

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ALLEGHENY DEFENSE PROJECT)

Plaintiff,)

v.)

Civil Action No. _____

DALE BOSWORTH, Chief, UNITED)

STATES FOREST SERVICE;)

UNITED STATES FOREST)

SERVICE; KEVIN B. ELLIOTT,)

Forest Supervisor; JOHN SCHULTZ,)

District Ranger; and)

LEON BLASHOCK, District Ranger,)

Defendants.)

COMPLAINT

I. Preliminary Statement

1. This is an action for declaratory judgment and injunctive relief challenging the actions of the Defendants in approving 19 individual salvage logging projects: FR 191, FR 395/396, FR 468/594, South of KEF, Thad Shanty, James City, Windy City, West 127, FR 216, FR 631/727, and West of Salmon salvage logging projects in the Marienville Ranger District of the Allegheny National Forest; and the Bull North, Bull South, FR 252, West Branch Tionesta Creek, Mudlick, Lewis, Guffey, and Chappel salvage logging projects in the Bradford Ranger District of the Allegheny National Forest. These salvage logging projects were approved without the Defendants preparing Environmental Impact Statements (“EIS”) or Environmental Assessments (“EA”) under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332,

and NEPA's implementing regulations, and were approved in violation of the National Forest Management Act ("NFMA") and other related forest management statutes, 16 U.S.C. § 1600 *et seq.* and the respective implementing regulations.

II. Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the claims set forth in this complaint, by virtue of NEPA and NFMA, and pursuant to 28 U.S.C. § 1331 (federal question) and § 1361 (mandamus) and may issue a preliminary injunction and further relief pursuant to 28 U.S.C. § 2201 (declaratory relief) and § 2202 (injunctive relief). Plaintiff alleges this Court has jurisdiction of the claims presented in the Complaint by invocation of the Administrative Procedure Act. In particular, Plaintiff alleges that the Administrative Procedure Act gives this Court jurisdiction to hear the claims in Plaintiff's Complaint. 5 U.S.C. §§ 551-596, 601-612 and 701-706. As a basis therefore, Plaintiff alleges that all actions challenged in the Complaint are final actions for purposes of review and that the Defendants are taking action that is arbitrary and capricious, that is an abuse of discretion and that is not in accordance with law. Plaintiff has fully availed itself of all available agency appeal procedures, and there are no further means for Plaintiff to appeal this agency action within the agency or its procedures, and the decisions challenged herein are final agency actions. There is a present and actual controversy between the parties. This Court has venue as the subject matter of this case is in the Western District of Pennsylvania, Pittsburgh Division, and the Plaintiff has its office in Clarion, Pennsylvania.

III. Parties

3. Plaintiff Allegheny Defense Project (ADP) is a not-for-profit corporation with

offices in Clarion, Pennsylvania. ADP is active and dedicated to the protection and restoration of forest communities, and the diversification of economies of the Allegheny Bioregion, including the Allegheny National Forest. ADP has 200 members, most of whom use the Allegheny National Forest for a wide variety of purposes on a regular basis. ADP participated in the scoping process for each of the salvage logging projects herein named.

4. The Plaintiff and its members use and enjoy the National Forests, particularly the Allegheny National Forest, and they have taken particular and individual interest in the study and recovery of the natural forest ecosystems of the Allegheny National Forest including the areas where the logging projects at issue in this case are located. Plaintiff's members regularly recreate in the Allegheny National Forest pursuing activities such as hiking, camping, canoeing, bird and other wildlife watching, photography, scientific study, enjoying these and other recreational and aesthetic resources of the lands where these projects are located. Plaintiff writes and publishes newsletter and journal articles about the National Forests and the Allegheny National Forest in particular and about the land and biological resources of the Allegheny, making part of their living from the health, biodiversity and beauty of the Allegheny and the land and biological resources of the Allegheny. Devoting much of their personal and professional time to the protection of the environment and to documenting and protecting the land and biodiversity of the area, Plaintiff and its members are personally concerned about the plight of the Allegheny National Forest and the destruction of any part of it through improper and illegal logging decisions that destroy native forests through even-aged management. Plaintiffs are concerned with the proper administration of statutes and regulations designed to protect public lands and the public interest. The logging

of these forest areas without compliance with the law causes and will cause substantial injury to Plaintiff's use and enjoyment of the Allegheny National Forest and will significantly harm their aesthetic enjoyment and recreational use of the Allegheny. Plaintiff has used and enjoyed the areas that are the subject of this lawsuit and plan to use them in the future.

