

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RECREATIONAL FISHING ALLIANCE, INC.,
Plaintiff,

Case No. 3:09-cv-1187-J-20JRK

v.
THE NATIONAL MARINE FISHERIES SERVICE,
Defendant.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Recreational Fishing Alliance, Inc., Inc. (RFA), by and through its undersigned counsel, brings this action against Defendant, National Marine Fisheries Service (NMFS), and alleges:

INTRODUCTION AND JURISDICTION

1. This Court has subject-matter jurisdiction over this action and the parties under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (“APA”); and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 U.S.C. § 1801 et seq. (hereafter referred to as the “MSA”). District Courts of the United States have exclusive jurisdiction over any case or controversy arising under the MSA, 16 U.S.C. §1861(d). The MSA provides that regulations promulgated under the statute shall be subject to judicial review “if a petition for such review is filed within thirty [30] days of the date on which the regulations are promulgated or action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855(f) (1). The APA provides that: “persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof.” 5 U.S.C. §702. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in 1 court are subject to judicial review.” 5 U.S.C. §704. In an APA suit, the reviewing court shall “hold unlawful and set aside agency actions, findings, and conclusions to be found (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . (C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; [or] (D) without observance of procedure required by law. . . .” 5 U.S.C. § 706(2).

2. The Recreational Fishing Alliance is a New Jersey corporation is a marine conservation group with members throughout the United States. The RFA’s membership consists of recreational and commercial fishermen, conservationists, bait and tackle store owners, dive shop operators, fishing equipment manufacturers, marina owners, boat retailers, boat repairmen, and divers. A number of RFA's members live along the South Atlantic Ocean and fish its waters. Many of its members seek to catch Red Snapper, and RFA has been actively involved in the management of various South Atlantic fisheries including Red Snapper since its inception. It has participated in the development of many of the regulations and measures governing the Atlantic now in place and has generally supported efforts to enact recovery plans for at-risk fish in the Atlantic Ocean. RFA's members are directly and adversely affected by the actions of which it complains.

3. Defendant NMFS is an agency of the United States government with primary responsibility for management of marine fisheries. NMFS manages those fisheries by administering the Magnuson-Stevens Act and performing NEPA compliance on its Magnuson-Stevens Act actions. NMFS, under the Magnuson-Stevens Act has been delegated the responsibility to manage the United States marine fisheries through Fishery

Management Plans (“FMP”), FMP amendments and regulations implementing those FMPs and FMP amendments. Since NMFS is responsible for the Snapper Grouper Fishery Management Plan which governs the Red Snapper fishery, NMFS has final management authority over Red Snapper in the Atlantic Ocean. NMFS is the federal agency that approved the Red Snapper Interim Rule, which is the subject of this Complaint. NMFS is a sub-agency of NOAA within the United States Department of Commerce.

4. The Red Snapper fishery is conducted off the South Eastern coast of the United States in the EEZ. The Red Snapper fishery is both a commercial and recreational fishery.

5. Amendment 4 in 1991 set the present minimum size limit of 20” and bag limit of 2 per person, per day.

FACTUAL BACKGROUND

6. The recreational take of Red Snapper in the Atlantic Ocean in federal waters (beyond 3 nautical miles) is governed by a Fishery Management Plan (“FMP”), which is amended from time to time based in part on stock assessments. FMPs must balance the needs of fishery users against conservation principles by reference to ten national standards (“National Standards”). 16 U.S.C. §1851(a). Regional councils submit FMPs to the Secretary of Commerce, who acts through NMFS. NMFS solicits public comment and reviews the FMPs to ensure they are consistent with the National Standards and other applicable laws. 16 U.S.C. §§1852(h)(1), 1854(a)(1)-(2). The National Standard guidelines promulgated to assist in development of FMPs and amendments to FMPs state that “[t]he

national standards are statutory principles that must be followed in any fishery management plan.” 50 C.F.R. §600.305. If a FMP plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. §1854(a)(3).

