
State Water Resources Control Board

AMENDED NOTICE OF PUBLIC HEARING

The State Water Resources Control Board
Administrative Hearings Office
will hold a public hearing
on a proposed Cease and Desist Order
and an Administrative Civil Liability Complaint against

Farmers Ditch Company

The **Public Hearing** will commence on

March 9, 2023, at 9:00 a.m.

and will be held by Zoom teleconference.

Please access Zoom by using the link:

<https://waterboards.zoom.us/j/92836012203?pwd=aTVaOG1RUUnpISDhRZ29Pb3ZCVTIQT09> with Meeting ID: 928 3601 2203 and Passcode: 100108
or by calling in at: +16699009128,,92836012203#,,,,*100108# US (San Jose)

Interested members of the public who would like to watch this hearing without participating may do so through the Administrative Hearings Office YouTube channel, accessible by clicking on “Watch AHO Hearings” at:
https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

BACKGROUND

On September 16, 2022, Jule Rizzardo, Assistant Deputy Director for the State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) Enforcement Section, issued an administrative civil liability complaint (ACL Complaint) and draft cease and desist order (Draft CDO) against Respondent, Farmers Ditch Company. The Division sent copies of the ACL Complaint and Draft CDO to Farmers Ditch Company by letter dated September 16, 2022. The letter notified Farmers Ditch Company of the right to request a hearing to contest the allegations in the ACL Complaint and Draft CDO.

According to the ACL Complaint and Draft CDO, Farmers Ditch is an unlined ditch that is approximately 11 miles long and has been in operation since 1870. Farmers Ditch conveys water from the Scott River diverted under adjudicated pre-1914 water rights

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

held by the owners of properties along the ditch. These property owners are: Richard and Nancy Barnes, Arabella Merlo, Lynn and Geraldine Slaght, Mary D. Roehrich Trust, George and Donna Poe, Jeffrey Fowle, Scott River Ranch, Carl Hammond Jr., Spencer Ranch, Marcus Johnson, and Andrew Hurlimann. The ACL Complaint and Draft CDO allege that Farmers Ditch Company is an unincorporated association acting on behalf of these individual water right holders.

2021 and 2022 Scott-Shasta Emergency Regulations

On August 17, 2021, the State Water Board adopted California Code of Regulations, title 23, sections 875 through 875.9 (2021 Scott-Shasta Emergency Regulations), which became effective on August 30, 2021.¹ On June 21, 2022, the State Water Board readopted sections 875 through 875.9 with some amendments (2022 Scott-Shasta Emergency Regulations), which went into effect on July 29, 2022. The 2021 and 2022 Scott-Shasta Emergency Regulations (collectively, Scott-Shasta Emergency Regulations) were adopted by the Board under Water Code pursuant to 1058.5. The Scott-Shasta Emergency Regulations authorize the Deputy Director of the Division of Water Rights (Deputy Director) to issue curtailment orders to water right holders and claimants in the Scott and Shasta Rivers when flows are insufficient to support all diverters.

The Scott-Shasta Emergency Regulations prohibit diversion of surface water and groundwater at a diversion point or for use at a place of use that is subject to a curtailment order. (Cal. Code Regs., tit. 23, § 875, subd. (a).) The regulations authorize the Deputy Director to issue a curtailment order upon a determination that without curtailment of diversions, flows are likely to be reduced below drought emergency minimum flows for the Scott and Shasta Rivers specified in the regulations. (*Id.* at subd. (b).) Section 875.3 of the Scott-Shasta Emergency Regulations allow limited diversions for stockwatering after a water right holder receives a curtailment order in an amount not to exceed the reasonable daily amounts for stockwatering use defined in section 697, if the diversion is the only source of water for those needs and the water is conveyed without seepage losses.

