

CERTIFICATION OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

I hereby certify that there exists adequate legal authority within the State of Connecticut for the implementation and enforcement of the chemical control management measures at construction sites and at dams, as applicable for the management area identified pursuant to Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990.¹ 16 U.S.C. § 1455b, P.L. No. 101508. The authority of the State of Connecticut to enforce the nonpoint source provisions of Section 6217 rests chiefly with the state's Department of Environmental Protection (DEP), through its water pollution control statutes, and secondarily with municipal regulation of development proposals, based upon guidance and oversight from the DEP. The existence of certain additional state and municipal programs, such as coastal zone management, provides further assurance that the chemical control management measures can be implemented and enforced where necessary. These legal mechanisms are detailed in the following discussion.

I. DIRECT REGULATORY AUTHORITY OF THE COMMISSIONER OF ENVIRONMENTAL PROTECTION

The Commissioner possesses both medium-specific and program-specific authority to regulate chemical pollution at the categories of sites that fall within the reach of the applicable management measure. The Commissioner's primary legal authority is contained in the state's water pollution control statutes and water quality standards, which are very wide-reaching medium-specific delegations of regulatory authority, and in the DEP's dam safety program, a program-specific delegation of authority that is also statewide in its reach.

A. Connecticut's Water Pollution Control Act

Chapter 446k of the General Statutes, Conn. Gen. Stat. § 22a-416 *et seq.*, provides legal authority adequate to assure the implementation of the management measures identified in this certification. This statute constitutes a broad delegation of authority to abate pollution of the waters of the state, consistent with the legislature's declaration of policy that "the pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state, is a public nuisance and is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water," and that "the elimination of pollution is hereby declared as a matter of legislative determination." Conn. Gen. Stat. § 22a-422.

¹ The applicable management measures for chemical and pollutant control at dams, construction site chemical control at roads, highways and bridges, and all urban construction sites less than five acres in area are the same. The management measures are to: 1) limit the application, generation, and migration of toxic substances; 2) ensure the proper storage and disposal of toxic materials; and 3) apply nutrients at rates necessary to establish and maintain vegetation without causing significant nutrient runoff to surface waters. These measures are designed to control chemical pollutants generated from new development, redevelopment, and new and relocated roads, highways, and bridges, as well as the construction of new dams, and the construction activities associated with the maintenance of dams. Since the statutory authority to implement all three management measures are the same, we have included all three management measures in this particular certification.

Pollution, broadly defined for the purposes of this delegation and mandate, is any "harmful thermal effect or the contamination or rendering unclean or impure or prejudicial to public health of any waters of the state by reason of any wastes or other material discharged or deposited therein by any public or private sewer or otherwise so as directly or indirectly to come in contact with any waters." The term "rendering unclean or impure" means "any alteration of the physical, chemical or biological properties of any of the waters of the state, including, but not limited to, change in odor, color, turbidity or taste." The term "waters" includes "all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways. . . and all other surface . . . bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof[.]" The term "wastes" includes "sewage or any substance, liquid, gaseous, solid or radioactive, which may pollute or tend to pollute any of the waters of the state." Conn. Gen. Stat. § 22a-423, *q.v.* "pollution"; "rendering unclean or impure"; "waters"; "wastes."

The Commissioner is specifically empowered to "develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state"; "to advise, consult and cooperate with other agencies of the state, the federal government . . . and with . . . political subdivisions . . . in furtherance of the purposes of this chapter"; "to encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to water pollution and the causes, prevention, control and abatement thereof"; "to issue, modify or revoke orders prohibiting or abating pollution of the waters of the state, . . . or adopting such other remedial measures as are necessary to prevent, control or abate pollution"; "to issue, continue in effect, revoke, transfer, modify or deny permits . . . for the discharge of any water, substance or material into the waters of the state . . ."; "to adopt regulations . . . to implement this chapter . . ."; and "to exercise all incidental powers necessary to carry out the purposes of this chapter and the federal Water Pollution Control Act." Conn. Gen. Stat. §§ 22a-424 (b), (c), (e), (f), (i), (l), and (k).