7. The present controversy arises in connection with the Red Snapper Interim Rule published December 4, 2009 requiring a closure of the Red Snapper fishery effective January 4, 2010. The Interim Rule purports to implement some of the 2006 amendments to the MSA which were enacted January 12, 2007. Some of the MSA requirements at issue in this action are Annual Catch Limits (“ACLs”) and Accountability Measures (“AMs”).

8. The fundamental flaw in Red Snapper Interim Rule is that NMFS wants the power and flexibility to close fisheries when an ACL is reached without meeting the preconditions Congress has imposed on such an expansive power. In the MSRA, Congress delayed the requirements for ACLs and AMs until 2010 based on the notion that NMFS would be basing decisions on vastly-improved sources of data by January 1, 2009. NMFS is attempting to cherry-pick those portions of the MSA and the National Standards that it likes, while ignoring the portions that do not fit its predetermined goals. This a la carte usage of the MSA and the National Standards is another clear example of the arbitrary and capricious methods used by NMFS in enacting this Interim Rule and the general practices it uses in management of the fisheries.

9. The MSRA was signed into law and went into effect on January 12, 2007. See Public Law 100–479, 120 Stat. 3575. The MSA, in the form as originally enacted in 1976, required that NMFS collect statistics for measuring effort and total catch. NMFS

commenced the Marine Recreational Fishing Statistical Survey ("MRFSS") program in 1979, which relies on dock intercepts and random telephone surveys.

10. MRFSS was not designed to provide real-time data to determine whether a quota is exceeded or an ACL is reached. NMFS has acknowledged that the MRFSS system was never intended to be used for such purposes and its data is flawed.

11. In 2006, Congress found that MRFSS was flawed and required NMFS to take very specific actions to correct it by January 1, 2009. See 16 U.S.C. § 1881(g) ("The Secretary shall complete the program under this paragraph and implement the improved Marine Recreational Fishery Statistics Survey not later than January 1, 2009")

The MSA requires in pertinent part:

(A) Improvement of the Marine Recreational Fishery Statistics Survey. Within 24 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 [enacted Jan. 12, 2007], the Secretary, in consultation with representatives of the recreational fishing industry and experts in statistics, technology, and other appropriate fields, shall establish a program to improve the quality and accuracy of information generated by the Marine Recreational Fishery Statistics Survey, with a goal of achieving acceptable accuracy and utility for each individual fishery.

(B) The NRC concluded that:

The designs, sampling strategies, and collection methods of recreational fishing surveys do not provide adequate data for management and policy decisions. Unknown biases in the estimators from these surveys arise from reliance on unverified assumptions. Unless these assumptions are tested

and the degree and direction of bias reasonably estimated, the extent to which the biases affect final estimates will remain unknown. The statistical properties associated with data collected through different survey techniques differ and are often unknown. The current estimators of error associated with various surveys products are likely to be biased and too low. It is necessary at a minimum to determine how those differences affect survey results that use differing methods.

(National Research Council, Review of Recreational Fisheries Survey Methods (2006))

(C) NRC report recommendations. The program shall take into consideration and, to the extent feasible, implement the recommendations of the National Research Council in its report Review of Recreational Fisheries Survey Methods

(2006), including—

(i) redesigning the Survey to improve the effectiveness and appropriateness of sampling and estimation procedures, its applicability to various kinds of management decisions, and its usefulness for social and economic analyses; and

(ii) providing for ongoing technical evaluation and modification as needed to meet emerging management needs

16 U.S.C. 1881(g)(3)

12. Cornell Professor Dr. Patrick Sullivan, Chairman of the NRC and co-author of the report deemed MRFSS “fatally flawed”

13. The Congressional requirement to fix the broken MRFSS system has not been accomplished as required. A proposed system called the Marine Recreational Information Program (MRIP) is the NMFS response to this and was released by NMFS on December 23, 2008. The implementation has not occurred and will not be effective until some unknown date and data from the system will not be available for a considerable time after that date.

