No. 11-15871

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs-Appellees,

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Plaintiff-Intervenor-Appellee,

v.

SALLY JEWELL, as Secretary of the Department of Interior, *et al.*,
Defendants-Appellants,

and

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Defendants-Intervenors-Appellants.

Appeal from the United States District Court for the Eastern District of California,
Case No. 1:09-CV-00407

BRIEF *AMICUS CURIAE* OF THE NATIONAL HYDROPOWER ASSOCIATION, NORTHWEST HYDROELECTRIC ASSOCIATION, AND NORTHWEST RIVERPARTNERS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *amicus curiae* states that the National Hydropower Association, Northwest Hydroelectric Association, and Northwest RiverPartners have no parent corporation, nor does any publicly held corporation own 10 percent or more of their stock.

DATED this 22nd day of May, 2014.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Hydropower Association ("NHA"), Northwest Hydroelectric Association ("NWHA"), and Northwest RiverPartners ("RiverPartners") hereby submit this *amicus curiae* brief in support of rehearing en banc regarding the portion of the Panel's decision at Section IV.E (pages 110-119).[1] Specifically, NHA, NWHA, and RiverPartners write to address the Panel's holding that the U.S. Fish and Wildlife Service (the "Service") has no obligation to explain in the record how the "reasonable and prudent alternative" required by Section 7 of the Endangered Species Act ("ESA") is, in fact, "reasonable and prudent" as that term is defined in federal regulation. As detailed below, the Panel's opinion is contrary to the language and history of the ESA, creates an inter-circuit conflict, and fundamentally alters the ESA Section 7 consultation process.

NHA is a nonprofit national association dedicated to promoting the growth of clean, affordable U.S. hydropower. It seeks to secure hydropower's place as a climate-friendly, renewable, and reliable energy source that serves national environmental, energy, and economic policy objectives. NHA represents more than 180 companies in the North American hydropower industry, from Fortune

[1] Pursuant to Ninth Circuit Rule 29-2(a), all parties have consented to this filing. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), undersigned counsel certifies that (A) no party's counsel authored this brief, in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person, other than the *amicus curiae* or their members, contributed money that was intended to fund preparing or submitting the brief.

500 corporations to small family-owned businesses. NHA's members include both public and investor-owned utilities, independent power producers, developers, manufacturers, environmental and engineering consultants, attorneys, and public policy, outreach, and education professionals.

NWHA is a nonprofit trade association dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region. Incorporated in 1981, NWHA represents members in Alaska, Idaho, Montana, Oregon, Washington, Northern California, and British Columbia. Members include utilities, both investor-owned and public; independent power producers, including water and irrigation districts and municipalities; manufacturers; consultants; associations; and trade unions in those states.

RiverPartners is an alliance of public and private utilities, ports, businesses, and farming organizations working for a balanced approach to managing the federal hydropower system on the Columbia and Snake rivers. RiverPartners' member organizations include more than 40,000 farmers, four million electric utility customers, thousands of port employees, 7,000 small businesses, and hundreds of large businesses that rely on the economic and environmental resources provided by the Columbia and Snake rivers. RiverPartners promotes all the benefits of these rivers – fish and wildlife, renewable hydropower, agriculture, flood control, commerce, and recreation.

NHA, NWHA, and RiverPartners agree with the reasoning put forth in the Petition for Rehearing En Banc filed by Kern County Water Agency, *et al.* (Dkt.

128-1), explaining that the Panel's decision warrants en banc review because it squarely conflicts with basic requirements of administrative law (requiring a reviewable record) and with the Fourth Circuit's decision in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462, 475 (4th Cir. 2013) (holding that "[b]y not addressing the economic feasibility of its proposed 'reasonable and prudent' alternative . . . the . . . Service has made it impossible for us to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decision-making"). Without repeating those arguments, NHA, NWHA, and RiverPartners are compelled to write separately because the ramifications of the Panel's holding extend far beyond the parties in this case.

