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September 23, 2003

Mr. Gilbert L. Phillips
U.S. Army Corps of Engineers
P.O. Box 6898
Elmendorf, AFB 99506-6898

Dear Mr. Phillips

SUBJECT: KING COVE ACCESS PROJECT DEIS
STATE I.D. NO. AK 0307-13AA

The State of Alaska has reviewed the King Cove Access Project Draft Environmental Impact Statement (DEIS) dated July 2003 and the associated Project Description (PD) dated April 24, 2003 (5th Revision). The comment period for the Alaska Coastal Management Program (ACMP) consistency review of the proposed action (Cold Bay 12) closes today September 23, 2003. We will be forwarding ACMP comments in separate correspondence. We have reviewed the project described in the subject documents in relationship to activities that affect Izembek National Wildlife Refuge and to provisions under the Alaska National Interest Lands Conservation Act (ANILCA). We request corrections be made to numerous misrepresentations of the Wilderness Act, as amended by ANILCA, particularly involving ANILCA protections of motorized access for subsistence, recreation, and other activities.

Our comments initially focus on 1) Motorized Access, 2) Wilderness Purposes, 3) Subsistence Uses, and 4) Habitat Permitting Issues. These are followed by Other Comments providing page specific editorial comments as well as examples that detail problem areas mentioned in the sections below.

Motorized Access

Throughout the PD and DEIS, statements concerning legislated directions for management of motorized access on refuge lands need correction. ANILCA Section 102 defines "*conservation system unit*" to include refuges and designated wilderness areas. Motorized access provisions in ANILCA Section 1110(a) and Section 811 apply equally to all conservation system units, thus

modifying the prohibitions on such access generally applied to wilderness areas outside of Alaska. Through these access provisions, ANILCA amends the Wilderness Act for Alaska conservation system units (see Section 707) in a manner that leaves all refuge lands “open until closed” for access by snow machines, airplanes, motorboats, and other surface transportation. Off-road vehicle (ORV) access for subsistence use is specifically protected by ANILCA Section 811 on all conservation system units, including wilderness.

The access guarantees under ANILCA Section 811 for subsistence use include motorized “*traditional methods*” and under Section 1110(a) by specified methods for “*traditional activities*.” Pre-ANILCA traditional activities include those generally occurring in the area, such as subsistence and recreation. Motorized access by snow machines, motorboats, and airplanes for “*traditional activities*” and by other “*traditional methods*” of surface transportation (e.g., Off Road Vehicles) for subsistence activities “*shall be permitted*” in the refuge unit (including designated wilderness) unless restricted through a codified process of public notice and a finding of detriment.

The process for permanent restriction of access for these activities on refuge land (including wilderness) is found in 43 CFR 36.11 and 50 CFR 36.12. Snow machine access for “*traditional activities*” protected by ANILCA Section 1110(a) is subject to regulations in 43 CFR 36.11, which require a finding of detriment, public hearings, and federal regulations. Access by snow machines and Off Road Vehicles (ORVs) for subsistence activities is protected by ANILCA Section 811 subject to reasonable regulations for their conduct found at 50 CFR 36.12(d) and can only be restricted pursuant to the process in 50 CFR 36.12(a)-(c). Other sections of ANILCA authorize motorized access and equipment for public access, access to inholdings, access to conduct studies, and for transportation and utility corridors, among others. The regulations that address these additional access provisions are primarily found in 43 CFR Part 36.

Wilderness Purposes

According to Section 1133 of the Wilderness Act, wilderness purposes are “*within and supplemental to the purposes for which*” units of the refuge system “*are established and administered*”; however, they do not supercede the ANILCA purposes for which the Izembek refuge was established. The 1985 Final Comprehensive Conservation Plan (CCP) addresses the unit purposes and management for Izembek National Wildlife Refuge, including designated wilderness. We, therefore, request that the King Cove Access Project DEIS and PD be carefully edited and revised to accurately reflect the unit purposes and related provisions of the Wilderness Act, as amended by ANILCA. This point cannot be overemphasized; it is a very important distinction as refuge managers evaluate uses when rendering compatibility determinations pursuant to the National Wildlife Refuge System Administration Act.

