

**SOAH DOCKET NO. 582-15-0460
TCEQ DOCKET NO. 2014-1401-AIR**

APPLICATION BY SOUTHERN	§	BEFORE THE STATE OFFICE
CRUSHED CONCRETE, LLC FOR	§	
AIR QUALITY STANDARD PERMIT	§	OF
NO. 119443L001	§	
	§	ADMINISTRATIVE HEARINGS

SOUTHERN CRUSHED CONCRETE, LLC’S REPLY TO EXCEPTIONS
AND
BRIEF IN SUPPORT OF PROPOSAL FOR DECISION

Applicant Southern Crushed Concrete, LLC (“SCC” or “Applicant”) files this Reply to Exceptions and Brief in Support of Proposal for Decision (“PFD”) in reply to the exceptions filed by Protestant Willow Waterhole Greenspace Conservancy (“WWGC”). For the reasons set forth below, SCC respectfully urges the Commission to adopt Administrative Law Judge (“ALJ”) Casey Bell’s Proposed Order and to approve SCC’s application and issue Standard Permit Registration No. 119443L001.

I. Introduction

This matter involves an application filed by SCC to register a temporary concrete batch plant (“CBP”) under the Air Quality Standard Permit for Concrete Batch Plants (“CBP Standard Permit”).

SCC submitted an application (“Application”) to the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) seeking registration under the CBP Standard Permit on April 23, 2014.¹ The Application seeks authorization to construct and operate the proposed temporary CBP (“the Plant”) on property known as the Gasmer Yard, an 18-acre site owned by SCC and located in a commercial/light industrial area in southwest Houston, at 5001 Gasmer Drive.² SCC has conducted construction material-related operations at

¹ Applicant’s Ex. No. 2D (Application); Applicant’s Ex. No. 2 at 10:8-11 (Wells Prefiled).

² Applicant’s Ex. No. 1 at 3:4-7 & 22-25 (Miller Prefiled); Applicant’s Ex. No. 1A at 9 (TCEQ Executive Director’s Response to Comments).

the Gasmer Yard since the early 1990s, including a portable concrete crushing facility and a pug mill (also known as a soil stabilization plant).³

The TCEQ Executive Director (“ED”) declared the Application to be administratively complete on May 1, 2014,⁴ and completed its technical review of the Application on July 15, 2014.⁵ At the completion of the technical review of the Application, the ED determined that the Application met all TCEQ rules and all of the requirements of the CBP Standard Permit, and made a preliminary decision to issue the registration.⁶ On October 30, 2014, the ED issued its Response to Public Comment on the Application, and at that time made no changes to the preliminary determination that the Application met the requirements for issuance of the registration under the CBP Standard Permit.⁷

SCC requested direct referral of the Application to the State Office of Administrative Hearings (“SOAH”), where it was docketed for a contested case hearing before ALJ Casey Bell under SOAH Docket No. 582-15-0460. Following the preliminary hearing, Judge Bell granted the hearing requests of the WWGC and Joseph Shahda, who was granted status as an authorized representative of Elsie Bonilla and Denniz Ramirez. Mr. Shahda and WWGC were aligned by an Order dated March 2, 2015. WWGC (“Protestant”) has been the only protestant to participate in discovery, the hearing on the merits, or the post-hearing briefing in this matter.

SCC filed its direct testimony and exhibits on May 1, 2015. James R. Miller, Jr., the Director and General Manager of SCC, described the Plant and the Gasmer Yard, demonstrating that the Plant meets the requirements of the CBP Standard Permit. Monique Wells, who prepared the Application, presented expert testimony describing the standard permit process, the resources that she relied upon in preparing the Application, the emissions calculations included in the Application, and how the Application complies with TCEQ requirements. Tim Prince provided further expert testimony regarding his evaluation of the emissions calculations made by Ms. Wells that were included in the Application, concluding that the emissions calculations present a conservative estimate of emissions from the Plant. Mr. Prince further opined that the

³ Applicant’s Ex. No. 1 at 3:23-24 and 4:4-5 (Miller Prefiled); Tr. at 40:18-42:1, 41:25-42:1 and 68:22-69:18 (Miller Cross).

⁴ Applicant’s Ex. No. 2H (May 1, 2014 TCEQ Letter Declaring Application Administratively Complete).

