

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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| In the matter of:              | ) | Docket No. CWA-05-2016-0015             |
|                                | ) |   |
| BP Products North America Inc. | ) | Proceeding to Assess a Class II Civil   |
| Whiting, Indiana,              | ) | Penalty Under Section 311(b)(6) of the  |
|                                | ) | Clean Water Act, 33 U.S.C. § 1321(b)(6) |
| <u>Respondent.</u>             | ) |   |

**Complainant's response to petition to set aside  
Consent Agreement and proposed Final Order**

Complainant, the Acting Director of the Superfund Division, U.S. Environmental Protection Agency, Region 5, is responding to the petition to set aside the Consent Agreement and proposed Final Order in the matter of *BP Products North America Inc.*, Docket No. CWA-05-2016-0015 (CAFO). Complainant respectfully presents this response to the assigned Petition Officer under Section 311(b)(6)(C) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6)(C), 40 C.F.R. § 22.45(c)(4)(iv) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Rules of Practice), and the Petition Officer's Order dated June 16, 2017.

Complainant has carefully reviewed and considered the petition and the information provided on the issues it raised. For the reasons discussed below, Complainant has determined that Petitioners have not raised any issues that are relevant and material to the issuance of the CAFO that have not already been considered.

**I. Background**

**A. CAFO**

Under 40 C.F.R. §§ 22.1(a)(6)<sup>1</sup> and 22.13(b), where the parties agree to settlement of one or more causes of actions before the filing of a complaint, a class II administrative penalty

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<sup>1</sup> The CAFO incorrectly cites 40 C.F.R. § 22.1(a)(2) as a basis for bringing this action.

proceeding under Section 311(b)(6) of the CWA may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). On May 31, 2016, Complainant signed the consent agreement in this matter, which is a class II administrative penalty proceeding brought under Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii). (Ex. 1).<sup>2</sup> The Respondent, BP Products North America Inc., operates an oil refinery in Whiting, Indiana, near the shore of Lake Michigan. The CAFO would resolve Respondent's liability for federal civil penalties for EPA's allegations that Respondent violated the oil pollution prevention regulations at 40 C.F.R. Part 112, promulgated under Section 311(j) of the CWA, 33 U.S.C. § 1321(j). Respondent has agreed to pay a penalty of \$151,899 to resolve these alleged violations.

Specifically, the CAFO alleges that Respondent failed to: maintain and implement Respondent's Spill Prevention, Control, and Countermeasure (SPCC) Plan dated January of 2014 in violation of 40 C.F.R. § 112.3; and provide appropriate containment and/or diversionary structures or equipment to prevent a discharge and failed to address the typical failure mode and the most likely quantity of oil that would be discharged from oil-filled equipment with the potential to discharge to Lake Michigan, in violation of 40 C.F.R. § 112.7(c). (Ex. 1, paragraphs (paras.) 50 and 51). These alleged violations relate to Respondent's installation of temporary equipment and operation of an oil/water separator that resulted in a discharge of oil to Lake Michigan on March 24, 2014<sup>3</sup> and EPA's subsequent review of Respondent's SPCC Plan. (Ex. 1, paras. 33 through 46).

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<sup>2</sup> This response refers to the exhibits attached to and referenced in the List of Exhibits that was transmitted to the Office of Administrative Law Judges with the Request to Assign Petition Officer on June 6, 2017.

<sup>3</sup> The U.S. Coast Guard (USCG) had lead enforcement authority over the discharge to Lake Michigan under Executive Order 12777 (October 18, 1991), the National Contingency Plan at 40 C.F.R. Part 300, and the Region 5 Regional/Area

Additionally, the CAFO states that Respondent took several actions after the March 24, 2014 discharge, including removing the temporary equipment, blocking and sealing several connections, installing alarms, and removing sediment from the oil/water separator. The CAFO further notes that in December of 2014, Respondent updated its SPCC Plan to include, for oil-filled equipment with the potential to discharge to Lake Michigan, the typical failure mode, the most likely quantity of oil to be discharged, and the capacity of the oil/water separator to recover that quantity of oil. (Ex. 1., paras. 39, 47 through 49).

