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Oregon Natural Resources Council, Pacific Rivers Council,
and WaterWatch*

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CENTER FOR BIOLOGICAL DIVERSITY,
OREGON NATURAL RESOURCES COUNCIL,
PACIFIC RIVERS COUNCIL, and WATERWATCH,

Plaintiffs,

Civ. No.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant.

INTRODUCTION

1. This action challenges the Fish and Wildlife Service's ("FWS") determination that the southwestern Washington/Columbia River Distinct Population Segment of coastal cutthroat trout does not merit listing under the Endangered Species Act ("ESA" or "Act"). In refusing to list, FWS ignored the recommendations of the government's Biological Review Team and reversed a proposed rule issued by both FWS and the National Marine Fisheries Service ("NMFS") that concluded that a severe decline in the cutthroat's anadromous (or sea-going) life form necessitated listing. FWS's determination is in violation of the ESA, contrary to the best available science, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

PARTIES

2. The plaintiffs are:

A. Center for Biological Diversity ("CBD"), a nonprofit environmental organization founded in 1989. The organization is dedicated to the protection of native species and their habitats in the Western Hemisphere. CBD strives to fulfill its mission through science, education, policy, and environmental law. CBD has approximately 5,000 members, many of whom live in California, Washington, and Oregon. CBD has successfully advocated, petitioned, and litigated for the protection of hundreds of species and has obtained critical habitat designations affecting millions of acres.

B. Oregon Natural Resources Council ("ONRC"), a non-profit with 7,500 members in the Pacific Northwest. ONRC and its members are dedicated to protecting and conserving the region's wildlife, lands, waters, and natural resources. ONRC works directly with local citizens and citizen groups to incorporate environmental concerns into statewide,

region wide, and nationwide programs. In 1997, ONRC petitioned FWS to list and designate critical habitat for sea-run cutthroat trout in Washington, Oregon, and California.

C. Pacific Rivers Council (“PRC”), a non-profit corporation dedicated to the protection and restoration of rivers, watersheds, and the native aquatic species they support. With offices in Oregon and Montana, PRC has over 750 members nationwide, most of who reside in the western United States. PRC has a long history of working to protect and recover native fish populations in general and native salmonids in particular. For over fifteen years, PRC has developed substantial scientific, legal, economic, and policy support for ecologically sound land management standards for the benefit of imperiled salmonids like the coastal cutthroat trout through independent assessments and working on federal (e.g., the Northwest Forest Plan) and state/private industrial forestland management (e.g., Washington Forests and Fish) efforts.

D. WaterWatch of Oregon (“WaterWatch”), a non-profit conservation organization incorporated under the laws of Oregon, with approximately 1,200 members throughout Oregon and the Pacific Northwest. WaterWatch’s mission is to promote water policies and water allocation decisions in Oregon that provide for the quality and quantity of water necessary to support fish, wildlife, recreation, ecological values, public health, and a sound state economy.

3. Plaintiffs and their members use the watersheds and marine waters of Washington and Oregon that form the range of the southwestern Washington/Columbia River coastal cutthroat trout for recreational, scientific, and aesthetic activities. Plaintiffs and their members derive – or, but for the imperiled status of coastal cutthroat trout, would derive – recreational, scientific, and aesthetic benefits from the existence in the wild of coastal cutthroat trout through observation, study, and photography as well as recreational fishing. The past, present, and future

enjoyment of these benefits by plaintiffs and their members has been, is being, and will continue to be irreparably harmed by the defendant's disregard of its statutory duties.

4. Plaintiffs' – and their members' – interests in protecting coastal cutthroat trout and in federal agencies' compliance with environmental law has been, and unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of the defendant to comply with its obligations under the ESA.

5. The aesthetic, conservation, recreational, and scientific interests of these groups and their members in the survival and recovery of coastal cutthroat trout have been and, unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of the defendant to comply with the law.

