

## ***Californians for Renewable Energy, Inc. (CARE)***

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### **Comments on the California Energy Commission's Final Staff Assessment of the MEC**

K. Shawn Smallwood, Ph.D.

I have reviewed the California Energy Commission's (CEC) Final Staff Assessment (FSA) of the Application for Certification 99-AFC-3, Metcalf Energy Center. My comments on the CEC's Preliminary Staff Assessment (PSA) were ignored in the FSA, and all but one of my comments to the US Fish and Wildlife Service (USFWS) on July 18 were ignored in the FSA. Not only were my recommended changes and comments not addressed, but my comments were given no responses in the Response to Public and Agency Comments section, and my comment letter was not cited and did not appear in the References section of the FSA. I have never before been so utterly ignored when I have commented on proposed projects requiring federal or state permits.

The FSA was prepared without the benefit of the biological resources mitigation implementation and monitoring plan (BRMIMP). The BRMIMP did not appear in the References section. The FSA presents a protocol for the final BRMIMP, which needs to be turned into the CEC at least 45 days prior to groundbreaking activities (pages 499-500). The CEC clearly intends to bypass public input on the mitigation and monitoring plan, and has rendered conclusions about the adequacy of the mitigation and monitoring without even having considered the BRMIMP. It appears that the CEC has already decided to certify the MEC regardless of what mitigation and monitoring is proposed by Calpine/Bechtel, and in the absence of legitimate public participation. A well-prepared, effective mitigation and monitoring plan is critical to CEQA's foremost principle of maximizing environmental protection while avoiding or minimizing environmental harm. The FSA foregoes this principle.

#### **Minimization of impacts**

In my comments on the PSA, I pointed out that the CEC staff minimized the likely impacts of the MEC. The minimization of the potential significance of impacts on irreplaceable biological resources, whether intentional, accidental, or due to institutional bias, violates CEQA's foremost principle. The FSA continues to minimize the impacts of the MEC, but as I will demonstrate below, the FSA more flagrantly minimizes environmental impacts than did the PSA. The conclusions in the FSA are based on red herrings, false causes, and other logical fallacies that were not used in the PSA.

For example, the FSA introduces a new false cause to minimize impacts on California Red-legged Frogs. According to the FSA (page 473), "The site supports elderberry savanna that *may be* considered *potential* upland habitat for red-legged frogs" (italics added for emphasis). Staff then suggests that the potential habitat value is reduced due to overgrazing, litter, and penned roosters (page 473). Staff does not explain why penned roosters and litter would reduce habitat suitability. Overgrazing favors California ground squirrels, which excavate the burrows that are used as refugia by California Red-legged Frogs and California Tiger Salamanders. To minimize impacts on California Red-legged Frogs, the PSA claimed that dogs at the proposed MEC site chase off ground squirrels (the dogs there are either penned or chained up), and now the FSA switches to penned roosters, litter and grazing goats as factors that somehow discourage California Red-legged Frogs.

In another example, Coyote Creek is described in the FSA as a migration corridor for neotropical bird species (page 472), then later "the MEC site is not known to be an optimal flight path" (page 481). A migration corridor need not be an "optimal flight path," which appears as a red herring used to minimize the significance of the narrow northern end of the Santa Clara Valley to neotropical migrants. The MEC would occur at a choke point for neotropical migrants, as the low elevation plain of the San Francisco Bay Area severely narrows between Tulare Hill and Coyote Ridge, as does

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the Santa Clara Valley from the south. Neotropical migrants are funneled into this narrow strip of lower elevation terrain. Therefore, staff minimizes impacts to neotropical migrants when they say, “collisions would be rare” with the 240-foot long electric transmission lines and “unlikely or minimal” with the 145-foot tall HRSG stacks (page 481). If staff are correct to conclude that migrating song birds rarely fly at low heights, usually only during poor weather conditions (page 481), then staff should be concerned about mass fatalities due to collision with MEC’s tall structures during poor weather conditions, which are fairly common during migrations of neotropical birds. Furthermore, focusing only on neotropical migrants minimizes the impacts of these structures on other avian species (see my comment on the PSA, Photo 11), some of which were discussed in the PSA but not discussed in the FSA. These latter species were expected to increase their flights to the MEC project site due to Calpine/Bechtel’s proposed expansion of the riparian forest on Fisher Creek (see the PSA).

