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Public Comments Processing
Attention: FWS-HQ-ES-2021-0033
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Ms. Lisa Ellis
Acting Chief, Div. of Restoration & Recovery
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on the U.S. Fish and Wildlife Service's Proposed Rule to Revise the Regulations Concerning the Designation of Experimental Populations Under the Endangered Species Act
Docket No. FWS-HQ-ES-2021-0033

Dear Ms. Ellis:

The Petroleum Alliance of Oklahoma and Western Energy Alliance (collectively, the "Trades") submit the following comments on the U.S. Fish and Wildlife Service's ("FWS") proposed rule to revise the Endangered Species Act ("ESA") implementing regulations concerning experimental population designation in order to allow FWS to introduce endangered and threatened species into habitat outside of their historical range.¹ The Trades appreciate the opportunity to provide these comments.

The Petroleum Alliance of Oklahoma represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Their members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

Western Energy Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

The Trades' members support conserving at-risk species and their habitat and work hard to ensure that their activities avoid and minimize impacts to species' habitat to the greatest extent reasonable. The Trades' members participate in habitat conservation plans, candidate conservation agreements, candidate conservation agreements with assurances, and many other programs to benefit

¹ 87 Fed. Reg. 34625 (June 7, 2022).



species and their habitat. The Trades' members have a long history of close coordination with federal regulatory agencies including the FWS on endangered species and species conservation as well as working with various state agencies to ensure that oil and gas development is done in a manner that protects the environment and special resources.

The Trades are concerned that the proposed experimental population rule, in combination with additional proposed and finalized changes to the ESA's implementing regulations, unnecessarily and unreasonably expands the scope of the ESA and FWS's ability to limit development within certain habitats. The Trades are concerned that the proposed experimental population rule will be used to needlessly introduce imperiled species into producing oil and gas basins without history of the lands supporting such species, and without reasonable expectations that the experimental populations will survive. The Trades are concerned that FWS will use the proposed rule as a tool to hinder or entirely block oil and gas development in already producing areas. The FWS must ensure that its proposed rule remains within the scope of the ESA.

I. Executive Summary

The Trades' members are concerned about the survival of endangered and threatened species and their existing, natural habitat. However, the Trades disagree with the proposed changes to the experimental population regulations because they are unnecessary, and, combined with other FWS proposed and final rule changes, go beyond the scope of the ESA as enacted by Congress and interpreted by the U.S. Supreme Court.

Significantly, the Trades are concerned that the shift to non-historical habitat will lead to FWS disregarding members' valid existing lease and private property rights. The economic impact of imposing experimental populations into new lands must be analyzed in detail and given significant weight in the decision-making process. Indeed, an analysis that indicates there will be economic impacts on property rights should result in a decision that the proposed experimental population not be introduced onto those lands, particularly where there is objection from local landowners, owners of valid property rights, industries, and the local community.

The Trades' members provide significant economic benefits to federal, state, and local communities while also providing benefits to species through on-the-ground conservation measures, including habitat improvements. The Trades request that FWS incorporate criteria and procedures that prioritize economic impacts in weighing a decision to introduce an experimental population into areas that have never before supported the species and recognize the importance of the economic and other benefits of oil and gas development in communities proposed for experimental populations.

The Trades request that FWS rescind its proposal, or at a minimum revise it, to ensure that it stays within Congress's intent that any experimental populations be introduced on lands that have demonstrated supporting a species' life cycle. If FWS insists on expanding its reach into non-habitat, it must similarly enhance the process required before introducing already-listed threatened or endangered species into such non-habitat. FWS should perform an environmental impact statement ("EIS") before introducing a listed species into lands that have never before supported such species.

Further, FWS cannot use experimental populations as weapons against existing lease rights and development on private lands.

II. Legal Overview - Statutory and Regulatory Framework

1. Congress Amended the ESA to Allow “Experimental Populations”

In 1982, Congress amended the ESA and established procedures for designating “experimental populations” by adding Section 10(j) to the ESA. 16 U.S.C. § 1539(j). Under Section 10(j), the Secretary of the Interior may authorize the release of an experimental population of an endangered species outside the species’ current range if the Secretary determines that the release will further the conservation of that species. *See* 16 U.S.C. § 1539(j).

An “experimental population” is defined as “any population (including any offspring arising solely therefrom) authorized by the Secretary for release . . . , but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.” *Id.* § 1539(j)(1). Once designated, an experimental population is treated as “threatened” under the ESA. 50 C.F.R. § 17.82; *see* 49 Fed. Reg. at 33,885 (Aug. 27, 1984).

