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United States

ENVIRONMENT

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This country-specific Q&A provides an overview of environment laws and regulations applicable in United States.

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UNITED STATES
ENVIRONMENT

1. What is the environmental framework and the key pieces of environmental legislation in your jurisdiction?

Congress has enacted statutes that apply nationwide. The most important of these laws are the National Environmental Policy Act; the Clean Air Act; the Clean Water Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Endangered Species Act; the Oil Pollution Act; the Resource Conservation and Recovery Act; and the Comprehensive Environmental Response, Compensation, and Liability Act. Each of the fifty states also has its own environmental laws, as do some cities and towns. There is limited pre-emption of state and municipal law by federal law. Generally, states and cities are able to adopt environmental laws that must be stricter than, and must not conflict with, the federal statutes and regulations.

2. Who are the primary environmental regulatory authorities in your jurisdiction? To what extent do they enforce environmental requirements?

The Environmental Protection Agency (EPA) is the primary environmental regulatory authority. The Department of Justice represents EPA in most court proceedings, including in enforcement actions. The Army Corps of Engineers is the regulatory authority for discharges of certain material into waters of the United States. The Fish and Wildlife Service is the regulatory authority responsible for managing fish, wildlife, and natural habitats. Each state has at least one environmental regulatory authority that enforces environmental laws, typically with the assistance of the state's attorney general.

3. What is the framework for the environmental permitting regime in your jurisdiction?

Permits are required for certain types of discharges to air and water, and for the construction and operation of facilities that emit pollution into the air or water, that handle or dispose of wastes, and that may impact species or habitat. EPA issues many of these permits, but has delegated to some states the authority to issue and manage permits under certain statutes. Local governments can also issue their own permits under their own laws.

4. Can environmental permits be transferred between entities in your jurisdiction? If so, what is the process for transferring?

Environmental permits can usually be transferred between entities. Depending on the statute involved, this may be accomplished simply by providing notice of the transfer to the relevant agencies, or it may require the approval of the relevant regulatory agencies.

5. What rights of appeal are there against regulators with regards to decisions to grant environmental permits?

Most final decisions by regulatory agencies may be challenged administratively or in court. Decisions by EPA and other federal agencies are challenged in federal court. Most decisions by state agencies are challenged in state courts. EPA and many states have independent administrative tribunals that hear challenges to certain regulatory decisions.

6. Are environmental impact assessments (EIAs) for certain projects required in your jurisdiction? If so, what are the main elements of EIAs and to what extent can EIAs be challenged?

The National Environmental Policy Act (NEPA) requires an environmental analysis called an Environmental Assessment (EA) prior to permitting or construction of a

project subject to NEPA. Based on the EA's results, the lead federal agency conducting the environmental review may then prepare a more rigorous assessment providing for public review and comment, and responses to substantive comments. This more rigorous assessment is an Environmental Impact Statement (EIS). NEPA requires an EIS to be prepared whenever a proposal involves a major federal action that will significantly affect the quality of the human environment. The EIS must include consultation with agencies preparing studies mandated by specified environmental laws and must include the comments of federal agencies that have jurisdiction by law or special expertise with respect to any environmental impact involved. EISs include a description of the action under consideration, a description of the current state of the environment that could be affected by the action, analysis of how the action could affect the environment, analysis of alternatives to the action, and description of methods to mitigate any adverse impacts. Many states have their own environmental impact assessment laws. Final agency decisions after environmental impact assessment, whether federal or state, can typically be challenged in court.

7. What is the framework for determining and allocating liability for contamination of soil and groundwater in your jurisdiction, and what are the applicable regulatory regimes?

The principal law governing liability for contamination of soil and groundwater is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund law. It imposes a broad liability regime in which current and past owners and operators of contaminated land may be liable for its cleanup, as well as parties that generated waste that was disposed at what was later listed as a contaminated site. Few statutory defenses are available. CERCLA also provides for the cleanup of contaminated sites and has detailed procedures for studies to determine the nature and extent of contamination, cleanup methods, and decisions by EPA regarding the cleanup of contaminated sites.

8. Under what circumstances is there a positive obligation to investigate land for potential soil and groundwater contamination? Is there a positive obligation to provide any investigative reports to regulatory authorities?