#### **B. Public Notice and Comment Period**

From June 3, 2016 through July 12, 2016, Complainant provided public notice of and opportunity to comment on the CAFO under Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C) and 40 C.F.R. § 22.45(b).<sup>4</sup> (Ex. 2). Complainant received a number of comments during the public comment period, including comments from Petitioners. (Ex. 3). After careful review and consideration of the comments received, Complainant did not make any changes to the CAFO. Although not required to do so by the CWA or 40 C.F.R. Part 22, Complainant also issued a response to the comments, which was signed on January 1, 2017. (Ex. 4). On January 17, 2017, Complainant mailed to the commenters a copy of the CAFO as required by 40 C.F.R. § 22.45(c)(4), and a copy of the response to comments. (Ex. 5).

#### **C. Petition to set aside the CAFO**

On February 27, 2017, Complainant received a timely petition to set aside the CAFO on the basis that material evidence was not considered under Section 311(b)(6)<sup>5</sup> of the CWA and 40

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Contingency Plan available at: <http://rrt5.org/> (last updated April 17, 2017). USCG assessed a \$2,000 class I administrative penalty against Respondent under Section 311(b)(6)(A)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(i).

<sup>4</sup> EPA Region 5 posts public notices for CWA CAFOs on its website at <https://www.epa.gov/aboutepa/epa-region-5>.

<sup>5</sup> Petitioners incorrectly cite Section 309(g) of the CWA as part of the basis for bringing the petition. However, because Petitioners also cite to the docket number for the CAFO in this action and submitted a similar petition for a separate



C.F.R. § 22.45(c)(4).<sup>6</sup> (Ex. 7). The petition was submitted by four citizens who commented on the CAFO, two of whom appear to be affiliated with citizen organizations in the greater Chicago area. After carefully considering the issues raised in the petition, Complainant determined that Petitioners did not identify any relevant and material issues that had not already been considered with respect to issuance of the CAFO. Therefore, Complainant decided not to withdraw the CAFO under 40 C.F.R. § 22.45(c)(4)(iii). On May 17, 2017, the Regional Administrator of EPA Region 5 requested that an Administrative Law Judge within EPA's Office of Administrative Law Judges be assigned to consider and rule on the petition under 40 C.F.R. § 22.45(c)(4)(iii).

## **II. Standard of Review**

Under Section 311(b)(6)(C)(iii) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(iii), if no hearing is held under CWA § 311(b)(6)(B)(ii) before issuance of an order assessing a class II civil penalty, any person who commented on the proposed assessment may petition, within 30 days after issuance of such order, EPA to set aside such order and provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, EPA shall immediately set aside such order and provide a hearing in accordance with Section 311(b)(6)(B)(ii) of the CWA.

Section 22.45(c)(4) of the Rules of Practice implement the requirements of Section 311(b)(6)(C)(iii) of the CWA. Under 40 C.F.R. § 22.45(c)(4)(ii), within 30 days of receipt of the CAFO a commenter may petition the Regional Administrator (RA) to set aside the CAFO on the

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action under Section 309(g) of the CWA against Respondent, Complainant considers the petition to be related to this action.

<sup>6</sup> Under 40 C.F.R. § 22.45(c)(4)(ii), any person who comments on the CAFO may petition the Regional Administrator to set aside the CAFO within 30 days of receipt of the CAFO. According to the certified mail receipts, two of the petitioners received the CAFO on January 24, 2017, and therefore submitted the petition after the 30-day deadline of February 23, 2017. However, because the other two petitioners received the petition on January 30, 2017, and submitted the petition by March 1, 2017, Complainant considers the petition to be timely. (Ex. 6).

basis that material evidence was not considered. If Complainant does not withdraw the CAFO to consider the matters raised in the petition within 15 days of receipt, the RA assigns a Petition Officer to consider and rule on the petition under 40 C.F.R. § 22.45(c)(4)(iii).

The assigned Petition Officer shall review the petition and Complainant's response, and issue written findings as to: (1) the extent to which the petition states an issue relevant and material to the issuance of the proposed Final Order; (2) whether complainant adequately considered and responded to the petition; and (3) whether a resolution of the proceeding by the parties is appropriate without a hearing. 40 C.F.R. § 22.45(c)(4)(v).

### **III. Complainant's response to the issues raised in the petition**

#### **A. Petitioners raise issues outside the scope of the CAFO in support of a request for a public hearing.**

Petitioners contend that a "public hearing is necessary to understand the chemical, air and water violations of the proposed CAFO that we maintain involves the broader Northwest Indiana and Northeast Illinois communities." In support of this, Petitioners raise issues related to the USS Lead Superfund Site in East Chicago, Indiana, where, according to Petitioners, citizens were unable to participate in the clean-up and restoration requirements under the Consent Decree (CD) for the Site because they failed to comment during the CD's public comment period.<sup>7</sup> Petitioners also point to a report of a "near-miss" accident at Respondent's refinery that occurred in January of 2014 that "could have caused an explosion and fatalities," and that they maintain shows Respondent is not managing critical safety information well.<sup>8</sup> Finally, Petitioners state that "the

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<sup>7</sup> Petitioners appear to cite to a news article as support for this statement.

