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PRESERVING PUBLIC ACCESS TO CAPE HATTERAS BEACHES

SEPTEMBER 10, 2013.—Ordered to be printed

Mr. WYDEN, from the Committee on Energy and Natural Resources, submitted the following

R E P O R T

[To accompany S. 486]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 486) to authorize pedestrian and motorized vehicular access in Cape Hatteras National Seashore Recreational Area, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Preserving Public Access to Cape Hatteras Beaches Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) FINAL RULE.—The term "Final Rule" means the final rule entitled "Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore—Off-Road Vehicle Management" (77 Fed. Reg. 3123 (January 23, 2012)).

(2) NATIONAL SEASHORE.—The term "National Seashore" means the Cape Hatteras National Seashore Recreational Area.

(3) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(4) STATE.—The term "State" means the State of North Carolina.

SEC. 3. REVIEW AND ADJUSTMENT OF WILDLIFE PROTECTION BUFFERS.

(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Secretary shall review and modify wildlife buffers in the National Seashore in accordance with this section and any other applicable law.

(b) BUFFER MODIFICATIONS.—In modifying wildlife buffers under subsection (a), the Secretary shall, using adaptive management practices—

(1) ensure that the buffers are of the shortest duration and cover the smallest area necessary to protect a species, as determined in accordance with peer-reviewed scientific data; and

(2) designate pedestrian and vehicle corridors around areas of the National Seashore closed because of wildlife buffers, to allow access to areas that are open.

(c) COORDINATION WITH STATE.—The Secretary, after coordinating with the State, shall determine appropriate buffer protections for species that are not listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), but that are identified for protection under State law.

SEC. 4. MODIFICATIONS TO FINAL RULE.

The Secretary shall undertake a public process to consider, consistent with management requirements at the National Seashore, the following changes to the Final Rule:

(1) Opening beaches at the National Seashore that are closed to night driving restrictions, by opening beach segments each morning on a rolling basis as daily management reviews are completed.

(2) Extending seasonal off-road vehicle routes for additional periods in the Fall and Spring if off-road vehicle use would not create resource management problems at the National Seashore.

(3) Modifying the size and location of vehicle-free areas.

SEC. 5. CONSTRUCTION OF NEW VEHICLE ACCESS POINTS.

The Secretary shall construct new vehicle access points and roads at the National Seashore—

(1) as expeditiously as practicable; and

(2) in accordance with applicable management plans for the National Seashore.

SEC. 6. REPORT.

The Secretary shall report to Congress within 1 year after the date of enactment of this Act on measures taken to implement this Act.

PURPOSE

The purpose of S. 486, as ordered reported, is to direct the Secretary of the Interior to review and modify wildlife buffers at Cape Hatteras National Seashore in North Carolina, and to undertake a public process to consider changes to the National Park Service's regulations which would allow increased motorized access to certain beaches in the National Seashore.

BACKGROUND AND NEED

Officially authorized in 1937 along the Outer Banks of North Carolina, Cape Hatteras is the nation's first national seashore. Consisting of more than 30,000 acres distributed along approximately 64 miles of shoreline, Cape Hatteras National Seashore Recreation Area (National Seashore) is part of a dynamic barrier island system. Millions of visitors come to the National Seashore each year to engage in recreational activities such as fishing, hunting, surfing, boating, beach driving, and bird and wildlife viewing. The National Seashore also provides important habitat for various species of wildlife and serves as a wintering area for migratory waterfowl. It is home to several species that are listed as threatened or endangered under the Endangered Species Act, including the endangered leatherback turtle and the piping plover.

In 2007, the National Park Service implemented an Interim Protected Species Management Strategy (Interim Strategy) governing off-road vehicle (ORV) use at the National Seashore to address resource protection, visitor safety, and potential conflicts among various park users. The Interim Strategy was implemented in response to a lawsuit filed in 2005 claiming that the National Park

Service had failed to protect species and establish an ORV management plan, as required by the agency's regulations.

In October 2007, another lawsuit was filed against the National Park Service alleging that the Interim Strategy was inadequate and that the Seashore's management of ORV use violated existing laws, including the Endangered Species Act, the National Park Service Organic Act, an executive order relating to ORV use, and National Park Service regulations regarding ORV use in units of the national park system.

In April 2008, a U.S. District Court Judge signed a consent decree to settle the lawsuit. The consent decree was agreed to by the plaintiffs and the National Park Service; and by Dare and Hyde Counties and a coalition of local ORV and fishing groups who participated in the lawsuit as interveners.

