7045.0612 FINANCIAL ASSURANCE FOR FACILITY CLOSURE.

Subpart 1. **In general.** An owner or operator of a facility shall establish financial assurance for closure of the facility by choosing from the options specified in subparts 2 to 6.

Subp. 2. **Closure trust fund.** Requirements for closure trust funds are as follows:

A. An owner or operator may satisfy the requirements of this rule by establishing a closure trust fund which conforms to the requirements of items A to M, and by submitting an originally signed duplicate of the trust agreement to the commissioner. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

B. The wording of the trust agreement must be identical to the wording specified in part 7045.0524, subpart 1, item A, and the trust agreement must be accompanied by a formal certification of acknowledgment as shown in part 7045.0524, subpart 1, item B. Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current closure cost estimate covered by the agreement.

C. Payments into the trust fund must be made annually by the owner or operator of a facility required to establish financial assurance for closure under Code of Federal Regulations, title 40, part 265, subpart H (1983) over the 20 years beginning the effective date of Code of Federal Regulations, title 40, section 265.143 (1983), or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund must be made as described in subitems (1) and (2):

(1) The first payment must be made by the effective date of Code of Federal Regulations, title 40, section 265.143 (1983), except as provided in item F. The first payment must be at least equal to the current closure cost estimate, except as provided in subpart 7, divided by the number of years in the pay-in period.

(2) Subsequent payments must be made no later than 30 days after each anniversary date of the first payment.

D. Payments into the trust fund must be made annually by the owner or operator of a facility which was not required to establish financial assurance for closure under Code of Federal Regulations, title 40, part 265, subpart H (1983) but is required to establish financial assurance for closure under these parts over the 20 years beginning with July 16, 1984, or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. The first payment must be made within 90 days of July 16, 1984. The first payment must be at least equal to the current closure cost estimate, except as provided in subpart 7, divided by the number of years in the pay-in period. Subsequent payments must be made as specified in item C, subitem (2). The amount of each subsequent payment must be determined by this formula:

$$\text{next payment} = \frac{CE-CV}{Y}$$

where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

E. The owner or operator may accelerate payments into the trust fund or may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he or she shall maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in item C or D.

F. If the owner or operator establishes a closure trust fund after having used one or more alternate mechanisms specified in this part, the first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in item C or D.

G. After the pay-in period is completed, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate and submit a receipt from the trustee for this payment to the commissioner, or obtain other financial assurance as specified in this part to cover the difference.

H. If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the commissioner for release of the amount in excess of the current closure cost estimate.

I. If an owner or operator substitutes other financial assurance as specified in this part for all or part of the trust fund, he or she may submit a written request to the commissioner for release of the amount in excess of the current closure cost estimate covered by the trust fund.

J. The trustee shall notify the owner or operator and the commissioner by certified mail within ten days following the expiration of the 30-day period after the anniversary of the establishment of the trust, if no payment is received from the owner or operator during that period. Within 60 days after receipt by both the owner or operator and the commissioner of a notice of nonpayment of any payment required by this part, the owner or operator shall:

(1) make the required payment;

(2) provide alternative financial assurance as specified in this part and obtain the commissioner's written approval of the assurance provided; or

(3) stop accepting waste and begin closure of the facility.

K. Within 60 days after receiving a request from the owner or operator for release of funds as specified in item H or I, the commissioner shall instruct the trustee to release to the owner or operator funds as the commissioner specifies in writing.

L. After beginning partial or final closure, an owner or operator or any other person authorized to perform partial or final closure may request reimbursement for partial or final closure expenditures by submitting itemized bills to the commissioner. The owner or operator may request reimbursements for partial closure only if sufficient funds remain in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for partial or final closure activities, the commissioner shall determine whether the partial or final closure expenditures comply with the closure plan or are otherwise justified, and if so, the commissioner shall instruct the trustee to make reimbursement in amounts as the commissioner specifies in writing. If the commissioner has reason to believe that the maximum cost of closure will be significantly greater than the value of the trust fund, the commissioner may withhold reimbursement of the amounts as deemed prudent until it is determined, under subpart 9, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the commissioner withholds reimbursement, the commissioner shall provide the owner or operator with a detailed written statement of reasons.

M. The commissioner shall agree to termination of the trust if:

(1) an owner or operator substitutes alternate financial assurance as specified in this part; or

(2) the commissioner releases the owner or operator from the requirements of this part in accordance with subpart 9.

