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DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

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and EAST MAUI IRRIGATION COMPANY,
LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case
Regarding the Continuation of Revocable
Permits (RPs) for Tax Map Key Nos.
(2) 1-1-001 :044 & 050; (2) 2-9-014:001,
005, 011, 012 & 017; (2) 1-1-002:002 (por.)
and (2) 1-2-004:005 & 007 for Water Use on
the Island of Maui to Alexander & Baldwin,
Inc. (A&B) and East Maui Irrigation
Company, LLC (EMI) for the remainder of
the 2021 RPs, if applicable, and for their
continuation through the end of 2022

DLNR File No. CCH-LD-21-01

APPLICANTS ALEXANDER &
BALDWIN, INC. AND EAST MAUI
IRRIGATION COMPANY, LLC'S
**EXCEPTIONS TO HEARING
OFFICER'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
DECISION & ORDER; CERTIFICATE OF
SERVICE**

Hearing Officer: Suzanne Case

**APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION
COMPANY, LLC'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER**

I. INTRODUCTION

Pursuant to Minute Order No. 19, Applicants Alexander & Baldwin, Inc. (“A&B”) and East Maui Irrigation Company, LLC (“EMI”) respectfully submit their exceptions to the Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Decision & Order issued by Hearing Officer Suzanne Case (the “Hearing Officer”) on April 26, 2022 (the “Proposed Decision”).

II. A&B/EMI’S EXCEPTIONS TO THE PROPOSED DECISION

A. Exceptions pertaining to interim committee.

In the Proposed Decision, the Hearing Officer recommends amending an existing condition creating an interim committee to discuss water usage issues in the areas covered by the subject revocable permits (the “RPs”). *See* Proposed Decision D&O ¶ (7). Specifically, the Hearing Officer recommends adding a representative from the Sierra Club to the committee and directing A&B/EMI to “[c]oordinate with” the interim committee. *See id.* (italics omitted). A&B/EMI take issue with the direction that they “[c]oordinate with” the interim committee because it is not clear what is being coordinated. The interim committee was formed to facilitate communication between A&B/EMI and other members of the community to “discuss the plans for stream restoration projections before implementation” with a “focus” on “explain[ing] the modifications and gather[ing] feedback on any impacts”. *See* Ex. Y-27 at PDF pp. 10-11. As the purpose of the committee is to facilitate communication, it is not clear what needs to be coordinated, particularly where EMI is a member of the interim committee. *See* Proposed Decision D&O ¶ (7).

B. Exceptions pertaining to reservoir reporting requirements.

In the Proposed Decision, the Hearing Officer recommends a condition requiring A&B/EMI to include in their quarterly reports to the Board:

(f) A listing of all reservoirs in the A&B/EMI water system serviced by the RPs, with the following information provided for each:

- *The capacity of each such reservoir;*
- *The surface area of each such reservoir;*
- *What fields are irrigated by each such reservoir, or in the alternative, which reservoirs service the County of Maui's domestic needs, Kula Agricultural Park farmers, and DHHL lands;*
- *Which reservoirs are lined, and with what material, and which are not;*
- *The estimated amount of evaporation per day from the surface of each such reservoir;*
- *An analysis of the cost and time to line at least one such reservoir; and*
- *Information on any reservoirs planned to be taken out of service[.]*

Proposed Decision D&O ¶ (8)(f) (p. 76). A&B/EMI take exception with the portion of the proposed condition requiring “[a]n analysis of the cost and time to line at least one such reservoir[.]” *Id.*

The record makes clear that, even if a decision were to be made to line a single reservoir, it is likely unfeasible to commence and complete the design, permitting and installation of the lining before the RP expires. Moreover, the already limited recharge of the ground water aquifer that is occurring under current conditions does not, in any event, warrant a further limitation on this recharge by the lining of any reservoirs, particularly where ground water usage will foreseeably increase due to dry surface water conditions in the upcoming summer months. For example, in their 2022 first quarterly report to the Board, A&B/EMI explain that in the first quarter of 2022, “lower-than-expected rainfall in the East Maui watershed area, . . . limited the amount of water that could be diverted,” Ex. X-26 (Q1 2022 Report) at 1, and the numbers in the report reflect a significant increase in the amount of pumped groundwater used on the farm during that quarter, *id.* at 11 (0.52 millions of gallons of water per day (“mgd”) in January 2022 and 4.82 mgd in February 2022).

