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## **SUBMITTED COMMITTEE REPORTS**

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# REPORT OF THE ENVIRONMENT AND PUBLIC LANDS COMMITTEE

## I. CLEAN AIR ACT DEVELOPMENTS

### A. *Developments in the Courts*

#### 1. *American Trucking Associations, Inc. v. Browner*

On November 7, 2000, the U.S. Supreme Court heard oral arguments in the “Non-delegation case,” *Browner v. American Trucking Associations*,<sup>1</sup> and the accompanying “National Ambient Air Quality Standards cost case,” *American Trucking Associations v. Browner*.<sup>2</sup> The Supreme Court granted writs of certiorari in the two cases to review the decision of the U.S. Court of Appeals for the District of Columbia Circuit invalidating the Environmental Protection Agency’s 1997 rules revising the National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone.<sup>3</sup> The primary issues before the Court are whether section 109 of the Clean Air Act (CAA) violates the Constitution’s non-delegation doctrine absent a limiting construction by the Environmental Protection Agency (EPA) and whether the EPA may weigh costs and benefits when it sets the NAAQS.

The underlying decision by the D.C. Circuit overturned the EPA’s promulgation of new ozone and particulate matter standards for NAAQS. The D.C. Circuit held that the EPA’s interpretation of its NAAQS authority under the CAA, section 109 results in discretion so broad as to make those provisions an unconstitutional delegation of legislative power.<sup>4</sup> Accordingly, the court remanded the standards and directed the EPA to articulate an “intelligible principle” explaining and limiting the EPA’s discretion to set NAAQS in relation to their effect on human health.<sup>5</sup> The issue of whether the EPA may weigh costs and benefits when setting NAAQS was raised by industry petitioners before the Court in response to the D.C. Circuit’s holding, based on prior precedent in *Lead Industries Association*

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1. *American Trucking Ass’ns v. Environmental Protection Agency*, 175 F.3d 1027 (1999), opinion modified on reh’g by *American Trucking Ass’ns v. Environmental Protection Agency*, 195 F.3d 4 (1999), cert. granted, *Browner v. American Trucking Ass’ns.*, 529 U.S. 1129 (2000).

2. *American Trucking Ass’ns, Inc. v. Environmental Protection Agency*, 175 F.3d 1027 (1999), opinion modified on reh’g by *American Trucking Ass’ns, Inc. v. E.P.A.*, 195 F.3d 4 (1999), cert. granted, *American Trucking Ass’n’s. v. Browner*, 530 U.S. 1202 (2000).

3. *See generally American Trucking Ass’ns*, 175 F.3d 1027, reh’g granted in part, denied in part, 195 F.3d 4 (D.C. Cir. 1999).

4. *Id.* at 1034-37.

5. *American Trucking Ass’ns*, 175 F.3d at 1038.

*v. EPA*,<sup>6</sup> that the EPA cannot consider economic costs when it establishes or revises NAAQS under section 109 of the CAA.<sup>7</sup>

The outcome of this case may significantly affect the EPA's regulatory authority and methods for promulgating regulations. A decision by the Supreme Court was expected in early 2001.

## 2. *Michigan v. Environmental Protection Agency*

On March 3, 2000, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Michigan v. Environmental Protection Agency* rejecting numerous challenges to a final rule issued by the EPA requiring that twenty-two states in the eastern half of the nation, and the District of Columbia, revise their State Implementation Plans (SIPs) under the CAA in order to reduce the interstate transport of ozone to meet compliance with the one-hour ozone standard (0.12 ppm averaged over one hour).<sup>8</sup> Although the Court held that the EPA had failed to justify application of this "SIP Call Rule" to three states – Georgia, Missouri, and Wisconsin – it largely upheld the SIP Call with respect to the remaining jurisdictions.<sup>9</sup>

Under section 110(k)(5) of the CAA, the EPA may require states to revise their SIPs if it finds they have become inadequate for attaining or maintaining NAAQS for particular pollutants.<sup>10</sup> The EPA's rules requiring such revisions are known as "SIP Calls." In 1998, the EPA issued the so-called "Nitrogen Oxide (NOx) SIP Call" which required States to prohibit sources within their jurisdiction "from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State" of the applicable NAAQS – in this case the one-hour ozone standard.<sup>11</sup> The EPA's 1998 NOx SIP Call required each named state to reduce nitrogen oxide, an ozone precursor, based on a 0.15 lbs/mmBtu rate for electric generation units. Industry representatives have filed a petition for certiorari with the U.S. Supreme Court challenging the D.C. Circuit's decision upholding the NOx SIP Call.

