No. 16-299

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF RESPONDENT UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

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INTRODUCTION

The government argues that a rule establishing the outer geographic reaches of "the waters of the United States" Congress protected under the Clean Water Act ("CWA" or the "Act") falls within a specific list of Environmental Protection Agency ("EPA") actions subject to expedited review in a single court of appeals. EPA actions named in Section 1369(b)(1) may be judicially reviewed *only* if challenged within 120 days and *only* where all challenges are consolidated before a single court of appeals. These constraints limit judicial review, and, as a result, courts have cautioned against expansive interpretation of Section 1369. One would expect the government to point to a plain statement from Congress that it intended so narrow an opportunity for review for a rule as vast as "the waters of the United States" rule ("WOTUS Rule" or the "Rule"). But the government can point to no such statement in Section 1369 and instead argues that the Rule is something it plainly is not.

The WOTUS Rule was jointly issued by EPA and the U.S. Army Corps of Engineers ("Corps") (together, "Agencies"). It sets forth the Agencies' interpretation of a key statutory term – "the waters of the United States" ("WOTUS") – that establishes the geographic scope of the Agencies' jurisdiction for all CWA regulatory programs. By defining the geographic reach of the Act through the WOTUS Rule, the Agencies have purported to interpret the will of Congress regarding which lands and waters come

under the protections of the Act. Whether a feature is a WOTUS is an overarching determination that addresses whether the CWA applies to a specific land or water feature at all. The determination whether and to what features the WOTUS Rule applies does not dictate whether an activity qualifies for a CWA permit or not, nor does it establish any limits, effluent or otherwise, which would apply through, or in lieu of, a permit, as the government contends.

The government argues that the WOTUS Rule is subject to direct appellate review under Section 1369(b)(1) because this joint rule defining WOTUS is a "limitation" or a "permit." See Fed. Resp'ts' Br. at 10-11. But the government's arguments blur the specific provisions of Section 1369(b)(1) to the point that the terms Congress selected are rendered essentially meaningless.

Straying well outside the lines of Section 1369, the government argues that a rule that establishes geographic jurisdiction for a wide range of CWA regulatory programs fits into two of the seven discrete categories of EPA action subject to Section 1369(b)(1) – those for limitations and for permits. According to the government, a rule establishing the outer boundaries of the Act limits activities within and permits activities beyond those boundaries. But even a brief review of the Act shows these are not the types of limitations and permits Congress had in mind. Indeed, a CWA permit authorizes discharges into WOTUS; it does not authorize activities beyond the reach of the Act (nor could it). Similarly, the WOTUS Rule is not a "limitation" because it is not

the type of limit Congress called on EPA to set for discharges into WOTUS; it is a threshold determination of those waters that are WOTUS.

The WOTUS Rule is a broad ranging definitional rule that is distinct from the enumerated EPA actions that are subject to circuit review under Section 1369(b)(1). Accordingly, this Court should reverse the judgment of the Court of Appeals.[1]

ARGUMENT

I. The Government Has Narrowly Framed the WOTUS Rule in a Manner that Fundamentally Mischaracterizes the Rule

Congress instructed EPA to develop and implement CWA programs for those waters or activities that the statute makes jurisdictional. The WOTUS Rule, however, is not one of those programs. Rather, the Rule is the Agencies' latest attempt to interpret the scope of the CWA's geographic jurisdiction, consistent with Congressional intent. The government conflates geographic CWA jurisdiction, which determines where activities are regulated, with EPA-promulgated restrictions, which determine whether and how an activity is regulated.

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[1] The Utility Water Act Group ("UWAG") adopts in full the arguments presented by Petitioner National Association of Manufacturers ("NAM") and the Respondent States filing in support of NAM.

A. In Promulgating the WOTUS Rule, the Agencies' Task Was to Interpret Congress' Intent in the CWA

When Congress enacted the CWA, it determined the reach of the statute and set the prohibitions and conditions that must be met. The challenged Rule interprets a crucial statutory term – WOTUS – which triggers myriad CWA requirements and restrictions. Of these, the Act's key restriction is the prohibition against discharges of pollutants into "navigable waters," 33 U.S.C. § 1311, defined as "the waters of the United States." *Id.* § 1362(7). The Act's prohibition against discharges applies without any need for action by EPA or the Corps.

