MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **[PROPOSED] ORDER DENYING DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation, and Governor Greg Gianforte have moved for an order clarifying this Court's August 14, 2023 Findings of Fact, Conclusions of Law, and Order (Doc. 405), and for an order to stay this Court's August 14 judgment, pending appeal. Doc. 422. Defendants' motions were consolidated into a combined filing. Plaintiffs oppose both motions. After considering the parties' briefing, and in light of this Court's prior rulings and the evidentiary record before the Court, this Court issues the following order:

PROCEDURAL HISTORY

This Court's August 14 Order contains a detailed procedural history of this case. Doc. 405 at 1-9. After this Court issued its August 14 Order, the parties asked the Court to postpone ruling on the issue of Plaintiffs' entitlement to and amount of attorneys' fees and costs and, pursuant to Montana Rule of Civil Procedure 54(b), requested certification of the August 14 Order for

interlocutory appeal to the Montana Supreme Court. Docs. 411, 415. On September 18, 2023, this Court certified its August 14 Order (Doc. 405) and several ancillary orders as final for purposes of interlocutory appeal, pursuant to Rule 54(b), M. R. Civ. P. and Rule 6(6), M. R. App. P. Doc. 417.

On September 29, 2023, Defendant State of Montana filed its notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal to the Montana Supreme Court. *Held v. State of Montana*, DA 23-0575, Notice of Appeal (Mont. Sup. Ct. Oct. 2, 2023). On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed their Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in the motion for clarification or motion to stay judgment.

On October 17, 2023, the Supreme Court accepted this Court's certification order and "ordered that this appeal may proceed." *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). This case is now on appeal to the Montana Supreme Court.

FACTUAL BACKGROUND

The record before this Court includes an extensive trial record, with testimony from twenty-seven witnesses and one hundred and seventy-two exhibits, and the detailed Findings of Fact and Conclusions of Law in the August 14 Order. Relevant to the present motions before this Court, the August 14 Order found, in part:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."

FF #104. “Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.”

FF #193. “The degradation to Montana’s environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change.”

FF #194. “The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State’s disregard of GHG pollution and climate change pursuant to the MEPA Limitation.”

FF #218. “Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible.”

FF #252. “Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station.”

FF #257. “If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change.”

FF #272. “It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035.”

FF #275. “[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings).”

FF #276. “New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal.”

FF #281. “Transitioning to WWS [wind, water, solar] will keep Montana’s lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana’s land resources.”

CL #6. “Every additional ton of GHG emissions exacerbates Plaintiffs’ injuries and risks locking in irreversible climate injuries.”

> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."
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> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405 at 24, 28, 46, 67, 73-74, 81-82, 84, 87, 98, 101 (citations to the record omitted).

These findings and conclusions were undisputed at trial by Defendants. The record before this Court demonstrates the dangerous nature of the *status quo* that Defendants seek to preserve. That *status quo* is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405 at 46. The record before this Court also shows that Montana does not need to continue relying on fossil fuels to meet its energy needs, and can meet all of its energy needs by transitioning the State to renewable energy sources, which would have climate benefits, create jobs, reduce air pollution, save lives and costs from air pollution, and reduce energy costs for Montanans. Doc. 405 at 81-82. The record also demonstrates, through Defendants' own trial testimony and documents, that Defendants can conduct a MEPA analysis that considers GHG emissions and climate impacts, and indeed Defendants have done so in the past. It is in light of this undisputed factual context and trial record that the Court considers Defendants' present motions.

LEGAL STANDARDS

Motion for Clarification: The precise legal standard for a motion for clarification is not relevant here because, as explained below, this Court does not have jurisdiction to rule on Defendants' motion for clarification.

Motion to Stay: Montana Rule of Appellate Procedure 22 provides that a motion seeking to stay judgment pending appeal shall be filed in the district court. Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). Defendants, as the parties requesting the stay, have the burden to establish that their specific circumstances justify a stay pending appeal. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"); *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In evaluating a motion to stay, Montana's courts consider four factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotes, citations omitted).