Some states, most prominently New Jersey and Connecticut, require disclosure of environmental site conditions and, in some cases, site investigations before certain transactions involving land or its ownership can be consummated. The release of certain quantities of certain hazardous substances to soil or groundwater must be promptly reported to the authorities under CERCLA and under the Emergency Planning and Community Right to Know Act.

9. If land is found to be contaminated, or pollutants are discovered to be migrating to neighbouring land, is there a duty to report this contamination to relevant authorities?

See the prior answer.

10. Does the owner of land that is affected by historical contamination have a private right of action against a previous owner of the land when that previous owner caused the contamination?

It might under certain circumstances. For instance, CERCLA authorizes private actions for contribution against potentially responsible parties.

11. What are the key laws and controls governing the regulatory regime for waste in your jurisdiction?

The principal federal laws governing waste management are CERCLA and the Resource Conservation and Recovery Act. Waste burned or vented into the air may be subject to regulation under the Clean Air Act. Waste discharged into inland or coastal waters is regulated under the Clean Water Act. Radioactive waste is regulated by the Nuclear Waste Policy Act and Low-Level Radioactive Waste Policy Act. The Safe Drinking Water Act regulates waste disposed of through underground injection wells. Most states also have their own laws on these subjects.

12. Do producers of waste retain any liabilities in respect of the waste after having transferred it to another person for treatment or disposal off-site (e.g. if the other person goes bankrupt or does not properly handle or dispose of the waste)?

Under CERCLA, the producers of waste may be liable for their improper handling or disposal, or their disposal at a contaminated site. The Resource Conservation and Recovery Act authorizes citizen suits against anyone who has contributed or is contributing to the past or present handling of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment, and authorizes EPA to restrain anyone who has contributed or is contributing to the past or present handling of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment.

13. To what extent do producers of certain products (e.g. packaging/electronic devices) have obligations regarding the take-back of waste?

Some states and cities have laws requiring the take-back of certain products, including electronic waste, pharmaceuticals, tires and other designated materials.

14. What are the duties of owners/occupiers of premises in relation to asbestos, or other deleterious materials, found on their land and in their buildings?

Some cities require the inspection of properties for asbestos and/or lead, and their remediation before they may be renovated or demolished. Some cities require the remediation of asbestos in residential dwellings. The federal Occupational Safety and Health Administration's regulations require that facilities with presumed asbestos-containing materials or asbestos-containing materials comply with certain employee notification, training, labelling and recordkeeping requirements (and housekeeping programs). The federal Asbestos Hazard Emergency Response Act requires special attention to asbestos in schools.

15. To what extent are product regulations (e.g. REACH, CLP, TSCA and equivalent regimes) applicable in your jurisdiction? Provide a short, high-level summary of the relevant provisions.

The Toxic Substances Control Act requires extensive disclosures to EPA before chemicals can first be manufactured in the United States or imported. Under certain circumstances, EPA may require testing of new and existing chemicals. Some states, such as California, also have regulations requiring that businesses provide warnings to consumers on products about potential exposure to certain chemicals.

16. What provisions are there in your jurisdiction concerning energy efficiency (e.g. energy efficiency auditing requirements) in your jurisdiction?

Energy efficiency audits are generally not required, except that a few cities and states require disclosure of energy efficiency in large buildings. Several states have recently enacted legislation focused on improving building efficiency and conserving energy by expanding existing energy efficiency resource standards for utilities. Under these standards, utilities must achieve a certain reduction in energy usage by implementing energy efficiency measures. In effect, utilities plan to procure less energy in the future (typically according to a percentage-point reduction target) by implementing these efficiency measures. The most common way to do this is by applying energy efficiency programs at the customer level so that there is less demand.

17. What are the key policies, principles, targets, and laws relating to the reduction of greenhouse gas emissions (e.g. emissions trading schemes) and the increase of the use of renewable energy (such as wind power) in your jurisdiction?

