
SUBSTITUTE SENATE BILL 5776

State of Washington

58th Legislature

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By Senate Committee on Land Use & Planning (originally sponsored by Senators Doumit, Morton, Hargrove, Mulliken, Rasmussen, Swecker, Haugen, Zarelli, Reardon, Parlette, McAuliffe and Winsley)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to review of permit decisions by state agencies and
2 local governments for economic development projects; amending RCW
3 43.21B.110, 77.55.170, and 90.58.180; adding a new chapter to Title 43
4 RCW; and declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The purpose of this chapter is to reform the
7 process of appeal and review of permit decisions made by state agencies
8 for qualifying economic development projects, by establishing uniform,
9 expedited, and consolidated appeal procedures and uniform criteria for
10 reviewing such decisions, in order to provide consistent, predictable,
11 and timely judicial review. The appeal process authorized in this
12 chapter is intended to be the exclusive process for review of decisions
13 made by agencies on permit applications for qualifying economic
14 development projects, superseding other existing administrative board
15 appeal procedures.

16 NEW SECTION. **Sec. 2.** The definitions in this section apply
17 throughout this chapter unless the context clearly requires otherwise.

1 (1) "Final decision" means the highest and last decision available
2 within the permit agency with respect to a permit application to the
3 agency, including but not limited to decisions resulting from internal
4 appeals available within the agency for the permit decision.

5 (2) "Participating permit agency" means any permit agency in which
6 the applicant for a qualifying project has filed an application for an
7 environmental or land use permit that is required for the qualifying
8 project.

9 (3) "Permit" means any license, permit, certificate, certification,
10 approval, compliance schedule, or other similar document pertaining to
11 any regulatory or management program related to the protection,
12 conservation, use of, or interference with the land, air, or water in
13 the state, which is required to be obtained from a state agency or
14 local government prior to constructing or operating a qualifying
15 project. As used in this definition, "permit" does not include
16 building, grading, and other nondiscretionary construction permits.

17 (4) "Permit agency" means any state or local government authorized
18 by law to issue permits.

19 (5) "Qualifying project" means an economic development project that
20 is (a) located within a county that qualifies as a distressed area as
21 defined in RCW 43.168.020(3) and a rural natural resources impact area
22 as defined in RCW 43.160.020, and (b) designed to provide at least
23 thirty full-time year-round jobs.

24 NEW SECTION. **Sec. 3.** The appeal process authorized in this
25 chapter shall, notwithstanding any other provisions of this code, be
26 the exclusive process for review of the decisions made by participating
27 permit agencies on permit applications for a qualifying project and
28 shall be in lieu of state hearings board or other state quasi-judicial
29 appeals processes that would otherwise apply to final permit decisions
30 by the agencies. The superior court civil rules shall govern
31 procedural matters for the appeal process under this chapter to the
32 extent that the rules are consistent with this chapter.

33 NEW SECTION. **Sec. 4.** (1) Proceedings for review under this
34 section shall be commenced by filing a petition in the superior court
35 for the county in which the property of the qualifying project is
36 located.

1 (2) Such petition is barred, and the court may not grant review,
2 unless the petition is timely filed with the court and timely served on
3 the following persons who shall be parties to the review of the
4 petition:

5 (a) The participating permit agencies, which for purposes of the
6 petition shall be (i) if a state agency, the director thereof, and (ii)
7 if a local government, the jurisdiction's corporate entity and not an
8 individual decision maker;

9 (b) Each of the following persons if the person is not the
10 petitioner:

11 (i) Each person identified by name and address in the application
12 to the participating permit agencies;

13 (ii) Each person identified in project application documents as an
14 owner of the property at issue or, if none, each person identified as
15 a taxpayer for the property at issue in the records of the county
16 assessor.

17 (3) The petition is timely if it is filed and served on all parties
18 listed in subsection (2) of this section within twenty-one days of the
19 issuance by the permit agency of the permit for the qualifying project.

20 (4) For the purposes of this section, the date on which a permit
21 decision is issued is:

22 (a) Three days after a written decision is mailed by the permit
23 agency to the project applicant or, if not mailed, the date on which
24 the permit agency provides notice that a written decision is publicly
25 available; or

26 (b) If (a) of this subsection does not apply, the date the decision
27 is entered into the public record.