⁵ Applicant’s Ex. No. 2J (July 15, 2014 TCEQ Letter Declaring Application Technically Complete).

⁶ Applicant’s Ex. No. 2J at 5 (July 15, 2014 TCEQ Letter Declaring Application Technically Complete).

⁷ Applicant’s Ex. No. 1B at 19 (TCEQ Executive Director’s Response to Public Comment).

Application met TCEQ requirements, and that the proposed Plant qualifies for authorization under the CBP Standard Permit. The direct testimony of the witness for the ED, Don Nelon, supports the ED's review of the Application and the ED's determination that the Application meets all requirements for issuance of a registration under the CBP Standard Permit.

Judge Bell's PFD includes a thorough analysis of the evidence and the parties' arguments for the narrow list of disputed issues in this matter. The PFD recognizes that applicants have flexibility in the design and operation of a CBP, provided the proposed CBP falls within the parameters established in the CBP Standard Permit. The PFD also correctly states that, where an application contains multiple representations relating to the same factor – for example, where an applicant enters one value on an application table, but uses a different, higher value in making conservative emissions calculations – that the more-restrictive of those representations will be an enforceable condition of the registration. Where the Protestant actually alleges noncompliance with a requirement of the CBP Standard Permit, Judge Bell applies the permit's minimum plant buffer distance requirement in a manner that is consistent with both common sense and the ED's interpretation of the provision to conclude that the Plant will comply with CBP Standard Permit requirements.

Judge Bell concluded that the preponderance of the evidence shows that SCC's Application meets the applicable statutory and regulatory requirements for issuance of the registration under the CBP Standard Permit. SCC respectfully requests that the Commission issue an Order approving SCC's Application and directing the issuance of Standard Permit Registration No. 119443L001 to authorize SCC's construction and operation of the Plant at the Gasmer Yard.

SCC's Reply to Exceptions and Brief in Support of Proposal for Decision will address the issues raised in the Protestant's exceptions. SCC also incorporates by reference both its Closing Arguments and its Brief in Reply to Closing Arguments in the event that the Commissioners are interested in more details of the evidence in the record supporting issuance of the requested standard permit registration.

II. The Gasmer Yard roads and vehicle traffic will meet the requirements of the CBP Standard Permit

The record in this matter supports Judge Bell's determination that SCC can and will comply with the minimum plant buffer distance requirements that apply to vehicle traffic under Special Condition (8)(D) of the CBP Standard Permit.

In its exceptions, the Protestant argues that vehicle traffic for the Plant will not comply with Special Condition (8)(D), the CBP Standard Permit's minimum buffer distance provision. The buffer distance provision reads as follows:

The owner or operator shall maintain the following minimum plant buffer distances from any property line, except for temporary concrete plants approved to operate in the right of way of a public works project:

- (i) The suction shroud baghouse exhaust shall be at least 100 feet from any property line.
- (ii) The owner or operator shall not locate or operate stationary equipment, stockpiles, or vehicles used for the operation of the concrete batch plant (except for incidental traffic and the entrance and exit to the site) within 50 feet from any property line.⁸

The record in this matter demonstrates that only entrance/exit road traffic will take place within 50 feet of a Gasmer Yard property line, and supports the proposed Findings of Fact and Conclusions of Law regarding compliance with Special Condition (8)(D).

The Gasmer Yard has two paved driveways that run approximately 350 feet from the unpaved traffic areas of the yard north to Gasmer Drive.⁹ They are shown on two of the aerial photographs in the record in this matter – on page 16 of Applicant's Exhibit No. 2D (the Application), and on Protestant's Exhibit No. 1C. The paved driveways run parallel to one another; the west driveway runs alongside the Gasmer Yard's western property line, and the east driveway is roughly centered in the yard.¹⁰

SCC considered the paved driveways to be "the entrance and exit to the site" when it completed the Application. The driveways:

⁸ Applicant's Ex. No. 2B at 10-11 Par. (8)(D) (CBP Standard Permit) (emphasis added).

⁹ Tr. at 119:8-21 & 120:13 (Miller Cross).

¹⁰ Applicant's Ex. No. 2D at 16 (Application); Protestant's Ex. No. 1C.