14. The requirement of a system that provides reliable data is central to the time requirements of the MSA for the implementation of new regulations and the deadlines imposed. In ignoring the deadlines imposed by Congress, NMFS has shown its contempt for the requirements of the MSA and has acted arbitrarily and capriciously in continuing to implement regulations based upon what has been proven to be incomplete and incorrect data. This Interim Rule will force businesses to close and cost thousands of Americans who rely on those businesses for their livelihood their jobs and cripple communities.

15. NMFS is not in compliance with section 1881(g) and should be prohibited from implementing the accountability measure contained in the Red Snapper Interim Rule unless the data on which it is based meets the standards set forth under the MSA.

16. The data improvements mandated by the MSA are clear:

Unless the Secretary determines that alternate methods will achieve this goal more efficiently and effectively, the program shall, to the extent possible, include—

(i) an adequate number of intercepts to accurately estimate recreational catch and effort;

(ii) use of surveys that target anglers registered or licensed at the State or Federal level to collect participation and effort data;

(iii) collection and analysis of vessel trip report data from charter fishing vessels;

(iv) development of a weather corrective factor that can be applied to recreational catch and effort estimates; and

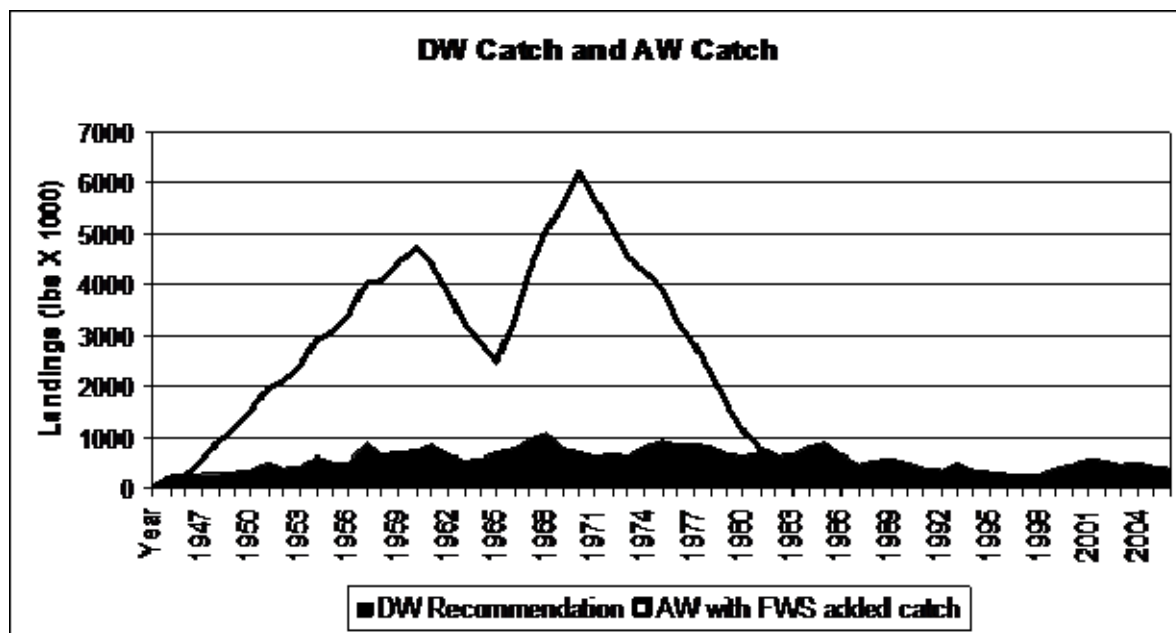
(v) an independent committee composed of recreational fishermen, academics, persons with expertise in stock assessments and survey design, and appropriate personnel from the National Marine Fisheries Service to review the collection estimates, geographic, and other variables related to dockside intercepts and to identify deficiencies in recreational data collection, and possible correction measures.

16 U.S.C. § 1881.

17. Even without the mandate of the MSA to improve the quality of the data on which FMPs are based, the Red Snapper Interim Rule and the underlying Red Snapper stock assessment are not based on the best available science.

