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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff and Counterclaim Defendant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Defendant and Counterclaimant.

Case No. 08-5722RJB

ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment on Liability Re: Coal Tar Contamination (Dkt. 80). The Court has considered the motion, responses, and the relevant documents herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a CERCLA suit brought by the United States against the Washington State Department of Transportation ("WSDOT") to recover costs incurred in responding to releases of hazardous substances into the Thea Foss and Wheeler Osgood Waterways ("Waterways"), which are within the Commencement Bay/Nearshore Tidelands Superfund site ("CB/NT Superfund site" or "CB/NT"). Dkt. 80, p. 6-9. Defendant WSDOT is alleged to own or operate parcels of land ("Tacoma Spur Property") near the Waterways and within the CB/NT Superfund site. Dkt.

1 80, p. 9-11, Dkt. 86, p. 5-6. On the Tacoma Spur Property, WSDOT built South A Street to
2 connect downtown Tacoma with Dock Street and the waterfront. Dkt. 86, p. 2. WSDOT
3 encountered a high water table during the construction of South A Street and built a “French
4 drain system” to protect the roadway from water damage. *Id.* The French drain system
5 connected to the street’s stormwater drain, which then connected with the City of Tacoma storm
6 sewer system. *Id.* The City of Tacoma storm sewer system eventually drains into the Thea Foss
7 Waterway through the “West Twin” drain at the head of the waterway. *Id.*

9 WSDOT alleges that the Washington State Department of Ecology discovered that coal
10 tar had migrated through the soil into the French drain system and into a catch basin. Dkt. 86, p.
11 3. The United States alleges that the drainage system installed by WSDOT acted as a pathway
12 for coal tar to be funneled into the Thea Foss Waterway, thus contaminating the Waterways.
13 Dkt. 80, p. 7.

15 On December 2, 2008, the United States filed this suit seeking recovery of response costs
16 incurred in the cleanup of the Waterways under CERCLA. Dkt. 1. On May 27, 2010, the United
17 States filed this motion for partial summary judgment regarding coal tar contamination. Dkt. 80.
18 The United States is seeking judgment as to liability for coal tar contamination under CERCLA.
19 *Id.*

20 **II. DISCUSSION**

21 **A. LEGAL STANDARDS**

22 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
23 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
24 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is
25 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
26 showing on an essential element of a claim in the case on which the nonmoving party has the
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1 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
2 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
3 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
4 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
5 metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
6 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
7 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
8 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
9 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

11 The determination of the existence of a material fact is often a close question. The court
12 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
13 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
14 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
15 of the nonmoving party only when the facts specifically attested by that party contradict facts
16 specifically attested by the moving party. The nonmoving party may not merely state that it will
17 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
18 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
19 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not
20 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

23 The Comprehensive Environmental Response, Compensation, and Liability Act of 1980,
24 as amended (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, was enacted to facilitate “expeditious and
25 efficient cleanup of hazardous waste sites.” *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270
26 F.3d 863, 880 (9th Cir. 2001). Its secondary purpose is to hold responsible parties accountable
27 for cleanup efforts. *Id.* CERCLA accomplishes these goals by imposing strict liability on owners
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1 and operators of facilities where releases of hazardous substances occur. *Id.* at 870. This liability
2 is joint and several, subject to statutory defenses set forth in 42 U.S.C. §9607(b). *See California*
3 *v. Montrose Chemical Corp. of California*, 104 F.3d 1507, 1518 n.9 (9th Cir. 1997).

