

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES COMMISSION
COUNTY OF NEW HANOVER	)	<b>CRC-VR-15-09</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY	)	
N.C. STATE PORTS AUTHORITY	)	
	)	

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On December 1, 2015 Petitioner the North Carolina State Ports Authority requested a variance from the North Carolina Coastal Resources Commission’s (“Commission”) rule 15A NCAC 7H .0208(b)(1) which prohibits new dredging in a primary nursery area along with a request for an expedited hearing. The North Carolina Division of Coastal Management did not oppose the request for an expedited hearing. The Commission Chairman granted the request for an expedited hearing after finding that Petitioner had met the requirements set forth in N.C.G.S. § 143-318.12(f) which allow the Commission to schedule a meeting in situations where “generally unexpected circumstances” are present requiring “immediate consideration by the public body.”

Thereafter, this matter was heard on oral arguments and stipulated facts at a specially scheduled meeting on December 8, 2015 in Wilmington, North Carolina pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A NCAC 7J .0700, *et seq.* Assistant Attorney General Christine A. Goebel, Esq. appeared for the Department of Environmental Quality, Division of Coastal Management (DCM). Special Deputy Attorney General Scott T. Slusser and Assistant Attorney General Thomas D. Henry appeared on behalf of Petitioner along with co-counsel William A. Raney, Jr., Esq.

Upon consideration of the record documents and the arguments of the parties, the Commission adopts the following:

**STIPULATED FACTS**

**Overview of Project and Petitioner**

1. Petitioner, the North Carolina State Port Authority (“NC Ports”), is an instrumentality of the State of North Carolina, created within the Department of Transportation, which by law has been granted the “broad objective of developing to the utmost the port possibilities of the State of North Carolina.” N.C. Gen. Stat. § 136-261.

2. Pursuant to N.C. Gen. Stat. § 136-261, as a public entity NC Ports has several general purposes, including: (a) to develop and improve the harbors or seaports at Wilmington, Morehead City and Southport, North Carolina, (b) to foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the State of North Carolina, and (c) to increase the movement of waterborne commerce, foreign and domestic between such harbors and ports.

3. NC Ports operates the Port of Wilmington (“POW”), located on the Cape Fear River in Wilmington, New Hanover County, approximately 25 miles north of the mouth of the river and about 1.2 miles south of the Cape Fear Memorial Bridge.

4. On October 16, 2015, NC Ports submitted to the DCM a CAMA major permit application, seeking approval of a project (“Project”) to expand the turning basin of the Port of Wilmington by 200 feet, from an existing diameter of 1,200 feet to 1,400 feet, by mechanically dredging the bottom of the Cape Fear River. To accomplish the widening of the turning basin, NC Ports also sought approval to remove and relocate in a shoreward direction the liquid bulk

terminal pier, loading platform, and mooring dolphins (facilities which are leased to Kinder Morgan by NC Ports). No construction or activity was proposed for the tank farm facility associated with the liquid bulk pier.

5. By written resolution dated October 22, 2015, the Board of Directors of NC Ports authorized the expenditure of funds related to the solicitation, bidding, and execution of contracts for the design and construction of this project to widen the POW turning basin. The Resolution was provided to the Commission as an attachment to the DCM Staff Recommendation.

6. The estimated cost of the Project is about \$16 million, and the duration of construction is estimated at 5 months. See Affidavit of Jeffrey E. Miles (“Miles Affidavit”) ¶5, which was provided to the Commission as an attachment to the DCM Staff Recommendation.

#### **Project Purpose and Need**

7. The POW has served ships carrying container cargo for over 30 years and has served vessels in the Panamax class for over 10 years. Panamax vessels, with lengths up to 965 feet, are defined by the maximum ship length allowable in the locks of the Panama Canal. (Miles Affidavit ¶12)

8. POW is the only port facility in North Carolina that services container vessels. (Miles Affidavit ¶8)

9. A November 2014 study published by the Institute for Transportation Research and Education at North Carolina State University (“NCSU Study”) found that the Port of Wilmington has an “annual economic contribution to the state’s economy” of approximately \$12.9 billion. (NCSU Study p. iv) A copy of the NCSU Study was provided to the Commission as an attachment to the DCM Staff Recommendation.

