

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00777-ALH

MVP

August 28, 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023) ,¹ MVP-2025-00777-ALH [MFR 1 of 1]²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) published the “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”). On September 8, 2023, the agencies published the “Revised Definition of ‘Waters of the United States’; Conforming”, which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (“*Sackett*”).

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of “Waters of the United States”; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Parts of Wetland Area 1	Non-Jurisdictional	N/A
Wetland Area 2	Non-Jurisdictional	N/A
Wetland Area 3	Non-Jurisdictional	N/A
Wetland Area 4	Non-Jurisdictional	N/A
Wetland Area 5	Non-Jurisdictional	N/A
Wetland Area 6	Non-Jurisdictional	N/A
Wetland Area 7	Non-Jurisdictional	N/A

2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- d. “Memorandum To the Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of ‘Waters Of The United States’ Under The Clean Water Act” (March 12, 2025)

3. REVIEW AREA.

- a. Project Are Size (in acres): 3 acres
- b. Location Description: The project/review area is located in Section 31, Township 22N, Range 18E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.339080 Longitude: -88.359700

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- d. Nearest City or Town: Appleton
 - e. County: Outagamie
 - f. State: Wisconsin
 - g. Other associated Jurisdictional Determinations (including outcomes): N/A
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A]⁶
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [N/A]
 6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸
N/A
 7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court’s decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed. [N/A]

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as “navigable in law” even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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- a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹ [Parts of Wetland Area 1 are constructed ditch features that are not waters of the U.S. According to multiple years of the Wisconsin Historic Aerial Imagery Finder, the features were constructed by excavating dry land between or through active agricultural fields. Multiple years of aerial imagery show there is not a relatively permanent flow of water in these features. These parts of the wetland fit under the definition of a b(3) water, from 33 CFR 328.3(b) as they are linear ditches excavated in and draining only dry land and do not carry a relative permanent flow of water.]
- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). [Wetland Area 2 extends outside of the delineated area to the west. However, the Digital Elevation Model layer of the National Regulatory Viewer (NRV) shows that the wetland gets lower in elevation as it goes from west to east, showing that any flow would go into the delineated area, and not out of it. According to the

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wetland delineation report, Wetland 2 does not abut any other wetlands on site. There are no wetlands indicated by the National Wetland Inventory layer of the NRV in the area immediately west of Wetland Area 2. Multiple years of aerial imagery do not show many changes in the last decade.

Wetland Areas 3, 4, 5, 6 and 7 are depressional wetlands in the crop field that are surrounded by uplands and are entirely within the delineated area according to the wetland delineation report. They do not abut any other wetlands or waterways. Wetland Area 3 is a side hill seep that is depressional in nature. Contour lines show that Wetland Area 4 is not connected to a roadside ditch as it is shown on the other side of the tree line and into the agricultural field. Wetlands 5, 6 and 7 are small wetlands in the northeast portion of the delineated area. The National Wetland Inventory layer on the National Regulatory Viewer does not indicate a presence of wetlands where these wetlands are located. Multiple years of aerial imagery do not show many changes in the last decade.

These wetlands are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. The wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. The wetlands are nontidal wetlands that do not abut a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland; therefore, the wetlands are not jurisdictional under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule.]

