

NO. 94293-5

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and
STATE OF WASHINGTON, POLLUTION CONTROL
HEARINGS BOARD,

Respondents.

STATE OF WASHINGTON'S CORRECTED SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Consistent with federal and state regulations, the Department of Ecology granted a National Pollutant Discharge Elimination System permit to Seattle Iron and Metals that (1) forbids releasing wastewater with PCBs over 0.00017 micrograms of per liter (μ/L); (2) requires technical and management practices to reduce PCBs to the permitted level; and (3) requires monitoring using chemical test Method 608, which has a minimum detection limit of 0.25 μ/L . 40 C.F.R. Part 136; WAC 173-201A-260(3)(h).

Soundkeeper contends that Seattle Iron must be prohibited from discharging wastewater unless its permit requires Seattle Iron to use Method 1668c to test for PCBs. But Method 1668c has been soundly rejected for use in discharge permits. During President Obama's tenure, the EPA considered amending its rules to require monitoring with Method 1668c. Studies by federal agencies and private laboratories revealed that Method 1668c does not consistently produce accurate data. 75 Fed. Reg. 58020, 58023 (Sept. 23, 2010). As a result, EPA did not approve Method 1668c for use in discharge permits, and federal regulations continue to require monitoring with Method 608. 75 Fed. Reg. at 58023.

Soundkeeper contends that Method 608 allows permit holders to violate the PCB limit. Not so. Monitoring is just one of the ways in which

discharge permits limit PCBs. In addition to monitoring, Seattle Iron's permit forbids discharge of wastewater with over 0.00017 $\mu\text{g}/\text{L}$ of PCBs. It also requires Seattle Iron to use business and water treatment practices designed to reach the PCB cap. Ecology recognizes the limitations of Method 608. But until a more accurate, consistent method is developed, there is no basis for compelling Ecology to ask for EPA approval of another analytical method, or for revoking Seattle Iron's permit.

II. STATEMENT OF THE ISSUES

1. Was it lawful for Ecology to issue a wastewater discharge permit requiring Seattle Iron to use Method 608 to monitor polychlorinated biphenyls (PCBs), when Method 608 is the only monitoring method approved by state and federal regulations?

2. When a discharge permit limits PCB discharges to 0.00017 $\mu\text{g}/\text{L}$, but the only accurate, legally permissible monitoring test has a detection limit of 0.25 $\mu\text{g}/\text{L}$, does the permit limit PCB discharges to 0.00017 $\mu\text{g}/\text{L}$?

III. STATEMENT OF THE CASE

A. Discharge Permits Limit the Amount of PCBs In Wastewater

The federal Clean Water Act prohibits anyone from discharging pollutants into bodies of water, unless they first obtain a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a).

Discharge permits limit the amount of PCBs and other pollutants that permit holders can release in their wastewater. Ecology is responsible for issuing the permits in Washington.¹ RCW 90.48.260(1)(a).

One of the chemicals regulated by discharge permits is polychlorinated biphenyls, or PCBs. PCBs are manmade chemicals that pose a number of risks to human health. These chemicals were widely used from the 1920s until the late 1970's, in manufacturing, in common household products like televisions, refrigerators, cars, floor finish and paint, and in industrial products such as building materials, plasticizers, electrical transformers, and caulk.² The United States produced an estimated 1.5 billion pounds of PCBs.³ Although PCBs were largely banned in the late 1970's, they break down extremely slowly.⁴ They continue to be pervasive not just in industrial wastewater, but also in stormwater runoff from roads and parking lots, and even human waste. As a result, manufacturers,

¹ Not all states have federal approval to issue NPDES permits. In states that do not have such authority, the permit program is directly administered by the federal Environmental Protection Agency. 33 U.S.C. § 1342.

