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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al., Federal Defendants.	Case No. 1:10-CV-0760-JH-ACT **FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

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LIST OF ACRONYMS

APA	Administrative Procedure Act
CMR	Chemistry and Metallurgy Research Building
CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994). Plaintiff has fallen far short of meeting this burden. Relying on unsubstantiated statements, hearsay, and arguments in an affidavit from its Executive Director that goes far beyond what a court might consider to establish jurisdiction,[1] Plaintiff mischaracterizes the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") and belies a fundamental misunderstanding of the National Environmental Policy Act ("NEPA").

As set forth in Federal Defendants' opening brief, the Department of Energy/National Nuclear Security Administration ("DOE/NNSA" or "NNSA") has already completed extensive environmental review of the CMRR-NF, including an environmental impact statement ("EIS") in 2003. While new developments and information have necessitated modifications in the design of the CMRR-NF, the purpose and need have not changed, nor has the scope of operations to be carried out in the facility. Cook Decl., Dkt. No. 9-1, ¶¶ 13, 14. No construction is occurring, and design of the proposed project is less than 50 percent complete. Id. ¶ 20. To assess the potential environmental effects of the design modifications, NNSA is preparing a supplemental EIS ("SEIS") and is currently receiving comments and suggestions from the public on the scope. 75 Fed. Reg. 60,745 (Oct. 1, 2010). The time to submit such comments recently was extended

[1] A court has wide discretion to consider affidavits to resolve disputed jurisdictional facts when considering a Rule 12(b)(1) motion to dismiss. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). In reviewing such a motion, however, a court "may not rely on conclusory or hearsay statements contained in the affidavits." J.S. ex rel. N.S. v. Attica Central Schs., 386 F.3d 107, 110 (2d Cir. 2004). Plaintiff's affidavit consists almost entirely of hearsay, ill-informed speculation, argument, and legal conclusions, and the Court should accord it no weight.

by 15 days. 75 Fed. Reg. 67,711 (Nov. 3, 2010).

Plaintiff's response presents nothing to address the Complaint's fatal jurisdictional defects. Federal Defendants moved for dismissal based on the statute of limitations for challenges to the 2003 EIS and 2004 Record of Decision ("ROD"). Federal Defendants also moved for dismissal because Plaintiff's challenge to the adequacy of the SEIS is not ripe for review, and because Plaintiff's claim that further environmental analysis of the proposed CMRR-NF is required were mooted by NNSA's decision to prepare an SEIS. Plaintiff's response mischaracterizes the limitations argument and presents a false dichotomy that claims cannot simultaneously be unripe and moot. Well-established case law and the facts show that Federal Defendants' jurisdictional arguments present the Court with the basis for dismissing all of the claims in this case, as Plaintiff has not established jurisdiction. Moreover, even had Plaintiff met this burden, the Court has the inherent power, through the doctrine of prudential mootness, to dismiss this case because NNSA is preparing an SEIS that will address the potential environmental effects of the design changes to the proposed CMRR-NF.

I. PLAINTIFF'S CHALLENGES TO THE 2003 EIS ARE TIME-BARRED

Plaintiff mischaracterizes Federal Defendants' statute of limitations defense. See Pl. Br. at 12-14. Federal Defendants' limitations defense focuses on Plaintiff's challenges to the 2003 EIS and 2004 ROD themselves. See Fed. Def. Br. at 10 (asserting statute of limitations to ¶¶ 65-79, 90 of Complaint). Because Plaintiff waited more than six years to bring these claims, they are time barred. 28 U.S.C. § 2401(a); Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1494-95 (10th Cir. 1997). See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186-87 (4th Cir. 1999) (challenge to adequacy of NEPA analysis for

project arises on date of ROD, which constitutes the "final agency action" for the project pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 704); Friends of Tims Ford v. Tenn. Valley Auth., 585 F.3d 955, 964-65 (6th Cir. 2009) (same).

