

STATE OF MINNESOTA
IN SUPREME COURT

Court of Appeals File Nos. A0-40886 & A0-40890

Citizens Advocating Responsible Development, et al,
Petitioners/Respondents,

vs.

Kandiyohi County Board of Commissioners,

Appellant,

County of Kandiyohi, Minnesota,

Appellant,

Duininck Brothers, Inc.,

Appellant.

PETITIONER/RESPONDENT CARD'S REPLY BRIEF

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INTRODUCTION

In its principal brief, Kandiyohi County asserts:

[t]he County has not asserted in this litigation an argument that the terms "impacts" and "effects" are different. The focus of Appellants¹ and Amicis on comparing and contrasting these specific words is misguided. Instead, the key issue for the Supreme Court requires the Court to determine whether analysis of the aggregate effects of past, present and/or future related or unrelated projects is the same as an aggregate analysis that focuses on only related or anticipated future projects.

(Kandiyohi County Brief, p. 8)

But no satisfactory analysis of what Kandiyohi County identifies as the "key issue" can avoid coming to terms with this issue of whether "impacts" and "effects" are synonymous. For if the word "effects" is synonymous with the word "impacts," then "impacts" may be freely substituted for the word "effects" as the latter word occurs in the text of various relevant EQB regulations. And if this substitution is made, then the definition of "impacts" in the EQB regulations mandates that an EIS be performed.

Kandiyohi County's brief is written with exceptional skill. One of the dangers of skillful writing, however, is that it can "paper over" many of the weak spots in that party's analysis, either through artful rhetoric or calculated ellipsis. In this case, the County's brief presents examples of both.

¹The parties have switched positions so many times that the undersigned will use CARD rather than "Appellant" or "Respondent" except when quoting from someone else's document.

Kandiyohi County has a very difficult task when it attempts to argue that a regulation which attempts to require an RGU to examine the potential outcomes of successive additions of the sort of thing a developer proposes to do was not intended to force the developer or the RGU to examine other projects of the same or similar sort. It must not only undermine the EQB's argument that "cumulative impacts" means "cumulative impacts." It must also present an alternative reading of the ECB's "cumulative impacts" which makes some practical sense and which, if applied, would prevent the multiplication of same or similar projects from subjecting the environment to the death of a thousand cuts. Otherwise, the County would merely be inviting the Supreme Court to read an important environmental policy out of existence without proposing a reading which accomplishes anything at all.

It is precisely at this point where the County's position is deficient. It proposes no alternative reading which would advance any of the purposes for which such a regulation would be written. So it will be helpful in advancing the analysis in this case, in every instance where the County suggests that "cumulative potential effects" does not mean "cumulative impacts," to ask "Then what does "cumulative potential effects" mean, how does it differ from "cumulative impacts" and what purpose does the difference in language serve. If this question

is borne in mind, it will become obvious that there is no difference in the policy the two locutions are meant to serve, and that precisely the same issues are being addressed, and that precisely the same analysis is being imposed upon the RGU.

I.

THE "CUMULATIVE POTENTIAL EFFECTS" CRITERION, SET OUT IN MINNESOTA RULE 4410.1700, SUBP. 7(B), MUST BE DEFINED WITH RESPECT TO MINNESOTA RULE 4410.0200, SUBP. 11.

The essence of Kandiyohi County's response to CARD's argument is set forth on p. 199 of its brief:

By its plain meaning, Minn.R.4410.1700, subp. 7, only requires the County to consider the potential aggregate effects of *related or anticipated future projects* in determining whether to require an EIS. This is a significantly more narrow [sic] inquiry than contained in the definition of "cumulative impacts," which requires the consideration of aggregate effects of the project *in addition to other past, present, and reasonably foreseeable future projects* regardless of what person undertakes the other projects, and regardless of the relatedness of the projects; while consideration of the actual criteria in Minn. Rules 4410.1700, subp. 7 requires and aggregate analysis only of *related or anticipated future projects*, analysis of *cumulative impacts* requires consideration of past projects as well, without consideration for whether these projects are related to the project under consideration. By their plain meanings, the definitions contained in these two sections of the EQB rules are simply not synonymous.