² EPA, *Learn about Polychlorinated Biphenyls (PCBs)*, <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#release> (last visited Aug. 24, 2017); NOAA, *What are PCBs?*, <https://oceanservice.noaa.gov/facts/pcbs.html> (last visited Aug. 24, 2017); NOAA, *PCBs: Why Are Banned Chemicals Still Hurting the Environment?*, <https://response.restoration.noaa.gov/about/media/pcbs-why-are-banned-chemicals-still-hurting-environment-today.html> (last visited Aug. 24, 2017).

³ See *supra* note 2.

⁴ See *supra* note 2.

recyclers, state and local government, and municipal waste treatment facilities all must have discharge permits that address PCBs.

Wastewater discharge permits tackle PCBs in three ways. First, permits limit PCB discharges. When Seattle Iron obtained its permit, the PCB limit was 0.00017 micrograms per liter of water (0.00017 $\mu\text{g/L}$).⁵ Second, permit holders are required to develop equipment and management practices to reduce and treat PCB contaminated water. And third, permits set forth the testing method that must be used to monitor PCBs in wastewater. The testing method is the only factor at issue in this appeal.

Under state regulations, permits must use the testing method found in the federal regulations. WAC 173-201A-260(3)(h). Federal regulations require discharge permit holders to monitor wastewater using “sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters.” 40 C.F.R. § 122.44(i)(1)(iv). A testing method is sufficiently sensitive if it “has the lowest [method minimum detection level] of the analytical methods approved under 40 CFR. part 136.”⁶ 40 C.F.R. § 122.44(i)(1)(iv)(A)(2);

⁵ In 2016, the EPA lowered the PCB limit to .000007 $\mu\text{g/L}$. 81 Fed. Reg. 85417, 85430 (Nov. 28, 2016) (Table 1, Line 90, Column C, scientific notation “7E-06” equals .000007). This brief will refer to the earlier PCB limit of 0.00017 $\mu\text{g/L}$, because that is the limit reflected in Seattle Iron’s permit. The PCB limit in Seattle Iron’s permit is uncontested.

⁶ The minimum detection limit is the “minimum concentration of an analyte (substance) that can be measured and reported with a 99% confidence that the analyte concentration is greater than zero.” 40 C.F.R. § 136.2(f). In other words, this is the limit

WAC 173-201A-260(3)(h). The only federally approved test is Method 608. 40 C.F.R. § 136. Therefore, the State's water quality regulations require using Method 608. WAC 173-201A-260(3)(h).

Method 608 has a minimum detection limit of 0.25 µ/L and a practical quantitation limit of 0.05 µ/L, considerably higher than the human health limit of 0.00017 µ/L. *Puget Soundkeeper All. v. Dep't of Ecology*, No. 13-137c, at 24 (Wash. Pollution Control Hr'gs Bd. July 23, 2015); Pet. at 9. In 2010, the EPA proposed adding a more sensitive test, Method 1668c, to the list of approved methods. 75 Fed. Reg. at 58023. Comments on the proposed rule were submitted by thirty-five federal, state, and municipal entities, individuals, and industry organizations. 77 Fed. Reg. 29758, 29763 (May 18, 2012). Only five of the thirty-five comments supported approval. 77 Fed. Reg. 29758, 29763. One of the primary concerns with Method 1668c was the "ubiquitous problem of background contamination." *Id.* Method 1668c is so sensitive that even the air in a blank sample container may test positive for PCBs. As the Los Alamos National Laboratory explained, the background contamination creates "significant inconsistencies between laboratories." Los Alamos

at which the target chemical can be reliably detected, but not necessarily reliably quantified. Board Decision at 26. The practical quantitation limit for Method 608 is 0.050 µ/L. The practical quantitation limit is a statistical calculation which results in a reliable measure of the amount of the pollutant. Board Decision at 26. The practical quantitation limit is always higher than the method detection limit.