As the Hearing Officer noted in her proposed findings, during sugar cultivation there was a much higher recharge of the ground water aquifer due to the fact that EMI was, at the time, importing around 165 mgd. Proposed Decision FOF ¶ 124. This allowed regular use of brackish ground water for irrigation during the summer months when there was insufficient surface water. *Id.* Importantly, the seepage from the reservoirs helps to recharge the ground water aquifer to levels beyond those reached through rainfall alone. This supplemental recharge has historically allowed aquifer users to pump ground water in amounts that exceed what would otherwise be available (*i.e.*, the sustainable yield). Ex. X-1 at PDF p. 126. Now that the amount of water being imported is less than 25 mgd, there is significantly less ground water recharge. Proposed Decision FOF ¶ 124. Further reducing the already limited recharge of the ground water aquifer by lining reservoirs would limit the amount of ground water that could be sustainably pumped to support the cultivated crops in Central Maui when surface water availability is insufficient—which is occurring more frequently rather than less frequently due to regulatory and climatic conditions. *Id.* ¶ 125.

For that same reason, A&B/EMI take exception with paragraph 167 of the Proposed Decision's findings which suggests the use of Reservoir 23 instead of Reservoirs 22, 33, 35, 40 and 42. Reducing the recharge of the ground water aquifer from five reservoirs would limit the amount of ground water that could be sustainably pumped. Moreover, the record does not support the finding that Reservoir 23 could be used to service fields 501, 509, 510, 511 and 512 in place of Reservoirs 22, 33, 35, 40 and 42. Proposed Decision FOF ¶ 167. The reservoirs do not have comparable capacities. Mark Vaught testified that Reservoir 23 has a 13 million gallon capacity. 12/8/21 Audio at 01:05:40 – 01:05:46 (Vaught). By contrast, Reservoir 22 has a capacity of 43.8 million gallons, *id.* at 00:53:23 – 00:53:33 (Vaught); Reservoir 33 has a capacity of 46.5 million

gallons, *id.* at 00:55:24 – 00:55:34 (Vaught) (12/8/21 AM Tr. at 32:2-6); Reservoir 35 has a capacity of 16.2 million gallons, *id.* at 00:56:09 – 00:56:32 (Vaught) (12/8/21 AM Tr. at 32:16-22); and Reservoir 40 has a capacity of 62.8 million gallons, *id.* at 00:57:21-00:57:32 (Vaught), and 42 has a capacity of 10.4 million gallons, *id.* at 00:58:17-00:58:28 (Vaught). Thus, it is unlikely that using Reservoir 23 would obviate the need for Reservoirs 22, 33, 35, 40 and 42. This is also unlikely because, for example, Reservoir 40 is used to capture water made available to the Kula Ag Park but not consumed at the Park, *see id.* at 00:29:31 – 00:31:09 (Vaught), as well as to help irrigate fields 407, 408 and 409, *id.* at 00:57:19 – 00:57:48 (Vaught). There is no evidence in the record that Reservoir 23 can be used for that purpose. In addition, there is no evidence in the record of the current condition of Reservoir 23, and whether it could be utilized in the near future.

Since actually completing the lining of a reservoir before the expiration of the RPs is in any event unfeasible, and even if it were feasible, it would not be warranted under current water availability conditions and those expected to persist through the termination date of the RPs, A&B/EMI take exception with the portion of the Hearing Officer's proposed condition (8)(f) requiring an analysis of lining a reservoir as being irrelevant to the subject RPs.

C. Exceptions pertaining to fire related reporting requirements.

In the Proposed Decision, the Hearing Officer recommends a condition requiring A&B/EMI to include in their quarterly reports to the Board:

- (h) *The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, together with:*
 - (i) *whether those reservoirs are lined or not;*
 - (ii) *The average depth of water in those reservoirs;*
 - (iii) *Estimated average monthly inflows and outflows from those reservoirs; and*

(iv) The amount of water used for hydroelectric purposes, if any.