As an exception to the ban on discharges, the CWA establishes *two* separate permitting programs administered by separate agencies, EPA *and* the Corps, depending on the type of pollutant being discharged (*e.g.*, industrial waste, Section 1342, or dredged or fill material, Section 1344). Congress empowered the Agencies to administer these permitting programs for those lands and waters that are subject to federal CWA jurisdiction. Permit holders seeking to discharge pollutants must abide by any applicable limitations established under other statutory sections, such as "effluent limitations" for existing point sources and water quality limits. See*, e.g.,* 33 U.S.C. §§ 1311 (effluent limitations guidelines), 1312 (water quality limitations), 1316 (new source performance standards), 1317 (toxic standards), and 1345 (limitations for disposal or use of sewage sludge).

The WOTUS Rule is the Agencies' most recent attempt to interpret the statutory phrase WOTUS, which applies broadly to all CWA regulatory programs. Nothing in the Act requires the Agencies to define the term WOTUS. As such, in issuing the WOTUS Rule, the Agencies were not acting pursuant to instructions from Congress, as they are when administering the specific permitting programs for those features that are deemed to be subject to CWA jurisdiction. Instead, in attempting to define the geographic reach of WOTUS, the Agencies' task was to interpret what Congress meant in the CWA, as discernable from the text, framework, and history of the statute.[2]

Contrary to the government's framing of the Rule, it neither restricts discharges or other activities, nor determines whether or on what terms EPA may issue a permit. Rather, the WOTUS Rule broadly determines where the Act applies, which is a statutory predicate to the requirement to obtain a permit. And that predicate is determined by Congress, not EPA.

B. A Wide Range of CWA Programs Rely on the Definition of WOTUS

In order to fit the Rule within two of the discrete categories of EPA action reviewable under Section 1369(b)(1), the government frames the WOTUS Rule

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[2] Indeed, during promulgation of the WOTUS Rule, the Agencies explained that the Rule does not impose new restrictions or create new requirements because the Rule simply interprets and clarifies an existing statutory term. 80 Fed. Reg. 37,054, 37,101 (June 29, 2015).

narrowly, ignoring the full panoply of CWA programs that rely on the WOTUS definition. See*, e.g.,* Fed. Resp'ts' Br. at 16. The government portrays the Rule as primarily governing "the geographic scope of effluent limitations under Section 1311," *id.* at 5, 19, 27, and downplays the myriad other CWA programs that apply the WOTUS definition.[3]

UWAG members' activities and projects, for example, are often subject to multiple CWA programs that apply the WOTUS definition, which the government ignores, including: the program implementing the Section 1321 oil spill provisions, requiring a Spill Prevention, Control, and Countermeasure plan for facilities that have the potential to discharge into WOTUS; the water quality standards provisions, which apply to all WOTUS; and EPA's Section 1326(b) rules for new and existing facilities, which apply to facilities that withdraw "cooling water" from WOTUS and have any sort of National Pollutant Discharge Elimination System ("NPDES") permit. It is precisely because of the broad spectrum of CWA

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[3] The government selectively references just two provisions of the Act upon which the Agencies purport to rely in promulgating the Rule, ignoring the fuller list of CWA programs cited in the Preamble. *Compare* Fed. Resp'ts' Br. at 6 (stating that the Rule was issued under 33 U.S.C. Sections 1311 and 1342) *with* 80 Fed. Reg. at 37,055 (stating that the Rule is issued under the authority of the CWA, 33 U.S.C. §§ 1251, *et seq.,* "including sections 301, 304, 311, 401, 402, 404 and 501"). The Agencies' broad statement in the WOTUS Rule Preamble regarding the authority for the Rule contradicts the government's current assertion that the Rule is a specific EPA action subject to Section 1369(b)(1).

programs to which the Rule applies that the Rule has such critical implications for regulated parties, including UWAG members and the electric utility industry, the States, and the public.

Further demonstrating its mischaracterization of the WOTUS Rule, the government minimizes the Rule's application to the Corps' Section 1344 program and the Corps' critical role as a co-signatory in the rulemaking. The Agencies' Economic Analysis for the WOTUS Rule, however, underscores the Corps' prominent and lead role. The Economic Analysis attributes most of the economic impacts of the WOTUS Rule to the Corps and recognizes that the Corps took over 63,000 permit actions in Fiscal Year 2014 alone.[4] Economic Analysis at x-xi, 35, 56. The Economic Analysis does not even purport to identify the impacts of other regulatory programs. *Id.* at 21. For example, the Agencies made no attempt to estimate significant impacts for the Section 1342 program, yet they now claim that the Rule "controls whether permits may or may not be issued" under the Section 1342 NPDES program and is therefore reviewable by the circuit courts under Section 1369(b)(1)(F). See*, e.g.,* Fed. Resp'ts' Br. at 12.

