1998 WL 34112238 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

State of North Carolina, Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION.
ROANOKE RIVER BASIN ASSOCIATION, Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION.

Nos. 97-836 and 97-839.
October Term, 1997.
January 21, 1998.

On Petition for a Writ of Ceptiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for the Federal Energy Regulatory Commission in Opposition

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*I QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly determined, in approving an amendment to an existing hydropower license, that no water quality certification by the State of North Carolina was required under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), because the amendment would not "result in any discharge into" North Carolina waters.

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*1 OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a [1]) is reported at 112 F.3d 1175. The court's earlier order remanding the record to FERC, and the amendment to that order, appear at Pet. App. 49a-54a.

***2** The opinions of the Federal Energy Regulatory Commission (Pet. App. 55a-129a) are reported at 72 F.E.R.C. ¶ 61,075, 72 F.E.R.C. ¶ 61,283, and 77 F.E.R.C. ¶ 61,138.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on May 9, 1997. A petition for rehearing was denied on August 21, 1997. Pet. App. 130a-131a. The petition for a writ of certiorari was filed on November 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. 1341(a)(1), provides, in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with * * * [the effluent limitations and water quality requirements of the CWA]. No license or permit shall be granted until the certification required by

> this section has been obtained or has been waived * * *. No license or permit shall be granted if certification has been denied by the State.

Section 401(d) of the CWA, 33 U.S.C. 1341(d), provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary ***3** to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations [under 33 U.S.C. 1311, 1312, 1316, and 1317], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

STATEMENT

1. Sections 4(e) and 10(a) of the Federal Power Act (FPA), 16 U.S.C. 797(e), 803(a)(1), authorize the Federal Energy Regulatory Commission (FERC) to issue licenses for the construction and operation of hydroelectric projects, subject to the condition that the project licensed "shall be such as in the judgment of the Commission will be best adapted to a compre-hensive plan for improving or developing a waterway or waterways." [2] 16 U.S.C. 803(a)(1). In addition, Section 6 of the FPA, 16 U.S.C. 799, provides that "[e]ach such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of the [FPA], and such further conditions, if any, as the Commission shall prescribe." Licenses may then be altered only upon mutual agreement between the licensee and the Commission. *Ibid.*

2. In 1983, the City of Virginia Beach, Virginia, applied for a dredge-and-fill permit from the U.S. ***4** Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344 to construct a new water supply facility that would withdraw up to 60 million gallons per day (mgd) from Pea Hill Creek. The Creek is a tributary of the Roanoke River, a navigable waterway that traverses both Virginia and North Carolina. [3] Specifically, the City proposed to install a water intake structure on the Virginia side of the Lake Gaston hydropower project licensed by FERC to the Virginia Electric and Power Company (VEPCO), and to construct a 76-mile pipeline, entirely in Virginia, to transport the water to treatment facilities near the City of Norfolk, Virginia. [4] Shortly thereafter, the Commonwealth of Virginia issued a water quality certification for the project in connection with VEPCO's dredge-and-fill permit application to the Corps of Engineers, pursuant to Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1). Subsequently, in 1984, the Corps of Engineers determined to issue the requested dredge-and-fill permit, over the opposition of the State of North Carolina and the Roanoke River Basin Association (RRBA). [5] Pet. App. 3a-4a.

***5** In 1991, VEPCO filed an application with FERC, on behalf of Virginia Beach, to amend its hydropower license to permit the City to build the water intake structure within the licensed project boundaries, and to withdraw the water from a point inside those boundaries on the Virginia side of that project. [6] North Carolina and RRBA intervened before FERC to oppose the issuance of the license amendment. [7] Pet. App. 4a-6a.

In July 1995, the Commission issued a detailed environmental impact statement (EIS) finding that Virginia Beach would need at least 60 mgd of water by the year 2030 to alleviate severe water shortages; that the proposed water supply project would ensure Virginia Beach a safe, reliable, and relatively inexpensive source of potable water; and that the City's ***6** proposal would be the best alternative to meet its water needs. EIS at xviii, xxii (C.A. Def. App. 3140, 3144). Furthermore, after evaluating the proposal's effects on both the areas immediately surrounding the intake structure and the downstream reaches of the Roanoke River in North Carolina, the EIS found that the environmental impact of the City's water project would be minimal. EIS at xix-xxii (C.A. Def. App. 3141-3144).

