

Bill No. SB 1182

Barcode 870556

CHAMBER ACTION

Senate

House

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The Committee on Environmental Preservation (Smith)
recommended the following **substitute for amendment** (932892):

Senate Amendment (with title amendment)

Delete everything after the enacting clause

and insert:

Section 1. Section 403.0874, Florida Statutes, is
created to read:

403.0874 Performance Based Permitting Program.--

(1) SHORT TITLE.--This section may be cited as the
"Florida Performance Based Permitting Act."

(2) LEGISLATIVE FINDINGS; PUBLIC PURPOSE.--

(a) The Legislature finds and declares that a permit
applicant's history of compliance or noncompliance with
environmental laws and permit conditions is a factor that
should be considered by agencies when they determine whether
to issue or reissue a permit to the applicant.

(b) Permit applicants with a history of compliance
with environmental laws and permit conditions should be
eligible for incentives to reward and encourage such

1 applicants.

2 (c) Permit applicants with a history of noncompliance
3 with environmental laws and permit conditions should be
4 subject to more stringent requirements, and in some cases such
5 applicants should be denied permits for an appropriate period
6 of time.

7 (d) It is therefore declared to be the purpose of this
8 section to provide agencies with clear and specific authority
9 to consider the compliance history of permit applicants and
10 those who control the applicants when evaluating whether the
11 applicant has provided reasonable assurance that it can and
12 will comply with applicable statutes, rules, and permit
13 conditions applicable to the regulated activity.

14 (3) DEFINITIONS.--For purposes of this section, the
15 term:

16 (a) "Applicant" means the proposed permittee or
17 transferee, the owner, and the operator of a regulated
18 activity seeking an agency permit. The term also includes any
19 person who has the legal or actual authority to control the
20 proposed permittee, transferee, owner, or operator, including,
21 but not limited to, any parent company and all of its
22 subsidiaries.

23 (b) "Agency" means the Department of Environmental
24 Protection.

25 (c) "Agency statutes" means chapter 161, part IV of
26 chapter 373, chapter 376, and this chapter.

27 (d) "Compliance history" means compliance and
28 noncompliance with all environmental laws and permit
29 conditions.

30 (e) "Environmental statutes" means any state or
31 federal statute that regulates activities for the purpose of

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1 protecting the environment or for the purpose of protecting
2 the public health from pollution or contaminants.

3 (f) "Formal enforcement action" means that the
4 Department of Environmental Protection or the United States
5 Environmental Protection Agency issued a Notice of Violation,
6 commenced a civil action, or executed a consent order. It also
7 includes criminal charges filed against the applicant for an
8 environmental offense that is or would be a criminal offense
9 if committed in this state, if the applicant has been
10 convicted of, pled guilty or nolo contendere to, or entered
11 into a deferred prosecution agreement with respect to the
12 offense, regardless of whether adjudication has been withheld.
13 It also includes a civil action executed by a private citizen
14 which was adjudicated with a finding against the applicant or
15 which is pending against the applicant.

16 (g) "Reasonable assurance" means that there is a
17 substantial likelihood, although not an absolute guarantee,
18 that the proposed activity and applicant will comply with
19 agency statutes and rules, orders, and permit conditions.

20 (h) "Regulated activity" means any activity, including
21 the construction or operation of a facility, installation,
22 system, or project, for which a permit or certification is
23 required under law.

24 (i) "Site" means a single parcel, and all commonly
25 owned or controlled contiguous or adjacent parcels, of land on
26 one or more of which the applicant proposes to conduct, or has
27 conducted, a regulated activity, regardless of when the
28 parcels are acquired. A site is a "new site" if the applicant
29 has not held an agency permit for a regulated activity at that
30 location for at least 4 of the 5 years preceding submission of
31 an application.

