03-7203

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants,

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AND FLORIDA ASSOCIATION OF SPECIAL DISTRICTS IN SUPPORT OF DEFENDANTS/APPELLANTS CITY OF NEW YORK, et al.

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JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici Curiae, National Association of Flood and Stormwater Management Agencies (NAFSMA) and Florida Association of Special Districts, are non-profit corporations. They have no parent corporations and no publicly owned corporation owns 10% or more of either's stock.

Amicus Curiae, South Florida Water Management District, is a governmental entity.

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INTEREST OF THE AMICI

Amici curiae, South Florida Water Management District (SFWMD), National Association of Flood and Stormwater Management Agencies (NAFSMA) and Florida Association of Special Districts (FASD) submit this brief to encourage the court to reconsider its earlier decision in *Catskill Mountain v. City of New York*, 273 F.3d 481 (2d Cir. 2001) which imposes the federal National Pollutant Discharge Elimination System program (NPDES) upon conveyances of water by New York City in conflict with the longstanding legal reasoning and policy determinations of the federal government and other judicial circuits.

The SFWMD is one of five water management districts with stewardship over Florida's public water resources. §§ 373.069 & 373.016, Fla. Stat. The District establishes and implements the State's water policies from Orlando to Key West for the benefit of over 7 million people. §§373.069(2)(e), 373.073 & 373.016, Fla. Stat. It operates a comprehensive water management system of levees, canals and other flow diversion facilities designed to control and allocate the waters throughout the watersheds within its jurisdiction for flood control, water supply, and environmental purposes.

SFWMD was also the petitioner before the United States Supreme Court in *South Florida Water Management District v. Miccosukee*, Case No. 02-626, ___ U.S. ___, 124 S. Ct. 1537 (2004) which reviewed the only other case nationwide

that has followed this court's decision to apply NPDES to public works projects that merely convey water, a ruling vacated by the Supreme Court and remanded for further consideration.

NAFSMA is a national non-profit association representing over 100 municipalities, special purpose public districts, and state agencies that serve over fifty (50) million people. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, departments, and other instruments of state and local government, which protect lives, property and economic activity from storm and flood waters while focusing upon the improved health and quality of our nation's waters.

FASD is a non-profit association of 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which control the movement of waters within their jurisdiction.

It is critical to these amici, both in this appeal as well as on remand in *Miccosukee,* that the courts of appeals are fully informed so as to resolve the dispute over NPDES permit requirements with a clearer understanding of the text, structure and purposes of the Clean Water Act, (CWA) as well as the national policy determinations being made and their practical ramifications.

Long before and ever since the Clean Water Act was adopted in 1972, state and local governments, including amici, have used millions of tunnels, canals, levees and other flow diversion facilities to distribute water throughout the nation for public safety and welfare. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982). Until this case, conveyances by state and local water agencies had never been considered within the province of the NPDES. Both before and since the panel's opinion here, other federal courts and the U. S. Environmental Protection Agency, which is charged with implementing Clean Water Act policy, has consistently adhered to the longstanding position that pollution caused by the mere conveyance of water was left by Congress to other more appropriate regulatory programs. See e.g., *Gorsuch*.

To the Supreme Court in *Miccosukee*, it was represented that in 1975 EPA had taken an *apparently* different position, i.e. that "irrigation ditches" require NPDES even if they moved navigable waters. As the Solicitor General pointed out at argument:

> They're relying on a 1975 general counsel opinion that addressed the question of irrigation return flows. Congress repudiated the position that was taken there 2 years later in the 1977 amendments. [The 1975 opinion] mentions this point only tangentially. It's not even among the 17 questions presented that are listed in that opinion. And I think what's more telling is the practice of EPA since that time. EPA has not required permits from water control facilities to do no more than move water.

Transcript of Oral Argument in *Miccosukee* at 30, ln. 4-13.[1] In fact not one single example has been shown where the U. S. EPA has applied the National Pollutant Discharge Elimination System (NPDES) to regulate the kind of governmental basin transfers involved in this or the *Miccosukee* matter.