28 (5) Service on all parties must be in accordance with superior
29 court rules and applicable statutes. Service by mail is effective on
30 the date of mailing. Proof of service shall be by affidavit or
31 declaration under penalty of perjury.

32 NEW SECTION. **Sec. 5.** If the project applicant for the permit
33 approval is not the owner of the real property at issue, and if the
34 owner is not accurately identified in the records referred to in this
35 chapter, the applicant shall be responsible for promptly securing the
36 joinder of the owners. In addition, within fourteen days after service
37 each party initially named by the petitioner shall disclose to the

1 other parties the name and address of any person whom such party knows
2 may be needed for just adjudication of the petition, and the petitioner
3 shall promptly name and serve any such person whom the petitioner
4 agrees may be needed for just adjudication. If such a person is named
5 and served before the initial hearing, leave of court for the joinder
6 is not required, and the petitioner shall provide the newly joined
7 party with copies of the pleadings filed before the party's joinder.
8 Failure by the petitioner to name or serve, within the time required by
9 section 4(3) of this act, persons who are needed for just adjudication
10 but who are not identified in the records referred to in this section
11 shall not deprive the court of jurisdiction to hear the petition.

12 NEW SECTION. **Sec. 6.** Standing to bring a petition under this
13 chapter is limited to the following persons:

14 (1) The applicant and the owner of the property to which the permit
15 decision is directed;

16 (2) Another person aggrieved or adversely affected by the permit
17 decision, or who would be aggrieved or adversely affected by a reversal
18 or modification of the permit decision. A person is aggrieved or
19 adversely affected within the meaning of this section only when all of
20 the following conditions are present:

21 (a) The permit decision has prejudiced or is likely to prejudice
22 that person;

23 (b) That person's asserted interests are among those that at least
24 one participating permit agency was required to consider when it made
25 its permit decision;

26 (c) A judgment in favor of that person would substantially
27 eliminate or redress the prejudice to that person caused or likely to
28 be caused by the permit decision; and

29 (d) The petitioner has exhausted his or her administrative remedies
30 to the extent required by law.

31 NEW SECTION. **Sec. 7.** A petition must set forth:

32 (1) The name and mailing address of the petitioner;

33 (2) The name and mailing address of the petitioner's attorney, if
34 any;

35 (3) The name and mailing address of the permit agency whose permit
36 is at issue, if any;

- 1 (4) A duplicate copy of the permit decision;
- 2 (5) Identification of each person to be made a party under this
3 chapter;
- 4 (6) Facts demonstrating that the petitioner has standing to seek
5 judicial review under this chapter;
- 6 (7) A separate and concise statement of each error alleged to have
7 been committed;
- 8 (8) A concise statement of facts upon which the petitioner relies
9 to sustain the statement of error; and
- 10 (9) A request for relief, specifying the type and extent of relief
11 requested.

12 NEW SECTION. **Sec. 8.** (1) Within seven days (a) after the petition
13 is served on the parties identified in section 4(2) of this act or (b)
14 if the project applicant elects consolidation of the project permits as
15 provided in section 9 of this act after the appeal period for the final
16 permit issued for the qualifying project, the petitioner shall note,
17 according to the local rules of superior court, an initial hearing on
18 jurisdictional and other preliminary matters and, if applicable, other
19 pretrial matters. This initial hearing shall be set no sooner than
20 thirty-five days and not later than fifty days after the petition is
21 served on the parties identified in section 4(2) of this act or if
22 applicable after the appeal period for the final permit issued on the
23 qualifying project.

24 (2) The parties shall note all motions on jurisdictional and
25 procedural issues for resolution at the initial hearing, except that a
26 motion to allow discovery may be brought sooner. Where confirmation of
27 motions is required, each party shall be responsible for confirming its
28 own motions.

29 (3) The defenses of lack of standing, untimely filing or service of
30 the petition, lack of good faith or improper purpose in filing, and
31 failure to join persons needed for just adjudication are waived if not
32 raised by timely motion noted to be heard at the initial hearing,
33 unless the court allows discovery on such issues.