Plaintiff contends that these claims are not time barred because there is a continuing NEPA violation consisting of "on-going design and construction." Pl. Br. at 12. This contention is flawed. The two out-of-circuit cases Plaintiff cites in support of this argument are easily distinguishable. In both Oregon Natural Resources Council v. U.S. Forest Service, 445 F. Supp. 2d 1211, 1230-31 (D. Or. 2006), and Montana Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1143 (D. Mont. 2004), the courts determined that the challenged final agency actions all took place within the six year statute of limitations. Here, the alleged failures of the 2003 EIS to comply with NEPA, as set forth in paragraphs 65-79 and 90 of the Complaint, all accrued on the date of the ROD, February 12, 2004, more than six years prior to the filing of the instant action. Federal Defendants do not raise a statute of limitations defense to Plaintiff's claims that DOE was required to prepare a new or supplemental EIS based on new information arising *after* the date of the ROD, which are the types of claims that were at issue in the cases that Plaintiff cites. Cf. Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997) (holding that the plaintiff's position that the statute of limitations did not bar claims about the adequacy of the original EIS "defies logic because they complain of actions taken by the [federal agency] at the time the final EIS was approved and the ROD was issued"). That Plaintiff may have some claims that are not barred does not revive claims for which the limitations period has expired.

II. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW

In the motion to dismiss, Federal Defendants demonstrated that Plaintiff's claims that changes to the proposed CMRR project dictate a new NEPA analysis are not ripe for review because

there is no final agency action on DOE's new NEPA analysis, DOE/NNSA is not irretrievably committing resources, and judicial review at this stage would seriously harm DOE/NNSA. Fed. Def. Br. at 12-18. Plaintiff fails to rebut these arguments. See Pl. Br. at 14-18.

A. Plaintiff Has Not Shown that Its Claims Are Fit for Judicial Decision

Plaintiff glosses over its burden to identify a final agency action on the updated CMRR-NF Project. Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000) (granting motion to dismiss since plaintiff failed to demonstrate that the challenged agency action was final). Instead, Plaintiff offers a wholly conclusory statement that "[Federal D]efendants are clearly proceeding with the CMRR-NF." Pl. Br. at 15. Plaintiff provides no factual support for this statement, let alone explains how the preliminary design work on the proposed CMRR-NF constitutes "final agency action." See id. The actions challenged in Plaintiff's Complaint do not mark the consummation of NNSA's decision-making process and do not determine rights and obligations or result in legal consequences. Fed. Def. Br. at 13 (citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Franklin v. Massachusetts, 505 U.S. 788, 797 (1992); Ctr. for Native Ecosystems v. Cables, 509 F.3d. 1310, 1329 (10th Cir. 2007)).

Design work is not a "final agency action" because NNSA still must issue final approval for the proposed CMRR-NF before construction. See Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist., 752 F.2d 373, 378-79 (9th Cir. 1985) (deciding to fund preliminary design and engineering work is not a final decision because final approval by the Secretary is still required before construction can begin). Under analogous circumstances, the Second Circuit rejected the notion that design work constitutes final agency action that would be ripe for judicial review:

> [T]he proposed [study] may reaffirm the [project], reform it, or even recommend that it not be constructed. We are asked to intervene in an administrative process which

> at this point has created no rights or obligations and involves no legal consequences . . . . We conclude that no final agency action has been taken, that the issues are not ripe for adjudication and that our intervention would not only be a waste of judicial resources but an untoward interference in the administrative process.

Envtl. Def. Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir. 1980).

Not only does Plaintiff fail to identify any final agency action, it also fails to show that NNSA has made irreversible and irretrievable commitments of resources. Plaintiff alleges only that large amounts of money have been expended on preliminary design work for the proposed CMRR-NF, allegations that include inaccurate past amounts and speculative, unappropriated funds in the total. Pl. Br. at 15; see Mello Aff. ¶ 54. This conclusory statement, with no supporting case law, is at odds with case law holding that even the expenditure of substantial amounts of money is not an irretrievable commitment of resources. See WildWest Inst. v. Bull, 547 F.3d 1162, 1169 (9th Cir. 2008) (pre-marking of [hazard] trees did not irretrievably commit agency to a particular course of action, notwithstanding expenditure of over $200,000 to mark the trees); Haw. County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1198 (D. Haw. 2000) (spending $350 million on a weapons system was not an irretrievable commitment of resources, because "doing research and building a ship do not mark the consummation of agency decision making on deployment").

Absent final agency action or an irreversible and irretrievable commitment of resources, Plaintiff cannot establish that its claims are fit for judicial decision. Therefore, Plaintiff's claims are not ripe for judicial review.

