No. 97684-8
Court of Appeals No. 51439-7-II

SUPREME COURT OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Petitioner,

v.

CENTER FOR ENVIRONMENTAL LAW & POLICY; AMERICAN WHITEWATER; and SIERRA CLUB,

Respondents

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Respondents Center for Environmental Law & Policy, American Whitewater, and Sierra Club (Appellants below, hereinafter "CELP") ask this Court to grant in part and deny in part review of the Court of Appeals' decision terminating review designated in Part B of this petition:

1. Petitioners Department of Ecology and Jay Inslee's (Respondents below, hereinafter "Ecology") request for review of the Court of Appeals' ruling that the 850 cfs summer instream flow rule is invalid should be denied; and

2. Review should be granted on the Court of Appeals' ruling that the administrative record as assembled by Ecology was adequate for judicial review.

II. COURT OF APPEALS DECISION

CELP asks this Court to review in part the Court of Appeals, Division II opinion in *Center for Environmental Law & Policy, American Whitewater, and Sierra Club v. Washington Department of Ecology and Jay Inslee,* Docket No. 51439-7-II, filed on June 26, 2019 and amended by the Court of Appeals' Order Granting Motion for Reconsideration and Order Amending Opinion dated August 20, 2019 ("Slip Op."). A copy of that opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that Ecology's adoption of an 850 cfs summer instream flow exceeded its statutory authority, and was arbitrary and capricious, where the Court's decision was consistent with unambiguous statutory requirements and controlling caselaw?

2. Did the Court of Appeals err in holding that the administrative record, as assembled by Ecology, was adequate for review, where the record omitted numerous documents and presented a misleading view of the facts and circumstances accompanying Ecology's decision?

IV. STATEMENT OF THE CASE

A. Introduction.

Ecology seeks review of a straightforward application of the statutes obligating the Washington Department of Ecology ("Ecology") to protect the instream values set out in RCW 90.22.010 and RCW 90.54.020(3)(a). The Court of Appeals correctly found that, when adopting instream flows by rule, Ecology must consider the full set of instream values protected by these unambiguous statutes, and that failure to do so was both outside Ecology's statutory authority and arbitrary and capricious. The Court of Appeals' decision presents no conflict with any decisions of this Court or of the Court of Appeals.

This case also includes an important issue of first impression in Washington: may an agency frustrate effective judicial review by failing

to consider all relevant information in its possession or to include such relevant material in the administrative record? Because this issue has broad and statewide implications for review of administrative decision-making, it presents both a significant question of law and an issue of substantial public interest that should be addressed by this Court.

For the reasons set forth herein, CELP respectfully requests that this Court deny review as sought by Ecology (Issue 1) and grant review on the question of adequacy of the administrative record as presented by CELP (Issue 2).

B. Statutory requirements for protection of Instream Flows.

As steward of the state's water resources, Ecology is tasked with protecting instream flows and the full set of uses and values that our rivers and streams support. Ecology's authority and obligation to establish instream flows are based on two statutes. First, the 1969 Minimum Flows and Levels Act provides that Ecology "may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010.

Two years later, the Legislature enacted the Water Resources Act of 1971, which mandates that Ecology protect a suite of instream values:

> The quality of the natural environment *shall* be protected and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, *scenic, aesthetic and other environmental values, and navigational values*.

RCW 90.54.020(3) (emphasis added).

When read together, these statutes both set forth a list of instream values to be protected and mandate that Ecology preserve each of them. Nothing in either statute's language suggests that one is "secondary" to the other. As the Court of Appeals correctly noted, the statutory scheme "requires Ecology to consider all instream values." Slip Op. at 17.

C. The Spokane River's Summer Instream Flow

The Spokane River flows from Lake Coeur d'Alene in Idaho to Lake Roosevelt (the Columbia River) in Washington. The River supports a wide range of recreational uses including fishing, whitewater rafting and paddling.