18. The National Standards in the MSA required that that “conservation and management measures . . . be based upon the best scientific information available.” 16 U.S.C. §1851(a)(2).

19. Dr. Frank Hester has provided testimony to the South Atlantic Fishery Management Council regarding the errors in the data and analysis. This clearly shows that the best available science was not used in drafting the Red Snapper Interim Rule. The following chart clearly shows the serious flaws in the historical data and the errors that were made in the extrapolation of the data by the NMFS. There is no reasonable data to defend the spike that has been set as peaking in 1960's and 1970's.



The Chart above shows that the error was made in the extrapolation of the Red Snapper stocks prior from 1980 to 1945. The spiked top line shows the erroneous NMFS extrapolation, the straight bottom line shows Dr. Hester's analysis.

20. The Fisheries Management Plan (FMP) for South Atlantic Red Snapper is not based on the best available science.

a) The Sustainable Fisheries Act requires that Fisheries Management Plans be based on the best available science. The agency has certified (Federal Register /Vol. 74, No. 232 / Friday, December 4, 2009 /Rules and Regulations 63673, DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration, 50 CFR Part 622 [Docket No. 090508900-91414-02] RIN 0648-AX75, Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Red Snapper Closure) that this fisheries

management plan for South Atlantic Red Snapper is based on the best available science. This is false.

b) This FMP is the product of three workshops conducted during SEDAR 15. The first of these workshops was the Data Workshop (DW) during which biologists and fishery scientists familiar with the available data and its quality recommended what data should be used in the assessment for this stock.

c) The second of these workshops was the Assessment Workshop (AW) during which mathematicians and statisticians conducted the actual assessment and prepared the stock status benchmarks and the projections for various future management scenarios.

d) The third these workshops was the Review Workshop (RW) during which independent scientists reviewed the assessment to assure it met the terms of reference for SEDAR 15, that the assessment was technically correct, and to request clarification if deemed necessary and make recommendations for any changes that they believed were required.

e) One of the recommendations make by the DW was that data for the years 1960, 1965 and 1970 derived from polling surveys of US recreational fisheries by the US Fish and Wildlife Service (FWS) should not be used because the data collection methodology was flawed. However, the AS decided to use these data regardless of this recommendation by the DW.

f) The reason was that the AW desired to begin the assessment with the year 1945. Data on catch-at-age for the fishery was completely lacking prior to 1972. In order to conduct the assessment beginning in 1945, it was necessary to fabricate an

input table of catches-at-age for fish in the period prior to 1972. The AW did this by using the three years of survey data from FWS,

g) The FWS data sets provides estimates for a number of components of the national recreational fisheries by species, area, fishing type, numbers of anglers, and annual total catch in weight and in number. Of interest to SEDAR 15 were catch in weight and number of red snapper for each of the three years.

To prepare catch-at-age tables, the AW modeled part of the FWS data set for the estimated weight of the catches for the 1960, 1965, and 1970, using a theoretical distribution of ages in the stock for each year and extrapolated and interpolated to prepare a catch-at-age table for the early three decades when there were no data. In doing this, they ignored the second half of the FWS catch data for red snapper, which was catch in numbers of fish. These numbers were not needed to prepare the table; however, customary scientific best practice would have required that the number of fish in each of the three years that were estimated by the model using the catch by weight be compared to the numbers in the FWS data as a check on the modeling.

h) This clearly was not done because the actual results were very different from the numbers provided by the Fish and Wildlife Service for catch by number. (See tables.) The failure to make the comparison may have been due to carelessness or the comparison was made and deliberately ignored is uncertain. Whatever the reason, the review workshop also failed to make the comparison. Thus, the assessment and FMP preceded using only one half of the FWS data set, and the benchmarks are clearly wrong.