10. The NCSU Study found that economic activity at the two ports of Wilmington and Morehead City resulted in estimated state and local tax revenues totaling \$707 million. (NCSU Study p. iv)

11. The NCSU Study determined that container traffic (imports and exports) increased 32.8 percent at the POW between 2008 and 2013. (NCSU Study p. 17)

12. The NCSU Study determined that the value of goods produced in North Carolina and exported by container ship through the POW was approximately \$1.7 billion. (NCSU Study p. 9)

13. The NCSU Study determined that, taken together, NC Ports' operations accounted for approximately 3% of the State's entire gross domestic product. (NCSU Study p. 11)

14. The annual revenue of POW is approximately \$43.8 million. (Miles Affidavit ¶9)

15. Container business makes up about 32% of POW's revenue. (Miles Affidavit ¶9)

16. The major container customers that call on the POW are four shipping companies originating in Asia - Cosco, K-line, Yang Ming, and Hanjin – which are collectively referred to as the “CKYH” alliance. (Miles Affidavit ¶10)

17. CKYH container ships utilize the Panama Canal for trade routes between the Port of Wilmington and Asia. (Miles Affidavit ¶10)

18. Revenue derived from CKYH shipping comprises approximately 66% of the port's container business. (Miles Affidavit ¶11)

19. NC Ports is pursuing the Project in order to develop the POW in a manner that ensures the port's ability to service container ships larger than the current Panamax vessel class. Specifically, the goal of NC Ports is to enable the POW to service ships in the vessel class

known as “New Panamax.” (Miles Affidavit ¶¶ 15, 19, 26)

20. New Panamax, which is larger than Panamax, refers to a class of vessels having a size up to 1,200 feet in length and 160 feet in width. The New Panamax designation is related to a present-day, ongoing expansion of the Panama Canal’s lock system. Once the Panama Canal improvements are complete (anticipated in year 2016), the canal will be able to accommodate ships that are longer (up to 1,200 feet) and wider (up to 160 feet). (Miles Affidavit ¶¶ 12, 13)

21. The existing 1,200-foot turning basin at the POW is insufficient for the 1,200-foot New Panamax vessels that will transit the Panama Canal in the near future. The purpose of a turning basin is to allow cargo vessels to reorient themselves for safe ingress to and egress from the port. (Miles Affidavit ¶¶ 17, 18)

22. The federal channel in the Cape Fear River and Wilmington Harbor is federally authorized at 42 feet. The existing channel depth and proposed dredging of the turning basin to 42 feet will be adequate for vessels in the New Panamax class.

23. The existing onshore facilities and infrastructure at the POW are adequate to accommodate New Panamax ships and their cargo. (Miles Affidavit ¶16)

24. The present 1,200-foot diameter of the turning basin stands as the only physical impediment to servicing vessels in the New Panamax class at the POW. (Miles Affidavit ¶¶ 15, 16, 17)

25. NC Ports has determined that a turning basin expanded to 1,400 feet is the minimum width necessary to allow the POW to accommodate New Panamax vessels. A proper turning basin should have a minimum diameter approximately 20 percent longer than the length of the ship using it. (Miles Affidavit ¶18)

26. Through discussions with the CKYH alliance, NC Ports has been made aware that, upon completion of the Panama Canal improvements, the CKYH alliance intends to use New Panamax vessels for their trade with ports on the east coast of the United States. (Miles Affidavit ¶¶20)

27. The use of larger container ships allows international shippers to move more cargo, more efficiently. (Miles Affidavit ¶21)

28. CKYH calls on other ports on the east coast, such as Miami, Charleston, Savannah, Norfolk and New York. These ports will be able to accommodate New Panamax vessels. (Miles Affidavit ¶22)