Pursuant to the consent decree, the National Park Service was required to complete an ORV Management Plan and an accompanying environmental impact statement for the seashore by December 31, 2010, and complete a final Special Regulation by 2011. On February 15, 2012, the final ORV Management Plan/Environmental Impact Statement and special regulation went into effect for the National Seashore (77 Fed. Reg. 3123). The final plan includes a five-year periodic review process that allows for evaluation and modifications to be made, if necessary.

While the National Park Service believes that the rule brings the National Seashore into compliance with the Executive Orders and other applicable laws and policies after many years of non-compliance, opponents of the rule believe it unfairly limits historic access to the seashore, in particular the use of off-road vehicles on certain beaches, thereby decreasing economic activity in the region.

As ordered reported, S. 486 would leave the final rule in effect, but would direct the National Park Service to modify wildlife buffers within the National Seashore to provide for greater motorized and pedestrian access, while maintaining the necessary protection for wildlife required by existing laws, and to consider modifications to the rule that would provide for increased ORV access within the National Seashore.

LEGISLATIVE HISTORY

Senators Burr and Hagan introduced S. 486 on March 7, 2013. Senator Manchin is a cosponsor. The Subcommittee on National Parks held a hearing on S. 486 on April 23, 2013. At its business meeting on June 18, 2013 the Committee ordered S. 486 favorably reported with an amendment in the nature of a substitute.

In the 112th Congress, a similar bill, S. 2372, was introduced by Senators Burr and Hagan on April 26, 2012. The Subcommittee on National Parks held a hearing on S. 2372 on June 27, 2012 (S. Hrg. 112–578). Similar legislation was also included in H.R. 2578, the Conservation and Economic Growth Act, which passed the House of Representatives by a vote of 232–188 on June 19, 2012.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on June 18, 2013, by a voice vote of a quorum present, recommends that the Senate pass S. 486 if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of S. 486, the Committee adopted an amendment in the nature of a substitute. The amendment would leave the current National Park Service regulations governing off-road vehicle use at the National Seashore in place, but require that the Secretary of the Interior review and adjust wildlife protection buffers, using adaptive management practices, to ensure that the buffers are of the shortest possible duration and cover the smallest area necessary to protect the species. The Secretary would also be required to designate pedstrian and vehicle corridors around areas of the National Seashore that are closed because of wildlife buffers, to allow access to other areas that are open.

Additionally, the substitute amendment would direct the Secretary to undertake a public process to consider changes to the National Park Service's Final Rule that would allow for greater off-road vehicle access on beaches within the National Seashore. Finally, the amendment directs the Secretary to expeditiously construct new vehicle access points and roads within the National Seashore in accordance with applicable management plans.

The amendment is described in detail in the section-by-section analysis below.

SECTION-BY-SECTION ANALYSIS

Section 1 provides for the short title, the "Preserving Public Access to Cape Hatteras Beaches Act."

Section 2 defines key terms in the bill.

Section 3(a) directs the Secretary of the Interior (Secretary), not later than 180 days after the date of enactment of this Act, to review and modify wildlife buffers applicable to the Cape Hatteras National Seashore Recreational Area (National Seashore) in accordance with this section and any other applicable law.

Subsection (b) requires that the Secretary, in modifying wildlife buffers under subsection (a), use adaptive management strategies to: (1) ensure that wildlife buffers are of the shortest possible duration and cover the smallest possible area necessary to protect a species as determined by peer reviewed scientific data; and (2) designate pedestrian and vehicle corridors around areas closed because of wildlife buffers, to allow access to areas that are open.

Subsection (c) requires that the Secretary coordinate with the State of North Carolina in determining appropriate buffer protections for species that are not listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 et sec.), but are identified for protection under State law.

Section (4) directs the Secretary to undertake a public process to consider changes to the Final Rule (77 Fed. Reg. 3123) that would: open segments of beaches closed to night driving on a rolling basis; extend seasonal off-road vehicle routes for additional periods in the Fall and Spring; and modify the size and location of vehicle-free areas.

Section (5) requires that the Secretary, as expeditiously as practicable, construct new vehicle access points and roads at the National Seashore in accordance with applicable management plans for the National Seashore.

Section (6) directs the Secretary to report to Congress on measures taken to implement this Act within 1 year after the date of enactment.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

S. 486—Preserving Public Access to Cape Hatteras Beaches Act

S. 486 would require modifications to the management of the Cape Hatteras National Seashore in North Carolina. Under the bill, the Secretary of the Interior would review and modify wildlife buffers on the seashore to cover the smallest area necessary. S. 486 also would require the Secretary to construct new vehicle access points to the seashore. The National Park Service (NPS) would be directed to conduct a public process to consider modifications to the existing management plan for the seashore.