When this mistake was discovered over a year later during an outside review of the assessment for the clients, the National Marine Fisheries Service responded to the revelation by stonewalling the problem. They have refused official comment on the contention that the South Atlantic Red Snapper FMP is not based on the best available science. The unfortunate result is that the entire South Atlantic bottom fisheries for all species will be shut down beginning in January 2010 despite the fact that the FMP is fatally flawed, and despite the fact that recent preliminary analyses conducted by NMFS indicate that such draconian measures are unnecessary

21. The Assessment Workshop modeling is flawed in that:

a. The selectivity used for all sectors in the fishery from 1945 until the first size limit in 1983 assumed that all fish age two or older are equally vulnerable to all sectors in the fishery: Commercial Handline, Headboats, Charter Boats and Private Boats.

b. The Assessment Workshop ignored the fact that there is no size data before 1972, and therefore there is no way to know how well model results represent the actual size and age composition of the population in any of these early years

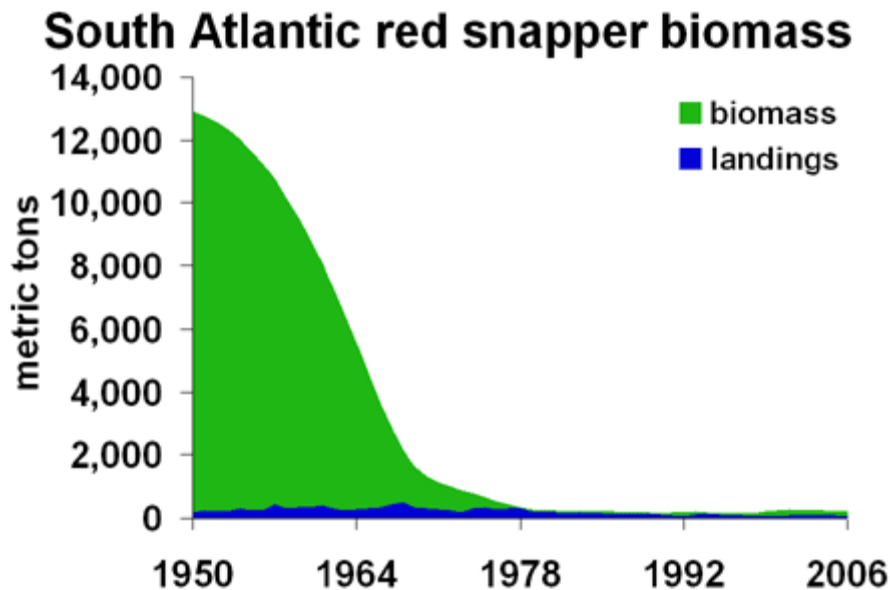
c. The Assessment Workshop made additional baseless assumptions about the ratio of yellowtail to red snapper in the catch for and obtained numbers for 1960

d. The Assessment Workshop ignored the numbers provided in the FWS survey regarding the number of fish caught in addition to total weight.

22. The FWS data was used to set the benchmarks without addressing the

the discrepancies between catch weights and catch numbers, the discrepancies need to be resolved or the FWS data not included in the assessment as was the original recommendation by the Data Workshop.

23. The following chart shows the error in the mathematical analysis in the calculations of the extrapolation of Red Snapper biomass prior to 1980. The error is reflected in the massive reduction in the biomass while the landings stay relatively consistent.



(source: NOAA Fishwatch January 2010)

24. Recreational fishing effort has declined since 2004.
25. The Red Snapper stock assessment (SEDAR 15) completed in 2008 was based on MRFSS' estimate of fishing effort from 2006 and before.
26. NMFS ignored evidence that the reduction in take for Red Snapper had already been achieved before Red Snapper Interim Rule was finalized.
27. During public hearings, the Council received testimony that a large percent of reduction has already been achieved through reductions in recreational effort due to

high fuel prices, economic downturn and other factors, but a reliable value to assign to this reduction could not be determined.

