



Environmental UPDATE November 2009

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Green Buildings: Planning for the Future

Lately, everyone is talking about green buildings and green construction. The prevailing wisdom is that these green technologies are necessary to conserve energy, thereby (1) reducing the cost of energy, (2) reducing the need for additional electrical generation capacity and (3) reducing emissions of greenhouse gases. Notwithstanding these common beliefs, however, there seems to be a fair amount of confusion regarding green buildings. This article briefly examines some of the issues that New Jersey businesses will face in the coming years, as we adapt to this

new green paradigm.

Will green buildings become prevalent? The December 15, 2008 draft Global Warming Response Act Recommendation Report strongly suggests that the answer is "Yes." New Jersey has set aggressive targets for reductions in annual emissions of greenhouse gases by 2020 and by 2050. In order to reach the 2020 target, all the State's current plans will need to be fully implemented and will need to work exactly as planned - a tall order indeed. Furthermore, the State does not have a good notion of how to reach the 2050 target emissions, but has determined the key sources of those emissions. Residential and commercial buildings account for 21% of the greenhouse gas emissions in New Jersey, which places building occupancies as the State's third-largest contributor to emissions. Consequently, the State will need to aggressively target building occupancies in order to meet its targets.

The State is considering the following goals and requirements for building occupancies:

- 1. Modify building codes to require that all new construction is at least 30% more energy efficient than conventional construction.
- 2. Set new minimum efficiency standards for new appliances and other equipment.
- 3. Provide technical assistance to commercial and industrial entities to develop strategies for reducing energy demand, particularly peak demand. Also, provide reductions in electricity rates for customers who permit utilities to control their usage during peak demand periods.
- 4. Reduce tax barriers and provide financial incentives to promote the installation of renewable energy and energy- efficient technologies.

Recent federal case law, however, suggests that New Jersey's plan to require new construction to be 30% more energy efficient than conventional construction may be preempted by federal law. The federal Energy Policy and Conservation Act governs energy efficiency and energy use for residential, commercial and industrial appliances and equipment, including heating, ventilation, air conditioning, and water heaters. It expressly preempts any state law that attempts to regulate "the energy efficiency, energy use, or water use" of any covered products. A recent federal decision from New Mexico looked to the legislative history and found the following explanation: "the building code exception [is] intended to 'ensure that performance-based codes cannot expressly or *effectively* require the installation of covered products whose efficiencies exceed ... the applicable Federal standard ...'"

The import of this quoted language is remarkable. Green buildings achieve their efficiencies by using a collection of technologies, designs and strategies. The Court, however, decided that unless a building could achieve 30% energy efficiencies by using only products covered by federal law, then the proposed state regulation was impermissible due to federal preemption. (New Mexico, like New Jersey, was seeking to impose 30% efficiencies.) Consequently, because 30% efficiencies cannot be achieved with just covered products, the court determined that the proposed New Mexico code was preempted. While it is not certain that a federal court in New Jersey would rule the same way, this decision suggests that New Jersey's strategy for implementing the Global Warming Response Act may be in peril. States may need to ask Congress to amend the federal law before they are able to proceed with their intended building code amendments.

Regardless of whether green buildings are mandated, people will continue to construct them because tenants demand them. For instance, a Colliers ABR study of commercial leasing in New York City for the first quarter of 2009 found that three of the four largest leases were for space in green buildings. So, the next logical questions are: how does one go about building "green"? And, how much more will it cost as compared to conventional construction?

As to how to build "green," there are numerous organizations that provide guidelines for achieving defined standards. Two of the better-known organizations are Leadership in Energy and Environmental Design (LEED) and Green Globes, each of which provides standards for four tiers of "green" building efficiencies. Integral to both of these programs, and of inherent importance regardless of the standard selected, is the requirement that compliance with the standard be audited. Each of the available programs has benefits and detriments, which should be evaluated carefully by a prospective building owner in selecting a desired standard. Then, such building owner should state clearly in all building construction contracts the standard to follow, and the tier of compliance desired. Because tenancies may require attaining specific tiers, and because rental amounts may be contingent on achieving those tiers, whether a post-construction audit will confirm that a given building achieves its desired tier has already become, and will undoubtedly grow, as a matter of concern across the country.

