UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

Tony L. Brown and Joshua A. Brown d/b/a Riverview Cattle Armstrong, Iowa Respondents	))))))	Docket No. CWA-07-2016-0053

COMPLAINANT'S REBUTTAL TO RESPONDENTS' MEMORANDUM AND POINTS OF AUTHORITY IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

In support of its Motion for Accelerated Decision as to Liability (Motion) and accompanying Memorandum (Complainant's Memorandum), Complainant, files this Rebuttal to Respondents' Memorandum and Points of Authority in Response to Complainant's Motion (Respondents' Memorandum). Respondents have also requested oral argument before the Presiding Officer per 40 C.F.R. 22.16(d). Complainant respectfully opposes this request and requests the Presiding Officer rule upon its Motion for Accelerated Decision on the filings submitted by the parties. Upon the Presiding Officer's decision, the parties will be fully entitled to present all remaining issues at a hearing.

As set forth in the Motion, Complainant seeks an accelerated decision for "(1) the discharges documented during EPA's June 17, 2014 inspection of Respondents' facility, and (2) for at least three other discharge events, where the site conditions and precipitation data were

comparable to the conditions observed by EPA during the June 2014 inspection discharge event" (Complainant's Memorandum, pg. 4). In the alternative, Complainant seeks accelerated decision on the *prima facie* elements of EPA's claim.

Discussed below, Respondents have either failed to cite to materials in the record in support of their denials, or have failed to show that the materials cited do not establish the absence of a genuine dispute. Based on these failures by Respondents, Complainant respectfully asserts that the Presiding Officer should consider the essential facts of Complainants' prima facie case as presented in the Motion are undisputed, and that accordingly, Complainant is entitled to an Order granting its motion for Accelerated Decision as to liability.

Legal Standards for Accelerated Decision

As a preliminary matter, Respondents do not disagree with Complainant's summary of the legal standards for accelerated decision (Respondents' Memorandum, pg. 1). A party may not rest upon mere denials of the adverse party's pleadings when opposing such a motion. *In re Labarge, Inc.*, Docket No. CWA-VII-91-W-0078 (1997). Further, the nonmoving party must show that the material fact is genuinely disputed by "citing to particular parts of materials in the record" or show "that the materials cited do not establish the absence … of a genuine dispute." *Id.* FRCP 56(e)(3) holds that "(i)f a party … fails to properly address another party's assertion of fact … the court may … consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it."

I. Respondents discharged from a "Point Source" on June 17, 2014:

A. Respondents' facility confined more than 300 head of cattle for more than 45 days:

In Complainant's Memorandum, Complainant summarizes evidence documenting that that greater than 300 head of cattle were present at Respondents' facility between October 25, 2013 and June 17, 2014, the date of EPA's 2014 inspection (Complainant's Memorandum, pgs. 19-20). In Respondents' Memorandum, no argument is raised nor evidence is cited to give rise to any genuine issue of material fact regarding this element of the violation. Based on Respondents' failure to present countering evidence, the facts asserted by EPA should be considered undisputed for purposes of the motion and EPA is entitled to an accelerated decision regarding this element of the violations.

B. The drain tile is a man-made ditch, flushing system, or other similar man-made device:

In their Answer, Respondents jointly deny that the "culverts and field-tile drainage system are man-made ditches, flushing systems or similar man-made devices." However, Respondents admit the inlet to the drain tile, which is part of the field-tile drainage system, drained the swale (Respondents' Memorandum, Pg. 5), and the drain tile is clearly a "man-made device," as described by 40 C.F.R. § 122.23(b)(6). There is no legal or factual basis provided in support of Respondents' denial in its Answer or in their Response. .