(Respondent's Brief, pp. 19, 20)

There are several misconceptions contained in this somewhat obscure paragraph. Perhaps the most important is the confusion between a definition (which is what Rule 4410.0200 subp. 11

contains) and a directive (which is what Rule 4410.1700, subp. 7 institutes). Rule 4410.1700, subp. 7, sets forth what a RGU is supposed to **do**. By contrast, Rule 4410.0200, subp. 11, sets forth what the words used in the environmental rules which are to be applied by the RGU are supposed to **mean**. Hence, respondent's statement that "[t]he definitions contained in these two sections...." is a mistake in categories, like comparing apples to oranges.

The County's conclusion from the analysis quoted above is that the language of 4410,1700 subp. 7(B) does not require examination of past projects or present projects, unless those projects can be shown to be "related." As suggested in the introduction above, the County, in order to make its case, must demonstrate that the words "cumulative potential effects" in Rule 4410.0700 subp. 7 is not governed by the definition of "Cumulative impact" contained in Rule 4410.0200 subp. 11. But if "Cumulative potential effects" has a different meaning from "Cumulative impact," it must either be because (a) the two phrases are defined differently in the Rules themselves, or (b) the meaning of "Cumulative potential effects" is primitive and is self-evidently different from "Cumulative impact" as defined in Rule 4410.0200.

Neither claim can be sustained. "Cumulative potential effects" is not defined anywhere in the Rules, nor is "potential

effects." Thus, "cumulative potential effects" can differ from "cumulative impact" only if the difference in meaning between the two phrases is obvious from context. But the difference in meaning is not at all obvious. This can be demonstrated by substituting one phrase for the other:

B. The impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects of related or anticipated future projects.

This makes perfect sense. To reach respondent's proffered conclusion, on the other hand, requires a strained definition of "cumulative potential effects" which reads something like this:

B. The impact on the environment that results from incremental effects of the project itself without regard to other past, present, and reasonably foreseeable future projects ... of related or anticipated future projects.

Not only does this make little sense; insofar as it makes any sense at all, it is self-contradictory.

Moreover, for its argument to make parse, respondent has to demonstrate how the word "related", as used in § 4410.1700 subp. 7, means something other than "other past, present, and reasonably foreseeable future projects...regardless of what person undertakes the other projects." The only candidate would be to substitute the word "only if the person making the application has undertaken the other projects" for the phrase set forth in Rule 4100.0200. But there is nothing in either the

Rules themselves or in common sense that would justify such radical etymological surgery.

First, Minn. R. 4410.0200 makes it clear that the definitions contained in it apply to Minn. R. 4410.1700:

Subd. 1. Scope. For the purposes of parts 4410.0200 to 4410.6500 the following terms and abbreviations have the meanings given to them, unless otherwise provided.

Rule 4100.1700 does not "otherwise provide." So the definition of "cumulative impact of Rule 4410.0200 subp. 11 controls Rule 4410.1700.

Second, if the Rules had meant to institute a different standard with regard to the person or organization performing the project in 4100.1700 than the one defined 4100.0200 subp. 11, they would surely have attempted to make that difference clear. They did not.

Third, what possible difference would it make to the environment if the potential hazard from too many projects of a same or similar nature arose from the actions of one developer who instituted many projects or the actions of many developers instituting the same number of projects?

Respondent then cites *EIO v. Minnesota Pollution Control Agency*, 1998 WL 389079, for the proposition that "related or anticipated future projects" means "related ... future projects." Respondent derives this conclusion from the *EIO* decisions' somewhat cryptic remark that "Appellant confuses the existence of

other agricultural operations in the area with the cumulative effects of future operations...." But this statement hardly supports the conclusion that Rule 4100.1700 only applies to "future operations." It merely restates the unremarkable proposition that unrelated operations, be they past, present, or future, need not be considered in determining whether to order an EIS. In the instant case, however, the County Board did not examine other gravel mining operations in the area at all. Rather, it pre-empted such an analysis by concluding that Rule 4100.1700 did not apply even if the operations were related unless it could be shown that all such operations were environmentally problematical. Hence, even if the County were correct in its strained reading of "related,"² the County Board considered "related projects", future or otherwise, under the wrong standard when it made its determination that there was no need for an EIS.