Nat'l Lab. Comments to Proposed Amendment of 40 C.F.R. Part 136, Enclosure 1 at 1 (Dec. 20, 2010).⁷ Similarly, a Department of Defense clean water committee supported stricter testing methods, but expressed concern that Method 1668c is flawed. Dep't of Def. Clean Water Act Steering Comm. Comments to Proposed Amendment of 40 C.F.R. Part 136 (Feb. 2, 2012).⁸ The EPA's study of Method 1668c illustrated these concerns. Only six of the fourteen labs participating in the EPA's study of Method 1668c were able to report any usable wastewater data. *Id.* Three labs reported no data and five others reported that the samples were unusable. *Id.* After considering this data and the comments to the rule, the EPA decided to deferr action and further evaluate the method. *Id.*

Washington's monitoring standard is dictated by the EPA. Discharge permit holders must monitor wastewater using an analytical method approved by the EPA or a superseding published method. WAC 173-201A-206(3)(h). Ecology has discretion to ask the EPA to approve Method 1668c for regulatory monitoring. WAC 173-201A-206(3)(h). But like the federal government, Ecology has concerns about Method 1668c. Jerry Shervey, Ecology's Northwest Regional Office Supervisor for Industrial Permit Writing, testified that the sampling

⁷ <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0150>.

⁸ <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0237>.

procedures for Method 1668c are not reliable. RP 650:17-654:16. Like the laboratories and government agencies that expressed concern with EPA's proposed addition of Method 1668c, Mr. Shervey testified that the agency has experienced problems with PCB contamination levels in empty sample containers. RP 650:17-654:16. Notably, Soundkeeper's expert also testified that background contamination is a problem. RP 79:10-15.

Federal regulations also allow Soundkeeper to request that the EPA approve Method 1668c. 40 C.F.R. 136.5(a). The record does not indicate whether Soundkeeper has done so.

B. Soundkeeper Challenged the Discharge Permit Issued to Seattle Iron

In 2013, a discharge permit was issued to Seattle Iron and Metals, a recycling company located on the banks of the Lower Duwamish River. Over the last 100 years, PCBs have heavily contaminated this industrial area. *Puget Soundkeeper All. v. Dep't of Ecology*, No. 48267-3-II, 2017 WL 702504, at *1 (Wash. Ct. App. Feb. 22, 2017) (unpublished).

Seattle Iron's discharge permit tackled PCBs in three ways. First, it capped PCBs at 0.0051 micrograms per liter of water (0.0051 µg/L). Second, it required Seattle Iron to comply with the PCB cap by using

certain prevention, management, and treatment plans. AR 3254, 3269-80.⁹ Finally, the permit required Seattle Iron to use Method 608 to monitor wastewater. AR 3305. The permit expires in 2018. AR 3254.

Soundkeeper filed an appeal with the Pollution Control Hearings Board, contesting numerous aspects of Seattle Iron's discharge permit. The Board held that the permit must limit the PCBs in its wastewater discharge to 0.00017 µg/L. But the Board rejected Soundkeeper's request that Ecology be ordered to request the EPA's permission to use a more sensitive method to monitor PCBs in wastewater. The Board noted that "Method 608 is the only testing method currently approved by EPA" for monitoring discharge permits. Board Decision at 48. The Board encouraged Ecology to consider such a request, but held that it lacks authority to order Ecology to do so. Board Decision at 48.

On appeal, the Court of Appeals rejected Soundkeeper's argument that Washington law forbids using Method 608. *Puget Soundkeeper All.*, 2017 WL 702504, at *5-6. The court reasoned that federal law requires monitoring with "'sufficiently sensitive' test methods." *Id.* *7 (quoting 40 C.F.R. § 122.44.(i)(1)(iv)). A test method is sufficiently sensitive if it has the lowest PCB detection level of the methods approved under

⁹ Citation is to the Permit under appeal at the Pollution Control Hearings Board. The Board's decision modified the PCB limits to 0.00017 µg/L. Board Decision at 47.

