

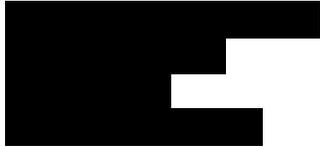
From: Masill, Keith [REDACTED]
Sent: Monday, July 09, 2012 2:53 PM
To: Wessel, Ann (ECY)
Cc: Suzanne Skinner [REDACTED]
Subject: Comments to proposed Dungeness rule

Hello Ann,

I would first off like to thank you and your staff for being so generous with your time in responding to my many questions about the proposed rule. I have attached CELP's comments to the proposed rule to this email. Please let me know if you have any trouble viewing this email or the attached pdf. I look forward to your response and again thank you for your time.

Sincerely,

Keith Masill
Center for Environmental Law and Policy (CELP)





CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
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Re: Proposed Chapter 173-518 Washington Administrative Code: Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18.

Thank you for the opportunity to comment on the proposed Dungeness Instream Flow rule.

The Center for Environmental Law and Policy (CELP) is a Washington non-profit conservation organization devoted to ensuring clean, flowing waters for the state. CELP has long advocated for the adoption of an instream flow and water management rule for the Dungeness River basin. CELP thanks the stakeholders in the Dungeness River basin and the Department of Ecology for the long hours devoted to developing the proposed rule. Given the imperiled state of many rivers and streams in Washington it is encouraging to see a draft rule for the Dungeness published.

CELP strongly supports the adoption of an instream flow rule that not only protects, but also restores and replenishes the Dungeness basin and associated aquifers. The proposed rule must be amended to achieve those essential goals. CELP applauds the surface water closures and the minimum flow levels set under the proposed rule. However, CELP objects strenuously to the creation of reserves of water for domestic use when mitigation is not available, and the setting of so-called maximum depletion amounts for consumptive uses both from the reserves and mitigation plans. The reservations and the maximum depletion amounts undermine the very purpose of the rule: setting instream flows which Ecology itself defines as the “stream flow (amount of water) that must remain in the stream at a specified location and at a specified time to protect instream values.” Department of Ecology, *Workplan for Instream Flow Setting Through 2010*, (2002) at 2.

CELP recognizes the tremendous pressure that Ecology and local government are under to find more water for domestic uses in the Dungeness. The greater Sequim area has experienced a 32% population increase since 2000. However, the population will continue to increase, and the proposed reserves, if adopted, will soon be used up. When that happens Ecology and local government will face renewed pressure to create additional reserves—as recent developments in the Skagit River basin prove. Reserves do nothing more than kick the can of dealing with water shortages down the road at significant cost to the sustainability of our water resources.

The impact of the reserves and the maximum depletion amounts on the waters and the fish of the Dungeness river basin will be significant. The basin is home to four species of salmonids listed under the Endangered Species Act (ESA) and the precipitous decline of flows in the basin is the fundamental cause for the listing. In 1899-1901, the average September flow in the lower Dungeness River was 200 to 225 cubic feet per second (cfs) at river mile 0.9. Caldwell and Beecher, *Instream Flows for the Dungeness River* (WDFW and Department of Ecology). Since then, irrigation and development have done significant damage to flows. In 2000-2011, average monthly flow in September averaged *only* 113 cfs at river mile 0.8 (with that average increased due to high flows of 212 cfs in 2010 and 222 cfs in 2011, two very wet summers). In short, current average September flow in the Dungeness falls far below the minimum flow level set in the proposed rule. Plainly, the water resources of the Dungeness are imperiled. Yet, in the name of political compromise and consensus, the proposed rule allows further consumptive use from this water-short basin.

In summary, CELP is very concerned that the proposed rule, as presently configured, does not (1) sufficiently protect the Dungeness from further degradation; (2) adequately consider changes to the basin occurring since the completion of the draft instream flow in 2010; and (3) provide protections and habitat enhancements required to conserve¹ the river's four Endangered Species Act (ESA) listed salmonids. 16 U.S.C. 1532(3).