29. Through discussions with the CKYH alliance, NC Ports has been made aware that the CKYH alliance intends to divert its existing container trade to other east coast ports if POW cannot accommodate New Panamax vessels. (Miles Affidavit ¶23)

30. If the turning basin at POW cannot accommodate New Panamax vessels, the economic benefits associated with container shipping at the POW will be redirected away from North Carolina to nearby states that can accommodate such vessels. (Miles Affidavit ¶¶24, 25)

31. If POW's turning basin is not expanded to 1,400 feet, the competitiveness and profitability of the POW will be adversely affected. Adverse impacts will be felt by many North Carolina businesses and citizens whose economic well-being is related to the movement of container cargo through the POW. (Miles Affidavit ¶¶24, 25)

32. The goal of NC Ports is to have POW ready for New Panamax vessels by May 2016. (Miles Affidavit ¶¶26)

### **Project Location and Environmental Factors**

33. The Project environs are best characterized as industrial. The property is developed as a major port facility that services ocean-going vessels. The Project location sits in a stretch of the Cape Fear River that is heavily used by maritime traffic and is also adjacent to the federal channel which is dredged and maintained by the U.S. Army Corps of Engineers.

34. The proposed development (or portions of it) is located within the Public Trust and Estuarine Waters Areas of Environmental Concern (“AEC”) as described in 15A NCAC 7H.0206 and .0207.

35. The proposed dredging is within an area designated by the North Carolina Marine Fisheries Commission as primary nursery area (PNA) and is closed to the harvest of shellfish. The waters of the Cape Fear River at this site are classified as SC by the NC Environmental Management Commission.

36. PNAs in this part of the Cape Fear River are defined as all areas of the river with the exception of the maintained channel. 15A NCAC 3R.0103(19)(a). The waters of the Cape Fear River at this location have been designated as a PNA since 1977.

37. The Project entails the mechanical dredging of sediment within an approximate 6.4-acre area of soft bottom estuarine habitat. The estimated volume of dredged sediments is expected to be about 100,000 cubic yards. After the application was submitted, NC Ports consulted with the Corps of Engineers resulting in a new plan that reduced the dredged area from 8.5 acres to 6.4 acres and the volume of dredged material from 300,000 CY to 100,000 CY. NC Ports agrees to a condition that substitutes the revised plan for the original plan NC Ports has committed to employing best management practices, such as turbidity barriers and maximizing

dredging during falling tides to avoid and minimize impacts during dredging operations. (Miles Affidavit ¶28)

38. Dredged material will be placed in scows, transferred across the river, re-fluidized, and hydraulically pumped into the Eagle Island Confined Disposal Facility. The Eagle Island facility is owned and operated by the US Army Corps of Engineers.

39. For the Project, NC Ports has prepared an “Essential Fish Habitat Assessment” (EFH Study) pursuant to the federal Magnuson-Stevens Fishery Conservation and Management Act of 1976. .

40. A majority of the estimated dredging volume is due to dredging in waters presently ranging in depth from -5 feet to -20 feet MLW. The area will be dredged to a depth of -44 feet MLW, sloping back up to natural grade inshore. (EFH Study p. 2, 6)

41. While turbidity and dispersion of suspended sediment in the waterbody is a potential effect during the 5-6 months of dredging, the EFH Study has found that the proposed method of clamshell dredging allows mobile species to “quickly avoid plumes of elevated turbidity and the mechanical operations, even when migrating up river or foraging in shallow areas.” (EFH Study p. 14)

42. There are no known areas of submerged aquatic vegetation or oyster beds within the footprint of the Project.

43. In order to offset potential impacts associated with the Project, NC Ports has offered two mitigation measures:

NC Ports will contribute \$750,000 towards a project to create a fish passage at Lock and Dam #2 on the Cape Fear River, assuming issuance of a CAMA major permit and US Army



Corps General Permit (GP 291) to NC Ports by January 19, 2016. NC Ports makes this offer conditional because the turning basin expansion is urgent and important to NC Ports and the State in general. The contribution of NC Ports, if made, will be combined with other funding allocated by the State to complete the planning, design, and permitting (phase 1) of a rock ramp fishway. With NC Ports' contribution, phase 1 should be completed by May 2017. Lock and Dam No. 2 is located in Bladen County, upstream from the Port of Wilmington. The design, permitting, and construction of a fish passage will allow migratory fish (such as shortnose and Atlantic sturgeon, striped bass, American shad, and river herring) to access approximately 20-40 percent of the remaining historic fish habitat that is currently blocked. (EFH Study 39-40).