In 2015, Ecology adopted an instream flow rule to establish minimum flows for the River at various times of year. WAC Chapter 173-557; the "Rule." The summer instream flow was selected as 850 cfs, measured at the Spokane gage.[1] Flows at Spokane currently exceed this level for most or all of the summer in most years, supporting recreational

uses including kayaking, rafting, swimming, picnicking, and fishing as well as the aesthetic values associated with the River.[2] Selecting such a low flow means that water would be available for issuing new water rights. The predictable result is that river flows would be reduced to the 850 cfs level in all summers.

During the rulemaking process, Ecology received thousands of comments critical of the proposed 850 cfs summer flow, many of which noted that allowing the river to fall to this low level on a regular basis would impair instream uses such as navigation, recreation and aesthetics.[3] Respondent American Whitewater conducted a recreational use survey and provided the data to Ecology during the rulemaking process.[4] The survey found that 1000 cfs was the minimum flow necessary to protect navigation, with recreational boaters having a preferred minimum flow of 1500 cfs.[5] As noted by the Court of Appeals, CELP submitted other scientific, economic, and river-user information, addressing scenic and aesthetic flows, the potential return of anadromous fish, and

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[1] AR002709.

[2] As shown by the hydrographs for years 1968-2005, the river's flow exceeds 1000 cfs throughout the summer in all but very dry years (represented by the 90% exceedance flow). AR003874.

[3] AR003001-11.

[4] AR002290-2494; AR002495-2514, AR002519-45.

recreational/navigational use of the River. Slip Op. at 6.

D. The 850 cfs summer instream flow was based solely on fish habitat and failed to consider other instream values.

Ecology selected the 850 cfs flow based solely on studies of habitat for fish (redband trout and mountain whitefish).[6] The agency has repeatedly made the conclusory statement that setting flows for fish habitat will ensure protection of other instream values, but has provided no support for this assertion.[7] Ecology has stated that it "considered" other instream values but chose not to use them as the basis for decision; however, the record is devoid of evidence of any such consideration.[8]

E. Recommendations for higher summer flows were omitted from the administrative record.

Numerous other instream flow recommendations (nearly all for summer flows higher than 850 cfs) were made before the Rule was adopted.[9,10] The majority of these were absent from the administrative record produced by Ecology; only a December 23, 2007 memo

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[5] AR016257-59. Similarly, a 2004 Whitewater Paddling Instream Flow Assessment Study Report prepared for the Spokane River Hydroelectric licensing process found that a flow of 1350 cfs was preferred and 1000 cfs was an absolute minimum. AR002225-89

[6] AR2985; AR3003

[7] CP22

[8] AR3003; CP19-20.

[9] Previous recommendations included a flow of 700 cfs at Post Falls (equivalent to 1091 cfs at Spokane) (CP149); 1100 cfs (CP142); 1040 cfs (CP144); 900-1050 cfs (AR007749-51); and 1100 cfs (AR019091).

recommending 900-1050 cfs and a January 2008 memo recommending 850 cfs were included.[11] CELP received the remaining recommendations through a Public Disclosure Act request to WDFW, the agency that assisted Ecology in determining instream flows.[12]

In 2016, CELP filed a petition under the Administrative Procedure Act, RCW Chapter 34.05. The petition not only referred to the large volume of concerns raised during rulemaking but also included significant information regarding recreational navigation, and the Rule's effect on river-dependent businesses. Ecology denied the Petition, and this litigation followed. After the Thurston County Superior Court denied CELP's challenge to the Rule, CELP sought direct review by this Court. That petition was denied, and the case was transferred to Division II of the Court of Appeals. On June 26, 2019, the Court of Appeals, in a published decision,[13] invalidated the Rule on the basis that Ecology failed to

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[10] The 850 cfs flow was the lowest of the WDFW recommendations. WDFW biologist Dr. Hal Beecher noted in a June 2, 2014 email to Ecology that he would "oppose lower flows, but not higher summer flows." AR013609.