As detailed below, the "reasonable and prudent alternative" requirement was added to the ESA in 1978 out of growing concerns that the implementation of the ESA Section 7 consultation process by the Service and the National Marine Fisheries Service (jointly "Services") was halting too many important infrastructure projects, including, specifically, hydropower projects. To alleviate these concerns, Congress amended the ESA and added the requirement that the Services must develop a "reasonable and prudent alternative" before they could force an action agency or applicant to give up on a project altogether. Congress explicitly instructed that, in addition to avoiding jeopardy or the adverse modification or destruction of a species' critical habitat, the reasonable and prudent alternative must be an action that "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Accordingly, the Services amended their

implementing regulations in 1986 and identified those factors that make an alternative "[r]easonable and prudent," including whether the alternative is "economically and technologically feasible." 50 C.F.R. § 402.02.

As intended by Congress, the reasonable and prudent alternative requirement has proven exceptionally important for the members of NHA, NWHA, and RiverPartners who own and operate hydropower projects or rely on the benefits of this clean, renewable energy source. Because of the nature of these projects, ESA Section 7 consultations for hydropower projects can result in the Services concluding that the project will jeopardize the species or adversely modify critical habitat. When that occurs, the applicants and federal agencies must work cooperatively with the Services to develop a reasonable and prudent alternative that avoids jeopardy but still "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). This often involves complex negotiations between the Services, action agency, and applicant as to whether all the factors provided in the Services' regulations are satisfied, particularly, whether the agency or applicant can implement the alternative consistent with the factors specified in the regulations, such as whether the agency or applicant has authority to carry out the alternative and whether the alternative would render the project uneconomic. Perhaps the most visible such consultation is the negotiated reasonable and prudent alternative developed for the Columbia River Hydropower System ("FCRPS"),

which was produced in collaboration with states, tribes, federal agencies, and stakeholders.[2]

The Panel's holding in this case renders the important protection for agencies and applicants established by the reasonable and prudent alternative largely meaningless. Now (at least in those states represented by the Ninth Circuit) the Services are not required to have any evidence in the record that a proposed reasonable and prudent alternative is within the authority of the agency to carry out, is technologically or economically feasible, or otherwise "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). As a result, a Service conclusion that an alternative is "reasonable and prudent" is essentially unreviewable. Because the Panel's holding is directly contrary to the language and purpose of the ESA, is in direct conflict with the only other circuit court to address this matter, and would seriously alter the scope of ESA consultations moving forward, this case presents the exceptional circumstances warranting en banc review.

[2] *See* 2014 FCRPS Supplemental Biological Opinion, at 32 (Jan. 17, 2014), *available at* http://www.westcoast.fisheries.noaa.gov/fish_passage/fcrps_opinion/federal_columbia_river_power_system.html (discussing history of reasonable and prudent alternative for the FCRPS).

ARGUMENT

A. The ESA's Reasonable And Prudent Alternative Requirement Was Added To The ESA In 1978 To Provide An Important Protection For Federal Action Agencies And Applicants Against Unnecessary Economic Harm.

Congress originally enacted the ESA in 1973, in response to a rise in the number and severity of threats to the world's wildlife, with the intent of preserving threatened and endangered species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978) ("*TVA*"). As originally enacted, Section 7 of the ESA categorically instructed all federal agencies that they must "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species." Pub. L. No. 93-205, § 7, 87 Stat. 884 (1973). This original mandate (now encompassed in ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2)) left no room for alternatives or the consideration of economic concerns.

The ESA's categorical mandate quickly became a matter of controversy, however, when a concerned citizen filed suit against the Tennessee Valley Authority alleging that the construction of the Tellico Dam on the Little Tennessee River would eradicate the endangered "snail darter," a small fish living in the vicinity of the dam. *See TVA*, 437 U.S. at 156. Although construction was "virtually complete[]," with nearly $100 million already expended on the major infrastructure project, the Supreme Court enjoined work on the dam. *Id.* at 172. As the Court explained in its June 15, 1978 opinion, the plain language of Section

7 in early 1978, and its legislative history, indicated "plain intent . . . to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184.