Specific Comments

WAC 175-518-010 General Provisions

Subsection(3)

The rule, as proposed, exempts yet undeveloped parcels that are part of a group domestic if one parcel has put water to beneficial use. Subdivisions, or portions of subdivisions, based upon permit exempt wells or private water systems in which water has not been put to use should not receive a five-year exemption from the rule. *Dep't. of Ecology v. Theodoratos*, 135 Wn.2d 582, 957 P.2d 1241 (1998) requires actual beneficial use of water, not a demonstration of system capacity, to secure a water right certificate. Therefore, for a subdivision based upon a permit exempt well or private water system, the use associated with each new residence should only obtain a priority date once beneficial use begins.

Subsection(4)

The water problems of the Dungeness and WRIA 18 are not just the concern of local residents. The Dungeness and the Elwha rivers are cherished regionally, nationally, and internationally. Both rivers are essential to the health of Puget Sound and the Strait of Juan de Fuca. Nothing could make the importance of the rivers of WRIA 18 clearer than the national and international attention focused on the removal of dams from the Elwha River. Therefore, while watershed plans may express some component of the public interest, the locally developed watershed plan is not the sole expression of the public's interest in the river, nor does the plan fulfill the state's

¹ Ecology is well aware that the state's ESA obligations to "conserve" the Dungeness basin's listed salmonids require "all methods and procedures which are necessary to bring any endangered or threatened species to the point" where ESA protections are no longer necessary. 16 U.S.C. 1532(3).

public trust obligation to protect the public's interest in returning adequate instream flows to the Dungeness. The state's trust obligation to protect the public's interest in instream environmental values limits the state's authority to diminish or impair minimum flows. *In the Matter of Water Appeals*, PCHB Nos. 90-08 et seq. (1996) (“[T]he water code, by recognizing the waters of the state belong to the public and acknowledging the state acts as the trustee for the public in regulating the use of those waters . . .”); *See also Weden v. San Juan Cty.*, 135 Wn.2d 678, 698, 958 P.2d 273, 283 (1998) (quoting Ralph W. Johnson, et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)); *Orion Corp. v. State*, 109 Wn.2d 621, 640–41, 747 P.2d 1062, 1073 (1987) (Washington courts have recognized new public trust interests in keeping with evolving public need). In disregard of its trust duties—for the sake of political compromise—Ecology proposes to allow new consumptive uses—even if not fully mitigated—in spite of the fact that the very minimum flows the rule establishes remain unmet. The state's duty as trustee of public waters constrains Ecology from giving away trust resources to private users by waiving impairment of instream flows by establishing reserves that are not fully mitigated and maximum depletion amounts. *See, Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232, 239 (1993).

WAC 173-518-030 Definitions

“Critical Period”

The definition of critical period is wholly inadequate in the proposed rule. There are many important fish species in the Dungeness and all species have several critical life stages: spawning, rearing, and migration, to name a few. The critical life stages of the various species in the basin generally persist for more than thirty days and can vary greatly. For example, Chinook are considered to be spawning throughout August and September; Steelhead spawn from February through June; and Bull Trout spawn from September through November. P.L. Wampler and J.M. Hiss, *Fish Habitat Analysis for the Dungeness River Using the Instream Flow Incremental Methodology*, U.S. Fish and Wildlife Service, Western Washington Fishery Resource Office, Olympia, WA (1991). It is unclear why the “critical period” is limited to thirty days when scientific evidence clearly indicates that critical periods almost always persist for longer than thirty days. The definition of critical period should be amended in the final rule to include all the critical life stages, for their full duration, of the important species of the Dungeness. Moreover, the definition of “critical period” is difficult if not impossible to apply accurately since by its terms it applies to the thirty day period with the “lowest stream flow available”: a judgment that can only be made with hindsight once the low flow period is over.

“Instream flows”

The equating of “base flow” and “instream flow” confuses hydrology with regulatory terminology and misstates the law. The reference in RCW 90.54 to “base flows” makes clear that base flows are different from minimum instream flows or instream flows, by stating, in pertinent part, as follows:

(3) The quality of the natural environment shall be protected and, where possible, *enhanced* as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their

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natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3)(a) (emphasis added).