Under direct impacts (page 481), the FSA lists *potential* bird collisions with 240-foot transmission line and 145-foot tall HRSG stacks (italics added for emphasis). As I pointed out in my PSA comment (photo 11), at least one collision already occurred with existing transmission lines on Tulare Hill. There will be collisions with the additional tall structures. This direct impact is not just potential; it is real. It is a minimization of impacts to label collisions as potential.

In another example, the CEC staff concludes that Coyote Ridge and Kirby Canyon are core areas supporting high enough numbers to sustain the Bay Checkerspot Butterfly population (page 485), implying that this species will do just fine without its host plants on Tulare Hill. This conclusion minimizes impacts to Tulare Hill, lacks foundation, and contradicts the earlier conclusion that Tulare Hill’s serpentine-based grassland “serves as a stepping stone connection between the serpentine habitats of the Santa Cruz Mountains and Diablo Range” (page 471). Staff’s conclusion that core areas are enough to sustain the Bay Checkerspot Butterfly ignores my comment on the PSA, in which I described the importance of metapopulation dynamics and habitat fragmentation. Staff’s focus on only the Bay Checkerspot Butterfly in this case, and ignoring impacts to several other endangered species occurring on Tulare Hill, further minimizes impacts caused by NOx pollution. The Santa Clara Valley Dudleya occurs only in the immediate vicinity of the Santa Clara Valley. If Santa Clara County’s remaining serpentine-based grassland has really been reduced to 4,537 acres (page 485), then the MEC’s impacts on Tulare Hill alone would take more than 7.5% of the remaining habitat of the Santa Clara Valley Dudleya. Considering cumulative impacts, including current ambient NOx levels and the additional NOx due to the Coyote Valley Research Park, the Santa Clara Valley Dudleya is in jeopardy of being driven to extinction.

The CEC staff relies on yet another impact analysis performed by Calpine/Bechtel (I have lost track of how many have been done, and which one I am supposed to rely upon), and based on using “worst-case results” (page 485). However, the worst-case results were not used. In the very same paragraph, staff admits that Calpine/Bechtel assumed an ambient NOx level of 12.5 kg/ha/yr, which is 10 kg/ha/yr less than Weiss (1999) estimated as an upper confidence limit. A worst-case result would have assumed 22.5 kg/ha/yr, which is more than twice the upper range of the NOx loading needed to cause adverse ecosystem effects. Next, staff says that Calpine/Bechtel provided a revised calculation of nitrogen deposition, which included a revised background annual NOx loading, reducing it from 12.5 to 8.4 kg/ha/yr (page 486). Staff accepts Calpine/Bechtel’s dramatically reduced estimates of impacts, but this continued reduction in assumed ambient NOx loading is contrary to using worst-case results, as would be expected using the Precautionary Principle in risk assessment (O’Brien 2000), as well as CEQA’s foremost principle. Using worst-case results, or even more realistic results based on the estimated NOx loading in Weiss (1999), which was peer-reviewed and published, the estimated cumulative values of NOx loading would have more than *approached* or *exceeded* the high range of NOx loading considered sufficient to affect ecosystem structure and diversity – they would have *greatly exceeded* this high range. Considering the NOx loads to be added by the Coyote Valley

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Research Park, which as been approved by the City of San Jose, the worst-case and best-case cumulative NOx values likely would have been unacceptable to the EPA and USFWS. Staff and Calpine/Bechtel have together minimized the impacts caused by MEC-borne NOx pollution.

The CEC staff claims that nitrogen will be effectively removed by the 16-100 feet of riparian forest that is transitional between the upland and wetland areas (page 486). However, this constructed forest will occur immediately adjacent to the MEC. I expect that the effluent from the 145-foot tall HRSG stacks will travel right over the tops of this constructed forest, which will have little opportunity to remove nitrogen from the NOx load. Staff minimizes impacts with this conclusion.