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6. 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

7. 175 F.3d at 1040-41.

8. 213 F.3d 663 (D.C. Cir. 2000).

9. Alabama, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. *See generally* Final Rule, *Finding of Significant contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, Part II, 63 Fed. Reg. 57,356 (1998).

10. 42 U.S.C. § 7412(k)(5) (2001).

11. 63 Fed. Reg. 57,356 (1998). Initially, EPA's NOx SIP Call also addressed measures necessary to ensure compliance with EPA's proposed eight-hour ozone standard. However, EPA stayed the NOx SIP Call's provisions relating to the eight-hour ozone standard after that standard was invalidated by the D.C. Circuit in its opinion in *American Trucking Ass'n, Inc. v. Browner*. The D.C. Circuit's opinion in *Michigan v. Environmental Protection Agency* did not address the validity of the SIP Call requirements for the eight-hour standard. *See generally* 213 F.3d at 670-71.

## B. Regulatory Developments

### 1. NO<sub>x</sub> SIP Call

Since the issuance of the D.C. Circuit's opinion *Michigan v. Environmental Protection Agency* in March, 2000, the implementation of the NO<sub>x</sub> SIP Call has begun. On June 22, 2000, the D.C. Circuit lifted its stay on the deadline for states to submit SIPs in response to the NO<sub>x</sub> SIP Call, setting a new deadline of October 30, 2000. At the same time, the court extended the deadline for implementing reductions under the rule from May 2003 to May 2004.

On December 26, 2000, the EPA issued a final rule announcing findings that eleven states and the District of Columbia had not submitted complete SIP revisions by the NO<sub>x</sub> SIP Call's October 30, 2000, deadline.<sup>12</sup> In its notice, the EPA made a finding that Virginia, West Virginia, Alabama, Kentucky, North Carolina, South Carolina, Tennessee, Illinois, Indiana, Michigan, Ohio and the District of Columbia had failed to "officially submit complete submissions to their SIPs, including adopted rules, in response to the SIP call."<sup>13</sup> These findings trigger a sanctions clock. If within eighteen months an affected state does not submit a plan and obtain from the EPA a determination of the plan's completeness, the state is subject to an enhanced 2:1 emissions offset requirement.<sup>14</sup> If the state still fails to correct its deficiency within twenty-four months, the state is subject to the enhanced offset requirement *and* a restriction on federal highway funds.<sup>15</sup> In addition, the EPA may issue its own federal implementation plan (FIP) if the state fails to act within twenty-four months.

### 2. Section 126 Rule

On January 18, 2000, the EPA issued a final rule under section 126 of the CAA requiring large Electric Generating Units (EGUs) and a limited number of non-EGUs to install controls for reduction of NO<sub>x</sub> emissions by May 1, 2003.<sup>16</sup> This rule was in response to petitions filed by Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont alleging that NO<sub>x</sub> emissions from certain stationary sources in upwind areas were significantly contributing to the petitioning states' nonattainment with the ozone NAAQS. Under section 126 of the CAA, sources subject to a "finding of significant contribution" must shut down or come into compliance with an

12. Final Rule, *Final Rule Making Findings of Failure to Submit Required State Implementation Plans for the NO<sub>x</sub> SIP Call*, 65 Fed. Reg. 81,366 (2000).

13. *Id.* at 81,367.

14. 65 Fed. Reg. 81,367, at 81,368. *See also* 42 U.S.C. § 7410(c)(2000); 40 C.F.R. § 51.121(n) and 40 C.F.R. § 52.31(2000).

15. 65 Fed. Reg. 81,367, at 81,368.

16. Final Rule, *Findings of Significant Contribution and Rulemaking on Section 126 Restrictions for Purposes of Restricting Interstate Ozone Transport*, 65 Fed. Reg. 2,674 (2000)(codified at 40 C.F.R. pts. 52 and 97).