Relying on the EIS, the Commission issued an order that same month granting a license amendment to allow the City's project to proceed. Pet. App. 55a-87a. In that order, the Commission rejected the contention by petitioners that the Commission should not amend the license unless VEPCO first obtained a water quality certification from the State of North Carolina pursuant to Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1). Under that Section, an applicant for a federal license or permit "which may result in any discharge into the navigable waters" must provide a certification from the State "in which the discharge originates or will originate" that the discharge will comply with the effluent limitations and water quality standards of the Clean Water Act, including state water quality standards. The Commission assumed, without deciding, that that provision applied to this case, because water is discharged from the dam itself and the amount of water released at the dam would be reduced by VEPCO's withdrawals from the Lake. The Commission determined, however, that the license amendment did not require certification by North Carolina. The Commission based that determination on FERC regulations that do not require certification of activities covered by a license ***7** amendment where, as it found to be the case here, the activities would not have a material adverse impact on the water quality in the discharge from the hydropower project. Pet. App. 67a-68a.[8] Moreover, in a subsequent order denying rehearing (*id.* at 88a-106a), the Commission concluded that North Carolina had waived any claim that the project requires a certification by North Carolina under Section 401(a)(1), since it had participated fully in the Corps' permit proceedings without ever asserting before the Corps of Engineers a right to certify the project. *Id.* at 96a-98a. North Carolina and RRBA then sought judicial review of those orders under 16 U.S.C. 825*l*.

3. After initial briefing and oral argument, the court of appeals in September 1996 remanded the matter to the Commission, directing that the Commission-- instead of merely assuming the application of Section 401(a) in the circumstances of this case -- should decide "whether § 401(a)(1) applies to require a certification from North Carolina." Pet. App. 52a.

4. In a supplemental order on remand, entered November 7, 1996 (Pet. App. 107a-129a), FERC concluded that Section 401(a)(1) did not apply to this case, for two reasons.

First, the Commission noted that the license amendment sought in this case involves the removal of water from Lake Gaston. In the Commission's view, "Congress intended the word 'discharge' [in ***8** Section 401(a)(1)] to include only substances that are added to the water in some manner, and did not intend to include the withdrawal of the water itself within the scope of that term." Pet. App. 115a.

Second, the Commission concluded, "as an alternative basis for decision," that, "even if the word 'discharge' is ultimately determined to be broad enough to include the removal of water from the water, ** * the activity involved in enabling such removal occurs entirely in (*i.e.*, for CWA purposes 'originates' in) Virginia, and not in North Carolina." Pet. App. 118a. For that reason, too, the Commission concluded, certification by North Carolina was not required.

In reaching its conclusions, the Commission expressly distinguished the case before it, involving an amendment to a license that authorizes water withdrawal from an existing licensed project, from proceedings "in which the Commission issues an original license to construct and operate a new hydroelectric project" or proceedings "for a new license (relicense) of the project after the original license has expired." Pet. App. 118a-119a. In cases involving original licenses or relicenses, the Commission explained, there would be a discharge at "the place * * * where the water flows from the project into the river," and Section 401(a)(l) thus would require certification by the State where the discharge occurs. *Id.* at 119a.

5. After the remand and after further briefing and argument, a divided panel of the court of appeals affirmed the Commission's conclusion that North Carolina did not have the right to certify the water supply project in connection with the license amendment ***9** proceedings.[9] Pet. App. la-46a. In the court's view, the plain meaning of the term "discharge," as used in Section 401(a)(1), "contemplates the addition, not the withdrawal, of a substance or substances." *Id.* at 17a. Because the evidence of record showed that the operation of the pipeline project would not result in the addition of anything to the water flowing ***10** through the dam turbines, the court sustained the Commission's determination that neither the withdrawal of water from Lake Gaston nor the reduction in the volume of water passing through the dam turbines in North Carolina would "result[] in a discharge" for purposes of that section. *Ibid.*

In the court of appeals' view, its holding in this case was not inconsistent with this Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). The court stated that *PUD No. 1* presented the question whether a minimum stream flow condition imposed by the State of Washington on a dam license under Section 401(d) of the Clean Water Act, 33 U.S.C. 1341(d), was unlawful because it was "unrelated to the [] specific discharges" at issue. Pet. App. 19a (quoting 511 U.S. at 711). The court understood that the holding in *PUD No. 1* was that Section 401(d) "authorizes a state to place 'additional conditions on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.'" *Id.* at 19a-20a (quoting 511 U.S. at 712). The court therefore found *PUD No. 1* "inapposite" here, because this Court in *PUD No. 1* "never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of Section 401(a)(1)." *Id.* at 20a.

