

Potential Effects of Natural Resource Damage Claims on Environmental Reform

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This article outlines the potential effects of natural resource damage (NRD) claims on recent environmental reform initiatives from industry, legal, and consulting perspectives. Recently, there have been sweeping changes in the environmental arena that are bringing sensibility while ensuring protection of human health and the environment. However, new NRD assessment regulations, if not handled carefully, could follow the same historical pattern where litigation ultimately overwhelmed and impeded any progress made in site remediation. With this in mind, stakeholders must cautiously move forward and ensure that all parties are involved up front during response or corrective action activities and throughout the NRD process. The article summarizes recent environmental reform initiatives, the January 5, 1996, Federal Register publishing of the Oil Pollution Act NRD assessment final ruling, the current status of NRD claims under the Comprehensive Environmental Response, Compensation and Liability Act, NRD valuation developments, and potential NRD impacts on industry.

Recent brownfield initiatives, future land use and remedy selection directives, and evolving agency paradigms that allow site remediation to be driven in part by common sense and reasonable risk have brought hope to a variety of stakeholders. Not since Superfund reauthorization was proposed has the regulated community seen changes at this level. The stakeholders, which include the regulated community, local public economies, land developers, elected officials, lending institutions, and regulatory agencies, now see a vehicle to accelerate the cleanup and redevelopment of sites for reuse. This emerging philosophy focuses on opportunities to clean up and develop sites for beneficial reuse while protecting human health and the environment. These new paradigms create an atmosphere for public input and redirect funds originally slated for site cleanup and remediation to capital investments, development, and operating improvements.

The picture for the regulated community, however, is not perfect. Legislation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA) includes provisions for assessing and recovering costs for natural resource damage (NRD) claims. OPA has assigned trustees to enforce this legislation as outlined in 33 USC 2706(b). Trustees are those official representatives of the federal and state governments, Indian tribes, and foreign governments assigned responsibility for natural resources belonging to, managed by, controlled by, or pertaining to each of these organizations. Although federal trustees have typically not pursued NRD claims for the last 15 years, the current mandate is that responsible parties will pay above and beyond the normal cost of remediation. It appears that different agencies of the federal government have entirely different and conflicting agendas.

This article provides an update of recent agency initiatives, introduces the December 1995 NRD rulemaking and its impact on future NRD initiatives under Superfund, reviews recent case law and trustee initiatives, and evaluates the potential impact of NRD on industry.

RECENT INITIATIVES

Since the enactment of CERCLA in 1980, lending institutions, land developers, and insurance companies have avoided sites designated as “Superfund sites” or even sites listed on the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) list for fear of future liability. The end result has been an abundance of vacated properties in the community and a depreciation of land value with little hope for future reuse.

Superfund reform was initiated after studies by the Congressional Budget Office projected that public and private costs of cleaning up Superfund sites, excluding federal sites, may reach \$230 billion by the year 2075.¹ The study estimated that in addition to the 6,000 sites yet to be assessed, 4,500 more sites are likely to be added to the Superfund list. Currently, Superfund has cost taxpayers and industry more than \$20 billion, with cleanups completed at less than 20 percent of the approximately 1,400 listed sites.²

¹ U.S. Environmental Protection Agency, Brownfields Economic Redevelopment Initiative (January 1995).

² U.S. Environmental Protection Agency, Future Land Use and Remedy Selection Initiative (May 25, 1995).

With President Clinton's Superfund Reform initiative in 1994 and the swift finalization of guidance by EPA on such topics as future land use, remedy selection, and brownfields economic redevelopment, there has been a major shift in environmental philosophy across the country. These initiatives are attempting to add "common sense" and "reasonableness" to the remedy selection process. The goal of these programs is to expedite the remediation of sites so that property can be returned to beneficial use, while at the same time protecting human health and the environment based on its projected future use. These directives could influence more than 500 of the approximately 1,400 sites listed among the worst sites in the United States.³ Additionally, EPA estimates that the changes could potentially reduce cleanup costs by 25 percent or more.⁴