34 (4) The petitioner shall move the court for an order at the initial
35 hearing that sets the date on which the permit decision record of
36 applicable permit agency or agencies must be submitted, sets a briefing

1 schedule, sets a discovery schedule if discovery is to be allowed, and
2 sets a date for the hearing or trial on the merits.

3 (5) The parties may waive the initial hearing by scheduling with
4 the court a date for the hearing or trial on the merits and filing a
5 stipulated order that resolves the jurisdictional and procedural issues
6 raised by the petition, including the issues identified in subsections
7 (3) and (4) of this section.

8 (6) A party need not file an answer to the petition.

9 NEW SECTION. **Sec. 9.** (1) The project applicant, if a party, may
10 within seven days after receiving service of the petition file with the
11 court an affidavit certifying all environmental or land use permit
12 applications that the project applicant has filed with participating
13 permit agencies for the qualifying project. The court shall request
14 verification from the participating agencies of the permit applications
15 certified in the project applicant's affidavit and of the expected date
16 for final decision on the permit applications. If permits for the
17 qualifying project are verified by a participating permit agency as
18 applied for but not yet issued, the court shall toll from the date of
19 filing of the applicant's affidavit the hearings and other schedules as
20 set forth in section 8 of this act for any and all petitions for review
21 already filed on the qualifying project until twenty-one days after the
22 issuance of the final permit for the qualifying project that has been
23 certified in the applicant's affidavit and verified by a participating
24 agency as applied for.

25 (2) If petitions for review of other permits issued by
26 participating permit agencies for the qualifying project have
27 previously been filed with the court, the court shall consolidate all
28 such petitions into the same case for review and hearing. The
29 schedules set forth in section 8 of this act shall be adjusted
30 accordingly.

31 NEW SECTION. **Sec. 10.** The court shall provide expedited review of
32 petitions filed under this chapter. Any matter reviewed on the
33 decision record as provided in section 13(1) of this act must be set
34 for hearing within sixty days of the date set for submitting the
35 decision record of all participating permit agencies, absent a showing
36 of good cause for a different date or a stipulation of the parties.

1 Any matter reviewed de novo as provided in section 13(3) of this act
2 must be set for hearing or trial no later than one hundred eighty days
3 after the initial hearing date.

4 NEW SECTION. **Sec. 11.** (1) A petitioner or other party may request
5 the court to stay or suspend an action by a participating permit agency
6 or another party to implement the decision under review. The request
7 must set forth a statement of grounds for the stay and the factual
8 basis for the request.

9 (2) A court may grant a stay only if the court finds that: (a) The
10 party requesting the stay is likely to prevail on the merits, (b)
11 without the stay the party requesting it will suffer irreparable harm,
12 (c) the grant of a stay will not substantially harm other parties to
13 the proceedings, and (d) the request for the stay is timely in light of
14 the circumstances of the case.

15 (3) The court may grant the request for a stay upon such terms and
16 conditions, including the filing of security, as are necessary to
17 prevent harm to other parties by the stay.

18 NEW SECTION. **Sec. 12.** (1) Within forty-five days after entry of
19 an order to submit the record, or within such a further time as the
20 court allows or as the parties agree, each participating agency shall
21 submit to the court a certified copy of the record for judicial review
22 of the permit decision, except that the petitioner shall prepare at the
23 petitioner's expense and submit a verbatim transcript of any hearings
24 held on the matter.

25 (2) If the parties agree, or upon order of the court, the record
26 shall be shortened or summarized to avoid reproduction and
27 transcription of portions of the record that are duplicative or not
28 relevant to the issues to be reviewed by the court.

29 (3) The petitioner shall pay the participating agency the cost of
30 preparing the record before the participating agency submits the record
31 to the court. Failure by the petitioner to timely pay the
32 participating agency relieves the participating agency of
33 responsibility to submit the record and is grounds for dismissal of the
34 petition.

35 (4) If the relief sought by the petitioner is granted in whole or
36 in part the court shall equitably assess the cost of preparing the

1 record among the parties. In assessing costs the court shall take into
2 account the extent to which each party prevailed and the reasonableness
3 of the parties' conduct in agreeing or not agreeing to shorten or
4 summarize the record under subsection (2) of this section.