At the federal level, EPA has authority under the Clean Air Act—made explicit by the Inflation Reduction Act of 2022 (the "IRA")—to monitor and regulate greenhouse gas emissions. Greenhouse gas emissions from new power plants are regulated under EPA's New Source Performance Standards for greenhouse gas emissions from new, modified, and reconstructed fossil fuel-fired power plants. In 2019, EPA implemented the Affordable Clean Energy Rule to establish emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired electric utility generating units, but in January 2021, the D.C. Circuit Court overturned the rule. In June 2022, the Supreme Court reversed the D.C. Circuit's decision to overturn the Affordable Clean Energy Rule in West Virginia v. EPA (further discussed, below). In response to the Supreme Court's ruling, EPA indicated plans to move forward with an alternative regulatory proposal for reducing greenhouse gas emissions from existing large stationary sources.

Federal tax incentives also encourage the development of renewable energy (such as wind power), carbon

capture and sequestration and hydrogen in the United States. At the state level, twenty-three states and the District of Columbia have adopted, by executive order or by statute, specific greenhouse gas reduction targets to address climate change. Most states have renewable portfolio standards, which require electric utilities to procure certain percentages of their electricity from renewable sources. Eleven states in the north-eastern and mid-Atlantic states belong to the Regional Greenhouse Gas Initiative, a trading scheme for carbon dioxide emitted from power plants. The California cap-and-trade rules apply to power plants and industrial facilities that emit 25,000 metric tons or more of carbon dioxide-equivalent, and fuel distributors that meet the 25,000 metric ton threshold. The covered emissions include weighted equivalent values of methane, nitrous oxide, sulfur hexafluoride, perfluorocarbons and nitrogen trifluoride, along with carbon dioxide.

18. Does your jurisdiction have an overarching "net zero" or low-carbon target and, if so, what legal measures have been implemented in order to achieve this target.

The United States has a goal of reaching net-zero greenhouse gas emissions by 2050 and reducing net greenhouse gas emissions 50-52% below 2005 levels by 2030. The Biden administration released a "2021 Long-Term Strategy" stating that achieving net-zero greenhouse gas emissions by 2050 is possible and outlining the proposed steps for doing so. No legal measures have been implemented in order to achieve this target. In support of the 2021 Long-Term Strategy, the Biden administration released a "U.S. National Blueprint for Transportation Decarbonization," in January 2023, which calls on federal agencies to create an interagency framework of strategies and actions to remove all emissions from the transportation sector by 2050 through investment in battery and electric technology, hydrogen, and sustainable liquid fuels.

19. To what extent does your jurisdiction regulate the ability for products or companies to be referred to as "green", "sustainable" or similar terms? Who are the regulators in relation to greenwashing allegations?

In the United States, such claims made in promotional materials and business-to-business advertising are subject to the Federal Trade Commission's (FTC) Green Guides. The FTC published this guidance to help marketers avoid making environmental marketing claims that are unfair or deceptive under the Federal Trade Commission Act. Generally, in assessing whether such claims are unfair or deceptive, the FTC considers whether the marketer has a reasonable basis and sufficient substantiation for its statement, and whether the marketer has credible evidence to support any environmental benefit claims, with scientific proof, tests, analyses, research or studies. The FTC recently sought public comments on potential updates to the Green Guides, specifically on the issues of carbon offsets and climate change, the terms "recyclable" and "recycled content," and whether additional guidance is needed for claims such as "compostable," "degradable," "ozone-friendly," "organic," and "sustainable," as well as claims regarding energy use and efficiency. Any forthcoming changes to the Green Guides remain pending with the FTC.

Claims by investment funds and their investment advisers regarding environmental, social, and governance (ESG) credentials could soon become subject to regulations proposed by the Securities and Exchange Commission (SEC) in May 2022. The proposed rule would impose disclosure requirements on advisers claiming to consider ESG factors in their investment decisions and would require registered fund names accurately reflect the fund's investment focus and risk in relation to ESG factors.

20. Are there any specific arrangements in relation to anti-trust matters and climate change issues?

Antitrust enforcement has increased during the Biden Administration, and there has been an emerging government interest in expanding antitrust enforcement to target ESG initiatives of energy companies, financial firms and others. Whereas the Biden Administration's efforts are ostensibly intended to bolster ESG goals, in the last year Republican senators held a series of hearings that were intended "to scrutinize the institutionalized antitrust violations being committed in the name of ESG." Thus, antitrust challenges with respect to climate change may arise from a variety of ideological angles.