5. Defendant United States Forest Service is the agency of the United States Government that has the authority to administer the National Forest system. The U.S. Forest Service maintains offices at the national, regional, forest and district levels. The national headquarters is located at 12th and Independence SW, 201 14th Street, SW, Washington, D.C. 20090. The Chief, Dale Bosworth, is the highest ranking officer at the national office.

6. Defendant Kevin B. Elliott is the Forest Supervisor for the Allegheny National Forest and he is the official responsible for all actions that occur on the Allegheny National Forest under the Land and Resource Management Plan (LRMP), and for implementation of the LRMP. He is sued in his official capacity.

7. Defendant Leon Blashock is the District Ranger for the Marienville District of the Allegheny National Forest, and is the official who approved the FR 191, FR 395/396, FR 468/594, South of KEF, Thad Shanty, James City, Windy City, West 127, FR 216, FR 631/727, and West of Salmon salvage logging project decisions at issue. Leon Blashock is sued in his official capacity as the District Ranger for the Marienville District of the Allegheny National Forest, and his office address is: Leon Blashock, District Ranger, Marienville District, Allegheny National Forest, HC 2, Box 130, Marienville, Pennsylvania 16239.

8. Defendant John Schultz is the District Ranger for the Bradford District of the

Allegheny National Forest, and is the official who approved the Bull North, Bull South, FR 252, West Branch Tionesta Creek, Mudlick, Lewis, Guffey, and Chappel salvage logging project decisions at issue. John Schultz is sued in his official capacity as the District Ranger for the Bradford District of the Allegheny National Forest, and his office address is: John Schultz, District Ranger, Bradford District, Allegheny National Forest, 29 U.S. Forest Service Drive, Bradford, Pennsylvania 16701.

IV. General Allegations

9. In July 2003, a storm event downed trees on thousands of acres of the Allegheny National Forest. Wind disturbance is a natural event in the Allegheny National Forest and it produces vital habitat and important ecological functions for numerous wildlife species that inhabit the Allegheny National Forest, including the listed, state-threatened Yellow-bellied Flycatcher.

10. The Defendants performed an internal analysis of the storm event blowdown and reported the preliminary findings in a document entitled *Allegheny National Forest Preliminary Storm Assessment July 2003*.

11. With the preliminary assessment of storm damage, the Defendants estimated that approximately 9,525 acres of the Allegheny National Forest¹ and 5359 acres of land in non-Forest Service ownership were impacted by the storm event. The Forest Service now wants to log many of the downed and leaning trees.

¹ The Forest Service revised the estimated impacted acreage on the Allegheny National Forest to 9,333 acres in a June 30, 2004, addendum to the preliminary assessment.

12. The Defendants propose logging the impacted trees in 25 different projects, 19 of which are the subject of this suit. Exhibit A.

13. The FR 191, FR 395/396, FR 468/594, South of KEF, Thad Shanty, James City, Windy City, West 127, FR 216, FR 631/727, and West of Salmon salvage logging projects in the Allegheny National Forest were each documented in scoping notices and Decision Notices (“DN”) issued by District Ranger Leon Blashock. The Bull North, Bull South, FR 252, West Branch Tionesta Creek, Mudlick, Lewis, Guffey, and Chappel salvage logging projects in the Allegheny National Forest were each documented in scoping notices and Decision Notices (“DN”) issued by District Ranger John Schultz. All 19 projects are proposed pursuant to the limited-timber-harvest categorical exclusion from NEPA documentation (CE) adopted in 2003 as agency guidance in the Forest Service Handbook. FSH 1909.15, ch. 30, sec. 31.2 (13).

14. Categorical exclusions from NEPA documentation are categories of actions that do not individually or cumulatively have a significant effect on the quality of the human environment. Categorical exclusion number 13 allows the salvage of dead and/or dying trees not to exceed 250 acres with no more than one-half mile of temporary road, in a project that does not individually or cumulatively have a significant effect on the quality of the human environment.

15. Together these 19 logging projects involve salvage of approximately 1670 acres located within the Allegheny National Forest. One 6 acre project, the Timberline ATV Trailhead Salvage project has already been logged. Approximately 3460 additional acres of impacted National Forest lands are being evaluated for salvage logging in at least five other projects, two of which were scoped before the July 2003 storm event, and one of which is currently the subject

of an appeal to the United States Court of Appeals for the Third Circuit.