ANALYSIS

I. Defendants' Motion for Clarification

This case has been accepted for interlocutory appeal by the Montana Supreme Court and, therefore, the District Court does not have jurisdiction to decide Defendants' motion for clarification. *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896 ("It is the law in Montana that once a Notice of Appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on any pending motions."). Should any clarification of this Court's August 14 Order be required at a later date, the appropriate time would be after the Supreme Court issues a final judgment. *Meine v. Hren*

Ranches, Inc., 2020 MT 284, 402 Mont. 92, 475 P.3d 748. Because this Court does not have jurisdiction, Defendants' motion for clarification is DENIED.

II. Defendants' Motion for Stay of Judgment Pending Appeal

A. Whether Defendants have Made a Strong Showing they Are Likely to Succeed on the Merits

In their moving papers, Defendants do not identify any errors with this Court's August 14 Order, the Order they seek to have stayed, or any of this Court's prior orders. Therefore, Defendants fail to establish they are likely to succeed on the merits of their appeal. Defendants' argument that they are likely to succeed on the merits of their appeal if this Court ordered Defendants to prepare and implement a remedial climate recovery plan is not relevant because this Court did not order such relief in its August 14 Order. The Court's August 14 Order, which applied constitutional law, declared rights, declared statutes unconstitutional, and enjoined Defendants from acting in furtherance of the unconstitutional statutes, is entirely in line with the judiciary's duty to secure the constitutional rights of Montana's citizens. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is."); *see also* Doc. 217.

Because Defendants' moving papers fail to identify any errors with this Court's August 14 Order, or any of this Court's prior orders, they have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

B. Whether or Not Defendants Will be Irreparably Harmed Absent a Stay Pending the Appeal

Defendants have the burden to demonstrate they will be irreparably harmed absent a stay pending appeal. *MEIC v. Westmoreland*, *5-6. However, a stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions" and argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, uncertainty, and potential liability for DEQ. Doc. 423 at 9. Defendants' allegations of harm fall short of meeting their burden to prove irreparable harm absent a stay pending appeal.

This Court's Order does not prevent DEQ from carrying out its statutory functions, including performing environmental analyses on permit applications and deciding whether to issue permits. It requires that its statutory functions are carried out in a constitutionally-compliant manner. There is no evidence before the Court that analyzing the GHG emissions and climate change impacts in their environmental reviews, which Defendants argue could potentially lead to not issuing permits for fossil fuel activities, will cause *irreparable* harm to any Defendants in this case. Nor do Defendants support their motion with evidence that not issuing permits for fossil fuel activities would cause Defendants irreparable harm. To the contrary, the undisputed evidence at trial established that the opposite would be true when renewable energy alternatives to fossil fuels are considered as provided in MEPA. *See* Mont. Code Ann. § 75-1-201(1)(b)(iv)(C); Doc. 405 at 81. The undisputed trial record and this Court's findings in the August 14 Order make clear that Montana can meet its current and future energy needs by transitioning its energy systems away from fossil fuels and towards renewable energy. Doc. 405 at 80-84. The uncontested evidence at trial established that a transition to renewable energy will clean up Montana's environment, improve the health of its citizens (especially Montana's children), save Montana energy consumers

money, and ensure a reliable grid. Doc. 405 at 80-84; Tr. 1072:24-1075:25. Defendants had the opportunity to dispute this evidence at trial, or offer alternative evidence, but they did not. While the testimony of Defendants' sole testifying expert, Dr. Terry Anderson, contained flaws and was not given weight by this Court, Dr. Anderson never questioned the feasibility, reliability, or costs of transitioning Montana's energy system to renewable energy. Doc. 405 at 66. Neither of the two DEQ witnesses that testified at trial, Sonja Nowakowski and Chris Dorrington, questioned the feasibility, reliability, or costs of transitioning Montana's energy system to renewable energy either (nor were they identified as experts on the subject).