The CERCLA remedy selection process is largely driven by the results of a baseline risk assessment and feasibility study. In the past, the migration pathways and scenarios used to assess the hypothetical exposures to contaminants at a site were often developed assuming a conservative reuse of the site (e.g., residential).⁵ These conservative assumptions regarding the anticipated future use of a site often resulted in risk that exceeded EPA's target risk ranges for carcinogenic and noncarcinogenic compounds and thus resulted in costly remedies to protect against these hypothetical risks. Therefore, these recent initiatives are considered major advances in determining a more cost-effective, appropriate, and reasonable remedial solution. Specifically, these initiatives will affect the types of exposures that may occur from any residual contamination remaining at the site. Consequently, for industrial reuse of a site, the exposure scenarios would be developed to be protective of future workers rather than include ingestion of dirt by children or consumption of vegetables by homeowners.

One other interesting aspect of the initiatives is the amount of community involvement. Historically, the community was not usually actively involved at any point in the Superfund process. With these new initiatives, the community will play a more substantial role by being involved throughout the entire process, including approval of the future land use of the site.

These long-anticipated steps are leading toward programs that, if successful, can provide practical and cost-effective solutions. Industry now has a vehicle to (1) demonstrate to the stakeholders that industrial sites can be safely remedied and (2) offer benefits to the

³ See note 1.

⁴ See note 2.

⁵ U.S. Environmental Protection Agency, Supplemental Risk Assessment Guidelines for the Superfund Program, U.S. EPA Region 1 Risk Assessment Work Group, EPA 901/5-89-001 (June 1991).

community through site development and restoration, increased tax revenue, and increased employment opportunities for the surrounding communities.

These Superfund reforms provide incentives to the regulated community to address historic “brownfield” sites. However, PRPs should be aware of their potential NRD liability. Until recently, once the site was cleaned up for beneficial reuse and was protective of human health and the environment, the responsible party could essentially walk away from the site with a covenant not to sue or minor future liability. The resurgence of NRD claims under existing laws jeopardizes the progress made by stakeholders toward environmental reform.

HISTORY OF NRD AND THE DECEMBER 1995 RULEMAKING

The National Oceanic and Atmospheric Administration (NOAA) met its December 31, 1995, judicial deadline for completing the long-awaited NRD assessment rule under OPA. As outlined in the Superfund Report on January 10, 1996, the rule, which was published in the *Federal Register* on January 5, 1996, addresses damages resulting from oil spills, but it is expected to be a model for a future NRD assessment rule under CERCLA.⁶ Also, the Superfund Report indicated that initial comments from industry and environmental officials would likely be at significant odds over the Agency’s new approach.

In general, officials responded to numerous comments to the proposed rule but made few changes to the August 1995 second version. In the final rule, the Agency is placing greater emphasis on restoring resources to baseline conditions, rather than seeking monetary damages to cover the costs of restoration. While the final rule applies to oil spills covered by OPA, the approach followed in this rule will likely set the precedent for a pending NRD assessment rule to be promulgated under CERCLA by the Department of the Interior (DOI).

As outlined in the rule, the assessment process has been developed to address damages resulting from a discharge or substantial threat of discharge of oil.⁷ One key distinction clarified in the rule is that these assessments are not intended to replace response or corrective actions, which are implemented to protect human health and the environment. The purpose of this rule is to provide a process for restoring natural resources injured and services lost as a result on an incident involving oil.

⁶ Superfund Report, New NOAA Natural Resources Damage Rule Seeks To Insure Restoration (January 10, 1996).

⁷ 61 Fed. Reg. 440 (January 5, 1996).

One of OPA's key provisions was to make the environment and public whole for injuries to natural resources and natural resource services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident). As outlined in the *Federal Register*, OPA has defined "injury" as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or a combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines."⁸ The term "services" has been defined as "the functions performed by a natural resource for the benefit of another natural resource and/or the public."⁹ This goal of making the environment and public whole is to be achieved through returning injured natural resources and lost services to baseline and compensating for interim losses of such natural resources and services through the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and services. The *Federal Register* also outlines the purpose of the rule to provide a framework for conducting a sound natural resource damage assessment (NRDA) that achieves restoration under OPA.