Proposed Decision D&O ¶ (8)(h) (p. 76). The aim of the proposed condition is to “provide better detail on the necessity of the availability of water in reservoirs for fighting fires[.]” *Id.* FOF ¶ 121 (p. 42). In other words, the information will assist the Board in understanding how much reservoir water is used to fight fires and thus needs to be available in the reservoirs for this purpose.

Subparagraphs (i) through (iv), however, lack any nexus to that purpose. Whether a reservoir is lined or not, the average depth of the water in that reservoir, and the inflow and outflow of water from that reservoir do nothing to illuminate how much water is actually used to fight fires. Even more unrelated to the issue of fighting fires is the amount of water used for hydroelectric purposes. If the goal is to understand how much reservoir water is used to fight fires and thus needed in the reservoirs on an ongoing basis for that purpose, the condition should require the names and locations of the reservoirs from which water was drawn to fight fires during the quarter along with an estimate of the total amount of water used to fight fires during the quarter. The Proposed Decision provides no explanation for, let alone a sufficient factual basis to support, the need for reporting on additional items identified in subparagraphs (i) through (iv) which are unrelated to the use of reservoir water to fight fires. *See* FOF ¶ 121; D&O ¶ (8)(h).

The record is not only inadequate to show a need for such reporting, but also to show that the reporting requirements identified in subparagraphs (i) through (iv) are feasible and reasonable under the circumstances. For example, the record does not demonstrate that estimating daily inflow and outflow of each reservoir is feasible and not unduly burdensome. Similarly, the record does not demonstrate that monitoring¹ of the depth of each reservoir is feasible and not unduly

¹ The proposed condition does not specify whether the average is daily, weekly, monthly or otherwise. *See* Proposed Decision D&O ¶ (8)(h)(ii).

burdensome. For these reasons, A&B/EMI take exception to proposed finding of fact ¶ 121 and paragraph ¶ (8)(h) in the Decision & Order section of the Proposed Decision.

D. Exceptions pertaining to irrigation well reporting requirements.

The Hearing Officer also recommends a proposed condition requiring A&B/EMI to include in their quarterly reports to the Board: “(i) A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well noted[.]” Proposed Decision D&O ¶ (8)(i). The condition appears to address the Hearing Officer’s finding that there is uncertainty as to how much groundwater can be pumped without causing drawdown in the aquifers and/or saline intrusion given the substantially lower amounts of water being imported by EMI. *See* Proposed Decision FOF ¶ 124-125. The record, however, does not support the need to measure water and chloride levels for irrigation wells that are not in use. For that reason, A&B/EMI take exception with proposed finding of fact ¶ 129 and proposed condition (8)(i). The condition should be modified to require quarterly reporting of the amount of ground water pumped and chloride levels for wells from which ground water was pumped during that quarter.

E. Exceptions pertaining to inspection of streams for development purposes.

In the Proposed Decision, the Hearing Officer proposed another modification of an existing condition regarding inspection of the streams for development purposes. The proposed modified condition states: “*Permittee shall require its staff to inspect the streams and report on whether the lands could be developed for agricultural land or water leases[.]*” Proposed Decision D&O ¶ 13 (italics in original). The prior condition stated: “Staff is to inspect the streams and report on whether those lands could be developed for agricultural uses, including the viability of agricultural land or water leases.” Ex. Y-22 at PDF p. 9. “Staff” presumably meant BLNR staff, not the “staff”

of A&B/EMI. A&B/EMI take exception with the proposed condition because (1) there is no nexus between the continuation of the RPs and the development analysis work proposed by the condition to be performed by “staff” of the permittee rather than BLNR “staff;” and (2) it is unclear exactly what action must be taken by A&B/EMI.