Subsistence Uses

The subsistence report prepared by Stephen R. Braund and Associates (Appendix G of the Appendices volume) presents a brief but informative overview of subsistence resource uses in the study area, based on studies conducted in the mid-1980s and early 1990s (the latter by ADF&G’s Division of Subsistence). The Braund report presents no new information regarding current subsistence use patterns in King Cove but concludes that “ . . . *noncommercial wild resource harvesting and use remain important to King Cove’s economy and way of life.*” We

agree with this conclusion, but we note that some changes could have occurred during the past decade in areas used for subsistence purposes and on the levels of use of particular resources that might be impacted by the access project. However, in an April 17, 2001 letter to the US Army Corps of Engineers (Appendix A), the Agdaagux Tribe of King Cove does not anticipate that significant subsistence impacts will result from construction of the proposed road. Similarly, concerns about subsistence impacts are not identified in a June 21, 2001 letter from the City of King Cove. We desire opportunities to fully cooperate with the project developers and the FWS in decision-making that may affect the subsistence uses in this area in order to reduce impacts.

Habitat Permitting Issues

The DEIS is in need of detailed editing the many references to ADF&G (Division of Habitat) now the Office of Habitat Management and Permitting as well as Title 16 and Title 41.

Also the DEIS makes many references to mitigation measures, erosion and sediment control plans, storm water prevention plans, hazardous materials plans, petroleum products plans, etc. However, none of these plans are included in the DEIS. Without the inclusion of these plans and their protective measures, it is not possible to determine if the project is adequately protecting fish and wildlife resources.

Mitigation measure 4.7.1 for construction in fish streams also mentions a timing window unless expressly authorized by a qualified person. There will be no construction in fish streams unless expressly authorized by OHMP through a Fish Habitat Permit. Timing windows may vary dependent on the stream and resources.

The plans and specifications submitted to OHMP are DRAFT. OHMP permits are usually not issued until final plans and specifications are received. If OHMP issues permits based on draft information, subsequent permit modifications may require additional review under the Alaska Coastal Management Program.

The DEIS does not provide enough detail to determine whether or not the road alignment has been adjusted to avoid salmon spawning areas and high bear use areas in the lower Delta Creek valley. In fact, the wetland figures provided appear to show the road going over and thru the streams at places other than the proposed crossings.

The DEIS mentions Munson's Creek as not being specified or having a number, Munson's and a tributary to it are proposed additions with the numbers 283-34-10800 and 283-34-10800-2003 respectively. The DEIS also states these streams are only known for Pink rearing (from ADF&G surveys). This is incorrect, both ADF&G surveys and the surveys conducted for the project by Northern Ecological Services found spawning Pink salmon not rearing Pink salmon.

The discussion of Delta Creek drainage (pp. 225 and 226) portrays the Delta Creek drainage as divided into two sections though the information provided with each is inconsistent. On one hand upper Delta Creek is described as high gradient, coarse substrate, no fish, and no crossings of this portion, etc. yet escapement numbers are listed in this section. If the intent is to divide the system into sections, the discussion should define each of these sections and attribute the correct data and design specifications for each section.

Finally, the Final EIS should provide information on brown bear use in the Delta Creek valley. The DEIS currently only addresses areas north of there.

OTHER COMMENTS

The following comments provide page-specific discussion of the major issues identified above plus other suggestions to improve the DEIS and PD.

(1) PD—page 56, item **5. Fish and Wildlife Protection Plan, line 4**: Please add the Alaska Department of Fish and Game (ADF&G) to the list of recipients of the plan “*that will detail specific measures to be implemented to protect important fish and wildlife resources during project construction and operation.*” ADF&G manages all fish and resident wildlife in the State of Alaska. Furthermore, Section 662 of the Fish and Wildlife Coordination Act requires that whenever any body of water is proposed to be modified by a federal agency or under a Federal permit or license, consultation shall include both the Fish and Wildlife Service and the “*head of the agency exercising administration over the wildlife resources . . .*” Thus, ADF&G must be included in consultations regarding conservation of wildlife and fish resources during development of the plan as well as receiving a copy.

(2) Concerning motorized access in Wilderness Areas as discussed, the document sections identified below must be changed to accurately reflect that ANILCA amends the Wilderness Act by authorizing motorized access on refuges by off-road vehicles for subsistence and by authorizing other motorized access methods for subsistence and other public use activities. The specific wording of concern is found in one or more locations and includes phrases such as:

. . . to prevent motorized vehicles leaving the road . . . to illegally enter the Izembek NWR Wilderness Area with motorized vehicles.