#### **CAMA Major Permit Application**

44. NC Ports' CAMA major permit application for the Project was accepted as complete by DCM on October 16, 2015.

45. The proposed Project is a Major Modification to CAMA Major Permit No. 47-87, originally issued on February 17, 1987 for hydraulic dredging of NC Ports' shipping berths. The liquid bulk pier was authorized through a Minor Modification to the permit on March 16, 1999.

46. As part of the CAMA major permit review process, state and federal resource agencies were given copies of the application and the field investigation report. Three agencies and a DCM Fisheries Resource Specialist provided comment back to DCM. The Department of Natural and Cultural Resources (as it is now known) recommended caution during the dredging in case watercraft remains were found. The NC Wildlife Resources Commission also responded raising concerns about PNA habitat. The National Marine Fisheries Service provided comment related to the fish habitat in the project area.

47. All other agencies had either “no objection” or “no comment” on the Project, except for two which did not return comment by November 30, 2015. Those include Division of Water Resources, which has the 401 certification application pending, and DCM’s Land Use Planner with a consistency determination.

48. As part of the CAMA major permit process, notice of this proposed project was given to the public and neighbors by (1) publishing notice in the Star-News newspaper on October 21, 2015, (2) posting notice on site, and (3) sending notice to the adjacent riparian owners Apex Oil and Kinder-Morgan. DCM received no comments back from the general public. Apex Oil had no objection to the project. Kinder-Morgan initially objected, it later “received clarification of the project from the Port of North Carolina that has satisfied our concerns” and officially withdrew objections to the project.

49. On November 17, 2015, NC Ports notified DCM Staff that they wished to remove the two northern mooring dolphins initially proposed and which were located in Kinder-Morgan’s riparian area.

50. On November 30, 2015, DCM denied the NC Ports’ application and noted the denial was based on the proposed development’s inconsistency with rule 15A NCAC 7H .0208(b)(1), which requires that new dredging projects avoid areas designated as PNAs. Accordingly, DCM denied the permit application for inconsistency with state guidelines in accordance with N.C. Gen. Stat. § 113A-120(a)(8).

51. On December 1, 2015, Petitioner filed this variance petition seeking a variance from 15A NCAC 7H .0208(b)(1) in order to allow the dredging proposed and since revised as noted in Fact 37, above.

52. Also on December 1, 2015, Petitioner filed a request to hear this variance in an expedited fashion. The Commission granted the request for an expedited hearing.

53. During the hearing, the Commission reviewed site photographs as part of a PowerPoint presentation included as a Stipulated Exhibit.

### **STIPULATED EXHIBITS**

Included with the Petition and the Staff Recommendation for the Commission's review were the following Stipulated Exhibits:

- PowerPoint Slideshow with relevant maps, diagrams, aerial photos, photos, and site plans;
- October 22, 2015 NC Ports Board Resolution;
- November 2014 Study prepared by Institute for Transportation Research and Education at North Carolina State University;
- October 2015 Essential Fish Habitat Study;
- Affidavit of Jeffrey E. Miles signed November 30, 2015;
- CAMA Major Permit Application of October 16, 2015 as amended;
- DCM Field Investigation Report;
- Comments of Department of Natural and Cultural Resources;
- Comments of NC Wildlife Resources Commission;
- Comments of National Marine Fisheries Service;
- Comments of DCM Fisheries Resource Specialist;
- Proof of publishing of notice in the Star News;
- Copy of On-site notice card;
- Notice forms returned from Apex Oil and Kinder-Morgan, along with email correspondence withdrawing objection;
- November 17, 2015 email from Ports removing northern-most two dolphins from the project;
- November 30, 2015 denial letter from DCM;
- PNA map showing the site;