Nonetheless, in October 2001, after over 30 years of contrary administrative practice, a panel of this court rejected the agencies longstanding position and invented a new jurisdictional test for the federal NPDES. That test for the first time ever extended federal permitting to regulate the simple movement of water by states and local governmental agencies among "distinct" water bodies.[2]

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[1] At http://www.supremecourtus.gov/oral_arguments/argument transcripts/02-626.pdf.

[2] Pennsylvania is the only state that purports to apply its state NPDES program to inter-basin transfers under authority of a state court ruling. *DelAWARE v. Penn*, 508 A.2d 348 (1986). The federal government pointed out in *Miccosukee*, that Pennsylvania's regulation of water transfers is not a federal requirement, but rather represents the flexibility states have under the Clean Water Act to impose more stringent standards. Moreover, their purported NPDES program does not impose federally mandated effluent limitations that would otherwise be required under the federal NPDES program, but rather substitutes the greater flexibility of best management practices, a traditional state regulatory tool. That alternative, which is offered under their state NPDES program, would not be available if the federal NPDES program were applied. Therefore, Pennsylvania is not a comparable example to the imposition here of the federal NPDES program to conveyances, nor has its approach been embraced by the remaining 49 states.

Also, *Dubois v. United States Dep't. Ag.*, 102 F.3d 1273 (1st Cir. 1996) upon which this court partly relied, is distinguishable having dealt with water removed, into a private commercial process, and then the reintroduction of that water. The court's decision in this case will neither effect nor should it be based upon that case.

The implications of this court's expansive interpretation are staggering. State and local water managers that must convey billions of gallons daily for the public needs are suddenly confronted with the imposition of burdensome federal regulatory requirements that were never designed to deal with the multiple objectives of the civil works projects they operate and with which many may never be able to feasibly comply.

NPDES is certainly one of the most significant regulatory programs in the Clean Waters Act's arsenal. It was established to provide the federal regulatory hammer considered necessary to achieve its express goal of eliminating the discharge of pollutants into the navigable waters. 33 U.S.C. 1251(a)(1). What often escapes those not familiar with its strictures is that the NPDES program imposes technology-based requirements to limit effluents. 33 U.S.C. § 1311. For that reason, among others, NPDES is often incompatible with the need to distribute water for agricultural, urban and *environmental* needs. For the public benefits of moving water include not only water supply and flood protection, but frequently environmental protection and enhancement, as organizations like many of the agencies represented by these amici must continuously transfer water to provide minimum flows necessary to foster the environmental health of the very ecosystems they manage. Unlike the state non-NPDES programs, NPDES provides no opportunity to balance these multiple and often competing objectives.

The amici, therefore, urge this court to carefully reconsider the earlier panel's decision in light of information now available from the federal government, concerned national amici and the record that was subsequently developed below. We suggest that the court would similarly benefit from requesting and considering the views of the federal government as did the Supreme Court in *Miccosukee.*

ARGUMENT

This court's interpretation of the Clean Water Act is inconsistent with the legal analysis and public policy determinations of its judicial brethren from other circuits and of the federal agencies. Any doubt that this court should not extend NPDES in this case is settled by three rules of statutory construction. For those reasons, this court should reconsider its broad expansion of the federal NPDES program.

1. This Court's Novel Interpretation Of NPDES Jurisdiction Conflicts With The Legal Analysis and Public Policy Determinations Of Other Judicial Circuits.

This courts' interpretation is inconsistent with prior rulings by the Courts of Appeals in the D.C., 4th and 6th Circuits. *See, National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *United States v. Law*, 979 F.2d 977 (4th Cir. 1992); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th cir. 1976); *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

Those cases all support the proposition that the mere movement of water containing only preexisting pollutants does not trigger NPDES requirements. Once a pollutant is in the navigable waters its simple conveyance to a different part is not a "discharge of a pollutant" triggering NPDES.