The EPA has met its burden to establish that the drain tile is conveyance of pollutants. The location of the referenced drain tile is documented by diagrams provided by Respondents to EPA on November 17, 2014, previously submitted as an attachment to EPA's 2014 inspection

report (CX 1.10). The location of the outfall of this drain tile was confirmed during EPA's 2016 inspection, at which time the drain tile was freely discharging (CX 8, pg.9, Photo 29, pg. 59). Over the 2,500-foot surface distance between the inlet to the drain tile and the outlet, the surface elevation drops an estimated 30 feet, demonstrating a positive gradient and drainage within the drain tile would occur (CX 13, 33). Lastly, the effectiveness of the drain tile system is also established by the fact that additional lateral lines were connected by Respondents and/or Bacon Maker Farms, Inc. into the drain tiles in 2010, 2011 and 2012 (CX 1.10). Lastly, and most significantly, the declarations of Respondents Tony and Joshua Brown and their father Gary Brown all state that "all of the tile lines in the area of our feed yard drained to the south of our feed yard and outleted at the East Fork of the Des Moines River" (Declarations of Joshua Brown, ¶ 5; Tony Brown, ¶ 5; Gary Brown, ¶ 2). Accordingly, EPA contends this element of the violation has been established both by direct evidence (including the sworn statements of Respondents) and Respondents' failure to provide a basis for their denial, and EPA is entitled to an accelerated decision regarding this element of the violation.

C. **Respondents discharged pollutants via the drain tile to the East Fork of the Des Moines River:**

Respondents admit that "It is uncontroverted that the manure pit was overflowing on June 17, 2017 when Mr. Urban and Mr. Roberts were there" (Respondents' Memorandum, Pg. 6). Further, "Riverview Cattle agrees that their manure pit had overflowed on June 17, 2014 and that the drain tile intake drained the area where that overflow occurred" (Respondents' Memorandum, Pg. 5). Through these admissions, Respondents have confirmed the release of pollutants from the facility's manure pit into the swale "that the drain tile intake drained."

By direct evidence, Complainant has established the presence and location of the inlet to

the drain tile, at which a Sample #1 was taken during the 2014 inspection (CX 1.5, photo 35; CX 1.6, pg. 4; CX 8.6, Photo 10; Complainant's Memorandum, pg. 11). The results of Sample #1 from the 2014 Inspection demonstrated the presence of pollutants from Respondents' animal feeding operations discharging from the swale into the drain-tile inlet (Complainant's Memorandum, Table 1). During the inspection, the EPA inspector Trevor Urban further observed the flow of process wastewater from the swale into the inlet of the drain tile. These observations were included in the "Sample Collection Field Sheet" where Sample #1 identifies the sample location as the "north road tile inlet" and states the sample was "brown in color + smelled like manure" and describes the sample as 'discharge from Riverview Valley Feeders (Tony Brown)" (CX 1.14, pg.7; also CX 1, pg. 189). Further, EPA's "CAFO Inspection Form" was filled in by an EPA's Inspector Trevor Urban during the inspection and states "Riverview Cattle Manure Pit was full and discharging into field east of facility + then into a drain tile inlet … Took sample of discharge (CX 1.17, pg. 7; also CX 1, pg. 200).

The declaration of EPA Inspector Trevor Urban documents his observations that over the several hours he was at Respondents' facility on June 17, 2014, the water level within the swale dropped significantly, due to draining into the drain tile (Urban Declaration, ¶ 4). This observation is corroborated by the attached declaration of Mr. Richard Roberts, EPA's second inspector present during the June 2014 Inspection. Mr. Robert's also observed that level of water within the swale had dropped significantly during the several hours of EPA's inspection (Roberts Declaration, ¶ 4).

In an effort to refute the significant evidence of discharge from the swale into the inlet of the drain tile that EPA has amassed, Respondents' Memorandum and supporting affidavits

reference a photo taken during EPA's inspection and a photo taken the next day by Respondents that Respondents purport to show that the water level "had not gone down at all over the 24 hours after that." (Respondents' Memorandum, pg. 5, referencing Statements of Tony and Josh Brown, ¶ 4). Complainant responds that, first, the photo taken by and referenced by Respondents was taken the day *after* EPA's inspection (June 18, 2017) and does not show the "water level" at the time of EPA's inspection, or at the time of sampling on June 17, 2014. Importantly, for purposes of its Motion for Accelerated Decision, Complainant has not asserted that the pollutant discharges continued the day after EPA's inspection – the day this this photo was taken by Respondents. Second, the photo referenced by Respondents does not even capture or allow a viewer to discern "the water level" and therefore does not support the conclusion for which it is offered.

