spent by the State or the local government on reforestation and afforestation, maintenance of existing forest, and achieving urban

canopy goals. A State Forest Conservation Fund holds funds associated with projects reviewed by the State, and local forest conservation funds are associated with local forest conservation programs.

# Forest Mitigation Banks

"Forest mitigation banking" means the *intentional restoration or creation* of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.

DNR is required to develop standards and adopt regulations for the creation and use of forest mitigation banks, including criteria for tracking, crediting, maintaining, bonding, and reporting mitigation bank activities. In addition, a local jurisdiction may develop procedures for establishing forest mitigation banks as part of its local forest conservation program. The establishment of mitigation banks and their use may not alter the sequence for retention, reforestation, or afforestation on a development site. Criteria established by local or State programs for the use and establishment of forest mitigation banks must include protection and conservation in perpetuity of forest mitigation banks consistent with reasonable management plans, through methods that include easements, covenants, or similar mechanisms that must be in place at the time the credits are withdrawn. Credits in a mitigation bank may not be approved for debiting until construction of the mitigation bank is complete. In addition, a mitigation bank must maintain sufficient credits in reserve to cover anticipated expenses of completion of the mitigation bank.

#### Interpretation of What Constitutes Forest Mitigation Banking

Historically, local forest mitigation banking programs have provided credits to developers who preserve existing forested lands by recording restrictive easements that run in perpetuity. However, the Office of the Attorney General (OAG) recently issued an opinion addressing whether FCA allows off-site forest mitigation banks that were established to preserve existing forest. In its opinion, OAG concluded that the placement of a protective easement on an *already-existing* forest, as opposed to *intentionally created or restored forest*, would not qualify as mitigation banking under FCA. As a result, at least some local governments have suspended the granting of credits for existing forest.

#### Technical Study on Changes in Forest Cover and Tree Canopy

<u>Chapter 405 of 2019</u>, which took effect June 1, 2019, required the Hughes Center, in consultation with DNR, MDE, MDP, MDA, and CBP, as appropriate, to conduct the same technical study required under the bill, and to report its findings to the Governor and the General Assembly by December 1, 2019. The study was not able to be completed and Chapter 405 terminated June 30, 2020.

### Tree Planting

Although current law does not establish specific goals related to tree planting in the State, several State laws and programs address forest conservation and tree planting. In addition to FCA, examples include:

- Maryland's Roadside Tree Law protects trees along public road rights-of-way; before a roadside tree is trimmed or cared for in any way, a tree care permit must be obtained. Planting a tree within the public road right-of-way also requires a permit. Any work performed on a roadside tree must be done by a roadside tree care expert or a Maryland licensed tree expert.
- DNR launched a Marylanders Plant Trees program in 2009 to encourage citizens and organizations to partner with the State to plant new trees. Citizens can receive a \$25 coupon off the purchase of a native tree at participating nurseries.
- DNR also administers the Tree-Mendous Maryland program, which is aimed at helping restore tree cover on public land and community open space.

# Conservation Reserve Enhancement Program

The U.S. Department of Agriculture and the State have partnered in implementing CREP, a voluntary program, to enroll up to 100,000 acres of agricultural land in the State. Participants remove cropland and marginal pastureland from agricultural production and convert the land to native grasses, trees, and other vegetation or restore wetlands. Eligible participants receive payments in return.

### Chesapeake Bay Trust

CBT is a nonprofit grant-making organization dedicated to improving the watersheds of the Chesapeake Bay, the Maryland Coastal Bays, and the Youghiogheny River. Created in 1985 by the Maryland General Assembly, CBT's goal is to increase stewardship through grant programs, special initiatives, and partnerships that support K-12 environmental education, on-the-ground watershed restoration, community engagement, and the underlying science of these three realms. Grantees include schools, local governments, community groups, faith-based groups, watershed organizations, and other not-for-profit entities.

### Chesapeake Bay and Atlantic Coastal Bays 2010 Trust Fund

The 2010 Trust Fund was established in 2008 and is funded with a portion of revenues from the motor fuel tax and the sales and use tax on short-term vehicle rentals (which, collectively, generate approximately \$50.0 million each year for the fund). The trust fund is used for nonpoint source pollution control projects to help meet Chesapeake Bay restoration goals and to improve the health of the Atlantic Coastal Bays and their HB 991/Page 8

tributaries. Examples of nonpoint source projects that can be funded with the trust fund include cover crops, natural filters, and local watershed restoration projects, including stormwater management projects.