Subp. 3. **Surety bond guaranteeing payment into a closure trust fund.** Requirements for surety bonds that guarantee payment into a closure trust fund are as follows:

A. An owner or operator may satisfy the requirements of this part by obtaining a surety bond which conforms to the requirements of items A to I, and by submitting the bond to the commissioner. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in Circular 570, issued by the United States Department of the Treasury, as published annually in the Federal Register on July 1.

B. The wording of the surety bond must be identical to the wording specified in part 7045.0524, subpart 2.

C. The owner or operator who uses a surety bond to satisfy the requirements of this part, shall also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the commissioner. This standby trust fund must meet the requirements specified in subpart 2 except that: an originally signed duplicate of the trust agreement must be submitted to the commissioner with the surety bond; and until the standby trust fund is funded pursuant to the requirements of subpart 3, the requirements specified in subitems (1) to (4) are not required:

(1) payments into the trust fund as specified in subpart 2;

(2) updating of Schedule A of the trust agreement to show current closure cost estimates;

(3) annual valuations as required by the trust agreement;

(4) notices of nonpayment as required by the trust agreement.

D. The bond must guarantee that the owner or operator will:

(1) fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility;

(2) fund the standby trust fund in an amount equal to the penal sum within 15 days after an order to begin final closure is issued by the commissioner, the agency, or a court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this rule and obtain the commissioner's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the commissioner of a notice of cancellation of the bond from the surety.

E. Under the terms of the bond, the surety becomes liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

F. The penal sum of the bond must be in an amount at least equal to the current closure cost estimate, except as provided in subpart 7.

G. Whenever the current closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, shall either cause the penal sum to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the commissioner, or obtain other financial assurance as specified in this rule to cover the increase. Whenever the current closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure cost estimate following written approval by the commissioner.

H. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the commissioner. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the commissioner, as evidenced by the return receipts.

I. The owner or operator may cancel the bond if the commissioner has given prior written consent based on receipt of evidence of alternate financial assurance as specified in this part.

Subp. 4. **Closure letter of credit.** Requirements for closure letters of credit are as follows:

A. An owner or operator may satisfy the requirements of this part by obtaining an irrevocable standby letter of credit which conforms to the requirements of items A to J, and by submitting the letter to the commissioner. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency.

B. The wording of the letter of credit must be identical to the wording specified in part 7045.0524, subpart 4.

C. An owner or operator who uses a letter of credit to satisfy the requirements of this part shall also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the commissioner, shall be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the commissioner. This standby trust fund must meet the requirements of the trust fund specified in subpart 2 except that: an originally signed duplicate of the trust agreement must be submitted to the commissioner with the letter of credit; and unless the standby trust fund is funded according to this subpart, the requirements specified in subitems (1) to (4) are not required:

(1) payments into the trust fund as specified in subpart 2;

(2) updating of Schedule A of the trust agreement to show current closure cost estimates;

(3) annual valuations as required by the trust agreement;

(4) notices of nonpayment as required by the trust agreement.

D. The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the identification number, name, and address of the facility, and the amount of funds assured for closure of the facility by the letter of credit.

E. The letter of credit must be irrevocable and issued for a period of at least one year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the commissioner, by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days begins on the date when both the owner or operator and the commissioner have received the notice, as evidenced by the return receipts.

F. The letter of credit must be issued in an amount at least equal to the current closure cost estimate, except as provided in subpart 7.

G. Whenever the current closure cost estimate increases to an amount greater than the amount of the credit, the owner or operator, within 60 days after the increase, shall either cause the amount of the credit to be increased so that it at least equals the current closure cost estimate and submit evidence of such increase to the commissioner or obtain other financial assurance as specified in this part to cover the increase. Whenever the current closure cost estimate decreases, the amount of the credit may be reduced to the amount of the current closure cost estimate following written approval by the commissioner.

H. Following a determination by the commissioner that the owner or operator has failed to perform final closure in accordance with the closure plan and other interim status requirements when required to do so, the commissioner may draw on the letter of credit.

I. If the owner or operator does not establish alternate financial assurance as specified in this part and obtain written approval of the alternate assurance from the commissioner within 90 days after receipt by both the owner or operator and the commissioner of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the commissioner shall draw on the letter of credit. The commissioner may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of an extension the commissioner shall draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this part and obtain written approval of such assurance from the commissioner.

J. The commissioner shall return the letter of credit to the issuing institution for termination if:

(1) an owner or operator substitutes alternate financial assurance as specified in this part; or

(2) the commissioner releases the owner or operator from the requirements of this part in accordance with subpart 9.