The process of coordinating the NRDA has been delegated to the trustees of the federal and state governments, Indian tribes, and foreign governments. The assessment process includes three steps. First is the preassessment phase, which includes a determination of whether natural resources or services have been injured. If it is concluded that injuries have occurred, trustees next determine whether response actions will eliminate the threat of ongoing injury. If injuries are expected to continue, trustees will proceed with the assessment.

Once the commitment to proceed is finalized, the process enters the second phase, which includes restoration planning to evaluate the injuries and determine the need for a scale of restoration activities. This provides the link between injury and restoration and consists of injury assessment and restoration selection. As outlined in the final rule, injury assessment determines the nature and extent of injuries to natural resources or services and provides a technical basis for evaluating the type of restoration actions. The assessor is tasked with determining the exposure, pathway, and any adverse changes to the natural resource or service as a result of a discharge. Additionally, the extent of injuries must be quantified.

⁸ Id.

⁹ Id.

Once the injury assessment is finalized, a restoration plan for the injured natural resources and services must be developed. This includes providing a reasonable range of alternatives with a preferred alternative suggested in both a draft and final plan that considers public comment. Restoration is either primary or compensatory. Primary restoration includes actions taken to get the resource or service back to baseline conditions, while compensatory restoration includes actions taken to compensate for interim losses and pending recovery.

The third and final phase of the process is the implementation of the restoration plan. The trustees present the plan to the responsible parties to implement or to fund the trustee's cost for implementing the plan. Several general guidance documents have been prepared to assist responsible parties with the NRDA process. These include preassessment, injury assessment, restoration, compensation formulas, and National Environmental Policy Act (NEPA) compliance guidance.

As stated in the rule, NOAA believes that an assessment focusing on evaluating injuries relevant to feasible restoration alternatives and soliciting public input in restoration planning will accomplish three major goals: (1) validating trustee determinations regarding those actions that will make the environment and the public whole; (2) ensuring that appropriate assessment procedures for determining restoration actions for a given incident are followed; and (3) reducing transaction costs.¹⁰ The rule provides for the use of a range of appropriate and cost-effective procedures for an assessment. Procedures to be used within the rule must meet certain standards. They must be capable of providing information for use in determining the type and scale of restoration appropriate for a particular injury. The additional cost of a more complex procedure must be reasonably related to the expected increase in the quality or quantity of information provided by the more complex procedure. Finally, they must be reliable and valid for the particular incident. Trustees must select the most cost-effective of two or more equally appropriate assessment procedures.

CURRENT STATUS OF NRD UNDER CERCLA

As part of the Superfund reauthorization process, the recovery of NRD claims continues to be hotly debated in Congress. Proponents of NRD reform have asserted that the impact of NRD on the country's economy has only begun to surface and that without significant change, serious repercussions on the nation's economy will result.¹¹ To make

¹⁰ Id.

¹¹ See "More Liabilities Coming Your Way: Tidal Waves and Natural Resources," *Energy Economist* (July 1992).

matters worse, this dire forecast is being made about a program that is only in its infancy. The United States General Accounting Office reports that as of April 1995, federal agencies had settled only 98 NRD cases for a total estimated value of \$106 million.¹² Of these NRD settlements, approximately one-half were at Superfund sites and were crafted in the form of covenants not to sue with no payment required. Such agreements were granted because the federal trustees determined that either (1) the cleanup to be performed addressed their concerns about natural resources or (2) no natural resources under federal trusteeship were damaged at the site.¹³

The remaining settlements involved the recovery of monetary damages. Of these, 36 cases were settled for less than \$500,000 each, nine cases were settled for \$0.5 million to \$5 million, and five cases were settled for \$12 million or more.¹⁴ The most significant NRD settlements involved injuries to large bodies of water. Aside from the Exxon *Valdez* settlement (a settlement of more than \$900 million and the most well-known and largest NRD award to date), the largest settlement to date has been with the City of Seattle and the municipality of metropolitan Seattle for \$24 million. In this case, 150 years of commercial activity along the Elliot Bay and Duwamish River has reportedly caused extensive contamination of near-shore sediments, reducing the value of the area as a habitat for fish and wildlife. The monetary payment included costs associated with sediment remediation, habitat development, real estate acquisition, and compensation to NOAA for natural resource and habitat restoration planning.

