

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ST. BERNARD CITIZENS)
FOR ENVIRONMENTAL QUALITY, and)
LOUISIANA BUCKET BRIGADE)
)
 Plaintiffs,)
)
 v.)
)
 CHALMETTE REFINING, L.L.C.,)
)
 Defendant.)
)

COMPLAINT

For their complaint, plaintiffs St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade make the following allegations:

I. INTRODUCTION

1. This complaint is an environmental citizen suit under the Clean Air Act (“CAA”) and the Emergency Planning and Community Right to Know Act (“EPCRA”) against Chalmette Refining, L.L.C. (“Chalmette Refining”). Due to frequent and preventable equipment breakdowns, Chalmette Refining illegally emits millions of pounds of harmful air pollutants that can cause respiratory diseases, reproductive disorders, developmental disorders, nervous system

disorders, cognitive disorders, cancer, and death. Chalmette Refining also violates its permit limits for emission of benzene from its storage tanks and fails to properly maintain and monitor its flares. Furthermore, Chalmette Refining fails to fully report unauthorized discharges and releases of extremely hazardous substances as required by state and federal law. Chalmette Refining, which is within three miles of twenty schools, two hospitals, and six retirement communities, endangers the health and damages the quality of live of members of St. Bernard Citizens for Environmental Quality and members of Louisiana Bucket Brigade.

II. JURISDICTION

2. This Court has jurisdiction over the action pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction), 28 U.S.C. § 2201 (governing actions for declaratory relief), CAA § 304(a), 42 U.S.C. § 7604(a) (the citizen suit provision of the CAA), and EPCRA § 326(c), 42 U.S.C. § 11046(c) (the citizen suit provision of EPCRA).

III. VENUE

3. Venue is proper in this Court pursuant to EPCRA § 326(b)(1), 42 U.S.C. § 11046(b)(1) and CAA § 304(c)(1), 42 U.S.C. § 7604(c)(1) because Chalmette Refining is located in this district and its violations occur in this district.

IV. NOTICE

4. Plaintiffs provided notice of the violations alleged herein in a December 4, 2003 Notice of Intent to File Suit to Chalmette Refining, the Louisiana Department of Environmental Quality (“LDEQ”), and the U.S. Environmental Protection Agency (“EPA”).

5. Plaintiffs’ December 4, 2003 Notice of Intent to File Suit complies with CAA § 304(b), 42 U.S.C. § 7604(b); EPCRA § 326(d), 42 U.S.C. § 11046(d); 40 C.F.R. pt. 54; and 40

C.F.R. pt. 374. A true and correct copy of the December 4, 2003 Notice of Intent to File Suit, including certified mail receipts, is attached as “Exhibit A” and incorporated by reference.

6. More than 60 days have passed since St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade provided Chalmette Refining, LDEQ, and EPA with the December 4, 2003 Notice of Intent to File Suit.

7. Neither EPA nor LDEQ are diligently prosecuting a civil or criminal action in a court to redress Chalmette Refining’s violations.

8. Chalmette Refining has not stopped violating the CAA and EPCRA. Upon information and belief, Chalmette Refining’s violations of the CAA and EPCRA will continue until enjoined by this court.

V. PARTIES

9. St. Bernard Citizens for Environmental Quality (“St. Bernard Citizens”) is an association formed to address pollution issues in St. Bernard parish and is a “person” pursuant to CAA § 302(e), 42 U.S.C. § 7602(e) and EPCRA § 329(7), 42 U.S.C. § 11049(7).

10. Louisiana Bucket Brigade (“LABB”) is a nonprofit corporation formed to address environmental health and justice issues in Louisiana by working with communities that neighbor the state’s oil refineries and chemical plants. LABB is a “person” pursuant to CAA § 302(e), 42 U.S.C. § 7602(e) and EPCRA § 329(7), 42 U.S.C. § 11049(7).

11. Defendant Chalmette Refining is a Limited Liability Company domiciled at 1013 Centre Road, Wilmington, Delaware 19805. Its principal office is at 500 W. St. Bernard Highway, Chalmette, Louisiana 70043.