EPA-imposed remedy within three years.<sup>17</sup> The EPA's final rule provides that affected upwind sources (specifically identified in the rule) must comply with the control requirements and emission allocations set forth in the Federal NOx Budget Trading Program.<sup>18</sup> The NOx "allowances" set forth in the program authorize the emission of one ton of NOx and each source is allocated a specific number of allowances for each ozone season. Allowances may be bought, sold, or traded among the affected sources and other private parties.<sup>19</sup> Sources may also receive credit for achieving reductions earlier than required and may "bank" the resulting allowances for future use.<sup>20</sup> As a result of this action, 392 facilities are required to reduce seasonal NOx emissions by a total of nearly 510,000 tons from projected 2007 levels. These facilities are in the following states: Delaware, Indiana, Kentucky, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia and the District of Columbia.

The EPA's issuance of the section 126 rule has been appealed. In December, 2000, the D.C. Circuit heard oral arguments in a lawsuit challenging the implementation of the section 126 rule.

### 3. Regulation of Mercury

On December 15, 2000 the EPA issued a regulatory determination finding that mercury emissions from coal-fired power plants must be regulated and reduced.<sup>21</sup> The EPA's determination was made pursuant to Section 112(n)(1)(A) of the CAA relating to the regulation of the emission of hazardous air pollutants.<sup>22</sup> The EPA's determination was based on its evaluation of exposures, hazards and risks due to hazardous air pollutant emissions from coal, oil, and natural gas-fired electric steam generating units.<sup>23</sup> The EPA concluded that there is a "plausible link between emissions of mercury from [coal-fired electric utility steam generating units] and methylmercury in fish [and therefore] mercury emissions from electric utility steam generating units are considered a threat to public health and the environment."<sup>24</sup> The EPA has declared its intent to issue proposed regulations reducing mercury emissions from electric utility steam generating units by 2003 and final regulations by 2004.

### 4. Outer Continental Shelf Air Pollution Regulation in the Gulf of Mexico

The 1990 Amendments to the Clean Air Act authorize the Minerals

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17. See generally 42 U.S.C. § 7426(c)(2001).

18. See generally 65 Fed. Reg. 2,674, at 2,686-2720, 2,727-67.

19. *Id.* at 2,686.

20. 65 Fed. Reg. 2,674, at 2,690.

21. Notice of Regulatory Finding, *Regulatory Filing on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units*, 65 Fed. Reg. 79,825 (2000).

22. *Id.* See also 42 U.S.C. § 7412(n)(1)(A)(2001).

23. 65 Fed. Reg. 79,825 at 79,826.

24. *Id.* at 79,827.

Management Service (MMS) to regulate air pollution on the Central and Western Gulf of Mexico Outer Continental Shelf (OCS).<sup>25</sup> The MMS regulations establish a five-step Prevention of Significant Deterioration (PSD) review for new sources of air emissions on the Gulf of Mexico OCS.<sup>26</sup>

The Breton Sound National Wildlife Area (BNWA) is a "Class I" area under the Prevention of Significant Deterioration (PSD) program administered by the Environmental Protection Agency (EPA). The EPA has recently confirmed that all OCS sources must be considered in the review of PSD "increment consumption" for the BNWA.<sup>27</sup> All new sources within 100 kilometers of Breton Wildlife Refuge must review their air quality affects on the area.<sup>28</sup> The United States Fish and Wildlife Services is the federal "land manager" with oversight over the BNWA and reviews air permits for sources within 100 kilometers of Breton Wildlife Refuge. As a result, MMS is carefully reviewing all Development Operation and Control Documents (DOCDs) for platforms in this area emitting sulfur dioxide or nitrogen oxide. In 2000, MMS issued two Notices To Lessees (NTLs) requiring meteorological data collection and emissions reporting for sources within 100 kilometers of the BNWA.<sup>29</sup> The energy industry has funded the detailed studies to better define possible environmental impacts for offshore facilities.

## II. COASTAL ZONE MANAGEMENT ACT

The federal Coastal Zone Management Act (CZMA)<sup>30</sup> primarily impacts OCS operations with regard to state "consistency review" of OCS plans filed with the Minerals Management Service. Generally, OCS lessees planning to conduct exploration and development activity must certify that their planning is "consistent" with the requirements of the coastal zone programs administered by bordering states. If a state objects to the "consistency certification" filed by an OCS lessee, the Act prevents MMS from issuing any drilling permit to the lessee until either the state's objection is otherwise satisfied, or the state's objection is overridden by an appeal to the Secretary of Commerce. Most recently, in a rulemaking finalized on December 8, 2000, the Department of Commerce, which administers the provisions of the CZMA, has enacted significant revisions of State consistency review requirements, including an attempted expan-

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25. 42 U.S.C. § 7627(a)(1) (2000).