21. Have there been any notable court judgments in relation to climate change litigation over the past three years?

On June 30, 2022, the Supreme Court issued its opinion in *West Virginia v. EPA*, which struck down the Obama Administration's Clean Power Plan. Under the Clean

Power Plan, EPA determined that power plants could cut greenhouse gas emissions by both installing emission controls and by shifting from high carbon fuels (e.g., coal) to lower carbon or renewable energy sources (e.g., natural gas, wind, or solar). In a 6-3 decision, Chief Justice Roberts' majority opinion ruled that EPA lacks statutory authority under Section 111(d) of the Clean Air Act to employ this "generation shifting" approach in setting performance standards for stationary sources but left intact EPA's power to regulate greenhouse gases through emissions control technology. In its conclusion, the Court embraced the "major question doctrine," which dictates that administrative agencies lack authority to act on questions of extraordinary economic and political significance unless Congress "clearly" granted the agency such authority. Beyond the express limitation on EPA's power to direct a transition away from fossil-fuel-based power generation, this decision could indicate new legal constraints on EPA's authority to address climate change under all its statutory programs.

Over the past three years, there has also been an increasing number of climate change-related legal proceedings in the United States, particularly against fossil fuel producers. Many state and city governments are seeking ways to recover the costs of responding to the effects of climate change, including filing litigation in both state and federal court. Initially, many of these climate-related cases were dismissed, removed or remanded, or stayed pending an administrative determination from an environmental regulator. These dismissals, removals, remands, or stays were often based on determinations that a court is not the proper venue for a climate-related dispute because the dispute raises a political question, the claim has been pre-empted or displaced by a federal statute, the claim arose under state law rather than federal law, or the climate-related dispute is more appropriate for consideration by an environmental regulator. In the last year, federal courts remanded several state law actions back to state court, and the Supreme Court effectively ended the jurisdictional tug-of-war in these cases by declining to review remand orders affirmed by federal appeals courts. Climate-related cases filed in state courts that assert state law claims are now proceeding in state court. Below are several notable court judgments that have occurred in the last three years.

In *New York City v. BP plc et al*., New York City filed suit in federal court in 2018 against five oil companies, claiming that their production and sale of fossil fuels constituted public and private nuisance and trespass. In June 2018, the federal district court dismissed the suit, ruling that the federal Clean Air Act pre-empted the city's claims and that its claims interfered with separation of powers and foreign policy. In April 2021, the federal appellate court affirmed the dismissal.

In *Board of County Commissioners of Boulder County et al. v. Suncor Energy (U.S.A.) Inc. et al.*, local government entities in Colorado filed suit against Suncor and Exxon in state court, alleging the defendants knowingly contributed to climate change by producing, promoting, and selling fossil fuels while concealing and misrepresenting the dangers associated with their use. Defendants attempted to remove the case to federal court, but the federal district court remanded the case back to state court, and the Tenth Circuit Court of Appeals affirmed the remand. Defendants sought review of the remand order in the Supreme Court, but the Supreme Court denied the petition for writ of certiorari in April 2023, effectively deciding that this case, and a number of similar cases brought under state law, would proceed in state court.

In *Held v. State*, sixteen youth plaintiffs filed a lawsuit in Montana state court in 2020, asserting claims under the Montana Constitution against the State of Montana, its governor, and state agencies challenging the constitutionality of Montana's fossil fuel-based State Energy Policy and the "Climate Change Exception" in the Montana Environmental Policy Act. The Climate Change Exception forbade state agencies from considering greenhouse gas emissions and climate change impacts in environmental reviews of state actions. Montana repealed the challenged State Energy Policy, but the plaintiffs' challenge to the Climate Change Exception became the first climate change case to proceed to trial in the US. In August 2023, the state trial judge granted judgment for the plaintiffs, ruling the Climate Change Exception violated plaintiffs' right to a "clean and healthful environment," as provided in the Montana Constitution. Montana's appeal of the judgment remains pending.

22. In light of the commitments of your jurisdiction that have been made (whether at international treaty meetings or more generally), do you expect there to be substantial legislative change or reform in the relation to climate change in the near future?