Judge Wald dissented. Pet. App. 32a-46a. Referring to the majority's assumption "that the flow of water through the power project's turbines in North Carolina is a § 401(a)(1) 'discharge,'" she reasoned that "if a State must consent before a new discharge is introduced into its waters, then a change in that discharge must require a new consent." *Id.* at 34a-35a. Judge Wald recognized that a project modification "that will ***11** have no effect on an existing discharge, or that will have at most a *de minimis* effect on the discharge, may perhaps be granted without requiring a new certification from the State in which the discharge originates."*Id.* at 35a. But she rejected the majority's view that the only license modifications that trigger the certification right are those representing an "addition * * * of a substance or substances" to the discharge. *Id.* at 36a. In her view, the language and structure of the Clean Water Act support her conclusion, and the majority's contrary approach "threatens a congressional policy" that "States were to be put in charge of making and enforcing the crucial judgments surrounding water quality within their borders." *Id.* at 39a. [10]

7. On August 21, 1997, the court of appeals rejected petitioners' suggestions of rehearing en banc. Judges Wald and Tatel noted that they would grant rehearing en banc. Pet. App. 132a-133a.

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or otherwise raise an issue warranting further review. The petitions for a writ of certiorari should therefore be denied.

***12** 1. Contrary to petitioners' contentions (NC Pet. 17; RRBA Pet. 11), the decision of the court of appeals does not conflict with the Fourth Circuit's decision in *City of Fredericksburg v. FERC*, 876 F.2d 1109 (1989), a case involving an application for a new hydropower project at a pre-existing dam. In that case, the license applicants had sent a letter to the appropriate state agency seeking a Section 401(a)(1) certification, but, because they had failed to file the forms that the state agency required, the applicants had not obtained the Section 401(a)(1) certification. FERC nonetheless granted the license, on the ground that the applicant's letter had constituted "a request for certification" under Section 401(a)(1) and FERC's own regulations, and that the State had failed to act on that request within the one-year period specified in Section 401(a)(l). 876 F.2d at 1111.

The Fourth Circuit held in *City of Fredericksburg* that FERC had erred in waiving the certification requirement in those circumstances, because the applicant "never made a 'request' for certification within the meaning of FERC's regulations." 876 F.2d at 1111. The court noted that it "rest[ed] [its] holding solely on [its] reading of the FERC regulations." *Id.* at n.1. The court's opinion does not indicate that there was any dispute between the parties regarding whether the project might result in a "discharge" under Section 401(a)(1). The opinion in *City of Fredericksburg* therefore does not mention or discuss the term "discharge" and reaches no conclusion with respect to its meaning or application--the only issues in this case. Accordingly, there is no conflict ***13** between the decision in this case and *City of Fredericksburg*. [11]

2. North Carolina argues (Pet. 13) that "[t]here are more than one thousand hydroelectric dams in the United States, affecting untold numbers of rivers and tributaries," and that, if the decision of the court of appeals is allowed to stand, "States will be

stripped of their ability to preserve water quality in one of the most critical areas of environmental concern, *i.e.*, regulation of the flow of water over hydroelectric project dams." Contrary to petitioner's contentions, the decision of the court of appeals can be expected to have a very limited impact on state certification authority under Section 401(a)(1).

Initially, the Commission's holding will have little impact on FERC-licensed hydropower projects that are located entirely within a single State, which, as RRBA concedes (Pet. 18), constitute by far the most common type of hydropower project. In such cases, Section 401(a)(1) requires state certification of federal license amendments that authorize the *construction* of water withdrawal facilities within their borders. The construction of water intake structures of ***14** the type involved here necessarily adds substances to the water as facilities are installed in the riverbed, and such construction activities invariably create disturbances of riverbed sediment that may result in a discharge of dredge-and-fill material. See Pet. App. 118a-119a. Indeed, in this particular case, the City of Virginia Beach was required to obtain a dredge-and-fill permit from the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344. At that time, the State of Virginia exercised its Section 401(a)(1) certification authority with regard to the effects of both construction *and* operation of the water intake facility. See C.A. Def. App. 27-31. Had this case involved a water intake facility for a project wholly located within the State of North Carolina, therefore, North Carolina would have had a full opportunity--even under the court of appeals' decision--to exercise its Section 401(a)(1) certification authority before the applicant could obtain the necessary Section 404 permit from the Corps of Engineers.