<sup>8</sup> Petitioners appear to cite to a news article as support for this assertion, which Complainant was able to locate. Joseph S. Pete, *Near-Miss at BP Whiting Refinery in 2014 Was Potentially Deadly*, Dec. 14, 2016, [http://www.nwitimes.com/business/near-miss-at-bp-whiting-refinery-in-was-potentially-deadly/article\\_2406bd02-9738-59f4-bb7d-40039bc666b7.html](http://www.nwitimes.com/business/near-miss-at-bp-whiting-refinery-in-was-potentially-deadly/article_2406bd02-9738-59f4-bb7d-40039bc666b7.html).

George Lake Canal branches are near West Calumet homes and there is a connection to BP and their pollution of the neighboring canal.”

None of the issues Petitioners raise are relevant and material to the issuance of the CAFO. As described above, the CAFO memorializes a class II administrative penalty action in settlement of Complainant’s allegations against Respondent for violations of the oil pollution prevention regulations under 40 C.F.R. Part 112, particularly with respect to Respondent’s SPCC Plan, at Respondent’s oil refinery in Whiting, Indiana. EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. 40 C.F.R. § 22.18(b). As described in the CAFO, Respondent has taken actions to address the alleged inadequate secondary containment and deficiencies with its SPCC Plan. Additionally, the agreed upon penalty of \$151,899 is consistent with EPA’s penalty policy<sup>9</sup>, adequate to deter future violations, and is further supported by conserving the significant government resources required by prolonged litigation. Therefore, this settlement is consistent with the provisions and objectives of Section 311 of the CWA and oil pollution prevention regulations.

The USS Lead Superfund Site is not related to this action, and does not provide a basis for a hearing on this matter. Additionally, a news report citing a “near-miss” accident at Respondent’s refinery in January of 2014 that could have caused an explosion and relating to Respondent’s allegedly poor management of critical safety information, while troubling, is not relevant and material to Respondent’s failure to have adequate measures in place to prevent the oil discharge to Lake Michigan that occurred on March 24, 2014. Finally, the CAFO does not relate to Petitioners’ allegation that Respondent has polluted the Lake George Branch of the Indiana Harbor Ship Canal

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<sup>9</sup> *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* (August 1998). <https://www.epa.gov/sites/production/files/documents/311pen.pdf>.



(Lake George Canal) and furthermore, Petitioners do not point to any information to support this allegation.

Petitioners ask for a public hearing to understand the CAFO, which they contend is connected to the broader environmental issues facing the Northwest Indiana and Northeast Illinois communities. However, Section 311(b)(6)(B)(ii) and the Rules of Practice provide for a hearing on the merits of the CAFO. The purpose of such a hearing would be to determine whether Complainant has shown, by a preponderance of the evidence, that the alleged violations occurred as set forth in the CAFO and the assessed penalty is appropriate. 40 C.F.R. §§ 22.24 and 22.45(c). That is, whether Complainant has adequately proven that Respondent failed to adequately maintain and implement the 2014 SPCC Plan and provide adequate secondary containment to prevent the March 24, 2014 discharge. The USS Lead Superfund Site, a potential incident at Respondent's refinery in January 2014, and Respondent's alleged pollution of the Lake George Canal are not relevant and material to the allegations in the CAFO.

**B. Petitioners' request for an independent advisory committee and comments on Respondent's outreach activities are not relevant and material to this class II civil administrative penalty proceeding.**

Petitioners state that an "independent advisory committee and environmental monitoring program for Respondent's wastewater treatment plant should be created." They quote an excerpt from Complainant's response to comments on that same issue, which included information reported by Respondent about its public outreach activities and the contact information for Respondent's representative for questions or concerns about the refinery. Petitioners further identify concerns they have with accessing Respondent's website, indicate that they do not know what current public outreach Respondent conducts, and refer to past public meetings held by Respondent related to a consent decree that no longer occur.