2. Experimental Population Designation Requires a Separate Rule for Each Designated Species, Including Requiring Public Comment

In order to designate an experimental population, FWS must propose a species-specific rule addressing the needs of the species and allow for public review and comment. *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1232 (10th Cir. 2000) (citing H.R. Conf. Rep. No. 97-835 (1982)); 49 Fed. Reg. at 33,886. Before releasing an experimental population under Section 10(j), the Secretary must also develop regulations identifying the experimental population, 16 U.S.C. § 1539(j)(2)(B), the geographic area where the regulations apply, 50 C.F.R. § 17.81(c)(1), and the specific management restrictions that apply to the population. *Id.* § 17.81(c)(3). These regulations are species-specific, developed on a case-by-case basis, and are then implemented by FWS and other federal, state, Tribal and local entities. 49 Fed. Reg. at 33,886.

3. An Experimental Population Can Only be Designated if Designation will Further the Conservation of the Species and if the Population is Essential to the Continued Existence of the Species

The FWS must make two specific findings to designate an experimental population. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). First, FWS must find that the release will “further the conservation of [the] species.” 16 U.S.C. § 1539(j)(2)(A). The factors considered for this initial inquiry include:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;



(3) The relative effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

50 C.F.R. § 17.81(b). This determination must be made using the best scientific and commercial data available. *Id.*

Second, FWS must determine whether the population is essential to the continued existence of the species in the wild. 16 U.S.C. § 1539(j)(2)(B); *see also* 50 C.F.R. § 17.81(c)(2). “Essential” means the experimental population’s loss “would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” 50 C.F.R. § 17.80(b). All other populations are classified “nonessential.” *Id.* This finding is “based solely on the best scientific and commercial data available, and the supporting factual basis” *Id.* § 17.81(c)(2).

Importantly, as explained by Congress, most experimental population designations will be nonessential. S. Rep. No. 97-418, at 9 (1982). To date, the “essential” designation has never been applied to an experimental population of any species. *See* 50 C.F.R. §§ 17.11, 17.84. This outcome is because of the high standard set for an essential designation in that the loss of a single experimental population would rarely appreciably reduce the likelihood of the entire species’ or parent populations’ survival in the wild. *See* 49 Fed. Reg. at 33,888.

Whether a population is designated “essential” or “nonessential” affects whether federal agencies have a duty to consult with FWS on certain federal actions under ESA Section 7(a)(2). Where a population is designated “nonessential,” federal agencies are not required to formally consult with FWS on actions likely to jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2). Instead, federal agencies must engage in a conferral process that results in conservation recommendations that are not binding upon the agency. *Id.* § 1536(a)(4).

Congress enacted Section 10(j) in order to provide greater administrative flexibility in managing reintroduced species, however, it may only be utilized when “necessitated by the conservation and recovery needs of a listed species” 49 Fed. Reg. at 33,889. Accordingly, Congress did not enact Section 10(j) for non-conservation purposes. *Id.*

4. Critical Habitat Designation for Essential Experimental Populations Must Encompass Actual Habitat

The statute provides that FWS may not designate critical habitat for an experimental population designated as nonessential. *Id.* § 1539(j)(2)(C)(ii). In compliance with U.S. Supreme Court authority, FWS cannot designate critical habitat for an experimental population designated as essential unless it is actual habitat for the listed species.² Thus, critical habitat—even when designated

² *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361, 368 (2018) (ruling that lands cannot be designated critical habitat unless it is habitat for the species). *See also Bennett v. Spear*, 520 U.S. 154, 176-77

for an essential experimental population—must contain areas that currently or periodically contain the resources and conditions necessary to support one or more life processes of the species.

Furthermore, critical habitat designations must consider the economic impact of specifying a particular area as critical habitat and must be based on the best scientific data available.³ Courts interpreting the ESA have consistently found that critical habitat can only be designated “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2).⁴

III. Specific Comments

1. FWS Must Establish a Higher Standard and Add Additional Processes—Including an EIS—and Public Comment Before Introducing Threatened or Endangered Species into Non-Historic Habitat

As explained above, introducing an experimental population currently requires a significant amount of review and analysis, including public comment and consultation with local government entities, Tribes, and private landowners—all for introduction of experimental populations in *historical habitat*. 49 Fed. Reg. at 33,886.