- are paved, unlike the rest of the Gasmer Yard roads and traffic areas;¹¹
- are equipped with a fixed sprinkler system, unlike the rest of the Gasmer Yard roads and traffic areas;¹²
- will be regularly swept with the company’s own street sweeper (which can only be used on paved surfaces);¹³ and
- are only used to travel from Gasmer Drive to the unpaved operating areas of the Gasmer Yard, and do not run alongside or through any operating areas of the yard.¹⁴

SCC based its Application representations on this determination, and represented that no vehicles would operate within 50 feet of any property line, except for the entrance and exit to the site, and that it did not intend to install dust-suppressing fencing or some other barrier along the paved entrance/exit driveways.¹⁵

Vehicle traffic that is entering or exiting the Gasmer Yard via one of the paved driveways should qualify for the buffer distance exception for “the entrance and exit to the site.”¹⁶ The driveways are not an operating area of the Gasmer Yard, and are only used to enter and exit the site. If the Commission disagrees with this interpretation of the CBP Standard Permit, however, and concludes that traffic along the westerly paved driveway does not qualify for the exception, SCC can and will close that driveway to all traffic during the operation of the Plant to ensure compliance with its Application representations and permit requirements.

Vehicle traffic associated with the operation of the Plant will comply with the requirements of Special Condition (8)(D). The Protestant’s exceptions relating to vehicle traffic and roads should be overruled.

III. The most-restrictive Application representations regarding the construction and operation of the Plant will be enforceable

The Protestant’s attacks on the Application in this matter include an attempt to manufacture unresolvable conflicts between application representations, when no such unresolvable conflicts exist. Judge Bell correctly found that, where the Application includes different representations within the bounds of the CBP Standard Permit – for example, whether

¹¹ Applicant’s Ex. No. 1 at 9:5-6 (Miller Prefiled).

¹² Applicant’s Ex. No. 1 at 9:6-7 (Miller Prefiled).

¹³ Applicant’s Ex. No. 1 at 9:8-10 (Miller Prefiled).

¹⁴ Tr. at 119:51-21 (Miller Cross); *see also* Protestant’s Ex. No. 2C.

¹⁵ Applicant’s Ex. No. 2D at 13 (Application).

¹⁶ *See* Applicant’s Ex. No. 2B at 10-11 Par. (8)(D) (CBP Standard Permit).

there will be one or two silos at the Plant – the most restrictive representation will be enforceable against SCC.¹⁷ Protestant takes exception to this finding, straining logic and good sense to argue that Judge Bell’s conclusion is “legally erroneous,” based on the rule language in Chapter 116 that makes “all” representations regarding construction plans and operating procedures conditions upon which a standard permit registration is issued.¹⁸

Prior to addressing the Protestant’s exceptions, it is important to recognize a key aspect of the enforceability of application representations under the standard permit program. Like case-by-case new source review (“NSR”) permits, application representations relating to construction plans and operating materials in an application for registration under the standard permit program are enforceable conditions of the authorization. However, the standard permit rules establish important flexibility for standard permit registrants: under TCEQ rules, it is only unlawful to vary from a representation in a standard permit application if that change will affect a person’s right to claim the standard permit.¹⁹ If a standard permit registrant varies from an enforceable representation, but that change does not affect the facility’s eligibility for the standard permit, the registrant has an obligation to notify the ED no later than 30 days after the change.²⁰

The problem with the Protestant’s position regarding the enforceability of standard permit application representations can be illustrated with an example based on the Application: on Table 20 in the Application, SCC represented that the plant will use a single, 40-ton silo,²¹ while two silos are shown on the Application’s process flow diagram.²² (It is important to note that the CBP Standard Permit does not limit the number of silos for qualifying plants; a proposed CBP can qualify for the CBP Standard Permit if it will employ one or two or eight silos, provided the CBP meets the permit’s emissions control and production rate requirements.) The requirement that all representations regarding construction plans and operating procedures become conditions of the authorization does not create the compliance impossibility theorized by the Protestant, where SCC would be out-of-compliance with either one representation or the

¹⁷ Proposed Finding of Fact No. 73.

¹⁸ 30 TEX. ADMIN. CODE § 116.615(2); *see also* Applicant’s Ex. No. 2B at 1 (Standard Permit General Condition No. 2).