The CEC staff considered only one of my concerns expressed in my letter to the USFWS on July 18, 2000. Staff concludes that this concern of mine is unwarranted because the salt pollution levels from the HRSG stacks will increase salinity concentrations in Coyote Creek far below the levels needed to kill California Red-legged Frog eggs or larvae (pages 486-487). The level needed to kill eggs is 4.5 parts per thousand (USFWS 2000), but staff conservatively estimates that the level will be 4.446 parts per million (no uncertainty range was specified). However, staff offers no details of the methods used to come to this point estimate, nor do they consider existing salt concentrations or those that might be added by the Coyote Valley Research Park. Until a convincing risk assessment is provided, my concern remains that the MEC will contribute enough salt to the Santa Clara Valley watershed to kill California Red-legged Frog eggs or larvae, which would extend the spatial area of extirpation of this threatened species from the region.

The CEC staff concluded that Fisher Creek will dry up for extended periods of time due to the cumulative water needs of both the MEC and Coyote Valley Research Park, but they deem this impact as insignificant because Fisher Creek supports no special status species (page 488). This conclusion is wrong for several reasons. First, Mt. Hamilton Thistle (SC<sup>1</sup>; California Native Plant Society 1B) occurs along Fisher Creek (FSA Table 1). Second, staff acknowledges Fisher Creek as potential dispersal habitat for California Red-legged Frog (FT) and California Tiger Salamander (C) (page 472; Table 1). California Red-legged Frogs were observed in Fisher Creek historically (Table 1, page 478), and CH2MHILL (2000) conservatively assumes these species to be present in Fisher Creek. Third, I have observed Great Blue Herons (CSC) using Fisher Creek. Fourth, staff acknowledges Fisher Creek as potential habitat for Tricolored Blackbird (CSC), Western Pond Turtle (CSC), and San Francisco Dusky-footed Woodrat (SC, CSC) (Table 1). Fifth, staff concluded (Table 1) that Coyote Creek is potential habitat for Fringed Myotis (SC), Greater Western Mastiff Bat (SC, CSC), Long-eared Myotis (SC), Long-legged Myotis (SC), Pacific Western Big-eared Bat (SC, CSC), Small-footed Myotis (SC), Yuma Myotis (SC), Riparian Brush Rabbit (FE, SE), and White-tailed Kite (SC, FP), but for unspecified reasons did not make the obvious conclusion that Fisher Creek also serves as potential habitat for these species, especially after Calpine/Bechtel expands the riparian forest as a mitigation strategy. Expanding the riparian forest of Fisher Creek, only to starve it of water, seems counter-productive and may transform the Fisher Creek mitigation into an ecological sink for multiple special status species. Staff are also wrong to base their significance determination only on projected impacts on special status species. Other species live in and along Fisher Creek, including Arboreal Salamander, Western Skink, Tree Swallow, Common Merganser, Mallard, and many others. To conclude that the extended dry-down of Fisher Creek will have insignificant environmental impacts, the CEC staff claimed there are *no* special status species in Fisher Creek, when there could be as many as 16 special status species, including 2 threatened and endangered species, and many others relying upon Fisher Creek.

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<sup>1</sup> Special status codes used in this comment include the following: FE = federal Endangered; FT = federal Threatened; SC = federal species of concern; C = federal candidate species for listing; SE = California Endangered; ST = California Threatened; CSC = California species of special concern; FP = California fully protected.

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Although California Red-legged Frogs, California Tiger Salamanders, and Western Pond Turtles were considered present despite not being seen at the MEC site (Table 1), Coast Horned Lizards (SC) were given no such benefit of conservatism. Coast Horned Lizards occur on Coyote Ridge (Fig. 2a of BRMIMP) and the prey base certainly occurs on Tulare Hill (see my comment on the PSA, Photo 2). Calpine/Bechtel also admits that Coast Horned Lizards may be present on Tulare Hill (Set 7, Attachment BR 1: 3, responses to comments on the PSA). Considering this species as absent on Tulare Hill minimizes impacts. Additionally, the FSA claims that no suitable habitat of the Foothill Yellow-legged Frog occurs in the project area (Table 1), but I found this species only 5 km away in Cherry Creek (adjacent to Calero Reservoir) and I doubt that Coyote Creek is devoid of Foothill Yellow-legged Frog habitat. I doubt that Foothill Yellow-legged Frog habitat is absent from the zone of NOx pollution from the MEC. Even CH2MHILL (1999) considers Fisher Creek to be potential Foothill Yellow-legged Frog habitat.

