

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FOOD AND WATER WATCH
1616 P Street, NW, Suite 300
Washington, DC 20036, and

FRIENDS OF THE EARTH
1100 15th Street, NW, 11th Floor
Washington, DC 20005

PLAINTIFFS,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Av., N.W.
Washington, DC 20460, and

LISA JACKSON, Administrator,
United States Environmental Protection Agency,
1200 Pennsylvania Av., N.W.
Washington, DC 20460

DEFENDANTS.

Case No. 1:12-cv-01639

MOTION ON CONSENT TO AMEND PLAINTIFFS' COMPLAINT

Pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiffs Food and Water Watch and Friends of the Earth (collectively, "Plaintiffs"); move, with the consent of Defendants United States Environmental Protection Agency, Bob Perciasepe, Acting Administrator, United States Environmental Protection Agency (collectively "Defendants") and Defendant-Intervenors American Farm Bureau Federation, National Association of Home Builders, National Association of Clean Water Agencies, Virginia Association of Municipal Wastewater Agencies, Virginia Nutrient Credit Exchange Association, Maryland Association of Municipal Wastewater

Agencies, North Carolina Water Quality Association, West Virginia Municipal Water Quality Association and CSO Partnership (collectively Putative Intervenor), for leave to file an Amended Complaint. Pursuant to LCv15.1, the proposed Amended Complaint is submitted herewith.

/s/ Susan Kraham

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DEFENDANTS.

Case No. 1:12-cv-01639-RC

AMENDED COMPLAINT FOR DECLARATORY RELIEF

1. Plaintiffs Food and Water Watch and Friends of the Earth hereby challenge the provisions authorizing pollution trading and offset programs in the final rule promulgated by the United States Environmental Protection Agency (“EPA”) and former EPA Administrator Lisa Jackson (collectively “Defendants”) establishing Total Maximum Daily Loads for nitrogen, phosphorus, and sediment for the Chesapeake Bay and its tributaries.

2. The rulemaking documents setting forth EPA’s final action and rationale are hereinafter collectively referred to as the “Chesapeake Bay TMDL,” “the Bay TMDL,” or “the TMDL.”

3. A TMDL identifies the maximum amount of a pollutant that a waterway may receive and still meet water quality standards.

4. EPA took final action on the Chesapeake Bay TMDL via notice-and-comment rulemaking, co-signed by the Regional Administrators for EPA Regions 2 and 3 on December 29, 2010. *Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load (TMDL) for the Chesapeake Bay*, 76 Fed. Reg. 549-550 (Jan. 5, 2011).

5. The Chesapeake Bay TMDL authorizes water pollution trading and offset programs that exceed EPA's authority under the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d)(1)(C), are arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and violate notice and comment procedures required by the Administrative Procedure Act, 5 U.S.C. § 553.

PARTIES

6. Plaintiff Food and Water Watch, incorporated in the District of Columbia, with its headquarters in Washington, D.C., is a non-profit organization that advocates for common sense policies that will result in access to safe and healthy food and clean water. Food and Water Watch has more than seven thousand members in the six states and the District of Columbia that comprise the Chesapeake Bay watershed. Water pollution trading and offsets are antithetical to the values and mission of Food and Water Watch. Food and Water Watch brings this action on behalf of its members.

7. Plaintiff Food and Water Watch's members live, work, recreate, and own property in the lands and waters of the Chesapeake Bay watershed. Plaintiff's members boat, fish, hike, kayak, swim, and participate in other professional, commercial, scientific, and recreational activities on and near the Chesapeake Bay, its tributaries and connected waterways. Plaintiffs'

members are fearful of using waters contaminated by National Pollution Discharge Elimination System (NPDES) permit holders who discharge excess pollutants pursuant to trading and offset programs. Plaintiff's members' reasonable concerns about the effects of these discharges directly and adversely affect their recreational, aesthetic, and economic interests.

8. Plaintiff Friends of the Earth, Inc. is a national non-profit environmental advocacy organization founded in 1969 and incorporated in the District of Columbia, with its headquarters in Washington, D.C. Friends of the Earth's mission is to defend the environment and champion a healthy and just world. Friends of the Earth has more than 2,500 members residing in the six states and District of Columbia that comprise the Chesapeake Bay watershed. Water pollution trading and offsets in the Bay TMDL directly contradict the goals and values of Friends of the Earth. Friends of the Earth brings this action on behalf of its members.