. . . no motorized vehicles are allowed in the Congressionally-designated Izembek Wilderness Area.

. . . notice to the public will be given that motorized vehicles in the Wilderness Area are prohibited under Federal Law.

. . . the Wilderness Act prohibits the use of mechanized equipment within a Wilderness Area.

. . . since motorized vehicle use on these roads/trails is prohibited.

The Federally owned surface estate in Izembek NWR is closed to motorized vehicle access except on authorized trails and there are no such trails . . .

The Izembek NWR Wilderness Area ...is closed to motorized access of any kind...

The CCP also states that landbased vehicle use in the Wilderness Area is prohibited

These and other erroneous statements appear in at least the following sections:

PD—page 59, **11. Access and Other Disturbances**, A i) lines 3, 4 and 5, and A iii) lines 2, 3, 4, 5, and 6;

DEIS—page ES-25, **MM-11, Access and other Disturbances**, A i) line 2, and Aii) lines 1 and 2;

DEIS—Chapter 2, page 38, **Table 2-1 MM-11 A iii**;

DEIS—Chapter 2, page 142, **2.6 Alternative 6 – Isthmus Road**, 1st paragraph lines 4 and 5;

DEIS—Chapter 2, Page 177, **Wilderness**, lines 6 and 7;

DEIS—Chapter 3, page 203, **Surface Disturbance**, 3rd paragraph, last sentence;

DEIS—Chapter 3, page 289, paragraph 4 lines 3 and 4;

DEIS—Chapter 4, page 377-378, **Alternative 1**, paragraph 1, third sentence; and paragraph 2, third and fourth sentence;

DEIS—Chapter 4, page 445, **Construction and Operation, Alternative 1**, paragraph 3, first sentence;

DEIS—Chapter 4, page 448, **Common Impacts, Alternative 1**, paragraph 2, first, second, third and fifth sentences; paragraph 3, first sentence, and paragraph 4, third sentence paragraph.

Given that the proposed actions listed under the **Access and Other Disturbances** section “A” (e.g., PD page 59 item 11, and DEIS page 38 item MM-11) also include intent to prevent motorized vehicles that would arrive via hovercraft or road from increasing legal access to the refuge and state waters, additional consideration of efforts to protect fish, wildlife, and habitat will be needed. We welcome any opportunity to work with the USFWS and project designers to cooperatively evaluate management options.

Although the 1985 Izembek CCP contains incorrect references to allowable access by ORVs in some locations it accurately describes allowable ORV uses on CCP page 114 for subsistence uses. While the CCP indicates ORV use “*will be*” limited to roads and trails, such limits have not been implemented to date through the required rulemaking. References to the CCP on EIS page 203 describe roads built and used in the area during World War II and subsequently used by the community of Cold Bay by land-based vehicle use prior to designation in 1980 as Wilderness. The references also cite incorrect statements in the CCP regarding the legality of this use and not other sections of the CCP that correctly address roads and ORV use. Similarly, access by airplanes is primarily by wheel plane landings on the state beaches but no regulations are in effect to close such landings within the federal refuge.

(3) PD page 59; **DEIS** pages 38, 289, 295, 298, 300; Other access issues addressed in the **Access and Other Disturbances** section “A” (e.g., PD page 59 item 11, and DEIS page 38 item MM-11), and the **Ownership and Land Use** section of the DEIS (e.g., chapter 3) remain unresolved in the CCP, including management of 17(b) easements and non-exclusive use easements. These were addressed in the state’s letter of July 8, 1985, asking for close

coordination with the USFWS. In the August 1, 1985 Record of Decision, the USFWS responded:

The FWS will address these management concerns as part of the development of a land protection plan and prior to taking specific action affecting the use of 17(b) easements or areas where public use areas conflict with private inholdings. The State of Alaska and other interested parties will be involved in the development of these policies.

The subsequent 1988 Land Protection Plan similarly did not resolve management concerns regarding the easements. It is important that the USFWS and the State of Alaska work closely to address these issues prior to the U.S. Army Corps Engineers attempting to indicate management decisions for actions involving those easements in the DEIS, and thereby subjecting themselves to the associated controversies.