The County goes on to argue that the EQB itself recognized a difference between the application of the phrase "cumulative

²Why would the EQB bother to use the word "or" in 4410.1700 subp. 7 if it had intended to restrict the use of the word "related" to "future projects" only? If "Minn.R. 4410.1700 imposes a [strictly] prospective view on the RGU's analysis by requiring it to consider impacts of reasonably foreseeable projects" as alleged by the County (Kandiyohi County Brief, p. 24), Minn.R. 4410.1700 subp. 7 would have read "[e]ffects of related anticipated future projects...." and it does not so read. Indeed, "related" can only refer to past and present projects, since "future" projects are already provided for in the rule.

potential effects" as it occurs in the phrase "cumulative potential effects of related or anticipated future projects" in 4410.1700 subp. 9 and the application of the phrase "the potential for significant environmental effect as a result of the cumulative impacts of such projects" set out in 4410.3800 subp. 5G. Frankly, it seems to the CARD that it takes a nitpicker to see a difference here. Second, it is impossible to see where the ECB has something different in mind in these two sections. If it did, the two regulations, read together, would work an absurd result - namely that a local RGU would have to decide whether or not to order an EIS based upon the cumulative potential effects to the environment of related or anticipated future projects, but the EQB would have to decide whether there was a need for a generic EIS based upon whether there was a potential for significant environment effects as a result of the cumulative impacts of similar projects. If this reading were correct, then local RGU's would be deciding on the need for EIS's based upon different criteria than the EQB would use in making the same determination for the same environment in the same area. As Minn. Stat. § 654.17(1) makes clear, neither the legislature nor agencies instituted by the legislature, intend a result that "[i]s absurd, impossible of execution, or unreasonable."

The County proceeds to argue that the EQB itself recognizes a difference in reading and result between § 4410.1700 and §

4410.3800, stating:

Finally, in further recognition that the phrase "cumulative potential effects of related or anticipated future projects" and "cumulative impact" are not synonymous, the Environmental Quality Board has recently considered revising the language of the EIS criteria contained in Minn.R.4410.1700, subp. 7. In a document dated October 21, 2004, titled "Environmental Review Rules: Housekeeping, Technical and Other Procedural Revisions Identified by EQB Staff" the EQB notes, contrary to its position in its Amicus Brief, that the wording in Minn.R. 4410.1700 subd. 7 is not consistent with the definition of cumulative impacts. See, App. A-84.

There are several problems with this argument. First, it refers to documents *aliunde* the record. There are ordinarily only two types of documents which can be cited to an appellate court - documents introduced at trial or hearing and thus "of record," and authorities. See. *Brosdahl v. Minnesota Mutual Fire and Casualty Co.*, 437 N.W.2d 695) Minn. App. 1989). An unadopted Draft Revision of Housekeeping Rules is neither a document in evidence nor a citable authority. After all, the EQB never adopted the proposed rule - perhaps the reason it did not is its determination that § 4410.1700 and § 4438.3800 were essentially equivalent and a rule revision was unnecessary, or it may well have felt that even if the current rule were a bit confusing, attempts to clarify it further would only result in a more problematic rule³

³As an exercise, it is useful to imagine how one would word sections such as § 4410.0200, 4410.1700 and 4410.3800. It is uncommonly difficult. Words such as "effects," "impacts,"

But even if the Supreme Court feels that it can consider such problematical authority, the proposed revision presents at least as good an argument that the EQB intended § 4410.1700 subd. 7B to track § 4410.0200 subp. 11 than it presents for the proposition that the results should be read differently. First, it should be noted that the proposed draft is labeled "*Housekeeping, Technical & Other Procedural Revisions....*" So it is clear that the Staff recommendations did not contemplate a substantive change in the rules, nor the results worked by the rules, in their proposal. A rule which would have resulted in no