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1 (4) COMPLIANCE INCENTIVES.--In order to obtain a
2 compliance incentive, the applicant must affirmatively request
3 it as part of the permit application. Unless otherwise
4 prohibited by state or federal statute, agency rule, or
5 federal regulation, and provided that the applicant meets all
6 other applicable criteria for the issuance of a permit, any
7 applicant who meets the criteria set forth in this subsection
8 may be eligible for the following incentives:

9 (a) Silver Incentives.--An applicant may be eligible
10 for Silver Incentives under this paragraph if the applicant
11 has conducted the regulated activity at the site for at least
12 4 of the 5 years preceding submittal of the complete permit
13 application and has had no formal enforcement actions,
14 documented violations, or permit condition exceedances against
15 it during the preceding 5 years at any site in the country. At
16 a new site, an applicant may be eligible for Silver Incentives
17 if the applicant has conducted an activity similar to the
18 proposed activity under an agency permit at other sites in the
19 state for at least 4 of the 5 years preceding submittal of the
20 permit application; has had no formal enforcement actions,
21 documented violations, or permit condition exceedances against
22 it in the state during the preceding 5 years; and has had no
23 formal enforcement actions, documented violations, or permit
24 condition exceedances at any site in the country during the
25 preceding 5 years. Silver Incentives may include:

26 1. Automatic renewal of permit. A renewal of an
27 operation or closure permit shall be issued for a period of 5
28 years and shall, after notice and an opportunity for public
29 comment, be automatically renewed for one additional 5-year
30 term without agency action, unless the agency determines,
31 based on information submitted by the applicant or resulting

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1 from public comment or its own records, that the applicant has
2 committed violations or crimes during the relevant review
3 period that disqualify the applicant from receiving the
4 requested extension.

5 2. Expedited permit review.

6 3. Short-form renewals. Renewals of operation or
7 closure permits not involving substantial construction or
8 expansion may be made upon a shortened application form
9 specifying only the changes in the regulated activity, or a
10 certification by the applicant that no changes in the
11 regulated activity are proposed if that is the case.
12 Applicants for short-form renewals must complete and submit
13 the prescribed compliance form with the application and will
14 remain subject to the compliance history review of this
15 section. All other procedural requirements for renewal
16 applications remain unchanged. This provision shall supplement
17 any expedited review processes found in agency rules.

18 (b) Gold Incentives.--An applicant may be eligible for
19 Gold Incentives under this paragraph if the applicant meets
20 the requirements for Silver Incentives described in paragraph
21 (a) and takes other actions not otherwise required by law or
22 permit that significantly reduce threats or impacts to the
23 environment or public health. These actions may include
24 reductions in actual or permitted discharges or emissions,
25 reductions in the impacts of regulated activities on public
26 lands or natural resources, waste reduction or reuse, or other
27 similar actions as determined by department rule. Gold
28 Incentives may include all Silver Incentives and may also
29 include:

30 1. Ten-year permits, provided that the applicant has
31 conducted a regulated activity at the site for at least 5

1 years.

2 2. Fewer routine inspections than other regulated
3 activities similarly situated.

4 3. Expedited review of requests for permit
5 modifications.

6 4. Agency recognition, program-specific incentives, or
7 certifications in lieu of renewal permits.

8 (c) None of the incentives in paragraph (a) or
9 paragraph (b) will be offered for permits under federally
10 delegated programs, under which to grant such incentive would
11 violate federal law or not be in accordance with the existing
12 approved program under the federal delegation.

13 (d) Within 6 months after the effective date of this
14 act, the department shall initiate rulemaking to implement
15 these incentives. The rule shall specify what incentives will
16 be made available, how applicants may qualify for incentives,
17 how extended permits may be transferred and the limitations on
18 transfer, and how incentives may be removed or revoked if the
19 applicant fails to maintain the programs entitling it to an
20 incentive or if the applicant's compliance history changes.
21 Until an implementing rule is adopted, incentives will not be
22 available to permit applicants under this act.

23 (5) CONSEQUENCES OF NONCOMPLIANCE ON AGENCY PERMITTING
24 DECISIONS.--The agency shall consider the applicant's
25 compliance history, as described in this subsection, when
26 determining whether a permit applicant has provided reasonable
27 assurance of future compliance with applicable agency statutes
28 and rules and conditions of the requested permit. This
29 subsection is not intended to conflict with any requirement of
30 any federally delegated or approved program.