B. Plaintiff Has Failed to Meet Its Heavy Burden to Show Predetermination

Plaintiff contends that its claims are ripe for review because NNSA has predetermined the outcome of the SEIS. Pl. Br. at 16-17. This contention is not supported by the facts or controlling case law. Under circumstances not present here, evidence of predetermination can be used to show

that an agency failed to take the requisite "hard look" at environmental impacts, and therefore acted arbitrarily and capriciously in violation of the APA. Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 713 (10th Cir. 2010). Any challenge based on predetermination, however, can only be reviewed *after* an agency has completed the NEPA process. See id. at 714 (considering predetermination of the *result* of an environmental analysis).

Even assuming that Plaintiff could assert predetermination at this stage, "[a] petitioner must meet a high standard to prove predetermination." Id. "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." Id. (emphases in original). Predetermination is not "present simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the *possibility* that a particular environmental outcome would be the result of its NEPA review of environmental effects." Id. at 715 (emphasis in original). Nor is predetermination present when an agency enters into a series of agreements that are contingent upon the completion of NEPA requirements. Lee v. U.S. Air Force, 354 F.3d 1229, 1240 (10th Cir. 2004).

To establish that NNSA has predetermined the outcome of the SEIS, therefore, Plaintiff must show an irreversible and irretrievable commitment of resources. As discussed in Part II.A, supra, Plaintiff cannot meet this requirement.[2] Plaintiff therefore failed to meet the stringent standard

[2] Plaintiff speculates that the proposed CMRR-NF will have proceeded far enough to inflict an irreparable injury by the time the SEIS is completed. Pl. Br. at 16. Even if this were true, which it is not, see Cook Decl. ¶ 21 (stating that there will be no construction during the SEIS period), it has no bearing on the predetermination inquiry because an irreparable *injury* does not constitute an irreversible and irretrievable commitment of *resources* – the relevant standard for predetermination.

required for a finding of predetermination. Forest Guardians, 611 F.3d at 714.

C. Plaintiff Will Not Suffer Any Hardship During The SEIS Process

Plaintiff contends that if judicial review is withheld until completion of the SEIS, members will be exposed to: (1) impacts from construction; (2) short-term risks of the continued operation of the existing CMR Building; (3) enhanced risk from the CMRR-NF; and (4) risk from the demolition of the CMR Building and CMRR-NF. Pl. Br. at 17-18. These alleged harms are speculative, unrelated to the present action, and not immediate.

The first allegation of hardship is inaccurate, because no construction will occur at least until June 2011, the end of the expected SEIS period. Cook Decl. ¶ 21, 25. The second allegation is unrelated to the design, construction, and operation of the proposed CMRR-NF because the present action challenges the NEPA process of the proposed CMRR-NF, not the CMR Building. See Compl. Moreover, Plaintiff ignores the analysis of this issue in the 2003 EIS and decision in the 2004 ROD. The third allegation is more than ten years away because the CMRR-NF, if authorized after completion of the SEIS, will not be operational until at least 2022. Cook Decl. ¶ 25. The fourth allegation is even more remote. See id. ¶¶ 8, 23 (if authorized, proposed CMRR-NF has a life expectancy of at least 50 years).

Plaintiff's speculative, unrelated, and distant harms are not the certain or immediate hardships courts consider when evaluating ripeness. Utah v. U.S. Dep't of the Interior, 535 F.3d 1184, 1197-98 (10th Cir. 2008) (hardship element generally falls into one of two categories: (1) where "parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe for adjudication"; and (2) where "the defendant had taken some *concrete action* that threatened to impair – or had already impaired – the plaintiffs' interests.")

(citations omitted; emphasis in original). Plaintiff has not identified any significant costs or threats to its interests that will occur during the SEIS period. On the other hand, allowing NNSA to complete the SEIS will have tangible benefits to judicial economy because it will allow further factual development of the potential environmental effects from the design changes to the proposed CMRR-NF. Id. at 1198; Fed. Def. Br. at 18-19.