Based on information provided by the NPS, CBO estimates that implementing S. 486 would cost about $6 million over the 2014–2018 period, assuming the availability of appropriated funds. That amount includes an estimated increase in administrative costs of $1 million annually to monitor wildlife buffer areas and $1 million to prepare and implement a modified management plan. The NPS is currently constructing new vehicle-access points at the seashore, so implementing that provision of S. 486 would have no additional cost. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

S. 486 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On May 31, 2013, CBO transmitted a cost estimate for H.R. 819, the Preserving Access to Cape Hatteras National Seashore Recreational Area Act, as ordered reported by the House Committee on Natural Resources on May 15, 2013. H.R. 819 would require the seashore's management plan to revert back to the Interim Strategy, which was issued in 2007. In contrast, S. 486 would require the Secretary to undertake a public process to determine how to modify the current management plan. The CBO cost estimates reflect those differences.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 486.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 486, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 486, as reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the National Park Service at the April 23, 2013, Subcommittee on National Parks hearing on S. 486 follows:

STATEMENT OF PEGGY O'DELL, DEPUTY DIRECTOR FOR OPERATIONS, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today to present the Department of the Interior's views on S. 486, a bill entitled "to authorize pedestrian and motorized vehicular access in Cape Hatteras National Seashore Recreational Area, and for other purposes."

The Department strongly opposes S. 486. This bill would reinstate the 2007 Interim Protected Species Management Strategy (Interim Strategy) governing off-road vehicle (ORV) use at Cape Hatteras National Seashore (Seashore).

The Department supports allowing appropriate public use and access at the Seashore to the greatest extent possible, while also ensuring protection for the Seashore's wildlife and providing a variety of visitor use experiences, minimizing conflicts among various users, and promoting the safety of all visitors. We strongly believe that the final ORV Management Plan/Environmental Impact Statement (EIS) and special regulation are accomplishing these objectives far better than the defunct Interim Strategy. Contrary to some reports, there is not now and never has been a ban on ORVs at the Seashore. The great majority of the beach is open to ORVs, visitation is rising, and tourist revenues are at record levels. At the same time, beach-nesting birds and sea turtles are finally showing much-needed improvements.

The Seashore stretches for about 67 miles along three islands of the Outer Banks of North Carolina. It is famous for its soft sandy beaches, outstanding natural beauty, and dynamic coastal processes that create important habitats, including breeding sites for many species of beach-nesting birds, among them the federally listed threatened piping plover, the state-listed threatened gull-billed tern, and a number of species of concern including the common tern, least tern, black skimmer, and the American oystercatcher. Long a popular recreation destination, Cape Hatteras attracts about 2.3 million visitors a year who come to walk the beach, swim, sail, fish, use ORVs, and enjoy the ambiance of the shore. In the towns that dot the Outer Banks, a major tourism industry has developed to serve visitors and local beachgoers, including fishermen. In 2011, visitors to the three islands spent approximately $121 mil-

lion (an increase of $13 million from 2010), and supported about 1,700 jobs.

Under the National Park Service Organic Act, the Endangered Species Act, the Migratory Bird Treaty Act, the Seashore's enabling act, and National Park Service (NPS) regulations and policies, the NPS has an affirmative responsibility to conserve and protect wildlife, as well as the other resources and values of the Seashore. Executive Order 11644 (1972), amended by Executive Order 11989 (1977), requires the NPS to issue regulations to designate specific trails and areas for ORV use based upon resource protection, visitor safety, and minimization of conflicts among uses of agency lands.

The special regulation that went into effect on February 15, 2012, brings the Seashore into compliance with applicable laws, policies, and Executive Orders after many years of noncompliance. In addition to resource impacts, the approved plan addresses past inconsistent management of ORV use, user conflicts, and safety concerns in a comprehensive and consistent manner.

The Interim Strategy was never intended to be in place over the long-term. When it was developed, the Seashore had no consistent approach to species protection and no ORV management plan or special regulation in place. While the Interim Strategy took an initial step toward establishing a science-based approach, key elements such as buffer distances for American oystercatchers and colonial waterbirds, and the lack of night driving restrictions during sea turtle nesting season, were inconsistent with the best available science. The 2006 U.S. Fish and Wildlife Service (USFWS) biological opinion for the Interim Strategy indicated that it would cause adverse effects to federally listed species, but found no jeopardy to those species mainly because of the limited duration of implementation (expected to be no later than the end of 2009). Similarly, the 2007 NPS Finding of No Significant Impact (FONSI) for the Interim Strategy indicated the action had the potential to adversely impact federally listed species and state-listed species of concern, but found that a more detailed analysis (an EIS) was not needed because of the limited period of time that the Interim Strategy would be implemented.

