



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Water Policy Interim Committee

61st Montana Legislature

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NOTE: At the January WPIC meeting, members discussed sending a letter opposing certain amendments to the Federal Water Pollution Control Act. Chairman McNutt directed staff to draft a letter for the committee's review. Below the letter is the federal language to which the letter refers. Sen. Hamlett and Rep. Bean provided proposed language, which is included below S. 787. The draft letter takes language from both of the proposals.

Sen. Max Baucus
511 Hart Senate Office Bldg.
Washington, D.C. 20510

Sen. Jon Tester
724 Hart Senate Office Building
Washington, DC 20510-2604

Rep. Denny Rehberg
2448 Rayburn HOB
Washington, DC, 20515

March ??, 2010

Sens. Baucus and Tester and Rep. Rehberg,

The Water Policy Interim Committee of the Montana Legislature is concerned about language contained in Senate Bill 787 that seeks to clarify which waters are subject to the jurisdiction of the United States under the Federal Water Pollution Control Act.

The Water Policy Interim Committee (WPIC) is a bipartisan committee that studies water issues in Montana.

First and foremost, it is important for Congress to know and recognize that, as stated in the Montana Constitution, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Furthermore, it is the responsibility of the Legislature, not another entity, to provide for the administration, control, and regulation of water rights.

WATER POLICY INTERIM
COMMITTEE
MARCH 10, 2010
EXHIBIT 1

If adopted, S. 787 would amend the Federal Water Pollution Control Act by striking the words "navigable waters of the United States" and replacing the phrase with "waters of the United States." That term is defined as all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters.

In 1972, the Clean Water Act gave the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers the authority to regulate "navigable" waters of the U.S., such as lakes, rivers and oceans. By passing this common sense law, Congress ensured that these bodies of water were protected environmentally and that they were able to help promote interstate-commerce. The original Act provides the federal government broad, but not unlimited, authority to regulate "navigable waters," with state governments responsible for regulating all other waters.

The proposed legislation moves to strip states of that right under the guise of "clarifying" jurisdictional questions raised by language within the Clean Water Act.

The WPIC is concerned that striking the word "navigable" would potentially expand the federal government's reach beyond what was intended, blurring jurisdictional authority to manage and regulate water resources within state and local government jurisdictions. Given the ambiguity of the legislation's jurisdictional reach, the implementation of this proposal may lead to increased litigation and uncertainty among public and private stakeholders, including homeowners, farmers, water districts, and state and federal agencies. It would undoubtedly lead to more bureaucracy and undue burdens on the water right holders throughout the country.

The WPIC adamantly opposes these provisions of S. 787 and any similar legislation. The committee respectfully requests that the author and members of the United States Congress work to amend S. 787 to ensure that state authority over intrastate water resources is not preempted and engage with Western state legislators and stakeholders to address specific concerns related to the expansion of federal jurisdiction under the Federal Water Pollution Control Act.

Sincerely,

111th CONGRESS

1st Session

S. 787

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

SUMMARY AS OF:

4/2/2009--Introduced.

Clean Water Restoration Act - Amends the Federal Water Pollution Control Act (commonly known as the Clean Water Act) to replace the term "navigable waters" that are subject to such Act with the term "waters of the United States," defined to mean all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting them, are subject to the legislative power of Congress under the Constitution.

Declares that nothing in such Act affects the authority of the Secretary of the Army or the Administrator of the Environmental Protection Agency (EPA) under the provisions of the Clean Water Act related to discharges: (1) composed entirely of return flows from irrigated agriculture; (2) of stormwater runoff from certain oil, gas, and mining operations composed entirely of flows from precipitation runoff conveyances, which are not contaminated by or in contact with specified materials; (3) of dredged or fill materials resulting from normal farming, silviculture, and ranching activities, from upland soil and water conservation practices, or from activities with respect to which a state has an approved water quality regulatory program; or (4) of dredged or fill materials for the maintenance of currently serviceable structures, the construction or maintenance of farm or stock ponds, irrigation ditches and maintenance of drainage ditches, or farm, forest, or temporary roads for moving mining equipment in accordance with best management practices, or the construction of temporary sedimentation basins on construction sites for which discharges do not include placement of fill material into the waters of the United States.