### **Formulation of mitigation and monitoring plans deferred to later date**

According to the FSA, the mitigation and monitoring plan (BRMIMP) will be submitted by Calpine/Bechtel at least 45 days prior to ground-breaking for the MEC. The preliminary BRMIMP states “It is anticipated that this draft Management Plan will be modified during CEC Workshops and further discussions with the USFWS, California Department of Fish and Game, Stanford University Center for Conservation Biology, and local cattle ranchers ...” (CH2MHILL 2000: G-11). To be consistent with CEQA, the BRMIMP should have presented a complete formulation of the mitigation and monitoring plan, and it should have done so in a single document that includes all the other analyses and issues typically presented in an EIR. Under CEQA, the applicant is not supposed to defer the formulation of the mitigation and monitoring plans to a later date, because the public has a right to comment on these plans before they are finalized and certified by the lead agency. In the FSA, the CEC staff exacerbates Calpine/Bechtel’s violation of CEQA by allowing the applicant to defer the formulation of the mitigation and monitoring plan to a later date – long after the FSA and staff conclusions and recommendations.

In another ironic twist caused by this deferring the formulation of the mitigation and monitoring plan to a later date, the FSA claims that Calpine/Bechtel (CH2MHILL 2000) will conduct an avian collision monitoring program under the electrical transmission lines and HRSG stacks, but the BRMIMP (page F-2) claims that the number of birds allowed to be killed by the electric transmission line and HRSG stacks (i.e., significance criteria) will be determined by the California Energy Commission CPM. The CEC was expecting the applicant to describe a monitoring program in the BRMIMP, but the applicant says the CEC will design the monitoring program. Who is really going to design this monitoring program? When? And, how is the public going to have any chance to participate with designing this program?

### **Mitigation**

#### *NOx pollution*

The CEC staff present a red herring when relating Stuart Weiss’s testimony at the CEC workshop on biological resources (page 491). According to staff, Weiss stated that management of Tulare Hill alone would not secure the Bay Checkerspot Butterfly population. Nobody has proposed that Tulare Hill be managed alone. My concern, based partly on Weiss (1999), is that the serpentine-based grassland on Tulare Hill is critical for the continued existence of Bay Checkerspot Butterfly, along with the other remaining serpentine-based grasslands in the area. The CEC’s red herring argument is used to rationalize a compensatory mitigation consisting of a 30-year endowment fund to manage and administer the 116 acres of Tulare Hill purchased by Calpine/Bechtel. In essence, this red herring argument rationalizes non-mitigation for the impacts on the Bay Checkerspot Butterfly because the

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endowment fund changes nothing in terms of NOx pollution of the environment. This argument also fails to consider the several other threatened and endangered species that live on Tulare Hill.

Staff claimed that Calpine/Bechtel will provide an adaptive management strategy for cattle grazing on Tulare Hill (page 491). However, **the BRMIMP described no adaptive management strategy**. Furthermore, I cannot see how Calpine/Bechtel could possibly implement an adaptive management strategy for cattle grazing when Calpine/Bechtel will have no control over stocking rates because they will not fence out cattle from neighboring landholders. I cannot believe staff's claim that Calpine/Bechtel will implement an adaptive management strategy.