40 C.F.R. Part 136. The court concluded that because Method 608 is the only method approved for PCBs under 40 C.F.R. Part 136, “it necessarily is the method with the lowest minimum level.” *Puget Soundkeeper All.*, 2017 WL 702504, at *7. Therefore, the court held that Seattle Iron’s permit properly used Method 608. *Id.* at *8

IV. ARGUMENT

A. Standard of Review

The Washington Administrative Procedure Act governs review of the Pollution Control Hearings Board’s decision. RCW 34.05.510; *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 584-85, 344 P.3d 199 (2015). The Board’s decision can be reversed if it is based on erroneous interpretation of the law, unsupported by substantial evidence, inconsistent with administrative regulations, or arbitrary and capricious. RCW 34.05.570(3). The Board’s review of Ecology’s actions is entitled to deference. *Snohomish County v. Pollution Control Hr’gs Bd.*, 187 Wn.2d 346, 370, 386 P.3d 1064 (2016).

An agency’s interpretation of law is given great weight if a statute is ambiguous and falls within the agency’s area of expertise, and the agency’s interpretation does not conflict with the plain language. *Id.* at 357. “Given that the legislature designated Ecology as the agency to regulate the State’s water resources, ‘Ecology’s interpretation of relevant

statutes . . . is entitled to great weight.’” *Snohomish County*, 187 Wn.2d at 370 (alteration in original) (citation omitted) (quoting *Port of Seattle v. Pollution Control Hr’gs Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004)). The same deference is accorded to Ecology’s interpretation of its own regulations. *Port of Seattle*, 151 Wn.2d at 593.

B. Method 608 Is Required by Federal and State Regulations

Seattle Iron’s discharge permit requires it to use Method 608 to test for PCBs because the test is mandated by federal and state law. 40 C.F.R. Part 136; WAC 173-201A-260(3)(h).

Federal law requires monitoring of PCBs with a “sufficiently sensitive” testing method. 40 C.F.R. § 122.44(i)(1)(iv). A method is sufficiently sensitive if (1) the minimum level detected is at or below the discharge limit or (2) the method has the lowest detection level of the analytical methods approved under 40 C.F.R. Part 136. The method specified by 40 C.F.R. Part 136 is Method 608. The minimum PCB detection limit for Method 608 is 0.05 µg/L, well above the discharge limit of .00017 µg/L. But at this time, Method 608 is the only analytical method approved under 40 C.F.R. Part 136.

Washington’s regulations require Ecology to comply with the federal rules. WAC 173-201A-260(3)(h) provides:

The analytical testing methods for these numeric criteria must be in accordance with the “*Guidelines Establishing Test Procedures for the Analysis of Pollutants*” (40 C.F.R. Part 136) or superseding methods published. [Ecology] may also approve other methods following consultation with adjacent states and with the approval of the [EPA].

WAC 173-201A-260(3)(h). Under Washington’s rule, discharge permits must employ the testing method approved by 40 C.F.R. Part 136. Since Method 608 is the only method approved by the federal rule, it is the method required by the State rule.

Soundkeeper contends that the Court of Appeals erred in “blindly” deferring to the “EPA’s apparently arbitrary requirement” that discharge permits use Method 608. Pet. at 13. What Soundkeeper neglects to mention is that the EPA proposed amending 40 C.F.R. Part 136 to require use of Method 1668c, the method favored by Soundkeeper. 75 Fed. Reg. at 58023. The EPA received comments from other government agencies, laboratories, and individuals that raised serious questions about the ability to obtain consistent results using Method 1668c. 77 Fed. Reg. at 29763; comments to proposed rule.¹⁰ As the comments disclose, when Method

¹⁰ See, e.g., <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0237> (Dep’t of Def. Clean Water Act. Steering Comm. Comments); <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0150> (Los Alamos Nat’l Lab. Comments); Comments of the Utility Water Act Group On EPA’s Proposed Changes To Analysis and Sampling Test Procedures for the Analysis of Pollutants Under the Clean Water Act (Sept. 23, 2010), <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0176> (last visited Aug. 28, 2017).