IN THE SENATE OF THE UNITED STATES

April 2, 2009

Mr. FEINGOLD (for himself, Mrs. BOXER, Mr. CARDIN, Mr. BROWN, Ms. CANTWELL, Mr. CARPER, Mr. DODD, Mr. DURBIN, Mrs. GILLIBRAND, Mr. KERRY, Mr. KOHL, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. LIEBERMAN, Mr. MENENDEZ, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mr. SCHUMER, Mrs. SHAHEEN, Ms. STABENOW, Mr. WHITEHOUSE, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Clean Water Restoration Act'.

SEC. 2. PURPOSES.

The purposes of this Act are--

- (1) to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States;
- (2) to clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); and
- (3) to provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution.

SEC. 3. FINDINGS.

Congress finds that--

- (1) water is a unique and precious resource used not only to sustain human, animal, and plant life, but is also economically important for agriculture, transportation, flood control, energy production, recreation, fishing and shellfishing, and municipal and commercial uses;
- (2) water is transported through interconnected hydrological cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system;
- (3) in 1972, Congress enacted the Federal Water Pollution Control Act Amendments

of 1972 (Public Law 92-500; 86 Stat. 816), which amended the Federal Water Pollution Act (33 U.S.C. 1251 et seq.) in its entirety, in order to meet the national objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters;

(4) prior to the date of enactment of that Act in 1972, State approaches and previous Federal legislation proved ineffective in protecting the Nation's waters;

(5) the enactment of that Act in 1972 established uniform, minimum national water quality and other clean water protection programs to restore and maintain aquatic ecosystems of the United States that serve as critical drinking water sources, water supplies for municipal, industrial, and agricultural uses, flood reduction, recreation, habitat for fish and wildlife, and many other uses;

(6) in establishing broad, uniform, and minimum Federal standards and programs under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) in 1972, Congress recognized, preserved, and protected the responsibility and right of the States and Indian tribes to prevent, reduce, and eliminate pollution of waters by preserving for States and Indian tribes the ability to manage grant, research, and permitting programs by assuming implementation of portions of the Act to prevent, reduce, and eliminate pollution, and to establish standards and programs that are more protective than Federal standards and programs, for waters of the United States within the borders of each State or on land under the jurisdiction of the Indian tribe;

(7) since the 1970s, the definitions of 'waters of the United States' in regulations of the Environmental Protection Agency and the Corps of Engineers have properly established the scope of waters that require protection by the Federal Water Pollution Control Act in order to meet the national objective described in paragraph (3);

(8) this Act will treat, as 'waters of the United States', those features that were treated as such pursuant to the regulations of the Environmental Protection Agency and the Corps of Engineers in existence before the dates of the decisions referred to in paragraph (10), including--

(A) all waters which are subject to the ebb and flow of the tide;

(B) all interstate waters, including interstate wetlands;

(C) all other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds;

(D) all impoundments of waters of the United States;

(E) tributaries of the aforementioned waters;

(F) the territorial seas; and

(G) wetlands adjacent to the aforementioned waters;

(9) 'ground waters' are treated separately from 'waters of the United States' for purposes of the Federal Water Pollution Control Act and are not considered 'waters of

the United States' under this Act;

(10) the ability to meet the national objective described in paragraph (3) has been undermined by the decisions of the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (January 9, 2001) and *Rapanos v. United States*, 547 U.S. 715 (June 19, 2006), which have resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States described in paragraph (8);

(11) to restore original protections, Congress is the only entity that can reaffirm the geographical scope of waters that are protected under the Federal Water Pollution Control Act;