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter.
2. Following a December 1, 2015 letter requesting an expedited hearing, the Chairman granted the request pursuant to the provisions of N.C.G.S. § 143-318.12(f) and

scheduled the hearing on NC Ports' request for a variance on December 8, 2015 at a special meeting of the Commission in Wilmington, North Carolina. The decision to allow an expedited briefing schedule and hearing was based on Petitioner's *prima facie* claim that the Panama Canal expansion is to be completed April 2016 and this expansion will allow the New Panamax ships access to the POW which cannot currently accommodate the size of these ships. The decision to hold the expedited hearing was explicitly found not to be a determination on the merits of Petitioner's variance request. All notices for the proceeding were adequate and proper.

3. Petitioner has met the requirements in N.C.G.S. § 113A-120.1(a) and 15 NCAC 07J .0703(f) which must be found before a variance can be granted as set forth below.

**A. Strict application of Commission's Rule will cause unnecessary hardships.**

The Commission affirmatively finds that strict application of the Commission's Rule would cause Petitioner unnecessary hardship. Specifically, 15A NCAC 7H.0208(b)(1) is designed to ensure that there is no new dredging in primary nursery areas. A project is nearing completion to enlarge locks in the Panama Canal to allow larger and wider ships to utilize the Canal. The Panama Canal is used by the four largest container shipping customers of the POW. The POW cannot currently accommodate the larger ships because the deep water turning basin needed by ships to have safe ingress to and egress is not wide enough. The POW has been informed that its customers will move their business to other ports on the East Coast unless the POW is able to accommodate these longer and wider ships. Increasing the width of the turning basin can only be accomplished by dredging an area adjacent to the existing turning basin. The inability to enlarge the turning basin would result in a loss of the four largest container ship customers of the POW. Based on the most recent figures, these shipping lines accounted for

approximately \$9.2 million of the Port's total revenue, or approximately 21 percent of the Port's total revenue. The loss of this revenue would have a significant adverse effect on the Port's profitability.

Strict application of the Commission's Rule would prevent Petitioner from dredging and enlarging the existing turning basin at the Wilmington port facility and thereby cause an unnecessary hardship. The proposed dredging for this water-dependent use is not allowed by the rules because the area is within a designated Primary Nursery Area (PNA), a designation which extends from bank to bank of the Cape Fear River (with the exception of the federal channel) and has been in place since 1977. The proposed site is within an industrial port area which has been used in this manner for many decades and, therefore, the fisheries value of this site is already reduced due to the historic use of the area and other site characteristics. Petitioner will face unnecessary hardships of the likely loss of significant commercial shipping traffic if the Commission's rule prohibiting new dredging in a designated PNA is strictly applied.

For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

**b. Petitioner has demonstrated that the hardship results from conditions peculiar to Petitioner's property.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, the property is the site of the North Carolina State Port at Wilmington. The Cape Fear River at this location has been extensively dredged to accommodate large ships, including container ships. The State Port facility and the ship channel and turning basin are the only facilities in North Carolina that can practically be used for the foreseeable future to accommodate container shipping. There is no other site in

North Carolina that can practically be used to create a wide enough and deep enough body of water to accommodate the larger vessels that will soon be using the Panama Canal. Moreover, the enlargement of the existing turning basin is the only change to existing infrastructure needed to accommodate this new class of ship. This area has been heavily dredged in the past to create and maintain the federal channel and the existing turning basin.