9. Plaintiff Friends of the Earth's members enjoy the waters of the Chesapeake Bay watershed. Plaintiff's members live, work, recreate, and own property in the lands and waters of the Chesapeake Bay watershed. Plaintiff's members boat, fish, hike, kayak, swim, and participate in other professional, commercial, scientific, and recreational activities on or near the Chesapeake Bay, its tributaries and connected waterways. Plaintiffs' members are fearful of using waters contaminated by NPDES permit holders who discharge excess pollutants pursuant to trading and offset programs. Plaintiff's members' reasonable concerns about the effects of these discharges directly and adversely affect their recreational, aesthetic, and economic interests.

10. Defendant EPA is the federal agency responsible for administering the CWA, including supervision of the states' actions under the CWA. In the District of Columbia, EPA is

the agency primarily responsible for administering permits under the NPDES program. EPA headquarters are located in Washington, D.C.

11. Defendant Bob Perciasepe is the Acting Administrator of the EPA. He is charged with the supervision and management of all decisions and actions of that agency. Mr. Perciasepe is being sued in his official capacity.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

13. Declaratory judgment and such other relief as the Court may deem just and proper are available pursuant to 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 2201 and 2202.

14. Plaintiffs bring this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 through 706.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendants' official residence is in the District of Columbia.

FACTUAL BACKGROUND

I. Water Quality Conditions in the Chesapeake Bay

16. The Chesapeake Bay ("the Bay") is a body of water stretching from Havre de Grace, Maryland, to Norfolk, Virginia. TMDL at 2-1.

17. The Bay is the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world. Exec. Order No. 13,508, 74 Fed. Reg. 23,099, 23,099 (May 12, 2009).

18. The Chesapeake Bay's 64,000-square-mile watershed includes parts of six states—Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia—and the entirety of the District of Columbia. TMDL at 2-1.

19. The Bay contains more than 10,000 streams and rivers that eventually flow into the Bay. *Id.*

20. In 2010, there were nearly 17 million people living in the Chesapeake Bay watershed. TMDL at 2-4.

21. Major pollutants of concern in the Chesapeake Bay include nutrients (namely nitrogen and phosphorus) and sediments. TMDL at 2-7.

22. Nationwide, agriculture is the largest source of water pollution in the country, responsible for over 94,000 miles of river and stream impairment. *See* A National Evaluation of the Clean Water Act Section 319 Program, US EPA, November 2011.

23. Impaired waterways are those for which technology-based regulations and other required controls are not stringent enough to meet the water quality standards.

24. Agriculture constitutes the largest single source of nitrogen, phosphorus and sediment loading to the Bay.

25. Agriculture is responsible for approximately 44 percent of nitrogen and phosphorus loads and 65 percent of sediment loads delivered to the Bay. TMDL at 4-29.

26. A load refers to the total amount of nutrient or sediment entering the water during a given time, such as “tons of nitrogen per year.”

27. Because of the excess nutrient and sediment loads caused in part by agricultural operations, most of the Chesapeake Bay and its tidal waters are listed as impaired waterways for nitrogen, phosphorus and sediment under the CWA. TMDL at ES-3.

28. Excessive nutrients produce undesirable water quality conditions, including excessive algal growth, low dissolved oxygen and reduced water clarity. TMDL at 2-7.

29. Excessive sediment suspended in the water column impairs the ability of light to penetrate the water column and carries other pollutants, such as *E. coli*, into the water column. *Id.*

30. Adverse water quality conditions produced by excessive nutrients and sediment diminish the ability of the Chesapeake Bay to support healthy assemblages of aquatic wildlife and vegetation and impair recreational use and enjoyment of the Chesapeake Bay and its tributaries. *Id.*

31. In 2003, and in subsequent amendments, EPA established water quality criteria for the Chesapeake Bay, which have been incorporated into the state water quality standards of several Bay watershed states. TMDL at 3-1, 3-2.

II. EPA's Adoption of the Chesapeake Bay TMDL

32. On October 1, 2007, the states and EPA agreed that EPA would establish a TMDL for the Chesapeake Bay no later than May 1, 2011. TMDL at 1-9.

33. Additionally, EPA entered into a number of settlement agreements and consent decrees in the context of lawsuits filed by individuals and groups dedicated to the restoration of the Chesapeake Bay dating back to the late 1990s. TMDL at ES-3.

34. Under those agreements and decrees, EPA was obligated to complete the TMDL for the Chesapeake Bay and its tributaries by specified dates. TMDL at 1-17 to 1-20.