26. 30 C.F.R. § 250.303 (1998).

27. Memorandum from Bill Harnett, Acting Director, EPA Office of Information Transfer to Robert E. Hanneschlager, Acting Director, EPA Multimedia Planning (May 1999).

28. 30 C.F.R. 250.303(k)

29. United States Dept. of Interior, Mineral Mgmt. Service, Gulf of Mexico OCS Region, *Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases in the Outer Continental Shelf, Gulf of Mexico OCS Region*, NTL No. 200-G-18 (Nov. 21, 2000) (Meteorological Data Collection); NTL No. 2000-G-19, (Nov. 21, 2000) (Emissions Requirements).

30. 16 U.S.C. §§ 1461-1465 (2001).

sion of the scope of OCS activities subject to State consistency analysis.<sup>31</sup>

### III. CLEAN WATER ACT

In January 2001, the Supreme Court surprised many legal commentators when it declined to expand its recent jurisprudential revival of federalism into the environmental law arena.<sup>32</sup> In October 2000, the Court heard arguments on whether section 404(a) of the Clean Water Act<sup>33</sup> may be extended to cover the discharge of dredged or fill materials into an isolated wetland and, if so, whether Congress could exercise such authority consistent with the Commerce Clause.<sup>34</sup> The case before the Court, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, involved a consortium of suburban Chicago cities and villages that had banded together to obtain clearance for a solid waste disposal site on a former sand and gravel mining site.<sup>35</sup> They were denied permits from the U.S. Army Corps of Engineers (Corps) to discharge dredged or fill material on the site on the grounds that the water areas on the site are used as a habitat by migratory birds that cross state lines. In other words, the Corps found their request to violate its Migratory Bird Rule under the Clean Water Act.

Congress began a new era in environmental regulation in 1972 by enacting the Clean Water Act, one of the nation's first comprehensive federal environmental laws. The Clean Water Act sought to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters."<sup>36</sup> To fulfill this larger purpose, Congress included section 404 in the Act. That provision prohibits discharge of dredge or fill materials into our nation's "navigable waters" for parties who do not first receive a permit from the Corps.<sup>37</sup> The Clean Water Act itself adds little guidance to what Congress meant by "navigable waters," offering only that such waters include "the waters of the United States, including the territorial seas."<sup>38</sup> Charged with implementing much of the Act, the EPA further defined "navigable waters," promulgating regulations that extended section 404's reach to "interstate wetlands,"<sup>39</sup> wetlands adjacent to "other waters of the United States,"<sup>40</sup> and intrastate or isolated wetlands including "intrastate

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31. See generally Final Rule, *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed. Reg. 77124 (2000)(codified at 15 C.F.R. pt. 930).

32. In the past six years, the Rehnquist Court has struck down more than twenty-two acts of Congress, nearly double the number invalidated during the nine preceding years. Most recently, the Court quashed the Violence Against Women Act because it violated the Commerce Clause. *United States v. Morrison*, 120 S. Cl. 1740 (2000); See also *United States v. Lopez*, 514 U.S. 549 (1995).

33. 33 U.S.C. § 1344(a) (2000).

34. U. S. Const. art. I, § 8, cl. 3.

35. 191 F.3d 845 (7<sup>th</sup> Cir. 1999), cert. granted, 529 U.S. 1129 (2000), rev'd, 531 U.S. 159 (2001).

36. 33 U.S.C. § 1251(a) (2000).

37. *Id.* at § 1344.

38. 33 U.S.C. § 1362(7).

39. 33 C.F.R. § 328.3(a)(2) (1999).

40. *Id.* § 328.3(a)(7).



lakes, rivers, streams (including intermittent streams), mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”<sup>41</sup> As to which of these isolated wetlands might affect interstate commerce, the Corps and the EPA issued guidance tracing the rule they would follow. If isolated wetlands “are or would be used as habitat by birds protected by Migratory Bird Treaties,” or “are or would be used as habitat by other migratory birds which cross state lines,” then they fall under section 404’s prohibition against filling wetlands without Corps consent.<sup>42</sup> This so-called “migratory bird rule” has suffered numerous challenges since its inception, but has almost invariably survived them.<sup>43</sup>