Section 875.7 of the Scott-Shasta Emergency Regulations prohibits inefficient diversions of surface water for livestock watering even when a curtailment order is not in effect. Section 875.7 of the 2021 Scott-Shasta Emergency Regulations defined as inefficient and unreasonable, diversions of surface water during the fall migration season for fall-run Chinook and coho salmon, from September through January, in amounts measured at the point of diversion that exceed ten times the amount needed to support the number of livestock using the reasonable water quantities per head provided in section 697. Section 875.7 of the 2021 Scott-Shasta Emergency Regulations was effective from September 1, 2021, to January 31, 2022. As amended, section 875.7 of the 2022 Scott-Shasta Emergency Regulations prohibits inefficient

¹ Unless otherwise specified, references to section numbers in this notice refer to sections of title 23 of the California Code of Regulations.

diversions of surface water for livestock watering from September 1, 2022, to March 31, 2023, unless suspended by the Deputy Director.

The Deputy Director issued a curtailment order under the Scott-Shasta Emergency Regulations on September 9, 2021 (Curtailment Order), which ordered certain surface water right holders on the Scott River to cease all diversions unless an exception in the regulations applied to the diversion and use. On January 7, 2022, the Deputy Director issued an Information Order for Winter Surface Diversions in the Shasta and Scott River Watersheds (Order WR 2022-0052-DWR) (January 2022 Information Order) to identified water right holders on the Scott and Shasta Rivers, which required them to submit information about their diversions and use of water for livestock watering.

Measurement and Monitoring Regulations

California Code of Regulations, title 23, sections 931 to 938 (hereinafter, Measurement and Monitoring Regulations) impose requirements for measurement and recording devices upon certain diversions of surface water as described in the regulations. These regulations were approved by the Office of Administrative Law on March 21, 2016.

Section 932, subdivision (a), requires specified classes of diverters to “install and maintain a measuring device or employ a measurement method capable of measuring the rate of diversion, rate of collection to storage, the rate of withdrawal or release from storage, and the total volume of water diverted or collected to storage.” Section 933, subdivision (b), requires diverters who divert “during the period from June 1 through September 30, and directly divert[] more than 30 cubic feet per second [(cfs)] at any time,” to record and report the diversions by telemetry.

Administrative Civil Liability Complaint

Water Code section 1846 authorizes the State Water Board to impose administrative civil liability, pursuant to Water Code section 1055, on any person or entity that violates a regulation or order adopted by the Board. Under these statutes, the Board may impose administrative civil liability in an amount not to exceed \$500 per day for each day in which the violation occurs.

Water Code section 1055.3 provides that, in determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to: (a) the extent of harm caused by the alleged violation; (b) the nature and persistence of the alleged violation; (c) the length of time over which the alleged violation occurred; and (d) the corrective actions, if any, taken by the violator.

The ACL complaint alleges that Farmers Ditch Company violated sections 875, 875.3, and 875.7 of the 2021 Scott-Shasta Emergency Regulations and section 933 of the Measurement and Monitoring Regulations.

2021 Curtailment Order and Section 875.7 (Inefficient Livestock Watering)

The ACL Complaint alleges that Farmers Ditch Company responded to the January 2022 Information Order on April 12, 2022, on behalf of all of its members, and reported that approximately 2,000 cows, 200 sheep, and 20 horses are watered through Farmers Ditch using water from the Scott River. Based on this response and the daily quantities of water use that are reasonable for each type of livestock under section 697, the ACL Complaint calculates that the maximum amount of water that Farmers Ditch Company could divert for reasonable use for livestock watering under section 875.7 was 0.47 cfs. The ACL Complaint calculates that after Farmers Ditch Company received the Curtailment Order, the amount of water that Farmers Ditch Company could divert under the livestock watering exception to curtailment pursuant to sections 875 and 875.3 was 0.047 cfs.

The ACL Complaint states that the Curtailment Order applied to diversions from September 9, 2021, to October 24, 2021, and from December 1, 2021, to January 4, 2022. The ACL Complaint alleges that Farmers Ditch Company exceeded the maximum diversion amount authorized under section 875.3, while the Curtailment Order applied to diversions by Farmers Ditch Company, for 34 days: from December 2, 2021, through January 4, 2022. The ACL Complaint alleges that Farmers Ditch Company exceeded the maximum diversion amount authorized under section 875.7 for 63 days: October 26, 2021, November 9, 2021, and December 2, 2021, through January 31, 2022.