(4) DEIS on pages ES-25, 38,289, 295, 298, and 301; **PD** page 59; **17(b) and other easements:** Several statements in the PD and DEIS refer to allowable uses along 17(b) easements that access across private lands to public lands and waters. While we understand that a waiver of the allowed motorized uses in the conveyance documents for 17(b) easements is being pursued, a vacation of those motorized access rights may not be granted, in part because they were premised on the misunderstanding of allowable ORV use in Wilderness. We urge careful consideration of additional options to protect the resources if the change in allowable uses of these 17(b) easements is not granted to amend the land conveyance.

We also question the merits of vacating motorized access on the easements, particularly when these easements were granted for the express purpose of providing access to the public land and waters. Due to distance and terrain, motorized access is at times and on some easements the only realistic method of access for traditional activities on the public lands.

Discussions of the pre-ANILCA roads and trails need to be carefully reevaluated in light of the allowable uses on the refuge and on such roads and trails. The discussions of roads and easements in the DEIS on pages 289, 295, 298, and 301 in particular shed additional light on the purposes of the easements, other uses that occurred prior to ANILCA, and the express authorization of ORV use within the boundaries of the refuge on one easement that would be removed.

Easements 9 C4 and 9a C4 currently exist on paper only as there are no physical markings or evidence on the ground to indicate their locations and/or use. The current permitted use of Trail 9a C4 includes motorized vehicles up to 3,000 pounds GVW. However, ORV use is not feasible because an 8-mile section of the coast has a continuous 100-foot high bluff that precludes getting ORVs from the beach to the trail easement. The current permitted use of motorized vehicles must be reconciled with the fact that it is physically impossible to access via an ORV on to the trail easement from the beach.

The USFWS is proposing to relocate four 17(b) easements as part of the proposed project, to which the state tentatively did not object conditional upon a number of recommendations. In particular, the state expressed concern that it does not generally support accepting use reductions (e.g., changing motorized to non-motorized) on alternative easements. However, the state

expressed willingness to evaluate the proposal in light of the road development project and dependent upon the state's recommendations for trail locations, parking, width, and only after the replacement easements are formally secured and road construction accomplished. In the interim, the project developers and FWS may wish to reconsider the proposed changes in light of the misunderstandings of allowed uses on the public lands to which these easements provide access.

(5) PD page 59 item 11, **DEIS** pages ES 25 item MM-11, 38; **Boat access from launches:** We also note reference to "*uncontrolled . . . boat access*" in several locations of the PD and DEIS. The marine waters adjacent to the conservation system unit are under the jurisdiction of the State of Alaska. Any restrictions on public uses of the Izembek State Refuge will need to be implemented through a state planning process and subsequent regulations. Restrictions on other marine or inland navigable waters under jurisdiction of the state will need to undergo similar evaluation and management planning. While the manager of a marine launch facility may be able to restrict access on the facility itself, the access to the state or federal lands needs to be addressed separately and directly.

(6) DEIS—page ES-27, **Unresolved and Resolved Issues**, continued paragraph and **DEIS**—Chapter 1, Page 26, **ANILCA Title XI**, 2nd paragraph; We request the first bullet relating to ANILCA Title XI correctly cite Section 1105, which requires a finding whether all or part of a transportation system would be within a conservation system unit, not "*on federal land.*" As written, the DEIS could be misinterpreted that the FWS directs where the exact route for a transportation system will occur. ANILCA Section 1105 reads:

The head of the Federal agency concerned shall, within four months after the date of filing of any final Environmental Impact Statement, make recommendations...to grant such authorizations as may be necessary to establish such system, in whole or in part, within the conservation system unit concerned if he determines that-

- (1) such system would be compatible with the purposes for which the unit was established; and*
- (2) there is no economically feasible and prudent alternative route for the system.*

(7) DEIS—page ES-27, paragraph 2 describing "*The second issue . . .*"; While we agree that the "*increased potential for unauthorized motorized [ORV?] access into the Wilderness Area*" is a concern, the proposed construction of barriers and signage will do little to prevent access without significant enforcement. It is important that accurate information be provided to the public, particularly local residents, regarding legal public access in these documents and all associated decision-making, such as:

- ORV and snow machine access is allowed throughout the refuge, including Wilderness, for subsistence under regulations to prevent damage to habitat and wildlife.
- ORV access is not allowed for other activities unless on designated routes and areas, and such areas have not been designated at this time.
- The State may claim RS2477 trails, on which allowable uses are not resolved.
- Snow machine and airplane access are allowed throughout the refuge unless restricted through 43 CFR Part 36 rulemaking.