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[4] Although the Economic Analysis dramatically underestimates the impacts of the Rule, it illustrates the prominence of the Corps' role. U.S. EPA and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 20, 2015), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20866 ("Economic Analysis").

The Agencies can't have it both ways. The Agencies' interpretation of the geographic reach of the term WOTUS carries considerable regulatory consequences for a wide range of CWA programs implemented and enforced by not only EPA, but also the States, the Corps, and the U.S. Coast Guard. Thus, the Rule simply does not fit within the specified categories of EPA action subject to circuit court review.

II. The WOTUS Rule Is Neither the Issuance or Denial of an NPDES Permit Nor the Functional Equivalent of an NPDES Permit

The government argues that the WOTUS Rule is reviewable under Section 1369(b)(1)(F) because it "controls whether permits may or may not be issued for the bodies of water that it describes," and thus is "functionally similar" to the issuance or denial of a permit under Section 1342. *Id.* These arguments again rest on a fundamental misrepresentation of the Rule and the NPDES permit scheme.

A. The Definition of WOTUS Is a Predicate to the Issuance or Denial of an NPDES Permit

By claiming that the Rule is reviewable under Section 1369(b)(1)(F), the government stretches Section 1369 beyond the statutory text. An agency cannot issue or deny a permit for activities over which it has no jurisdiction.

The WOTUS Rule is the Agencies' interpretation of an overarching statutory term on which the CWA's discharge prohibition rests. 80 Fed. Reg. at 37,054,

37,102. The definition of WOTUS is essential to determining whether the prohibition against discharges applies, but the Rule does not restrict discharges or other activities, or determine whether a permit is required and, if so, with what conditions.

Even if a feature is determined to be a WOTUS, that is distinct from the determination whether an NPDES permit is required and should be issued. The obligation to apply for an NPDES permit, and thus the opportunity for EPA (or the States) to issue or deny a permit, arises only where there is a "discharge of pollutants," defined as an "addition," from a point source to a WOTUS. See *Nat'l Pork Producers Council* v. *EPA*, 635 F.3d 738, 749 (5th Cir. 2011); *Nat. Res. Def. Council* v. *EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987); 33 U.S.C. § 1362(7), (12).

B. The Functional Similarity Test Is Applied Narrowly

The government asserts that the WOTUS Rule is reviewable under the functional approach of *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (*per curiam*). Fed. Resp'ts' Br. at 12. This is incorrect and would result in a far broader "functional approach" than this Court applied in *Crown Simpson* and *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977).[5]

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[5] The *Crown Simpson* Court held that an EPA action disapproving effluent limits in a state-issued NPDES permit was "functionally similar" to a permit denial and, therefore, reviewable under Section 1369(b)(1)(F). 445 U.S. at 196. Otherwise, the Court explained, jurisdiction over "denials" of NPDES permits

In both cases, only EPA action was at issue, and only with respect to specific NPDES program requirements that applied once an applicant applied for an NPDES permit. Courts have held that reading Section 1369(b)(1)(F) to apply to any "'regulations relating to permitting itself'" would be "contrary to the statutory text." *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008). The WOTUS Rule applies to all CWA programs, including Corps-administered programs not listed in Section 1369, and provisions that do not involve the issuance of permits (*e.g.*, water quality standards).

This Court should apply a functional approach to find that the WOTUS Rule does not have the "precise effect" of an action to issue or deny a permit. Even under a broader reading, however, the WOTUS Rule is not subject to judicial review under Section 1369(b)(1)(F) because it does not regulate permit procedures.

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would illogically depend on whether the State was authorized to issue permits. *Id.* at 196-97. *E.I. du Pont* involved industry-specific technology-based "effluent limitations" that EPA argued it was authorized to apply under Section 1311, and that, once adopted, would be applied in NPDES permits for members of the relevant industry category. 430 U.S. at 124.