Congress immediately responded to this pronouncement by amending the ESA in November of 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978). As the House Report explains, "[t]he Supreme Court decision may be good law, but it is very bad public policy." H.R. Rep. No. 95-1757, at 822 (1978).[3] Simply put, the situation facing Tellico Dam was not unique, and many members of Congress faced similar problems in their own districts. *Id*. at 805. As a result, legislators expressed serious concerns that the ESA would "serve[] to delay and, in many cases, completely halt important public works projects with impeachable cost/benefit ratios." *Id*. at 796. In short, Congress quickly recognized that the Supreme Court's decision left the ESA "totally inflexible" (*id*. at 799) and that changes were needed to inject "commonsense" into the statute (*id*. at 837). Accordingly, and as the House Report explains, "we have rewritten that legislation this year and we have made a diligent effort to take into consideration more accurately the development needs of the Nation." *Id*. at 801.

The 1978 changes to the ESA reflect Congress's pragmatic concerns for federal agencies and applicants. For example, Congress amended Section 7, expanding it from a single paragraph to 16 subsections. Pub. L. No. 95-632.

[3] Citations to the relevant House Reports are provided here, as reprinted in Staff of Comm. on Environment and Public Works, 97th Cong., a Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980 (Comm. Print 1982).

Relevant here, subsection (b) was amended to require the Services to produce a written biological opinion explaining the basis for their conclusion that a federal action will jeopardize the continued existence of a listed species. *Id*. Moreover, if the action as proposed would violate the prohibition on jeopardy or destruction of critical habitat, the amendment further directed the Service to propose alternatives:

> The [Service] shall suggest those reasonable and prudent alternatives which he believes would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which can be taken by the Federal agency or the permit or license applicant in implementing the agency action.

Id. (emphases added) (the current version of this requirement is now at ESA Section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A)).[4] Indeed, Congress specifically revised the consultation process so as to "assist in the development of alternatives to the proposed action," particularly "those that are 'reasonable and prudent'" and not "inconsistent with the project's objectives and outside of the Federal agency's jurisdiction." H.R. Rep. No. 95-1625, at 744 (1978). The addition of the reasonable and prudent alternative to the statute therefore provided critical

[4] Subsequent amendment in 1979 made technical changes to this provision, substituting a cross-reference to Section 7(a)(2) for the narrative description: avoid jeopardizing "the continued existence of any endangered species" or adversely modifying or destroying the critical habitat of such species. Pub. L. No. 96–159, 93 Stat. 1225 (1979). In 1982, this subsection was renumbered as Section 7(b)(3)(A) and shortened "permit or license applicant" to "applicant." Pub. L. No. 97–304, 96 Stat. 1411 (1982).

flexibility to the ESA, by allowing agencies and applicants to proceed with projects that would otherwise be prohibited by making reasonable modifications to proposed actions.

In 1978, Congress also provided a last resort for agencies and applicants where no reasonable and prudent alternative could be identified. Specifically, Subsection (g)(5)(A) allows a federal agency or applicant to seek exemption from the Endangered Species Committee, where it has worked "in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives." Pub. L. No. 95-632. In sum, and as the House Report explains, the broad range of amendments made to the ESA in 1978, "for the first time, recognize[d] that there are human considerations to be dealt with and people are an important factor in [the ESA] equation." H.R. Rep. No. 95-1757, at 837.

Consistent with the language of the ESA and its legislative history, in 1986, the Services adopted regulations to implement the reasonable and prudent alternative requirement added to the statute in 1978. As Congress intended, these rules recognize the importance of the reasonable and prudent alternative in providing flexibility for agencies and applicants. *See* 51 Fed. Reg. 19926, 19952 (June 3, 1986). In their rules, the Services define the "reasonable and prudent alternative" as

> alternative actions identified during formal consultation that [1] can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal

> agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02. The first three factors (sometimes called the nonjeopardy factors) relate to the explicit statutory mandate that the reasonable and prudent alternative "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). The fourth factor (sometimes called the jeopardy factor), on the other hand, relates to the statutory mandate that the reasonable and prudent alternative may not violate the prohibition on jeopardizing a species or adversely modifying or destroying critical habitat. *Id*.

In addition to defining the term "reasonable and prudent alternative," the Services' 1986 regulations shed light on their obligations to "[d]iscuss with the Federal agency and any applicant . . . the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2)." 50 C.F.R. § 402.14(g)(5). In so doing, the rules provide that "[t]he Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives," (*id*.) and "will use the best scientific and commercial data available" in the formulation of alternatives (50 C.F.R. § 402.14(g)(8)). Finally, the Service's preamble recognizes that, while it often relies on the expertise of the agency or applicant as to the "feasibility of an alternative," the Services can disagree with that assessment and "must reserve the right to include . . . alternatives in the biological opinion if it determines that they

are 'reasonable and prudent' according to the standards set out in the definition in § 402.02." 51 Fed. Reg. at 19952.