Base flows are therefore “natural” flows which the state is obliged to retain, to sustain, and, where possible, enhance wildlife, environmental, and aesthetic purposes. Base flows can enhance where the purpose of minimum flows is to protect. Instream flow rules take into account use both by wildlife and humans, and do not necessarily mimic natural flows. Instream flows, as the name of their authorizing statute—the Minimum Flow Act— suggests, are (or at least should be) set at levels absolutely necessary to protect salmon and other wildlife. Hence, instream flows may be less than base flows.

In short, by conflating these two terms Ecology is rewriting the Legislature’s purposeful use of two different terms in two different statutes, and the proposed rule should be amended accordingly.

“Mitigation”

The definition of “mitigation” in the proposed rule means “action taken to offset impacts”...“on closed surface water bodies or senior water rights...” The proposed language is unacceptably vague, and fails to prevent detriment to the public interest. To protect the public interest, any action purporting to constitute mitigation must *fully* replace the newly appropriated water in-quantity, in-quality, in-time, and in-place: bucket for bucket and drop for drop. “Action...to offset impacts” simply expresses the intent to mitigate, it does not promise delivery of full mitigation.

Moreover, the definition for “mitigation” in the proposed rule differs from the definition Ecology uses for mitigation in its draft mitigation policy (Final Draft 1/17/12—Water Resources Policy—POL-xxx, Evaluating Mitigation Plans).² It is not clear why Ecology proposes to use two different definitions of the term mitigation and what the differences might be in how those definitions are applied.

“Timely and reasonable”

See comments for WAC 173-518-070 below.

WAC 173-518-060 Metering

Ecology very wisely incorporates metering into the Dungeness rule. Metering, which of course is common to all municipal water users, encourages conservation by informing users of how much water they are using. Being able to track withdrawals is critical in an area like the Dungeness where the water resource is in short supply. However, the rule should also reiterate the metering requirements of RCW 90.03.360 and court orders as they pertain to existing water users in this fish-critical basin.

² “‘Mitigation’ means measures that offset adverse effects on a water source to eliminate impairment and/or detriment to the public interest.”

Additionally, the rule should be amended to require mitigation that matches the consumptive use as indicated by a meter. The rule should also set penalties for those who exceed their amount of mitigated consumptive use. Metering is a tool that can and should be used to ensure that water in excess of the mitigated amount is not being withdrawn.

WAC 173-518-070 Future Groundwater Appropriations

Subsection (2)

CELP commends Ecology for encouraging, as the first option for new water, hook-up to a public water system, and for requiring written evidence when hook-up is not “timely and reasonable.” However, the term “timely and reasonable manner” is neither clearly defined nor linked directly to any guidance provided by the Department of Health. “Timely and reasonable” is only statutorily defined in relation to counties that have a Coordinated Water System Plan in place. RCW 70.116.060(3)(b) defines “timely and reasonable as follows: “[a]n existing purveyor is unable to provide the service in a timely and reasonable manner if the water cannot be provided to an applicant for water within on hundred and twenty days unless specified otherwise by local legislative authority.” If Ecology is referencing this provision, it should be stated with specificity in the rule.

In the alternative, if Ecology intends to leave the determination of “timely and reasonable” up to the County, then this provision fails to provide the public guidance on the term’s application. This lack of guidance could mean that permit exempt wells are issued based on nothing more than the mere assertion that the time or cost of hook-up exceeds that of installing a well, even if the potential user is located within an existing water district and service is available. Such fuzzy language inevitably will not protect the public’s interest in reducing consumptive uses of Dungeness basin water, and is likely to make drilling new wells the fall back every time a prospective applicant finds the process for hook-up to be burdensome. The definition of “timely and reasonable manner” should be amended in the final rule to avoid complications in this section’s implementation.

Subsection (2)

The proposed rule provides that a new permit exempt withdrawal when added to an existing domestic system will be considered an additional and separate exemption. What also should be noted is that the priority date for that new permit exempt withdrawal is the date of beneficial use and that the exemption will be subject to the instream flow rule.