6. The defendant is the Fish and Wildlife Service, the federal agency to which the Secretary of the Interior has delegated the task of listing freshwater and terrestrial species. NMFS previously had ESA regulatory jurisdiction over the southwestern Washington/Columbia River coastal cutthroat trout, but FWS assumed full responsibility of all coastal cutthroat pursuant to a 1999 agreement with NMFS.

JURISDICTION

7. This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1). As required by 16 U.S.C. § 1540(g)(2), on June 23, 2004, plaintiffs sent a 60-day notice to the Director of FWS and the Secretary of the Interior. The Notice indicated plaintiffs' intent to seek judicial review if the legal violations were not corrected. More than 60 days have passed since the defendant FWS received this notice. Alternatively, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 to determine under the Administrative Procedure Act, 5 U.S.C. § 706, whether the Secretary acted arbitrarily, capriciously, and contrary to the ESA in failing to list southwestern

Washington/Columbia River coastal cutthroat trout under the ESA. Venue lies in this judicial

district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the violations occurred in this district.

THE ESA STATUTORY FRAMEWORK

8. Congress enacted the ESA “to provide a program for the conservation of ... endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). As the first step in the protection of these species, Section 4 of the ESA requires the Secretary to list species as endangered or threatened when they meet the statutory listing criteria. Id. § 1533.

9. The Act defines species to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). The ESA requires that a species must be listed as “endangered” if it is in danger of extinction throughout all or a “significant portion” of its range, id. § 1532(6), and as “threatened” if it is likely to become endangered within the foreseeable future throughout all or a “significant portion” of its range. Id. § 1532(20).

10. The term “Distinct Population Segment” or “DPS” is not specifically defined in the text of the Act. In 1996, NMFS and FWS jointly developed a policy requiring a finding that a population is both “discrete” and “significant” in order to be considered a DPS. When evaluating the status of Pacific salmonids, NMFS uses the concept of “Evolutionarily Significant Units” rather than DPS. The joint DPS policy specifically embraces NMFS’s ESU concept as the equivalent of a DPS when applied to Pacific salmon and steelhead. 61 Fed. Reg. 4,722, 4,722 (Feb. 7, 1996).

11. A species must be listed as endangered or threatened if FWS or NMFS (the “Services”) find that any one or more of the following factors are present:

- (A) the present or threatened destruction, modification or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c). The Service must analyze the listing factors “solely on the basis of the best scientific and commercial data available[.]” 16 U.S.C. § 1533(b)(1)(A).

12. Any interested person can begin the listing process by filing a petition to list a species. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a). Upon receipt of a petition, the Service has 90 days to review the submitted information and make a finding as to whether that petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). If the petition is found to present substantial information, the Service must publish this preliminary finding in the Federal Register and initiate a “status review” of the species. 16 U.S.C. § 1533(b)(3)(A).

13. A second finding, commonly referred to as the “12-month finding,” is due within one year of the date the petition is received. At the expiration of the twelve months, the Service must make one of three determinations: (1) the petitioned action is warranted; (2) the petitioned action is warranted but presently precluded by other pending proposals for listing species; or (3) the petitioned action is not warranted. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

14. If the Service determines that listing is not warranted, the listing process concludes and the species receives no protection under the ESA. If the Service finds that the

listing of a species is warranted, the Service must then publish, in the Federal Register, a proposed rule to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5). Under normal circumstances, within one year of the publication of a proposed rule to list a species, the ESA requires the Service to render a final determination on the proposal. Id. §§ 1533(b)(6)(A), (C).

15. Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species in its native ecosystem. See 16 U.S.C. §§ 1536, 1538. The ESA's ultimate goal is recovery of listed species to the point that ESA protection is no longer necessary. Id. §§ 1531(b)-(c); 1532(3).