[11] AR007749-51; AR007752.

[12] CP136-7. CELP's motion to supplement the record with three of these documents, recommending flows of 1100 cfs at Spokane, 1040 cfs at Spokane, and 700 cfs at Post Falls (equivalent to 1091 cfs at Spokane) was denied by the trial court. CP58-87.

[13] The Court of Appeals' opinion was amended on August 20, 2019 to clarify that only the 850 cfs summer instream flow had been invalidated. *CELP v. Ecology*, No. 51439-7, Order Granting Motion for Reconsideration and Order Amending Opinion, issued August 20, 2019. Citations to the Slip Opinion in this brief refer to the amended opinion.

consider the instream values required by RCW 90.54.020(3)(a) and that Ecology's decision was arbitrary and capricious. Ecology has now petitioned this Court for review of Division II's opinion.

V. ARGUMENT

A. Review as sought by Ecology should be denied.

1. Review under RAP 13.4(b)(1) should be denied, as there is no conflict with *Elkhorn*, which addressed only flows for fish and made no mention of other instream values.

Ecology's argument regarding *Department of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993) (aff'd by *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 128 L. Ed. 716 (1994) ("*Elkhorn*") is irrelevant. Pet. Rev. at 10-12. Aesthetic and recreational values were not at issue in *Elkhorn;* that decision addresses only the question of what method Ecology may use to determine an instream flow for fish habitat. *Elkhorn* neither holds that considering fish habitat alone fulfills the requirements of RCW 90.54.020(3)(a), nor affirms, as Ecology claims, that "Ecology may focus on fish when it sets minimum flows." Of the instream values set out in RCW 90.54.020(3)(a), *Elkhorn* addresses only fish habitat, specifically whether use of the Instream Flow Incremental Methodology (IFIM) method was appropriate for determining the habitat needed by salmonids, and whether the flow

that was adopted "enhanced" or merely "preserved" the fishery.[14] *Elkhorn,* 121 Wn.2d at 202-3

The passage cited by Ecology on this point merely states that "Ecology's streamflow conditions were *necessary* to ensure compliance with RCW 90.54.020(3)(a)." *Elkhorn,* 121 Wn.2d at 189 (emphasis added). Nothing in the case even suggests (in fact, the question was never asked) that providing adequate habitat for fish is *sufficient* to fulfill RCW 90.54.020(3)(a)'s requirements.[15] Because *Elkhorn* does not address this question, there can be no conflict with the Court of Appeals' decision here.

2. Review under RAP 13.4(b)(2) should be denied, as there is no conflict with *Bassett v. Ecology.*

Ecology also urges this Court to accept review under RAP 13.4(b)(2), arguing that Division 2's decision conflicts with the Court of Appeals' published opinion in *Bassett v. Ecology*, 8 Wn. App. 2d 284, 438 P.3d 563 (2019). There is no conflict with *Bassett*. Ecology's asserted conflict is based on a misreading of *Bassett* as holding that RCW 90.54.020 is merely a "statutory policy statement" that does not require

[14] *Elkhorn* dealt with a state certification under Section 401 of the Clean Water Act (33 U.S.C. 1341) rather than with adoption of an instream flow.

[15] Ecology cites to several other statutes (RCW 90.54.005, RCW 77.57.020, 90.22.060, and 90.82.070) on this point. None of these suggests in any way that

Ecology to preserve the instream values listed in the statute, and that does not "impose mandatory duties on Ecology." Ecology's Petition for Review, filed September 18, 2019 ("Pet. Rev.") at 14.