Measurement and Monitoring Regulations

The ACL Complaint alleges that Farmers Ditch Company did not have a working measurement device for its diversions into Farmers Ditch from the Scott River and did not provide telemetered diversion data, for 92 days from September 1, 2021, through December 1, 2021, in violation of the Measurement and Monitoring Regulations. (Cal. Code Regs, tit. 23, § 933.)

The ACL Complaint states that the maximum potential liability for the alleged violations is \$94,500 (189 days x \$500 per day of violation). The ACL Complaint recommends the imposition of administrative civil liability in the amount of \$94,500.

Proposed Cease and Desist Order

Water Code section 1831 authorizes the State Water Board to issue a cease and desist order when the Board determines any person is violating, or threatening to violate, a regulation adopted under Water Code section 1058.5. (Wat. Code, § 1831, subd. (d)(4).)

The Draft CDO states that Farmers Ditch Company violated the 2021 Scott-Shasta Emergency Regulations by diverting more than 0.047 cfs, which was the maximum diversion amount authorized when the Curtailment Order applied to diversions by

Farmers Ditch Company, from December 2, 2021, through January 4, 2022. (Cal. Code Regs., tit. 23, § 875.3.) The Draft CDO further states that Farmers Ditch Company violated the 2021 Scott-Shasta Emergency Regulations by diverting more than 0.47 cfs, which was the maximum diversion amount authorized for stockwatering under the regulations even when a curtailment order was not in effect, on October 26, 2021, November 9, 2021, and December 2, 2021, through January 31, 2022. (Cal. Code Regs., tit. 23, § 875.7.)

The Draft CDO alleges that Farmers Ditch Company is violating or threatening to violate the Scott-Shasta Emergency Regulations by diverting and threatening to divert water for stockwatering in an amount that exceeds the maximum diversion authorized under sections 875.3 or 875.7.

The Draft CDO would order Farmers Ditch Company to (1) comply with the limits on diversion set by the 2022 Scott-Shasta Emergency Regulations; (2) maintain records of all of its surface water diversions from the Scott River; (3) maintain a working measurement device for its point of diversion on the Scott River; (4) use a telemetry device to record and update daily diversion data on a public website as required by section 933, subdivision (b)(4)(C); and (5) repair or upgrade the headgate for Farmers Ditch to prevent leaks.

PURPOSE OF HEARING AND HEARING ISSUES

The Administrative Hearings Office (AHO) of the State Water Board will hold a public hearing to receive evidence and arguments relevant to the ACL Complaint and Draft CDO. During the hearing, the hearing officer will receive evidence and arguments relevant to the following questions:

- 1) Did Farmers Ditch Company violate California Code of Regulations, title 23, section 875 by diverting more water from the Scott River for livestock watering than was authorized under section 875.7, on October 26, 2021, November 9, 2021, or on any day from December 2, 2021, through January 31, 2022?
 - a. How much water was Farmers Ditch Company authorized to divert for livestock watering under section 875.7 on these days?
 - b. Did Farmers Ditch Company divert more than this amount for livestock watering on any of these days?

- 2) Did Farmers Ditch Company violate California Code of Regulations, title 23, section 875 by diverting more water from the Scott River for livestock watering than was authorized under section 875.3, on any day from December 2, 2021, through January 4, 2022?
 - a. Did the Curtailment Order apply to diversions into Farmers Ditch on these days?
 - b. How much water was Farmers Ditch Company authorized to divert for livestock watering under section 875.3 on these days?

