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November 26, 2001

Mr. Len Marino
Department of Water Resources
State Water Project Analysis Office
1416 Ninth Street
P.O. Box 942836
Sacramento, CA 94236-0001

Re: NEPA Scoping Document 1 and CEQA Notice of Preparation for the Oroville Facilities Relicensing, Federal Energy Regulatory Commission, Project No. 2100 September 27, 2001

Dear Mr. Marino:

The State Water Contractors, Inc. (SWC) is responding on behalf of its 27 member agencies[1] to the Department of Water Resources' (DWR's) request for comments on the September 27, 2001 Draft NEPA Scoping Document 1 and CEQA Notice of Preparation, Oroville Facilities Relicensing, FERC Project No. 2100 (Scoping Document or SD1). The SWC submitted comments on both the initial and second draft of SD1. The SWC and several of its member agencies also provided comment at the October 30 Public Scoping Meeting for the Oroville Facilities Relicensing.

The SWC appreciates DWR's efforts in addressing comments on the earlier drafts of SD1. However, not all of the SWC comments on the August 24, 2001 draft were incorporated into the September 27, 2001 revision of SD1. The SWC asks DWR to reconsider these earlier comments. Two of the comments that DWR did not fully address in the September 27, 2001 revision of SD1 are repeated here with W-07-01

1 Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Casitas Municipal Water District on behalf of the Ventura County Flood Control District; Castaic Lake Water Agency; Central Coast Water Authority on behalf of the Santa Barbara County FC&WCD; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; The Metropolitan Water District of Southern California ("Metropolitan"); Mojave Water Agency; Napa County FC&WCD; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley MWD; San Gorgonio Pass Water Agency; San Luis Obispo Co. FC&WCD; Santa Clara Valley Water District; Solano County Water Agency; and Tulare Lake Basin Water Storage District.

additional justification on why DWR should adopt the suggested changes. The SWC is also providing comments in additional areas.

SWC ISSUES NOT FULLY ADDRESSED IN THE SEPTEMBER 27 SD1 DRAFT

1) DWR's Relicensing Goals and Objectives

W-07-02

DWR partially responded to the SWC suggestion to include DWR's relicensing goals and objectives in SD1. DWR included its relicensing goal on page 1 of the September 27revision but did not include its relicensing objectives for each of the resource areas.

The California Environmental Quality Act (CEQA) requires that the project description for all Environmental Impact Reports (EIR) include a statement of the objectives sought by the proposed project. A clearly written statement of objectives will guide the lead agency in the development of a reasonable range of alternatives to evaluate in the EIR and will aid decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project.[2] Likewise, the National Environmental Policy Act (NEPA) requires that all Environmental Impact Statements (EIS) briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.[3] These regulations also clearly state that the alternatives, including the proposed action, are the heart of the environmental impact statement.[4]

According to the Initial Information Package (IIP) for Oroville Project relicensing, project purposes include water supply, power generation, flood control, fish and wildlife, and recreation. The SWC suggests that the Scoping Document should include clearly stated goals and objectives based on the underlying purposes stated in the IIP. As noted above, clearly articulated goals and objectives will guide the definition of the project alternatives selected for comparative analysis in the environmental impact assessment process. The SWC recommends that goals and objectives for Oroville Facilities relicensing by FERC include preservation of existing water supply, power generation and flood management benefits. DWR should adopt appropriate goals and objectives for each resource area.

2) Study Need Evaluation Criteria

W-07-03

The SWC also suggested that two documents that provide criteria for evaluating the need for proposed studies be included as an appendix in the next version of the Scoping Document. The reference documents were originally distributed at the

2 CEQA Guidelines Section 15124(b).
3 40 CFR 1502.13.
4 40 CFR 1502.14.

August 27 Land Use, Land Management and Aesthetics Study Plan Development Task Force meeting. Since that time, DWR has refined and distributed the evaluation criteria to other task forces and work groups. The SWC recommends that DWR review the evaluation criteria with the Plenary Group and include the criteria in the next version of the Scoping Document. Including these evaluation criteria in the Scoping Document will facilitate understanding the Study Plan Development process described in Figure 2. W-07-03