Estimates of the cost of building "green" vary greatly. Generally speaking, such costs are estimated at between 2% and 15% more than the cost of conventional construction. One of the primary determining factors regarding how much of a premium will be required to build green depends on the experience of the contractor. First-time "green" construction tends to be on the expensive side, while subsequent construction tends to be closer to the cost of conventional construction. This difference appears to be based on the contractor and subcontractors getting accustomed to using new, different techniques during the construction process. Thus, it is worthwhile to seek experienced contractors, or to use the same contractor over the course of multiple, similar jobs.

Also, there can be tremendous differences of opinion between the landlord and the tenant, or the landlord and its contractors, as to what constitutes acceptable green space. There are many open questions about the long-term viability of green building technologies: if a green technology fails during a tenancy, who is responsible for remediating it? If it cannot be remediated, such that the space is no longer "green", is the lease voidable by the tenant? If promotional information for a green technology claims a certain degree of efficiency, but the technology does not actually achieve such efficiency, who is responsible for the resulting failure? Considering these questions, it is clear that boilerplate contract language most likely will not adequately resolve the green issues that will arise, and when that happens, litigation will ensue.

For example, in *Shaw Development v. Southern Builders* (filed in Maryland Circuit Court in 2007, but presumably settled), it was alleged by Shaw Development that it lost \$635,000 in tax credits from Maryland's Energy Administration because the builder failed to achieve LEED Silver rating for a condominium project within the eligibility period to obtain the credits. Remarkably, while Shaw was apparently counting on receiving those credits, its building contract failed to address who would be responsible if delays caused them to be lost. *Shaw Development* underscores the need for parties to express to their counsel, and for counsel to understand, the myriad green building issues that can arise during the term of a contractual agreement, and for the parties to adequately address those issues.

Summary of the American Clean Energy Security Act of 2009

The proposed American Clean Energy Security Act of 2009 (known as "ACES") is a comprehensive energy bill under consideration in the United State Senate that, if enacted, will require the use of renewable energy sources, increased energy efficiency and establishment of an economy-wide cap and trade program for greenhouse gases. ACES would impose stricter, and in some cases new, performance standards and reporting requirements on several sectors of the economy. These provisions are designed to work in concert with and enhance existing state and regional programs. The bill anticipates that many sectors will be financially impacted by the new and expanded standards, and provides some funding assistance for those economically harmed by its provisions.

Specifically, the renewable energy provisions of ACES would create a federal renewable portfolio standard, which will apply to electric utilities that sell 1 million or more megawatt hours of electricity to consumers. These utilities will be required to produce an increasing percentage of power from renewable sources, beginning with 6% in 2012 and reaching 25% by 2025. The renewable standard will include wind, solar, geothermal, and hydropower energy, as well as biomass and landfill gas. The increased energy efficiency provisions of the statute include creating standardized retrofit policies for residences and commercial buildings and promoting the voluntary use of these standards by building owners and the incorporation of these standards in municipal building codes.

The energy efficiency provisions also establish minimum lighting and appliance efficiency standards for manufacturers, set nationwide minimum levels of electricity and natural gas savings that will require retail distributors to submit reports demonstrating savings, direct the President to create tighter emission standards, including greenhouse gas standards, for vehicles and mobile sources, and direct the Secretary of Energy to develop energy efficiency certification standards for industrial plants. Owners and operators of electric generation facilities may be eligible for loans from a revolving State Energy and Environment Development (SEED) Fund that will be created initially with federal funding.

Finally, the economy-wide cap and trade program that will be established by the statute will cover 85% of U.S. greenhouse gas emissions and will cover approximately 7,000 to 8,000 sources. Among the entities to be regulated are power plants, mid- and upstream producers and importers of petroleum and coal-based fuel, mid- and upstream producers of certain greenhouse gases, midstream local distributors of natural gas, downstream producers of cement, aluminum, ammonia, chemicals, petrochemicals, process food, glass, iron, steel, pulp, paper, and fossil fuel-fired combustion devices. Cap and trade compliance obligations begin in 2012 for most sectors, with emissions targets set at 3% below 2005 levels by 2012, 20% below 2005 levels by 2020, 42% below 2005 levels by 2030 and 83% below 2005 levels by 2050.