The court's attempt to "harmonize" its position with the *Gorsuch* line of cases by concluding that they dealt with a "single" body of water, where as this matter deals with "distinct" water bodies, is misguided. *Catskill*, 273 F.3d at 491. In *Miccosukee* the federal government explained that distinction is "unsound," squarely noting:

> The determination whether an NPDES permit is required should not depend whether the water control facility at issue conveys waters of the United States from one location to another or whether it connects what are arguably two distinct bodies of navigable waters. So long as the water control facility at issue does not add pollutants to "waters of the United States," and NPDES permit is not required. See *Gorsuch,* 693 F.2d at 175 (noting the United States longstanding view that "the point or nonpoint character of pollution . . . does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downsteam river)")

South Florida Water Management District v. Micosukee, Supreme Court Case No. 02-626, Brief of the United States at 18-19 (hereafter *Miccosukee "U.S.* Brief").[3]

[3] The Federal Government's Brief filed in *South Florida Water Management v.* Miccosukee is available on the Solicitor General's website at: <http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-626.pet.ami.inv.pdf>

2. This Court Improvidently Rejected The Longstanding and Consistent Position of the Federal Agencies, Which Was Given Insufficient Deference.

One of the reasons this court gave for not following EPA's longstanding position is the reduced level of deference required informal administrative practices after *Christenson* and *Mead*. *Catskill*, 273 F.3d at 491. While the previous panel correctly concluded the facts here do not mandate *Chevron* deference, the Supreme Court never retreated from its "long recogni[tion] that considerable weight should be accorded to an executive department's construction of a statutory scheme it has been entrusted to administer" *United States v. Mead*, 533 U.S. 218, 227-28 (2001). Although the weight given under the circumstances will vary, before rejecting over thirty years of administrative practice and the federal government's views regarding this court's contrary analysis presented in *Miccosukee*, their analysis deserves more than cursory consideration.

In contrast, although purporting to give strong deference to EPA's position, the courts of appeal in both *Gorsuch* and *Consumers Power*, assiduously discussed the legal analysis and policy determinations underlying the agency's position. They particularly noted that EPA's construction was made contemporaneously with the passage of the Cleans Water Act, and has been consistently adhered to since. *Gorsuch,* 693 F.2d at 167. They carefully discuss the basis of EPA's

position, both pro and con, finally declaring EPA's position to be the most reasonable interpretation.

Amici suggest this court should not so easily have substituted its own judgment for those well-developed expert opinions of the responsible agencies. It should instead be of grave concern that no federal agency has *ever* supported this court's interpretation and now they have even declared it to be "unsound." *Miccosukee* U.S. Brief at 18.

3. This Court's Statutory Interpretation Is Inconsistent With The Plain Language Of The Clean Water Act.

The there is nothing in the plain language of the Clean Water Act's NPDES provisions to support distinguishing between transfers within a singular water body and those between distinct water bodies. To the contrary, read as a whole the Clean Water Act fully supports the conclusion that the NPDES permitting requirements do not apply to water control facilities that merely convey or connect navigable waters. Again the Solicitor General explained:

> The Clean Water Act's definitions support th[e] conclusion [that this court's distinction is unsound]. Section 510(12) defines the "discharge of a pollutant" to include "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes

> of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a difference part is not a "discharge of a pollutant" within the meaning of the Act.
>
> If Congress had intended that the movement of one body of navigable waters into another body of navigable waters should be treated as the addition of a pollutant to navigable waters, it would have made that extraordinary intention manifest. At the least, it would have defined the "discharge of a pollutant" to include "any addition of any pollutant to [a specific portion of the] navigable waters from any point source," 33 U.S.C. 1362(12). Indeed, Congress elsewhere used precisely that type of phrase when it intended to refer to only a portion of "the waters of the United States," rather than the whole. See CWA § 302(a) 33 U.S.C. 1312(a) ("a specific portion of the navigable waters"). Congress would not have extended NPDES permitting requirements to potentially thousands of water diversion facilities without any textual acknowledgment of that intention.

Miccosukee U.S. Brief at 19. The fact remains that this court's analysis is not supported by the plain language, purpose or structure of the Clean Water Act, which reflect instead that Congress intended to treat the "navigable waters" as a unified whole for the purposes of determining whether pollutants were being "added" and, therefore, NPDES would apply.