1668c is used, even a blank sample container, containing no contaminated wastewater, can exceed the PCB limit of 0.00017 µg/L. The EPA’s own tests bore this out—of the fourteen labs that tested Method 1668c, only six were able to produce relevant data. 77 Fed. Reg. at 29763. As a result of this analysis, the EPA determined that Method 1668c is promising but not yet ready for use. 77 Fed. Reg. at 29763. Ecology agrees. Use of a suspect test would not provide a just basis for citing violations of the PCB permit limit.

In issuing discharge permits, Ecology may require other superseding, published methods. The Court of Appeals rejected Soundkeeper’s argument that Method 1668c is a superseding method. *Puget Soundkeeper*, 2017 WL 702504, at *6. Because state regulations do not define the term “superseding,” the court determined the meaning of this non-technical term by looking to the dictionary. *Id.* at *6-7; *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017) (determining the definition of a non-technical word by turning to the dictionary). The dictionary defines “superseding” as “[1] to make obsolete, inferior, or outmoded, [2] to make superfluous or unnecessary, [3] to take the place of and outmode by superiority : supplant and make inferior by better or more efficiently serving a function.” *Webster’s Third New International Dictionary* 2295 (2002). Method 608

continues to be the only testing method approved by the EPA. Although Soundkeeper considers Method 1668c a superior analytical method, it has not made Method 608 obsolete or outmoded. *Puget Soundkeeper*, 2017 WL 702504, at *6-7. In its petition to the Supreme Court, Soundkeeper did not challenge this holding. *See* Pet.

If there is any remaining ambiguity, the agency's interpretation of its own rule "is given great weight where that agency has the duty to administer the statute." *Thorpe v. Inslee*, 188 Wn.2d 282, 290, 393 P.3d 1231 (2017). As this Court has recognized, the legislature entrusted Ecology with regulating the State's waterways. *Snohomish County*, 187 Wn.2d at 370. In addition, the federal government has entrusted Ecology with administering the federal discharge permit program.

Ecology applied its expertise in determining that Method 1668c has not superseded Method 608. Ecology's Regional Supervisor Jerry Shervey testified that Ecology is using Method 1668c in some environmental studies. He explained that there are sampling problems with the method, because even the ambient air has enough PCBs to contaminate a sample container. RP 650:17-654:16. As a result, Method 1668c does not consistently determine total PCBs with precision. For that reason, the EPA, governmental and private commenters on the proposed adoption of Method 1668c, and Ecology all agree that Method 1668c is not ready to

supersede Method 608 for wastewater monitoring. Determining whether one chemical method has superseded another is precisely the type of analysis that warrants deference. Here, Ecology has properly employed its expertise in determining that Method 1668c has not superseded Method 608 and is not sufficiently accurate to do so.

C. Ecology Is Not Required to Seek EPA Approval of an Unreliable Testing Method

Ecology has authority under WAC 173-201A-260(3)(h) to approve other testing methods if it consults with adjacent states and obtains EPA approval. Given the analysis contained in the comments to the proposed amendment to 40 C.F.R. Part 136, and Ecology's own experiences with Method 1668c, Ecology has chosen not to do so.

At the Pollution Control Hearings Board, Soundkeeper asked the Board to require Ecology to ask the EPA to allow Method 1668c to be used in Seattle Iron's discharge permit. Board Decision at 34. In other words, the relief sought was a mandamus order, compelling Ecology to engage in a discretionary act. As this Court has consistently held, when an agency exercises its discretion, "mandamus does not lie to force them to act in a particular manner." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999) (quoting *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978)).

Ecology had no basis for asking that the EPA approve use of Method 1668c for wastewater discharge monitoring. The analytical method used to monitor Washington's water quality must consider "the precision and accuracy of the sampling and analytical methods used." WAC 173-201A-260(3)(g). Until the shortcomings of Method 1668c are resolved, it cannot be used to enforce compliance. Because Ecology has exercised its discretion in a manner that is neither arbitrary nor capricious, there is no basis for mandamus.