While FWS has introduced experimental populations into historical habitat, not all introductions have been successful. Indeed, in the case of the gray wolf, there were multiple entities opposed to reintroduction, and even supporters of the re-introduction faulted FWS for not doing enough for the species in its experimental population introduction. *See Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000); *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019-TUC-JGZ (l), 2018 U.S. Dist. LEXIS 56436 (D. Ariz. Mar. 31, 2018).

FWS must provide more collaboration and public participation in the beginning stages of the experimental population rulemaking—even where there is historic habitat being proposed—and FWS must ensure that the proposed experimental population will have a likelihood of survival based on FWS proposed management prescriptions.

(1997); *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1279-80 (10th Cir. 2001).

³ 16 U.S.C. § 1533(b)(2).

⁴ The ESA defines “critical habitat” as:

- (i) the specific areas within the geographical area currently occupied by the species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features
 - (I) essential to the conservation of the species and
 - (II) which may require special management considerations or protection; and
- (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the [ESA], upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5).



The American Burying Beetle (“ABB”) is another example of a listed species with a controversial experimental population introduction. 77 Fed. Reg. 16,712 (March 22, 2012). In the case of the ABB, which at that point was listed as an endangered species, the experimental population was proposed in the heart of oil and gas development, and hindered development of a key pipeline. Importantly with the ABB, the species was downgraded in 2019, in part because of the oil and gas industry supporting research on the ABB, conservation measures, and funding more surveys to find more occurrences of the species than initially thought existed. *See* 84 Fed. Reg. 19013 (May 3, 2019).

FWS and environmental organizations utilized the experimental population of the ABB to slow down, and in some cases entirely halt, oil and gas development. This, where there was known historic habitat for the species.

In the case of FWS wanting to propose experimental populations in non-historical habitat, FWS should meet a higher standard. There should be increased review and analysis in the form of an EIS in compliance with the National Environmental Policy Act (“NEPA”). This process is reflected in other aspects of the ESA framework for threatened and endangered species. Indeed, when private entities propose habitat conservation plans (“HCP”), those plans undergo rigorous review in the form of an EIS to inform FWS decision-making on the proposed conservation plan. Introducing species into non-historical habitat should require at least as rigorous of a review as a plan to protect species *within its existing habitat*.

FWS should not introduce a threatened or endangered species into areas where there is no history of supporting the life cycles of the proposed species without a full review and analysis of why the experimental population is proposed, likelihood of success, and agreement by local governmental entities, private landowners, stakeholders, and industry operators in the area who hold valid existing lease and property rights.

Requested Action: The proposed rule should be revised to require FWS to perform a full EIS prior to finalizing any rule allowing an experimental population’s introduction in non-habitat. The EIS must include analysis of potential economic impacts, as well as biological impacts, and provide for broad public participation including from private landowners, local communities, and local industries such as oil and gas companies who would be economically affected by the proposal.

FWS is already required to perform multiple levels of review and analysis when introducing a threatened or endangered species into historical habitat. Those same standards must be included in any regulatory process addressing experimental populations. FWS must perform more NEPA analyses on the potential impacts upon the human environment before introducing such species into non-historical habitat.

2. In Proposing Experimental Populations, FWS Must Recognize Valid and Existing Oil and Gas Lease Rights and Private Property Rights

In proposing a species-specific rule for designating an experimental population, FWS must include the Trades’ membership and other local oil and gas industry representatives in the public process. Oil and gas leases are valid existing rights and constitute real property that could be affected by an experimental population designation.



Pursuant to the ESA, designation of experimental populations must follow the rulemaking procedures established under the APA as detailed in 5 U.S.C. § 533—including public notice, opportunity for comment and submission of materials, and opportunity for an interested person to challenge or petition to amend the designation. These provisions are especially important here, where APA rulemaking affords participation, procedural process, and protections for owners of valid existing leases and property interests who have a direct and substantial interest in any proposed experimental population project upon on their lands.

Thus, under the terms of the ESA as to experimental populations, FWS cannot ignore valid existing lease and property rights by introducing experimental populations on leased and producing or likely to produce lands or lands that contain other valid rights conveyed through rights-of-way, easements, and surface use agreements. Experimental population designations must be made for conservation purposes, not as a weapon against industry and economic development.

Requested Action: To protect property rights, any rule on an experimental population should include a detailed economic analysis and exception process whereby specific lands are excluded from introduction of the experimental population in the event that potentially impacted landowners and property owners object to such action.

In the final rule, FWS must recognize valid and existing lease and property rights when considering lands for experimental population designation, and must include oil and gas leaseholders, landowners, and other local stakeholders in any public process considering designation of an experimental population.