These statements do not provide any relevant and material issues related to the issuance of the CAFO, and are outside the scope of EPA's authority under this class II penalty proceeding. Complainant brought this enforcement action under Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), which allows Complainant to assess a civil administrative penalty against, among other things, any operator of any facility who fails to comply with the oil pollution prevention regulations. Under 40 C.F.R. § 22.18(c), payment of a penalty proposed in a CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO. EPA does not have authority under Section 311(b)(6) of the CWA (Administrative Penalties) or the Rules of Practice to establish advisory committees and independent monitoring programs, or fund such committees or programs. Federal law directs where civil penalties are to be applied. All civil penalties paid pursuant to Section 311 of the CWA must be deposited in the Oil Spill Liability Trust Fund (OSLTF), which is administered by the U.S. Coast Guard (USCG). *See* 26 U.S.C. § 9509(b)(8). Similarly, EPA cannot require Respondent to conduct outreach activities, and has no control over Respondent's website. Complainant included the information related to Respondent's public affairs representative and website in the response to comments in an effort to be responsive to the public comments received on the CAFO.

**C. Petitioners' comments on the CAFO do not raise any relevant and material issues.**

Petitioners refer to their comments submitted during the public comment period for the CAFO as relevant to their petition. (Ex. 3). Petitioners' comments and Complainant's responses are included below. Complainant's responses are taken largely from Complainant's response to



comments, which Complainant requests be included as part of its response to this petition.<sup>10</sup> (Ex. 4).

**1. The civil penalty should be increased.**

The Petitioners commented that EPA should impose the maximum fine of \$187,500, plus \$100,000 for “absence of a culture of health and safety” because the March 24, 2014 discharge “spilled into Lake Michigan that provides water to 40 million people, was only two miles from the Hammond Indiana intake crib, and eight miles from a Chicago water intake crib.”

Under the CAFO, Respondent must pay \$151,899 in civil penalties to resolve the alleged violations of the oil pollution prevention regulations. At all times relevant to the allegations in the CAFO, the maximum statutory penalty was \$16,000 per day for each day of violation up to a maximum of \$187,500. 33 U.S.C. § 1321(b)(6)(B)(ii) and 40 C.F.R. Part 19. As explained above, the proposed agreement under the CAFO is a settlement agreement.

In settlement negotiations, civil penalties in CWA § 311 enforcement actions typically are calculated and negotiated based upon the *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*, dated August 1998.<sup>11</sup> The penalty policy is consistent with and takes into consideration the statutory criteria for assessing a civil penalty described in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8).

Under the penalty policy, EPA considers the violations cumulatively to determine the extent of noncompliance. The size of the penalty depends in part upon the duration and extent of the alleged violations and their environmental impact, and takes into account EPA’s assessment of

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<sup>10</sup> Complainant’s response to comments summarized all of the comments received on the CAFO, which included comments from other citizens in addition to Petitioners.

<sup>11</sup> Available at <https://www.epa.gov/sites/production/files/documents/311pen.pdf>. The amount of the civil penalty must be adjusted for inflation. *Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (Effective August 1, 2016)* (July 27, 2016), available at <https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf>.

the degree of litigation risk. Civil penalties imposed in CAFOs vary widely for reasons unique to each situation. Due to the confidential nature of settlement negotiations, there are legal constraints on the information that EPA can share concerning the details of penalty calculations and negotiations.

Use of EPA's penalty policy ensures that penalties are consistently applied throughout the regulated community and that the objectives of a penalty are achieved. The civil penalty contained in the CAFO is consistent with EPA's civil penalty policy. Unless Respondent agrees to pay the maximum penalty, the alleged violations in the CAFO would first need to be proven. In adjudicated CWA penalty cases, the penalty calculations are "highly discretionary calculations that take into account multiple factors." *See Tull v. U.S.*, 481 U.S. 412, 427 (1987). In addition, Complainant is satisfied that the civil penalty being paid by Respondent is adequate to deter future violations and is further supported by conserving the resources required by prolonged litigation and avoiding uncertainty regarding the outcome at an administrative hearing or trial.

Petitioners point to the fact that Respondent discharged oil into Lake Michigan in March of 2014 as the basis for the need of a higher penalty. However, the 2014 oil discharge is not at issue in this matter. The USCG had lead enforcement authority over the discharge and assessed a \$2,000 class I administrative penalty against Respondent for the discharge under Section 311(b)(6)(A)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(i). This CAFO would assess a \$151,899 class II civil administrative penalty against Respondent for alleged violations of 40 C.F.R. Part 112 under Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii).