After a lawsuit was filed against the Interim Strategy, a federal judge entered a Consent Decree for park management. The species-specific buffer distances and the night driving restrictions contained in both the Consent Decree and in the plan/EIS are based on scientific studies and peer-reviewed management guidelines such as the USFWS Piping Plover and Loggerhead Turtle Recovery Plans, and the U.S. Geological Survey (USGS) Open-File Report 2009–1262 (also referred to as the "USGS protocols,") on the management of species of special concern at the Seashore. Buffer distances for state-listed species are based on relevant scientific studies recommended by the North

Carolina Wildlife Resources Commission, USFWS, and USGS.

Under the science-based species protection measures of the Consent Decree, many of which are incorporated into the ORV management plan and special regulation, a trend of improving conditions for beach nesting birds and sea turtles has emerged. Although breeding success depends on a number of factors including weather, predation, habitat availability, and level of human disturbance, there has been a striking improvement in the condition of protected beach-nesting wildlife species. The Seashore has experienced a record number of piping plover pairs and fledged chicks, American oystercatcher fledged chicks, least tern nests, and improved nesting results for other species of colonial waterbirds. The number of piping plover breeding pairs has increased from an annual average of 3.6 pairs from 2000 to 2007 under the Interim Strategy to an average of 11.75 pairs between 2008 and 2011 under the Consent Decree. In 2012, the NPS documented 15 piping plover breeding pairs. The number of sea turtle nests also significantly increased, from an annual average of 77.3 from 2000 to 2007 to an average of 129 from 2008 to 2011. In 2012, sea turtle nesting in the Seashore climbed to an all-time high of 222.

Although the prescribed buffers have resulted in temporary closures of some popular locations when breeding activity was occurring, even at the peak of the breeding season there have generally been many miles of open beach entirely unaffected by the species protection measures. Under the Consent Decree from 2007 to 2011, annual visitation at the Seashore continued at a level similar to that of 2006 to 2007. In 2012, visitation increased 17% from 2011, and it was a 6% increase from the average visitation between 2007 and 2011. Dare County, where the Seashore is located, experienced record occupancy and meal revenues in 2012, as reported by the Outer Banks Visitor Bureau, despite the impacts of Hurricane Sandy that closed or substantially limited traffic along North Carolina Highway 12 to Hatteras Island from late October to late December 2012. This occupancy revenue has continued to climb over the last several years as follows: 2009 ($318 million), 2012 ($330 million), 2011 ($343 million), 2012 ($382 million through the end of November) while meals revenue has also increased as follows: 2009 ($185 million), 2010 ($188 million), 2011 ($191 million), and 2012 ($201 million though the end of November).

The final ORV management plan and regulation provide long-term guidance for the management of ORV use and the protection of affected wildlife species at the Seashore. The plan not only provides diverse visitor experience opportunities, manages ORV use in a manner appropriate to a unit of the National Park System, and provides a science-based approach to the conservation of protected wildlife species, but also adapts to changing conditions over the life-span of the plan. It includes a five-year peri-

odic review process that will enable the NPS to systematically evaluate the plan's effectiveness and make any necessary changes.

During the preparation of the environmental impact statement (EIS) for the management plan, the NPS evaluated the potential environmental impacts of long-term implementation of the Interim Strategy. The analysis determined that if the Interim Strategy were continued into the future, it would result in long-term, moderate to major adverse impacts to piping plovers, American oystercatchers, and colonial waterbirds, as well as long-term, major adverse impacts to sea turtles. Impacts to sea turtles and three species of colonial waterbirds had the potential to rise to the level of "impairment," which would violate the National Park Service Organic Act.

Moreover, if the Interim Strategy were to be reinstated, it could well be counterproductive to visitor access. Under the Interim Strategy, popular destinations such as Cape Point and the inlet spits still experienced resource protection closures. Several of the beach-nesting bird species at the Seashore may renest several times during the same season if eggs or very young chicks are lost, which is more likely when there is a higher level of human disturbance in proximity to nests and chicks. Under the Consent Decree, with its science-based buffers, there has been a noticeable reduction in the number of these renesting attempts for piping plovers and American oystercatchers, which means the duration of closures is typically shorter. Because the Interim Strategy allows smaller buffers and more disturbance of nests and chicks at these key sites, it increases the likelihood that birds will renest one or more time at those sites, and so even though the closures may seem smaller, they may be in place for a longer time than under the ORV plan or Consent Decree. This is even more likely to be the case now, because the number of nesting birds has increased significantly since 2007.