Staff used an inappropriate formulation of compensatory mitigation requirements due to MEC-caused NOx pollution. Staff developed weightings to be multiplied against areas of impact in order to calculate the areas needed to be "conserved" (page 491). These weightings are based on the percentage increase in ambient NOx loads due to MEC pollution levels, as if Calpine/Bechtel should be held accountable only for their share of the cumulative NOx load rather than the actual environmental damage that their added NOx pollution will cause. MEC contributions of NOx loading renders the cumulative NOx loading as significant in terms of adverse effects on the ecosystem. The MEC's activities will add sufficient nitrogen to adversely affect at least 2,667 acres of serpentine-based grasslands, which support multiple threatened and endangered species. The appropriate mitigation, as I pointed out in my comment on the PSA, is to compensate for the take of the habitats within the outer contour of projected NOx deposition. Just focusing on serpentine-based grasslands, rather than the entire area of NOx deposition, 2,667 acres of out-of-area serpentine-based grassland would need to be protected using a 1:1 mitigation ratio. This more appropriate compensatory mitigation would still fail to prevent the severe take of Santa Clara Valley Dudleya, which only occurs in the vicinity of the Santa Clara Valley, and would experience a 84% loss of remaining habitat area. (A compensatory mitigation ratio of 7:1 would be even more appropriate, as I will discuss below.)

Because staff believes Tulare Hill is only marginal butterfly habitat, they reduced the compensatory mitigation ratio to 0.5:1. However, Tulare Hill "serves as a stepping stone connection between the serpentine habitats of the Santa Cruz Mountains and Diablo Range" (page 471), which was also recognized in the BRMIMP (page 1-2) and the recovery plan for serpentine grasslands (USFWS 1998). It is inappropriate to minimize impacts to the Bay Checkerspot Butterfly by concluding that the habitat on Tulare Hill is marginal. Making this conclusion is analogous to claiming that the hallway of your house provides only marginal living quarters, and so is a good place to stack your garbage. Such a conclusion ignores the context of the hallway in your house. Even though you probably spend little time in the hallway, it connects the important rooms of your house, making it one of the most functionally important aspects of your house. It is not the place to toss your garbage!

Furthermore, the reduced mitigation ratio was rationalized by the CEC's perception of the quality of Tulare Hill's habitat for the Bay Checkerspot Butterfly. The CEC's rationalization completely ignored the importance of Tulare Hill for sustaining several endangered species, as well as multiple other special status species. Tulare Hill supports >7.5% of the remaining habitat area of Santa Clara Valley Dudleya. It is identified as a priority protection site for Opler's Longhorn Moth (USFWS 1998). It either is known or suspected to support the Metcalf Canyon Jewelflower, Most Beautiful Jewelflower, Smooth Lessingia, Tiburon Indian Paintbrush, Mt. Hamilton Thistle, Edgewood Blind Harvestman, Coast Horned Lizard (see my comment on the PSA), California Red-legged Frog (FSA page 481), California Tiger Salamander (FSA page 481), American Peregrine Falcon, Ferruginous Hawk, White-tailed Kite, Western Burrowing Owl, and Golden Eagle. In how many locations in California can we find 17 special status species, 6 of which are state or federally listed as threatened or endangered? **Tulare Hill helps sustain one of the most impressive lists of special status**

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**species occurring at any site in the USA.** Losing the health and integrity of Tulare Hill's serpentine-based grassland cannot be functionally mitigated. Rather than the 0.5:1 ratio that the CEC seems to be satisfactory, a compensatory mitigation ratio should be more in the neighborhood of 7:1, which is composed of, for every acre taken, one acre conserved for each of the threatened and endangered species, and another one for the other 11 special status species. Using this more appropriate compensatory mitigation approach, 18,669 acres of serpentine-based grassland would need to be protected, which is a much greater area than all of the serpentine-based grassland remaining in Santa Clara County.

According to the FSA (page 481), providing compensation habitat on Tulare Hill and Coyote Ridge would mitigate any loss of potential upland habitat for the California Red-legged Frog. The BRMIMP linked the 116 acres on Tulare Hill and the 15 acres on Coyote Ridge to impacts caused by NO<sub>x</sub> deposition. Thus, it appears that these areas on Tulare Hill and Coyote Ridge are compensatory mitigation for both California Red-legged Frog habitat loss *and* NO<sub>x</sub> deposition on Tulare Hill. It appears that these two mitigation sites are going to pull double duty, and as I pointed out in the last paragraph, it appears these two sites are intended to mitigate for the take of up to 17 special status species. However, the compensation formula on page 491 of the FSA does not address impacts to California Red-legged Frogs, but only Bay Checkerspot Butterfly, and the mitigation sites themselves are vulnerable to NO<sub>x</sub> deposition and other forms of pollution from the MEC.