ADDITIONAL ISSUES

1) Identification of Project Alternatives and the Environmental Baseline

The SWC concurs with the Scoping Document's statements in Section 3.1.3, p. 20 that the "No Action Alternative" is not pre-project conditions but continued operation of the Oroville facilities under the terms and conditions of the current FERC license. This accords with case law and FERC practice.[5] W-07-04

The Scoping Document also correctly states that the No-Action Alternative "establishes the baseline environmental conditions against which all other 'action' alternatives will be compared." Section 3.1.3, p. 20. The SWC suggests amending this language to clarify what is implicit therein, namely, that the baseline is used to compare the environmental effects, including cumulative effects, of the proposed project and the alternatives. Thus, the last sentence in Section 3.1.3 would read: "Pursuant to NEPA, the "no action" ~~this~~ alternative, i.e., continued operation of the Oroville facilities under the terms and conditions of the current license, establishes the baseline environmental conditions against which the environmental effects, including cumulative effects, of the proposed project and all other 'action' alternatives will be compared." This approach accords with NEPA practice.[6]

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5 *See American Rivers v. FERC*, 201 F.3d 1186, 1195-1201 (9th Cir. 1999) wherein the Ninth Circuit held that, in hydropower relicensing, the environmental baseline consists of current existing environmental conditions with the existing hydroelectric power facilities, not a historical recreation of conditions that would exist without those facilities; the "no action" alternative is continued operation of the project under the current license.; *See also Conservation Law Foundation v. FERC*, 216 F.3d 41, 45-46 (D.C. Cir. 2000); *City of Tacoma*, 71 FERC ¶ 61,381, at 62,491-492 (1995); *Public Service Company of New Hampshire*, 68 FERC at 61,866-868 (1994).

6 *American Rivers v. FERC, supra*, 201 F.3d at 1195, n. 15 "A baseline is . . . employed to identify the environmental consequences of a proposed agency action."; CEQ, *Considering Cumulative Effects* at 1 "The range of alternatives considered must include the no-action alternative as a baseline against which to evaluate cumulative effects", and at 23 "These baseline conditions provide the context for evaluating environmental consequences,"; *Public Service Co. of New Hampshire, supra*, 68 FERC at 61,867,"The staff's definition of the no action alternative as continued operation of the project under the same terms and conditions as the existing license simply reflects this statutory reality. It also establishes an environmental benchmark or baseline for comparison of the environmental effects of the proposed action and alternatives." emphasis added. As FERC has noted, because this is the proper baseline in a relicensing proceeding, one must reject the notion that "all past damage caused to fish and wildlife caused by the project must be 'mitigated' in a relicensing proceeding." *City of Tacoma, supra*, 71 FERC at 62,492.

The SWC also agrees with the discussion in Section 3.2 that, at this stage of the NEPA process, the alternatives of project retirement or issuance of a non-power license can be eliminated from further consideration. FERC has recognized in other proceedings that it is appropriate to eliminate decommissioning and non-power license alternatives at the scoping stages when, as here, those alternatives are not reasonable.[7] Eliminating these alternatives now will conserve resources for the analysis of realistic and feasible alternatives. W-07-04

2) Cumulative Effects

Section 5.1 of the Scoping Document states that the geographic scope of the cumulative effects analysis "may vary from resource to resource" and that the analysis for each resource "will be defined during development of the PDEA." The Scoping Document also invites comments on the "scope and approach for completing the cumulative impact analysis." W-07-05

The SWC agrees that the geographic scope of the cumulative effects analysis will vary from resource to resource.[8] However, the SWC believes that the Scoping Document should provide more guidance on the proper scope of the cumulative effects analysis, and offers the following comments on this issue.