Extending the court's "soup pot" metaphor illustrates the point. This court contended that soup is not "added" by lifting a ladleful out of a pot (the single water body) and pouring it back in to the same pot. *Catskill*, 273 F2d at 492. It is no less fair to say that no soup is "added" if the pot is divided into two smaller ones and a ladle is used to move the soup between the two of them. Still the same amount of soup, no addition, just reallocation. Whether the navigable waters are

treated as one or several pots, nothing is added by simply moving them from place to place.

4. Any Doubt That The NPDES Program Does Not Extend To State And Local Government's Diversion Of Water Is Settled By Three Principles Of Statutory Construction.

Any doubt the text does not support extending NPDES to water diversions is resolved by three rules of statutory interpretation.

a. A Plain Statement Of Congress Is Required To Displace Traditional State Jurisdiction Over Local Water Management.

The Supreme Court has long recognized States have traditional and primary power over both land and water use. See *Solid Waste Authority of Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). In the Clean Water Act, "[C]ongress did not want to interfere any more than necessary with state water management." 33 U.S.C. §1251(b) & (g) ("the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act); *NWF v. Gorsuch,* 693 F.2d at 178. Distinct federal and state roles were assigned.

It is well established that a clear congressional statement is required to alter the traditional federal-state balance of powers. *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166-167, 173 (2001). There is nothing resembling a clear statement in the CWA that Congress intended to subject traditional state control of

water management and movements to federal permitting. To the contrary, congress declared its intent to preserve the rights of the States to plan, develop and allocate their waters resources. CWA § 101(b), (g), 33 U.S.C. § 1251(b), (g). The federal and state governments were given distinct roles under the CWA which are obliterated by this court's decision.

Absent a clear congressional statement, which does not appear in the Clean Water Act, the court should avoid interpreting the jurisdictional boundary between federal and state responsibility for water transfers contrary to the longstanding and consistent practice of the federal administrative agencies charged by Congress with implementing the Act.

b. The Extension Of NPDES To Water Diversions Leads To Absurd, Wholly Impracticable Results.

This court's earlier interpretation of Section 402 should also be rejected because it leads to absurd, wholly impracticable results with unintended hardships that would undermine the entire regime of non-point source regulation. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (proper interpretation not only avoids "absurd or futile results," but also rejects "merely an unreasonable one 'plainly at variance with the policy of the legislation as a while'"); *Burnett v. Guggenheim*, 288 U.S. 280, 285 (1933) (Statute construed to avoid unnecessary hardship).

The interpretation of this court is untenable and impracticable because:

1. The ability to freely divert, transport, store and use water in accordance with state law and waters allocations made thereunder is vital to the social and economic well-being of the nation. Since NPDES prohibits the addition of "*any*" pollutant, not only those that exceed water quality standards,[4] the transfer of *any* water becomes a discharge under this court's interpretation. A "movement" becomes an "addition" and "navigable waters" become "pollutants." The "navigable waters" are treated on par with industrial and municipal waste. Every federal, state, regional, and local agency charged with managing a State's waters is subjected to NPDES every time it determines the public interest is served by moving them, necessitating hundreds of thousands of additional NPDES permits across the country.

2. By ignoring the line Congress drew between point and nonpoint sources, the court of appeals has pitted NPDES—the program designed to eliminate the flow of pollutants into the Nations waters—against CWA-approved state planning processes established to ensure that both water quantity and quality

[4] Every body of water contains distinct constituents. See Brian J. Skinner & Stephen C. Porter, PHYSICAL GEOLOGY 283-285 (1987). The D.C. Circuit in *Gorsuch* explained, for example, that the very act of damming a river changes the constituents of the water above the dam, so that water going over the dam has different pollutants than the receiving water. See 693 F.2d at 161-164 (discussing "a variety of interrelated water quality problems, both in the reservoirs and in the river water downstream from a dam," caused by dams, and concluding that "[d]ams affect environmental quality in a large number of ways, both good and bad").