If Soundkeeper believes that Method 1668c is accurate, it need not wait for Ecology to request that the EPA approve its use. It can independently petition the EPA. 40 C.F.R. Part 135(a).

D. Using Method 608 for Monitoring Does Not Authorize Seattle Iron to Violate State Water Quality Standards

Discharge permits must ensure compliance with Washington's water quality standards, and discharges cannot cause or contribute to violation of the water quality standards. WAC 173-220-130(1)(b)(i); WAC 173-201A-510(1). Seattle Iron's discharge permit complies with this requirement by mandating that its waste water contain no more than 0.00017 µg/L of PCBs, the applicable human health limit. The permit also requires the use of business practices and equipment that will enable Seattle Iron to comply with the discharge limit. CP 3254.

Soundkeeper contends that using Method 608 to monitor compliance effectively grants Seattle Iron permission to discharge waste containing up to 0.25 µg/L of PCBs. Not so. Discharges that contain more than 0.00017 µg/L of PCBs are prohibited. AR 3259-60. “Any discharge of any pollutant more frequent than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” WAC 173-220-150(1)(c). The discharge limit does not change based on the sensitivity of the test method used for routine monitoring.

In arguing that the sensitivity of the monitoring test controls the discharge limit, Soundkeeper cites *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn. App. 127, 356 P.3d 753 (2015). That case addressed a discharge permit Ecology issued to an oil refiner, allowing the refiner to discharge wastewater that complied with limits on acute toxicity. State and federal regulations explicitly linked the acute toxicity discharge limit to the detection limit of the “whole effluent toxicity” test used to determine compliance. *Puget Soundkeeper All.*, 189 Wn. App. at 143. Consistent with state regulations, an Ecology employee testified that when a permit holder fails a whole effluent toxicity test, there is “a definite toxicity hit.” *Id.* at 146. Federal regulators also viewed a failure of the whole effluent toxicity test as a permit violation. *Id.* at 147

n.6. Despite this, the oil refiner's permit allowed it to fail the test and continue to discharge wastewater, without being subjected to enforcement action. *Puget Soundkeeper All.*, 189 Wn. App. at 133. The Court of Appeals held that Ecology cannot issue a permit that allows the permit holder to fail an admittedly accurate test, and continue to discharge wastewater. *Id.* at 152.

Unlike the acute toxicity test, the test for monitoring PCBs does not dictate the discharge limit. If it did, discharges below 0.25 µg/L of PCBs—the minimum detection limit of Method 608—would be allowed. As required by state and federal regulations, and the decision in *Puget Soundkeeper Alliance*, wastewater permits prohibit PCB discharges above 0.00017 µg/L. Seattle Iron's permit also imposes extensive requirements for equipment and management practices it must use to prevent, manage, and treat PCB contaminated water so that it does not exceed 0.00017 µg/L. Permit at 15-27. The purpose of these requirements is to make sure Seattle Iron is operating in a way that will allow it to comply with the PCB limit of 0.00017 µg/L, not the detection limit of Method 608.

In the end, the relief requested by Soundkeeper is unrealistic and irresponsible. Soundkeeper contends that unless Ecology ignores state and federal regulations, and requires monitoring with Method 1668c, Seattle Iron should not receive a discharge permit. Failing to issue a permit will

not make the wastewater disappear for Seattle Iron. Nor will it disappear for the state and municipal governments that receive discharge permits for stormwater on roads, or for the municipal wastewater treatment plants that handle human waste. Without a permit, there are no monitoring requirements, and no required management practices or required treatment plans for PCB contaminated water.

V. CONCLUSION

The Board decision should be upheld. Seattle Iron's permit complies with state and federal regulations. In addition to following the law, Ecology properly applied its expertise in determining that Method 1668c is not a superseding method and does not deliver accurate, consistent data.

RESPECTFULLY SUBMITTED this 28th day of August 2017.

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I certify under penalty of under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of September 2017, at Olympia, Washington.

s/ Wendy R Scharber

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SOLICITOR GENERAL OFFICE

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