5 NEW SECTION. **Sec. 13.** (1) For all permit decisions being reviewed
6 that (a) were made by quasi-judicial bodies or permit agency officers
7 who made factual determinations in support of the decisions, and (b)
8 provided proceedings in which the parties had an opportunity consistent
9 with due process to make records on the factual issues, judicial review
10 of factual issues and the conclusions drawn from the factual issues
11 shall be confined to the records created by the quasi-judicial bodies
12 or permit agency officers, except as provided in subsections (2)
13 through (4) of this section.

14 (2) For decisions described in subsection (1) of this section, the
15 records may be supplemented by additional evidence only if the
16 additional evidence relates to:

17 (a) Grounds for disqualification of a member of the body or of the
18 officer that made the permit decision, when such grounds were unknown
19 by the petitioner at the time the record was created;

20 (b) Matters that were improperly excluded from the record after
21 being offered by a party to a permit decision proceeding; or

22 (c) Matters that were outside the jurisdiction of the body or
23 officer that made the permit decision.

24 (3) For permit decisions other than those described in subsection
25 (1) of this section, the judicial review of the permit decision shall
26 be de novo on issues presented as error in the petition.

27 (4) The court may require or permit corrections of ministerial
28 errors or inadvertent omissions in the preparation of the record.

29 (5) The parties may not conduct pretrial discovery except with the
30 prior permission of the court, which may be sought by motion at any
31 time after service of the petition. Except as required under
32 subsection (3) of this section, the court shall not grant permission
33 unless the party requesting it makes a prima facie showing of need.
34 The court shall strictly limit discovery to what is necessary for
35 equitable and timely review of the issues that are raised under
36 subsections (2) and (3) of this section. If the court allows the
37 record to be supplemented or requires de novo review, the court shall

1 require the parties to disclose before the hearing or trial on the
2 merits the specific evidence they intend to offer. If any party, or
3 anyone acting on behalf of any party, requests records under chapter
4 42.17 RCW relating to the matters at issue, a copy of the request shall
5 simultaneously be given to all other parties and the court shall take
6 such request into account in fashioning an equitable discovery order
7 under this subsection.

8 NEW SECTION. **Sec. 14.** (1) The superior court, acting without a
9 jury, shall review the record and such supplemental evidence as is
10 permitted or required for de novo review under section 13 of this act.
11 The court may grant relief only if the party seeking relief has carried
12 the burden of establishing that one of the standards set forth in (a)
13 through (f) of this subsection has been met. The standards are:

14 (a) The body or officer that made the permit decision engaged in
15 unlawful procedure or failed to follow a prescribed process, unless the
16 error was harmless;

17 (b) The permit decision is an erroneous interpretation of the law,
18 after allowing for such deference as is due the construction of a law
19 by an agency with expertise;

20 (c) The permit decision is not supported by evidence that is
21 substantial when viewed in light of the whole record before the court;

22 (d) The permit decision is a clearly erroneous application of the
23 law to the facts;

24 (e) The permit decision is outside the authority or jurisdiction of
25 the body or officer making the decision; or

26 (f) The permit decision violates the constitutional rights of the
27 party seeking relief.

28 (2) In order to grant relief under this section, it is not
29 necessary for the court to find that the permit agency engaged in
30 arbitrary and capricious conduct. The court may grant relief on a
31 petition for review of one permit decision and not on others
32 consolidated with it for review. A grant of relief by itself may not
33 be deemed to establish liability for monetary damages or compensation.

34 (3) The court may affirm or reverse any or all permit decisions
35 under review or remand the decision for modification or further
36 proceedings involving the permit agencies. If the decision is remanded
37 for modification or further proceedings, the court may make such an

1 order as it finds necessary to preserve the interests of the parties
2 and the public, pending further proceedings or action by the permit
3 agencies.

4 **Sec. 15.** RCW 43.21B.110 and 2001 c 220 s 2 are each amended to
5 read as follows:

6 (1) The hearings board shall only have jurisdiction to hear and
7 decide appeals from the following decisions of the department, the
8 director, local conservation districts, and the air pollution control
9 boards or authorities as established pursuant to chapter 70.94 RCW, or
10 local health departments:

11 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
12 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and
13 90.56.330.