The Senate Environmental and Public Works Committee is currently reviewing the bill and is expected to introduce it to the Senate floor later this fall.

Burlington Northern: The Supreme Court Clarifies Arranger Liability and Apportionment Under CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) renders certain classes of potentially responsible parties strictly liable for costs incurred by the government, or other private parties, to investigate and remediate contaminated sites. One such class of parties held liable under CERCLA consists of "any person who ... arranges for disposal or treatment ... of hazardous substances." CERCLA § 107(a)(3). CERCLA has been interpreted to establish joint and several liability for any such party, meaning that a party who arranged for disposal or treatment of any amount of hazardous substances could be liable for the entire cost of investigating and remediating a contaminated site.

In Burlington Northern & Santa Fe Railway Co. v. United States, 129 S. Ct. 1870; 173 L. Ed. 2d 812; 2009 U.S. LEXIS 3306 (2009), the Supreme Court addressed two issues regarding liability under CERCLA. First, the Court held that pursuant to the plain language of § 107(a)(3) of CERCLA, "arranger" liability extends only to an entity that takes intentional steps to dispose of a hazardous substance. Second, the Court held that the District Court reasonably apportioned the cost of remediation, thus reversing the Ninth Circuit's imposition of joint and several liability for the entire contaminated site.

The facts underlying the decision are that in 1960, an agricultural chemical distribution business (Company) began purchasing pesticides and other chemical products from a chemical supplier (Supplier). The Company opened its business on former farmland and expanded operations onto an adjacent parcel of land owned jointly by two railroad companies (Railroads). Over time, pesticides and other chemicals spilled during transfers and deliveries and as a result of equipment failures. The Company performed some initial remediation. By the late 1980s however, it had become insolvent and ceased all operations. In 1989, the California Department of Toxic Substances and the EPA (Governments) exercised their respective CERCLA authority to clean up the site. In an effort to recover response costs, the Governments brought suit against the Railroads under § 107 of CERCLA as partial owners of

the site and against the Supplier as a CERCLA "arranger."

The District Court found both the Supplier and the Railroads liable and apportioned the costs, holding the Railroads liable for 9% of the Governments' total response costs, and the Supplier liable for 6%. On appeal, the Ninth Circuit agreed that the Supplier could be held liable as an arranger and that the harm in this case was theoretically capable of apportionment. The Court of Appeals found the facts insufficient to support apportionment, and therefore held the Supplier and the Railroads jointly and severally liable for the Governments' response costs.

The Supreme Court of the United States determined that the Supplier was not liable as an arranger. The Court stated that pursuant to the plain language of § 107(a)(3) of CERCLA, an entity may qualify as an arranger when it takes intentional steps to dispose of a hazardous substance. Therefore, to qualify as an arranger, the Supplier must have entered into pesticide sales with the intent that at least a portion of the product be disposed of during the transfer process. The Court determined that the facts found by the District Court did not support such a conclusion. That is, although the Supplier was aware that minor, accidental spills occurred during pesticide transfer from a common carrier to the Company, the Supplier's intent was to sell a useful product to the Company, and took numerous steps to encourage its distributors to reduce the likelihood of spills. The Court determined that the Supplier's mere knowledge of continuing spills and leaks was insufficient grounds for concluding that it arranged for pesticide disposal.

The Supreme Court also found that the District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%. The District Court calculated this allocation based on three factors: the percentage of the total area of the facility that was owned by the Railroads, the duration of the Company's business divided by the term of the Railroads' lease, and the Court's determination that only two polluting chemicals spilled on the leased parcel required remediation.

This case is significant because it restricts "arranger" liability under CERCLA to parties that take intentional steps to dispose of a hazardous substance. It also allows for imposition under § 107 of CERCLA of several liability only, as opposed to joint and several liability, when there is a "reasonable basis for determining the contribution of each cause to a single harm." Although the reach of the Burlington Northern decision remains to be defined by future judicial and administrative action, it is likely that these holdings will encourage parties to challenge efforts to impose joint and several liability and/or arranger liability under CERCLA and, thus, lead to more aggressive divisibility arguments and more complicated settlement discussions.