At Commencement Bay, another Washington site, federal, state, and tribal trustees have negotiated a settlement with the Port of Tacoma of as much as \$31 million to restore or replace the affected ecosystem. It is noteworthy that at Commencement Bay, the natural resource remediation project included habitat mitigation measures to compensate for the dredging of contaminated sediments and fill activities which, ironically, were part of an EPA-supervised cleanup under CERCLA.

One of the first NRD cases involved the New Bedford Harbor Superfund site in Massachusetts. A settlement in this case reportedly has been reached with five companies for \$21.1 million and includes assessment and restoration costs; however, the value of the restoration is contingent on the scope of the cleanup.

¹² See Testimony before the House of Representatives. Subcommittee on Water Resources, Committee on Transportation and Infrastructure by Peter F. Guerrero, U.S. General Accounting Office (July 11, 1995).

¹³ Id. at 5.

¹⁴ Id. at 2.

It is important to note that these settlements are only a sampling of some of the more significant claims and are not indicative of the future impact of NRD. The number of settlements to date is small relative to the ever-growing number of Superfund sites. In fact, the investigation at many of these sites is still preliminary and will require many years of study before an NRDA can be performed. Moreover, NRD claims are not limited to Superfund sites and may include state-identified sites and sites at which accidental releases have occurred, such as the Exxon *Valdez* incident.

Although federal and state trustees are unable to predict the number and value of future NRD claims, the trustees have publicly identified at least three areas in which pending or future claims are valued at \$500 million or more. These include the Coeur d'Alene River Basin in Idaho, the Upper Clark Fork River Basin in Montana, and an area offshore of Los Angeles County.¹⁵ The government's ability to recover NRD for the Los Angeles County offshore area, however, may be substantially reduced due to a recent decision by a federal court in California. In *United States v. Montrose Chemical Corp. of California*, 833 F. Supp. 1396(C.D. Cal. 1995), the court held that the government's claim against seven chemical companies for NRD for the Southern California Bight was barred by the statute of limitations. (This decision has been appealed and oral argument was heard by the Court of Appeals for the Ninth Circuit on January 8, 1996). The court based its decision on the two-pronged statutory test, which provides in pertinent part that:

...no action may be commenced for damages (as defined in Section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

- (A) The date of discovery of the loss and its connections with the release in question.
- (B) The date on which regulations are promulgated under Section 9651(c) on this title.¹⁶

The court in this case, contrary to a holding in another jurisdiction, held that the date on which regulations were promulgated was August 1, 1986, the date on which the DOI promulgated its Type B regulations under Section 9651(c) of the Act. Based on this date and the defendants' proof that the trustees had knowledge of NRD as early as 1985, the court barred the government's claim as untimely.

It is noteworthy, however, that the DOI recently has established the date of promulgation for statute-of-limitations purposes as the date when its amendments to its current Type A

¹⁵ Id. at 6.

¹⁶ 42 USC §9613(g)(1).

or Type B regulations are published in the *Federal Register*, whichever is later. The Type B regulation amendments were published on March 25, 1994; however, an appeal of the Type B amendments is pending.¹⁷ The proposed Type A regulations have not been published as a final rule to date. Thus, in accordance with the DOI's position, the statute of limitations has not begun to run on any case. The fate of the statute-of-limitations issue, therefore, remains at the center of controversy and will ultimately be decided either by the courts or through the Superfund reauthorization process.

In addition to potential NRD claims at Superfund sites, NOAA is evaluating the following hazardous material sites under its jurisdiction: (1) Calcasieu–Lake Charles, Louisiana; (2) Housatonic–Berkshire County, Massachusetts; (3) Hudson River–Hudson Valley, New York; (4) Iron Mountain Mine–Redding, California; (5) Lavaca Bay–Calhoun County, Texas; (6) Passaic River/Newark Bay–Passaic River and Newark Bay, New Jersey; (7) United Heckathorn–Richmond, California; and (8) Jamaica Bay–New York, New York. Oil spills for which NRD are being assessed include: (1) American Trader–Huntington Beach, California; (2) Cibro–Savannah–Arthur Kill (waterway between New York and New Jersey); (3) Morris Berman–San Juan, Puerto Rico; and (4) Tampa Bay–Egmont Channel, Pinellas County, Florida.