31 (a) The applicant's compliance history shall consist

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1 of the applicant's knowing civil and criminal violations of
 2 environmental statutes, rules, consent orders, final orders,
 3 final judgments, agreements, or permit conditions or
 4 exceedances of permit conditions and other violations
 5 demonstrating a pattern of noncompliance, with the following
 6 limitations. Each violation must have occurred during the 5
 7 years preceding submission of a complete permit application to
 8 the agency.

9 (b) The agency may consider any violations as
 10 authorized in this subsection, whether or not they have been
 11 adjudicated or resolved.

12 (c) If the applicant's compliance history does include
 13 violations as specified in paragraph (a), the agency shall
 14 consider and weigh the following factors in order to evaluate
 15 such violations in the context of the applicant's overall
 16 compliance history and to determine whether the applicant has
 17 provided reasonable assurance of future compliance with agency
 18 statutes and rules and the proposed permit:

19 1. The number of violations and the seriousness of
 20 such violations;

21 2. The number of other similar facilities controlled
 22 by the applicant;

23 3. The number and complexity of any permits held by
 24 the applicant;

25 4. Whether the violations involved regulatory programs
 26 that are the same as, or similar to, the regulatory program
 27 from which the permit is being requested;

28 5. Whether the violations involved activities that are
 29 the same as, similar to, or related to the regulated activity
 30 for which a permit is being requested;

31 6. Whether the violations resulted in harm to human

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1 health or the environment and the extent of such harm;

2 7. Whether the applicant has implemented an approach
3 or remedial measures that have prevented a recurrence of the
4 violations or crimes and is legally obligated to continue this
5 approach or remedial measures; and

6 8. Whether the facility for which a permit is being
7 requested provides or proposes to provide utility services to
8 the public or serves a similar public purpose.

9 (d) If the applicant's relevant compliance history
10 includes one or more violations the agency may determine
11 whether the applicant has provided reasonable assurance in
12 light of its compliance history. If the agency determines that
13 reasonable assurance has not been provided, it shall deny the
14 permit application, and the applicant shall not be entitled to
15 apply for a permit for that regulated activity for a period of
16 1 year from the time a final order denying the permit has been
17 entered.

18 (e) If the applicant's compliance history demonstrates
19 a pattern of noncompliance, the agency may, in its discretion,
20 issue a permit, not to exceed 1 year in duration, if the
21 applicant satisfies all other reasonable assurance
22 requirements. A pattern of noncompliance exists when the
23 applicant is responsible for two or more violations of
24 environmental laws or permit conditions occurring on two or
25 more separate occasions.

26 1. The agency shall include a statement in its notice
27 of intended agency action with respect to the permit
28 application, explaining that the agency has determined that
29 the applicant has a pattern of noncompliance and that this
30 determination has formed the basis for issuing a permit not to
31 exceed 1 year. The agency shall also include a notification in

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1 its notice of intended agency action on the permit application
2 that the permit could be revoked or an application to renew
3 the permit could be denied if the pattern of noncompliance
4 continues.

5 2. If, at the time of permit renewal following notice
6 of determination of a pattern of noncompliance, the agency
7 determines that the applicant committed one or more additional
8 violations in this paragraph resulting in a continuing pattern
9 of noncompliance, the agency shall deny the permit
10 application, and the applicant shall not be entitled to apply
11 for a permit for that regulated activity at that site for a
12 period of 1 year from the time a final order denying the
13 permit has been entered.

14 (f) If the agency denies a permit application in
15 accordance with this subsection for a permit that includes
16 closure, post-closure, or corrective action requirements, the
17 agency may deny that portion of the permit authorizing
18 operation, and may issue a permit that contains only the
19 closure, post-closure, or corrective action requirements and
20 conditions.