12. Chalmette Refining, L.L.C. is a “person” pursuant to CAA § 302(e), 42 U.S.C.

§ 7602(e) and EPCRA § 329(7), 42 U.S.C. § 11049(7), and is the “owner” and “operator” of the refinery at 500 W. St. Bernard Highway, Chalmette, Louisiana 70043 (“the Chalmette Refinery”). CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D).

13. Individual members of St. Bernard Citizens, and individual members of LABB work, reside, recreate, own property, breathe the air, and otherwise use areas in the vicinity of, and downwind of, Chalmette Refining’s facility.

14. Individual members of St. Bernard Citizens, and individual members of LABB are exposed to harmful air pollutants as a direct result of Chalmette Refining’s air emissions described in this Complaint and such exposures threaten injury to their health, and cause injury to their recreational and aesthetic interests. Chalmette Refining’s violations directly injure plaintiffs by polluting the air with dangerous and annoying pollutants that impair the plaintiffs’ use and enjoyment of the ambient air.

15. Chalmette Refining’s failure to properly report releases of extremely hazardous substances and deviations of permitted activities pursuant to EPCRA, the Clean Air Act, and state law unlawfully limits the information available to plaintiffs and their members about risks posed by the Chalmette Refinery and, thus, limits plaintiffs’ and their members’ ability to protect themselves against these risks.

16. The interests that St. Bernard Citizens and LABB seek to protect in this action are germane to the organizations’ purposes. Neither the claims asserted, nor the relief requested, require the participation of individual members of St. Bernard Citizens or LABB members as parties to this lawsuit.

VI. BACKGROUND

Clean Air Act Citizen Enforcement Rights

17. The citizen suit provision of the Clean Air Act encourages citizens to act as private attorneys general in situations where governmental enforcers fail to diligently prosecute violators under the act. CAA § 304(a), 42 U.S.C. § 7604(a). As private attorneys general, the plaintiffs are entitled to injunctive relief and civil penalties payable to the U.S. Treasury of up to \$27,500 per day for each Chalmette Refining violation of any emission standard or limitation under the act. CAA § 113(b), 42 U.S.C. § 7413(b); 40 C.F.R. § 19.4. Pursuant to the Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, EPA has proposed to increase the amount of civil penalties to adjust for inflation. Civil Monetary Penalty Inflation Adjustment Proposed Rule, 67 Fed. Reg. 41,363 (June 18, 2002).

18. “Emissions standards or limitations” include without limitation any condition or requirement of a Clean Air Act permit, any requirement of CAA §§ 111 and 112, any standard, limitation, or schedule established under subchapter V of the Clean Air Act or under Louisiana’s plan for implementing the federal Clean Air Act. CAA § 304(f), 42 U.S.C. § 7604(f).

19. Any discharge of air pollutants in violation of LDEQ regulations or any permit is unlawful. La. R.S. 30:2057. All requirements of Louisiana’s plan for implementing the federal Clean Air Act are “fully enforceable in federal courts.” See Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).

Permit Violations Due to Breakdowns

20. “[E]xcess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards.” EPA, Memorandum on State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and

Shutdown, 1, (Sept. 20, 1999). Therefore “all excess emissions [are] violations of the applicable emission limitation” even when excess emissions are caused by equipment breakdowns. Id. at 1.

21. The Clean Air Act allows states to provide an affirmative defense in their implementation plans for a facility that violates its air permit due to “malfunctions,” *i.e.*, “sudden and unavoidable breakdown[s] of process or control equipment.” Id. at 1 n.1 of Attachment. A facility can avoid civil penalties for its permit violations only if it can prove in an enforcement proceeding that the equipment failures were unpreventable and infrequent. Id. at 3-4 of Attachment. However, “[f]requent or reasonably preventable excess emissions would tend to indicate an underlying problem with the design, operating procedures or maintenance of a source and therefore should not be considered a malfunction.” Approval and Promulgation of State Implementation Plans; Michigan, 63 Fed. Reg. 8573, 8575 (Feb. 20, 1998). The defense applies “to actions for penalties, but not to actions for injunctive relief.” EPA, Memorandum on Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, 2 (Sept. 20, 1999).