But *Bassett* does not describe RCW 90.54.020's declaration of fundamentals as a mere "policy statement." The opinion *does* discuss a legislative policy statement. But that policy statement is from RCW 90.03.005 (the Water Code; addressing allocation of water to achieve "maximum net benefits"), not from RCW 90.54.020. *Bassett*, 8 Wn. App. 2d at 303. Along with the effect of policy statements generally, RCW 90.03.005 was cited in the court's specific discussion of the maximum net benefits requirement, not in its general discussion of what RCW 90.54.020(3)(a) requires. *Bassett*, 8 Wn. App. 2d at 303; *Id.* at 305.

The *Bassett* court held that the word 'shall' in RCW 90.54.020 does not create a mandatory duty for Ecology in the form of a formal balancing test for maximum net benefit findings. It did not hold, as Ecology asserts, "that RCW 90.54.020 does not mandate how Ecology should exercise its water management duties." Pet. Rev. at 16-17. Rather, *Bassett* holds that RCW 09.54.020 "instructs DOE how to generally exercise its discretion and expertise in water management." Bassett, 8 Wn.

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protecting habitat for fish adequately protects other instream resources.

App. 2d at 305. Nothing in *Bassett* suggests that Ecology may decline to consider certain of the instream values set out in RCW 90.54.020(3)(a).

Here, the Court of Appeals held that "shall" in RCW 90.54.020 mandates that Ecology "attempt to preserve [the listed instream values] to the fullest extent possible." Slip Op. at 16-17. This is entirely consistent with *Bassett's* holding that RCW 90.54.020 provides instructions for the Department in the exercise of its water management duties. Ecology considered only fish in setting the minimum summer flow, to the exclusion of the other values listed in the Water Resources Act. By doing so it ignored RCW's 90.54.020's instructions, and therefore exceeded its statutory authority.

Bassett does not hold or even suggest that Ecology may decline to consider certain of the instream values set out in RCW 90.54.020(3)(a). It therefore does not conflict with the Court of Appeals' finding here that Ecology must "attempt to preserve [the listed instream values] to the fullest extent possible." Slip Op. at 16-17.

Finally, *Bassett* did not involve the issue of *how* Ecology was to determine what flow levels should be set. In that case, the Watershed Planning Group had agreed on instream flow levels, which Ecology

adopted into rule pursuant to RCW 90.82.080(1)(a)(ii). *Bassett*, 8 Wn. App. 2d at 294-5. In contrast, the Spokane Watershed Planning Unit was unable to agree on an instream flow,[16] and Ecology stepped in and made the flow decision (in partnership with the Washington Department of Fish & Wildlife) and then adopted it into rule. RCW 90.82.080(1)(c).

3. The Court of Appeals did not announce an "ambiguous new standard" that conflicts with *Bassett*

Ecology contends that the Court of Appeals has created an "ambiguous new standard" of protecting instream values to "the fullest extent possible" that must be met when establishing instream flows. Pet. Rev. at 16. CELP submits that protecting these values is fully consistent with *Bassett* (noting that RCW 90.54.020(3)(a) "demands" that Ecology protect the listed instream values) and with RCW 90.54.020(3)(a)'s requirement that the listed uses be preserved and "enhanced where possible."[17]

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[16] AR002985; AR012991.

[17] As discussed *supra*, RCW 90.54.020(3)(a) tells Ecology what it must protect, not how to do so. The Court of Appeals' decision is consistent with this Court's seminal case on instream flow law, *Swinomish Indian Tribal Community v. State of Washington*, 178 Wn.2d 571, 579, 583-84, 311 P.3d 6 (2013), where the Court found that "[t]he water code also directs that base flows be retained in rivers and streams sufficient for preservation of fish, wildlife, scenic, aesthetic and other environmental values, and navigation," citing RCW 90.54.020(3)(a). *Swinomish* also described how Ecology balanced various interests

4. Review under RAP13.4(b)(4) should be denied, as the Court of Appeals' decision does not raise an issue of substantial public interest simply because part of the Rule was held invalid.