"cumulative," "progressive" and "incremental" are very similar in their meanings. None of these terms is in any obvious way more fundamental than the other, so defining one in terms of the other does not help very much. It is worth noting that the proposed re-draft of § sec.441011700 subp. 7 only proposes to "reword item B to use language consistent with the defn. of cumulative impacts," but does not suggest how to accomplish this. Suppose the EQB were to substitute the words "cumulative impacts" for the words "cumulative potential effects." Then we get "'The impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects' of related or anticipate future projects." This is hardly less muddy. The problem is not that the EQB is using different *concepts* in the two sections. It is that whichever words one uses, the precise nature of what is intended will be cloudy because the concept of "cumulative" effects or impact, like the concept of "proximate cause," is relatively easy to grasp when an example is presented, but is uncommonly difficult to define in the abstract. That is why Courts have granted considerable deference to agencies in the interpretation of their own rules. See, *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427 (Minn. App. 2003) *Goodman v. State Department of Public Safety*, 289 N.W.2d 559 (Minn. 1979), which determined that courts should accord substantial consideration to the interpretation of administrators working with the problem sought to be remedied.

EIS being required under the previous definition and which would, as revised, require an EIS is a substantive rule change. Hence, the rule change is not a housekeeping rule change, nor a technical rule change, nor a procedural rule change. Hence, such a change is not what the EQB staff had in mind.

To see this, consider Minn. Stat. § 3C.10, which states:

The revisor's office, in preparing printer's copy for editions of statutes, may not alter the sense, meaning, or effect of any legislative act, but may:

....

(o) make similar editorial changes to ensure the accuracy and utility of the publication.

The same logic applies to regulations⁴. Although an administrative agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rule (Minn.R. 1400.100, subp. 1, it may do so if the change is merely technical or procedural. *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 741 (Minn. App. 1989). In determining whether the change is substantial or not, courts look to whether the rule:

1. Effects classes of persons who could not have reasonably been expected to comment on the proposed

⁴For an excellent discussion of the effect of minor technical or housekeeping changes on the interpretation of revised or repealed & re-enacted statutes, see *Oregon v. Holland*, 277 P.2d 386 (Or. 1954).

rules at the rule-making hearing;

2. Goes to a new subject matter of significant substantive effect;

3. Makes a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing; or

4. Results in a rule fundamentally different in effect from that contained in the notice of hearing.

The proposed rule change, if enacted, would have done none of the above.

Where the change is merely clarificatory or technical, a change of wording will not work a change in result. To make this clear, the legislature enacted Minn. Stat. § 645.37, which states:

When a law is repealed and its provisions are at the same time reenacted in the same or **substantially the same** terms by the repealing law, the earlier law shall be construed as continued in active operation. All rights and liabilities incurred under such earlier law are preserved and may be enforced.

So even if the EQB had changed the language of § 4410.1700 to track the language of § 4410.0200 exactly, our courts would still have been obliged to reach the same result as the District Court did in this case.

The County states:

Obviously, the EQB has recognized that, despite its apparent interpretation of the phrase "cumulative potential effects of related or authorized [sic]⁵ future projects" and the definition of "cumulative

⁵The current rule actually uses the word "anticipated"

impacts" as synonymous, the terms in fact do not mean the same thing.

(Kandiyohi County Brief, p. 26)

Despite repeated invitations from CARD and amicii, the County has not said what "cumulative potential effects" means. The closest one gets to such an analysis occurs on page 20:

It is not the case that the phrase "cumulative impact" is left an orphan in Minn. Rules Ch. 4410 (though this would be the EQBs fish to fry). Minn. Rules 4410.3800 authorizes the preparation of a Generic EIS where the EQB has determined that an area study is more appropriate than a case-by-case project study. In such a context, the Rules, Minn. Rule 4410.3800, subp. 5(G), do literally require a more comprehensive study of the "cumulative impacts" of various projects in the area or region. The key distinction is that the EQB must act as RGU on such an EIS, unless a local government consents to act as RGU.

Consider the implications of this statement. If a local government unit consents to act as the RGU with respect to the same project as it would have been mandated to act as RGU had the EIS not determined that an area study is more appropriate, the local RGU should apply a different standard in determining the need for an EIS for the same area, the same land, the same environment, and the same project? It should require a more comprehensive study if it is the same unit of government making the same determination on the same project if it is requested to do so by the EQB than if it is directly required to do the same thing by law? This interpretation works a result which makes no sense at all.