16. Between March 3, 2004, and June 22, 2004, the Defendants released a scoping notice at the project-proposal stage-of-action for each of the 19 salvage logging projects, an average of more than one per week.

17. The average period of time permitted for the public and other interested parties to provide comments on each of the 19 salvage logging projects was approximately two weeks. None of the scoping comment periods was more than 18 days.

18. By August 17, 2004, the Defendants had issued all 19 salvage logging project implementation decisions.

19. On or about August 17, 2004, Defendants made publicly available for the first time a document entitled *2003 Storm Assessment Addendum* dated June 30, 2004, by posting it on the Forest Service website.

20. By June 30, 2004, scoping notices for all 19 projects at issue herein had already been issued, 3 of the 19 project decisions had been issued, and one 6-acre site had been logged. By August 17, 2004, decisions for all 19 projects at issue in this case had been issued. No scoping notice for any of the 2003 storm event salvage projects ever identified the existence of this report, and the Defendants never produced this report in response to Plaintiff's April 27, 2004, Freedom of Information Act request for the 2003 storm event salvage projects.

21. On July 9, 2004, the Defendants issued a scoping notice for an additional salvage project of more than 300 acres, for which the agency is preparing an environmental assessment (Kane Experimental Forest Windthrow salvage logging project). The scoping comment period for

the Kane Experimental Forest Windthrow salvage logging project closed on August 9, 2004.

22. The Defendants also are currently evaluating the Martin Run project within which approximately 630 acres of the July 2003 salvage blowdown may be logged.

23. The Defendants added approximately 480 acres of July 2003 blowdown salvage logging to the Spring Creek timber sale that was originally scoped in April 2002. Two separate salvage logging projects--the FR 395/396 and the Timberline ATV Trailhead CE that was logged in February 2004 are both within the Spring Creek project area.

24. The Defendants are developing at least one additional salvage logging project of more than 1000 acres called the Eagle Mills windthrow salvage project and are scheduled to scope this project September 30, 2004. Approximately 1050 acres of blowdown occurred within the project area for the East Side timber sale, currently in litigation, that the Forest Service is expected to add to that sale at some time in the future.

25. Defendants have proposed, approved, and are developing projects totaling approximately 5370 acres of salvage logging on the Allegheny National Forest as result of the July 2003 windstorm event, including the approximately 1670 acres proposed in the 19 salvage logging projects at issue in this case that are categorically excluded from NEPA documentation.

26. The Defendants propose salvage logging in two separate projects totaling 335 acres in the South Branch Tonista Creek watershed. The Martin Run project currently under analysis by the Defendants is also in this watershed and includes both blowdown-salvage (~ 630 acres) and live-tree logging.

27. The Defendants state: “The binding force behind a set of actions would be the presence or absence of a transportation system that is needed for access to an area. Therefore, it is reasonable to conclude that multiple salvage projects can be proposed that are similar in nature, and that they are not connected actions. It is logical to group together similar actions based on the local transportation system.” USDA Forest Service, *2003 Storm Assessment Addendum*, p 35. Nonetheless, in the case of the Bull North and Bull South logging projects, each project includes units that are located directly across the road from each other, dividing the projects based on acreage rather than linking them based on transportation. Other units in the Bull North logging project are located within a quarter mile of a unit in the Bull South project. The Bull North logging project totals 176 acres and the Bull South totals 181 acres. Based on the scoping criteria for connectivity and similarity, the Bull North and Bull South projects should be assessed together and total more than 250 acres. The Bull North and Bull South logging projects also share similar geography with the FR 252 (65 acres) and West Branch Tionesta (95 acres) logging projects as all projects are located in the West Branch Tionesta Creek watershed for a total of 517 acres of salvage logging.

28. The Defendants propose five separate salvage logging projects within the Tionesta Creek watershed totaling 517 acres, with five units in the FR 216 logging project separated only by Little Salmon Creek from eight units in the FR 631/727 logging project.

29. Plaintiff submitted timely comments in response to each of the 19 salvage logging project scoping notices pursuant to Defendants’ public participation procedures at 36 C.F.R. §§ 215 *et seq.* The noticed comment period for each project was the only administrative

opportunity to participate in these logging decisions, thus Plaintiff has exhausted all administrative remedies in regard to the logging projects.

30. The Allegheny National Forest holds publicly-owned lands that have native and natural forests containing a diverse range of tree species, many rare and endangered wildlife species, and valuable aquatic resources.