needs are met through comprehensive watershed planning and control systems. NPDES targets wastewater outflows by imposing maximum "effluent limitations." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976); 33 U.S.C. § 1311(b), (c). Those technology-based effluent limitations require compliance without consideration of local water resource planning and wildlife management goals. If the decision below stands, the planned solution to water quality problems caused by diversions—traditionally state regulatory strategies, best management practices, land use planning, urban waste management, public education, and ground water controls—will be replaced with technology-based effluent limitations that give no consideration to quantity requirements not only of urban and agricultural areas, but of the environment itself. Unlike industrial or municipal wastewater outflows, which are continuous and of known quality, discharges from water control structures are highly variable in timing and constituents. The City of New York's tunnels are major components of the City's overall water management, providing water supply to millions. Only through nonpoint source programs does the City have the flexibility to maintain the benefits of its conveyance system in balance with its detrimental effects on water quality. Trying to apply NPDES point source permits is unsound scientifically and economically. NPDES is simply not designed to handle these complexities for

which areawide water quality plans are the better regulatory tool. *Gorsuch*, 693 F.2d at 182.

3. What makes the result even more absurd is that under the court's rule New York City has been violating the CWA for decades by operating water control devices without NPDES permits. If the court of appeals decision stands, the City will be fined $5.7 million (out of a maximum possible civil penalty of $63 million) for operating a water supply system through which it had transferred water for 70 years and upon which the City greatly depends. The City will have to deal with efforts to impose liabilities for inevitable future violations as well.

4. The court replaces the clear line drawn by Congress between point sources of pollutants and nonpoint sources of pollution—a line that has governed water management for 30 years—with a test that will require actually intensive inquiries into whether the waters are "distinct." Such a test is fraught with untenable practical complications and implications. The Eleventh Circuit's ruling in *Miccosukee* held "distinct" waters separated only by a man-made levee. Scarcely any public water management system would escape NPDES regulation.

* * *

Never since adoption of the CWA over 30 years ago has the federal NPDES program been used to regulate pollution caused solely by the act of connecting and moving navigable waters through tunnels, canals, pipes or levees from one water

body to another. The prior panel's test, however, turns that history and the program upside down.

Given the host of serious practical problems that follow from this court's approach, one is "struck by what Congress did not say." *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971). "Congress would certainly recognize" the practical impact of extending NPDES permitting to virtually every diversion of water throughout the Nation, including its "alter[ation of] sensitive federal-state relationships." *Id.* at 812. "[T]he fact that [this impact is] not" expressly addressed in the statute or "even discussed in the legislative history - - - strongly suggests that Congress did not intend" to reach so far. *Ibid.*

c. Under The Rule Of Lenity The Clean Water Act Is Subject To Stricter Interpretation.

The CWA is enforceable through criminal as well as civil penalties. Violations carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under this court's interpretation, anyone that diverts water into another "distinct" water body commits a criminal offense. Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like Section 402, that have both criminal and civil

consequences. See *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] . . . not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); *id.* at 519 (Scalia and Thomas, JJ., concurring). Because this court's conclusion that a "addition" occurs merely from transporting water between distinct water bodies is hardly an "unambiguously correct" interpretation of the CWA (*United States* v. *Granderson*, 511 U.S. 39, 54 (1994)), and because that expansive interpretation exposes Petitioner and countless other public water managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected.

CONCLUSION

Given the national implications of this case, these amici urge the court to carefully reconsider the breadth of its earlier interpretation imposing NPDES against New York City and, if necessary, at the very least seek further guidance of the federal agencies.

Thereupon, this court should adopt the longstanding and consistent legal reasoning and public policy determinations that have been implemented for over 30 years by the U. S. Environmental Protection Agency and followed by the District of Columbia, Fourth and Sixth Circuits and under which NPDES would not apply to the water conveyances in this matter.

Respectfully submitted,

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June 21, 2004

CERTIFICATE OF COMPLIANCE

I, James E. Nutt, counsel for The South Florida Water Management District, certifies that this brief contains 4,050 words and complies with the type volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B).

_____

James E. Nutt

CERTIFICATE OF SERVICE

I, James E. Nutt, counsel for amici, certify that I caused copies of the Brief of The South Florida Water Management District, National Association of Flood and Stormwater Management Agencies and Florida Association of Special Districts as Amici Curiae, and accompanying Motion for leave, to be served on June 21, 2004, by Federal Express on the following counsel:

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I caused an original and 9 copies of this brief to be mailed to the Clerk for filing on June 21, 2004 by Federal Express.

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