Following the 1978 amendments to the ESA and the Services' promulgation of implementing regulations in 1986, federal agencies and applicants are no longer faced with the inflexible situation where a project proceeds or fails based on an initial jeopardy opinion. The Services are now required to be flexible and work with federal agencies and applicants to develop reasonable and prudent alternatives that are economically and technologically feasible, and thus "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A); *see* 50 C.F.R. § 402.02. Moreover, in those circumstances where disputes arise as to whether an alternative is actually feasible, the regulations provide certainty that the selection of a reasonable and prudent alternative will be based on the best scientific and commercial data available. 50 C.F.R. § 402.14(g)(8). As a result, in accordance with the post-*TVA* revisions to the ESA, few formal consultations should result in a jeopardy opinion where there is no available reasonable and prudent alternative.[5]

B. The Panel's Decision Renders Meaningless The Protections Provided By The Reasonable And Prudent Alternative.

The Panel's decision in this case seriously undermines the protections provided by Congress in the 1978 amendments to the ESA. The Panel recognized

[5] *See* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 318 (1993).

that 50 C.F.R. § 402.02 is "a definitional section; it is defining what constitutes [a reasonable and prudent alternative]." Panel Op. at 113. The Panel further concluded that the Service must always address the fourth prong of that definition (the jeopardy prong) because Section 7(b)(3)(A) directs (as does 50 C.F.R. § 402.02) that a reasonable and prudent alternative cannot result in jeopardy or adversely modify or destroy critical habitat. Panel Op. at 115. However, since the Panel could find "no similar requirement in the ESA that the FWS address the remaining three non-jeopardy factors," it concluded that the Service has no obligation to do so. *Id*.

This conclusion cannot be reconciled with the plain language of the ESA, its history, or the Service's regulations. First, when Congress required the Service to offer a "reasonable and prudent alternative" it instructed *both* that the alternative avoid jeopardy (as the Panel held) *and* that the alternative "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Instead of being superfluous, as the Panel's decision concludes, the three nonjeopardy factors set out in 50 C.F.R. § 402.02 describe this second requirement, *i.e.*, when an alternative "can be taken by the Federal agency or applicant." Accordingly, the Service cannot offer a reasonable and prudent alternative unless it provides some basis in the record for its determination that the alternative "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Not only is this necessary to give meaning to every word in the statute, but it is a bedrock principle of the judicial review of agency action. *See, e.g., Ctr. for Biological Diversity v.*

Norton, 254 F.3d 833, 839 (9th Cir. 2001) ("judicial review would become meaningless" where court has "no basis to evaluate the Secretary's conclusion").

Second, the Panel's holding is flatly contrary to the history of Section 7. As discussed *supra*, Congress included the reasonable and prudent alternative in the consultation process to provide flexibility for action agencies and applicants, and to infuse "commonsense" into the ESA. H.R. Rep. No. 95-1757, at 799, 837. If the Service can simply impose a reasonable and prudent alternative that would (in the applicant's or agency's opinion) be technologically or economically infeasible, without any obligation on the part of the Service to justify how that alternative "can be taken by the Federal agency or applicant," 16 U.S.C. § 1536(b)(3)(A), then that flexibility is meaningless. Simply put, there is nothing "commonsense" about a provision that would allow the Service to offer a reasonable and prudent alternative without requiring any explanation as to how or why that alternative is, in fact, reasonable or prudent. *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) ("[W]e require an explanation from the agency that enables meaningful judicial review.").