Finally, although states are natural resource trustees under the federal statutes, many states have taken a proactive approach by enacting their own statutory authority to pursue NRD. These states include Arkansas, Delaware, Florida, Hawaii, Louisiana, Michigan, Montana, New Hampshire, Pennsylvania, Texas, and Washington. Thus, parties potentially responsible for NRD claims in these states should carefully consider the implications of any cleanup plan under both federal and state law.

NRD VALUATION DEVELOPMENTS

For parties who have found themselves responsible for NRD, one of the most controversial issues is the valuation of a damage claim. Under CERCLA and the CWA, the components of an NRD claim include: (1) the cost of restoring the resource; (2) the cost of performing the assessment; and (3) compensation for the interim lost resource services from the time of injury until restoration.¹⁸ The third element refers to the loss of functions that one resource performs for another or for humans. As such, there may be several services attributable to each resource. For example, a wetland may provide food and shelter for fauna, stabilize sedimentation, and recycle nutrients as well as provide fishing, bird watching, water filtration, and shoreline storm protection.¹⁹

The trustees continue to struggle to identify the appropriate methodology for quantifying both the active and passive lost use value. Under the NOAA proposed regulations, this is characterized as compensatory restoration.²⁰ These methods include market-based methods which attempt to value the lost resources by survey, travel cost accounting, and other protocols.

¹⁷ *Chamber of Commerce v. United States Department of the Interior*, No. 94-1462 (D.C. Cir. June 1994).

¹⁸ 42 USC §960.7(a)(4)(c) and 33 USC §311(f).

¹⁹ See *Habitat Equivalency Analysis: An Overview*, NOAA (March 21, 1995) p. 3.

²⁰ 60 Fed. Reg. 39816 (August 3, 1995).

Perhaps the greatest area of contention with regard to NRD remains the actual assessment of damages. This controversy primarily surrounds the use of contingent valuation (CV) to assess nonuse values. CV attempts to measure the cost of an injured resource by asking a random sampling of individuals what the resource's value is to them. CV has been strongly criticized by economists and others as fundamentally flawed and incapable of accurately estimating nonuse damages because, among other problems, CV fails to take into account the difficulty individuals have in translating intangible values into a price.

Researchers have highlighted numerous examples of CV's inherent flaws in CV surveys, including the following: (1) respondents to CV surveys have placed nearly identical values on very different levels of natural resource loss; (2) because CV surveys are hypothetical, people are not forced to take into consideration actual budgetary constraints or other environmental or social problems that compete for their limited resources; and (3) the hypothetical nature of CV surveys allows people to inflate their estimation of what they would be willing to pay (WTP) to restore the natural resource in a way that does not reflect the value they actually place on the resource in question. Commentators have described this phenomenon as the "warm glow" associated with giving since people may view the WTP as "an imaginary gift to charity."²¹

Because of the uncertainty associated with CV and the opposition to its use, trustees have begun to advance another method for determining the appropriate compensation for the interim loss of natural resources—the Habitat Equivalency Analysis (HEA). In HEA, rather than determine compensation for lost use in monetary terms, the trustees calculate the size of a habitat replacement project necessary to compensate for the interim loss in habitat services.²² The habitat replacement is performed in addition to any restoration project that returns the resource to a baseline level.

Unlike the methods for deriving monetary compensation, the valuation assumptions are implicit in characterization of the lost habitat services. Rather than assign a dollar value, the trustees are required to make "a qualitative judgment that the compensatory projects provide services of comparable quality and value to lost services."²³ In general, restoration projects must be feasible and cost-effective. Compensatory restoration projects also must utilize a technology that is understood well enough to characterize resource gains.