The prior condition was added at the October 11, 2019 Board meeting at the request of Board member Stan Roehrig. Ex. Y-28 at PDF p. 9. Member Roehrig added a condition that “Staff is to look at whether the land area around the streams are viable for State land and agriculture leases.” *Id.* Member Roehrig’s intent was that the DLNR staff perform this work. Thus, it appears that the Hearing Officer’s proposed condition would be requiring A&B/EMI to perform development work for the State. Yet, there are no findings in the Proposed Decision explaining why the continuation of the RPs necessitates such a condition or what criteria A&B/EMI would follow in performing any such development analysis for the State. Moreover, there are no findings explaining the scope of the work to be performed, what streams need to be inspected, what type of development is contemplated by the State, that A&B/EMI have the expertise to perform such work, or that such work could be completed within the term of the RPs. For these reasons, A&B/EMI take exception with the Hearing Officer’s proposed condition in paragraph 13 of the Decision & Order section of the Proposed Decision.

F. Exceptions pertaining to watershed management fee.

In the Proposed Decision, the Hearing Officer recommends a new condition imposing a watershed management fee equal to the amount of rent paid by A&B/EMI for the RPs. *See* Proposed Decision D&O ¶ 22. Specifically, the proposed condition provides: “In addition to the rent paid for the Revocable Permits, the Permittee shall also pay to DOFAW each year a watershed management fee in an amount equal to the rent paid for the Revocable Permits, to be

paid according to the same schedule until such time as the Board adopts a Watershed Management Fee-policy otherwise.” *Id.* (italics omitted). This condition is proposed despite the Hearing Officer’s finding “recommend[ing] that the Board hear testimony in a sunshine Board meeting on the question of an appropriate watershed management fee to charge on the RPs.” *Id.* FOF ¶ 160. A&B/EMI take exception with this proposed condition as well as the related findings and conclusions in the Proposed Decision, as discussed further below. *See* FOF ¶¶ 159, 160, COL ¶¶ 46, 47, 48, D&O ¶ 22.

1. *No evidence demonstrating a need for a watershed management fee.*

First, the record is insufficient to establish a need to impose a watershed management fee in relation to the continuation of the RPs. The apparent purpose of the watershed management fee is to manage invasive species in the revocable permit area. *See* FOF ¶ 152 (“More money would allow more to be done to address invasive species in the revocable permit area.”). However, there is insufficient evidence to demonstrate that the operation of the EMI ditch system is responsible for or exacerbates the presence of invasive species in the revocable permit area. Scott Fretz from DOFAW testified that “feral ungulates are the number one biggest threat to the most species.” 12/13/21 Audio at 00:26:29 – 00:26:37 (Fretz). After that, DOFAW “target[s] other invasive species, especially invasive plants.” *Id.* at 00:26:44 – 00:26:50 (Fretz). While Dr. Fretz testified that “[t]he operation of the ditch system *can* spread invasive species on – on equipment and people who are in that system,” *see* Proposed Decision FOF ¶ 153 (emphasis added), there was no testimony or evidence establishing that invasive species are actually being spread by EMI’s equipment and people or how much of a threat this is to the watershed. Certainly, operation of the EMI ditch system does not cause the spread of feral ungulates which pose the greatest threat. Nor is it clear that EMI’s equipment and people are spreading the invasive plants that DOFAW targets

after feral ungulates. For this reason, there is insufficient evidence in the record to establish a nexus between the continuation of the RPs and the imposition of a watershed management fee.

2. *There is no evidence supporting the amount of the proposed watershed management fee.*

Second, the record is also insufficient to support the imposition of a watershed management fee equal to the amount of rent paid under the RPs. Dr. Fretz testified that DOFAW, the East Maui Watershed Partnership and the Maui Invasive Species Committee combined spend approximately \$800,000 to “manage the watershed.” 12/13/21 Audio at 00:24:43 – 00:25:27 (Fretz). There is no evidence in the record establishing what portion of that \$800,000 is spent by DOFAW or what portion of that is used to manage invasive species, as opposed to other management activities.