## **2. The CAFO should include a Supplemental Environmental Project.**

Petitioners commented that the CAFO should require Respondent to perform a Supplemental Environmental Project (SEP) for "local projects," and that EPA should include local

residents in the decision on how SEP funds are distributed. They also stated that past decisions by the government “have dispersed SEP funds to those that do not reside in environmental justice areas,” and that the National Fish & Wildlife Federation has not included residents in projects related to the Lake George Canal.

As explained above, civil penalties paid pursuant to Section 311 of the CWA must be deposited in the OSLTF, which is administered by the USCG. *See* 26 U.S.C. § 9509(b)(8). The main uses of Fund expenditures are: removal costs incurred by the USCG and EPA in responding to discharges; state access for removal activities, payments to federal, state and Native American tribe trustees to conduct natural resource damage assessments and restorations; and payment of claims for uncompensated removal costs and damages.<sup>12</sup>

A SEP is an environmentally beneficial project or activity that is not required by law, but that a respondent agrees to undertake as part of a settlement or enforcement action. SEPs are projects that go beyond what could legally be required in order for the respondent to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. While EPA encourages the use of SEPs that are consistent with the 2015 SEP Policy, EPA cannot require a respondent to perform a SEP, or dictate any particular SEP.<sup>13</sup>

Even in the absence of a SEP, enforcement settlements provide substantial benefits to communities and the environment. Penalties promote environmental compliance by deterring future violations by the respondent and other members of the regulated community. Penalties also

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<sup>12</sup> Oil Spill Liability Trust Fund, U.S. EPA, <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/oil-spill-liability-trust-fund> (last updated June 6, 2017).

<sup>13</sup> *Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy* (Jan. 10, 2015), available at <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.



ensure a national level playing field for the regulated community. As discussed above, Complainant is satisfied that the penalty assessed for the violations alleged in the CAFO achieves those goals.

**3. A public meeting should be held regarding the CAFO.**

Petitioners requested that a public meeting be held because the CAFO “is not an adequate amount to pressure BP to improve operations to prevent future oil spills,” and because “there is no Lake Michigan or Great Lakes coordinated first responder oil spill clean-up plan.”

The regulations at 40 C.F.R. § 22.45 govern the public notice and comment procedures in these proceedings. The regulations do not address requests for public meetings. The regulations do, however, provide the opportunity to present written comments during the comment period. As discussed above, Complainant has carefully considered all comments received, and finds that the commenters have not presented any relevant material information that Complainant has not considered relating to the CAFO. Additionally, the penalty is consistent with the penalty policy and Complainant is satisfied that the civil penalty being paid by Respondent is adequate to deter future violations.

Furthermore, the existence of a “Lake Michigan or Great Lakes coordinated first responder oil spill clean-up plan” does not relate to the alleged violations and is outside the scope of the CAFO. As required by Section 311(j) of the CWA, 33 U.S.C. § 1321(j) and the National Contingency Plan at 40 C.F.R. § 300.210, EPA Region 5 and USCG have developed, in consultation with the States, a Regional Contingency Plan to coordinate an effective and timely response to discharges of oil and/or hazardous substances within Region 5, which includes the Lake Michigan area.<sup>14</sup>

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<sup>14</sup> For more information on the Region 5 Regional Response Team, see Region 5 Regional Response Team, <http://rrt5.org/> (last updated April 17, 2017).

**IV. Conclusion**

In summary, Petitioners have not identified any document or witnesses to be introduced or description of information to be presented that are relevant and material to the allegations in the CAFO. For the reasons described above, Petitioners do not raise any issues relevant and material to the issuance of the CAFO.

Respectfully submitted,

7/5/2017

Date



Margaret M. Guerriero

Acting Director

Superfund Division

U.S. Environmental Protection Agency, Region 5

Complainant's response to petition to set aside Consent Agreement proposed Final Order  
In the matter of: *BP Products North America Inc.*  
Docket Number: CWA-05-2016-0015

**Certificate of Service**

I certify that I filed and served on the Petition Officer through the Office of Administrative Law Judge's E-Filing System at [https://yosemite.epa.gov/OA/EAB/EAB-ALJ\\_Upload.nsf](https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf) a copy of "Complainant's response to petition to set aside Consent Agreement and proposed Final Order" for Docket Number CWA-05-2016-0015. I further certify that I served a copy of "Complainant's response to petition to set aside Consent Agreement and proposed Final Order" for Docket Number CWA-05-2016-0015 in the following manner to the following addressees:

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Dated: 7/10/2017

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