3. FWS Must Weigh the Benefits of Oil and Gas Development for any Designation – Whether for an Experimental Population or Critical Habitat

As the ESA’s implementing regulations state, “the Secretary shall utilize the best . . . commercial data available” when determining whether an experimental population designation will further the conservation of the species. 50 C.F.R. § 17.81(b). The mandate to consider the best scientific and commercial data when designating an experimental population should also consider the economic benefits of oil and gas development to federal, state, and local economies.

In the similar context of species management, FWS considers the impact of designating certain areas as critical habitat under Section 4 of the ESA. Importantly, Section 4 of the ESA mandates that the FWS designate critical habitat “on the basis of the best scientific data available and after *taking into consideration the economic impact*, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2) (emphasis added). Oil and gas companies provide economic benefits through royalties and severance taxes. Importantly, in certain communities, oil and gas companies provide good paying jobs that must be factored into the decision-making process.

The ESA empowers the FWS to “exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat,” unless “the failure to designate such area as critical habitat will result in the extinction of the species concerned.” *Id.* Where, as here, experimental population designation and implementation

would have the same effect as critical habitat designation, FWS cannot avoid its duty to analyze the economic impacts of experimental populations.

Requested Action: FWS must analyze and consider the economic impact that any proposed experimental population will have on oil and gas development, particularly in rural communities where oil and gas provides high paying jobs as well as substantively increases local government revenues. FWS must be required to fully consider the economic benefits to the federal, state and local communities when considering an experimental population designation in non-historical habitat.

4. Expansion of “Experimental Population” Regulations, in Conjunction with Similar Changes to Critical Habitat Designation, Violates the Intent of the ESA

Congress intended that “experimental populations,” and critical habitat designations would be based on suitable, historical habitat for a species. FWS’s proposal to expand experimental populations beyond historic range, in conjunction with the recent final rule removing the definition of “habitat” for purposes of critical habitat designations,⁵ violates Congress’ intent and the Supreme Court’s ruling in *Weyerhaeuser* that such habitat must contain actual habitat for the species.

Pursuant to the ESA, experimental populations can only be designated if their release will “further the conservation of [the] species.” 16 U.S.C. § 1539(j)(2)(A). Designating areas that have not historically supported the proposed species or areas that do not currently support the species are inconsistent with the intent of the ESA.

The mere presence of an experimental population cannot serve as a legal basis to designate those lands as critical habitat. At a minimum, the proposed rules must be revised to include procedures that require monitoring, review, and analysis of potential critical habitat for a period of at least 10 years before any proposed critical habitat designation is made for an experimental population. This process would ensure that the viability of the potential habitat for the experimental population is studied in detail, and that a premature critical habitat designation is not made that would result in unlawful and inappropriate undue restrictions upon those lands.

For any revised experimental population rules, FWS must ensure that these legal limitations and criteria for critical habitat are recognized and complied with, to avoid federal overreach in managing lands where an experimental population is introduced.

Pursuant to the Congressional intent reflected in the express language of the ESA, FWS must focus on lands that have shown they can support the life stages of threatened or endangered species. This documentation is critical to ensure compliance with the law, and to avoid arbitrary and capricious decision-making. Without such evidence and record support, FWS is inappropriately risking imperiled species to conduct a science experiment, in a legally indefensible manner.

Requested Action: The experimental population rule must be revised and expanded to include a detailed process that includes a minimum of a 10-year biological study before any critical

⁵ 87 Fed. Reg. 37,757 (June 24, 2022).



habitat is proposed and potentially designated for an experimental population in non-historical habitat. This study must then be analyzed in an EIS in compliance with NEPA before a final decision is made including analysis of the impacts such a designation would have on the human environment.

The experimental population rule must also include detailed criteria and procedures to ensure that the economic impact of introducing an experimental population into new lands is appropriately analyzed, disclosed to the public for review and comment, and given considerable weight in deciding whether to make such an introduction onto those specific lands.

5. The Proposed Rule is Unnecessary

Congress enacted Section 10(j) in 1982 to give the Secretary flexibility in protecting threatened and endangered species outside their current habitat, and while FWS and the National Marine Fisheries Service (“NMFS”) have listed a combined 1,387 species since 1982, FWS and NMFS have only utilized the option to designate an experimental population for 49 of those listed species.⁶ Based on FWS’s limited use of its authority to designate experimental populations, it has not shown that the proposed changes are necessary for the protection of threatened and endangered species.