14 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
15 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
16 90.14.130, 90.48.120, and 90.56.330.

17 (c) Except as provided in RCW 90.03.210(2), the issuance,
18 modification, or termination of any permit, certificate, or license by
19 the department or any air authority in the exercise of its
20 jurisdiction, including the issuance or termination of a waste disposal
21 permit, the denial of an application for a waste disposal permit, the
22 modification of the conditions or the terms of a waste disposal permit,
23 or a decision to approve or deny an application for a solid waste
24 permit exemption under RCW 70.95.300.

25 (d) Decisions of local health departments regarding the grant or
26 denial of solid waste permits pursuant to chapter 70.95 RCW.

27 (e) Decisions of local health departments regarding the issuance
28 and enforcement of permits to use or dispose of biosolids under RCW
29 70.95J.080.

30 (f) Decisions of the department regarding waste-derived fertilizer
31 or micronutrient fertilizer under RCW 15.54.820, and decisions of the
32 department regarding waste-derived soil amendments under RCW 70.95.205.

33 (g) Decisions of local conservation districts related to the denial
34 of approval or denial of certification of a dairy nutrient management
35 plan; conditions contained in a plan; application of any dairy nutrient
36 management practices, standards, methods, and technologies to a

1 particular dairy farm; and failure to adhere to the plan review and
2 approval timelines in RCW 90.64.026.

3 (h) Any other decision by the department or an air authority which
4 pursuant to law must be decided as an adjudicative proceeding under
5 chapter 34.05 RCW.

6 (2) The following hearings shall not be conducted by the hearings
7 board:

8 (a) Hearings required by law to be conducted by the shorelines
9 hearings board pursuant to chapter 90.58 RCW.

10 (b) Hearings conducted by the department pursuant to RCW 70.94.332,
11 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

12 (c) Proceedings conducted by the department, or the department's
13 designee, under RCW 90.03.160 through 90.03.210 or 90.44.220.

14 (d) Hearings conducted by the department to adopt, modify, or
15 repeal rules.

16 (e) Appeals of decisions by the department as provided in chapter
17 43.-- RCW (sections 1 through 14 of this act).

18 (3) Review of rules and regulations adopted by the hearings board
19 shall be subject to review in accordance with the provisions of the
20 Administrative Procedure Act, chapter 34.05 RCW.

21 **Sec. 16.** RCW 77.55.170 and 2000 c 107 s 20 are each amended to
22 read as follows:

23 (1) There is hereby created within the environmental hearings
24 office under RCW 43.21B.005 the hydraulic appeals board of the state of
25 Washington.

26 (2) The hydraulic appeals board shall consist of three members:
27 The director of the department of ecology or the director's designee,
28 the director of the department of agriculture or the director's
29 designee, and the director or the director's designee of the department
30 whose action is appealed under subsection (6) of this section. A
31 decision must be agreed to by at least two members of the board to be
32 final.

33 (3) The board may adopt rules necessary for the conduct of its
34 powers and duties or for transacting other official business.

35 (4) The board shall make findings of fact and prepare a written
36 decision in each case decided by it, and that finding and decision

1 shall be effective upon being signed by two or more board members and
2 upon being filed at the hydraulic appeals board's principal office, and
3 shall be open to public inspection at all reasonable times.

4 (5) The board has exclusive jurisdiction to hear appeals arising
5 from the approval, denial, conditioning, or modification of a hydraulic
6 approval issued by the department: (a) Under the authority granted in
7 RCW 77.55.110 for the diversion of water for agricultural irrigation or
8 stock watering purposes or when associated with streambank
9 stabilization to protect farm and agricultural land as defined in RCW
10 84.34.020; or (b) under the authority granted in RCW 77.55.230 for off-
11 site mitigation proposals.

12 (6)(a) Any person aggrieved by the approval, denial, conditioning,
13 or modification of a hydraulic approval pursuant to RCW 77.55.110 may,
14 except as otherwise provided in chapter 43.-- RCW (sections 1 through
15 14 of this act), seek review from the board by filing a request for the
16 same within thirty days of notice of the approval, denial,
17 conditioning, or modification of such approval.