31. The Forest Service is legally responsible for the management and administration of all federal public lands within the Allegheny National Forest.

32. Categorical exclusion number 13 allows the salvage of dead and/or dying trees not to exceed 250 acres with no more than one-half mile of temporary road, in a project that does not individually or cumulatively have a significant effect on the quality of the human environment.

33. When the Forest Service proposed adopting categorical exclusion number 13, public comments in response to the proposal “expressed concern over the number and location of categorically excluded limited timber harvest activities that could be implemented with a given area or a limited time frame. Some respondents raised concerns that the agency could misuse the categories by segmenting larger projects into sizes that qualify under the CEs. Some respondents noted that such segmentation would violate CEQ regulations.” *National Environmental Policy Act Documentation Needed for Limited Timber Harvest*, 68 Fed. Reg. 44598, 44604 (Notice of Final Interim Directive, July 29, 2003).

34. In response to the concerns of potential misuse, the Forest Service stated: “The responsible official is required to properly identify the characteristics of the proposed action (FSH 1909.15, ch. 10, sec. 11.2). The agency adopted the following from the CEQ regulations

for all their proposals that may undergo environmental review, including the documentation for categorical exclusions, *‘proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.’*

The Forest Service also adopted the CEQ definition for determining the scope of a proposed action as defined at 40 CFR 1508.25, which discusses connected and related actions.

Consequently, *segmenting a larger project into smaller projects in order to meet the acreage requirements and be considered under these CEs is contrary to Forest Service guidance.’*

National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44598, 44604 (Notice of Final Interim Directive, July 29, 2003)(emphasis added).

35. According to the Forest Service:

Last July’s storm laid down approximately 10,068 acres of timber scattered across the Forest. 4148 acres are in management areas where salvage is not a primary emphasis and hence are not proposed for salvage, appropriately responding to other resource values. 735 acres were affected by sales presently under contract. 375 acres were added to existing sales and another 360 acres were addressed by supplementing existing environmental analysis. That left 5185 acres to “address” with new analysis in some fashion. 1471 acres were incorporated in existing EIS’s, i.e. the blowdown occurred in areas already in the planning stages, e.g. Spring Creek and Martin Run. 1600 acres are being addressed in EA’s for Fiscal Year 2005, e.g. Kane Experimental Forest, Forest Renewal, and Eagle Mills projects. 352 acres are left out of salvage proposals to address riparian, steep slopes, wet soils, limited or no access, etc., further emphasis on other resource values. The Limited Timber Harvest Categorical exclusions were then used on 1762 acres. 1712 acres this fiscal year and another 50 next fiscal year.

Kevin B. Elliot, Electronic mail communication (September 14, 2004).

36. At no time have the Defendants prepared an Environmental Impact Statement (EIS), or an Environmental Assessment (EA), under NEPA assessing environmental impacts of the logging of all timber salvage resulting from the July 2003 windstorm event significantly affecting the quality of the human environment within the Allegheny National Forest. The Defendants did prepare an internal storm damage assessment and a later addendum to that assessment, but at no time have the Defendants thoroughly evaluated the impacts from all proposed salvage logging, nor has the public had an opportunity to review and comment on any such analysis of the impacts of implementing all proposed salvage logging from the July 2003 storm event, or even the 19 CE salvage projects at issue in this case.

V. NEPA

37. NEPA requires federal agencies to prepare a “detailed statement” for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

38. “Major Federal action” includes “approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” 40 C.F.R. § 1508.18(b)(4).

39. An environmental impact statement (“EIS”) is “a detailed written statement as required by Section 102(2)(C) of the Act [42 U.S.C. § 4332(2)(C)].” 40 C.F.R. § 1508.11.

40. An environmental assessment (“EA”) is “a concise public document” that is required to, among other things, “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9.

41. The primary purpose of an EIS “is to serve as an action-forcing device to insure that the policies and goals defined in the [NEPA] are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1.

42. An EA or EIS “shall provide full and fair discussion of significant environmental impacts and shall inform the decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” Id.

43. “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. §1508.27(b)(7).

44. “Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4 (a). The Forest Service applies the direction on scoping from the CEQ regulations “without regard to whether or not the results of the analysis is to be documented in an EIS or an environmental assessment”. (FSH 1909.15, ch.10, sec. 11).

45. “Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. . . . To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include: (a) Actions (other than unconnected single actions) which may be: (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification. (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” 40 C.F.R. § 1508.25.