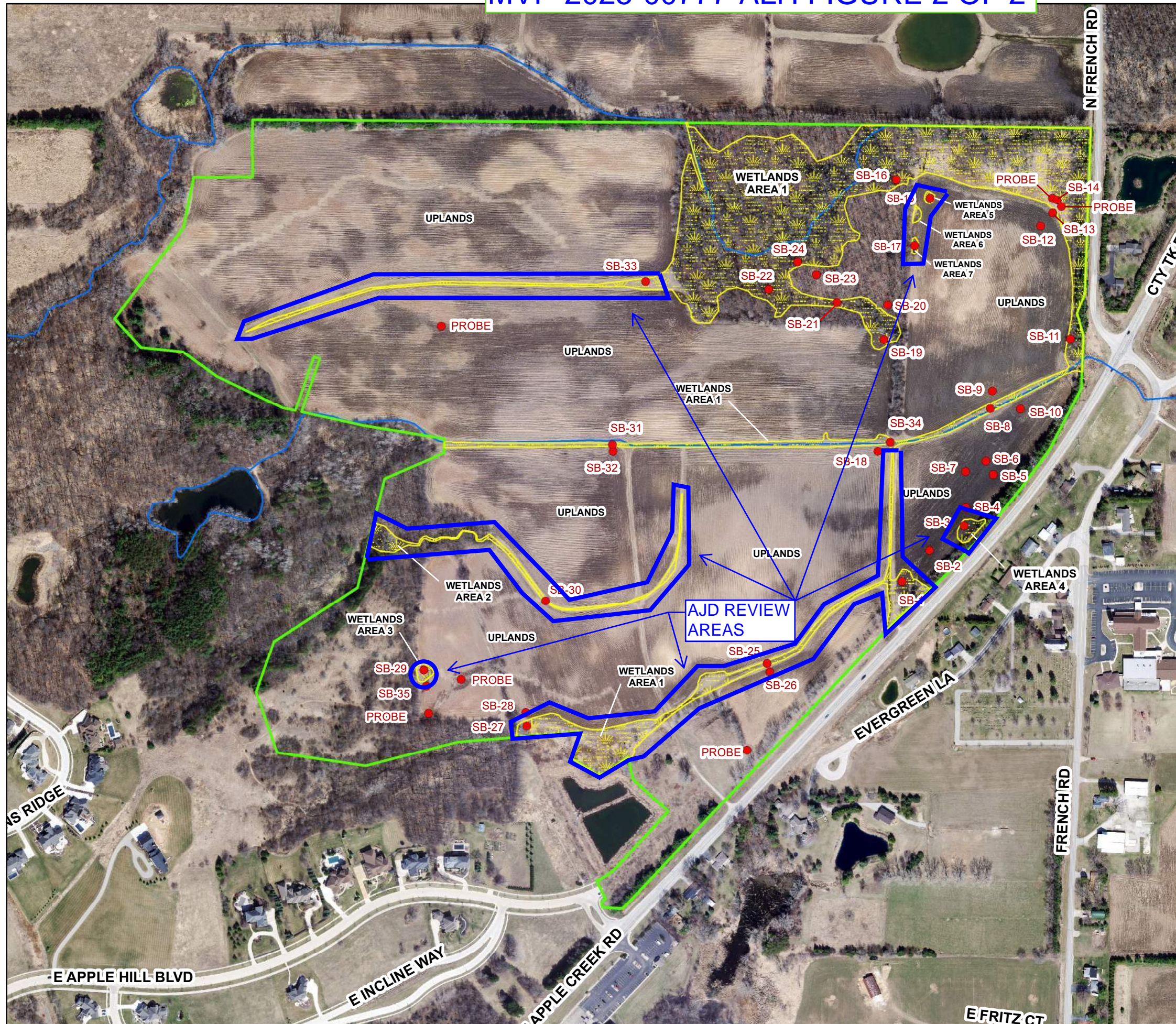
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. [Office evaluation was conducted on August 6, 2025.]
 - b. [Wetland Delineation Report Apple Creek Road & N. French Road by Martenson & Eisele, Inc. dated October 16 & 17th, 2023 Site Visit.]
 - c. [National Regulatory Viewer – USA Soils Hydric Class layer, National Wetland Inventory layer, Hillshade layer, DEM layer and WNDN Imagery 2022, 2020 and 2015 accessed on August 6, 2025.]
 - d. [Wisconsin Historic Aerial Imagery Finder (1938, 1957, 1964, 1982, and 1992) accessed August 27, 2025.]

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10. OTHER SUPPORTING INFORMATION. [N/A]

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Appendix B
 Surveyed Wetland Boundary

Parcel ID No. 311920200
 Section 31, T22N, R18E
 City of Appleton
 Outagamie County, Wisconsin

For: Apple Hill Farms Development LLC

Legend

- Boring Locations
- Wetlands
- Wetland Line
- Approximate Site Location
- ~ Waterways

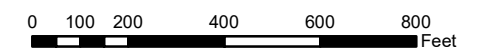
WETLAND AREA 1 = 891,698 S.F. (20.471 AC)
 WETLAND AREA 2 = 23,699.50 S.F. (0.544 AC)
 WETLAND AREA 3 = 3,466.32 S.F. (0.080 AC)
 WETLAND AREA 4 = 6,409.04 S.F. (0.147 AC)
 WETLAND AREA 5 = 1,469.67 S.F. (0.034 AC)
 WETLAND AREA 6 = 1,524.68 S.F. (0.035 AC)
 WETLAND AREA 7 = 1,314.20 S.F. (0.030 AC)

TOTAL SITE AREA = 7,436,350 S.F. (170.715 AC)

NOTE: AERIALS ARE NOT TIED TO COUNTY COORDINATES AND PHOTOS ARE APPROXIMATE. (FOR REFERENCE USE ONLY)



Scale 1" = 400'



This base map information was obtained from the Outagamie County Land Information Department and is intended to be used as a reference. They assume no liability for the accuracy of this map or its use or misuse.

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