No person or municipality may cause pollution of any of the waters of the state or maintain an unpermitted discharge of any treated or untreated wastes.² The Commissioner possesses the authority to regulate all discharges of "water, substance or material into the waters of the state . . . ,"³ and, further, possesses the authority to seek enforcement with respect to violations of any permitted or unpermitted discharge, by administrative order or by referral to the Attorney General for appropriate legal action. Conn. Gen. Stat. § 22a-430(d).

² No person or municipality shall cause pollution of any of the waters of the state or maintain a discharge of any treated or untreated wastes in violation of any provision of (Conn. Gen. Stat. Chapter 446k Water Pollution Control). Conn. Gen. Stat. § 22a-427. The Commissioner is specifically authorized to identify not only persons or municipalities that are causes of pollution to the waters of the state, but also to identify so-called "community pollution problems" and order their abatement. Conn. Gen. Stat. § 22a-428.

³ No person or municipality shall initiate, create, originate or maintain any discharge of water, substance or material into the waters of the state without a permit for such discharge issued by the commissioner....Conn. Gen. Stat. § 22a-430(a).

In the event that runoff polluted with chemicals is or could potentially be discharged to any waters of the state from construction sites, roads, highways, bridges, or dams, the Commissioner of DEP has authority pursuant to this statute to enforce against anyone creating or maintaining that discharge or a potential discharge, and to enjoin the activity. The Commissioner can invoke this authority to order the abatement of any actual or potential source of pollution, as when a condition is created or maintained at a construction site that causes or has the potential to cause pollution to the waters of the state. The Commissioner may also proceed against the property owner where the actual or potential polluting discharge to the waters of the state is being created or maintained by one other than the property owner. Conn. Gen. Stat. §§ 22a-432; 22a-433.⁴

In issuing an order to abate or prevent nonpoint source pollution from new development or redevelopment activities, the Commissioner can require whatever steps are necessary to abate an existing discharge or correct a potential source of pollution. These steps can address the issue of limiting the application, generation, and migration of toxic substances, ensuring proper storage and disposal of toxic materials, and controlling the application of nutrients at construction sites or at dams. An order to abate or prevent pollution would include a time schedule for the accomplishment of the necessary steps leading to the abatement of such pollution or the correction of such potential source of pollution.

B. Water Quality Standards

The Commissioner is empowered to adopt, and has adopted, water quality standards for the State of Connecticut. Conn. Gen. Stat. § 22a-426. The Commissioner submits, and the United States Environmental Protection Agency (EPA) approves, the most current version of the water quality standards. These standards contain in their narrative portion a specific policy of antidegradation, in addition to specific water quality classifications, which constitute a comprehensive exposition of the state's public policy. These standards shall not "plan for, encourage or permit any wastes to be discharged into any of the waters of the state without having first received the treatment available and necessary for the elimination of pollution." Conn. Gen. Stat. § 22a-426(a).

Specifically, the Class SA and Class SB water quality classification for coastal and marine surface waters under these standards indicates that, for chemical constituents, the allowable standard is "none in concentrations or combinations which would be harmful to the most sensitive designated water use." The Surface Water Standards that address chemical constituents are:

⁴ Pollution abatement orders occupy a central role in the Commissioner's ability to act administratively and expeditiously to address actual or potential sources of pollution. The text of the statute provides, in pertinent part, as follows: "If the commissioner finds that any person has established a facility or created a condition...or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution....If the commissioner finds that the recipient of any such order fails to comply therewith, he may request the Attorney General to bring an action in the superior court for the judicial district of Hartford to enjoin such person from maintaining such potential source of pollution to the waters of the state or to take the necessary steps to correct such potential source of pollution...." Conn. Gen. Stat. § 22a-432.

(12) The Commissioner, pursuant to Chapter 446K of the Connecticut General Statutes and regulations adopted thereunder, will regulate discharges to the waters of the State to assure that such discharges do not cause pollution due to cause pollution to acute or chronic toxicity to aquatic and marine life, impair the biological integrity of aquatic or marine ecosystems or result in an unacceptable risk to human health.