35. President Obama issued Executive Order 13508 on May 12, 2009, which directed the federal government to lead a renewed effort to restore and protect the Chesapeake Bay and its watershed. TMDL at ES-4.

36. The adoption of the TMDL was mandatory under the CWA because states were not meeting the water quality standards. See 33 U.S.C. § 1313(d)(1)(C).

STATUTORY BACKGROUND

37. Congress enacted the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In the Act, Congress articulated the national goal of eliminating “the discharge of pollutants into the navigable waters” by 1985. 33 U.S.C. §1251(a)(1). In furtherance of this goal, the CWA provides a comprehensive approach for the regulation of pollution discharge into the waters of the United States.

38. The CWA recognizes two broad categories of pollution sources: point sources and nonpoint sources.

39. Point sources are defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

40. “Nonpoint sources” are diffuse sources of pollution not covered by the definition of “point source.” 40 C.F.R. § 35.1605-4.

41. Section 301(a) of the CWA, 33 U.S.C. §1311(a) prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless pursuant to the terms of a NPDES permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

42. NPDES permits are only issued for point sources. *See, e.g.*, TMDL at ES-8.

43. New NPDES permits must be issued every 5 years. 33 U.S.C. § 1342(b)(1)(B).

44. The CWA authorizes states to adopt programs for issuing permits to point sources under the NPDES program. 33 U.S.C. § 1342(b).

45. Any such state permitting program must be administered in accordance with regulatory guidelines promulgated by the EPA Administrator, pursuant to 33 U.S.C. § 1342(c)(2), currently codified in Parts 122 and 123 of Title 40, Code of Federal Regulations.

46. The CWA requires point sources to achieve the technology-based pollution control standards set forth in 33 U.S.C. §§ 1311(b)(1)(A) and (B).

47. Point sources were required to implement the “best available technology economically achievable” (BAT) to control their discharges by March 31, 1989. 33 U.S.C. § 1311(b)(2)(A).

48. New BAT control capabilities must be included in the new permits. 33 U.S.C. § 1311(d).

49. The CWA requires all states to adopt water quality standards consisting of the designated uses applicable to waters and water quality criteria based on those uses. 33 U.S.C. § 1313(c)(2)(A).

50. The CWA mandates more stringent limitations when necessary to meet “water quality standards, treatment standards, or schedules of compliance” established pursuant to any Federal or State law or regulation, or when they are required to implement any applicable water quality standard established pursuant to the CWA. 33 U.S.C. § 1311(b)(1)(C).

51. These water quality-based effluent limitations (WQBELs) become enforceable parts of the NPDES permit when necessary to protect waterways.

52. The states must identify those waters for which the technology-based pollution controls set forth in 33 U.S.C. § 1311(b)(1)(A) and (B) are not stringent enough to implement

any applicable water quality standard. 33 U.S.C. § 1313(d)(1)(A). If EPA disapproves of the states' proposed loads, it shall establish such loads for such waters. U.S.C. § 1311(d)(2).

53. For such waters, a "total maximum daily load" of pollutants "shall be established at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C).

54. EPA's CWA implementing regulations define "total maximum daily load" as "[t]he sum of the individual [waste load allocations] for point sources and . . . [load allocations] for non-point sources and natural background." 40 C.F.R. § 130.2(i).

55. A TMDL specifies the maximum amount or "load" of a pollutant that can be discharged into the waters from all sources combined while still allowing that body of water to meet water quality standards. *Id.*

56. Under a TMDL, point sources are assigned "waste load allocations" while nonpoint sources receive "load allocations."

57. The waste load allocations for point sources are reflected in the permit as discharge limits.

58. 40 C.F.R. 122.44(d)(1)(vii)(B) requires that effluent limits in permits be consistent with "the assumptions and requirements of any available waste load allocation" in an approved TMDL.

59. The CWA limits the ability of point sources to discharge into impaired waters. 33 U.S.C. § 1311(b)(1)(A).

60. EPA's regulations for state NPDES programs prohibit the issuance of permits "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d).

61. 40 C.F.R. § 122.4(d) applies to both federal and state NPDES programs under 40 C.F.R. § 123.25.

62. EPA's regulations prohibit the issuance of a permit to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i).

63. In addition, 40 C.F.R. § 122.4(i)(1) requires that owners and operators of new sources or discharges of pollution into water segments that do not meet applicable water quality standards and where a TMDL has been established demonstrate that there are "sufficient remaining load allocations to allow for the discharge."