The Biden administration has indicated that it will continue efforts to reduce greenhouse gas emissions and announced that it would "continue to keep the goal to limit global warming to 1.5 degrees Celsius within reach." At COP26, the United States made several commitments, including joining the Global Methane

Pledge committing to a goal of reducing global methane emissions by at least 30 percent from 2020 levels by 2030, and committing to ending international public support for the unabated fossil fuel energy sector by the end of 2022 and instead prioritizing support for the clean energy transition. In 2022, COP27 concluded with an agreement for the creation of a loss and damage fund by developed countries that would help pay for damage and loss to developing nations that are particularly susceptible to climate change harms—at COP28, the US pledged $17.5 million to the fund. It is unclear whether these commitments alone will result in substantial legislative change or reform, but they are likely to shift public finance toward lower-carbon priorities.

In 2022, the US Securities Exchange Commission (SEC) proposed a rule to require climate-related disclosures from public companies. The proposed rule would require companies to report their Scope 1 and 2 greenhouse gas emissions in public filings. The most contentious provision would further require disclosure of Scope 3 emissions if Scope 3 emissions are "material to the company," or if the company sets an emissions target or goal that includes Scope 3 emissions. In November 2023, the SEC signalled it may scale back requirements related to Scope 3 emissions, but the rule remains under consideration. Notwithstanding the SEC's proposed rule, California passed a series of laws in 2023 that require climate-related disclosures from both private and public companies that meet certain annual revenue thresholds and that do business in the state. Under California's Climate Corporate Data Accountability Act, companies with total annual revenues of more than $1 billion that do business in California will be required to disclose Scope 1, 2, and 3 emissions.

23. To what extent can the following persons be held liable for breaches of environmental law and/or pollution caused by a company: (a) the company itself; (b) the shareholders of the company; (c) the directors of the company; (d) a parent company; (e) entities (e.g. banks) that have lent money to the company; and (f) any other entities?

Companies are liable for breaches of environmental law and for their pollution. Shareholders and directors are not liable unless they take an active role in environmental management or the operations or decisions that cause contamination. The corporate veil is rarely pierced to hold parent companies liable, but a parent company may be liable if the corporate formalities were not observed or if the parent company is itself involved in the polluting activities. Banks that have loaned money to polluting companies tend to be liable only if they foreclose on the property and do not divest property at the earliest practicable, commercially reasonable time using commercially reasonable means. Banks, like shareholders and directors, can also be liable if they take an active role in environmental management or decisions that cause contamination.

24. To what extent can: (a) a buyer assume any pre-acquisition environmental liabilities in an asset sale/share sale; and (b) a seller retain any environmental liabilities after an asset sale/share sale in your jurisdiction?

Sellers and buyers often allocate liability between themselves in transactions, but this allocation is not binding on other parties that are not party to the transaction agreements in which the liability is allocated. Generally, there are no limits on the extent to which a buyer can assume pre-acquisition environmental liabilities or a seller can retain environmental liabilities. As a matter of general corporate law in the United States, pre-acquisition liabilities generally remain with the entity being acquired in a share sale. However, a buyer in an asset sale might not assume pre-acquisition environmental liabilities if the relevant transaction agreement does not clearly allocate these pre-acquisition liabilities to the buyer.

25. What duties to disclose environmental information does a seller have in a transaction? Is environmental due diligence commonplace in your jurisdiction?

In transactions it is standard for sellers to be required to disclose environmental information. A seller that does not disclose material environmental information to the buyer could be sued for fraud. Environmental due diligence has been a key component of transactions in sectors such as power, oil & gas, and chemicals for decades in the United States.

26. What environmental risks can be covered by insurance in your jurisdiction, and what types of environmental insurance policy are commonly available? Is environmental insurance regularly

obtained in practice?