Ecology argues that this decision involves issues of substantial public interest and therefore warrants review under RAP 13.4(b)(4). Review on this basis should also be denied. The Court of Appeals' decision in this case is simply a straightforward application of statutory construction and of the Administrative Procedure Act, and the "issues of substantial public interest" that Ecology attempts to raise are nothing more than the predictable consequences of a rule being invalidated.

The chief consequence that Ecology complains of - that there is no longer a protected instream flow for the Spokane River in the summer months - presents no issue of substantial public interest for this Court to decide. The law is clear: a rule that is adopted without following the requirements of the APA is invalid. RCW 34.05.570(2)(c). That is what happened here. The summer 850 cfs flow not only failed to meet the statutory command to protect the instream values listed in RCW 90.54.020(3)(a), but the Court of Appeals found that Ecology's adoption of the rule (by ignoring the facts and circumstances relating to recreational

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under the statute, including both "aquatic resources and recreational uses" of the Skagit River.

and navigational uses) was arbitrary and capricious. Slip Op. at 21. As a result, the rule was held invalid. Resolution of this issue is also straightforward: Ecology can use the rulemaking process in a manner that complies with the APA and adopt an instream flow that meets the statutory requirements.

Contrary to Ecology's unsupported assertion, the Court of Appeals' decision did not "overturn a long-standing practice" by Ecology. Pet. Rev. at 1. Rather, the decision held that Ecology's failure to even consider most of the instream values as required by statute, under the circumstances present in this particular case, was improper.

If other rules were adopted without regard to the statutory requirements, they might rightfully be susceptible to challenge. But as this Court has noted, the language of instream flow rules is not uniform across the state, and each rule must be judged according to its own history and context. *Postema v. Pollution Control Hr'gs. Bd.*, 142 Wn.2d 68, 83-85, 11 P.3d 726 (2000). Ecology's unsupported assertion that other rules were adopted without consideration of recreational, navigational, or aesthetic values is contradicted by the Swinomish decision in which this Court described how Ecology balanced various interests under the statute, including both "aquatic resources and recreational uses" of the Skagit River. *Swinomish*, 178 Wn.2d at 579.

B. Review as sought by CELP should be granted

1. Review on the issue of an incomplete administrative record should be granted under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with prior Supreme Court decisions.

The question of whether an agency may choose not to include all pertinent information in its possession in a rulemaking file appears to be one of first impression here in Washington. However, in two cases predating the current APA, the Washington Supreme Court held that a complete record is required for review. *Loveless v. Yantis*, 82 Wn.2d 754, 762, 512 P.3d 1023 (1973) (decision cannot be intelligently reviewed based on "incomplete and inadequate" record because of faulty recording equipment); *accord*, *Beach v. Board of Adjustment*, 73 Wn.2d 343, 346-7, 438 P.2d 617 (1968) ("lack of a complete record was a fatal defect").

In this case, the agency record was incomplete due to deliberate action by Ecology rather than to technical difficulties. Several recommendations for higher streamflows that were made by WDFW and, in one case, by Ecology itself, were omitted from the record. This omission frustrates judicial review by providing a court with an incomplete picture of how the agency reached its decision (an inaccurate

account of the streamflows recommended to protect fish habitat).[18] By holding that the incomplete record in this case was adequate for review, the Court of Appeals' decision conflicts with *Loveless* and *Beach*.

2. Review should be granted under RAP 13.4(b)(4) because this case involves an issue of substantial public interest that should be determined by the Supreme Court.

a. A complete agency record is essential for adequate review of agency rulemaking.

The question presented by this case is simple: may an agency avoid addressing issues of public concern by selectively providing its rule writers only a subset of the relevant information? Such an outcome would fly in the face of the APA's purposes of open decision-making and meaningful public involvement and raises a "fundamental issue of broad public import which requires prompt and ultimate determination" that merits review by this Court under RAP 13.4(b)(4).