#### Bay Restoration Fund

Chapter 428 of 2004 established BRF, which is administered by the Water Quality Financing Administration within MDE. The primary purpose of the fund is to support upgrades to Maryland's 67 major publicly owned wastewater treatment plants with enhanced nutrient removal technology; funds are also used for septic system upgrade grants, among other things, and MDA's Cover Crop Program.

As a revenue source for the fund, Chapter 428 established a bay restoration fee on users of wastewater facilities, septic systems, and sewage holding tanks, and Chapter 150 of 2012 doubled the fee for most users (until July 1, 2030). Of the fee revenue collected from users of septic systems and sewage holding tanks, 60% must be deposited into a separate account, commonly referred to as the Septics Account. The remaining funds collected from users of septic systems and sewage holding tanks (40%) must be transferred to the Maryland Agricultural Water Quality Cost Share Program within MDA to provide financial assistance to farmers for planting cover crops.

#### **State Fiscal Effect:**

General Fund Expenditures (and a Related Special Fund Impact)

Commission for the Innovation and Advancement of Carbon Markets and Sustainable Tree Plantings – Fiscal 2022 and 2023

General fund expenditures for MDE increase by \$161,608 in fiscal 2022 and by \$25,687 in fiscal 2023, which accounts for a 30-day start-up delay. This estimate reflects the cost of (1) hiring a contractual administrator within MDE to support the Commission for the Innovation and Advancement of Carbon Markets and Sustainable Tree Plantings and (2) contractual services to support the commission's development of plans and recommendations. MDE has indicated these additional resources are needed to meet the bill's requirements of the commission by the reporting date of October 31, 2022. The estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

MDE FY 2022 Commission Costs	\$161,608
Operating Expenses	5,745
Contractual Services	100,000
Salary and Fringe Benefits	\$55,863
Contractual Position	1.0

Fiscal 2023 expenditures reflect a salary and ongoing operating expenses for the contractual position, for half of fiscal 2023 (through December 31, 2022), assuming the position ends soon after the report is completed.

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State's implementation of the federal Patient Protection and Affordable Care Act.

Technical Study on Changes in Forest Cover and Tree Canopy – Fiscal 2022 and 2023

General fund expenditures increase by approximately \$300,000 for the Hughes Center to complete the technical study and report required by the bill by December 1, 2023. The fiscal 2022 budget includes an appropriation of \$130,000 for ongoing environmental analysis and study at the Hughes Center, which is expected to be used for the study. Based on that appropriation, it is assumed, for the purposes of this fiscal and policy note that, of the \$300,000 total approximate cost, \$130,000 is incurred in fiscal 2022, and the remaining \$170,000 is incurred in fiscal 2023.

The Hughes Center has made initial efforts in line with the technical study provisions, despite the termination of Chapter 405 of 2019, but the study is largely yet to be completed. This estimate is based on the estimated costs to complete the study included in the fiscal and policy note for Senate Bill 729 of 2019 (enacted as Chapter 405), adjusted based on more recent information. The estimate assumes:

- funding is appropriated over the course of fiscal 2022 and 2023 for the full cost of the study;
- costs of contractual services to conduct surveying and mapping of potential afforestation and reforestation locations in the State are approximately \$150,000;
  and
- costs of contractual services for research and analysis relating to the remaining portions of the technical study are approximately \$150,000.

Assistance or consultation provided to the Hughes Center by CBP (in relation to the Chesapeake Bay Phase 6 Model or otherwise) and the State agencies mentioned in the bill is not expected to result in increased costs.