And what would that "more comprehensive study" look at that the narrower RGU EAW would not? The only candidate would appear to be that the generic EIS would look at "past and present" projects, while the narrower RGU would look only to "anticipated future projects." But that leaves the RGU to ignore any number of projects currently on the land or being dug into the land, an interpretation which has previously been characterized as absurd. Can any rational body charged with protecting the environment be presumed to have created a rule which ignores the current state of the environment? Surely not.

Finally, while the County Has much to say about the legal inability of an administrative agency's ability to alter a rule's plain meaning in an implementation context, it says very little about the ability of an administrative agency to interpret such a rule in the ordinary course of its duties. It thus has little to say about how the EQB and the MPCA interpret their rules, or the legitimacy of the process by which they do so. For example, the interplay between Federal Regulations enacted under NEPA and the Minnesota regulations which track EPA standards is absolutely fundamental to the Minnesota regulatory scheme, and failure to take this into account would result in State regulations which diverge progressively from the Federal laws and standards which they were enacted to implement.

The EQB has relied on the 1981 Statement of Need and

Reasonableness program ("SONAR") since 1981. In attempting to meld its regulations with those federal directives, the EQB stated, with regard to Minn. R. 4410.0200, subp. 11:

This definition is an adaptation of the Council on Environmental Quality definition found at 40 C.F.R. § 1508.7. The term is used in the current rules but is not defined therein....

And those regulations not only use the terms "impacts" and "effects" interchangeably, but expressly define them as synonymous: "Effects and impacts as used in these regulations are synonymous...." 40 C.F.R. 1508.8.

So if a draft technical change to a regulation is relevant because it provides some evidence that an agency knew its use of terms differed, how much stronger must be actual regulations used by that agency to show that it used the terms in exactly the same way! Consider its 1981 SONAR:

In addition to the environmental *impacts* expected to result directly from a proposed activity, the RGU is required to make an assessment of how it relates to other activities. Certain types of environmental *impacts* may be properly assessed only when viewed in conjunction with impacts of other proximate or related activities. For a more complete understanding of the intent of this criterion, definitions of cumulative effects, phased actions, and related actions should be considered.

See also the EQB's 1998 Rule Guide, Appendix 23, and its EAW Guidelines, all of which contain similar "cumulative impact" guidance.

As against this overwhelming evidence that "effects" and

"impacts" were to be interpreted synonymously, both in themselves and in the context of other regulations and definitions, the expressed need by staff to "clean up" the language of § 4410.17 is understandable and advances the County's case not at all.

II.

KANDIYOHI COUNTY'S NEGATIVE DECLARATIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Before considering issues related to facts presented and the adequacy of the County Board's response to them, two preliminary remarks need attention. First, as the County acknowledges, the Board's findings of fact were made with reference to its interpretation of Minn.R. 4100.1700. The County Board believed that it only had to make its determination with respect to anticipated future projects, and could therefore ignore any related projects either in being or in progress. Hence, it made its findings of fact under an error of law, and the deference accorded to an RGU's fact finding process is inoperative.

A fair amount of the County's fact finding was made under its (mis)interpretation of the "cumulative effect" rule. For example, Duininck's (and hence the Kandiyohi County Board's) analysis of the relationship of the two pits depends crucially upon its erroneous analysis of Minn.R. 4410.1700:

The issue of cumulative impacts must be evaluated separately and altogether differently from the issues of phased and connected projects. Whereas the latter two types of projects give guidance into requiring a mandatory EIS, cumulative impacts are not evaluated on

the cumulative area of the proposed project in relationship to existing projects, but the actual impacts that are cumulative based on both the existing and proposed projects. To show a cumulative negative impact, there must be a reason to believe that each project in itself will at least have a significant negative impact to the environment. It has been shown in these EAW's and proven time and time again that gravel pits do not have a negative environmental impact, and many times have a quite positive impact, especially given the current reclamation standards.