THE DECLINE OF THE SOUTHWESTERN WASHINGTON/ COLUMBIA RIVER COASTAL CUTTHROAT TROUT

16. Coastal cutthroat trout (*Oncorhynchus clarki clarki*) is one of 14 subspecies of cutthroat trout native to western North America. The term "cutthroat" is derived from the brightly colored scarlet stripes found on the underside of the species' jaw. Visually, the coastal cutthroat trout is distinguished by the profusion of spots that extend the length of its body, in contrast to inland species whose spots are often concentrated toward the tail and above the lateral dividing line.

17. The distribution of coastal cutthroat trout closely matches the distribution of coastal rainforest along the Pacific coast, stretching from southeast Alaska through northern California. Coastal cutthroat trout exhibit highly variable life histories, including resident (or primarily non-migratory), freshwater migrants, and marine migratory (or anadromous).

18. Historically, the southwestern Washington-lower Columbia River region supported healthy, highly productive populations of coastal cutthroat trout. Recent studies, however, have found unmistakable downward trends in the anadromous life history.

19. Anadromous coastal cutthroat trout use lower river reaches for migration, overwintering, and rearing young while the resident populations tend to reside in the upper watersheds. The anadromous cutthroat trout, unlike residents, make extensive use of estuaries and near shore marine waters. These areas are vulnerable to a variety of activities, such as dredging, agriculture, dams, dikes, and wetland fill, that destroy or modify valuable habitat.

20. Over time, the Columbia River estuary has lost approximately 43 percent of its historic tidal marsh and 77 percent of historic tidal swamp habitats. Particularly relevant to anadromous salmonids, the estuary has lost up to 65 to 75 percent of its off-channel habitats. Moreover, the Grays Harbor estuary has lost 30 percent of its historical wetland habitat, and the historical Willapa Bay estuary wetlands have been reduced by 31 percent. See 67 Fed. Reg. 44,934, 44,948 (July 5, 2002).

21. In the lower Columbia River area, the severe habitat degradation has contributed to dramatic declines in the anadromous populations. Returns of both naturally- and hatchery-produced coastal cutthroat trout in almost all lower Columbia River tributaries have decreased markedly. In particular, populations in the Hood and Sandy rivers in Oregon have suffered severe declines. Smolt counts in the Kalama River in Washington peaked at just over 16,000 fish in 1983 but were just over 100 in 1994. The Cowlitz River also experienced a 6 percent decline over the long term.

22. A similarly bleak assessment holds true for southwestern Washington, which has experienced declining trends in anadromous adult and outmigrating smolt populations.

Abundance in the Hoquiam River declined by 5 percent per year from 1989-1999, and downstream migrants in Stevens Creek, a tributary to the Humptulips River, declined by 15 percent per year since 1982.

23. Existing protections are inadequate for retaining and restoring habitat crucial to the anadromous life history. State regulatory mechanisms in Washington and Oregon are unsatisfactory for preserving and promoting salmonid habitat. The protections afforded by the Northwest Forest Plan have been significantly weakened and the restrictions that remain do not extend to lower river reaches.

24. The Army Corps of Engineers, the agency with direct jurisdiction over lower river reaches, marshes, and tidal wetlands, lacks a methodology for evaluating cumulative impacts and for minimizing the effects of continued development.

25. The Corps is currently moving forward with a plan to dredge over 100 miles of river channel in the lower Columbia River and will, in the future, face increased efforts to expand coastal urban areas. The long-term effects of urbanization include diking, filling, riparian conversion, channelization, sediment and flow regime changes, water storage, and persistent toxic chemicals. See 67 Fed. Reg. at 44,948.

PROCEDURAL LISTING HISTORY

26. On December 18, 1997, the Secretary of Commerce received a petition from ONRC and others to list and designate critical habitat for sea-run coastal cutthroat trout in Washington, Oregon, and California. The Commerce Department, through NMFS, historically exercised jurisdiction over sea-run cutthroat trout due to the anadromous life history.

27. In March 1998, NMFS found that the petition presented substantial scientific information indicating that listing might be warranted. 63 Fed. Reg. 13,832, 13,832 (March 23, 1998).