¹⁹ 30 TEX. ADMIN. CODE § 116.615(2).

²⁰ *Id.*

²¹ Applicant’s Ex. No. 2D at 28 (Application).

²² Applicant’s Ex. No. 2D at 20-21 (Application).

other. Rather, the fact that both representations are enforceable (because all representations are enforceable) means that SCC will only be in compliance with the enforceable-representations requirement if the silo count does not exceed either representation – that is, by installing one silo. The more-restrictive of the two representations necessarily becomes the limiting representation and the de facto “enforceable” representation, because SCC can only maintain compliance with all representations if it constructs a single silo. Mr. Nelson, testifying on behalf of the ED, took this same position regarding the enforceability of the most-restrictive representation.²³ There is no need for an additional “basis in statute, rule, or case law”²⁴ for this straightforward application of 30 TAC § 116.615(2). The Protestant’s exceptions regarding the enforceability of application representations should be overruled.

Citing its unsupportable position regarding the enforceability of application representations, Protestant argues that SCC’s use of a conservative two-acre stockpile size for purposes of its emissions calculations prevents SCC from demonstrating compliance with the CBP Standard Permit’s minimum buffer distance requirements for stockpiles. The Protestant’s attempt to find a violation of the stockpile buffer distance requirement, however, ignores the record in this matter. SCC represented in the Application that the sand and aggregate stockpiles used for operation of the Plant will meet the buffer distance requirements of Special Condition (8)(D).²⁵ The updated Plot Plan submitted to supplement the Application shows that the two stockpiles will comply with Special Condition (8)(D).²⁶ There is no evidence in the record that the stockpiles to be used in the concrete batching operation will not meet Special Condition (8)(D). Conservatism in emissions calculations cannot be converted into a violation of the CBP Standard Permit’s buffer distance requirements.

IV. The ALJ correctly ruled the CBP Standard Permit’s buffer distance requirements apply only to stockpiles “used for the purpose of the CBP”

The Protestant excepts to Judge Bell’s interpretation and application of the CBP Standard Permit’s minimum buffer distance provision as it relates to the stockpiles at the Gasmer Yard. Specifically, the Protestant takes issue with the conclusion that the CBP Standard Permit’s minimum buffer distance requirements apply only to stockpiles that will be used for the

²³ Applicant’s Ex. No. 5 at 21:6-18, 22:1-23:7, and 70:8-17 (Nelson Deposition).

²⁴ See Protestant’s Exceptions at 6.

²⁵ Applicant’s Ex. No. 2D at 12 (Application).

²⁶ Applicant’s Ex. No. 2D at 35 (Application).

operation of the Plant. The Protestant's view of Special Condition (8)(D)(ii) is inconsistent with the plain reading of the permit, conflicts with the ED's interpretation of its own permit language, and would lead to absurd results.

Special Condition (8)(D), quoted in full above, establishes the minimum buffer distance requirements for CBPs authorized under the CBP Standard Permit. Subparagraph (ii) reads as follows:

The owner or operator shall not locate or operate stationary equipment, stockpiles, or vehicles used for the operation of the concrete batch plant (except for incidental traffic and the entrance and exit to the site) within 50 feet from any property line.²⁷

If a CBP cannot meet the buffer distance requirements of Special Condition (8)(D)(ii) for a road or stockpile, the owner or operator must install dust-suppressing fencing (for roads) or a three-walled bunker (for stockpiles) in accordance with Special Condition (8)(E).²⁸

SCC has operated at the Gasmer Yard since the early 1990s.²⁹ There are existing material stockpiles at the Gasmer Yard associated with other SCC operations at the yard, including a milled asphalt pile and a pile of concrete rubble.³⁰ The existing material stockpiles at the Gasmer Yard will not be used for the operation of the Plant.³¹ Judge Bell confirmed this in Proposed Finding of Fact No. 23, which is not challenged in the Protestant's exceptions. The proposed CBP will have two new material stockpiles: an aggregate stockpile, and a sand stockpile.³² Neither of these stockpiles is currently located at the site.³³ The Protestant's exception is rooted in its position that the minimum buffer distance requirements of Special Condition (8)(D)(ii) should extend to the existing material stockpiles at the Gasmer Yard, even though those existing stockpiles will not be used for the operation of the Plant.