C. Review of the WOTUS Rule in District Courts Will Not Result in a Bifurcated System of Judicial Review

Review of certain discrete, site-specific actions (like EPA's issuance of an NPDES permit) in the courts of appeals, as Congress dictated, and review of the WOTUS Rule (a joint rule of broad applicability interpreting those areas that are subject to the CWA) in the district courts would *not* lead to a "bifurcated system," as the government contends. Fed. Resp'ts' Br. at 31. Again, the government's fixation on NPDES permits glosses over the full spectrum of CWA programs that apply the WOTUS definition and portends the wrong result.

The Supreme Court applied a functional approach in *E.I. du Pont* and *Crown Simpson* to avoid "a seemingly irrational bifurcated system," *Crown Simpson*, 445 U.S. at 197, in which direct circuit court review is available for individual EPA permit actions, but not for "the basic regulations governing those individual actions" (*i.e.*, regulations that govern issuance or denial of a permit), *E.I. du Pont,* 430 U.S. at 136, or where the State has authority to issue a permit that EPA later vetoes, *Crown Simpson*, 445 U.S. at 196-97.

The Rule, however, is easily distinguished from the EPA actions at issue in those cases. The WOTUS Rule does not set any standards or limitations, or issue or deny any permits. The government's position relies on its false construct of the WOTUS Rule as a regulation setting the geographic limitations for

numeral or qualitative effluent limitations, see Fed. Resp'ts' Br. at 14. The government, however, ignores what the WOTUS Rule does and does not do.

The Rule defines the geographic scope of features to which various CWA requirements and restrictions may apply. Whether the Rule's definition of WOTUS applies to a specific water feature depends on a site-specific evaluation of the facts and characteristics of that feature. The Rule employs a wide range of vague, open-ended, and ambiguous terminology to define each of the categories of jurisdictional waters such that there are likely to be varying interpretations regarding whether any particular feature is a WOTUS.[6]

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[6] For example, the Rule defines "tributary" to mean "a water that contributes flow" and has the physical indicators of bed, banks, and ordinary high water mark ("OHWM"). 80 Fed. Reg. at 37,105, 37,107, 37,109, 37,111, 37,113, 37,115, 37,117, 37,119, 37,120-21, 37,122, 37,124, 37,126. But there is no consistent method for recognizing the OHWM. One Corps official told the U.S. General Accounting Office "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments of the ordinary high water mark." U.S. Gen. Accounting Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, 22 (Feb. 2004), www.gao.gov/new.items/d04297.pdf. See also Matthew K. Mersel, U.S. Army Corps of Eng'rs, Eng'r Research & Dev. Ctr., Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014) ("vague definition" leads to "[i]nconsistent interpretations of OHWM concept," which leads to "[i]nconsistent field indicators and delineation practices").

Site-specific determinations of CWA jurisdiction are not reviewable until such time as the facts regarding the land or water feature at issue, and the Agencies' interpretation whether the Rule supports an assertion of CWA jurisdiction over that feature, are crystallized.[7] In that regard, the Court's decisions in the ripeness context are instructive. The ripeness doctrine serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-49 (1967). For example, in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), motor carriers sought judicial review of an Interstate Commerce Commission determination that certain commodities did not qualify for an agricultural exemption. *Id.* at 41. The order "would have effect only if and when a particular action was brought against a particular carrier."

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[7] The Agencies have acknowledged that "the rule does not project the miles or acres of waters that are or are not jurisdictional. That is outside the scope of the rulemaking. There is no existing ground-truthed wetland, stream, or water body mapping that comprehensively covers the entire area and thus no source of data from which to determine such metrics." EPA, Clean Water Rule Response to Comments, Topic 12: Implementation Issues, at 29 (undated), http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_12_implementation.pdf.

Abbott Labs., 387 U.S. at 150 (summarizing the facts in *Frozen Food Express*).

Similarly, disputes about the validity of the Rule will most often arise in enforcement actions, or through challenges to Corps jurisdictional determinations ("JDs") or Section 1344 permits once the facts have been crystallized.[8] These challenges are all subject to district court review under the Administrative Procedure Act. And the district courts are well equipped to consider the applicability of a broad based definitional rule to a specific land or water feature. Indeed, all other challenges to the application of the definition of WOTUS have originated in the district courts. See*, e.g., Rapanos* v. *United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985). Further, despite the government's laser focus on the NPDES program, disputes about CWA jurisdiction are far less likely to arise in the context of challenges to the issuance or denial of NPDES permits (indeed, EPA has no