28. Although NMFS had commenced a comprehensive status review for five species of Pacific salmonids in 1994, it had not yet completed the review of west coast sea-run cutthroat trout. NMFS's 1998 finding indicated that it would continue to evaluate the status of the cutthroat trout through its ongoing status review while soliciting further information and comments from the public. 63 Fed. Reg. at 13,832-33.

29. In January 1999, NMFS released the results of its status review. The Biological Review Team ("BRT") convened to conduct the review determined that six ESUs of coastal cutthroat trout exist along the Washington, Oregon, and California coasts.

30. Of the six, the BRT found only one approaching extinction. The BRT unanimously concluded that the southwestern Washington/Columbia River ESU of coastal cutthroat trout was "likely to become endangered in the foreseeable future." Status Review at 202.

31. In particular, the BRT expressed concern about the state of the anadromous portion of the ESU. Overall, the BRT found a "significant risk" to the ESU from the loss of its anadromous population. Status Review at 201.

32. The BRT had determined that each ESU includes all of the cutthroat trout's life-history forms: resident, migratory resident, and anadromous. Team members concurred that loss of any individual life-history form could increase risk to the ESU as a whole. As observed by the BRT, the multiple life-history forms "represent diverse genetic and phenotypic resources important to [the ESU's] evolutionary ecology[.]" *Id.* at xiv.

33. In April 1999, FWS and NMFS together issued a proposed rule to list the southwestern Washington/Columbia River ESU as threatened pursuant to the ESA. 64 Fed. Reg. 16,397, 16,408 (April 5, 1999). Reiterating the conclusions of the BRT's status review, the

proposed rule found that trends for the anadromous portion of the ESU showed a serious decline. The Services observed that the significance “of this reduction in life-history diversity to [] both the integrity and the likelihood of this ESU’s long term persistence is a major concern[.]” *Id.* at 16,407. The proposed rule concluded that “the Southwestern Washington/Columbia River ESU warrants listing as a threatened species.” *Id.* at 16,408.

34. Following the proposed listing, the Services had one year to finalize their determination. 16 U.S.C. § 1533(b)(6)(A). In November 1999, however, FWS assumed sole jurisdiction over all coastal cutthroat trout. The listing process then became marked by a series of extensions and delays. In August 2001, as the result of a settlement of litigation filed by plaintiff CBD and other conservation groups, FWS agreed to complete its work on the southwestern Washington/Columbia River coastal cutthroat trout DPS.

35. In July 2002, FWS issued a final rule that reversed the Services’ proposed rule and found that a listing was not warranted. 67 Fed. Reg. at 44,934.

COUNT I
THE DECISION NOT TO LIST THE COASTAL CUTTHROAT
TROUT DPS RUNS COUNTER TO THE EVIDENCE OF A
DECLINE IN THE ANADROMOUS LIFE HISTORY

36. The ESA directs FWS to base listing determinations on the best available scientific data. 16 U.S.C. § 1533(b)(1)(A). Moreover, the ESA embodies the precautionary principle, requiring FWS to give the benefit of the doubt to the species.

37. Returns of anadromous coastal cutthroat trout have decreased in almost all lower Columbia River tributaries, and southwestern Washington has similarly experienced declining trends in anadromous adult and outmigrating smolt populations.

38. The BRT emphasized the serious harm to the coastal cutthroat trout DPS associated with losing the anadromous life history:

For example, loss of the anadromous form would reduce the number of larger and more fecund individuals in the population. A reduction in the number of anadromous individuals in a population would probably also have significant effects on the population age structure, spawn timing, age and size at first reproduction, degree of iteroparity, sex ratio, spatial distribution of individuals, and mate selection.

Status Review at 145. In addition, anadromy is critical for colonization of new or previously occupied habitat. *Id.* Accordingly, the BRT determined that that loss of any individual life-history form could increase risk to the ESU as a whole. *Id.* at xiv.