22. In accordance with EPA policy, Louisiana has implemented an affirmative defense for “upsets,” *i.e.*, “sudden and reasonably unavoidable equipment failures.” La. Admin. Code 33:III.507.J.1. The defense does not apply to excess emissions caused by “improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.” Id. In “any enforcement proceeding, the owner and operator seeking to establish the occurrence of an upset has the burden of proof.” Id. 33:III.507.J.3

Flare Monitoring, Maintenance, and Emissions Violations

23. The “Standards of Performance for Petroleum Refineries” at 40 C.F.R. pt. 60 subpt. J are incorporated into Louisiana’s implementation plan and apply to Chalmette Refining.

La. Admin. Code 33:III.3003; Chalmette Refining, L.L.C., Revised Consolidated Part 70 Operating Permit Application, (Feb. 1999).

24. The Standards of Performance for Petroleum Refineries require that flares “shall be operated with a flame present at all times,” 40 C.F.R. § 6018(c)(2), and that the “presence of a flare pilot flame shall be monitored using a thermocouple or any other equivalent device to detect the presence of a flame.” 40 C.F.R. § 60.18(f)(2). The owners or operators of flares “shall monitor these control devices to ensure that they are operated and maintained in conformance with their designs.” 40 C.F.R. § 60.18(d).

25. The Standards of Performance for Petroleum Refineries also require that flares not have visible emissions for more than five minutes during any two consecutive hours. 40 C.F.R. § 60.18(c)(1).

“Unauthorized Discharge” Reporting Violations

26. An “unauthorized discharge” is a “continuous, intermittent, or one-time discharge, whether intentional or unintentional, anticipated or unanticipated, from any permitted or unpermitted source which is in contravention of any provision of the Louisiana Environmental Quality Act . . . or of any applicable regulation, compliance schedule, variance, or exception of the administrative authority.” La. Admin. Code 33:I.3905.

27. If a facility violates its permit or a regulation, LDEQ regulations require the violator to follow specific procedures to notify the LDEQ of the unauthorized discharge through verbal and written reports. La. Admin. Code 33:III.927. Failure to comply with these notice regulations “constitutes a violation of the Louisiana Environmental Quality Act (R.S. 30:2001 et seq.)” La. Admin. Code 33:I.3909. Each day of failure to give proper notice is a separate violation. Id.

28. Facilities must give verbal notification for all unauthorized discharges that cause emergency conditions. La. Admin. Code 33:I.3915.A.1. Emergency conditions are conditions which can “reasonably be expected to endanger the health and safety of the public, cause significant adverse impact to the land, water, or air environment, or cause severe damage to property.” Id. Violators must call the Department of Public Safety at its 24-hour Louisiana Emergency Hazardous Materials Hotline within one hour of learning of the discharge creating the emergency condition. Id. This notification must be made regardless of the amount of discharge. Id. Compliance with the verbal notification procedures of La. Admin. Code 33:I.3915 does not relieve violators of the burden of producing written reports. Id. 33:I.3915.A.4.

29. Facilities also must give verbal notification for all unauthorized discharges that do not cause an emergency. La. Admin. Code 33:I.3917.A. Violators must call the Office of Environmental Compliance within 24 hours after learning of the discharge. Id. Compliance with the verbal notification procedures of La. Admin. Code 33:I.3917 does not relieve violators of the burden of producing written reports. Id. 33:I.3917.B.

30. After initial verbal notification of unauthorized discharges pursuant to La. Admin. Code 33:I.3917 and unauthorized discharges that cause emergency conditions pursuant to La. Admin. Code 33:I.3915, facilities have seven days to file a written report with LDEQ. La. Admin. Code 33:I.3925.A. These written reports must include all information listed in La. Admin. Code 33:I.3925.B including but not limited to: methodology used to calculate amount of pollutants discharged; the remedial actions taken; the procedures taken to prevent future occurrences; a determination of whether the discharge was preventable; and, if the facility

reports a discharge as “unpreventable,” an explanation of why the discharge could not have been prevented.