In addition, the decision will have little effect on licenses for new hydropower projects or for which existing licenses have expired. In those cases, operation of the project results in a discharge--the flow of water back into the waterway after leaving the project impoundment or bypass facilities-- that could not lawfully exist without the license. Therefore, such new licenses require certification from the State in which water flows back into the river. Pet. App. 119a. Indeed, in this very case, the license applicant will require a Section 401(a)(1) certification from North Carolina when VEPCO's current license expires in 2001. See C.A. Def. App. 3935. At that time, North Carolina may prescribe flow-related conditions ***15** on the overall hydropower project pursuant to Section 401(d), 33 U.S.C. 1341(d), which permits a State to include water quality related conditions--including minimum flow requirements-- in its Section 401(a)(1) certification. See *PUD No.1,* 511 U.S. at 711-712. [12] Such conditions become a condition on the Federal license, 33 U.S.C. 1341(d), and may not be altered by a subsequent federal license amendment, absent the consent of the certifying agency, the EPA, and the federal licensing agency. See 40 C.F.R. 121.2(b). North Carolina and other States may use such minimum flow conditions to protect themselves against subsequent federal license amendments authorizing water withdrawals in an upstream State. [13]

The decision of the court of appeals will also have no effect on license amendment proceedings in which FERC's own regulations require a state water quality certification. Under 18 C.F.R. 4.38(f)(7)(iii), "any application to amend an existing license * * * requires a new request for water quality certification * * * if the amendment would have a material adverse impact on the water quality in the discharge from the project." In this case, the Commission found that the withdrawal of water would not have such a "material adverse impact" on the discharge from the ***16** project in North Carolina, and it accordingly did not require the applicant to obtain certification under the regulation. But in cases in which a State's water quality is at risk--where a license amendment would have a "material adverse impact" on a project's discharge--the FERC regulation, if validly applied, cf. Pet. 14a-15a, continues to grant the State where the discharge occurs a certification right. See note 9, *supra*.

Finally, petitioners overlook the protections that continue to be afforded the States by Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2). That provision expressly confers upon "affected" States a non-certifying role in the licensing process, to the extent that a licensed activity is subject to Section 401(a)(1) certification by an upstream State, as it was in this case. See *Arkansas v. Oklahoma,* 503 U.S. 91, 103 (1992); *International Paper Co. v. Ouellette,* 479 U.S. 481, 490-491 (1987). Indeed, North Carolina itself explicitly invoked Section 401(a)(2) in 1983 during the proceedings before the Corps of Engineers on VEPCO's application for Section 404 permit, when it petitioned the Environmental Protection Agency to act on its behalf to stop the project. See C.A. Def. App. 62. [14]

3. RRBA argues (Pet. 12 n.7) that the decision below may be read to deny States the right under Section 401(a)(1) to review new National Pollutant Discharge Elimination System (NPDES) permits or NPDES permit modifications under Section 402 of ***17** the Clean Water Act, 33 U.S.C. 1342, for activities that would result in a volume reduction of preexisting discharges. That contention is mistaken. EPA regulations require Section 401(a)(1) certifications--and thereby permit the imposition of Section 401(d) minimum flow conditions--for permitting of ongoing activities and amendments to such permits. 40 C.F.R. 122.62, 124.53, 124.55(a). Any change in the authorized discharge of pollutants that violates any condition of an NPDES permit is subject to enforcement by EPA and the States. See 33 U.S.C. 1319. [15]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Footnotes

1 Unless otherwise indicated, references to "Pet. App." refer to the Appendix in No. 97-836.

2 Section 3(11) of the FPA, 16 U.S.C. 796(11), defines "project" as the "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures * * * and all water-rights, rights-of-way, ditches, dams, reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

3 The Roanoke River basin "extends approximately 400 miles from its headwaters in the Blue Ridge mountains of Virginia to its mouth in the Albemarle Sound of North Carolina. Approximately 64 percent of the basin lies in Virginia, and the rest in North Carolina." Environmental Impact Statement (EIS) at 3-1 (C.A. Deferred Appendix (C.A. Def. App.) 3210).

4 Virginia Beach has no potable water supply of its own, and must purchase all of its water from the adjacent city of Norfolk. Pet. App. 89a.

5 The history of the Corps of Engineers proceedings is set out in *North Carolina v. Hudson,* 665 F.Supp. 428 (E.D.N.C. 1987), *North Carolina v. Hudson,* 731 F.Supp. 1261 (E.D.N.C. 1990), and *Roanoke River Basin Ass'n v. Hudson,* 940 F.2d 58 (4th Cir. 1991), cert. denied, 602 U.S. 1092 (1992).

6 VEPCO and its affiliate, North Carolina Power, serve markets in both Virginia and North Carolina. VEPCO has taken no position in this dispute. R. 27203-27204.