[8] The CWA is a strict liability statute. See UWAG Br. at 19-20. In addition to civil and criminal penalties, EPA and the Corps also have powerful administrative enforcement tools such as compliance orders, notices of violation, and cease-and-desist orders, 33 U.S.C. § 1319(a); 33 C.F.R. § 326.3(c), and can assess administrative penalties up to $187,500. 78 Fed. Reg. 66,643 66,647 (Nov. 6, 2013) (citing 33 U.S.C. § 1319(g)(2)(B)). Accordingly, entities conducting any kind of activity on the landscape must tread lightly, taking care to identify any areas that may be deemed "navigable waters" and either avoiding such areas or obtaining a permit if they plan to discharge to them.

separate process for determining jurisdiction in the NPDES-permitting context).

Accordingly, a functional approach favors district court review of the WOTUS Rule. Rather than create a "perverse situation," as the government asserts, Fed. Resp'ts' Br. at 13, 14, 36, 38, district court review of the WOTUS Rule would result in the more functional framework where individual enforcement actions and challenges to JDs, as well as review of the WOTUS Rule – "the basic regulation[] governing those individual actions" – are reviewable by the district courts.

III. Limiting Review Under Section 1369(b)(1) Would Raise Significant Concerns for the Regulated Community and the Public

Limiting the WOTUS Rule to direct circuit court review under Section 1369(b)(1) would raise significant due process concerns. See UWAG Br. at 16-21. The government claims that applying Section 1369(b) "promotes the ability of the regulated community, regulators, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals." Fed. Resp'ts' Br. at 4. As the Agencies and the courts have acknowledged, however, given the breadth and ambiguity of the Rule, a member of the public cannot identify what lands and waters constitute WOTUS subject to CWA regulation unless he seeks a JD or permit from the Agencies.

"[T]he transition from water to solid ground is not necessarily or even typically an abrupt one . . . [w]here on [the] continuum to find the limit of 'waters' is far from obvious." *Riverside Bayview Homes, Inc.*, 474 U.S. at 132. While "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property," *Hawkes Co.* v. *U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff'd*, 136 S. Ct. 1807 (2016), the CWA is an exception. Indeed, even the Corps recognizes that a layperson cannot confidently identify WOTUS by himself. See James S. Wakeley, U.S. Army Corps of Eng'rs, Eng'r Research & Dev. Ctr., ERDC/EL TR-02-20, Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations, 13 (Aug. 2002), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/dev_reg_wetlands.pdf, (wetland conditions "may not be directly observable in the field and may require long-term study or specialized training and equipment to evaluate [] a particular site."). But, as many members of the public can attest, even hiring an expert will not provide comfort because the Agencies may not agree with the expert, and, moreover, the Agencies may wrongly assert CWA jurisdiction.[9]

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[9] For example, after this Court's unanimous decision finding that JDs are final agency action subject to immediate judicial review, *Hawkes* was remanded to the district court for review of the JD. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). The district court found that the Corps lacked suf-

The exact scope and application of the WOTUS Rule to a particular feature will not be known until the Agencies determine and apply the WOTUS Rule to that feature. Accordingly, potentially regulated parties have no notice until that time whether the WOTUS Rule applies to their property or how they may be injured by the Agencies' promulgation of this Rule. This lack of notice is compounded by the fact that the Rule purports to define WOTUS for the entire CWA.[10] Rather than promoting regulatory certainty, if review is only to be had in circuit courts, individuals who may be unaware of the Rule and its potential applicability to their particular site could be barred from judicial review entirely.

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ficient evidence to assert CWA jurisdiction over Hawkes' property, set aside the JD, and enjoined the Corps from exercising CWA jurisdiction over the parcel. *Hawkes Co* v. *U.S. Army Corps of Eng'rs*, No. 13-107 ADM/TNL, 2017 WL 359170 (D. Minn. Jan. 24, 2017).

[10] Such a decision would also have significant ramifications for various scenarios that have not been developed in the administrative record for the WOTUS Rule. EPA does not purport to have looked at every waterbody in issuing the Rule, and specific determinations of jurisdiction over those waterbodies would be reviewed based on a different record (specific to that waterbody) than the one that is before the Sixth Circuit on petitioners' facial challenge to the WOTUS Rule.

CONCLUSION

For the foregoing reasons, and as explained by the States and NAM, UWAG respectfully requests that the Court reverse the judgment of the Court of Appeals.

September 11, 2017

Respectfully submitted,

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