Third, the Panel's conclusion that the Service has no obligation to document the nonjeopardy factors is directly contrary to the implementing regulations. In its rules, the Service makes clear that "[i]n formulating its . . . reasonable and prudent alternative, . . . the Service will use the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8). This obligation to use the best information available in formulating a reasonable and prudent alternative is in no way limited to *only* determining whether that alternative would avoid jeopardy. Instead, the

regulations plainly require that the Service use the best available information in formulating the alternative itself, which, by definition, includes consideration of the nonjeopardy factors. 50 C.F.R. § 402.02. Indeed, the only way for an action agency or applicant (or a reviewing court) to know whether the Service's obligations have been satisfied is to consider "an explanation from the agency that enables meaningful judicial review." *Humane Soc'y of U.S.*, 626 F.3d at 1054.

Finally, the Panel's holding is especially troubling in light of the Service's discussion in the preamble to its implementing rules, where the Service explains that it "must reserve the right to include those alternatives in the biological opinion if it determines that they are 'reasonable and prudent' according to the standards set out in the definition in § 402.02." 51 Fed. Reg. at 19952. If there is no requirement that the Service make a record on that finding (and the Panel has held that there is not) an agency or applicant that is presented with a reasonable and prudent alternative that is not actually feasible or achievable has no judicial recourse and must either forgo a project or face the difficult burden of seeking an exemption from the ESA.[6] Notably, even the Service's arguments stopped short of the Panel's holding, conceding that it would have to produce a reviewable record "where an action agency does assert that the RPA cannot meet one of the non-jeopardy factors." Dkt. 30 at 78 n.13.

[6] Indeed, that is precisely the Panel's conclusion in this instance: "…the FWS is not responsible for balancing the life of the delta smelt against the impact of restrictions on CVP/SWP operations." Panel Op. at 117.

There are, no doubt, situations where the feasibility of a reasonable and prudent alternative is self-evident, goes unquestioned by the agency, applicant, or other interested party, or is otherwise not subject to reasonable dispute. Under such circumstances, the obligation of the Service to document in the record that the alternative meets all the factors that comprise the definition of reasonable and prudent may be attenuated. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (parties must "structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions"). But the Panel's holding is categorical. It concludes that there is no obligation in the Service regulations, the ESA, or the APA that requires the Service to address the nonjeopardy factors that define a reasonable and prudent alternative. Thus, even where "an action agency does assert that the RPA cannot meet one of the non-jeopardy factors," as the Service describes (Dkt. 30 at 78 n.13), the Panel's opinion excuses the Service from justifying its position in the record.

Nor are the concerns exposed by the decision hypothetical. Service practice in consultations with the hydropower industry (as elsewhere) has demonstrated that the statutory obligation to produce a reasonable and prudent alternative based on a defensible record can be an important bulwark against the imposition of unreasonable alternatives on agencies or applicants. The Service occasionally suggests that the denial of a hydropower license is a "reasonable and prudent alternative" or that some excessively expensive alternative is reasonable and feasible. Yet, applicants and federal agencies can respond, when appropriate, with

"the best scientific and commercial data available" to show that an alternative is neither practicable or feasible, nor consistent with the proposed action. This process affords agencies and applicants the opportunity "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). That critical protection is rendered meaningless if, as the panel categorically held, the Services' have no legal obligation to document compliance with the non-jeopardy factors in the first place.

CONCLUSION

For all these reasons, NHA, NWHA, and RiverPartners respectfully urge the Court to grant rehearing on this issue. The Panel's holding directly conflicts with the Fourth Circuit's decision on this precise issue; fundamentally changes the nature of the Section 7 consultation process in a manner that is contrary to the ESA, its history, and the Services' regulations; and will have serious ramifications for future ESA consultations. Accordingly, this issue presents exceptional circumstances warranting en banc review.

Dated: May 22, 2014.

Respectfully submitted,

s/Jason T. Morgan

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CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to Ninth Circuit Rule 29-2, that the foregoing Brief *Amicus Curiae* Of The National Hydropower Association, Northwest Hydroelectric Association, And Northwest RiverPartners In Support Of Petition For Rehearing En Banc is proportionally spaced, has a typeface of 14 points or more, and contains 4,000 words.

Dated: May 22, 2014.

By: s/Jason T. Morgan
Jason T. Morgan

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2014, I electronically filed the foregoing Brief *Amicus Curiae* of the National Hydropower Association, Northwest Hydroelectric Association, and Northwest RiverPartners in Support of Rehearing En Banc, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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United States Court of Appeals for the Ninth Circuit

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