Judge Bell's interpretation of the buffer distance requirement, limiting its applicability to stockpiles used for operation of the CBP, is consistent with both (1) the plain language of Special Condition (8)(D)(ii) and (2) the testimony of Mr. Nelon, the ED's expert witness in this matter.

²⁷ Applicant's Ex. No. 2B at 10-11 Par. (8)(D) (CBP Standard Permit) (emphasis added).

²⁸ Applicant's Ex. No. 2B at 11 Par. (8)(E) (CBP Standard Permit).

²⁹ Applicant's Ex. No. 1 at 3:32 (Miller Prefiled).

³⁰ Applicant's Ex. No. 1 at 3:32-34 (Miller Prefiled); Tr. at 123:23 to 124:4 (Miller Redirect).

³¹ Applicant's Ex. No. 1 at 4:1-3 (Miller Prefiled); Tr. at 124:5-11 (Miller Redirect).

³² Applicant's Ex. No. 2D at 20 (Application); *see also* Applicant's Ex. No. 1 at 5:27-28 (Miller Prefiled); Applicant's Ex. No. 2 at 28:16-26 (Wells Prefiled).

³³ Applicant's Ex. No. 1 at 3:31-34 (Miller Prefiled); Tr. at 156:10-14 (Wells Cross).

Mr. Nelon testified that the CBP Standard Permit's buffer distance requirement applies only to those stockpiles used for purposes of the CBP.³⁴ Protestant argues first that, under principles of statutory construction, deference should only be given to an agency's interpretation if that interpretation "is not inconsistent with language of the condition or plainly erroneous." Mr. Nelon's explanation of the buffer distance requirement is not inconsistent with the permit language or "plainly erroneous"; in fact, Mr. Nelon's interpretation is the plain-language reading of the Special Condition (8)(D)(ii).

Protestant further argues that little deference should be given to Mr. Nelon's interpretation of the buffer distance requirement, because his interpretation of the permit language has not been "promulgated as an official interpretation" by the TCEQ Air Permits Division. This is not an issue of the ED offering up its interpretation of statutory language written by Texas lawmakers; this is the ED offering up its own interpretation of its own permit, by the person who is "primarily responsible for reviewing Air Quality Standard Permit applications for concrete batch plants."³⁵ While the Protestant does not agree with Mr. Nelon's position, the Protestant is unable to point to any authority for its argument that Mr. Nelon's position should be ignored. The absence of a written guidance document should not affect the weight of Mr. Nelon's interpretation of the permit language.

Moreover, the Protestant's position – that any stationary equipment or stockpile on the property is subject to the CBP Standard Permit's buffer distance requirements, regardless of whether that equipment or stockpile will be used for the operation of the CBP – is contrary to principles of statutory construction, because it leads to the absurd results. Texas's Code Construction Act grants deference to administrative construction of the language, and also gives weight to the "consequences of a particular construction."³⁶ As the Protestant would have the Commission interpret Special Condition (8)(D)(ii), no CBP could be authorized under the CBP Standard Permit for any site on which any stationary equipment or stockpile, unrelated to the CBP, was located within 50 feet of a property line, regardless of the size of the property, or the nature of that equipment or stockpile. It only makes sense that the ED, in writing the CBP Standard Permit's buffer distance requirements, would limit the provision to the equipment and

³⁴ Tr. at 288:4-16 (Nelon Cross).

³⁵ ED's Ex. No. ED-1 at 2:21-25 (Nelon Prefiled).

³⁶ TEX. GOV'T CODE § 311.023(5)-(6) (Code Construction Act).

stockpiles that would be used for the operation of the CBP. The contrary interpretation offered up by the Protestant ignores the potentially absurd consequences of the Protestant's interpretation.

The Protestant's exceptions regarding material stockpiles and Judge Bell's analysis of Special Condition (8)(D)(ii) should be overruled.

V. The ALJ correctly found that SCC submitted a complete application

A significant portion of this hearing involved the Protestant attempting to elevate harmless errors in how SCC completed the Core Data Form or other documents, presumably due to a lack of substantive arguments that the Application and proposed Plant fail to meet the requirements of the CBP Standard Permit. The Protestant cannot resist the temptation to do so one last time in its exceptions to the PFD, in this case seizing on the failure to submit a drawing with one of the tables included as part of the Application, despite the ED's insistence that the drawing was not necessary for its review of the Application.