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5 To recover its costs for engaging in response actions, the EPA must prove: (1) the site at
6 which the actual or threatened release of hazardous substances occurred constitutes a “facility”
7 under 42 U.S.C. §9601(9); (2) there was a “release” or “threatened release” of a hazardous
8 substance; (3) the party is within one of the four classes of persons subject to liability under 42
9 U.S.C. §9607(a) [CERCLA section 107(a)]; and (4) the EPA incurred response costs in
10 responding to the actual or threatened release. *U.S. v. Chapman*, 146 F.3d 1166, 1169 (9th Cir.
11 1998); *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 743
12 (8th Cir. 1986)(“NEPACCO”); 42 U.S.C. §9607(a)(4)(A) (defendants may be held liable for “all
13 costs of removal or remedial action incurred by the United States Government or a State or an
14 Indian tribe not inconsistent with the national contingency plan”). A party may be a potential
15 responsible party under CERCLA section 107(a) if they fall under one of four categories: current
16 owner and operator - section 107(a)(1); former owner or operator - section 107(a)(2); arranger -
17 section 107(a)(3); or transporter - section 107(a)(4). 42 U.S.C. § 107(a). The United States is
18 arguing that WSDOT is liable under section 107(a)(1) or (2), but is reserving any other theories
19 of liability (i.e. liability under sections 107(a)(3) & (4)). Dkt 80, p. 18 n. 3.

21 **B. OWNER/OPERATOR LIABILITY**

22
23 Under CERCLA section 107(a)(1), a party may be liable if it is the owner and operator of
24 a vessel or a facility. 42 U.S.C. § 9607(a)(1). The term “facility” means (A) any building,
25 structure, installation, equipment, pipe or pipeline... or (B) any site or area where a hazardous
26 substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. 42
27 U.S.C. § 9601(9). Additionally, a party may be liable if at the time of disposal of any hazardous
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1 substance it owned or operated any facility at which such hazardous substances were disposed
2 of. 42 U.S.C. § 9601(a)(2).

3 Plaintiff argues that WSDOT has admitted the first three elements in its answer and
4 discovery responses, and that the fourth element is established by undisputed factual evidence
5 that WSDOT is the current owner of the Tacoma Spur property. Dkt. 80, p. 19. Plaintiff also
6 states that there is undisputed factual evidence that establishes that WSDOT was the owner and
7 operator of that property and of the DA-1 drainage system¹ at the time that system disposed
8 hazardous substances into the Waterway. *Id.* Therefore, Plaintiff contends, the Defendant is
9 liable under CERCLA Section 107(a) as the current owner of contaminated property and as the
10 owner and operator of that property at the time of discharge. Dkt. 80, p. 18.

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12 Defendant responds by asserting that it is not the owner or operator of the facility at the
13 time the United State incurred costs. Dkt. 86, p. 5. Defendant asserts that the clean up by the
14 United States involved the Thea Foss Waterway, not the Tacoma Spur Property, where no
15 response costs were incurred, and that the Tacoma Spur Property is not the subject of the suit.
16 Dkt. 86, p. 5-10. Defendant next argues that even if the highway property were a facility,
17 WSDOT is not the owner of that property; the State of Washington is the owner. Dkt. 86, p. 11.
18 Finally, the Defendant asserts that operation of the French drain for the purpose of removing
19 groundwater does not make WSDOT an operator under CERCLA. *Id.*

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22 This motion regarding the issue of liability appears to partly turn on the scope of the
23 word “facility.” Under CERCLA Section 107(a)(1), the owner and operator of a vessel or a
24 facility is a liable party. Under CERCLA Section 107(a)(2), any person who at the time of
25 disposal of any hazardous substance owned or operated any facility at which such hazardous

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27 ¹The Plaintiff uses the nomenclature “DA-1 drainage system” in its filings. The Court
28 will use the nomenclature “Tacoma Spur Property” generically to refer to both the drainage
system and above ground structures.

1 substances were disposed of is potentially responsible. Plaintiff contends that “ownership of one
2 portion of a ‘facility’ – whose boundaries are defined by the extent of contamination, not by
3 property lines – is sufficient to establish liability for response costs at that facility as a whole.”
4 Dkt. 80, p. 19. Plaintiff argues, in essence, that the entire CB/NT Superfund site is a facility and
5 that Defendant owns property within that Superfund site. *See Id.* Defendant asserts the opposite
6 argument; that the CB/NT Superfund site is not a facility for purposes of this action, the facility
7 at issue is the Thea Foss and Wheeler Osgood Waterway, which is not owned nor operated by
8 the Defendant. Dkt. 86, p. 9-11.