(A) In making a determination under Chapter 446K of the Connecticut General Statutes as to whether a discharge or other activity will or can reasonably be expected to cause pollution of the waters of the State, the Commissioner shall consider the numeric criteria for the toxic pollutants listed in Appendix D.

(13) Surface waters and sediments shall be free from chemical constituents in concentrations or combinations which will or can reasonably be expected to result in acute or chronic toxicity to aquatic or marine ecosystems outside of any allocated zone of influence or which can reasonably be expected to bioconcentrate or bioaccumulate in tissues of fish, shellfish, and other aquatic organisms to levels which will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic life.

(17) Controls on point and nonpoint sources of phosphorus and nitrogen which contribute to the eutrophication of any surface water including streams, rivers, lakes, ponds, impoundments and Long Island Sound may be required on a case-by-case basis.

The Water Quality Standards include numeric criteria for toxic pollutants which identify threshold levels of toxic metals, volatiles, chemical compounds, pesticides, as well as ammonia, asbestos, and chlorine.

The water quality goal for all Connecticut coastal and marine waters is either SB or SA. Therefore, no discharge that would preclude reaching those goals can be authorized. The Commissioner may address violations of the standards through his pollution abatement order authority or by means of a cease and desist order. Conn. Gen. Stat. § 22a-7. As discussed in Section B.1 of this legal opinion, municipal land use commissions in the coastal area can condition coastal site plan reviews to include measures to insure that an upland development does not compromise these state-wide water quality goals.

C. Connecticut's Dam Safety Program

Another program-specific authority delegated to the Commissioner by the state's legislature is the regulation of any dam structure that the Commissioner determines to pose a potential danger to life or property by breaking away. This authority is contained in Chapter 446j of the General Statutes, Conn. Gen. Stat. § 22a-401 et seq., regarding Dams and Reservoirs, and constitutes a broad delegation of authority to regulate activities associated with the construction of new dams and the repair, maintenance, and operation of existing dam structures. The statute specifically states that "before any person constructs, alters, rebuilds, substantially repairs, adds to, replaces or removes any such [dam] structure, such person shall apply to the Commissioner for a permit to undertake such work." Conn. Gen. Stat. § 22a-403(a).

The Commissioner is required to "determine the impact of the construction work on the environment, on the safety of persons and property, and on the inland wetlands and watercourses of the state in accordance

with the provisions of sections 22a-36 to 22a-45, inclusive ... and shall ... inspect the site, and ... the Commissioner shall issue a permit authorizing the proposed construction work under such conditions as the Commissioner may direct.” Conn. Gen. Stat. § 22a-403(b). Thus, the Commissioner is specifically empowered to place conditions upon any permit issued for dam construction, repair, or maintenance in order to ensure in appropriate cases where necessary that any construction, repair, or maintenance in order to ensure in appropriate cases where necessary that any applicable best management practices for chemical and pollutant control are followed. These conditions could address the application, generation, and migration of toxic substances; ensure the proper storage and disposal of toxic materials; and regulate the application of nutrients at rates to establish and maintain vegetation without causing significant nutrient runoff to surface waters.

In those instances where the Commissioner determines that a dam structure and its associated construction activities do not constitute a danger to life or property, and, hence, do not require a permit from the DEP for repair, maintenance or removal, those construction activities would nevertheless still be subject to regulation by a municipal inland wetlands commission in the town where the structure is located, pursuant to the Inland Wetlands and Watercourses Act (IWWA), Chapter 440 of the General Statutes, Conn. Gen. Stat. § 22a-36 to 22a-45, inclusive. *See* Part II.B, *infra*.