(A-51)

One might well ask how it has been proven again and again in various EAW's that gravel pits do not have a negative environmental impact if EAW's do not have to address and assess the cumulative impact of gravel pits. But for present purposes, the important point is that Duininck's acknowledged that it did not make a critical impact assessment because it thought that it did not have to do so. Given that it failed to do so, and that the County's evidentiary findings were wholly dependent upon Duininck's input, the evidence which was adduced by the County was not addressed to the relevant considerations. Thus, such fact-finding as the County did make not entitled to deference.

Second, even the standard of deference which is due to an RGU which is operating under a correct interpretation of the law is overstated by the County. In the instant case, Kandiyohi count was acting as a factfinder, receiving evidence, weighing the evidence, and making factual conclusions. Where such a governmental body acts as a factfinder, receives evidence in

order to make factual conclusions, and weighs that evidence as would a judge in a court trial, it is held on review to the substantial-evidence standard. *In re Murphy Motor Freight Lines*, 428 N.W.2d 467 (Minn. App. 1988); *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Council*, 237 N.W.2d 375 (Minn. 1975); Minn. Stat. § 14.02 subd. 3.

In light of this, the District Court's analysis was right: Intervening Defendant stated that the extraction operations in the planned pits will have no negative effect on groundwater quality....

Contrary to the above opinion were the opinions of others with comparable or even better qualifications:

"[t]he question begs to be answered, what effect does removal of topsoil from more than 100 acres of land over the gravel pit area and the removal of 40 or more feet of gravel from such a large area have on the water quality and water supply to the lake?

.... More concrete evidence from Intervening Defendant's ideas above is not given, and the reasons particularized to the environmental constraints imposed by the area in and around th planned pits are not given in appreciable depth.

(A-18)

and

This gives at least some indication that the EAW's may not have been compiled with the greatest attention to detail and accuracy. When viewed in the light most favorable to Defendants, the court must find that the steep slopes are the Glacial Ridge bluff exclusively. However, this finding assumes less effect when weighed against the clear deficits in evidence supporting other assumptions in the EAW's and the lack of any response to many reservations expressed by the DNR, the MPCA, and the various citizens.

(A-21)

Viewed under a "substantial evidence" standard of review, the County's decision making process wholly fails. Consider Duininck's reply to the DNR's concerns about runoff in the mining area:

The difficulty comes in proving what we know is true about water quality and gravel pits before we actually start mining. One could spend hundreds of thousands of dollars to study these issues and still not know any more than what has already been proven through years of experience - that, if operated in an environmentally sensitive manner, gravel pits will have absolutely no negative effect on water quality."

(A-17)

The District Court's reply is apt:

This is an opinion unsupported by data collected regarding the environmental attributes in and around the sites of the planned pits Intervening Defendant may have an idea, borne out through experience, that no problems should be occasioned or expected with excavation operations on the planned pits. However, there is very little evidence that Intervening defendant brings forth in support of this idea, even viewing the facts in the light most favorable to defendants.

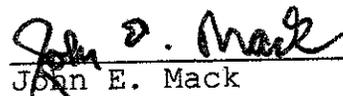
(A-17)

Finally, the County attempts to distinguish *Dead Lake Association, Inc. v. Otter Tail County*, 2005 WL 221773, from the instant case based upon the argument that the Otter Tail County Board acknowledged the potential significant environment effects that could result from the development in its EAW while the Kandiyohi County Board did not even acknowledge that there was a potential for significant environmental effects.

The County did not spend a great deal of time on its *Dead Lake* analysis, probably for a good reason - *Dead Lake* is now on review before this Court and neither party knows what the eventual outcome of that case will be. But assuming that *Dead Lake* will be affirmed as it stands, it certainly has an important impact on the instant case. For the action of the Otter Tail County Board is far more defensible than the action of the Kandiyohi County Board in CARD. At least Otter Tail County recognized that there was a problem, even though it did not adequately address it. Not only did the Kandiyohi County Board fail to adequately address many of the issues - it did not address the cumulative impact issues at all because it got the law wrong. Would the Otter Tail County Board have been sustained by the Court of Appeals if it had not even recognized the potential for significant environmental effects? Hardly. It would have been reversed on two grounds rather than only one. The Kandiyohi County Board's decision should be reversed on at least as many grounds.

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