### *Lighting and noise*

I disagree that low-pressure sodium illumination and shielding “will reduce *any* adverse impacts to nocturnal wildlife (page 483; italics added for emphasis). The evidence is overwhelming that impacts are likely (see my comment on the PSA). I also disagree with the CEC's decision that no mitigation is required for noise (page 484). The CEC staff used selective referencing (i.e. Bowles 1995) to conclude that noise from MEC operations will not adversely affect hearing or other physiological functions of wildlife.

### **Staff Recommendations**

Staff concluded that the mitigation proposed by Calpine/Bechtel for direct impacts are sufficient to reduce these impacts to less than significant levels. However, few of Calpine/Bechtel's mitigation strategies involve avoidance. For example, Calpine/Bechtel proposes to mark electric transmission lines if they cause a bird collision problem (described in the BRMIMP, but not the FSA). Birds should have the opportunity to recognize the transmission lines before they run into them and die, not after. In one example of new, but flawed mitigation, Calpine/Bechtel proposes to conduct preconstruction surveys for California Red-legged Frog, California Tiger Salamander, and Western Pond Turtle, then translocate them out of the project zone. Calpine/Bechtel does not offer to move these animals beyond the deposition zone of NO<sub>x</sub> and other pollutants; they are not avoiding or minimizing environmental impacts to the maximum extent feasible.

In responding to public and agency comments on the PSA, staff says it believes that the compensatory mitigation they require will reduce the impacts to serpentine soils from nitrogen deposition to less than significant levels. In the Conclusions and Recommendations section, staff concludes that the proposed compensation package will *fully mitigate* indirect and cumulative impacts caused by the MEC to serpentine-based grasslands and all of their associated special status species. However, the compensatory mitigation described in the Mitigation section falls far short of providing roughly proportional mitigation for the adverse impacts to serpentine-based grasslands due to NO<sub>x</sub> pollution from the MEC. The compensatory mitigation sites occur within the NO<sub>x</sub> pollution zone, and the measly 131 acres of serpentine-based grassland at these sites will be just as degraded by the NO<sub>x</sub> pollution as the several thousand acres of surrounding serpentine-based

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grassland. Staff's conclusions regarding the adequacy of the compensatory mitigation package is a startling reversal of the conclusions reached in the PSA, because the compensatory mitigation package has not changed one little bit between the releases of the PSA and the FSA. In fact, by the time the FSA was released, Calpine/Bechtel had dropped mitigation measures that were proposed earlier, resulting in a net loss of compensatory mitigation. The only revelation from the FSA is that staff has disregarded public input on the MEC and has relied solely on the input from Calpine/Bechtel as they developed a rationalization for changing their conclusions and recommendations regarding the MEC.

### **Summary**

Most of the issues I raised in my earlier comment letters remain unresolved. The FSA did not address the threats to the California Red-legged Frog posed by SO<sub>x</sub>, boron, chloride, formaldehyde, acetaldehyde, acrolein, PM<sub>2.5</sub>, ozone, and ammonia, all of which are projected to be released into the environment via the MEC HRSG stacks. In my letter to the USFWS, I asked that these recognized threats to the California Red-legged Frog (USFWS 2000) be considered, along with the multiple Superfund and other hazardous waste sites occurring in the vicinity of the proposed MEC. Almost all of the issues I raised in my PSA comment letter were not addressed in any manner. The applicant's intended meaning of adaptive management has yet to be described, but the CEC staff continue to claim that Calpine/Bechtel will implement adaptive management strategies.

As I indicated in my earlier comment letters, I have many other issues that I would like to raise. However, this piece-meal release of environmental documents, which is nothing like the release of an EIR pursuant to CEQA, has strained the resources of my client and the amount of time that I can devote to this project. I am responding to the FSA in only a cursory manner. Much more work needs to be done to assess the impacts of the MEC, as well as the adequacy of the mitigation and monitoring. Much more work needs to be done to assess the environmental impacts of the alternative sites, as well. However, given the large number of special status species occurring on Tulare Hill and the Santa Clara Valley watershed, I cannot imagine that the impacts would be nearly as great at some of the alternative sites.

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29 October, 2000

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