Subp. 5. **Closure insurance.** Requirements for closure insurance are as follows:

A. An owner or operator may satisfy the requirements of this rule by obtaining closure insurance which conforms to the requirements of items A to J, and by submitting a certificate of the insurance to the commissioner by July 16, 1984. By July 16, 1984, the owner or operator of a facility which is not required to establish financial assurance for closure under Code of Federal Regulations, title 40, part 265, subpart H (1983) but is required to establish financial assurance for closure under these parts shall submit to the commissioner a letter from an insurer stating that the insurer is considering issuance of closure insurance conforming to the requirements of items A to J to the owner or operator. Within 90 days after July 16, 1984, the owner or operator of a facility which is not required to establish financial assurance for closure under Code of Federal Regulations, title 40, part 265, subpart H (1983) but is required to establish financial assurance for closure under these parts shall submit the certificate of insurance to the commissioner, or establish other financial assurance as specified in this part. The insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

B. The wording of the certificate of insurance must be identical to the wording specified in part 7045.0524, subpart 5.

C. The closure insurance policy must be issued for a face amount at least equal to the current closure cost estimate, except as provided in subpart 7. The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer do not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

D. The closure insurance policy must guarantee that funds will be available to close the facility whenever final closure occurs. The policy must also guarantee that once final closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the commissioner, to such party or parties as the commissioner specifies.

E. After beginning partial or final closure, an owner or operator, or other person authorized to perform closure, may request reimbursement for closure expenditures by submitting itemized bills to the commissioner. The owner or operator may request reimbursements for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its operating life. Within 60 days after receiving bills for closure activities, the commissioner shall determine whether the closure expenditures are in accordance with the closure plan or otherwise justified, and if so, the commissioner shall instruct the insurer to make reimbursement in the amounts the commissioner specifies in writing. If the commissioner has reason to believe that the maximum cost of closure will be significantly greater than the face amount of the policy, the commissioner may withhold reimbursement of the amounts deemed prudent until it is determined in accordance with subpart 9 that the owner or operator is no longer required to maintain financial assurance for closure of the facility. If the commissioner withholds reimbursement, the commissioner shall provide the owner or operator with a detailed written statement of reasons.

F. The owner or operator shall maintain the policy in full force and effect until the commissioner consents to termination of the policy by the owner or operator as specified in item J.

G. Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. The assignment may be conditional upon consent of the insurer, if the consent is not unreasonably refused.

H. The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the commissioner. Cancellation, termination, or failure to renew may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the commissioner and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect if on or before the date of expiration one or more of the events specified in subitems (1) to (5) occurs:

(1) the agency deems the facility abandoned;

(2) interim status is terminated or revoked;

(3) closure is ordered by the commissioner, the agency, or a court of competent jurisdiction;

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under United States Code, title 11, Bankruptcy;

(5) the premium due is paid.

I. Whenever the current closure cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within 60 days after the increase, shall either cause the face amount to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the commissioner, or obtain other financial assurance as specified in this part to cover the increase. Whenever the current closure cost estimate decreases, the face amount may be reduced to the amount of the current closure cost estimate following written approval by the commissioner.

J. The commissioner shall give written consent to the owner or operator to terminate the insurance policy if:

(1) an owner or operator substitutes alternate financial assurance as specified in this part; or

(2) the commissioner releases the owner or operator from the requirements of this part in accordance with subpart 9.

Subp. 6. **Financial test and corporate guarantee for closure.** The financial test and corporate guarantee for closure is as follows:

A. An owner or operator may satisfy the requirements of this part by demonstrating passage of a financial test as specified in items A to L. To pass this test the owner or operator shall meet the criteria of either item B or C.

B. The owner or operator shall have:

(1) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5;

(2) net working capital and tangible net worth each at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimate for class I underground injection control (UIC) facilities, if applicable;

(3) tangible net worth of at least $10,000,000; and

(4) assets in the United States amounting to at least 90 percent of his or her total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimate for class I underground injection control (UIC) facilities, if applicable.

C. The owner or operator shall have:

(1) a current rating for his or her most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(2) tangible net worth at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimate for class I underground injection control (UIC) facilities, if applicable;

(3) tangible net worth of at least $10,000,000; and

(4) assets located in the United States amounting to at least 90 percent of his or her total assets or at least six times the sum of the current closure and postclosure cost

estimates and the current plugging and abandonment cost estimate for class I underground injection control (UIC) facilities, if applicable.

D. The phrase "current closure and postclosure cost estimates" as used in items A to C refers to the cost estimates required to be shown in paragraphs 1 to 4 of the letter from the owner's or operator's chief financial officer, as specified in part 7045.0524, subpart 6. The phrase "current plugging and abandonment cost estimate" as used in items A to C means the cost estimates required to be shown in paragraphs 1 to 4 of the letter from the owner's or operator's chief financial officer as specified in Code of Federal Regulations, title 40, section 144.70(f).