Subsection (3) generally

CELP is concerned about Ecology’s too-hearty embrace of mitigation in closed basins or where instream flows are unmet. We should be restoring flows to levels sustainable for fish and people. Mitigation is theoretically possible only if sufficient in time, quantity, quality, and location.

Subsection 3(c)

This subsection allows a new use in a closed subbasin if the proponent can show no adverse effect. The problem is that the reason that the subbasin is closed is that it is already water-short and suffering the adverse effects of too little water. Closed should mean closed to any and all new consumptive uses—if not fully mitigated—until we restore enough water to the Dungeness and its side channels to meet the flow numbers established in the rule.

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Turning to the specifics of section 3(c), Ecology provides no guidance on what kind of showing or data it will require to demonstrate no adverse effect. The groundwater modeling prepared for the basin is insufficient: it is designed to analyze hydrological systems, not predict the impact of a single use over time. More specific analysis is required.

Furthermore, a new user should not only address the impact of his or her proposed use, but the cumulative impact of other individual users. Without assessing cumulative impacts, particularly in low flow periods, subsection (3)(c) fails to protect closed waters from the adverse effects of further withdrawals.

Finally, given that we know that climate change will significantly reduce recharge from snow melt, Ecology should apply the precautionary principle and assess any new proposed use against the likelihood of reduced recharge over the next few decades.

WAC 173-518-075 Mitigation Plans

Subsection (2)

Tightening of the requirements for a mitigation plan is essential. The rule currently states a “mitigation plan must show that the proposed new water withdrawal with mitigation in place will not: 1) Impair existing water rights; 2) Be detrimental to the public interest.... OR 3) Result in a net loss of water from a closed source greater than the applicable maximum depletion amounts.” “[O]r” must be changed to “and.” Each of these three subparts of this section must be met, not simply one of them, to constitute mitigation that not result in loss or harm to an already water-short system.

Moreover, the term “result in a net loss of water from a closed source” should be replaced with “consume water from a closed source.” Any consumptive use of water from a closed source has an adverse impact on that source and should be prohibited. The purpose of closing a water source is to protect it from further appropriation. Changing the rule to read “consume water from a closed source” would more be more likely to accomplish that objective.

WAC 173-518-076 Expedited Processing

Ecology should not be expediting the processing of a water permit application or request that is *expected* to “fully offset the impacts to surface water.” Expedited processing is only warranted for applications or requests that return water to the basin, as set forth in subsections (2) and (3). Any water permit application or request that is only expected to fully offset impacts to surface waters should receive the same level of scrutiny as any other water permit application. There is too much uncertainty to the art of assessing impacts to surface water to allow expedited processing, especially weighed against the risk of exacerbating the insufficient flows throughout the Dungeness basin. Subsection (1) should be deleted from the final rule.

WAC 173-518-080 Reserves of Water for Domestic Use

CELP strenuously objects to Ecology’s current interpretation of “overriding concerns of public interest” (OCPI) as the basis for the creation of so-called reserves of water for new homes—which may not be or cannot be properly mitigated—for short-term, localized economic gain. Applying OCPI to the proposed Dungeness reserves allows the exception to be used for private

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interests: namely, new wells for private development. Ecology's current interpretation of the rule raises the question: if private development can be asserted to be a public interest, what remains as a "private" interest under Ecology's interpretation? CELP urges Ecology to return to the definition of OCPI it defended in *Auburn v. Department of Ecology*. PCHB No. 96-091 (1996).