- c. Did Farmers Ditch Company divert more than this amount for livestock watering on any of these days?
- 3) Did Farmers Ditch Company violate California Code of Regulations, title 23, section 933 by failing to record and report its diversions by telemetry on any day from September 1, 2021, through December 1, 2021?
 - a. Was Farmers Ditch Company required by section 933 to record and report its diversions by telemetry on any of these days?
 - b. Did Farmers Ditch Company record and report its diversions by telemetry on any of these days?
- 4) If Farmers Ditch Company violated California Code of Regulations, title 23, sections 875 or 933, should the Board impose administrative civil liability? If so, what is the appropriate amount for such administrative civil liability?
- 5) Is Farmers Ditch Company violating or threatening to violate California Code of Regulations, title 23, section 875 by diverting or threatening to divert more water from the Scott River for livestock watering than is authorized under section 875.3 or 875.7?
 - a. How much water is Farmers Ditch Company authorized to divert for livestock watering under section 875.7 and during what season?
 - b. Is a curtailment order applicable to Farmers Ditch Company under the 2022 Scott-Shasta Emergency Regulations?
 - c. How much water is Farmers Ditch Company authorized to divert for livestock watering under section 875.3 while a curtailment order is in effect?
 - d. How much water is Farmers Ditch Company diverting or threatening to divert for livestock watering?
- 6) If Farmers Ditch Company violated or is threatening to violate California Code of Regulations, title 23, sections 875, should the State Water Board issue a cease and desist order under Water Code section 1831?
- 7) If the State Water Board issues a cease and desist order, what provisions should be in the order?

ADMINISTRATIVE RECORD

The AHO hearing officer's proposed order in this matter will be based upon evidence and arguments in the administrative record. The AHO uses the State Water Board's File Transfer Protocol (FTP) site to make AHO administrative record files available to interested parties and the public. The State Water Board's FTP site may be accessed at <https://ftp.waterboards.ca.gov/>. All parties may use the shared account on this site to access and download documents in the administrative record for this hearing. This shared account is referred to in this notice as the "AHO-FTP Download Folder."

To access the AHO-FTP download folder, please submit an e-mail request to the AHO at AdminHrgOffice@Waterboards.ca.gov with "Request for AHO ftp password" in the subject line. After receiving the e-mail request, the AHO will send a reply e-mail with a password to access the download account. It is not necessary to include any other parties in the cc line for such an e-mail request.

The AHO will create a folder for this proceeding on the State Water Board's FTP site. The folder for this proceeding will contain all administrative record documents related to this proceeding and may contain various subfolders, including subfolders for background documents and hearing documents. Only AHO personnel may upload files to this folder. The AHO will post each party's hearing exhibits, exhibit identification indices and legal briefs, if applicable, to this folder promptly after each filing deadline. The AHO may add other administrative record documents to this folder during this proceeding (including recordings of hearings, correspondence and the AHO's order). The documents in this folder will be the AHO's administrative record for this proceeding.

HEARING OFFICER AND HEARING TEAM

Nicole Kuenzi, a hearing officer in the State Water Board's Administrative Hearings Office, will be the hearing officer for this proceeding and will prepare a written order, according to the requirements outlined in Water Code section 1114, subdivision (b)(1), within 90 days after the matter is submitted for decision. Other AHO staff may be present and may assist the hearing officer during the hearing and throughout this proceeding.

PROSECUTION TEAM

A State Water Board staff Prosecution Team will be a party to this hearing. The Prosecution Team will be comprised of attorneys from the State Water Board's Office of Enforcement and staff from the State Water Board's Division of Water Rights Enforcement Section.

PROHIBITION ON EX PARTE COMMUNICATIONS AND SEPARATION OF FUNCTIONS

While this proceeding is pending, ex parte communications between parties and members of the AHO hearing team are prohibited. Ex parte communications are any type of communication that occurs between a party or interested person and the hearing officer or a member of the hearing team without notice and an opportunity for all parties to participate.

Please do not attempt to communicate by telephone with any AHO hearing officer or staff member regarding this hearing, because other parties would not be able to participate in such communications. If any party wishes to communicate with the AHO at any time regarding any issue related to this proceeding, including any issue regarding hearing procedures or filing of documents, please communicate by e-mail to

adminhrgoffice@waterboards.ca.gov or by letter to the AHO and serve all other parties with copies of the communication.² The party shall include a proof of service through a formal proof of service or by other verification.³

The Prosecution Team is separated from the AHO hearing team. Like all other parties, the Prosecution Team is prohibited from having any ex parte communications with any members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.)⁴

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for Internet website accessibility in Government Code section 11546.7, the AHO will post all of its notices and other AHO documents regarding these proceedings on the AHO's Internet webpage:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

The AHO webpage has information about accessing the AHO's YouTube channel to watch live broadcasts or past recordings of hearings and pre-hearing conferences.