In Connecticut, the construction of new dams is directly regulated by the Commissioner pursuant to the Connecticut Water Diversion Policy Act, Chapter 446i of the General Statutes, Conn. Gen. Stat. § 22a-365 to 22a-378, inclusive, regardless of whether or not such construction is also regulated pursuant to the dam safety program or municipal inland wetlands and watercourses authority. The review criteria provided by the water diversion statutes are sufficient to ensure the application of the chemical control management measure for all new dams constructed within the Section 6217 management area. The water diversion program applies to diversion activities affecting all water of the state, including “all ...rivers, brooks, watercourses, waterways...lakes, ponds...and all other surface or underground streams, bodies or accumulations of water, natural or artificial, public or private which are contained within, flow through or border upon ...[Connecticut] or any portion thereof.” Conn. Gen. Stat. § 22a-367(9). “Diversion” means any activity which causes, allow or results in the withdrawal from or the alteration, *modification or diminution of the instantaneous flow of the water of the state*. Conn. Gen. Stat. § 22a-367(s) (emphasis added). No person or municipality may divert water from the waters of the state without first obtaining a permit for such diversion from the Commissioner. Conn. Gen. Stat. § 22a-368(b).

In applying for a diversion permit, an applicant must provide information to the Commissioner, including the effect of the proposed diversion on, among other things, public water supplies, water quality, wetland habitats, waste assimilation, agriculture, fish and wildlife. Conn. Gen. Stat. § 22a-369(7). In making the decision to grant or deny a water diversion permit, the Commissioner must consider several criteria, including water quality. Conn. Gen. Stat. § 22a-373(b)(5).

The Commissioner is also required to coordinate the activities of all regulatory programs under his jurisdiction with permitting authority in the coastal area to assure that the administration of such programs is consistent with the goals and policies of the Connecticut Coastal Management Act.⁵ *See infra*. In order

⁵ The Commissioner shall coordinate the activities of all regulatory programs under his jurisdiction with permitting authority in the coastal area to assure that the administration of such programs is consistent with the goals and policies of this chapter... Any person seeking a license, permit or other approval of an activity under the requirements of such regulatory programs shall

to ensure that activities regulated pursuant to the Dam Safety and Water Diversion programs and proposed in the coastal area are consistent with the goals and policies of the Coastal Management Act and do not result in statutorily defined adverse impacts to coastal water quality, the Commissioner can modify or condition permit approvals to limit the application, generation, and migration of toxic substances; ensure the proper storage and disposal of toxic materials; and require that nutrients be applied at rates necessary to establish and maintain vegetation without causing significant nutrient runoff to surface waters.

II. ADDITIONAL AUTHORITIES FOR THE IMPLEMENTATION OF THE CHEMICAL CONTROL MANAGEMENT MEASURES THROUGHOUT THE SECTION 6217 MANAGEMENT AREA

Owing to the prominence of municipal regulation of land use within the State of Connecticut, local authorization for many activities affecting chemical control at urban construction sites including construction of roads, highways, and bridges in addition to chemical and pollutant control at dams rests with local planning and zoning, and inland wetlands and watercourses commissions.

The Commissioner himself plays a significant role in the work of municipal land use control bodies. He both advises and oversees regulation of activities having an impact on inland and coastal resources through the following statutory programs, *viz.*: Inland Wetlands and Watercourses Act (IWWA), Conn. Gen. Stat. §§ 22a-36 through 22a-45; Coastal Management Act (CMA), Conn. Gen. Stat. §§ 22a-90 through 22a-112. These programs have the ability to address nonpoint chemical pollution and require management measures in their regulations and approvals for specific development activities.

A. Inland Wetlands And Watercourses Act (IWWA)

The IWWA requires the comprehensive regulation of activities affecting wetlands and watercourses within the limits of all of the state's municipalities, Conn. Gen. Stat. § 22a-2(a), and authorizes the creation of municipal inland wetlands agencies to apply the substantive requirements of the enactment. Conn. Gen. Stat. § 22a-42(c).⁶ The term "regulated activities" sweeps within its purview "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses" Conn. Gen. Stat. § 22a-38(13).

The IWWA contains detailed considerations of policy and factors for decision that are designed to balance the protection of inland wetlands and watercourses from pollution with the need for development. Conn. Gen. Stat. § 22a-36 (legislative declaration of policy); § 22a-41 (factors for consideration of regulated activities). The definitions of "pollution," "rendering unclean or impure," "waste," and "discharge" are identical to those contained in the water pollution control statute. Conn. Gen. Stat. § 22a-38(8), (9), (7) & (10). Additionally, the term "material" within the definition of "pollution" is defined broadly to embrace

demonstrate that such activity is consistent with all applicable goals impacts of such actions on coastal resources... Conn. Gen. Stat. § 22a-98.