10 While there is no directly relevant case law in the Ninth Circuit, the case of *U.S. v.*
11 *Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), is particularly instructive. The *Brighton*
12 case involved a 15 acre plot in Brighton Township. *Brighton*, 153 F.3d at 310. The land was
13 owned by Vaughan Collett, and later by Jack Collett. *Id.* The Township of Brighton contracted
14 with Vaughan Collett to use his land as a dump for the town’s residents. Specifically, three acres
15 in the southwest corner of the property were used as the township dump. *Id.* In 1994, the United
16 States brought suit against both the township and Jack Collett to recover response costs under
17 CERCLA after clean up of hazardous waste on the Collett property. *Brighton*, 153 F.3d at 312.
18 The district court found that Collett and the township were jointly and severally liable for the full
19 amount of the response costs. *Id.* The township appealed the decision and argued that the
20 Brighton Township dump comprised only three acres in the southwest corner of the 15 acres
21 Collett property. *Id.* Therefore, the township argued, the government should have defined the
22 bounds of the site in a way that excluded the township dump, which did not contain hazardous
23 waste. *Id.*

26 The *Brighton* court noted that CERCLA defines the term “facility” as “any site or area
27 where hazardous substances has been deposited, stored, disposed of, or placed, or otherwise
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1 come to be located.” *Brighton*, 153 F.3d at 312 (citing 42 U.S.C. § 9601(9)(B)). The *Brighton*
2 court stated that:

3 [their] task is to determine how broadly or narrowly the bounds of the “site” may
4 be drawn. At one extreme, the entire Collett property (or the entire county for
5 that matter), could be defined as a facility based on the presence of a hazardous
6 substance in one portion of it. At the other extreme, the facility could be defined
7 with such precision as to include only those specific cubic centimeters of Collett’s
property where hazardous substance were deposited or eventually found. The
first approach obviously would sweep too broadly, the second too narrowly.

8 *Brighton*, 153 F.3d at 312. The court stated that the “words of the statute suggest that the bounds
9 of a facility should be defined at least in part by the bounds of the contamination.” *Brighton*,
10 153 F.3d at 313. However, the court stated, “an area that cannot be reasonably or naturally
11 divided into multiple parts or functional units should be defined as a single ‘facility,’ even if it
12 contains parts that are non-contaminated.” *Id.* The *Brighton* court concluded that the entire
13 Collett property was one facility because Collett used the entire property as a dump. *Id.* The
14 *Brighton* court supported this conclusion by stating that the facts show that local household and
15 commercial dumping was largely, but not completely, limited to the southwest corner of the
16 property; that refuse was moved around on the property; and that Collett placed materials from
17 non-residents and industries in other parts of the site. *Id.* Finally, the *Brighton* court noted that
18 “[i]f the township was only connected to the southwest corner, the appropriate place to draw that
19 distinction is in the divisibility analysis [of CERCLA], not in the bounding of the facility.” *Id.*
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22 In this case, the United States defines facility as encompassing the entire CB/NT
23 Superfund site, while WSDOT defines facility as either the Waterway or the Tacoma Spur
24 Property. The United States’ asserted definition of facility is too broad. If the Court was to
25 adopt the United States’ definition of facility, then liability could be imposed broadly and on
26 persons not reasonably related to the contamination. In other words, a property owner whose
27 property does not contain hazardous substance but is within such a “facility” could be found to
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1 be an owner of the facility and thus liable under CERCLA for response costs. CERCLA was not
2 intended to place the cost of clean up on persons who are not responsible for the contamination.
3 *See U.S. v. Bestfoods*, 524 U.S. 51, 56 (1998)(“those *actually* responsible for any damage,
4 environmental harm, or injury from chemical poisons may be tagged with the cost of their
5 actions.”)
6

7 Under CERCLA, facility means any building, structure, installation, equipment, pipe or
8 pipeline, or “any site or area where a hazardous substance has been deposited, stored, disposed
9 of, or placed, or otherwise come to be located.” 42 U.S.C. § 9601(9)(A) & (B). Under the plain
10 meaning of the statutory provision, both the Waterways and the Tacoma Spur Property could be
11 considered facilities since hazardous substances are located at both sites. However, that does not
12 mean the two sites combine into one site to form a single facility. In the *Brighton* case, the site
13 at issue was owned by one person, Jack Collett. Moreover, the *Brighton* court found that the
14 entire site was used for a common purpose, a dump. In this case, the CB/NT Superfund site
15 appears to include the properties of several different owners, including WSDOT, and there
16 appears to be no common purpose among the different owners. Excluding other properties and
17 focusing on only the Waterways and the Tacoma Spur Property, it still appears that there are
18 different owners and different purposes. Moreover, the Waterways and the Tacoma Spur
19 Property are reasonably or naturally divided into multiple parts or functional units. For these
20 reasons, the Waterways and the Tacoma Spur Property should be considered separate facilities.
21