46. “Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or

otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” 40 C.F.R. § 1508.4.

47. “Cumulative impacts” are one of the numerous types of impacts Federal agencies are required to analyze in an EA or EIS.

48. “Cumulative impacts” are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7.

49. Pursuant to the Forest Service Handbook, a proposed action may be categorically excluded from further analysis in an EIS or EA **only** if there are no extraordinary circumstances related to the proposed action **and** “[t]he proposed action is within one of the categories in the Department of Agriculture (USDA) NEPA policies and procedures..., or ... The proposed action is within a category listed in section 31.12 or 31.2 of this Handbook.” FSH 1909.15 § 30.3(1) (July 6, 2004).

50. The Forest Service Handbook identifies three broad classes of categorical exclusions – categories established by the Secretary of Agriculture, categories established by the Chief of the Forest Service, and categories for which for a project or case file and decision memo are required. FSH 1909.15 §§ 31.11, 31.12, 31.2.

51. Categorical exclusion number 13 allows the salvage of dead and/or dying trees not to exceed 250 acres with no more than one-half mile of temporary road, in a project that does not

individually or cumulatively have a significant effect on the quality of the human environment.

VI. Claim For Relief

COUNT I: FAILURE TO COMPLY WITH NEPA, THE APA, THE NFMA, AND FAILURE TO PREPARE AN EIS.

52. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

53. The decisions to implement 19 individual salvage logging projects violates the letter and the spirit of Forest Service categorical exclusion number 13, NEPA, and the APA.

54. Categorical exclusion number 13 allows the salvage of dead and/or dying trees not to exceed 250 acres with no more than one-half mile of temporary road, in a project that does not individually or cumulatively have a significant effect on the quality of the human environment.

55. “To determine the scope of environmental impact statements, agencies shall consider. . . (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” 40 C.F.R. § 1508.25.

56. All 19 categorically excluded salvage logging projects are the result of a single, forest-wide storm event, an element of similarity.

57. All 19 categorically excluded salvage logging projects were scoped to the public within a single four-month period of time, an element of similarity.

58. Numerous of the 19 CE salvage logging projects are located within the same watershed, and the James City and Windy City projects are separated only by a stream.

59. The decision memorandum for each of the 19 salvage logging projects concludes that each project qualifies for CE(13), a conclusion reached in the absence of an analysis of the impacts of all salvage logging proposed as result of the July 2003 storm and the cumulative impacts of logging all proposed salvage together with other logging proposed and undergoing analysis on the Allegheny National Forest.

60. The Forest Service cannot break projects into units that fit a CE or invoke categorical exclusions for multiple projects that will occur at the same time in the same area. *See* 68 Fed. Reg. at 44,604 (noting that “segmenting a larger project into smaller projects in order to meet the acreage requirements and be considered under these CEs is contrary to Forest Service guidance”).

61. The significance of a project’s environmental effects “cannot be avoided by . . . breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

62. The Defendants have thus arbitrarily and capriciously segmented salvage logging project proposals, the trigger for which is a single storm event, to break-up the salvage into as many different projects less than 250 acres in size, for the purpose of avoiding the preparation of an EIS, or even an EA, and the public participation in a comprehensive analysis process.

63. The Defendants violated NEPA, NFMA, and the APA by improperly categorically excluding 19 logging projects from NEPA documentation and failing to prepare an EIS for the proposed salvage logging from the July 2003 blowdown event.

VI. Prayer For Relief

Plaintiffs respectfully request that the Court:

64. Determine and declare that the Defendants have violated the National Environmental Policy Act, the National Forest Management Act, and the Administrative Procedure Act and those statutes' implementing regulations in making these 19 salvage logging project decisions;

65. Enjoin the Defendants and order that they not implement these decisions to conduct these 19 salvage logging projects until such time as the Defendants comply fully with NEPA, NFMA, APA and their implementing regulations;

65. Award Plaintiff's costs and attorney fees under the Equal Access to Justice Act; under Rule 54, Fed.R.Civ.P., and/or under any other statutory authority of the Court, and such other relief as the Court may deem just and proper, and

66. Award such other relief as this Court deems appropriate, just and proper.

Respectfully Submitted,

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CERTIFICATE

I hereby certify that on this 23rd day of September, 2004, the foregoing Complaint, with attached Exhibit, was mailed, by U.S. Certified Mail, Return Receipt Requested, to Defendants at the following addresses:

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