Appellate Division Holds Pro-Rata Allocation Approach Applies Separately to Each Policyholder's Insurance Policies

It has been 15 years since the Supreme Court of New Jersey in Owens-Illinois adopted the pro rata approach to allocating a policyholders's losses among multiple insurance policies in effect during the continuous trigger of coverage, by assigning each carrier responsibility based upon the amount of coverage provided and time on the risk.

In February, the Appellate Division in Franklin Mutual Ins. Co. v. Metropolitan Prop. & Cas. Ins. Co. addressed for the first time how to apply the pro rata allocation formula when there is more than one property owner during the trigger period (i.e., the contaminated property is transferred after contamination starts but before it is discovered). This is not an unusual circumstance and one where insurance carriers typically argue that all insurance issued to all property owners during the trigger period must be taken into account in the allocation process, which may result in less coverage responsibility being allocated to any particular carrier.

The Appellate Division affirmed the lower court's holding that the Owens-Illinois pro rata allocation formula is applied separately for each policyholder, based only on the insurance procured by that policyholder. Thus, each carrier's "allocated share for cleanup costs is determined without regard to any liability insurance coverage that [other owners] may have had during the period of contamination." In reaching its decision, the Court recognized that the allocation of responsibility among a policyholder's insurance carriers is a separate question from the insured liability for the underlying contamination, which may be joint and several. Thus, each carrier is responsible (in its allocated share) for all costs for which its policyholder is responsible, without regard to the liability of others.

A practical example of the Appellate Division's ruling is provided by the following hypothetical. Five years ago, Property Owner A sold property to Property Owner B. Property Owner A is now defunct with no ascertainable insurance. Property Owner B seeks coverage under his insurance policies as a result of an underground storage tank at the property that he just discovered has been leaking for ten years. Property Owner B's insurance carriers will have to respond to all costs for which Property Owner B is liable, which, under joint and several liability, is 100% of the cleanup costs. Prior to the Court's decision, it may have been argued that Property Owner B's carriers only had to respond to 50% of the costs based upon an Owens-Illinois analysis that would have taken into account Property Owner A's insurance (or lack thereof since under Owens-Illinois and its progeny uninsured periods are borne by the policyholder). Now, Property Owner B's insurance may have to cover 100% of the costs. Franklin Mutual Ins. Co. v. Metropolitan Prop. & Cas. Ins. Co., Docket No. A-5265-07T2 (App. Div., April 17, 2009).

Green Technologies Can Help Reduce Remediation Costs

Parties conducting site remediation should consider the use of sustainable remediation practices, also known as green remediation practices, to increase the efficiency of their projects. Sustainable remediation is a broad concept that includes the use of alternative energy sources, *in situ* processes and/or modified remediation techniques. These practices can help to lower costs through the use of new technologies.

Although the increased efficiencies associated with sustainable remediation practices often come at a greater capital cost, they may make up the cost difference over time with lower operational costs. One example is the use of solar panels to supply electricity to a groundwater pump-and-treat remediation system; although the purchase and installation of power generating equipment will involve an initial outlay of capital, it will result in the reduction of electricity supplied by the utility company. Because solar panels require little to no maintenance, produce energy at

essentially no cost beyond capital costs and last for approximately 30 years, installation of such a system may result in long-term cost reductions for the project. In addition, grants and tax credits may be available to effectively lower the cost of these innovative technologies.

On a larger scale, it may be appropriate and cost-effective for a party to implement a passive or in situ remedy to achieve its remediation goals, instead of more traditional remediation techniques such as soil excavation or a groundwater pump-and-treat system. Some examples of passive or in situ techniques are: (a) chemical oxidation and bioremediation, which use chemical compounds and microbes, respectively, to foster degradation of contaminants in situ; (b) permeable reactive barriers, which are barriers installed below ground that filter contaminants out of groundwater as it flows past; and (c) phytoremediation, which is the use of plants to remove, transfer, stabilize or destroy contaminants in soil and groundwater. These types of remediation processes operate with little or no energy input from the remediating party and often generate less waste than other processes. If appropriate for a given site, these techniques may represent an effective and lower-cost alternative to a traditional remediation process such as a groundwater pump-and-treat system.