First, according to the Council on Environmental Quality's ("CEQ") guidance document, *Considering Cumulative Effects under the National Environmental Policy Act* ("Considering Cumulative Effects"), January 1997 at 11-16, the first step should be to identify, during scoping, the significant cumulative effects issues associated with relicensing. This identification turns on analysis of the cause-and-effect relationships between the project, other actions in the area, and particular, specified resources. Only after such analysis has been done should the appropriate geographic scope of the cumulative effects analysis be ascertained. Consequently, the current attempt by some resource agencies to define the geographic scope of the cumulative effects analysis as the "entire river basin," or the "downstream to the confluence with the ocean" inverts the proper sequence of the analysis. Geographic scope is properly determined only after cumulative effects pathways and cause-effect relationships have been analyzed, and after specific cumulative effects issues have been identified, not before.[9] W-07-06

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7 *Minnesota Power and Light Company*, 83 FERC ¶ 62,073 at 64,112-64,113 (1998); *Consolidated Hydro Maine, Inc.*, 81 FERC ¶ 62,172 at 64,388 (1997); *N.E.W. Hydro, Inc.*, 81 FERC ¶ 61,238 at 62,005-62,006 (1997).

8 FERC's past practice has been to use different geographic areas for its cumulative effects analyses depending upon the particular resource being analyzed. *See Georgia Power Company*, 88 FERC ¶ 62, 314 at 64,677 (1999).

9 Various parties and agencies have urged FERC in the past to adopt a blanket rule that the proper geographic scope for cumulative effects analysis should always be the entire river basin or the entire watershed where the particular project at issue is located. *See* Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts: Policy Statement, *FERC Statutes and Regulations, Regulations Preambles, 1991-1996*, ¶ 31,010 at 31,214 (1994), noting that commenters had urged FERC to require a "systematic cumulative analysis of all rivers and projects in the same watershed basin", and to

Second, there are important practical limitations on the scope of a cumulative effects analysis. The CEQ has cautioned that "[n]ot all potential cumulative effects issues identified during scoping need to be included in an EA or an EIS", and that "[c]umulative effects analysis should 'count what counts', not produce superficial analyses of a long laundry list of issues that have little relevance to the effects of the proposed action or the eventual decision."[10] FERC also has recognized the "problem of extending the geographical area of an environmental analysis so significantly that analytical methods might not be able to develop reliable estimates of impacts and needed mitigation measures." As FERC has explained: "In the environmental review process, practical limits must necessarily be established regarding the geographic area in which impacts of the proposed action are likely to occur; the scope of analysis could otherwise be virtually unlimited."[11] . W-07-07

Third, if other studies and reports have been prepared in other proceedings that analyze cumulative effects on the resources affected by relicensing, then those studies and reports should be used for the analysis of cumulative effects in this proceeding. It makes no sense to conduct new environmental studies here if those same studies already have been done or are planned in other proceedings. Foremost among these proceedings is the CALFED Program, discussed below. W-07-08

The CEQ also has noted that studies by other agencies should be utilized in analyzing cumulative effects, and that an agency need not "reinvent the wheel" if some other agency has already analyzed the issue.[12] In *California Trout v. Schaefer*, 58 F.3d 469, 474 (9th Cir. 1995), the court rejected the argument that the Environmental Assessment for the Stockton East Water District's Stanislaus River diversion canal should have analyzed impacts to fisheries downstream in the Stanislaus River. The court noted that other environmental analyses of these impacts had already been done by other agencies, and the duplicating such analyses was unnecessary:

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find that a case-by-case analysis of the proper scope of a cumulative effects analysis was erroneous. FERC however, has been unreceptive to this argument. *See Public Service Co. of New Hampshire, supra*, 68 FERC at 61,862-61,863 "neither the CEQ regulations nor the [Federal Power Act] requires that, for an environmental impact statement prepared to consider the licensing of any particular hydropower projects on a river, the geographic scope of a cumulative impact analysis must constitute the entire river basin. . . . Rather, a determination must be made in each instance of the geographic area in which such other actions might occur that, in combination with the proposed action, could create cumulative effects." Emphasis added.

10 *See Considering Cumulative Effects* at 12.