For general information about AHO proceedings, an AHO Frequently Asked Questions (FAQs) page is posted at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/procedures.html.

The AHO maintains a list of attorneys who may agree to provide pro bono legal assistance to parties without counsel. This list is available at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/pro_bono_aho.pdf.

DEADLINES FOR HEARING PARTICIPATION

Deadline for filing and service of any submittals of proposed testimony or exhibits before the hearing (optional)	March 2, 2023, 12:00 pm
Hearing date and time	March 9, 2023, 9:00 am

² The AHO's mailing addresses are provided in Item 6, below.

³ All references to "proof of service" in this document refer to either a formal proof of service or a list of the parties and the addresses of them or their representatives in an e-mail "cc" (carbon copy) list or the cc portion of a letter.

⁴ For a discussion of ex parte communications regarding State Water Board members, see "Ex Parte Questions and Answers," available on the State Water Board's website at: http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

PROCEDURES FOR THIS WATER-RIGHT HEARING

The following procedures apply to this hearing. The hearing officer may amend these procedures before, during or after the hearing as she deems appropriate.

1. HEARING PROCEDURES: The AHO will conduct this hearing according to the procedures for hearings set forth in California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. If there is any conflict between any provision of this notice and any provision of these regulations or any applicable statute, then the provision of the regulation or statute shall apply to this proceeding.

2. SETTLEMENTS: The Prosecution Team and the Respondent may engage in private settlement discussions, and may, or may not, include any other persons in those discussions. No representative of the AHO will participate in such settlement discussions. If the parties sign a written settlement agreement, the Respondent shall notify the AHO in writing that the parties have signed a written settlement agreement and that the Respondent withdraws her request for a hearing.

3. PARTY STATUS AND POLICY STATEMENTS BY INTERESTED PERSONS: Farmers Ditch Company and the Division of Water Rights Prosecution Team are parties to this proceeding. The hearing officer may allow other persons or entities to participate in the hearing as a party. (See Cal. Code Regs., tit. 23, § 648.1, subd. (a) & (b).) A person or entity that has not been identified as a party in this notice that wants to participate as a party in this hearing must file a request with the AHO no later than **March 2, 2023**. The person or entity shall include information demonstrating good cause as to why the hearing officer should allow the person or entity to participate in the hearing as a party rather than as an interested person presenting a policy statement.

As provided in California Code of Regulations, title 23, section 648.1, subdivision (d), the hearing officer normally will allow interested persons who are not designated as parties to present non-evidentiary policy statements during the hearing.

4. TESTIMONY AND OTHER EXHIBITS: Exhibits include all written proposed testimony and other documents to be submitted as evidence. There is no requirement for any party to submit any written proposed testimony or exhibits before the hearing, but a party may do so. Any party that wants to submit written proposed testimony or exhibits before the exhibit filing deadline listed above may do so by following the procedures described in Item 6 below. Any party submitting written proposed testimony before the hearing still must produce the actual witness or witnesses to verify the written proposed testimony, provide a summary of it, and be available for cross-examination, during the hearing.

5. EXHIBIT FORMATTING AND ORGANIZATION: A party deciding to submit exhibits before the hearing must file with the AHO both the exhibits and an Exhibit Identification Index, which is a list of exhibits in Excel format. A sample is attached to the end of this document.

Each party should label exhibits with a short version of the party's name and sequential numbers. For example, the Prosecution Team's exhibits should be numbered PT-1, PT-2, etc. Respondent's exhibits should be numbered Respondent-1, Respondent-2, etc.

6. SUBMISSIONS OF EXHIBITS: Submission of exhibits and written testimony before the hearing is optional. The AHO prefers that participants that decide to submit exhibits before the hearing do so by uploading the exhibits in electronic form to the State Water Board's FTP site. The AHO will provide each party a unique account to upload the party's documents for this hearing approximately one week before the deadline to file exhibits. These accounts are referred to in this hearing notice as the "Parties' Upload Folders." Only the party may upload files to the party's folder, and only the AHO may view, transfer, and download files from this folder.