(12) the intent of Congress with the enactment of this Act is to restore geographical jurisdiction of the Federal Water Pollution Control Act to that which was in existence before the dates of the decisions referred to in paragraph (10);

(13)(A) as set forth in section 6, nothing in this Act modifies or otherwise affects the amendments made by the Clean Water Act of 1977 (Public Law 95-217; 91 Stat. 1566) to the Federal Water Pollution Control Act that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements;

(B) furthermore, the definition of the term 'point source' under section 502 of that Act (33 U.S.C. 1362) excludes agricultural stormwater discharges and return flows from irrigated agriculture; and

(C) this Act does not modify or otherwise affect any of the provisions described in subparagraphs (A) and (B);

(14)(A) through agency rulemaking, the term 'waters of the United States' did not include--

(i) prior converted cropland used for agriculture; or

(ii) manmade waste treatment systems neither created in waters of the United States nor resulting from the impoundment of waters of the United States; and

(B) this Act does not modify or otherwise affect either of the provisions described in subparagraph (A);

(15) Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.';

(16) protection of intrastate waters is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States;

(17) the regulation of discharges of pollutants into intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States;

(18) small and intermittent streams, including ephemeral and seasonal streams, which have been jeopardized by the decisions referred to in paragraph (10)--

(A) comprise the majority of all stream miles in the United States;

(B) serve critical biological and hydrological functions that affect entire watersheds;

(C) reduce the introduction of pollutants to large streams and rivers;

(D) provide and purify drinking water supplies;

(E) are especially important to the life cycles of aquatic organisms; and

(F) aid in flood prevention, including reducing the flow of higher-order streams;

(19) the pollution or other degradation of waters of the United States, individually and in the aggregate, has a substantial relation to and effect on interstate commerce;

(20) protection of intrastate waters is necessary to prevent significant harm to interstate commerce and sustain a robust system of interstate commerce in the future;

(21)(A) waters, including streams and wetlands, provide protection from flooding; and

(B) draining or filling intrastate wetlands and channelizing or filling intrastate streams can cause or exacerbate flooding that causes billions of dollars of damages annually, placing a significant burden on interstate commerce;

(22) millions of individuals in the United States depend on streams, wetlands, and other waters of the United States to filter water and recharge surface and subsurface drinking water supplies, protect human health, and create economic opportunity;

(23) source water protection areas containing small or intermittent streams provide water to public drinking water supplies serving more than 110,000,000 individuals in the United States;

(24)(A) millions of individuals in the United States enjoy recreational activities that depend on intrastate waters, such as waterfowl hunting, bird watching, fishing, and photography;

(B) those activities and associated travel generate hundreds of billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States;

(C) annually, 34,000,000 hunters and anglers spend more than \$76,600,000,000 on hunting- and fishing-related products and activities, including approximately

2,000,000 waterfowl hunters who account for about \$2,300,000,000 in annual economic growth;

(25) activities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature, and, in the aggregate, have a substantial effect on interstate commerce;

(26) a substantial number of the sources regulated under the Federal Water Pollution Control Act discharge into headwater streams that may be intermittent or seasonal;

(27) more than 40 percent of those sources, or 14,800 facilities with individual permits issued in accordance with the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), including industrial plants and municipal sewage treatment systems, discharge into small or intermittent streams;

(28) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds, and other wildlife;

(29) approximately half of North American migratory birds depend upon or are associated with wetlands and intermittent or ephemeral streams;

(30) approximately half of all threatened and endangered species in the United States depend on wetlands;

(31) for those reasons, the protection of wetlands and other waters providing breeding, feeding, and sheltering habitat for migratory birds and endangered species is essential to enable the United States to fulfill the obligations of the United States under international treaties for the conservation of those species;

(32) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of protecting Federal land, including hundreds of millions of acres of parkland, refuge land, and other land under Federal ownership and the wide array of waters encompassed by that land; and

(33) protecting the quality of and regulating activities affecting the waters of the United States is necessary to protect Federal land and waters from discharges of pollutants and other forms of degradation.