During EPA's 2014 Inspection, and during EPA's sampling at the inlet to the drain tile, both Mr. Urban and Roberts attest to the fact that the sound of water entering the drain tile was clearly audible (Urban Declaration, ¶ 4; Roberts Declaration ¶ 4). When taking Sample #1, Mr. Urban states that he observed the velocity of water entering the drain tile was sufficient to pull small leaves into the inlet (Urban Declaration, ¶ 4). Mr. Roberts declaration confirms that Respondents were not in a position to view the inlet at the time the sample was taken of wastewater flowing into the inlet (Roberts Declaration, ¶ 5). Again, Respondents' assertions do not create an issue of material fact.

Lastly, Respondents speculate that just "because contaminated water may have been entering the tile inlet on June 17, 2014 does not mean that those contaminants exited the tile line and were discharged to the East Fork of the Des Moines River" (Respondents Memorandum, pg.

6, citing RX 2)." The only cited support in Respondents' Memorandum for this speculation is the statement by Respondents' expert that "although field tile lines are indeed designed to move excess ground and surface water from farm fields, these tile lines are subject to naturally occurring variables such as water exiting the tile lines through the perforations into the soil due to backflow pressures if the end of the tile line is submerged…" (Statement of Gerald Henteges, ¶ 4). Respondents' argument fails because there is no support for the assertion that pollution is stopped by the existence of "backflow pressure" and no evidence cited by Respondents or Respondents' expert to support the assertion that the outlet of the drain tile was below water at the time of EPA's inspection. While Respondents' expert report (RX 2) describes flow data from the East Fork of the Des Moines River, the expert report does not correlate such flow to the level of water within the river, or the elevation of the outfall of the drain tile (RX 2, pg. 3).

In contrast, Complainant has presented direct evidence that the outlet of the drain tile was not submerged at the time of EPA's 2014 Inspection. Complainant's Rebuttal Prehearing Exchange (Rebuttal Exchange) contains photographs taken during the 2014 and 2016 inspections that document the water level of the river (CX 1, CX 8, CX 29, CX 30) was at bank line, but not above, during the 2014 inspection. Further, Complainant has presented evidence that the drain tile outlet is an estimated 120 feet from the bank line of the river (CX 8, pg. 9). Furthermore, Complainant has provided a LiDAR (Light Detection And Ranging) radar image of ground surface elevations of the drain tile outfall location that documents that the elevation of the outfall of the drain tile line is at least 2 feet above the elevation of the bank line and the water level of the river observed during the 2014 inspection (CX 33). Based on the LiDAR data, the elevation of the streambank height is approximately 1,192 to 1,194 feet. The tile outlet's elevation is

estimated as between 1,196 to 1,197 feet. Since the outlet's elevation is higher than the streambank's elevation, this evidence refutes the assertion that outlet was submerged during the bank full flow observed on June 17, 2014. Accordingly, there is no evidentiary basis presented by Respondents to support the sole speculative theory offered by Respondents' expert that the process wastewater sampled entering the drain tile would not have discharged to the East Fork of the Des Moines River. Indeed, any assertion by Respondents that water entering the tile drain will not discharge into the stream controverts the precise purpose for which the tile drain system was designed and maintained.

D. Respondents' facility was a point source:

Based on the evidence summarized above and a lack of presentation of contradictory evidence by Respondents, there is no genuine issue of material fact that at all times relevant to EPA's allegation of CWA violations on and around June 17, 2014, Respondents' facility had more than 300 head of cattle for more than 45 days, and discharged pollutants to a water of the United States by a "man-ditch, flushing system or similar man-made device." Accordingly, EPA is entitled to an accelerated decision that at all relevant times associated with the discharge allegation, Respondents' facility was a medium CAFO and thus a "point source."

II. Respondents discharged from a "Point Source" during three precipitation events that occurred prior to Respondents' 2011 installation of the manure pit (May 12 – 22, 2011; June 10 – 16, 2011; June 19 – 23, 2011):

A. Respondents' facility confined more than 300 head of cattle for more than 45 days at all times relevant to these three events:

In the Motion and accompanying Memorandum, Complainant summarized evidence documenting that that greater than 300 head of cattle were present at Respondents' facility between at least May 2011 and May 2012. In Respondents' Memorandum, no argument is raised nor evidence cited to give rise to any genuine issue of material fact regarding this element of the violation during this period of time. Based on Respondents' failure to present or cite countering evidence, the evidence presented by EPA should be considered undisputed for purposes of Complainant's motion, and EPA is entitled to an accelerated decision regarding this element of the violation.