21 (6) REPORTING FORM.--The department shall establish a
22 form, by rule, to be used for the purpose of implementing this
23 section. Every permit application subject to this section that
24 is submitted to the agency shall be accompanied by this
25 completed form in order to be considered complete. During the
26 permit review process, the information on the form shall be
27 updated by the applicant to reflect any changes until such
28 time as the agency takes final action on the application. The
29 form shall include the following:

30 (a) A section requiring every applicant to report the
31 relevant criminal history of the applicant, including the

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1 nature of the offense, the date of the offense, the court
2 having jurisdiction in the case, the date of conviction or
3 other disposition, and the disposition of the offense; and

4 (b) A section requiring every applicant that is a
5 business entity to identify those persons having legal or
6 actual authority to control the owner, operator, or permittee.
7 The form may specify categories of persons having such
8 authority and other relevant information that must be
9 reported.

10 (7) RULEMAKING.--In addition to the rulemaking
11 necessary to adopt the form identified in subsection (6), and
12 to implement the incentives in subsection (4), the department
13 is authorized, but not required, to adopt such other rules as
14 are necessary to implement this section, including rules
15 providing for appropriate public notice and comment.

16 (8) NOTIFICATION.--The agency is encouraged to work
17 with permittees and permit applicants prior to taking any of
18 the actions authorized under this section, in order to
19 encourage compliance and avoid overly burdensome consequences
20 of noncompliance.

21 (a) In each case in which the agency initiates a
22 formal enforcement action, it shall at that time clearly and
23 specifically:

24 1. Inform the alleged violator of the provisions of
25 this section; and

26 2. Put the alleged violator on notice of the
27 consequences of the alleged violations and the potential
28 consequences of continuing noncompliance.

29 (b) In each case in which a citizen initiates and
30 adjudicates a violation claim, the adjudication itself will
31 constitute notice to the applicant that the agency is

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1 authorized to take any of the actions authorized under this
2 section.

3 (c) In each case in which the violation does not
4 result in a formal enforcement action but the violation is
5 documented the agency is not required to notify the applicant
6 of the applicability of this section.

7 (9) EXISTING AUTHORITY.--This section may not be
8 construed to limit the agency's existing authority to consider
9 factors other than an applicant's compliance history, such as
10 the technical merits of the proposed project or the
11 applicant's financial and human resources, when determining
12 whether the applicant has provided the reasonable assurance
13 necessary to receive the requested permit. Nor may this
14 section be construed to limit the agency's authority to
15 consider an applicant's civil and criminal violations of
16 environmental statutes, rules, consent orders, final orders,
17 final judgments, or agreements occurring at any site when
18 determining whether to impose special conditions in any permit
19 or to revoke any permit.

20 (10) INAPPLICABLE TO GENERAL PERMITS.--This section
21 does not apply to general permits issued in accordance with s.
22 403.814. However, the agency may continue to use its existing
23 authority to consider the compliance history of those wishing
24 to use general permits.

25 Section 2. Subsection (5) of section 403.087, Florida
26 Statutes, is amended to read:

27 403.087 Permits; general issuance; denial; revocation;
28 prohibition; penalty.--

29 (5) The department shall issue permits to construct,
30 operate, maintain, expand, or modify an installation which may
31 reasonably be expected to be a source of pollution only when

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1 it determines that the installation is provided or equipped
2 with pollution control facilities that will abate or prevent
3 pollution to the degree that will comply with the standards or
4 rules adopted by the department, except as provided in s.
5 403.088 or s. 403.0872. The compliance history of the
6 applicant shall be one factor that the department considers in
7 determining whether the applicant has provided such reasonable
8 assurance. However, separate construction permits shall not be
9 required for installations permitted under s. 403.0885, except
10 that the department may require an owner or operator proposing
11 to construct, expand, or modify such an installation to submit
12 for department review, as part of application for permit or
13 permit modification, engineering plans, preliminary design
14 reports, or other information 90 days prior to commencing
15 construction. The department may also require the engineer of
16 record or another registered professional engineer, within 30
17 days after construction is complete, to certify that the
18 construction was completed in accordance with the plans
19 submitted to the department, noting minor deviations which
20 were necessary because of site-specific conditions.