Ecology is required to consider WDFW's recommendations for fish habitat for "during all stages of development of minimum flow proposals." RCW 90.03.247. The documents included in the record as

[18] CELP does not suggest that Ecology intentionally biased the record to support its conclusion in this matter. But the requirements, in statute and case law, for a complete record do not depend on an agency's intent, and no showing of bad faith is required for a court to order the record be supplemented. Indeed, in *Loveless* the failure to provide an adequate record was due to mechanical failure of a recording machine. And nothing

prepared by Ecology include some, but not all, of WDFW's recommendations, for flows of 850 and 900-1050 cfs. Several recommendations for higher flows were omitted from the rulemaking file – these documents speak directly to the adequacy of the 850 cfs summer instream flow.[19] Ecology has never disputed that it was in possession of each of the flow recommendations, rather, it explains that these documents were "not in the custody of Ecology's rule-writing team during the rule writing process."[20]

The issue of a complete record for agency action is of broad import and potentially relevant to every state agency and every rule adopted in Washington. Under the APA, a court reviews agency action in part for whether it is supported by the record and is reasonable in light of the facts and circumstances. RCW 34.05.570; *Port of Seattle v. Pollution Control Hr'gs. Bd.*, 151 Wn.2d 568, 587-8, 90 P.3d 659 (2004). Because the record may be supplemented only under exceptional circumstances, effective judicial oversight of agency action depends on that record being correct and complete. RCW 34.05.562(1).

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presented in this case negates the obligation to produce a complete record for judicial review.

[19] See note 15, *supra.* At CELP's request, one memo making a recommendation for 1100 cfs was added to the record while the case was being briefed at the trial court. AR019091.

[20] CP162.

Rather than requiring that an agency include in the record all relevant information in its possession (the "attendant facts and circumstances"), the standard applied by Division 2 would allow an agency to deem the administrative record complete by fiat, regardless of whether other information known to the agency would tend to support the agency's decision. Omitting information that tends to argue against an agency's ultimate course of action may create the appearance that the action was reasonable even where facts and circumstances, considered as a whole, might argue against it. Put another way, an agency that is free to pick and choose what evidence to include in the record would be able to justify any action that it desired to take.

b. Federal courts have stressed the importance of a complete record for review.

Numerous Federal courts have considered this issue. The 10th Circuit held that the complete administrative record consists of "all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). An incomplete record "undermines the credibility of the court's review." *Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984). An agency may not "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence

to the proceeding in question." *Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978).

Here, omission of numerous science-based recommendations for instream flows undermines a reviewing court's ability to evaluate whether Ecology's ultimate decision to adopt the 850 cfs summer flow was reached through a process of reason.

Finally, Ecology's explanation that it did not rely on some of the available information and therefore need not include it in the record has been specifically disapproved by Federal courts. An agency may not "exclude information on the grounds that it did not 'rely' on the excluded information in its final decision." *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 197 (D.D.C. 2005) (emphasis added); *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 140 (D. DC, 2002) (transcript not properly excluded simply because agency claimed not to rely on it).

VI. CONCLUSION

For the reasons set forth herein, this Court should deny review as sought by Ecology, and accept review only on the issue of the Court of Appeals' holding that an incomplete record suffices for judicial review. CELP further requests that it be awarded its costs and fees as the prevailing party under RCW 4.84.350.

VII. CERTIFICATE OF SERVICE

I hereby certify that on the _10th__ day of October, 2019, I caused the forgoing Answer to Petition for Review to be served on the parties herein as indicated below:

Attorneys for Respondent Washington Department of Ecology Office of Attorney General Ecology Division Stephen H. North	[ ] US Mail [ ] Hand Delivered [X] email (via Appellate Courts Portal): stephen.north@atg.wa.gov ecyolyef@atg.wa.gov

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 10th day of October, 2019, in Seattle, Washington.

___*s/ Ted V. Howard* _____
Ted V. Howard, WSBA No. 54019
Attorney for Appellants

October 10, 2019 - 8:21 PM

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