Notwithstanding the lack of that information, the Proposed Decision seeks to impose a watershed management fee equal to the amount of rent, which is \$238,361.64 per year. *See* Ex. Y-22 at PDF pp. 25-26 (stating rent as follows: S-7263 = \$2,549.58 per month; S-7264 = \$9,952.45 per month; S-7265 = \$5,219.37 per month; S-7266 = \$2,142.07 per month). This is almost 30% of the approximately \$800,000 spent annually (excluding fencing) by DOFAW, the East Maui Watershed Partnership, and the Maui Invasive Species Committee combined to “manage” the watershed.² The record does not show that operation of the EMI ditch system actually contributes to the spread of invasive species in the areas covered by the RPs, let alone nearly 30% of the problem. Moreover, without information on how much money is spent by DOFAW to manage invasive species in the areas covered by the revocable permits, the proposed condition could be imposing a watershed management fee in excess of DOFAW’s current cost of managing invasive species in the areas covered by the RPs. Thus, the proposed management fee

² It is not clear that this amount reflects the amount of money spent managing the entire east Maui watershed or just the areas covered by the RPs.

is not related to any need to manage invasive species in the areas covered by the RPs caused by the operation of the EMI ditch system.

Nor is the proposed management fee related to the amount of water A&B/EMI divert from the RP areas. Although in paragraph 159 of the findings of fact in the Proposed Decision, the Hearing Officer contemplates imposing a watershed management fee equal to one cent per 1,000 gallons of water taken out of the watershed, and notes that, assuming A&B/EMI divert an average of 45 mgd, that would result in \$164,250 annually that could be used to manage the watershed, *id.* FOF ¶ 159, the Hearing Officer ultimately recommends, without explanation, imposing a watershed management fee equal to the \$238,361.64 per year rent charged for the RPs, regardless of the amount of water that is diverted. This makes no sense if the purpose of the watershed management fee is to mitigate the impact of the operation of the EMI ditch system. This illogic is further highlighted when considering that, with the proposed watershed management fee, A&B/EMI would be paying \$476,723.28 under the RPs at a time when they are diverting less than 25 mgd, but when A&B/EMI were diverting on average 165 mgd, they were paying \$158,283.84 under the RPs. *See* Trial Ex. J-1 (S-7263 charging \$1,698.32 rent in 2000); Trial Ex. J-2 (S-7264 charging \$6,588.40 rent in 2000); Trial Ex. J-3 (S-7265 charging \$3,476.72 rent in 2000); Trial Ex. J-4 (S-7266 charging \$1,426.88 rent in 2000); Ex. Y-46 ¶ 519. It is clear that the proposed management fee is not related to mitigating any impact caused by A&B/EMI's diversion of water under the RPs.

The proposed watershed management fee is also not related to the amount of land covered by the RPs. At its October 11, 2019 meeting, the Board voted to remove approximately 7,500 acres comprising the Hanawi Natural Area Reserve from the RP areas. *See* Ex. Y-21 at PDF p. 5; Ex. Y-28 at PDF p. 9. Prior to the removal of those 7,500 acres from the RP areas, A&B/EMI

paid \$230,964.24 annually under the RPs. Ex. Y-20 at PDF pp. 7-8; Ex. Y-27 at PDF p. 11. Despite the reduction of the RP areas by more than 22%, under the Proposed Decision and including the proposed watershed management fee, A&B/EMI would be paying more than double under the RPs for calendar year 2022. It is thus clear that the proposed watershed management fee is not related to mitigating any impact caused by the size of the areas covered by the RPs.

In sum, there are no findings or evidence in the record supporting the imposition of a watershed management fee in an amount equal to the rent paid under the RPs and for this reason, A&B/EMI take exception with the proposed condition.

3. *There is no evidence that the proposed management fee will be used solely to manage the areas covered by the RPs.*

Third, there is no requirement that DOFAW use the funds to be paid by A&B/EMI as the proposed watershed management fee to maintain the areas covered by the RPs, as opposed to other areas in the east Maui watershed or the State. There is no evidence that the funds will be segregated from DOFAW's general funds and used solely for the purpose of maintaining the areas covered by the RPs. While paragraph 47 of the conclusions states that "All payments made for this purpose shall be expended by DOFAW in order to fund its *watershed management activities*," see Proposed Decision COL ¶ 47 (emphasis added), there is nothing restricting those "watershed management activities" funded by the proposed management fee to activities within the areas covered by the RPs. This further demonstrates the lack of any nexus between the proposed watershed management fee and the use of State land pursuant to the RPs.