28. The Red Snapper stock assessment is erroneous in that it overestimates dead discards and release mortality by the recreational sector. The NMFS has arbitrarily set a 40% release mortality figure without any scientific basis, this method has been criticized by the NRC when it stated "Unknown biases in the estimators from these surveys arise from reliance on unverified assumptions"

29. There is not a scheduled stock reassessment for Red Snapper according to the currently published SEDAR Assessment Update Schedule. Yet, NMFS has failed to comply with the MSA's requirements to generate and utilize better data that do not produce fatally flawed results. NMFS should not be permitted to pass regulations until such time as it has complied with the MSA requirements.

30. The methodology of the NMFS is inherently flawed in that it is a designed closed loop system with little to no oversight.

1. NMFS screens council nominees submitted by Governor's
2. NMFS recommends appointments to the Secretary of Commerce
3. NMFS conducts or pays selected grantees for desired research
4. NMFS interprets the research submitted to them
5. NMFS chooses the members of the science and Statistical Committees
6. NMFS helps draft proposed regulations
7. NMFS interprets the regulations
8. NMFS recommends regulations through the council process
9. NMFS approves or rejects council proposed regulations

10. NMFS enforces the regulations

11. NMFS Administrative Judges sentence violators of NMFS regulation.

12. There is no peer review process for the science or analysis.

31. The NMFS and the SAFMC failed to conduct any economic studies or assessment to determine the economic impact on the South Atlantic area communities from the possible alternatives to the enacted regulations as required by the Magnusson Stevens Act. In fact, the SAFMC has not conducted any surveys of the impact on the South Atlantic communities of the closure mandated by this Interim Rule.

32. The NMFS has ignored National Standard 8 in selecting the alternative that maximizes the adverse economic impact on the communities that rely upon fishing for their livelihoods, instead of selecting an alternative that would minimize the economic impact as required by National Standard 8.

National Standard (8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

33. The NMFS has failed to implement two alternatives that would produce a substantial reduction in mortality by declining to require the use of venting tools and circle hooks. This is in violation of National Standard 9

National Standard (9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch

CLAIMS FOR RELIEF

34. The Red Snapper Interim Rule should be enjoined from implementation until and unless the National Marine Fisheries Service complies with its duties under the MSA to collect relevant data to manage the Red Snapper fishery as required by Congress. Legal error is an abuse of discretion under the MSA.

35. The Red Snapper stock assessment (SEDAR 15) completed in 2008 should be rejected as the product of the fatally flawed MRFSS program and agency predisposition and bias. SEDAR 15 assessment did not employ the best available science and improperly rejected better and available information that the desired reduction in Red Snapper take was achieved by Amendment 4 without any further action by the NMFS.

36. The closure of the Red Snapper fishery is an abuse of discretion in that the NMFS has failed to factor weather conditions into its assessments. The closures for 2010 and beyond should be rejected until and unless weather-adjusted data mandated by the MSA is collected, analyzed and factored into the decision making process for Red Snapper Interim Rule.

37. The NMFS should be prohibited from passing the most restrictive of regulations until such time as it has exhausted less draconian regulations to manage the fishery.

38. Plaintiff should be permitted to engage in discovery regarding the claim that NMFS was predisposed to close the recreational take of Red Snapper regardless of the

state of the fishery and permitted this bias to infect the 2008 stock assessment (SEDAR 15) and the content of Red Snapper Interim Rule.

39. The NMFS should be directed to set the benchmark date for a date which it has reliable and actual historical data to avoid the mistakes made in the present assessment and to do a reassessment of the stock using only data that has been collected since 1980.

40. The NMFS should be prohibited from the implementation of the any rule or regulation closing any stock until such time as there has been a new assessment conducted by an outside group of scientists.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter an Order granting the claims for relief and for such additional relief as the Court deems equitable, just and proper under the circumstances as required by the APA and the MSA.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **BRADLEY H. OLIPHANT, ESQUIRE**, U.S. Department of Justice, P.O. Box 7369, Ben Franklin Station, Washington, DC 20044-7369, this 28th day of January, 2010.

Respectfully submitted,

/s/ David R. Heil

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