This Court finds the trial record on this matter, which was subject to cross-examination, compelling and convincing and will not give weight to Defendants' belated attempt to introduce new material on this matter from someone unqualified to opine on the details of a renewable energy transition in Montana. *See* Nowakowski Decl. ¶ 44; Tr. 1343:23-1345:7 (Ms. Nowakowski describing her expertise in law and policy work, not technical and economic feasibility of decarbonizing Montana's energy system). In short, there is no evidence to support Defendants' allegations that, if considering GHG emissions and climate impacts during MEPA reviews resulted in DEQ not permitting new fossil fuel projects, the failure to approve these permits would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants – the undisputed evidence of record shows nothing but benefits from a transition away from fossil fuels for all Montanans. The evidence weighs heavily in favor of Plaintiffs.

Additionally, there is no evidence before the Court that MEPA reviews that considered the GHG emissions and climate change impacts in environmental reviews, which could potentially lead to not issuing permits for coal mines or gas plants, will cause *irreparable* harm to any party

in this case. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). The alleged harms here are readily distinguishable from those alleged in the cases cited by Defendants: *MEIC v. Westmoreland*, DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022) and *Vote Solar v. Montana Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). In *MEIC* and *Vote Solar*, there were private corporation defendants alleging irreparable financial injuries, but here there are no private corporations, or government Defendants for that matter, alleging any financial injuries, let alone irreparable financial injuries. Defendants present no evidence as to how *they* will be irreparably injured if they could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding climate impacts in MEPA reviews.

Defendants' concerns about potential liability are also tenuous and speculative, but again, even if accepted as true, do not arise to the level of irreparable harms. It is well established that actualized litigation burdens do not constitute irreparable harm. *See, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Defendants' hypothetical litigation burdens, likewise, do not constitute irreparable harm.

Similarly, Defendants' concerns about increased administrative burdens do not constitute irreparable harm. Any additional resources required by Defendants to comply with their statutory and constitutional obligations are part of Defendants' obligation to comply with the law, including

Montana's Constitution. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm); *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("even if the government faced severe logistical difficulties in implementing the order," that would merely represent the burden of complying with statutory and constitutional obligations); *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm caused by "a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while this case proceeds").

Finally, it is worth noting that the process Defendants now claim will be so onerous to complete – analyzing GHG emissions and climate impacts in MEPA reviews – is one that Defendants used to perform and DEQ's own declarant admitted at trial DEQ could do again if it had authority to do so. At trial, the Court asked Ms. Nowakowski, "if you had the authority, do you believe that your agency could do this kind of [climate change impacts] analysis?" Tr. 1437:4-6. Ms. Nowakowski responded, "I do believe we could do this kind of analysis, yes." Tr. 1437:7-8. Additionally, one of Plaintiffs' experts, Anne Hedges, was asked at trial, "[i]f the climate change limitation to MEPA were declared unconstitutional, do you think defendant agencies would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects?" Tr. 821:16-20. Ms. Hedges responded: "One hundred percent. State agencies absolutely have the skills and the information they need to create these types of analyses. These analyses are already conducted at the federal level and in MEPA." Tr. 821:21-25. Based on the trial record, this Court held: "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when

evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past." Doc. 405 at 101.

Defendants never argued at trial, or post-trial in Defendants' Proposed Findings of Fact and Conclusions of Law, they would suffer any harms, let alone irreparable injuries, if the challenged statutes were declared unconstitutional and if Defendants were enjoined from acting in accordance with the unconstitutional statutes. Their alleged harms are now being raised for the first time, without support, in their stay brief. Defendants have not met their burden to establish they will suffer any irreparable harms absent a stay pending appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

C. Whether Plaintiffs Will be Substantially Injured by a Stay

This Court has already found that each of the sixteen youth Plaintiffs are currently experiencing grave injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions, among others. Doc. 405 at 46-64. This Court found that, "[u]ntil atmospheric GHG concentrations are reduced . . . Plaintiffs will be unable to live clean and healthy lives in Montana." Doc. 405 at 24. Additionally, this Court found:

> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
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> FF # 98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
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> FF #139. "Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs."