⁶ Regulation is lodged with the municipal commissions with the exception of the regulation of the land use activities of state agencies, which the Commissioner administers directly. Conn. Gen. Stat. § 22a-39(a).

"any substance, solid or liquid, organic or inorganic, including, but not limited to soil, sediment, aggregate, land, gravel, clay, bog, mud, debris, sand, refuse or waste." Conn. Gen. Stat. § 22a-38(6).

The Commissioner is responsible for reviewing the regulations of the municipal agencies for conformity with the IWWA, and he both issues directives and promulgates model regulations designed to ensure that the municipal agencies apply the provisions of the enactment in a consistent manner. The Commissioner is also charged by the IWWA with the responsibility for the training of municipal commissioners and town agents in the requirements of the enactment. Conn. Gen. Stat. § 22a-39(b)-(d) & (j)-(n). Pursuant to this authority, the Commissioner both trains municipal commissioners and their staffs, and offers them technical assistance on specific projects that are of a complex nature. Such training already includes best management practices which embrace proposed regulated activities in both their construction and postconstruction phases. Under these authorities, the Commissioner requires municipalities to report on their activities, thus allowing him the ability to monitor the handling of chemical control activities by municipal wetlands agencies.

The IWWA provides enforcement mechanisms for both the municipal agencies and the Commissioner, including the ability to issue cease and desist orders, and seek judicial enforcement. Conn. Gen. Stat. § 22a-44(a). The Commissioner has the ability to issue an administrative order to abate pollution concerning any matter addressed by the IWWA, notwithstanding the existence of any municipal inland wetlands and watercourses commission. Conn. Gen. Stat. § 22a-44(a)(2). Both the Commissioner and municipal inland wetlands and watercourses agencies have the authority to condition permits in specific ways so as to minimize or eliminate adverse impacts to the subject resources. Such conditions can readily ensure the implementation of the new development management measure throughout the state's Section 6217 management area. See Conn. Gen. Stat. § 22a-41.

B. Coastal Zone And Coastal Municipal Management

The General Assembly of the State of Connecticut has devoted special attention to the coastal communities bordering Long Island Sound, and has enacted legislation designed to offer additional protections to this natural resource. The Department of Environmental Protection itself maintains an Office of Long Island Sound Programs (DEP-OLISP), which coordinates the Commissioner's interactions with the coastal communities both on an advisory and regulatory level. The following statutory provisions allow for the implementation of the chemical control management measures as they pertain to the state's coastal municipalities.

1. Coastal Management Act

The CMA offers a comprehensive combination of policy considerations, planning, regulation and enforcement designed to ensure that pollution to tidal and inland wetlands and watercourses, and the waters of the state located within the coastal boundary generally, is addressed in a manner consistent with the statutory programs specifically devoted to those topics. Conn. Gen. Stat. § 22a-92(a)(2); *see supra*. Upland development projects proposed within this statutory "coastal boundary" are subject to the policies and standards contained in the CMA, and cannot result in "adverse impacts on coastal resources" as

defined by the CMA.⁷ Land use boards and commissions in coastal municipalities are required to conduct coastal site plan review (CSPR) for most activities that are proposed within the coastal boundary to ensure that projects are consistent with the CMA, and the review dovetails with the general provisions for zoning regulation within the state. Conn. Gen. Stat. § 22a-105(a). In their review of a CSPR, municipal land use agencies are authorized to modify, condition, or deny the activity proposed in a CSPR in order to ensure that the potential adverse impacts of the proposed activity on coastal resources are acceptable. Conn. Gen. Stat. § 22a-105(e); *see also* 22a-106.

If necessary, municipal approvals of coastal site plans can be conditioned to require that steps be taken to limit the application, generation, and migration of toxic substances, as well as to ensure the proper storage and disposal of toxic materials. Municipal land use commissions can also condition coastal site plans to require limitation of fertilizer and other nutrient applications to protect surface waters, and include any measures specific to chemical constituents to ensure that the state's Water Quality Standards are upheld or met. The mechanism for bringing these requirements within the consideration of the municipal agencies would be through the Commissioner's oversight function, *see infra*, and the municipalities' obligation to ensure that upland development does not result in adverse environmental impacts downstream.