It is not in the public interest to further deplete already over-appropriated stream systems, and it is certainly not an *overriding* public interest. The proposed reserves allow consumptive use of water for domestic use irrespective of instream flow levels or closures established by the rule. The rationale for turning this rule into Swiss cheese is the generalized economic benefits of continued residential growth fueled by permit exempt wells from the proposed reservations. The relied upon economic analysis of development gain and fish losses for the Dungeness is localized. By contrast, the viability of the commercial fisheries—which are heavily dependent on the region's rivers—in Washington and British Columbia is of international concern. Ecology acknowledges that creating reserves in the Dungeness means the Dungeness will support less fish. As insupportable as this is in the Dungeness, the impact of this policy extends regionally. If the Dungeness instream flow rule becomes final containing reserves, Ecology will be hard-pressed not to incorporate reserves into every new instream flow rule it proposes, and, under some circumstances, to amend existing rules to add reserves. What Ecology's economic analysis fails to consider is the cumulative impact of diminished fish viability in rivers throughout Washington on the commercial fishery regionally. Moreover, the impact of the fishery cannot be measured wholly in dollars and cents: an imperative consideration is the central role of fisheries in the culture and viability of the region's tribes.

Additionally, it is inappropriate, if not legally foolhardy, to weigh localized economic benefit against the endangered Chinook, Chum, Steelhead, and Bull Trout in the Dungeness basin. WDFW has long recognized that "[i]t is logical that increased stream flow results in increased production of anadromous salmonids." Hal Beecher, *Low Streamflow and Steelhead Production*, Washington Department of Fish and Wildlife (1979). The converse is also logical; decreased stream flow results in decreased numbers of salmon and trout. CELP is very concerned that an ESA violation could arise from allowing reserves that would allow taking more water out of the main stem Dungeness and its side channels, without water for water mitigation at the same time and location and of the same quantity and quality, when current flow levels frequently fall substantially below the levels recommended in the rule. The likely loss of flow and habitat accompanying implementation of the reserves could give rise to a potential ESA violation for failing to "resolve water resource issues in concert with the conservation of endangered species." 16 U.S.C. 1531(c)(2); 16 U.S.C. § 1532(3).³

The section on reserves should be deleted from the final rule.

Subsection (3)

³ For all the controversy about the so-called avoided legal costs in Ecology's cost benefit analysis for the proposed rule, the state's avoided risk of an ESA violation by establishing truly protective instream flow rules is a consideration that supports the setting of the rule.

This section should read: ...ecology *shall* take action under WAC 173-518-110, not “may take action...” If the reserves are to be implemented then Ecology needs to ensure that compliance is mandatory.

Subsection (5)

Ecology’s method for debiting against the reserves is flawed. Neither Ecology, nor anyone else in Washington State, has comprehensively assessed ongoing consumptive uses in the Dungeness basin. Ecology bases its consumptive use assumptions on a USGS study conducted in the Great Lakes area. See Kimberly H. Shaffer and Donna L. Runkle, *Consumptive Water-Use Coefficients for the Great Lakes Basin and Climatically Similar Areas*, pubs.usgs.gov/sir/2007/5197/pdf/SIR2007-5197_body_ptl.pdf [hereinafter USGS study] (indicating as a median a 15% consumptive use coefficient for areas climatically similar to the Great Lakes basin and 20% consumptive use as the 75th percentile). Ecology’s reliance on the 15 gpd, representing the use of a coefficient in the 25th percentile is too liberal; at a minimum, 22.5 gpd, or 20% consumptive use, would be more scientifically sound. *Id.*

Use of caution in calculation of consumptive use is not only realistic, it is required. Ecology after all is not obliged by law to permit new uses where, as in the Dungeness, there is no un-appropriated water, the new uses conflict with existing rights, or if the new uses *threaten* to prove detrimental to the public interest. RCW 90.03.290(3) (emphasis added). The Legislature’s use of the word “threaten” calls for Ecology to invoke the precautionary principle in using consumptive use calculations to “find” new water, which is consistent with the agency’s duty to retain “waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.” RCW 90.03.005.

WAC 173-518-085 Maximum depletion amounts

Subsection (3)

The first flaw in this subsection is its incorporation of the draft rule’s definition of “critical period.” As stated above under WAC 173-518-030, the current definition reflects neither reality nor the biology of the seven principal fish species in the Dungeness basin. Because of the truncated, arbitrary definition of critical period, the limit on maximum depletion in the proposed rule is far too short to protect the seven important Dungeness fish species.