B. During the cited dates in 2011, the drain tile also served as a man-made ditch, flushing system, or other similar man-made device:

As set forth above in Section I.B of this Rebuttal, the uncontroverted evidence demonstrates that the inlet to the drain tile system and the drain tile system were functioning during 2011. Indeed, in both EPA's 2016 inspection report (CX 8) and Mr. Urban's declaration Respondent Tony Brown is quoted as stating that the drain tile inlet had been there as long as he could remember, and Gary Brown (Respondents' father) stating the inlet had been there since he was a child (Urban Declaration ¶ 13). Lastly, and most significantly, the declarations of Respondents Tony and Joshua Brown and their father Gary Brown all state that "all of the tile lines in the area of our feed yard drained to the south of our feed yard and outleted at the East Fork of the Des Moines River" (Declarations of Joshua Brown, ¶ 5; Tony Brown, ¶ 5; Gary

Brown, ¶ 2). Accordingly, EPA again contends this element of the violation has been established both by direct evidence cited in Section I.B of this Rebuttal for which there is no genuine issue of material fact (including Respondents' own sworn statements) and Respondents' failure to provide any evidence documenting the drain tile was not functioning, and EPA is entitled to an accelerated decision regarding this element of the violation during the dates of violation in 2011 described in Complainant's Motion.

C. Respondents discharged pollutants via the drain tile to the East Fork of the Des Moines River during three precipitation events that occurred prior to Respondents' 2011 installation of the manure pit (May 12 – 22, 2011; June 10 – 16, 2011; June 19 – 23, 2011):

As set forth in the Complainant's Memorandum and Rebuttal Prehearing Exchange, prior to the construction of the manure pit in late 2011, runoff from uncontrolled production areas of Respondents' facility flowed unimpeded into the swale (Memorandum, pg. 16; Rebuttal Prehearing Exchange, pg. 2). Specifically, Complainant has submitted into the record a series of April 17, 2011 aerial photos, taken before installation of the manure pit, that show visible drainage patterns from runoff from the facility into the from the feed storage areas on the north and west of the cattle pens/lots flowing east into the swale (CX 28.1); the manure alley on the north end of the facility draining east into the swale (CX 28.2); the cattle pens through cuts in the northern wall flowing around the facility and into the swale (CX 28.3 – 5); and lastly runoff from the feed alley on the east side of the facility (CX 12.2 to 12.14, CX 28.1 to 28.5)(Complainant's Memorandum, pgs. 16-17).

In Respondents' Memorandum and the statements of Respondents, Respondents only contest Complainant's assertion that runoff from the cattle pens occurred through cuts in the

northern wall (Respondents' Memorandum, pg. 9), but Respondents fail to provide any evidence addressing the uncontrolled runoff from the other cited production areas. Because Respondents failed to properly respond to the uncontrolled runoff from the other cited production areas (feed storage area, manure alley and feed alley), EPA's evidence of runoff from these production areas into the swale should be considered undisputed for purposes of the Motion.

While Respondents argue there are "too many unknown environmental factors" (Respondents' Memorandum, pg. 9) to allow for accelerated decision, the drainage features of Respondents' facility before the 2011 construction of the manure pit are not unknown, but are, instead, readily discernible from the aerial photos referenced and discussed above. These aerial photos (CX 28) also directly refute the statements offered by Respondents that the facility "did not have any discharge points in the area where manure was retained." Specifically, CX 28.1 shows surface runoff from northwest most cattle pen (Pen #1) draining through an open gate and eastward towards the swale. This photo (CX 28.1) also shows cuts in the northern wall of the manure alley and runoff from where manure was stored, contradicting Respondents' assertions that all manure/runoff was retained behind a 4 feet high concrete wall before the manure pit was installed (Respondents' Memorandum, pg. 9). Despite efforts by Respondents to insert questions of fact, EPA has presented sufficient evidence to ensure there is no material issue of fact related to this element of its discharge allegation.