(8) DEIS—Chapter 1, Page 10, **1.6.1, USDOJ. Bristol Bay Management Plan and Final Environmental Impact Statement, May 1985**; Please correct the first sentence to read: “ANILCA § 1203 required a study and report on the land ownership and resource uses of *all lands in the region*”.

(9) DEIS—Chapter 1, Page 10, **1.6.3, USFWS. Izembek National Wildlife Refuge Final Comprehensive Conservation Plan, Environmental Impact Statement, and Wilderness Review. June 1985**; Please also include reference to the August 1, 1985, Record of Decision, which modified the above document.

(10) DEIS--Chapter 1, Page 24, **Alaska Statehood Act**; The State of Alaska received ownership of submerged lands extending offshore a distance of “**three miles**,” not “*one*” mile.

(11) DEIS--Chapter 1, Page 24, Footnote 11; The correct citation for the Izembek State Game Refuge is Alaska Statute 16.20.30(a)14.

(12) DEIS—Chapter 1, Page 25, **Alaska National Interest Lands Conservation Act (ANILCA)**, 2nd paragraph; Add “, as amended by ANILCA” to the second sentence after “*under the provisions of the Wilderness Act.*”

(13) DEIS—Chapter 1, Page 25, **Alaska National Interest Lands Conservation Act (ANILCA)**, 3rd paragraph; Revise “*The purposes of the Alaska Peninsula NWR were set forth in ANILCA as*” to read “*The purposes for which the . . . is established and shall be managed include*”: Congressional intent reflects that the purposes in ANILCA were not all inclusive.

(14) DEIS Chapter 1, Page 30, table 1-1 ADNR

- The first line which refers to 11 AAC 58 should be deleted and replaced with "Issues, modifies or denies rights-of-way for the hovercraft access ramps and road right-of-way under AS 38.05.850."
- Move "Consults under Fish and Wildlife Coordination Act (16 USC 662)" to ADF&G row on page 31.
- Change reference to SHPO statutes from "AS 411.35.010 to .240" to just "AS 41.35."
- Reference to Title 16 line should be changed to, "Approves, modifies, or denies permits to work in waters containing fish habitat under AS 41.14.840 and AS 41.14.870-895."

(15) DEIS—Chapter 3, Affected Environment, page 294, footnote 36; Please correct the last sentence describing the federal authorities related to waterways for subsistence. The court found the federal government has a responsibility to assure the opportunity provided by ANILCA for priority subsistence use of fish by federally-qualified rural residents on federal lands and **those**

waterways within and adjacent in which a federal reserved water right is identified. This responsibility for subsistence does not give the FWS “*jurisdiction over all fish bearing waters within the boundary of a NWR for management of subsistence uses.*” In fact, the state manages subsistence fisheries on all lands in Alaska; the federal authority only supercedes that authority when the state is not providing the amounts necessary for the federally-qualified users.

(16) DEIS—Chapter 3, page 304, **3.34 Subsistence**, 3rd paragraph; The reference “*ADECD 2003*” appears to be missing from page 519 of the References section.

(17) DEIS—Chapter 3, page 304, **3.3.4 Subsistence**, 4th paragraph; Please revise the second sentence to note that subsistence foods and activities also have cultural importance to residents of the study area.

(18) DEIS—Chapter 4, page 347, **Figure 4-8**; In the legend of the figure, delete the phrase “*Motorized Access Prohibited.*”

(19) DEIS—Chapter 4, page 445, paragraph 2 and page 451, paragraph 4; Revise “*the USFWS management responsibility over waters for subsistence use.*” Also, delete “*The USFWS has primary responsibility for all waters within the two refuges.*” As described for page 294, the state manages its waters and manages subsistence use of fish except when the federally-eligible resident is unable to achieve the federal priority. (See comments for pages 450-454 below for further clarification.) The federal authority is limited to restricting uses only when necessary to protect the priority use by federally-qualified residents. Where the state is meeting that priority use, the USFWS has no responsibility over the subsistence use and, regardless, has no responsibility for management of the state’s waters.