As discussed in Section 4 immediately above, FWS has already modified the definition of “habitat” within the context of critical habitat such that FWS may already expand protected habitat for a threatened or endangered species beyond existing or historical habitat and into otherwise non-habitat. Listed species would receive greater protections through the critical habitat designation than through a nonessential experimental population designation.

With the expansion of the critical habitat rule into non-habitat, FWS has not shown that similar expansion of the experimental population rule is necessary for the protection of listed species.

Requested Action: FWS should rescind the proposed rule as unnecessary and instead focus on opportunities for experimental population designations within the framework already provided in the ESA’s implementing regulations.

6. FWS Has Not Shown a Need for the Revisions

FWS has not demonstrated a need for the proposed revisions to experimental population regulations. While the proposed rule states that instances could occur where formerly suitable habitat within a species’ historical range is no longer able to support one or more life history stages, the point of an experimental population designation is to introduce species to “wholly separate geographic areas,” 16 U.S.C. § 1539(j), instead of merely growing a species’ current range. Expanding the definition of an experimental population does not allow FWS to designate adjacent range as an “experimental population.” Instead, that is natural habitat shift in that the species itself is growing or

⁶ See 50 C.F.R. § 17.11(h); see also U.S. Federal Endangered and Threatened Species by Calendar Year, FWS Environmental Conservation Online System, available at <https://ecos.fws.gov/ecp/report/species-listings-by-year-totals> (last viewed July 29, 2022).

adjusting its habitat. As provided in the ESA, experimental populations cannot overlap existing populations. 15 U.S.C. § 1539(j)(1) (an experimental population must be “wholly separate geographically from nonexperimental populations of the same species”).

Indeed, the Trades’ members are involved in conservation plans in the communities that they operate, providing opportunities for habitat preservation and restoration, and other measures to benefit listed and sensitive species. FWS should continue to support local efforts to preserve and improve habitat in and around a protected species’ range instead of proposing “experimental populations” that could become de facto critical habitat.

Requested Action: FWS should work with and support local communities on efforts to preserve and expand species’ range instead of inappropriately broadening the reach of “experimental populations” to adjacent lands.

7. Section 7 Consultation Requirements Should be Minimal for Experimental Populations in Non-Historic Habitat

FWS should not require Section 7 Consultation for lands with experimental populations in non-historic habitat. Section 7 of the ESA addresses interagency cooperation and requires that a federal agency consult with FWS when a federal action may affect a sensitive species. This federal action could include developing federal oil and gas leases, or other development projects with a federal nexus. Through the Section 7 consultation process, FWS assesses potential impacts on listed and candidate species and develops limitations, restrictions, mitigation measures, and conservation activities for the proposed project. The potential ramifications upon a project application or proposed project are significant.

The consultation requirement provides that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”⁷

In the case of experimental populations in non-historic habitat, Section 7 consultation requirements should be minimal and for informational purposes only. The experimental introduction of a listed species into non-historical habitat should not become a means to delay oil and gas development.

Requested Action: For experimental population designations in non-historical habitat, the proposed rules must be revised to provide that FWS can only utilize Section 7 Consultation requirements for information purposes only and cannot be used to develop and impose restrictions that would limit access and development.

⁷ 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.10(a).



8. FWS Should Encourage Private Landowner Participation and Partnership

The process for designating an experimental population should further detail specific processes and procedures to encourage and increase communication and coordination with local landowners and local communities in order to increase conservation options available for a designated species. Through the public participation and designation process FWS should encourage incorporating partnerships with private landowners for term conservation measures that could result in a greater possibility of success. This could result in uplift or creation of habitat benefiting the species at issue.

Additionally, incentivizing landowners—including the Trades’ members—to participate in the designation process will have the direct benefit of providing additional information to better inform such designations.

Requested Action: The proposed rules should be revised to include specific processes and procedures for FWS to increase and encourage partnerships with private landowners and industry to achieve conservation measures for the benefit of a species.

IV. Conclusion

FWS must base any experimental population designation on an actual showing of conservation for a species. FWS must also fully consider potential economic impacts when making an experimental population designation. The proposed changes to the experimental population regulations fail to do either. Instead, they focus on broadening the scope of a tool that FWS has proven ineffective with its lack of use to date. FWS should work with the Trades and their members on innovative ways to protect and improve existing habitat instead of inventing new ways to broaden its reach, to the detriment of imperiled species. FWS should rescind this proposed rule.

The Trades thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact The Petroleum Alliance of Oklahoma at 405-601-2124 or Western Energy Alliance at 303-623-0987.

Sincerely,

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The Petroleum Alliance of Oklahoma

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