39. FWS ignored evidence indicating a decline in the anadromous portion of the DPS and demanded conclusive proof demonstrating the threat of extinction.

40. Although the final rule acknowledged threats to the anadromous life history, FWS diminished their impact by improperly collapsing the distinction between migratory and resident populations.

41. FWS failed to consider properly the importance of the anadromous life history and the evidence of its decline and consequently impermissibly refused to list the southwestern Washington/Columbia River coastal cutthroat trout.

42. Moreover, in its final rule, FWS failed to consider adequately whether the decline of the anadromous life history of the southwestern Washington/Columbia River cutthroat trout threatens the DPS over a significant portion of its range.

43. The ESA requires that a species must be listed as endangered if it is in danger of extinction throughout all or a “significant portion” of its range, 16 U.S.C. § 1532(6), and as threatened if it is likely to become an endangered species within the foreseeable future throughout all or a “significant portion” of its range. 16 U.S.C. § 1532(20).

44. While generally the resident trout populations reside in the upper watersheds, anadromous coastal cutthroat trout rely upon lower river reaches, estuaries, and near shore marine waters.

45. Lower river reaches, estuaries, and near shore marine waters are presently degraded within the range of the southwestern Washington/Columbia River coastal cutthroat trout and remain vulnerable to activities such as dredging, agriculture, dams, dikes, and wetland fill. Existing regulatory mechanisms are inadequate to protect these portions of the cutthroat trout's range.

46. The final rule also does not address whether the aggregate land area in which the FWS acknowledges serious reductions in anadromous coastal cutthroat trout along with the land that is governed by concededly inadequate regulatory schemes represents a significant portion of the DPS's range. See, e.g., 67 Fed. Reg. at 44,939 (Kalama River, 1.5% of range); 44,937-38 (Hood/Sandy Rivers, 6% of range), 44,954 (Oregon Forestry Practices Act, 8% of range).

47. Given the data indicating a severe decline in the anadromous portion of the DPS's life history and the importance of the life history to the future survival and recovery of the DPS as a whole, FWS acted arbitrarily, capriciously, contrary to the best available scientific data, and contrary to the ESA in making a determination that listing the southwestern Washington/Columbia River coastal cutthroat trout was not warranted.

COUNT II
THE FAILURE TO LIST THE COASTAL CUTTHROAT
TROUT DPS RUNS COUNTER TO THE EVIDENCE OF THE
INADEQUACY OF EXISTING REGULATORY MECHANISMS

48. FWS's final rule reveals pervasive concerns with the adequacy of existing regulatory mechanisms.

49. Approximately 27 percent of the land base within the DPS's range is federal land, with 26 percent governed by the Northwest Forest Plan. As conceded by FWS, however, the Plan's effectiveness as to coastal cutthroat trout is constrained by the limited amount of land covered by the Plan as well as its uneven distribution. 67 Fed. Reg. at 44,951. Most importantly, the majority of the land covered by the Northwest Forest Plan is located in the upper watersheds, above the areas generally used by the anadromous portion of the population. *Id.* at 44,952.

50. In addition, FWS should not have relied the Northwest Forest Plan given FWS's awareness of efforts by the Forest Service and the Bureau of Land Management to weaken the Plan's protections for fish and wildlife.

51. Both the proposed and final rules recognized shortcomings in the regulatory oversight of the Army Corps of Engineers for dredge, fill, and inwater construction activities. See 67 Fed. Reg. at 44,954. Corps guidelines lack a specific methodology for assessing cumulative impacts in its decisionmaking process and for minimizing and mitigating the additive effects of the continued development of waterfront, riverine, coastal, and wetland properties. FWS concluded that the Corps' procedures, along with protections offered by state programs, "may not fully remove the risk of some losses to cumulative effects from small individual projects." *Id.*; see also id. at 44,946. Particularly vulnerable are the lowest stream sections of rivers, where flood plains are wide and stream gradients are low. These areas have a proportionally greater effect on the anadromous and migratory portions of coastal cutthroat trout. *Id.* at 44,948.