11 *Public Service Co. of New Hampshire, supra*, 68 FERC at 61,863-864, emphasis added. *See also Fraser Papers, Inc.*, 83 FERC ¶ 61,129 at 61,575 (1998), rejecting the argument that the EIS must study a variety of "basinwide" impacts because "while such a massive undertaking might produce interesting data, it would not add any reasonable alternatives to the proceeding."

12 *See Considering Cumulative Effects, supra*, at 12 "Because cumulative effects can result from the activities of other agencies or persons, they may have already been analyzed by others", and at 20 "Because the actions of other agencies are part of cumulative effects analysis, greater emphasis should be placed on consulting with other agencies than is commonly practiced." emphasis added.

> "The SEWD project and its effects on the downstream fisheries, have been the subject of at least four in-depth governmental studies, all of which were followed by extensive public review and comment. Moreover, those studies, at congressional behest, are currently being updated by the Bureau [of Reclamation under the Central Valley Project Improvement Act]. Requiring the Corps to duplicate these efforts would be nonsensical. [citation omitted].". Emphasis added.[13]

W-07-08

FERC's ability to reserve authority to revisit cumulative effects after a license has been issued provides a further mechanism for integrating the results of later cumulative effect studies into the project license.[14] Thus, if a concern should arise that an important cumulative effect has been overlooked, appropriate studies can be conducted after the license has been issued to address any identified deficiency.

W-07-09

Finally, the Scoping Document says little about the scope of analysis of growth-inducing impacts.[15] Some resource agencies have suggested that the EA address the role of Oroville relicensing in facilitating and inducing urban growth in Southern California, the Bay Area and agricultural development in the Central Valley, and elsewhere. The scope of analysis of growth-inducing impacts, however, should be more limited. The courts have distinguished between projects that satisfy an existing need or demand – which do not require analysis of growth-inducing potential – and projects that go way beyond an existing need, and thereby induce and facilitate further growth, that do require analysis of growth-inducing impacts.[16] Here, the assumed baseline for the environmental analysis is continued operation of the project under the current license and the existing level of urban and agricultural

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13 *See also State of North Carolina v. F.A.A.*, 957 F.2d 1125, 1130-1131(4th Cir. 1992) F.A.A. need not conduct its own analysis of cumulative effects but could rely on the analysis of cumulative effects that would be made in the environmental documentation for additional air space restrictions that were being proposed.

14 While such reserved authority or reopener clauses in a license cannot be a substitute for conducting a thorough cumulative effects analysis, they do avoid the problem of delaying relicensing to await completion of other cumulative environmental effects studies, and thereby foregoing the environmental benefits of immediate relicensing. "There will be circumstances, however, in which comprehensive analysis of all potential cumulative impacts could entail unacceptably long delays in the relicensing process. Such delays could in themselves generate harm to the environment by delaying the implementation of necessary environmentally ameliorative construction or operation pursuant to a new license. Thus, if it is not possible to fully explore all of the cumulative impacts on a timely basis, the Commission will reserve the authority necessary to revisit those issues at a later date." Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts: Policy Statement, *FERC Statutes and Regulations, Regulations Preambles, 1991-1996*, *supra,* at 31,218.

15 Growth-inducing impacts fall within the rubric of "indirect" rather than "cumulative" effects, but they are included in this cumulative effects discussion.

16 *See Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 580 (9th Cir. 1998), holding that an Environmental Assessment for an airport expansion project at Los Angeles International Airport (LAX) need not analyze growth-inducing impacts because the project was addressing an existing problem at LAX ,and the fact that "it might also facilitate further growth is insufficient to constitute a growth-inducing impact"; *City of Carmel-By-The-Sea v. U.S. Department of Transportation,* 123 F.3d 1142, 1162 (9th Cir. 1997), holding that no growth-inducing impacts analysis was required for a highway expansion project because the freeway was in an area already well-developed, and it is "the existing development that necessitates the freeway" rather than the other way around.

development. Relicensing is not providing an expanded water supply in excess of current demand which will induce further urban and agricultural development. Therefore, relicensing does not necessitate an extensive analysis of growth-inducing impacts on the urban and agricultural sectors. W-07-10