SEC. 4. DEFINITION OF WATERS OF THE UNITED STATES.

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended--

(1) by striking paragraph (7);

(2) by redesignating paragraphs (8) through (25) as paragraphs (7) through (24), respectively; and

(3) by adding at the end the following:

`(25) WATERS OF THE UNITED STATES- The term `waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all

interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.'

SEC. 5. CONFORMING AMENDMENTS.

The Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended--

- (1) by striking 'navigable waters of the United States' each place it appears and inserting 'waters of the United States';
- (2) in section 304(l)(1) by striking 'NAVIGABLE WATERS' in the heading and inserting 'WATERS OF THE UNITED STATES'; and
- (3) by striking 'navigable waters' each place it appears and inserting 'waters of the United States'.

SEC. 6. SAVINGS CLAUSE.

Nothing in this Act affects the authority of the Administrator of the Environmental Protection Agency or the Secretary of the Army under the following provisions of the Federal Water Pollution Control Act:

- (1) Section 402(l)(1) (33 U.S.C. 1342(l)(1)), relating to discharges composed entirely of return flows from irrigated agriculture.
- (2) Section 402(l)(2) (33 U.S.C. 1342(l)(2)), relating to discharges of stormwater runoff from certain oil, gas, and mining operations composed entirely of flows from precipitation runoff conveyances, which are not contaminated by or in contact with specified materials.
- (3) Section 404(f)(1)(A) (33 U.S.C. 1344(f)(1)(A)), relating to discharges of dredged or fill materials from normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.
- (4) Section 404(f)(1)(B) (33 U.S.C. 1344(f)(1)(B)), relating to discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures.
- (5) Section 404(f)(1)(C) (33 U.S.C. 1344(f)(1)(C)), relating to discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches and maintenance of drainage ditches.
- (6) Section 404(f)(1)(D) (33 U.S.C. 1344(f)(1)(D)), relating to discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites, which do not include placement of fill material into the waters of the United States.
- (7) Section 404(f)(1)(E) (33 U.S.C. 1344(f)(1)(E)), relating to discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest

roads or temporary roads for moving mining equipment in accordance with best management practices.

(8) Section 404(f)(1)(F) (33 U.S.C. 1344(f)(1)(F)), relating to discharges of dredged or fill materials resulting from activities with respect to which a State has an approved program under section 208(b)(4) of that Act (33 U.S.C. 1288(b)(4)) meeting the requirements of subparagraphs (B) and (C) of that section.

WPIC Suggested Letter Language

Rep. Bean's suggested language

Federal legislation, introduced as H.R. 2421 and S. 1870, known as the Clean Water Restoration Act of 2007, has been proposed to clarify which waters are subject to the jurisdiction of the United States under the Clean Water Act of 1972. This federal legislation seeks to clarify jurisdiction by striking the term "navigable waters" and replacing it with "waters of the United States. This is defined as "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing".

In 1972, the Clean Water Act gave the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers the authority to regulate "navigable" waters of the U.S., such as lakes, rivers and oceans. By passing this common sense law, Congress ensured that these bodies of water were protected environmentally and that they were able to help promote interstate-commerce. The original Act provides the federal government broad, but not unlimited, authority to regulate "navigable waters," with state governments responsible for regulating all other waters. This legislation moves to strip states of that right under the guise of "clarifying" jurisdictional questions raised by language within the Clean Water Act.

Striking the term "navigable waters" would potentially expand the federal government's reach beyond what was intended and thereby blur jurisdictional authority to manage and regulate water resources within state and local government jurisdictions; and given the ambiguity of the legislation's jurisdictional reach, the implementation of this proposal may lead to increased litigation and uncertainty among public and private stakeholders, including homeowners, farmers, water districts, and state and federal agencies, among others. It would undoubtedly lead to more bureaucracy and undue burdens on the water right holders throughout the country.