Finally, subsection (3) should be amended to make clear no new uses in excess of the maximum depletion amounts will be allowed, and any new uses later discovered to be in excess of the depletion amounts will be terminated, if not fully mitigated with water for water mitigation at the same time and location, and of the same quality and quantity.

Subsection 4(a)-(c)

As mentioned in, and in addition to, the comments to WAC 173-518-080(5)(a), CELP opposes the use of a 10% coefficient for indoor domestic use of water served by an individual or community on-site septic system and the use of a 90% coefficient for outdoor water use. First, the indoor domestic use should initially be set at a minimum of 15% and should be re-evaluated if new studies or a change in circumstances warrant.

Second, outdoor water use should be assumed to be 100% consumptive. The 100% coefficient is supported by the USGS study based on its coefficients for irrigation and livestock. Additionally,

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a 100% coefficient is justified because it encourages water conservation by irrigators; nothing less than 100% efficiency in irrigation should be tolerated in an over-appropriated basin.

Third, CELP is very concerned about using "return flow" from septic systems to justify pumping more ground water from over-allocated groundwater systems. Septic return flow does not necessarily return to the same groundwater source from which household water was originally pumped, and frequently is returned in substantially lesser quality.

Therefore, Ecology should use the more conservative numbers presented in the USGS study because the basin is already over-appropriated and "return flow" from septic systems and irrigation is not a guarantee.

WAC 173-518-095 Storage Projects

This provision allows Ecology to authorize storage projects for "environmental enhancement and other beneficial uses." This open-ended authorization undermines the incentives to find mitigation water to accomplish the purposes of the rule. It is in the public's interest to rely on conservation and mitigation measures to restore flows to the river; storage projects are massively expensive, by comparison, for each drop of water captured. This provision should be rewritten to require that all opportunities for conservation are fully exploited and implemented before Ecology and local governments turn to additional storage, especially if additional storage is achieved by dams. Dams have consistently been shown to have adverse effects on wildlife and the surrounding ecosystem as a whole. Given the imperiled state of several ESA listed species in the watershed, the effect of any storage project on salmonids should be at the forefront of what shall be considered if the implementation of a storage project becomes a consideration.

WAC 173-518-100 Lakes and Ponds

The title of this subsection misleadingly gives the impression that RCW 90.54.020(3)(a) applies only to lakes and ponds. Ecology's duty under the statute is to enhance rivers and streams, where possible, which the reservations set forth in the proposed rule do not.

WAC 173-518-110 Compliance and Enforcement

Subsection (2)(a)

Ecology is a regulator, tasked to protect the state's waters. It is wholly inappropriate for Ecology to limit its ability to enforce, without resort to voluntary compliance, to "egregious cases," an undefined term with no basis in statute. Undoubtedly, if that language remains in the final rule, Ecology will be constrained from enforcing against an impairment of instream flows because the violation was not sufficiently harmful to be egregious or the overtures at procuring compliance inadequate. Ecology always has the discretion to seek voluntary compliance. Its enforcement authority should not be limited by rule.

Finally, CELP notes that repeated legislative cuts have significantly diminished Ecology's enforcement capabilities and efforts. Absent funding for Ecology's employment of a dedicated full time water master for WRIA 18, the proposed compliance and enforcement provisions are likely to prove toothless. We therefore recommend that a private right of action to enforce violations of instream flows be established, with an attendant attorney's fee provision.

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In closing, CELP supports the closures and instream flows in the proposed rule. CELP, however, objects to the proposed reserves as they will, if enacted, exacerbate the over-appropriation of the basin. The reserves, if used, will further degrade habitat critical to a number of commercially and culturally significant species of fish, and fail to meet the mandate of "conservation" under the ESA. Additionally, CELP supports the use of the median coefficients found in the USGS study to measure consumptive use, anything less could fail to offset the inevitable habitat loss resulting from the implementation of the rule.

CELP strongly encourages Ecology to strengthen the rule and meet its obligations to the public by incorporating the aforementioned revisions in the rule.

Very Truly Yours,

THE CENTER FOR ENVIRONMENTAL LAW AND POLICY



Suzanne Skinner, Executive Director



Keith Masill, Intern

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