3) Coordination with Comprehensive Proceedings

A. Coordination with the CALFED Program

The Scoping Document discusses the CALFED Program in section 2.4, p. 15 (Existing Environmental Protection Measures). That discussion states that the CALFED Program is developing a long-term comprehensive program for the Bay-Delta that will address issues identified in the Oroville relicensing, and that relicensing will be coordinated with CALFED to prevent duplication of effort and funding. The SWC agrees with this discussion but believes that it is too brief, and fails to identify the important reasons for coordinating Oroville relicensing with the CALFED Program. These include the following. W-07-11

First, Section 10(a)(2) of the Federal Power Act (FPA), 16 U.S.C. section 803(a)(2) requires FERC to consider the extent to which the proposed project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project. The CALFED Program is one of the largest estuary and ecosystem restoration and improvement programs in the United States, with billions of dollars to be spent on ecosystem, safety, and water supply projects. Its "solution area" covers the entire watershed and tributaries of the Sacramento River, including the Feather River and the Oroville Facilities area. Clearly, the CALFED Program constitutes a "comprehensive plan" with which Oroville relicensing must be closely coordinated W-07-12

Second, apart from the FPA, an adequate analysis of cumulative effects of Oroville relicensing cannot be made unless it is closely coordinated with the CALFED Program. The CALFED Program intends to spend hundreds of millions of dollars on ecosystem restoration projects that will benefit resources potentially affected by Oroville relicensing. Cumulative effects that must be analyzed under NEPA include beneficial – as well as adverse – environmental impacts.[17] Therefore, the analysis of cumulative effects in the Oroville PDEA must include the beneficial impacts of environmental restoration projects developed through the CALFED Program. W-07-13

Coordination with CALFED is essential not only to take into account the cumulative beneficial effects of the CALFED Program but also to fully utilize the studies of cumulative effects that CALFED has, is or will be conducting. The CEQ's guidance document notes that studies of cumulative effects may already have been W-07-14

17 *See*, for example, *Considering Cumulative Effects, supra,* at 27 "other activities that benefit the environment (e.g., restoration projects) should be included to determine the overall net (adverse or beneficial) effect on the environment."

completed by other agencies: "[b]ecause cumulative effects can result from the activities of other agencies or persons, they may already have been analyzed by others."[18] As noted above, courts have rejected the notion that different agencies need to conduct duplicative studies of the cumulative effects on the same resources.[19] Because the CALFED Program contemplates an extensive program of scientific and environmental studies that can be used to evaluate the cumulative effects of Oroville relicensing, it is essential to utilize those studies in any cumulative analysis undertaken here. One of the basic criteria for approval of any study program for Oroville relicensing should be a determination whether a comparable study has been or will be conducted in the CALFED Program. To facilitate the consideration of studies proposed and underway under the CALFED Program, they should be identified and listed in Appendix D to the Scoping Document. W-07-14

Close coordination with the CALFED Program is also needed because some of the agencies or actors whose activities may be contributing to cumulative effects are present, and involved, in the CALFED Program but not in the Oroville relicensing. One example might be the U.S. Bureau of Reclamation, whose Central Valley Project operations are a source of concern to some participants in this relicensing. Rather than using a very broad geographic scope for the analysis of cumulative effects of relicensing, it makes more sense to coordinate with the CALFED Program which will include a broad analysis of cumulative effects, and where the various agencies and actors potentially responsible for those cumulative effects are present. W-07-15

Finally, apart from the FPA and NEPA, close coordination with the CALFED Program should be pursued given the commitments of the CALFED participants to maintain the integrity and comprehensiveness of the CALFED process. For the CALFED Program to work, all participants therein need to pursue a comprehensive solution to the interrelated environmental, safety and water supply issues of the Bay-Delta in CALFED rather than pursue their particular objectives in collateral proceedings outside the CALFED process. This is essential to avoid fragmentation of the policy issues and disputes into a multiplicity of different uncoordinated regulatory proceedings, which result would fundamentally frustrate the global approach intrinsic to the CALFED Program. W-07-16