D. Plaintiff Has Not Suffered a Procedural Injury

The only argument that Plaintiff can muster that its claims are ripe for review is that it has suffered an unspecified procedural injury. Pl. Br. at 18. The case cited by Plaintiff to support this argument, however, only confirms that Plaintiff has *not* suffered a procedural injury. In Friends of Marolt Park v. U.S. Dep't of Transp., 382 F.3d 1088, 1095 (10th Cir. 2004), the Tenth Circuit found the NEPA claim ripe for review because the agency should have issued an SEIS that would have further considered the environmental impacts of the proposed project. Here, the *exact opposite* is occurring. NNSA is already preparing an SEIS to analyze the potential environmental impacts of design changes to the proposed CMRR-NF. Cook Decl. ¶ 16. As part of this process, Plaintiff (and the public) will be afforded an opportunity to comment on the draft SEIS, and DOE also added an extended, pre-draft SEIS public scoping process, including two public meetings. Id. ¶ 17.

Plaintiff also contends that its claims are ripe for review because NNSA will complete only "additional, albeit hollow, NEPA analyses" in the future. Pl. Br. at 19. Plaintiff cites Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1264 (10th Cir. 2002), for the proposition that it has already suffered a procedural injury even though NNSA will complete an SEIS for the proposed CMRR-NF project. See id. In Sierra Club, the Tenth Circuit found that the plaintiff's procedural claim was ripe because it challenged the granting of an easement, a final agency action that had already taken place

without an EIS being prepared. 287 F.3d at 1264-65. The Sierra Club Court itself distinguished the precise situation at issue here, noting that in Utah v. U.S. Dep't of the Interior, 210 F.3d 1193, 1196-97 (10th Cir. 2000), it had held that "the matter was not ripe for adjudication because the [federal agency] was performing a NEPA analysis and the NEPA procedure would give the [plaintiff] adequate opportunity to raise its concerns." 287 F.3d at 1264. Unlike Sierra Club (but like Utah), NNSA is preparing an SEIS that will provide Plaintiff and the public ample opportunity to comment on the design changes to the proposed CMRR-NF before a final decision is made to begin construction. See Part II.A, supra; Cook Decl. ¶ 17. Plaintiff's claims are not ripe.[3]

III. PLAINTIFF'S CLAIMS ARE MOOT BECAUSE NNSA IS PREPARING AN SEIS

Plaintiff contends that its claims are not moot because NNSA "do[es] not propose to discontinue [its] ongoing planning, design, and construction activities," and because NNSA must prepare a "new" EIS rather than an SEIS. Pl. Br. at 20. Neither assertion is correct.

A. The Extraordinary Exception of Voluntary Cessation Does Not Apply

Where, as here, the conduct at issue is highly fact- and context-specific, and not likely to "recur" under similar circumstances, the voluntary cessation doctrine is inapplicable. Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1150 (10th Cir. 2007). Plaintiff's alleged violations of NEPA are no longer extant because the SEIS will

[3] See also Coliseum Square Ass'n, Inc. v. Jackson, 465 F.3d 215, 245 (5th Cir. 2006) (holding that a NEPA claim was not ripe because it "would have inappropriately interfered with agency action, *viz.*, the reopened NEPA . . . review process[]"); Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1197 (9th Cir. 1997) (noting that a federal agency had "not concluded its [NEPA process] with respect to [an] access road," and thus "[u]ntil the [federal agency] actually makes a final decision regarding the road, a challenge to the access road under NEPA is not ripe for review"); Center for Marine Conserv. v. Brown, 917 F. Supp. 1128, 1150 (S.D. Tex. 1996) ("Of course, any challenge to the supplemental EIS itself is not ripe for review, because there is no final agency action to review until the EIS is actually issued.").

address the potential environmental effects of the proposed design changes to the CMRR-NF. Any future decision to construct the CMRR-NF will be informed by the SEIS. Cook Decl. ¶ 18. NNSA's decision to prepare an SEIS, and inform future decisions based on the SEIS, is no "mere informal promise," but a concrete, intervening event that moots Plaintiff's claims. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1118 (10th Cir. 2010); see also id. at 1117 n.15 (noting that "courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors").[4] The voluntary cessation doctrine is not applicable.