The Interim Water Policy Committee for the Montana Legislature adamantly opposes this proposed federal legislation, introduced as H.R.2421 in the United States House of Representatives in May 2007, and its companion proposal in the United States Senate, S. 1870, and urges Congress not to enact this or similar legislation that may be proposed in the future.

Sen. Hamlett's proposed language

Language from Constitution

RESOLUTION REGARDING U.S. SENATE BILL 787 – CLEAN WATER RESTORATION ACT – Proposed

WHEREAS The Council of State Governments – WEST is a non-profit, non-partisan organization serving the legislatures of the 13 Western States, providing a platform of regional cooperation and continuous exchange of information; and

WHEREAS the CSG-WEST Western Water and Public Lands Committee provides western legislators a forum to discuss growing and competing demands of western water and public lands; and

WHEREAS The CSG-WEST Western Water and Public Lands Committee also promotes partnerships with regional organizations such as the Western Governors' Association, Western States Water Council, and others in an effort to develop robust regional strategies to address western water and public land issues; and

WHEREAS The West holds the vast majority of our nation's federal lands and has experienced the highest level of population growth, thereby straining the region's limited water resources; and

WHEREAS federalism is an integral and founding principle of the government of the United States of America; and

WHEREAS the 10th Amendment of the United States Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people; and

WHEREAS CSG-WEST promotes a strong role and robust dialogue between the states and the federal government, and among the U.S. states themselves, which are the laboratories of democracy; and Amendment of the United States Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people; and

WHEREAS U.S. Senate Bill 787, as introduced on April 4, 2009, is aimed at 1) reaffirming the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 to restore and maintain the chemical, physical, and biological integrity of the waters of the United States; and 2) to clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act; and

WHEREAS Senate Bill 787 was referred and is currently in the Senate Environment and Public Works Committee; and

WHEREAS Senate Bill 787, if adopted, would amend the Federal Water Pollution Control Act by striking the words "navigable waters of the United States" and replacing it with "waters of the

United States," and

WHEREAS the legislation defines the term "waters of the United States" to mean all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters; and

WHEREAS Senators Max Baucus of Montana and others have introduced amendments, hereafter referred as Baucus Amendments, to the Clean Water Restoration Act that would make it explicit that the purpose of the Clean Water Restoration Act is to return to pre- Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (2001) and pre-Rapanos v. United States (2006) Supreme Court decisions and deletes language that would interpret the legislation to expand the jurisdiction of the statute beyond that point; and

WHEREAS the Baucus Amendments also strike language from Senate Bill 787 stating that the waters listed in the definition are included in the Clean Water Act "... to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of the Congress under the Constitution;" and

WHEREAS the members of CSG-WEST are concerned that replacing the words "navigable waters of the United States" would diminish the historical, traditional role of states to regulate and manage intrastate water resources within their jurisdictions; and

WHEREAS notwithstanding the Baucus Amendments, the members of CSG-WEST remain concerned that the passage of Senate Bill 787, in its current form, would further blur the jurisdictional authority among the federal government and states, and widening the scope of federal government authority over water resources under the Federal Water Pollution Control Act;

NOW THEREFORE BE IT RESOLVED THAT

- The members of CSG-WEST respectfully request that the author and members of the United States Congress work to amend Senate Bill 787, including the exclusion or modification of the term "waters of the United States" to ensure that state authority over intrastate water resources is not preempted; and
- The members of CSG-WEST urge the author and members of Congress to communicate and engage with Western state legislators and stakeholders to address specific concerns related to the expansion of federal jurisdiction under the Federal Water Pollution Control Act.

NOTES:

This resolution was considered but was not passed by the CSG-WEST Executive Committee during the 62nd CSG-WEST Annual Meeting in Santa Fe, New Mexico.

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