Because coordination of NEPA scoping for Oroville relicensing with the CALFED Program is so important, the Scoping Document needs to explain how this will be achieved. The SWC proposes that a separate work group be established to institutionalize this coordination and liaison function with the CALFED Program. W-07-17 W-07-18

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18 *Id., at 12, emphasis added.*

19 *See State of North Carolina v. F.A.A., supra*, 957 F.2d at 1131 "the environmental impact statement as supplemented for the Cherry I and Core military operation areas will address the cumulative impact of the special use airspace at issue in this case. A cumulative impact analysis is therefore not necessary at this point, and it would be a waste of resources given the necessity for analysis of the cumulative impact of this and other proposals in connection with the Cherry I and Core military operation areas. Courts should not require wasteful duplication of effort." emphasis added.

B. Coordination with Other Comprehensive Proceedings

NEPA scoping must also be coordinated, for many of the same reasons outlined for the CALFED process, with other comprehensive proceedings that are closely related to the Oroville relicensing. These other proceedings include the Central Valley Project Improvement Act implementation, the Sacramento and San Joaquin River Basins Comprehensive Study and the Yuba County Water Agency's Yuba-Feather Flood Protection Program. The Sacramento and San Joaquin River Basins Comprehensive Study is a joint effort of the US Army Corps of Engineers and the Reclamation Board of the State of California to address flood damage reduction in the Central Valley. The Scoping Document should provide an expanded explanation of how coordination with other comprehensive proceedings will occur. As part of this explanation, DWR should include an extensive list of studies with direct ties to the Oroville project that are currently underway with other agencies. W-07-19

4) Study Program Concerns

The SWC understands that DWR is facing a very tight timeframe to complete and implement a plan to commence the studies program as soon as practicable in 2002. The SWC acknowledges that a very broad collaborative team consisting of several Work Groups and a Plenary Group has been convened to work with DWR throughout the Alternative Licensing Process to ensure that resource concerns and needs are considered and appropriate studies are conducted. While the SWC is encouraged by the recent move to implement a disciplined approach to the studies program, the SWC encourages DWR and its consultants to focus on the importance of grouping studies by function and assigning critical path status to those studies that must move forward in order to timely collect vital field information in early 2002. The SWC will provide detailed comments to the collaborative team regarding a proposed functional structure for the studies program as the study plan review process proceeds to Plenary Group approval early in 2002. W-07-20

5) Specific Edits

The statements in the Introduction to Appendix D do not clearly communicate that the appendix only contains studies that DWR is conducting. The title and introduction to Appendix D need to be changed to convey the same information contained in Section 3.2.2, p. 20, "The licensee is currently conducting studies that focus on water quality and aquatic resources ...These studies are summarized in Appendix D." W-07-21

The SWC also recommends deleting the fourth bullet in Section 3.1.2 "Other Alternatives to be Formulated and Considered." This bullet addresses the impact of flood releases. It is obvious that the review of flood management issues in the Feather River will need to be closely coordinated with ongoing efforts such as the Sacramento and San Joaquin River Basins Comprehensive Study and the flood W-07-22

management protection effort of the Yuba County Water Agency. As stated, this bullet does not provide a good example of a preferred alternate in the Oroville relicensing process. W-07-22

The first paragraph of Appendix C states that after the work groups review the 70 comments provided in this appendix, "these comments may be used to refine the issue statements in Sections 4.2 through 4.10 of this document." At this point in the relicensing process, it is more appropriate to use the comments to refine the study plans. W-07-23

By means of this letter, the SWC is providing comments on the NEPA-CEQA scoping process based on information through November 26, 2001. The SWC reserves the right to comment further as additional information is developed and made available to the public and the participants in the Oroville relicensing process.

Thank you for addressing our comments on the September 27, 2001 draft of the Scoping Document.

Sincerely,

John C. Coburn
General Manager

Cc: SWC Member Agencies
SWC FERC Relicensing Ad Hoc Committee
Jim Fargo, FERC
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