The DCM's Fisheries Resource Specialist noted that there are already disturbances in this area due to historical propeller wash from tug boats and other vessels, as well as maintenance agitation dredging that is already permitted in this area. He concluded that "[o]verall the area has been highly developed and routinely impacted by large vessels utilizing the POW as a hub for commerce in the state." Deeper water depths at and adjacent to the dredging site reduces the shallow-bottom habitat and related characteristics and functions of a typical PNA, which is defined by the MFC at 15A NCAC 3I.0101(4)(f) as "those areas in which for reasons such as food, cover, bottom type, salinity, temperature and other factors, young finfish and crustaceans spend the major portion of their initial growing season. Primary nursery areas are those areas in the estuarine system where initial post-larval development takes place. These are areas where populations are uniformly early juveniles." Accordingly, while the dredging site is designated as a PNA, the site conditions and historical use of the site reduce the function of the site as a PNA. For these reasons, the Commission affirmatively finds the physical characteristics peculiar to this site cause Petitioner's hardship.

Accordingly, the Commission affirmatively finds that Petitioner has demonstrated that this hardship results from conditions peculiar to the property and has met the second factor required for the grant of its request for a variance.

**c. Petitioner has demonstrated that hardship does not result from its actions.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship does not result from actions taken by the Petitioner. Specifically, the Petitioner has no control over the size of the ships that are being used by its customers and potential customers. Nor does the Petitioner have any practical alternative for enlarging the turning basin.

The POW has been operating at this location for decades, as has the federal channel. It makes sense to minimize impacts to PNAs by locating new impacts where the existing turning basin and heavily used port infrastructure are already located in order to accommodate the New Panamax ships.

Therefore, the Commission affirmatively finds that Petitioner has demonstrated that it has met its burden to show hardships did not result from actions taken by Petitioner.

**d. Petitioner has demonstrated that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, will secure public safety and welfare, and will preserve substantial justice.**

The Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice.

Petitioner has stipulated that its proposed development is contrary to 15A NCAC 7H .0208(b)(1) and is seeking a variance from this rule, which provides that "Navigation channels, canals, and boat basins shall be aligned or located so as to avoid primary nursery areas. . ."

The Commission affirmatively finds that the variance meets the spirit, purpose and intent of the Commission's prohibition against new dredging in designated PNAs, where, as in this

case, the PNA resources have long been impacted by the longstanding use of the site as an industrial port subject to regular dredging and propeller agitation in the adjacent existing turning basin and federal channel. Moreover, there is significant economic value of the Port of Wilmington, and it is within the spirit of the rules to consolidate industrial port activities in the coastal area.


Public safety and welfare will be preserved by allowing ship traffic at the POW to have sufficient room to navigate, while minimizing impacts to the resource by reducing the dredging area and siting it near the existing turning basin and federal channel. Substantial Justice will be preserved by maintaining commercially useful port infrastructure.

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C.G.S. § 113A-120.1(a).

### **ORDER**

THEREFORE, the requested variance from 15A NCAC 7H. 0208(b)(1) is GRANTED. In granting this variance the Commission did not take into consideration the two proposed mitigation measures which Petitioner is pursuing as part of the ongoing federal permit review process. The granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts is not true.

This the 7<sup>th</sup> day of January 2016.

  
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Frank D. Gorham, III, Chairman  
Coastal Resources Commission

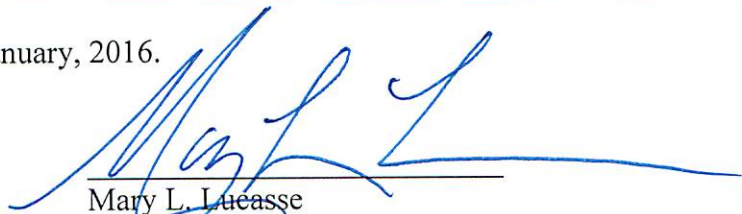


**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the foregoing FINAL AGENCY DECISION upon the parties by the methods indicated below:

Scott T. Slusser Thomas D. Henry NC DOJ Transportation Section P.O. Box 629 Raleigh, NC 27602	<i><u>Certified Mail/ Return Receipt Requested and electronically at</u></i> <i><u>Sslusser@ncdoj.gov</u></i> <i><u>thentry@ncdoj.gov</u></i>
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This is the 7<sup>th</sup> day of January, 2016.



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