There are three types of environmental insurance products generally available to cover risks associated with contaminated property in the United States: Cost Cap, Environmental Liability Buyout, and Pollution Legal Liability. Pollution Legal Liability insurance products are the primary insurance options for addressing environmental risks in the United States. These policies typically cover new conditions and may not provide sufficient protection to an acquirer when a site has known contamination subject to ongoing cleanup. The Cost Cap insurance product covers loss associated with a contaminated site in excess of forecasted total costs. The insured party is responsible for cleanup costs up to a forecasted total (the cap); if cleanup costs exceed that amount, the policy covers costs up through limits established in the policy. Insurance companies typically only offer this product when a site has a remedial action plan. An Environmental Liability Buyout is where a specialty company assumes the cleanup and closure risk in exchange for a monetary payment from the insured party. It is essentially a payment by the acquirer to a third party to assume environmental cleanup liability. Insuring against losses associated with litigation related to exposure hazardous substances may be more difficult, but bespoke insurance options to insure against these risks may be available in some situations. Environmental Insurance is not available to cover criminal penalties.

27. To what extent are there public registers of environmental information kept by public authorities in your jurisdiction? If so, what is the process by which parties can access this information?

The United States maintains a Toxics Release Inventory designed to track the management of certain toxic chemicals deemed to pose a threat to human health and the environment. The inventory includes information reported annually from U.S. facilities in several industry sectors (typically larger facilities involved in manufacturing, metal mining, electric power generation, chemical manufacturing and hazardous waste treatment) regarding how much of each of the chemicals is released to the environment and/or managed through recycling, energy recovery and treatment. The inventory currently includes 770 individually listed chemicals and 33 chemical categories. The Clean Water Act requires entities that propose to discharge pollutants to waterbodies to submit Notices of Intent to discharge and entities that are discharging to submit Discharge Monitoring Reports, and can require other waivers, certifications, and notices related to water quality. The Resource Conservation and Recovery Act requires hazardous waste generators and facilities that treat, store, or dispose hazardous waste to report their hazardous waste activities. The Emergency Planning and Community Right-to-Know Act requires industry to report on the storage, use and releases of hazardous substances. The Clean Air Act's Title V permit program requires air emissions and air quality monitoring and reporting by emitters to ensure compliance with permit conditions as well as any pollutant standards established by the Clean Air Act. The Clean Air Act greenhouse gas reporting rule requires reporting of greenhouse gas data and other relevant information from large greenhouse gas emission sources, fuel and industrial gas suppliers, and carbon dioxide injection sites. These reports are publicly available. EPA also collects and makes public certain enforcement and compliance information for EPA-regulated facilities on its website. Several commercial services obtain extensive information on permits, reported spills, listed contaminated sites, violations, and other data about sites, and make that information available for a fee.

28. To what extent is there a requirement on public bodies in your jurisdiction to disclose environmental information to parties that request it?

The federal Freedom of Information Act, and equivalent public records laws in every state, grant anyone, including U.S. citizens, foreign nationals, businesses and organizations, the ability to file a request for information in the possession of the federal government or its agencies. There are limited exceptions for certain confidential business information and other categories.

29. Have there been any significant updates in environmental law in your jurisdiction in the past three years? Are there any material proposals for significant updates or reforms in the near future?

In January 2023, the D.C. Circuit vacated the Trump administration's rollback of Obama-era greenhouse gas emission standards for existing power plants and its subsequent promulgation of the 2019 Affordable Clean Energy Rule, which was intended to replace the Obama-era standards, finding the Trump administration's actions were based on "a mistaken reading of the Clean Air Act." The Biden administration has also begun issuing new regulations that would strengthen some environmental protections. For example, in January 2023, the Council on Environmental Quality issued

interim guidance that directs federal agencies to evaluate the climate change impacts of major new projects as part of the permitting process under NEPA.

Notable cases currently pending before the Supreme Court could significantly impact environmental law. In *Lopez Bright Enter. V. Raimondo* and *Relentless Inc. v. Department of Commerce*, the petitioners are asking the court to overturn the *Chevron* doctrine, so named for the 1984 case, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. The *Chevron* doctrine, also known as *Chevron* deference, instructs federal judges to defer to agency interpretations of ambiguous congressional statutes when crafting rules and regulations, so long as the agency's interpretation is reasonable. If *Chevron* is overturned, it could weaken federal agencies' ability to regulate a wide range of issues, including EPA's efforts to use existing laws to regulate greenhouse gas emissions.

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