EPCRA Reporting Violations

31. The “primary goals of EPCRA are to provide the public access to information concerning hazardous chemicals present in the community and to use this information . . . to adopt local emergency response plans in the event of a hazardous chemical release.” Christopher L. Bell et. al., Environmental Law Handbook 733 (Thomas F. P. Sullivan ed., 17th ed. 2003).

32. EPCRA requires owners or operators of facilities to provide immediate notice of the release of an extremely hazardous substance to the designated state emergency response commission and the emergency coordinator for the appropriate local emergency planning commission. EPCRA § 304(a), 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1).

33. Facilities must give written follow-up emergency notice to the state emergency response commission and the local emergency planning commission “as soon as practicable after a release” of an extremely hazardous substance. EPCRA § 304(c), 42 U.S.C. § 11004(c).

34. “Extremely hazardous substances” are those chemicals that EPA has listed at 40 C.F.R. Part 355, app. A. The list contains a reportable quantity for each substance.

35. Enforcement of EPCRA can occur through the citizen-suit provision which authorizes civil penalties and injunctive relief against “an owner or operator of a facility for failure,” to “submit a followup emergency notice” as required by EPCRA § 304(c), 42 U.S.C. § 11004(c). EPCRA § 326(a)(1)(A)(i), 42 U.S.C. § 11046(a)(1)(A)(i). Plaintiffs are entitled to injunctive relief and civil penalties payable to the U.S. Treasury of up to \$27,500 per violation for each day that Chalmette Refining fails to submit a followup required by EPCRA § 304(c), 42 U.S.C. § 11004(c). EPCRA § 326(c), 42 U.S.C. § 11046; 40 C.F.R. § 19.4.

VII. THE NEED FOR COURT ACTION

36. Upon information and belief, without the issuance of injunctive relief and the assessment of civil penalties, Chalmette Refining will continue to release, and fail to properly report, excess emissions of harmful pollutants to the further injury of plaintiffs and the environment.

37. The issuance of injunctive relief and imposition of civil penalties is necessary to encourage Chalmette Refining to discontinue its current violations and deter it from committing future ones and thereby redress the injuries caused by Chalmette Refining's violations.

38. Chalmette Refining's violations cause the plaintiffs irreparable harm for which there is inadequate remedy of law because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

VIII. FIRST CAUSE OF ACTION

Violation of Permitted Emission Limits Due to Frequent and Preventable Equipment Breakdowns

39. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38.

40. Chalmette Refining fails to prevent frequent, foreseeable, and preventable breakdowns and other improper functioning of refinery equipment, including but not limited to, Waste Gas Compressors, Hydrocracker Units, the Fluid Catalytic Cracking Unit, Cokers, the Hydrodesulfurization Unit, the Sulfur Recovery Unit, and the Alkylation Unit.

41. Because of equipment breakdowns, Chalmette Refining violates its hourly permit emission limits for sulfur dioxide, hydrogen sulfide, carbon monoxide, nitrogen oxide, nitrogen dioxide, volatile organic compounds, carbon monoxide, hydrocarbons, and other harmful pollutants.

42. By way of example and not limitation: between March 12, 2001 and October 24, 2003, Chalmette Refining has had over 100 unauthorized discharges due to equipment failures. In 2003 alone, Chalmette Refining has so far exceeded permitted hourly emission levels by at least: 882,298 pounds of sulfur dioxide, 3,365 pounds of hydrogen sulfide, 13,746.5 pounds of nitrogen oxide, 1,277 pounds of nitrogen dioxide, 17,011 pounds of volatile organic compounds, 21,262 pounds of benzene, and 1,321 pounds of hydrocarbons.

43. The unauthorized discharges alleged in paragraphs 40 through 42, above, are permit violations of an “emission standard or limitation” under the Clean Air Act, and there is evidence that the violation has been repeated and will continue.