HEA is becoming more widely used by the trustees and is gaining acceptance from PRPs. However, there are limitations on its use. For example, if there are significant human uses of the affected resource on-site, NOAA recommends that standard economic methods be used to value the human services provided by the resource directly. In

²¹ Note, "Ask a Silly Question...: Contingent Valuation of Natural Resource Damages," 105 *Harv. L. Rev.* 1981, 1985-1989 (June 1992). As noted by one commentator: "[N]onusers may, at the suggestion of the survey, 'discover' that they would be willing to pay for cleanup, even though they have not been affected by the contamination, have not even thought about it, and would never have cared about it had the survey no been conducted." *Id.* at 1986 (citing Carl V. Phillips and Richard J. Zeckhauser, "Contingent Valuation of Damage to Natural Resources: How Accurate? How Appropriate?" 4 *Toxic L. Rep.* (BNA) 520, 528 (October 4, 1989)).

²² HEA Overview (cited in note 19) at 2.

²³ See, e.g., Testimony (cited in note 12) at 6.

addition, a habitat equivalency evaluation program cannot be considered until the primary on-site restoration project and the compensatory restoration project have been designed.

In summary, HEA is a progressive approach to assessing NRD claims which can be used to estimate damages for resources that are otherwise difficult and expensive to assess. NOAA predicts that the use of HEA may also facilitate the restoration and the settlement process.

INDUSTRY PERSPECTIVE

In an era in which politicians preach of government reinvention and deregulation, federal- and state-appointed trustees will have much difficulty pursuing NRD claims. The laws that create liability for natural resource damages (e.g., CERCLA, CWA, OPA) may have existed for years. However, the absence of well-defined guidelines for proceeding with NRD claims, as well as the subjectivity of assessing the loss of or damage to natural resources, will make the whole process tenuous at best.

The independent evaluation of natural resource damages by trustees may be in direct conflict with EPA's initiative to focus on actual risk to human health and the environment, alternative cleanup standards, or other more practical and cost-effective solutions to achieve site remediation. Although EPA cannot bring NRD claims against a PRP, the Agency is responsible for notifying trustees of potential NRD claims and for coordinating actions of the trustees. In fact, EPA is the best source of information for trustees to consult in evaluating sites and potential natural resource damages. The relationship between EPA and industry thus will develop a duality which industry should view cautiously.

In light of this, trustees should communicate with EPA early on before a final administrative order or other vehicle governing site remediation is signed with the responsible party. Both the designated trustee and the public must buy into cleanup strategies for sites as responsible parties negotiate with the regulatory agency. Their approval should constitute a covenant not to introduce an NRD claim for the site at a later date.

Responsible parties as well as the public should be cautious that NRD claims do not follow the same historical pattern as Superfund, where litigation ultimately overwhelmed and impeded any progress made in site remediation. NRD claims do nothing to promote site remediation, prevent unpermitted releases, or proactively address the protection of human health and the environment. They are merely a means to further penalize companies that already face an overwhelming abundance of environmental regulation. Only in extreme situations such as the Exxon *Valdez* spill do NRD claims serve to further protect the public interest.

Through the Chemical Manufacturer's Association (CMA) Responsible Care™ initiative, member companies have procedures in place to prevent unpermitted releases of hazardous substances, especially beyond the property boundary. This is accomplished through Pollution Prevention and Community Awareness and Emergency Response, two of the five Responsible Care codes. It is important to note that natural resource damages caused by smaller companies that choose not to implement the philosophies of Responsible Care will likely be uncooperative with NRD claims. It will be very difficult for trustees to pursue NRD claims with these companies, akin to the difficulty experienced by EPA in pursuing small companies under CERCLA. The final analysis is that trustees by default will focus their claims on larger companies with deeper pockets.

Natural resource damages must be divisible for multiple parties in cases in which a resource has been damaged by releases from multiple sources. Additionally, natural resource damages should be divisible for releases that occurred in part before December 11, 1980. The rules do not recognize that cleanups often take many years to accomplish. Thus, an evaluation of damages remaining after cleanup may be put on hold for years while the cleanup is taking place. For this reason, trustees must get involved in the process before remediation begins.

CONCLUSION

Natural resource damage claims continue to be an issue of heated debate between various stakeholders. As environmental litigation increases and precedence becomes set at the judicial level, NRD claims may become more complex and we could see a slowdown or halt of any progress toward getting sites cleaned up for beneficial reuse. As the foregoing discussion demonstrates, stakeholders must cautiously move forward and ensure that all parties are involved up front during any response or corrective action activities and throughout the entire assessment process.

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