7 That same year, North Carolina also lodged an objection to the project before the Secretary of Commerce under the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* As a result, FERC suspended the license amendment proceeding pursuant to 16 U.S.C. 1456(c)(3)(A). On May 19, 1994, the Secretary of Commerce issued an order rejecting North Carolina's CZMA objections on the merits, and that order was sustained on judicial review. *North Carolina v. Ronald H. Brown,* No. 94-1569 (TFH) (D.D.C. Sept. 27, 1995). Eleven days after the Secretary overruled its CZMA objections, North Carolina supplemented its opposition to the license amendment before FERC by asserting for the first time a right to certify the water supply project under CWA Section 401(a)(1), 33 U.S.C. 1341(a)(1).

8 Section 4.38(f)(7)(iii) of the Commission's Regulations, 18 C.F.R. 4.38 (f)(7)(iii), provides that an application to amend an existing hydropower project license must include a new request for water quality certification "if the amendment would have a material adverse impact on the water quality in the discharge from the project."

9 The United States submitted a brief as amicus curiae at that time. The brief noted that Section 401(a)(1) "does not explicitly deal with amendments to licenses for activities previously subject to certification under that provision, but the structure of the statute suggests that it nonetheless contemplates that changes in a license that adversely affect the water quality of the original discharge must be examined because the amended license still authorizes the original discharge." U.S. Br. 8. That is so, the brief continued, because "an amendment permitting an activity that does not result in a direct discharge in North Carolina could still result in a change in the original discharge and have an adverse effect [o]n water quality in North Carolina." *Ibid.* The brief reasoned that "[t]he failure of the statute expressly to address such circumstances creates a gap which it is the responsibility of the administering agency to fill." *Ibid.* The brief acknowledged that FERC had filled the gap by enacting its regulation requiring certification where the license amendment would cause a "material adverse impact on the water quality in the discharge from the project." 18 C.F.R. 4.38(f)(7)(iii). Accordingly, the brief concluded, "North Carolina's 401(a)(1) rights turn on whether the amendment adversely affects the original discharge in North Carolina." U.S. Br. 10. The brief did not address whether FERC's determination that there would be no adverse effect in this case should be affirmed. Although the brief for the United States as amicus curiae thus took no position on the ultimate disposition

of this case, it did state that "[i]f the court sustains FERC on [the adverse effect] issue, then in our view the court may conclude that further certification from North Carolina is not necessary in order for the license amendment to be lawfully issued." *Ibid.*

10 In portions of its decision not challenged in this Court, the court of appeals rejected the Commission's view that North Carolina had waived its Section 401(a)(1) certification rights, Pet. App. 9a-13a, and held that the findings underlying FERC's decision to grant the amendment were supported by substantial evidence and were not arbitrary and capricious, *id.* at 20a-31a. Judge Wald dissented in part from the majority's holding that FERC's decision was not arbitrary and capricious. *Id.* at 42a-46a.

11 Petitioner North Carolina asserts (Pet. 17 n.9) that the Second Circuit's recent decision in *American Rivers, Inc. v. FERC*, 129 F.3d 99 (1997), stands for the proposition that even after a discharge is reviewed and certified under Section 401(a) of the Clean Water Act, a certifying State has an interest that must be protected if the circumstances surrounding the discharge change. *American Rivers* is inapposite, however, as the existence of a discharge resulting from the hydropower projects involved in that case was not questioned. Rather, the essence of the Second Circuit's holding was that the Commission lacks authority to review the legality of conditions on water quality certification imposed by States pursuant to CWA Section 401(a)(1) and (d). 129 F.3d at 100.

12 The court of appeals' decision will also have little effect on hydropower projects that operate under licenses in which the State certification already imposes a minimum flow condition under Section 401(d).

13 This case does not present any question regarding the resolution of a conflict that could develop between a State's action under Section 401(a) or (d) of the Clean Water Act and an incompatible action taken in a licensing proceeding by FERC under its Federal Power Act authority. See *PUD No. 1*, 511 U.S. at 722-723.

14 North Carolina abandoned its efforts under Section 401(a)(2) after EPA informed the State that it had "found no technical rationale which would cause this agency to object to the proposed project." C.A. Def. App. 59.

15 RRBA contends (RBBA Pet. 8, 10) that the diminished dam releases resulting from the water supply project may adversely affect water quality in North Carolina waters by lowering dissolved oxygen, causing water temperature to rise, threatening the propagation of aquatic species, and causing salt water intrusion in the lower Roanoke River. Those same claims have already been evaluated and rejected as unsupported in exhaustive opinions or reports by the Corps of Engineers, the Secretary of Commerce, and the Commission.

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