22 Since they are separate facilities, the next step is to determine which facility might
23 impose liability on the Defendant. It has not been argued nor evidence presented that WSDOT
24 owns or operates the Waterways. Even if the Court assumes that WSDOT does own and operate
25 the Tacoma Spur Property, it does not necessarily mean that it is liable as an owner or operator
26 of a facility under CERCLA. The United States incurred response costs here in the Waterway,
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1 but not on the Tacoma Spur Property. The United States has not argued nor asserted that it has
2 incurred response costs on the Tacoma Spur Property.

3 The law is unclear as to whether CERCLA requires that the response costs be incurred on
4 the property owned or operated by a defendant, but CERCLA's purpose is to assign the cost of
5 remediation to the party actually responsible for any damage, environmental harm, or injury. *See*
6 *Burlington Northern and Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1874 (2009) ("The
7 Act was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the
8 costs of such cleanup efforts were borne by those responsible for the contamination"); *U.S. v.*
9 *Bestfoods*, 524 U.S. 51, 56 (1998) ("those *actually* responsible for any damage, environmental
10 harm, or injury from chemical poisons may be tagged with the cost of their actions."). CERCLA
11 provides for liability to attach in four ways; current owner and operator, former owner or
12 operator, arranger, and transporter. 42 U.S.C. § 9607(a). CERCLA section 107(a)(1) states that
13 the owner and operator of a facility is liable for response costs. *Id.* A facility is any building,
14 structure, installation, equipment, pipe or pipeline... or any site or area where a hazardous
15 substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. 42
16 U.S.C. § 9601(9). If the Court was to take the view that response costs need not be incurred on
17 the facility owned and operated by the defendant, then liability may be imposed on persons not
18 related to the contamination, which is not the purpose of CERCLA. Under a broad reading of
19 the requirements of CERCLA as is advocated by the Plaintiff, a person owning and operating a
20 building close to the clean up site (i.e. the Waterways) may be considered an owner and operator
21 of a facility under CERCLA whether or not that person was responsible for contamination of the
22 clean up site. The Court believes that this is not what CERCLA intended. The Court believes a
23 better interpretation of the requirements of CERCLA is that for liability to attach to WSDOT
24 under CERCLA section 107(a)(1), it must be the owner or operator of the facility in which the
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1 United States incurred a response cost. To allow otherwise would expose a party to liability
2 under CERCLA for merely holding property that fit the definition of facility whether or not that
3 party had any actual responsibility in contamination. While this interpretation of CERCLA
4 section 107(a)(1) may seem narrow, it carries out the purpose of CERCLA by allowing liability
5 to attach to persons who dispose of hazardous materials into the environment under CERCLA
6 section 107(a)(3) or (4), but allows persons not responsible for contamination to be free of
7 liability. In this case, WSDOT is not the owner or operator of the Waterways, and there were no
8 response costs incurred on the WSDOT owned Tacoma Spur Property. Therefore, the United
9 States' motion for summary judgment as to the CERCLA section 107(a)(1) should be denied.
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11 The foregoing analysis also applies to CERCLA section 107(a)(2) former owner or
12 operator liability.