4. *The Board lacks the authority to impose the watershed management fee, which is a tax.*

Finally, the Board lacks the authority to impose the proposed watershed management fee, which is actually a tax. "Generally, a fee is exchanged for a service rendered or a benefit conferred,

and the amount of the fee normally bears a relationship to the value of the service or benefit.” *Haw. Ins. Council v. Lingle*, 129 Hawai‘i 51, 59, 201 P.3d 564, 572 (2008). By contrast, a tax “raises money, contributed to a general fund, and spent for the benefit of the entire community.” *Id.* at 60, 201 P.3d at 573 (quotation marks and citation omitted). Thus, the distinguishing characteristics of fees are (1) “charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society,” and (2) “the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.” *Id.* at 61, 201 P.3d at 574 (quotation marks and citation omitted).

In determining whether an assessment is a fee or a tax, a court will consider whether the charge “(1) applies to the direct beneficiary or a particular service, (2) is allocated directly to defraying costs of providing the service, and (3) is reasonably proportionate to the benefit received.” *State v. Medeiros*, 89 Hawai‘i 361, 367, 973 P.2d 736, 742 (1999). The proposed watershed management fee cannot satisfy any of these three prongs. As to the first and second prongs, as discussed *supra*, there is no evidence that the funds from the proposed management fee would be segregated from the Department’s general budget and used solely to manage the areas covered by the RPs, as opposed to other areas in the east Maui watershed or the state. Thus, there is no evidence showing that the proposed management fee would apply directly to A&B/EMI or would be allocated directly to defraying the costs of providing the service, which presumably is the use of state land for the purpose of transporting and diverting water. Moreover, as discussed *supra*, there is no evidence in the record showing how much it actually costs DOFAW to manage the areas covered by the revocable permits. Likewise, there is insufficient evidence in the record to satisfy the third prong because, as discussed *supra*, the amount of the proposed watershed management fee is not tied to the amount of water being diverted or the size of the area covered

by the RPs. Thus, the proposed fee is not reasonably proportionate to the benefit received by A&B/EMI. Having failed to satisfy any of the three prongs, the proposed management fee is a tax, not a fee. The use of the term “fee” to describe the charge will not change this outcome. *Medeiros*, 89 Hawai‘i at 366, 973 P.2d 741 (“[T]he nature of the tax ‘or charge’ that a law imposes is not determined by the label given to it but by its operating incidence.” (Quotation marks, alterations, and citation omitted)).

“The Hawai‘i Constitution does not grant the executive branch the power to tax.” *Haw. Ins. Council*, 129 Hawai‘i at 59, 201 P.3d at 572; *see also* Haw. Const. art. VIII, § 3; *McCandless v. Campbell*, 20 Haw. 411, 420 (1911) (“The power of taxation is essentially a legislative power. It cannot be delegated except to municipalities which themselves exercise subordinate legislative powers”). Because the Board lacks the authority to impose a tax, the Board lacks the authority to adopt the Hearing Officer’s recommendation set forth in paragraph 22 of the Decision & Order section of the Proposed Decision.

For these reasons, A&B/EMI take exception with the proposed condition set forth in paragraph 22 of the Decision & Order section of the Proposed Decision and related findings and conclusions. *See* FOF ¶¶ 159, 160, COL ¶¶ 46, 47, 48, D&O ¶ 22.

III. CONCLUSION

For these reasons, A&B/EMI respectfully request that the Board modify the Hearing Officer’s proposed decision as discussed above.

DATED: Honolulu, Hawai‘i, May 16, 2022.

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CERTIFICATE OF SERVICE

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I hereby certify that, pursuant to Minute Order No. 3, a copy of the foregoing document will be served via email on this date to the following parties as noted below:

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