52. Oregon's Forest Practices Act regulates timber management and associated activities on most non-federal forests in the state, amounting to about 8 percent of the DPS's

range. The proposed rule found that Oregon's forestry practices regulations do not sufficiently protect salmonid habitat. Despite some changes after the proposed listing, FWS remained concerned that Oregon's forest practices regulations did not adequately support the riparian conditions crucial to supporting salmonid populations. 67 Fed. Reg. at 44,954. FWS found that Oregon's forestry practices regulations fail to constrain satisfactorily logging and road building on steep, unstable slopes; fail to properly consider cumulative impacts; and fail to provide streams with the large woody debris necessary for functioning salmonid habitat. *Id.*

53. Although Oregon's land-use planning laws are among the strongest in the nation, most local plans now in effect do not prioritize goals related to water quality and aquatic habitat protection and are not based on the best currently available data. FWS found that the plans may not eliminate adverse effects to the riparian and aquatic environment or provide protection for areas of coastal cutthroat trout habitat. 67 Fed. Reg. at 44,953-54.

54. In Washington, the state's Growth Management Act requires counties and cities to designate natural resource lands and to designate and protect critical areas. Recent reviews have demonstrated that protection of water quality and aquatic and riparian resources has not been prioritized. Many cities and counties have not adopted the required designations and regulations, and most plans do not incorporate the best available data. The ability of the state to impose sanctions for failure to comply with the Growth Management Act is limited and minimal guidelines established by the state are not mandatory. 67 Fed. Reg. at 44,952.

55. Washington's Shoreline Management Act requires local governments with shorelines to adopt a local shoreline plan that is reviewed and approved by the state's Department of Ecology. Most local plans were adopted in the mid- to late-1970s and are based on guidelines that do not reflect current scientific knowledge and do not adequately emphasize

salmonid conservation. At the time of FWS's final rule, efforts to ensure that plans are revised in accordance with current science and priorities were uncertain. 67 Fed. Reg. at 44,953.

56. Washington's State Environmental Policy Act ("SEPA") allows agencies to deny permits and other approvals if the proposal would likely result in significant adverse environmental impacts and planned mitigation would be inadequate. FWS found that Washington's SEPA has not effectively served as a conservation mechanism or addressed the inadequacies of other regulatory programs. 67 Fed. Reg. at 44,953.

57. In refusing to list, FWS relied heavily on improvements to Washington's Forest Practices Act, covering approximately 30 percent of the DPS's range. 67 Fed. Reg. at 44,952. At the same time, the FWS observed that

[w]e and others have noted some uncertainty about the effects of portions of this regulatory program, especially as related to non-fish bearing streams, road practices, and management of cumulative watershed impacts.

Id. FWS believed that a "comprehensive, long-term research, monitoring, and adaptive management program" will avoid harm to the DPS. Id. at 44,952-53. FWS's reliance was premature given that the mechanisms cited may not lead to necessary on-the-ground protections.

58. Given the inadequacy of existing regulatory mechanisms, FWS acted arbitrarily, capriciously, contrary to the best available scientific data, and contrary to the ESA in making a determination that the listing of the southwestern Washington/Columbia River coastal cutthroat trout was not warranted.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs request that this Court:

1. Declare that FWS's "not warranted" determination for the southwestern Washington/Columbia River DPS of coastal cutthroat trout under the ESA is arbitrary, capricious, contrary to the best available science, and in violation of the ESA.

2. Order FWS to make a new final listing determination for the southwestern Washington/Columbia River DPS of coastal cutthroat trout within 60 days of the Court's disposition of this case.

3. Award the plaintiffs their costs, expenses, and attorney fees pursuant to the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

4. Grant such further relief as the Court deems proper.

Respectfully submitted this 2nd day of February, 2005.

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