64. "[A] permit may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o). This provision is known as the anti-backsliding provision.

GENERAL ALLEGATIONS

65. EPA adopted the TMDL for the Chesapeake Bay on December 29, 2010.

66. The TMDL establishes final load allocations for the entire Chesapeake Bay, as well as specific load allocations by jurisdiction and river basin. TMDL at Table ES-1.

67. Under the CWA, the TMDL confers a legal obligation on states to develop Watershed Implementation Plans (WIPs) to implement the TMDL. 33 U.S.C. §1267(g)(1); *see* TMDL at ES-8.

68. Pursuant to the Chesapeake Bay TMDL, EPA reviews the states' WIPs for conformance with the TMDL.

69. The TMDL does not provide for a remaining pollutant load allocation for new sources or increased discharges from existing sources. TMDL at 10-1.

70. Thus, the TMDL does not account for natural population or economic growth.
71. Maryland alone is expected to add 478,000 households by 2035, which will contribute over 2 million pounds of nutrient pollution annually to the Bay. *Accounting For Growth*, Briefing to the AfG Work Group, January 18, 2013 (Robert M. Summers, Ph.D., Secretary, Maryland Department of the Environment) at 7.
72. In lieu of setting aside “remaining pollutant load allocations” to account for future growth, EPA expects states to develop trading and offset programs. TMDL at 10-1; 10-3.
73. The states submit the designs of their trading and offset programs to EPA as part of their WIPs.
74. EPA expects these programs to be consistent with Appendix S of the TMDL and subject to EPA oversight. TMDL at 10-1.
75. Pursuant to the TMDL, EPA will review trading and offset programs for compliance on a programmatic, not an individual basis. TMDL at 10-3.
76. EPA has already reviewed state trading and offset programs for compliance with TMDL Section 10 and Appendix S.
77. EPA controls the states’ trading and offset programs through that review.
78. Trading and offsets allow point sources to avoid technology and/or water quality standards required by their NPDES permits under the CWA. *See* 33 U.S.C. § 1311.
79. Trading and offsets are illegal under the source-by-source, technology-based mandate of the CWA and the anti-backsliding provision. *See* S. Rep No. 92-414 at 70 (1972).
80. Trading and offsets allow point sources to violate their NPDES permits by discharging greater amounts of pollutants than their waste load allocations permit. These

discharges contribute to both local and downstream non-attainment of water quality standards and adversely affect Plaintiffs' members' use of waters in those areas.

81. Trading and offsets will perpetuate non-compliance with the TMDL in many areas of the Bay. Plaintiffs' members are adversely affected by the harms they incur in portions of the Bay that do not meet water quality standards.

82. NPDES permit holders and applicants in the Bay watershed where Plaintiffs' members live and recreate have applied for trading and offset privileges or have expressed their intention to do so.

83. Trading authorizations and offsets are actual or imminent.

84. The TMDL is a final rule and thus final agency action within the meaning of the Administrative Procedure Act. 5 U.S.C. § 704.

85. EPA's authorization of trading and offsets, included as part of the TMDL, is final agency action.

86. The validity of trading and offsets provisions under the CWA is a purely legal question fit for judicial review.

87. Pollution trading and offsets adversely affect and will continue to adversely affect plaintiffs' members' professional, commercial, scientific, and recreational enjoyment of the Chesapeake Bay and connected waterways.

CLAIMS FOR RELIEF

COUNT I

EPA's Authorization of Pollution Trading is Unlawful, Arbitrary and Capricious

88. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth herein.

89. EPA's approval of pollution trading under the Chesapeake Bay TMDL is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

90. Pollution trading between point sources and nonpoint sources is not authorized under the CWA.

91. Pollution trading between point sources only is not authorized under the CWA.

92. Any pollution trading between and among sources is not authorized under the CWA.

93. The CWA does not allow sources of any kind to exceed their TMDL allocations or waste load allocations in exchange for pollution reductions in another location.

94. Point source permitting provisions of the CWA, with its source-by-source reduction mandate, do not allow for such sources to avoid any permit limitations—including technology-based, water quality-based or waste load limitations—through a pollution trading program. *See S. Rep No. 92-414 at 70 (1972).*

95. Allowing point sources of pollution to engage in trading undermines EPA's ability to receive reasonable assurances that point sources will be able to meet the waste load allocations contained in the TMDL.

96. EPA provides no rational basis to support a conclusion that pollution trading will ensure compliance with applicable water quality standards in the Chesapeake Bay or its tributaries.