(20) DEIS—Chapter 4, page 446-447, **4.3.9 Wilderness Areas**, 2nd paragraph; The FWS Wilderness Stewardship Policy cited in the text was published as a draft to revise its existing policy. The 2001 draft policy was not finalized as an official Service policy and, thus, the cited text is not policy at this time. We request the entire paragraph be deleted. ANILCA amends the Wilderness Act and no administrative policies associated with the Wilderness Act can supercede specific provisions that protect public uses in ANILCA.

(21) DEIS—Chapter 4, page 450-454, **4.3.11 Subsistence Resources and Use**; The first paragraph on page 450 attempts to characterize the subsistence harvest regulations for the study area and contains several inaccuracies. Contrary to the first sentence, the Federal Subsistence Board has implemented separate subsistence hunting, trapping, and fishing regulations in the study area for federal public lands and waters in which there is a federal reserved water right. These regulations apply to those rural residents who have a customary and traditional use of the particular fish stocks or wildlife populations. State regulations continue to apply to all lands and waters, including federal public lands unless the corresponding federal subsistence regulations are more restrictive. In cases where federal subsistence permits are required, such as for the Unit 9(D) caribou and moose hunts, only federally-qualified subsistence users can participate in these hunts on federal lands.

The statement in the first paragraph, “*All other fish [excluding halibut] used for subsistence are harvested in the study area under either Alaska sport or Alaska commercial fishing regulations, seasons, and possession limits*” is incorrect. The state administers subsistence fishing regulations for the Alaska Peninsula area, which are distinct from commercial and sport fishing regulations (see 5 AAC 01.400 – 440). Similarly, the federal subsistence fishing regulations also contain specific provisions for subsistence fishing in applicable waters in the Alaska Peninsula area. In some cases, there may be no differences in the state and federal subsistence fishing regulations.

We also request that reference to “*Alaska sport hunting regulations*” in the first paragraph be revised to “*Alaska resident hunting*” regulations. Referring to these as “*sport hunting*” regulations is incorrect or at least misleading, since they apply to both local and non-local state residents, all of whom currently qualify as subsistence hunters under the state regulations. “*Sport hunting*” is an appropriate label for non-resident hunters but not necessarily for all resident hunters.

The DEIS is missing the required ANILCA 810 Evaluation. We request clarification of whether the discussions in the second and fourth paragraph on page 451 are intended to serve as the required ANILCA Section 810 Evaluation. If so, this one is incomplete and does not conform to the format typically used for these analyses. We request this discussion be clearly identified as a Section 810 Evaluation if it is supposed to be one. Reference also is made in the fourth paragraph to a “*Title VIII determination*” that will be completed for Alternative 1. This determination should be included for review in this DEIS; we request such a determination be provided for review as soon as possible.

Under **Construction and Operation, Alternative 1**, page 453, *Availability of Resources*, the second paragraph, third sentence reads, “*The available information does not indicate that Cold Bay residents use the CWC terminal area for subsistence uses though some clamming, waterfowl hunting, and salmon fishing likely occur in the general area.*” Because there is essentially no documentation of subsistence use patterns in Cold Bay, it is unclear what “*available information*” is being referenced. Determining whether or not local residents conduct subsistence activities in the CWC terminal area would not be a difficult task and would eliminate unnecessary speculation.

On page 454, **Construction and Operation, Alternative 6**, we again recommend against use of the term “*sport hunting*”. Per previous comments, the state administers resident and non-resident hunting regulations.

(22) DEIS—Chapter 4, **Environmental Consequences, Subsistence**, page 478; In the first paragraph, as described above the use of the term “*sport hunting*” is potentially misleading. Reference also is made to the federal rural subsistence priority and requirement that the USFWS assures healthy fish and wildlife populations on federal public lands. The state also employs similar management principles on lands under its jurisdiction, which includes private lands in the project area. The state’s management principles apply on all lands in the absence of preemption by the federal subsistence program.

Please contact me at 269-7476 if you have any questions regarding these comments.

Sincerely,

A handwritten signature in cursive script that reads "Don Perrin".

Don Perrin
Project Review Coordinator

cc:

William Jeffress, DNR/OPMP
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