21 Section 3. Subsection (2) of section 403.0872, Florida
22 Statutes, is amended to read:

23 403.0872 Operation permits for major sources of air
24 pollution; annual operation license fee.--Provided that
25 program approval pursuant to 42 U.S.C. s. 7661a has been
26 received from the United States Environmental Protection
27 Agency, beginning January 2, 1995, each major source of air
28 pollution, including electrical power plants certified under
29 s. 403.511, must obtain from the department an operation
30 permit for a major source of air pollution under this section.
31 This operation permit is the only department operation permit

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1 for a major source of air pollution required for such source;
2 provided, at the applicant's request, the department shall
3 issue a separate acid rain permit for a major source of air
4 pollution that is an affected source within the meaning of 42
5 U.S.C. s. 7651a(1). Operation permits for major sources of air
6 pollution, except general permits issued pursuant to s.
7 403.814, must be issued in accordance with the procedures
8 contained in this section and in accordance with chapter 120;
9 however, to the extent that chapter 120 is inconsistent with
10 the provisions of this section, the procedures contained in
11 this section prevail.

12 (2) An application for an operation permit for a major
13 source of air pollution must be submitted in accordance with
14 rules of the department governing permit applications. The
15 department shall adopt rules defining the timing, content, and
16 distribution of an application for a permit under this
17 section. A permit application processing fee is not required.
18 The department may issue an operation permit for a major
19 source of air pollution only when it has reasonable assurance
20 that the source applies pollution control technology,
21 including fuel or raw material selection, necessary to enable
22 it to comply with the standards or rules adopted by the
23 department or the permit contains an approved compliance plan
24 that provides such reasonable assurance for that source. The
25 compliance history of the applicant shall be one factor that
26 the department considers in determining whether the applicant
27 has provided such reasonable assurance. If two or more major
28 air pollution sources that belong to the same Major Group as
29 described in the Standard Industrial Classification Manual,
30 1987, are operated at a single site, the owner may elect to
31 receive a single operation permit covering all such sources at

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1 the site.

2 (a) An application for a permit under this section is
3 timely and complete if it is submitted in accordance with
4 department rules governing the timing of applications and
5 substantially addresses the information specified in
6 completeness criteria determined by department rule in
7 accordance with applicable regulations of the United States
8 Environmental Protection Agency governing the contents of
9 applications for permits under 42 U.S.C. s. 7661b(d). Unless
10 the department requests additional information or otherwise
11 notifies the applicant of incompleteness within 60 days after
12 receipt of an application, the application is complete.

13 (b) Any permitted air pollution source that submits a
14 timely and complete application for a permit under this
15 section is entitled to operate in compliance with its existing
16 air permit pending the conclusion of proceedings associated
17 with its application. Notwithstanding the timing requirements
18 of paragraph (c) and subsection (3), the department may
19 process applications received during the first year of permit
20 processing under this section, in a manner consistent with 42
21 U.S.C. s. 7661b(c).

22 (c) The department may request additional information
23 necessary to process a permit application subsequent to a
24 determination of completeness in accordance with s.
25 403.0876(1).

26 Section 4. Paragraph (b) of subsection (2) of section
27 403.088, Florida Statutes, is amended to read:

28 403.088 Water pollution operation permits;
29 conditions.--

30 (2)

31 (b) The department may issue a permit only if the

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1 applicant affirmatively provides the department with
2 reasonable assurance that the proposed activity and applicant
3 will comply with agency and department rules, orders, and
4 permit conditions. The compliance history of the applicant
5 shall be one factor that the department considers in
6 determining whether the applicant has provided such reasonable
7 assurance. If the department finds that the proposed discharge
8 will reduce the quality of the receiving waters below the
9 classification established for them, it shall deny the
10 application and refuse to issue a permit. If the department
11 finds that the proposed discharge will not reduce the quality
12 of the receiving waters below the classification established
13 for them, it may issue an operation permit if it finds that
14 such degradation is necessary or desirable under federal
15 standards and under circumstances which are clearly in the
16 public interest.