Although the NJDEP neither encourages nor discourages their use, sustainable remediation practices are permissible under New Jersey law, subject to the innovative remedial action technology approval process described in NJDEP's Technical Requirements for Site Remediation, which allows a party to petition NJDEP for approval of a remedial technology based upon its technical merits. In addition, New Jersey's new Site Remediation Reform Act provides to licensed site remediation professionals a certain amount of flexibility to approve proposed remedial techniques. The EPA, on the other hand, actively encourages the use of sustainable remediation practices. EPA has published a guidance document explaining the use of sustainable practices in the remediation context, entitled *Green Remediation: Incorporating Sustainable Environmental Practices into Remediation of Contaminated Sites*, (April, 2008). More information regarding these topics, including copies of EPA's sustainable remediation guidance, can be found online at <http://www.clu-in.org/greenremediation/>.

Update on the LSRP Program and Site Remediation Reform Act

Since the Site Remediation Reform Act, P.L. 2009, c. 60 (SRRA), and its Licensed Site Remediation Professional (LSRP) program became law on May 7, 2009, we have seen a flurry of activity in the Site Remediation Program of NJDEP, in the environmental consulting community, and in regulated business and industries involved in site remediation. It has been called a "New World Order," in which private LSRPs instead of NJDEP will sign off on the cleanup of contaminated sites.

Use of LSRPs is to commence shortly, on November 3, 2009, for all "new sites." NJDEP is working on rules for the program to be adopted without opportunity for public comment on November 3rd. The Agency has approximately 20 internal committees and work groups working on aspects of the rules, new guidances, forms and procedure.

NJDEP has rolled out a new website dedicated to the SRRA: <http://www.nj.gov/dep/srp/srra/> . Application forms and criteria for the temporary licensing of LSRPs; draft or interim guidance on key aspects of the new program (e.g., Response Action Outcomes, Immediate Environmental Concerns, Presumptive Remedies); mandatory timeframes and submittal forms to be used by LSRPs to certify key remediation documents all are available. Memoranda of Agreement are no longer accepted by NJDEP as a matter of course, but a new brief form may be used until the new program is up and running. Much of this work will lead into the adoption of the "interim rules" on November 3rd, with final rules due 18 months thereafter.

Environmental consultants also have been busy. The New Jersey Licensed Site Remediation Professionals Association (LSRPA) has been launched. This trade association, which will support LSRPs and other site remediation professionals, currently is organizing itself, providing input to NJDEP on various guidances and other documents, and soliciting new members. For more information go to www.lsrpa.org . Future LSRPs have begun preparing and submitting licensing applications. A few have been approved as "Temporary LSRPs." Draft rules of the new Licensing Board are expected in 2010.

Remediating parties are considering whether to "opt in" to the LSRP program earlier than the May 7, 2012 deadline that is required for existing sites. Others are considering when, or if, they should hire an LSRP to manage the work at their sites (i.e., can they complete remediation projects before May 2012). Some remediating parties will have no choice. Use of an LSRP will be required for "new sites" after November 3rd, but an existing site may be considered a "new site" if there is a new discharge, a new trigger under the Industrial Site Recovery Act, a re-opened No Further Action letter, or if the site has had little activity performed in the last two years.

We expect significant activity to continue as the LSRP program is rolled out. If you buy, sell or own contaminated property, if you perform site cleanups, or if you are an environmental professional, please stay tuned-in to new developments arising from the SRRA and LSRP program.

Legislative Update

SIGNED INTO LAW BY THE GOVERNOR

S2188 - Changes riparian land grant and lease process and amends various parts of statutory law.

INTRODUCED IN THE ASSEMBLY

A3852 - Changes the scope of public notification regarding contaminated site remediation such that written notice of the remediation must be given to tenants or property owners within 200 feet of a known area of concern within the property bounds.

A3845 - Establishes "Solar Equipment Purchase and Installation Assistance Program" in NJ EDA. The Program will provide financial assistance to qualified commercial property owners purchasing solar energy units with a generating capacity of more than 100 kilowatts.

A464 - The bill would prohibit the construction of schools and/or school facilities on a contaminated or remediated site.

A2312 - Increases host community benefit for municipalities wherein solid waste transfer stations are located from fifty cents to one dollar per ton of solid waste processed at such facilities.

INTRODUCED IN THE SENATE

S2635 - This bill would require the State to compensate property owners for certain property devalued by 20% or more due to certain environmental laws and other State actions. The bill would also require State agencies to evaluate proposed administrative rules for their potential to constitute the taking of real property.