The Commissioner is responsible for overseeing the municipal implementation of the CMA, including comment and recommendations regarding the proposal of any municipal plan of conservation and development, or zoning regulations. Conn. Gen. Stat. § 22a-104. He has the authority to take legal action as is necessary to ensure that activities subject to CSPR receive the necessary approvals and comply with all conditions; that municipal CSPR is properly undertaken by land use boards and commissions; and that decisions rendered at the municipal level are consistent with the goals and policies contained in the CMA. Conn. Gen. Stat. § 22a-110. The Commissioner is empowered to submit comments upon specific matters pending before municipal agencies responsible for conducting CSPR; to appear before any such agency; and to appeal the decision of any municipal agency responsible for CSPR. *Id.* The Commissioner may also request that the Attorney General initiate legal action to enforce the substantive provisions of the CMA, apart from municipal enforcement activities, which are also cognizable under the CMA. Conn. Gen. Stat. § 22a-106(a); § 22a-108.

2. Connecticut General Assembly Public Acts 91-170 & 91-398

Public Acts 91-170 and 91-398, codified, respectively, as Conn. Gen. Stat. § 8-2(b) and § 8-23(a) in the state's zoning statutes, require that the zoning regulations and plans of conservation and development (POCD) for any municipality contiguous to Long Island Sound be adopted with reasonable consideration for the restoration and protection of the ecosystem and habitat of Long Island Sound. Municipal regulations and POCDs must be designed to reduce hypoxia, pathogens, toxic contaminants, and floatable debris in Long Island Sound. *Id.* The regulations and POCDs must also provide that municipal planning

⁷ "Adverse impacts on coastal resources" include but are not limited to: "Degrading water quality through the significant introduction into either coastal waters or groundwater supplies of suspended solids, nutrients, toxics, heavy metals or pathogens, or through the significant alteration of temperature, pH, dissolved oxygen or salinity....." Conn. Gen. Stat. § 22a-93(15)(A).

and zoning commissions consider the environmental impact on Long Island Sound of any development proposal. The provisions of these two Public Acts encompass all development and redevelopment within a coastal municipality, and not just that proposed within the coastal boundary (*see* CMA discussion above).

The Commissioner's Office of Long Island Sound Programs has developed a document entitled *Coastal Water Quality: A Guide for Local Officials* as a Coastal Zone Management Act Section 309 enhancement task, in order to aid in the implementation of Conn. Gen. Stat. § 8-2(b) and § 8-23(a). The guide contains a model stormwater ordinance that can be adopted by municipalities to meet the requirements of these enactments, as applicable to these management measures for chemical control at construction sites, roads, highways, bridges, and at dams. The model ordinance also encourages municipalities to require a stormwater management plan for all projects, especially those that have greater potential to impact Long Island Sound and other waters of the state. In adopting the stormwater ordinance, municipalities will also augment their existing regulations and protect against most adverse water quality impacts associated with chemical constituents in stormwater runoff.

Although Sections 8-2(b) and 8-23(a) of the General Statutes apply only to municipalities bounding on Long Island Sound, the water quality guide will be instrumental in ensuring broader implementation of the management measures for chemical control throughout the Section 6217 management area. The guide will be utilized as an outreach tool to inland municipalities located in the Section 6217 management area, and the model stormwater ordinance was drafted in such a way that it can be adopted by any municipality. As Section 6217 management area municipalities adopt stormwater ordinances, the new development management measures will be implemented.

In conclusion, there are no other aspects of state law in the water pollution control statutes or other authorities that would limit or preclude the use of the authority to regulate nonpoint source chemical pollution from construction sites for roads, highways and bridges, and dams. Any actual or potential source of nonpoint pollution, regardless of location within the state, can be addressed by the state's water pollution control authorities on the state or local level. It is not necessary for the state or its municipalities to issue additional regulations prior to using this authority to ensure management measure implementation.


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