B. Plaintiff's Demand for a "New" EIS Has No Basis In Law

Plaintiff repeatedly asserts that NNSA must prepare a "new" EIS to address the changes from the original proposed CMRR-NF design. Pl. Br. at 22-23.[5] This assertion has no basis in law. See Fed. Def. Br. at 18-19 (citing 40 C.F.R. § 1502.9(c) (authorizing preparation of an SEIS for substantial changes to a project)). Plaintiff has not identified any regulation that requires NNSA to complete a "new" EIS, because no such regulation exists. Rather, NEPA regulations confirm that preparing an SEIS, not creating a new EIS, is the appropriate procedure where there are "substantial changes to the proposal or significant new circumstances or information relevant to environmental

[4] Plaintiff also wrongly contends that this case is not moot because planning and construction activities are ongoing. Pl. Br. at 20. The Assistant Director of NNSA has made a sworn statement that no construction will occur during preparation of the SEIS, and design work (which, as discussed in Part II.A, supra, does not constitute an irreversible and irretrievable commitments of resources under NEPA) will only advance by approximately 15 percent. Cook Decl. ¶¶ 20, 21, 25.

[5] Although Plaintiff raises this argument in its section on mootness, it is properly considered under ripeness because any such challenge to the adequacy of the SEIS must wait until NNSA issues a new ROD based on the SEIS. See Fed. Def. Br. at 18-19.

concerns." 10 C.F.R. § 1021.314(a); see also 40 C.F.R. § 1502.9(c). "DOE may supplement a draft or final EIS at any time to further the purposes of NEPA." 10 C.F.R. § 1021.314(b).

The CMRR-NF as currently proposed is not an entirely new proposal, as Plaintiff contends. Rather, NNSA is merely exploring an altered design of a building that will sit in the same location and serve the same purpose and need as the one contemplated in the 2003 EIS. Cook Decl. ¶¶ 13, 14. When faced with design changes far more substantial than those at issue here, courts have consistently found an SEIS to be the appropriate NEPA approach. See, e.g., Nat. Wildlife Fed. v. Marsh, 721 F.2d 767, 782-84 (11th Cir. 1983) (SEIS appropriate where agency proposal would increase acreage affected, change character of land, and change type of activity on land); Envtl. Def. Fund v. Marsh, 651 F.2d 983, 987-88, 1005-06 (5th Cir. 1981) (SEIS appropriate where agency proposing adopted substantial design changes that would, *inter alia*, increase land use by one half, flood an additional 5,000 acres, and cost an additional $330 million). Consistent with this law, an SEIS will allow NNSA to build upon the 2003 analysis, taking into account the design changes, while affording Plaintiff no less opportunity for comment and participation than a "new" EIS.

Plaintiff's reliance on Blue Ocean Preservation Society v. Watkins, 767 F.Supp. 1518, 1523-24 (D. Haw. 1991), for the proposition that NNSA is compelled to prepare a new EIS is misplaced. Pl. Br. at 22-23. In Blue Ocean, DOE never completed an EIS for a proposed geothermal power plant, so there was no EIS to supplement. 767 F. Supp. at 1520; see 754 F. Supp. 1450, 1452-53 (D. Haw. 1991) (providing factual background of project). Here, NNSA completed an EIS in 2003 for the proposed CMRR-NF and, based on new information and changes to the original design, decided

to supplement the 2003 EIS to address those changes. Cook Decl. ¶¶ 9, 12, 16.[6]

Finally, Plaintiff contends that the doctrine of prudential mootness is inapplicable because circumstances have not changed since the beginning of this litigation. Pl. Br. at 23. This contention is incorrect because the NNSA decided to prepare an SEIS to address design changes to the proposed CMRR-NF. Cook Decl. ¶ 16, 17. If Plaintiff decides that its concerns are not adequately addressed in the SEIS, Plaintiff may file a new action, after exhausting administrative remedies and satisfying other requirements of justiciability. Any future possible actions do not mean that the instant Complaint presents justiciable claims. NNSA's decision to prepare an SEIS shows that the controversy on which Plaintiff filed suit, the environmental analysis of the design changes to the proposed CMRR-NF, is "so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) (quoting Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980)).

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Respectfully submitted on this 8th day of November, 2010.

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[6] Plaintiff also cites S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002), for the proposition that there is a continuing and live controversy. Pl. Br. at 23. Not only is the fact pattern of this case different from the present action because NNSA continues to comply with NEPA with its decision to prepare an SEIS, but this case was reversed by the Supreme Court on the grounds that there was no ongoing federal action that could require supplementation. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004).

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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