IX. SECOND CAUSE OF ACTION

Violations of Flare Performance Standards and Monitoring Requirements

44. The plaintiffs reallege and incorporate by reference paragraphs 1 through 38.

45. Chalmette Refining does not operate Flare Number 1 (“No. 1 Flare”) or Flare Number 2 (“No. 2 Flare”) with “a flame present at all times” in violation of 40 C.F.R. § 60.18(c)(2).

46. By way of example and not limitation: between July 16, 2002 and January 15, 2003, the flare monitor did not detect the presence of a flame at the No. 1 Flare for 326.23 hours (13.59 days).

47. Chalmette Refining violates 40 C.F.R. § 60.18(d), which states that “owners or operators of flares . . . shall monitor these control devices to ensure that they are operated and maintained in conformance with their designs” because Chalmette Refining does not continuously monitor the No. 1 Flare or the No. 2 Flare to determine whether its flare units always have a flame.

48. Chalmette Refining violates 40 C.F.R. § 60.18(f)(2), which states that “the presence of a flare pilot flame shall be monitored using a thermocouple or any other equivalent device to detect the presence of a flame” because Chalmette Refining does not continuously monitor the No. 1 Flare or the No. 2 Flare to determine whether its flare units always have a flame.

49. By way of example and not limitation: between July 16, 2002 and January 15, 2003, there were 36 operating days where monitoring data for the No. 1 Flare was available for less than 75% of the time. Chalmette Refining did not have monitoring data for the No. 1 Flare for 474.2 hours (19.75 days) between July 16, 2002 and January 15, 2003.

50. Chalmette Refining operates its flares in violation of 40 C.F.R. § 60.18(c)(1) because it operates its flares with visible emissions for periods that “exceed a total of 5 minutes during any 2 consecutive hours.”

51. The No. 1 Flare and the No. 2 Flare at Chalmette Refining are permitted to emit 1.19 pounds per hour of particulate matter, 2.13 pounds per hour of sulfur dioxide, and 18.20 pounds per hour of nitrogen dioxide. Chalmette Refining Air Permit # 2500-00005-01.

52. Chalmette Refining violates permit emission limits for the No. 1 and No. 2 Flares.

53. The violations alleged in paragraphs 45 through 52 are violations of an “emission standard or limitation” under the Clean Air Act, and there is evidence that the violation has been repeated and will continue.

X. THIRD CAUSE OF ACTION

Violation of Benzene Emission Limits for Storage Tanks

54. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38.

55. Storage tanks 200, 13001, and 13002, which store product-grade benzene at the Chalmette Refinery, are each permitted to emit 68 pounds per day of benzene.

56. Tanks 200, 13001, and 13002 each emit 51 pounds per day above Chalmette Refining's permit of 68 pounds per day.

57. Chalmette Refining's emissions of benzene from Tanks 200, 13001, and 13002 exceed its permitted limits.

58. The permit violations alleged in paragraphs 55 through 57 are violations of an "emission standard or limitation" under the Clean Air Act, and there is evidence that the violation has been repeated and will continue.

XI. FOURTH CAUSE OF ACTION

Violation of Reporting Requirements for "Unauthorized Discharge"

59. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38.

60. Chalmette Refining violates its permit because it does not consistently provide the Louisiana Air Quality Division with a written report within five days when "for any reason [Chalmette Refining] does not comply with, or will not be able to comply with, the emission limitations specified in [Chalmette Refining's] permit." Chalmette Refining Air Permit # 2500-00005-01, Louisiana Air Emission Permit General Conditions, Condition XI.

61. Chalmette Refining violates La. Admin. Code 33:III.927 because it does not consistently report unauthorized discharges of air pollutants "in accordance with the provisions of LAC 33:I, Chapter 39, Notification Regulations and Procedures for Unauthorized discharges."

62. Chalmette Refining violates La. Admin. Code 33:I.3915 by failing to consistently submit reports within one hour of learning of the discharge creating the emergency condition.