18 (b) The review proceedings authorized in (a) of this subsection are
19 subject to the provisions of chapter 34.05 RCW pertaining to procedures
20 in adjudicative proceedings.

21 **Sec. 17.** RCW 90.58.180 and 1997 c 199 s 1 are each amended to read
22 as follows:

23 (1) Any person aggrieved by the granting, denying, or rescinding of
24 a permit on shorelines of the state pursuant to RCW 90.58.140 may,
25 except as otherwise provided in chapter 43.-- RCW (sections 1 through
26 14 of this act), seek review from the shorelines hearings board by
27 filing a petition for review within twenty-one days of the date of
28 filing as defined in RCW 90.58.140(6).

29 Within seven days of the filing of any petition for review with the
30 board as provided in this section pertaining to a final decision of a
31 local government, the petitioner shall serve copies of the petition on
32 the department, the office of the attorney general, and the local
33 government. The department and the attorney general may intervene to
34 protect the public interest and insure that the provisions of this
35 chapter are complied with at any time within fifteen days from the date
36 of the receipt by the department or the attorney general of a copy of
37 the petition for review filed pursuant to this section. The shorelines

1 hearings board shall schedule review proceedings on the petition for
2 review without regard as to whether the period for the department or
3 the attorney general to intervene has or has not expired.

4 (2) The department or the attorney general may obtain review of any
5 final decision granting a permit, or granting or denying an application
6 for a permit issued by a local government by filing a written petition
7 with the shorelines hearings board and the appropriate local government
8 within twenty-one days from the date the final decision was filed as
9 provided in RCW 90.58.140(6).

10 (3) The review proceedings authorized in subsections (1) and (2) of
11 this section are subject to the provisions of chapter 34.05 RCW
12 pertaining to procedures in adjudicative proceedings. Judicial review
13 of such proceedings of the shorelines hearings board is governed by
14 chapter 34.05 RCW. The board shall issue its decision on the appeal
15 authorized under subsections (1) and (2) of this section within one
16 hundred eighty days after the date the petition is filed with the board
17 or a petition to intervene is filed by the department or the attorney
18 general, whichever is later. The time period may be extended by the
19 board for a period of thirty days upon a showing of good cause or may
20 be waived by the parties.

21 (4) Any person may appeal any rules, regulations, or guidelines
22 adopted or approved by the department within thirty days of the date of
23 the adoption or approval. The board shall make a final decision within
24 sixty days following the hearing held thereon.

25 (5) The board shall find the rule, regulation, or guideline to be
26 valid and enter a final decision to that effect unless it determines
27 that the rule, regulation, or guideline:

28 (a) Is clearly erroneous in light of the policy of this chapter; or

29 (b) Constitutes an implementation of this chapter in violation of
30 constitutional or statutory provisions; or

31 (c) Is arbitrary and capricious; or

32 (d) Was developed without fully considering and evaluating all
33 material submitted to the department during public review and comment;
34 or

35 (e) Was not adopted in accordance with required procedures.

36 (6) If the board makes a determination under subsection (5)(a)
37 through (e) of this section, it shall enter a final decision declaring
38 the rule, regulation, or guideline invalid, remanding the rule,

1 regulation, or guideline to the department with a statement of the
2 reasons in support of the determination, and directing the department
3 to adopt, after a thorough consultation with the affected local
4 government and any other interested party, a new rule, regulation, or
5 guideline consistent with the board's decision.

6 (7) A decision of the board on the validity of a rule, regulation,
7 or guideline shall be subject to review in superior court, if
8 authorized pursuant to chapter 34.05 RCW. A petition for review of the
9 decision of the shorelines hearings board on a rule, regulation, or
10 guideline shall be filed within thirty days after the date of final
11 decision by the shorelines hearings board.

12 NEW SECTION. **Sec. 18.** Sections 1 through 14 of this act
13 constitute a new chapter in Title 43 RCW.

14 NEW SECTION. **Sec. 19.** This act is necessary for the immediate
15 preservation of the public peace, health, or safety, or support of the
16 state government and its existing public institutions, and takes effect
17 immediately.

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