> FF # 193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
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> FF # 194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Doc. 405 at 24-25, 34, 46 (citations to the record omitted).

Given these, and other factual findings, the Court held: "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change." Doc. 405 at 98. This Court also held: "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries"; and "Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change." Doc. 405 at 87.

Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights. If a stay were granted, there is a high likelihood that dozens of MEPA reviews could be conducted, and permits issued thereafter, by Defendants during the pendency of this appeal and pursuant to the MEPA Limitation's injurious blinders that this Court has declared unconstitutional. *See* Nowakowski Decl. ¶¶ 26-28. Plaintiffs' injuries and constitutional violations will be substantially exacerbated if Defendants continue to ignore climate change and GHG emissions in MEPA reviews and absent such analysis continue issuing permits for fossil fuel activities, which will increase the already unconstitutional levels of GHG concentrations in the atmosphere. Doc. 405 at 87-88 (describing causal connection between MEPA Limitation and resulting GHG emissions). The infringement of constitutional rights constitutes irreparable harm. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a

constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same). Depletion or degradation of the environment and natural resources also constitutes irreparable harm. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

The evidence is uncontradicted: Plaintiffs will be substantially injured if a stay is granted that allows Defendants to maintain the *status quo* of failing to consider climate impacts and GHG emissions, approving every fossil fuel permit they receive, and increasing Montana's GHG emissions at a time when emissions must be declining rapidly. Even accepting arguendo Defendants' purported harms as true, the evidence at trial established Plaintiffs are experiencing harms much more substantial and irreparable than any of Defendants' alleged harms. Considering the balance of equities, this factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

D. Where the Public Interest Lies

The public's interest is best served when Montana's Constitution is followed and when constitutional rights are protected. *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed."). The public interest lies in protecting Montana's clean and healthful environment and in protecting the constitutional rights of all Montanans, especially the youth. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *9 (Mont. Sup. Ct. Aug. 9. 2022); *see also* Mont. Const. art. II, §§ 3, 4, 15, 17; art. IX, §§ 1, 3. The public also has an interest in having access to reliable, safe, and clean energy sources. *MEIC v. Westmoreland*, *9. Defendants argue that, absent a stay, there could be regulatory disruptions that could affect the energy industry and could prevent DEQ from issuing new coal mining permits or permits for gas generating plants, which could increase costs to

Montana energy consumers. The undisputed trial record before this Court makes clear that with the MEPA Limitation's injurious and unconstitutional blinders removed, and with the attendant renewable energy alternatives to fossil fuels properly considered as provided in MEPA, Mont. Code Ann. § 75-1-201(1)(b)(iv)(C), Montana can meet all of its energy needs by transitioning away from fossil fuels towards renewable energy sources and reach 100% renewable energy by 2035 at the earliest, and no later than 2050. Doc. 405 at 80-84. A renewable energy system in Montana would be reliable, save Montanans money, and improve air quality. Doc. 405 at 80-84. There was no evidence at trial and there is no evidence in support of this motion that there would be any disruption to the public's access to reliable and affordable energy if a stay were not granted. *See also supra,* Section II.B.

Because there is no evidence that the public interest would be harmed absent a stay, and the evidence in the record shows nothing but benefits to the public interest from transitioning Montana's energy system away from fossil fuels, Defendants have failed to meet their burden to show that the public interest weighs in favor of granting a stay. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

FOR THE FOREGOING REASONS, and upon review of the briefing and evidentiary record before this Court, it is hereby ORDERED:

Defendants' motion for clarification is DENIED.

Defendants' motion for stay of judgment pending appeal is DENIED.

DATED this _____ day of November, 2023.

_____
KATHY SEELEY
District Court Judge

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