The TCEQ Air Permits Division has promulgated a number of tables that can be used in preconstruction air quality permit applications. Some of these tables relate to control devices, and allow a permit applicant to provide information about the size, design, or operation of a control device to the ED in a uniform matter. One such table is Table 11, regarding Fabric Filters. The CBP Standard Permit calls for applicants to submit a completed, current Table 11, for the fabric filter(s) to be used in controlling dust from a proposed CBP.³⁷ Protestant does not dispute that SCC submitted Table 11, or that SCC omitted necessary information on the face of Table 11; rather, the exception is based on SCC's alleged failure to include an "assembly drawing" of the abatement device in accordance with a note that is found on the bottom of Table 11.

SCC completed and submitted a copy of Table 11 as part of the Application.³⁸ SCC also submitted a page of manufacturer's specifications about the central dust collector that it intends to use at the Plant that included photographs of the dust collector.³⁹ SCC did not attach an "assembly drawing" of the baghouse showing how the parts of the baghouse fit together. Mr.

³⁷ Applicant's Ex. No. 2B at 5 Par. (3)(A) (CBP Standard Permit).

³⁸ Applicant's Ex. No. 2D at 27 (Application).

³⁹ Applicant's Ex. No. 2D at 31 (Application).

Nelon testified that application forms like Table 11 are used for many different permit applications, and that the ED does not need or require such drawings for the technical review of an application for registration under the CBP Standard Permit.⁴⁰ It makes sense that the Air Permits Division would demand less detail about the baghouse to be used for a CBP to be authorized under the CBP Standard Permit, even though it might find that additional detail necessary for other permit applications: CBPs are consistent in design and operation (making them a good candidate for a standard permit authorization), and the CBP Standard Permit establishes specific requirements regarding the design and performance of the fabric filters used to control dust from facilities to be authorized under the permit.⁴¹ By contrast, in an application for a case-by-case NSR permit, the absence of pre-established permit requirements for the baghouse gives an applicant greater flexibility and may necessitate that additional detail regarding the baghouse be submitted to the Air Permits Division in order to confirm that the fabric filter baghouse will meet best available control technology (“BACT”) requirements.

SCC submitted a copy of Table 11 as part of the Application.⁴² The ED did not request additional drawings of the fabric filter baghouse during the technical review of the Application. The ED had sufficient information to confirm that the proposed baghouse would comply with the requirements of the CBP Standard Permit.⁴³ The Protestant’s exception regarding the “administrative requirements” of CBP Standard Permit Special Condition (3)(A) elevates form over substance. It is notable that, in its exceptions, the Protestant never once identifies the type of abatement device covered by Table 11, or the function of that device. Even more importantly, the Protestant has not made any argument or claim regarding the adequacy of the central baghouse that SCC described on Table 11 and that SCC proposes to use to control emissions from the Plant.

The Protestant’s exception regarding Special Condition (3)(A) is not about pollution control, but rather paperwork, as Protestant argues for the submittal of a drawing that the ED determined was not necessary to confirm that the baghouse described in the Application would meet the requirements of the CBP Standard Permit. Protestant’s exception regarding Special Condition (3)(A) and Table 11 should be overruled.

⁴⁰ Tr. at 308:1-12 (Nelon Cross).

⁴¹ Applicant’s Ex. No. 2B at 5 Par. (5)(A)-(B) (CBP Standard Permit).

⁴² Applicant’s Ex. No. 2D at 27 (Application).

⁴³ Tr. at 308:1-12 (Nelon Cross).

VI. Conclusion

The record in this matter demonstrates that the temporary CBP that SCC proposes to locate on the Gasmer Yard will satisfy the requirements for authorization under the CBP Standard Permit, the Texas Clean Air Act, and TCEQ rules.

SCC respectfully requests that the Commission issue an Order overruling the exceptions filed by the Protestant, approving the Application, and issuing Standard Permit Registration No. No. 119443L001 to authorize SCC's construction and operation of the Plant at the Gasmer Yard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on the following parties of record in this case on October 12, 2015.

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