As discussed above in Section I.C, of this Rebuttal, Respondents have acknowledged that in 2014, surface runoff from the manure pit at the facility flowed into the swale, and that the "tile intake drained the area where that overflow occurred." Table 1 of Complainant's Memorandum references the 2016 sample of runoff from the manure alley at the Respondents' facility at a time

the manure pit was not overflowing and again shows elevated levels of pollutants associated with animal feeding operations (Complainant's Memorandum, pg. 8, citing Sample #3 from 2016 Inspection, CX 8). The aerial images, Respondents' acknowledgement, and EPA's 2016 sampling all demonstrate that during 2011 Respondents' production areas were never fully contained and precipitation generated surface runoff from these portions of the facility would have drained into the adjacent swale. Respondents have not presented evidence to controvert this point. While there are no samples of runoff during the cited 2011 precipitation events, as stated in Complainant's Memorandum, "the notion that EPA must sample each site and demonstrate that such pollutants are actually flowing from the facility is rejected as it is unduly burdensome and defies common sense" (Complainant's Memorandum, pg, 23, citing *Leed Foundry*, pg. 49). Further, when runoff does exit a contaminated property; "there was no basis to assume ... given the conditions and sources of mobile materials, that the water would exit in a pristine state. Such an assumption would run contrary to commonsense." *Leed*, at 50. The 2016 sample results are from production areas that have never had adequate runoff controls (including from 2011 through 2016), and therefore, the reasoning of the precedent and the logic of the *Leed Foundry* decision certainly applies to the facts of the instant case.

For purposes of the Motion, Complainant has selected three precipitation events in 2011 that are comparable to the precipitation which caused the discharge into the inlet documented during EPA's inspection in 2014. Complainant has selected these precipitation events in 2011 based on the mathematical logic that if similar amounts of rain resulted in the discharge observed in 2014, in 2011 without the 400,000 gallon storage capacity of the manure pit in place to retain surface runoff, it is certain that runoff from the uncontrolled production of areas of the facility

into the swale, and discharges from the swale into the inlet, would have occurred. A dramatic illustration of the storage capacity of the manure pit is Respondents' Exhibit 1 which shows two men working on installing the floor of the manure pit. Before the installation of the pit, runoff from the facility that was later stored within the manure pit would discharged into the adjacent swale and the operative drain tile. For these reasons, there is no genuine issue of material fact that discharges from uncontrolled production areas at Respondents facility would have occurred during the cited precipitation events in 2011, prior to construction of the manure pit.

D. Respondents' facility was a point source:

Based on the evidence summarized above, there is no genuine issue of material fact that at all relevant times during 2011, Respondents' facility confined more than 300 head of cattle for more than 45 days or more, and discharged pollutants to a water of the United States through a "man-made ditch, flushing system or similar man-made device.". Accordingly, EPA is entitled to an accelerated decision that the that Respondents' facility was a medium CAFO and thus a "point source" during the cited events in 2011.

III. Respondents' legal arguments:

Complainant agrees with Respondents' statement that "circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence" (Respondents' Memorandum, pg. 5, citing *In Re Lowell Vos Feedlot* (EAJA Appeal No. 10-01, Final Decision, May 9, 2011, 15 E.A.D. 314, at pg. 322). In the instant case, the bulk of Complainant's case has been established by uncontroverted direct evidence or the admissions of Respondents, including sampling evidence of the pollutants entering the drain tile system. The sole inference required to establish that the June 2014 "discharge" described in the Motion

occurred is that the pollutants from Respondents' facility that entered the drain tile also exited the drain tile. This inference is supported by the uncontroverted evidence cited by Complainant describing the design and purpose of drain tile (drop in elevation, lateral lines installed by Respondents, observed discharge at outfall). Respondents have attempted to construct a new evidentiary burden regarding the EPA's obligation to conduct a perfect inspection.[1] In essence, Respondents urge the Presiding Officer to ignore all the direct evidence in the record based on their claim that EPA "voluntarily" declined to find and sample the outfall of the drain tile during the 2014 inspection.