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14 Furthermore, the hazardous substance in this motion is coal tar and the facility is the
15 Tacoma Spur Property. It is undisputed that coal tar was disposed of at the Tacoma Spur
16 Property. However, the United States argues that the coal tar contaminated the Waterways
17 through the drainage systems installed at the Tacoma Spur Property. Dkt. 80, p. 21-22. WSDOT
18 contends that Waterways contamination is not due to the coal tar being disposed of through the
19 drainage system. Instead, WSDOT argues that contamination resulted from urban stormwater
20 runoff. Dkt. 86, p. 20. There appears to be a genuine issue of material fact as to whether coal tar
21 was disposed of which resulted in removal and remedial actions costs. As such, the United
22 States' motion for summary judgment as to CERCLA section 107(a)(2) should be denied.
23

24 For the foregoing reasons, the Plaintiff's motion for partial summary judgment as to
25 liability under CERCLA sections 107(a)(1) &(2) should be denied. Since summary judgment as
26 to liability under CERCLA sections 107(a)(1) &(2) is denied, the Court declines to address the
27 arguments regarding affirmative defenses.
28

1 **C. NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL**

2 The United States contends that WSDOT has fully litigated its liability in connection
3 with the Tacoma Spur Property and drainage system in Washington State Superior Court and
4 lost. Dkt. 80, p. 26. The United States argues that under the doctrine of “issue preclusion,” the
5 state’s court’s judgment and finding of fact and law are conclusive against WSDOT. *Id.* The
6 United States specifically cites *Pacificorp Envtl. Remediation Co. v. WSDOT*, No. 07-2-10404-1
7 (Wash. Super. Ct. April 30, 2009) to support its argument that the issue of liability is precluded
8 in this litigation. Dkt. 27, p. 27. WSDOT responds by arguing that judgment regarding a state
9 law does not apply to a federal issue, and that federal law regarding collateral estoppel applies,
10 not state law. Dkt. 86, p. 12-20.

11
12 Nonmutual offensive collateral estoppel is estoppel asserted by a nonparty to an earlier
13 action to prevent a defendant from relitigating an issue previously decided against the defendant.
14 *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-332 (1979). Trial courts are given broad
15 discretion to determine when collateral estoppel should be applied. *Id.* at 331. “The general rule
16 should be that in cases where a plaintiff could easily have joined in the earlier action or where...
17 the application of offensive estoppel would be unfair to a defendant, a trial judge should not
18 allow the use of offensive collateral estoppel.” *Id.* The *Parklane* court stated that application of
19 offensive collateral estoppel may be unfair if: (1) the first action was for small or nominal
20 damages and that future suits are not foreseeable; (2) the judgment relied upon as a basis for the
21 estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; or
22 (3) the second action affords the defendant procedural opportunities unavailable in the first
23 action that could readily cause a different result. *Id.* at 330-31. Finally, the *Parklane* court notes
24 that the defendant must have had a full and fair opportunity to litigate. *Id.* at 328.

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27 In this case, it would be unfair to the Defendant for the Court to apply offensive estoppel.
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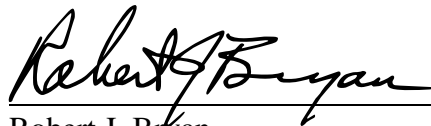
1 In the Superior court case, the issue was whether the Defendant violated the Model Toxics
2 Control Act (“MTCA”) RCW 70.105D, et seq., not whether it violated CERCLA. The United
3 States has admitted that the MTCA was “heavily patterned” after CERCLA, but it is not identical
4 to CERCLA. *See* Dkt. 80, p. 27 n. 9. Therefore, the issues presented in this case may be
5 different from the Superior court case. Moreover, there are defenses or exemptions in CERCLA
6 that are not found in the MTCA. It would be unjust not to allow the Defendant to avail itself of
7 these defenses. Finally, WSDOT has not had the opportunity to fully and fairly litigate the
8 CERCLA claims. The Superior court case only litigated MTCA claims. For the foregoing
9 reasons, nonmutual offensive collateral estoppel should not be applied in this case and the
10 Plaintiff’s motion for partial summary judgment should be denied.
11

12 III. ORDER

13 The Court does hereby find and **ORDER**:

- 14 (1) Plaintiff’s Motion for Partial Summary Judgment on Liability Re: Coal Tar
15 Contamination (Dkt. 80) is **DENIED** only insofar as the motion was based on CERCLA
16 section 107(a)(1) & (2); and
17
18 (2) The Clerk is directed to send copies of this Order to all counsel of record and any
19 party appearing *pro se* at said party’s last known address.

20 DATED this 7th day of July, 2010.

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23 Robert J. Bryan
24 United States District Judge
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