S1121 - Provides credit under corporation business tax and gross income tax for construction of buildings in accordance with certain energy and environmental performance standards.

S2505 - Establishes "Smart Housing Incentives Act." The bill would establish grants for communities that develop smart housing zones. The bill has several provisions dedicated to encouraging municipal redevelopment, one of which is incentivizing residential green building.

S2499 - Encourages purchase of solar panels and wind turbines made in New Jersey for State projects and State-funded projects.

PASSED BY THE ASSEMBLY

A3835 - Requires professional engineers to complete 24 hours of continuing professional competency during each biennial licensure period.

A1105 - Allows State agencies, counties and municipalities to comply with certain publication requirements by means of postings to official websites rather than advertisements in a newspaper.

PASSED IN BOTH HOUSES

A3739 - Requires confirmation of financial assistance for eligible homeowners voluntarily closing or replacing petroleum underground storage tanks, and expands eligibility for financial assistance.

EPA Update

Raritan Valley Community College Finds Its Success in Green Partnership with EPA

On June 16, 2009, the Raritan Valley Community College (RVCC) signed an agreement with the Environmental Protection Agency "EPA", planning to build on its efforts to reduce its carbon footprint. The agreement sets goals for energy and water conservation, solid waste management, green design and transportation, the progress of which will be tracked and submitted to EPA in a report every six months. Some highlights of the agreement include the RVCC becoming an ENERGY STAR® partner and reducing campus-wide energy use by at least 10%; increasing recycling efforts by adding 75 new recycling containers across campus; use of recycled construction materials where possible and the implementation of idling reduction measures for vehicles on campus. This agreement is the first of its kind between a community college and EPA. Further information can be found at www.epa.gov.

EPA, New York Giants and New York Jets Team Up to Make New Meadowlands Stadium a Beacon of "Green"

On June 1, 2009, the principal owner of the New Meadowlands Stadium Company signed a Memorandum of Agreement (MOA) with EPA that will see the Jets and Giants kick off the 2010 season in one of the most green venues in sports.

The goals of the MOA include reduction in air pollution, conservation of water and energy, improvement in waste management, and reduction of the environmental impacts of construction. The agreement also aims to cut annual water use at the stadium by 25%, increase total recycling by 25% and recycle 75% of construction waste. In terms of carbon dioxide emissions, 1.6 million metric tons would be saved, which can be equated to taking approximately 300,000 cars off the road for a year.

Additional efforts to minimize environmental impact include the recycling of 20,000 tons of steel when Giants

Stadium is demolished, providing mass transit options for fans, using environmentally friendly concrete in construction and the fact that the new stadium is being built on land that is a former brownfield. The New Meadowlands Stadium Company will submit six monthly reports to the EPA to track the environmental benefits of their efforts. Further information can be found at www.epa.gov.

NJDEP Update

Exceptional Scientists Encouraged To Serve On NJDEPs Science Advisory Board

In line with the New Jersey Department of Environmental Protection's "NJDEP", tradition of scientific excellence, nominees are being sought for a Scientific Advisory Board. The Scientific Board, comprised of 12 members for each of four standing committees (Ecological Processes, Public Health, Water Quality and Quantity and Climate and Atmospheric Sciences), will review and provide advice on scientific and technical issues relating to public health, the environment and natural resources in New Jersey. Findings and recommendations will be submitted to the Commissioner through the NJDEP's Office of Science.

Qualifications for prospective nominees include an advanced degree, extensive training, expertise and experience in scientific fields relating to all aspects of environmental protection.

Further information can be found at www.state.nj.us/dep.

New Jersey Gets Green Light to Move Forward With Greenhouse Gas Vehicle Program New

Jersey, along with 13 other states, has opted to become part of California's program to tackle global warming. The Clean Air Act provides such states with the right to implement more stringent vehicle emission standards than federal limits.

The passage of the Global Warming Response Act saw Governor Corzine's Executive Order signed into law, mandating a reduction in greenhouse gas emissions to 1990 levels by 2020 and an 80% reduction by 2050.

New Jersey is only the third state in the Union to codify its greenhouse gas reduction goals.

Further information can be found at www.state.nj.us/dep.

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