97. EPA provides no rational basis to support a conclusion that the states or EPA can adequately verify, track, and monitor trading activity in order to prevent worsening water quality and ensure compliance with water quality standards.

98. EPA's authorization of pollution trading without first establishing mandatory enforceable safeguards creates an impending threat that pollution trading will impede or impair achievement of water quality standards in the Chesapeake Bay and its tributaries, in violation of its mandate under the CWA.

99. EPA's authorization of trading under the Chesapeake Bay TMDL exceeds the agency's authority under 33 U.S.C. § 1313 and other provisions of the CWA.

100. EPA's authorization of pollution trading is unlawful, arbitrary and capricious.

COUNT II

EPA's Authorization of Offsets for New or Expanded Pollution Sources is Unlawful, Arbitrary and Capricious

101. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth herein.

102. The TMDL "does not provide a specific allocation to accommodate new or increased loadings" of pollutants. TMDL at 10-1.

103. Instead of accommodating growth, EPA "expects" jurisdictions to address new or increased loadings of pollutants through "credible and transparent offset programs subject to EPA oversight." TMDL at 10-1.

104. EPA "encourages and expects that the jurisdictions will generally develop and implement programs for offsetting new and increased loadings" in accordance with EPA's prescribed definitions and "common elements." TMDL at 10-3; TMDL at Appendix S.

105. EPA authorizes trading and offset programs as a component of states' plans for point sources to meet waste load allocations. TMDL at 10-3.

106. EPA's approval of offsets under the Chesapeake Bay TMDL is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

107. EPA's regulations under the CWA prohibit the issuance of a permit to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i).

108. New or expanded discharges into the Chesapeake Bay watershed will cause or contribute to ongoing violations of water quality standards in the Bay and its tributaries.

109. New or expanded discharges into the Chesapeake Bay watershed will cause or contribute to ongoing violations of water quality standards in the Bay and its tributaries, even where such new or expanded discharge is "offset" by a reduction in pollution discharges from another source.

110. EPA's authorization of offsets violates the agency's CWA implementing regulations set forth at 40 C.F.R. § 122.4(i)(2) (prohibiting the issuance of a permit to a new or expanded source into already-impaired waters unless "[t]here is sufficient remaining pollutant load allocations to allow for the discharge," and "[t]he existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.").

111. EPA provides no rational basis to support a conclusion that allowing new or expanded sources to discharge into the Chesapeake Bay watershed, in exchange for making or buying offsets from another location, will result in compliance with applicable water quality standards in the Chesapeake Bay or its tributaries.

112. EPA's authorization of offsets of new or expanded sources is unlawful, arbitrary and capricious.

COUNT III

EPA's Authorization of Pollution Trading and Offsets Violates Notice and Comment Requirements under the Administrative Procedure Act (APA)

113. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth herein.

114. EPA's approval of trading and offsets violates notice and comment requirements under the APA, 5 U.S.C. § 553.

115. Lawfully promulgated TMDLs cannot be altered unless EPA provides a notice of proposed rulemaking and opportunity for the public to participate in the rulemaking. 5 U.S.C. §§ 553(b) and (c).

116. Pollution trading authorizes transferring all or part of one source's share of the Chesapeake Bay TMDL allocations or waste load allocations to another source.

117. Pollution trading thus amends the waterways' TMDL.

118. Pollution trades alter the TMDLs of waterways without amending the Chesapeake Bay TMDL through formal notice and comment procedures.

119. Allowing new or expanded discharges by one source in exchange for reducing another source's lawfully-approved allocation creates new load allocations that were not included in the final Chesapeake Bay TMDL.

120. EPA may not authorize such an allowance without amending the Chesapeake Bay TMDL through formal notice and comment procedures.

121. Through EPA's approval of trading and offsets under the Chesapeake Bay TMDL, states or third parties have the ability to alter the Chesapeake Bay TMDL allocations outside of the legally required process.

122. EPA violates notice and comment procedures required under 5 U.S.C. §§ 553(b) and (c).

123. Wherefore, Plaintiffs pray for judgment against Defendants as set forth hereafter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Food and Water Watch and Friends of the Earth now pray for relief as follows:

124. Declaratory judgment that the trading and offset provisions of the TMDL are in violation of the Clean Water Act and notice and comment procedural requirements of the APA and are null and void.

125. Such other and further relief as the Court deems just and proper.

Dated this 19th day of February, 2013
Washington, D.C.

Respectfully submitted,

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