In *Solid Waste Agency*, the Seventh Circuit had addressed a constitutional challenge to the migratory bird rule when a group of Chicago suburbs were denied a permit to open a landfill on a former strip mine.<sup>44</sup> The mine left “a labyrinth of trenches and other depressions” that eventually turned the site into “an attractive woodland vegetated by approximately 170 different species of plants . . . [and occupied by] over 200 permanent and seasonal ponds.”<sup>45</sup> Realizing that these ponds served as habitat to a number of migratory birds — such as Canada geese, kingfishers, mallard and wood ducks, red-winged blackbirds, sandpipers, swamp swallows, tree swallows, water thrushes, and “the second-largest breeding colony of great blue herons in northeastern Illinois” — the Corps asserted its jurisdiction under its wetlands regulation authority and later disallowed the proposed project from going forward.<sup>46</sup>

Abandoning on appeal its merits-based claim against the Corps’ denial of its permit application, the Solid Waste Agency decided to instead contest the validity of the migratory bird rule itself. Specifically, the municipalities contended that under the Supreme Court’s analysis in *Lopez*, the migratory bird rule was unconstitutional for its failure to relate substantially to interstate commerce. The Seventh Circuit, however, upheld the rule, finding that “the destruction of migratory bird habitat and the attendant decrease in the populations of these birds ‘substantially affects’ in-

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41. 33 C.F.R. § 328.3(a)(3).

42. Final Rule, Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, at 41,217 (1986).

43. See, e.g., *Hoffman Homes, Inc. v. Envtl. Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) (finding that section 404 legitimately extends to waters “whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial”); *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (overturning a district court decision that refused to extend the Act’s wetland provision to humanmade salt drying ponds used by migratory birds), cert. denied, 498 U.S. 1126 (1991). *But see* *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (“The regulation requires neither that the regulated activity have a substantial affect [sic] on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties . . .”).

44. *Solid Waste Agency, Inc. v. United States Army Corps of Eng’rs*, 191 F.3d 845 (7th Cir. 1999).

45. *Id.* at 848.

46. *Solid Waste Agency*, 191 F.3d at 848.

terstate commerce.”<sup>47</sup> The court began by noting a number of significant economic impacts created by disappearing wetlands, particularly those associated with a reduction in “the populations of many species and consequently the ability of people to hunt, trap, and observe those birds.”<sup>48</sup> Accordingly, the Seventh Circuit found that despite its potentially broad application to purely intrastate wetlands, the interstate effects of wetlands loss were significant enough that the migratory bird rule passed constitutional muster. The court noted that “[t]he effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.”<sup>49</sup>

When the Supreme Court issued its decision in *Lopez*, a number of commentators questioned the probable resilience of the migratory bird rule. “[Like the Gun-Free School Zones Act,] the migratory bird rule . . . operates as a limiter-manque,” wrote one author, “a limiting rule with no limits.”<sup>50</sup> After *Morrison* and the Court’s grant of certiorari to the Seventh Circuit’s decision in *Solid Waste Agency*, however, the potential peril the migratory bird rule faced seemed even more imminent, and more likely, than ever before. In the end, the Supreme Court did strike down the migratory bird rule, but on a much more conventional basis than most had expected.

The Supreme Court found that the Corps did not have jurisdiction over the site based on the text of the Clean Water Act itself. Interpreting the statute, the Court concluded that the migratory bird rule took the Corps a far cry from the “navigable waters” and “waters of the United States” to which the Clean Water Act extended. The Court held that in issuing the migratory bird rule the Corps had exceeded its statutory authority. Going further the Court’s 5:4 majority stated that in enacting the Clean Water Act, Congress did not intend to exert anything more than its commerce power over navigation.<sup>51</sup> The dissent sharply attacked that notion contending that the Clean Water Act has nothing to do with Congress’s commerce power over navigation but was principally intended to prevent environmental degradation. Whatever Congress’s intention, the ultimate effects of the Supreme Court’s opinion is sure to be widespread. The decision brings into question the jurisdiction of many federal agencies

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47. *Id.* at 850.

48. *Solid Waste Agency, Inc. v. United States Army Corps of Eng’rs*, 191 F.3d at 850. (“[M]illions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds.”) (quoting *Hoffman Homes, Inc. v. Environmental Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993)).

49. *Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999).

50. J. Blanding Holman, IV, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 197 (1995).

51. *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O’Connor, Scalia, Kennedy and Thomas joined.

under the Clean Water Act to regulate wetlands that are not adjacent to open water. This opinion will undoubtedly reverberate throughout the regulation of clean water.

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