63. Chalmette Refining violates La. Admin. Code 33:I.3917 by failing to consistently submit incident reports within seven days of telephone notification for unauthorized discharges which do not cause emergency conditions.

64. Chalmette Refining violates La. Admin. Code 33.I.3925 by failing to consistently include all required information in its unauthorized discharge incident reports.

65. The permit violations alleged in paragraphs 60 through 64 are violations of an “emission standard or limitation” under the Clean Air Act, and there is evidence that the violation has been repeated and will continue.

XII. FIFTH CAUSE OF ACTION

Violations of EPCRA Reporting Requirements

66. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38.

67. The Chalmette Refinery is a facility, as defined by EPCRA § 329(4), 42 U.S.C. § 11049(4), at which hazardous chemicals are produced, used, or stored.

68. The Chalmette Refinery is a facility at which there are releases of reportable quantities of extremely hazardous substances.

69. Chalmette Refining fails to consistently give verbal and followup written notification of releases of reportable quantities of extremely hazardous substances as required by EPCRA § 304(c), 42 U.S.C. § 11004(c).

XIII. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully pray for judgment as follows:

A. An injunction requiring Chalmette Refining to cease violations of its permit limits for sulfur dioxide, nitrogen oxides, volatile organic compounds, benzene, carbon monoxide, and other harmful pollutants within thirty days of this Court’s ruling or to shut down.

B. An injunction requiring Chalmette Refining to cease violations of flare maintenance requirements, monitoring requirements, and emission limits within thirty days of this Court's ruling or to shut down.

C. An injunction requiring Chalmette Refining to cease violations of benzene emission limits for storage tanks within thirty days or shut down.

D. An injunction requiring Chalmette Refining to cease violations of unauthorized discharge reporting requirements, correct prior incomplete incident reports, and submit all required incident reports within thirty days of this Court's ruling or to shut down.

E. An injunction requiring Chalmette Refining to cease violations of EPCRA reporting requirements and submit all required reports within thirty days of this Court's ruling or to shut down.

F. An order requiring Chalmette Refining to pay civil penalties to the United States Treasury in the amount of \$27,500 (or the amount to which EPA, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, increases Clean Air Act and EPCRA civil penalties) per violation per day within thirty days of this Court's ruling for each violation of: (1) its permit limits for sulfur dioxide, nitrogen oxides, volatile organic compounds, benzene, carbon monoxide, and other harmful pollutants; (2) flare maintenance and monitoring requirements; (3) unauthorized discharge reporting requirements; and (4) EPCRA reporting requirements.

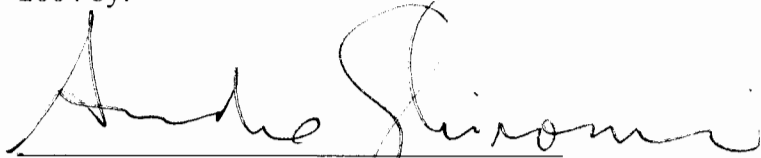
G. A declaration that Chalmette Refining is in violation of the Clean Air Act for (1) violations of permit limits for sulfur dioxide, nitrogen oxides, volatile organic compounds, benzene, carbon monoxide, and other harmful pollutants; (2) violations of benzene emission limits for storage tanks; (3) violations of flare monitoring requirements, maintenance

requirements, and emission limits; and (4) violations of unauthorized discharge reporting requirements.

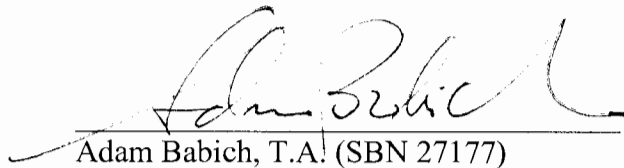
H. A declaration that Chalmette Refining is in violation of EPCRA for failing to submit followup notices for its releases of reportable quantities of extremely hazardous substances.

I. Grant the plaintiffs their reasonable attorney's fees and expert witness fees, and such other and further relief as the Court deems just and proper.

Respectfully submitted on this 12th day of February
2004 by:



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