Mandated Appropriations – Fiscal 2024 through 2031

Under the bill, the Governor must include in the annual State budget, in each fiscal year from 2024 through 2031, an appropriation of (1) \$10.0 million to CBT for the Urban Trees Program established by the bill; (2) \$2.5 million to the 2010 Trust Fund to be used for tree HB 991/Page 10

planting on public and private land; and (3) \$2.5 million to MDA to fund tree plantings under CREP and other tree-planting programs on agricultural land. Thus, general fund expenditures increase by \$15.0 million in fiscal 2024 through 2031. Special fund (2010 Trust Fund) revenues and expenditures increase correspondingly by \$2.5 million each year, from fiscal 2024 to 2031, reflecting the receipt of the \$2.5 million mandated appropriation by the 2010 Trust Fund and spending of that funding, assuming the full \$2.5 million is spent each fiscal year.

Redirection of Special Funds

Bay Restoration Fund Transfers – Fiscal 2023

Under the bill, after paying for eligible costs associated with upgrading wastewater treatment plants, as specified, MDE must transfer, in fiscal 2023, the following amounts from BRF's Wastewater Account: (1) \$10.0 million to CBT for the Urban Trees Program established by the bill; (2) \$2.5 million to the 2010 Trust Fund to be used for tree planting on public and private land; and (3) \$2.5 million to MDA to fund tree plantings under CREP and other tree-planting programs on agricultural land.

Under the bill, there is \$15.0 million less in funding available for currently authorized uses of BRF's Wastewater Account in fiscal 2023. Instead, this funding is redirected as described above to cover specified costs related to the bill's tree-planting provisions.

2010 Trust Fund – Specified Personnel Expenditures – Fiscal 2023 through 2031

The bill also redirects the use of existing funding in the 2010 Trust Fund, by requiring, from fiscal 2023 through 2031, that \$1.25 million annually from the 2010 Trust Fund be used to fund (1) MDE's 5 Million Tree Program Coordinator position and (2) 13 contractor positions within DNR's Forest Service. For contextual purposes, the 2010 Trust Fund generally receives approximately \$50.0 million in funding annually. It is assumed, for the purposes of this fiscal and policy note, that the tree program coordinator position, despite being established when the bill takes effect June 1, 2021, (and a reporting deadline associated with the position occurring December 1, 2021), does not begin until fiscal 2023, when funding is provided for the position under the bill.

#### **Local/Small Business Effect:**

Forest Mitigation Banking Provisions

DNR advises that historically, it has interpreted FCA to allow for retention mitigation banks (preservation/conservation of existing forest) and has approved local governments' use of this type of mitigation. The bill restores this interpretation temporarily (through HB 991/Page 11

June 30, 2024), with respect to such retention ("qualified conservation") mitigation banks approved on or before December 31, 2020. As noted above, in response to OAG's recent opinion, at least some local governments have suspended the granting of credits for existing forests. According to the Maryland-National Capital Park and Planning Commission (M-NCPPC), as of December 31, 2020, there are no remaining forest mitigation bank credits available for purchase in Montgomery County. M-NCPPC further advises that in Prince George's County, the credits that qualify under OAG's interpretation are likely to be depleted in the near future.

Although the overall fiscal effect of the OAG opinion is unknown, M-NCPPC advises that it has potential impacts on local forest conservation programs, costs related to mitigation, the value of existing mitigation banks, farmers and other landowners, and related economic development. By restoring the historical interpretation of mitigation banking under FCA with respect to existing retention forest mitigation banks, through June 30, 2024, these effects are avoided temporarily.

# Tree Planting Provisions

The bill's redirection of funding from BRF and the 2010 Trust Fund for tree planting programs/purposes may affect local governments and small businesses. Some may benefit from the funding provided for tree planting (including nurseries and farmers), while others may be negatively affected if they otherwise would have benefited from existing uses of the funds.

**Additional Comments:** The Hughes Center is a nonprofit organization affiliated with the University of Maryland, College Park Campus and the University System of Maryland. The center brings together diverse interests from the agricultural, forestry, and environmental communities for the purpose of retaining Maryland's working landscapes and the industries they support, while protecting and improving the health of the Chesapeake Bay and its tributaries.

#### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Montgomery and Prince George's counties; Maryland-National Capital Park and Planning Commission; cities of Annapolis and Bowie; Maryland Municipal League; Department of Natural Resources; Maryland Department of the Environment; Harry R. Hughes Center for Agro-Ecology; University System of Maryland;

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Maryland Department of Planning; Maryland Department of Agriculture; Department of Legislative Services

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