17 Section 5. Subsection (8) of section 403.707, Florida
18 Statutes, is repealed.

19 Section 6. Subsection (6) is added to section 373.413,
20 Florida Statutes, to read:

21 373.413 Permits for construction or alteration.--

22 (5) Section 403.0874, the Performance Based Permitting
23 Program, applies to individual, standard, general, and
24 conceptual permits issued under this part.

25 Section 7. Subsection (5) is added to section 161.041,
26 Florida Statutes, to read:

27 161.041 Permits required.--

28 (5) Section 403.0874, the Performance Based Permitting
29 Program, applies to all permits issued under this chapter.

30 Section 8. Subsection (17) of section 403.703, Florida
31 Statutes, is amended to read:

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1 403.703 Definitions.--As used in this act, unless the
2 context clearly indicates otherwise, the term:

3 (17) "Construction and demolition debris" means
4 discarded materials generally considered to be not
5 water-soluble and nonhazardous in nature, including, but not
6 limited to, steel, glass, brick, concrete, asphalt roofing
7 material, pipe, gypsum wallboard, and lumber, from the
8 construction or destruction of a structure as part of a
9 construction or demolition project or from the renovation of a
10 structure, and including rocks, soils, tree remains, trees,
11 and other vegetative matter that normally results from land
12 clearing or land development operations for a construction
13 project, including such debris from construction of structures
14 at a site remote from the construction or demolition project
15 site. Mixing of construction and demolition debris with other
16 types of solid waste will cause it to be classified as other
17 than construction and demolition debris. The term also
18 includes:

19 (a) Clean cardboard, paper, plastic, wood, and metal
20 scraps from a construction project;

21 (b) Except as provided in s. 403.707(11)(j) ~~s.~~
22 ~~403.707(12)(j)~~, unpainted, nontreated wood scraps from
23 facilities manufacturing materials used for construction of
24 structures or their components and unpainted, nontreated wood
25 pallets provided the wood scraps and pallets are separated
26 from other solid waste where generated and the generator of
27 such wood scraps or pallets implements reasonable practices of
28 the generating industry to minimize the commingling of wood
29 scraps or pallets with other solid waste; and

30 (c) De minimis amounts of other nonhazardous wastes
31 that are generated at construction or destruction projects,

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1 provided such amounts are consistent with best management
2 practices of the industry.

3 Section 9. This act shall take effect July 1, 2005.

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6 ===== T I T L E A M E N D M E N T =====

7 And the title is amended as follows:

8 Delete everything before the enacting clause

9

10 and insert:

11 A bill to be entitled
12 An act relating to environmental permitting;
13 creating s. 403.0874, F.S.; creating a
14 performance based permitting program; providing
15 findings and intent; defining terms;
16 establishing compliance incentives for
17 environmental permit applicants; providing
18 disincentives for noncompliance with
19 environmental statutes, rules, and permit
20 conditions; providing for a reporting form;
21 providing for rules; providing for notice to
22 permittees; providing applicability; amending
23 s. 403.087, F.S.; providing for consideration
24 of compliance history of applicants for permits
25 for facilities that do, or may be expected to,
26 pollute; amending s. 403.0872, F.S.; providing
27 for consideration of compliance history of
28 applicants for permits to operate facilities
29 that are major sources of air pollution;
30 amending s. 403.088, F.S.; requiring assurance
31 of compliance with statutes, rules, and permit

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1 conditions before issuance of a water pollution
2 operation permit; providing for consideration
3 of compliance history of permit applicants;
4 repealing s. 403.707(8), F.S., relating to
5 refusal to issue solid waste management
6 facility permits; amending s. 373.413, F.S.;
7 declaring applicability of the performance
8 based permitting program to permits for
9 construction or alteration of stormwater
10 management systems or similar works; amending
11 s. 161.041, F.S.; declaring applicability of
12 the performance based permitting program to
13 permits involving shore protection; amending s.
14 403.703, F.S.; conforming a cross-reference;
15 providing an effective date.

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