E. To demonstrate that he or she meets this test, the owner or operator shall submit the following items to the commissioner:

(1) a letter signed by the owner's or operator's chief financial officer and worded as specified in part 7045.0524, subpart 6;

(2) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that: he or she has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in the financial statements; and in connection with that procedure, no matters came to his or her attention which caused him or her to believe that the specified data should be adjusted.

F. The owner or operator of a facility which is not required to establish financial assurance for closure under Code of Federal Regulations, title 40, part 265, subpart H (1983) but is required to establish financial assurance for closure under these rules may obtain an extension of the time allowed for submission of the documents specified in item E if the fiscal year of the owner or operator ends during the 90 days prior to July 16, 1984, and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension ends no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer shall send, by July 16, 1984, a letter to the commissioner. This letter from the chief financial officer must:

(1) request the extension;

(2) certify that the financial officer has grounds to believe that the owner or operator meets the criteria of the financial test;

(3) specify for each facility to be covered by the test the identification number, name, address, and current closure and postclosure cost estimates to be covered by the test;

(4) specify the date ending the owner's or operator's last complete fiscal year before July 16, 1984;

(5) specify the date, no later than 90 days after the end of such fiscal year, when the financial officer will submit the documents specified in item E; and

(6) certify that the year-end financial statements of the owner or operator for the fiscal year will be audited by an independent certified public accountant.

G. After the initial submission of items specified in item E, the owner or operator shall send updated information to the commissioner within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in item E.

H. If the owner or operator no longer meets the requirements of item A, he or she shall send notice to the commissioner of intent to establish alternate financial assurance as specified in this part. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of the fiscal year.

I. The commissioner may, based on a reasonable belief that the owner or operator may no longer meet the requirements of item A, require reports of financial condition at any time from the owner or operator in addition to those specified in item E. If the commissioner finds, on the basis of these reports or other information, that the owner or operator no longer meets the requirements of item A, the owner or operator shall provide alternate financial assurance as specified in this part within 30 days after notification of the finding.

J. The commissioner may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his or her report on examination of the owner's or operator's financial statements, required by item E, subitem (2). An adverse opinion or disclaimer of opinion will be cause for disallowance. The commissioner shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this part within 30 days after notification of the disallowance.

K. The owner or operator is no longer required to submit the items specified in item E if:

(1) an owner or operator substitutes alternate financial assurance as specified in this part; or

(2) the commissioner releases the owner or operator from the requirements of this part in accordance with subpart 9.

L. An owner or operator may meet the requirements of this part by obtaining a written guarantee, hereafter referred to as "corporate guarantee." The guarantor must be the parent corporation of the owner or operator. The guarantor must meet the requirements for owner or operator in items A to J; and must comply with the terms of the corporate guarantee. The wording of the corporate guarantee must be identical to the wording specified in part 7045.0524, subpart 8. A certified copy of the corporate guarantee must accompany the items sent to the commissioner as specified in item E. The terms of the corporate guarantee must provide that:

(1) If the owner or operator fails to perform final closure of a facility covered by the corporate guarantee in accordance with the closure plan and other interim status requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in subpart 2 in the name of the owner or operator.

(2) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the commissioner. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the commissioner, as evidenced by the return receipts.

(3) If the owner or operator fails to provide alternate financial assurance as specified in this part and obtain the written approval of the alternate assurance from the commissioner within 90 days after receipt by both the owner or operator and the commissioner of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide the alternate financial assurance in the name of the owner or operator.

Subp. 7. **Use of multiple financial mechanisms.** An owner or operator may satisfy the requirements of this part by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in subparts 2 to 5, respectively, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he or she may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The commissioner may use any or all of the mechanisms to provide for closure of the facility.

Subp. 8. **Use of a financial mechanism for multiple facilities.** An owner or operator may use a financial assurance mechanism specified in this part to meet the requirements of this part for more than one facility. Evidence of financial assurance submitted to the commissioner must include a list showing, for each facility, the identification number, name, address, and the amount of funds for closure assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure of any of the facilities covered by the mechanism, the commissioner may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

Subp. 9. **Release of the owner or operator from requirements of this part.** Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been accomplished in accordance with the closure plan, the commissioner shall notify the owner or operator in writing that he or she is no longer required by this part to maintain financial assurance for final closure of the particular facility, unless the agency has reason to believe that closure has not been in accordance with the closure plan. The commissioner shall provide the owner or operator a detailed written statement of any reason to believe that closure has not been in accordance with the approved closure plan.

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