After the exhibit filing deadline, the AHO will move all filed exhibits and Exhibit Identification Indices from the parties' Upload Folders to the administrative record folder and advise the parties that these documents are available for downloading from the Download Folder. The AHO may rename or renumber exhibits that do not have proper exhibit names or numbers. If the AHO does this, then the AHO may create an electronic folder of documents that the party has submitted and a separate electronic folder of documents the AHO has renamed or renumbered, in the administrative record folder.

If a party cannot upload exhibits to the FTP site, then the party may serve its exhibits on the other parties by mail by the optional exhibit filing deadline specified in this notice.

The party may mail paper copies of all its exhibits to the AHO at:

State Water Resources Control Board
Administrative Hearings Office
P. O. Box 100
Sacramento, CA 95812-0100

Alternatively, a party may send paper copies of its exhibits to the AHO by overnight delivery to:

Joe Serna Jr. CalEPA Building
State Water Resources Control Board
Administrative Hearings Office
1001 I Street
Sacramento, CA 95814

7. ORDER OF PROCEEDING: The hearing officer will follow the order of proceedings specified in California Code of Regulations, title 23, section 648.5, unless the hearing officer decides to modify the order of proceeding before or during the hearing.

- a. **Policy Statements:** The hearing officer will allow interested persons to present policy statements at the start of the hearing before the presentations of cases-in- chief. **Oral policy statements and oral summaries of written policy statements will be limited to 5 minutes.**
- b. **Presentation of Cases-In-Chief:** Each party may present a case-in-chief addressing the key issues in the hearing notice. The hearing will proceed in the following order:
 - Party's opening statement (**5 minutes per party**)
 - Summaries of the party's witnesses' written proposed testimony or presentation of the party's oral testimony (**no more than 60 minutes total for all witnesses for each party**).
 - Cross-examination of the party's witnesses (**60 minutes total for all of the other party's witnesses**).
 - Re-direct examination and re-cross examination of the party's witnesses, if allowed by the hearing officer.
 - Questions from the hearing officer. (These questions may occur at any time, but normally will be after all other parties have completed their cross- examinations of a party's witnesses.)
 - Submitting exhibits into evidence, with opportunities for objections by other parties.
- c. **Presentations of parties' rebuttal evidence:** After all parties have presented their cases-in-chief, the hearing officer may allow parties to submit rebuttal exhibits and testimony.
- d. **Closing statements (5 minutes per party)**

8. HEARING LOGISTICS: Parties should participate in the hearing by both audio and video through the Zoom meeting link if possible. If this is not possible, then the hearing officer will accept audio-only participations.

The AHO will not order a court reporter for the hearing. Any interested party may order a court reporter at the party's own expense. The AHO will record the hearing and post a file of the recording on the AHO-FTP site as part of the administrative record for this matter. Parties should test their devices' video and audio functions before the start of the hearing.

Parties should plan to call into the hearing at least 10 minutes before the scheduled hearing time to ensure the party can resolve any technical issues before the hearing begins. Parties will initially be in a virtual waiting room and will be admitted to the hearing by a member of the AHO office. When speaking, please turn the video on and unmute the microphone by clicking on the symbols in the lower left-hand side of the Zoom window.

During the hearing, please be respectful and patient. Parties should raise a hand on-screen to get the hearing officer's attention. To reduce acoustic background noise, please remain on mute unless speaking. If other devices are tuned into the meeting, please turn off the speaker volume on those devices. Other participants will be able to see each party's name, depending on the party's Zoom account settings. Other participants may also see the last three digits of a party's phone number unless the party has called in anonymously. During the hearing, AHO staff may add designations of participants' names to the Zoom display.

If a party's device freezes, please notify staff at adminhrgoffice@waterboards.ca.gov or by calling (916) 341-6940 and leaving a voicemail message and restart the device. AHO staff will be monitoring the e-mail inbox and voicemail and will notify the hearing officer. If restarting the device does not work, try calling into the hearing using the phone number provided with the Zoom meeting information on the first page.

December 23, 2022

Date

/s/ Nicole L. Kuenzi

Nicole L. Kuenzi
Hearing Officer

Enclosures:

- Exhibit Identification Index
- Service List

SERVICE LIST

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