While the parties have presented different facts regarding the reasons why EPA did not find and sample the outfall during the 2014 Inspection, the reasons presented by EPA in Trevor Urban's and Rickey Roberts' declarations highlight that the location of the outlet of the drain tile was unknown, and the holding time for the samples taken during the 2014 inspection required EPA to leave the facility (Urban Declaration ¶ 8-10; Roberts declaration. ¶ 9-11). While the declarations of Respondents Tony and Joshua Brown and their father Gary Brown now all state that they each told EPA that "all of the tile lines in the area of our feed yard drained to the south of our feed yard and outleted at the East Fork of the Des Moines River" there is no statement that

1. Complainant also believes the case law cited by Respondent is inapplicable to the inspections taken under the authority of the CWA. In *McCormick Construction Co., Inc. v. United States*, 12 Cl. Ct. 496,498 (1987), the issue before the court was whether a "pre contract" investigation of a drilling site would have revealed different subsurface site conditions than those on which a contract had been premised. The court found this issue to be too fact intensive for summary judgement. In *Brechan Enterprises, Inc. v. United States*, 12 Cl. Ct. 545, 551 (1987), the issue before the court was whether site conditions for a dredging contract was significantly different than those on which the contract had been premised, and the court again rules this issue was to fact intensive for summary judgement. Lastly, Respondents cite the case of *Powell v. City of Chi. Human Rights Comm'n*, 389 Ill. App. 3d 45, 54,329 Ill. Dec. 179, 187,906 N.E.2d 24, 32 (2009), for the proposition that a deficient inspection resulted in a case resulted in a court refusing to grant summary judgement. This is incorrect. In the *Powell* case, a plaintiff appealed a wrongful termination action saying a claim of discrimination had not been properly investigated. The state court rejected this claim, saying the decision of the state agency not to further investigate the claim of discrimination was fully appropriate, and the termination was supported on other grounds.

Respondents told EPA's inspectors the location of these outlets (Declarations of Joshua Brown, ¶ 5; Tony Brown, ¶ 5; Gary Brown, ¶ 2). Ironically, if EPA had stayed and attempted to cross Respondents' muddy fields and exceeded the required sample holding time, these very sample results would be a subject of Respondents' challenges to the sufficiency of EPA's evidence. The differing facts presented by the Respondents do not rise to the level of a genuine issue of material fact relevant to Respondents' liability for the alleged discharges. Accordingly, EPA seeks an accelerated decision for liability.

IV. CONCLUSION

As demonstrated in Complainant's Motion for Accelerated Decision as to Liability and this Rebuttal, Respondents have failed to provide sufficient evidence or legal support that they are not liable for unpermitted discharges from their cattle feeding facility on at least four occasions, or that they are entitled to the defenses raised in their Prehearing Exchange or Memorandum. Any evidence referenced by Respondents to rebut EPA's motion for accelerated decision certainly does not give rise to any genuine issue of material fact.

EPA seeks a determination from the Presiding Officer that it is entitled to an Accelerated Decision pursuant to 40 C.F.R. §22.20 concerning each of these issues set forth in its Motion: Respondents have admitted that the East Fork of the Des Moines River is a water of the United States, and that they did not apply for or receive authorization under a CWA Section 402 Permit. Accordingly, EPA seeks a determination that it is entitled to an Accelerated Decision pursuant to 40 C.F.R. § 22.20 for the following:

1. Respondents discharged pollutants to a water of the U.S. on June 17, 2014.
2. Respondents discharged pollutants to a water of the U.S. during three

precipitation events that occurred prior to Respondents' 2011 installation of the manure pit (May 12 – 22, 2011; June 10 – 16, 2011; June 19 – 23, 2011); and

3. At the time of the discharge events described above, Respondents' facility was a point source.

Respectfully submitted,

/S/

Howard C. Bunch

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Attachment:

Declaration of Mr. Ricky Roberts

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2017, I sent via the OALJ E-filing system

the original of this Rebuttal Memorandum in Support of Motion for Accelerated Decision, with supporting Declaration, to the Office of Administrative Law Judges Hearing Clerk, and sent by email Mr. Eldon McAfee, Esq, counsel for Respondents.

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