The Seashore has taken steps to enhance access in areas favored by beach fishermen. Specifically, a bypass below Ramp 44 allows ORV access to the eastern side of Cape Point and areas not closed during bird breeding season in the event of access blockage on the beach proper, whether from weather and tide events or resource closures. At Hatteras Inlet, at the end of Hatteras Island, a trail has been created and maintained to allow ORV access and the ability to park closer to what have traditionally been preferred fishing areas. In the proximity of Ramp 4, a pedestrian access trail adjacent to the Oregon Inlet Fishing Center to provide access for fishing in the ocean for those visitors without ORVs. Also, as a mitigation measure with the building of the new Bonner Bridge project, a new access ramp will be installed at approximately mile 2.5 that will expedite access to the northern end of the park. The Seashore is also in the final stages of completing an Environmental Assessment titled "Proposal to Construct New Development that Facilitates Public Access" which may in-

clude additional access points to areas that are traditionally closed off due to resource closure; these will enhance the fishing/beach driving opportunities.

In addition to reinstating the Interim Strategy, S. 486 provides authority for additional restrictions only for species listed as "endangered" under the Endangered Species Act of 1973, and only for the shortest possible time and on the smallest possible portions of the Seashore. This would conflict with numerous other laws and mandates including the National Park Service Organic Act, the Endangered Species Act, the Migratory Bird Treaty Act, the Seashore's enabling act, the aforementioned Executive Orders, and NPS regulations implementing these laws, which provide for the protection of other migratory bird species and other park resources.

S. 486 also provides that the protection of endangered species at Cape Hatteras shall not be greater than the restrictions in effect for that species at any other national seashore. Species protection measures cannot reasonably be compared from seashore to seashore without considering the specific circumstances at each site and the context provided by the number and variety of protected species involved, the levels of ORV use, and the underlying restrictions provided by the respective ORV management plans and special regulations. Even though Cape Hatteras has a wider variety of beach nesting wildlife species than Cape Cod or Assateague, for example, its plan actually allows for a much higher level of ORV use on larger portions of the Seashore. It would be neither reasonable nor biologically sound for Cape Hatteras to use less protective measures if they were designed for a location where the level of ORV use is much lower to begin with. Nor does it appear that such an arbitrary approach could possibly comply with the "peer-reviewed science" requirement imposed elsewhere in the bill. The Cape Hatteras plan was specifically designed to be effective for the circumstances at Cape Hatteras. The bill would require, to the maximum extent possible, that pedestrian and vehicle access corridors be provided around closures implemented to protect wildlife nesting areas. This concept was thoroughly considered during the preparation of the plan and EIS. The plan already allows for such access corridors when not in conflict with species protection measures. For example, under the current regulation, the Seashore works with the communities and has the ability to allow access around a turtle nest when the alternative route is between the nest and dunes but does not cause impairment to the existing dunes/vegetation.

Shorebird nesting areas are often close to the shoreline because of the Seashore's typically narrow beaches. A concentration of nests occur near the inlets and Cape Point, and access corridors cannot always be allowed without defeating the fundamental purpose of such closures: protecting wildlife. Several species of shorebirds that nest at the Seashore have highly mobile chicks, which can move

considerable distances from nests to foraging sites. Inadequate resource closures in the past have resulted in documented cases of human-caused loss or abandonment of nests and chick fatalities. Corridors that cut through a resource closure area would essentially undermine the function of the closure and render it compromised or even useless.

Finally, the final ORV management plan/EIS and special regulation are the products of an intensive five-year long planning process that included a high level of public participation through both the National Environmental Policy Act (NEPA) process and negotiated rulemaking, including four rounds of public comment opportunities. The Negotiated Rulemaking Advisory Committee's function was to assist directly in the development of special regulations for management of ORVs and met from 2007 to 2009. Although the committee did not reach consensus on a proposed regulation, it provided a valuable forum for the discussion of ORV management and generated useful information for the NPS. The NPS received more than 15,000 individual comments on the draft plan/EIS and more than 21,000 individual comments on the proposed special regulation. In completing the final ORV management plan/EIS and special regulation, the NPS considered all comments, weighed competing interests and ensured compliance with all applicable laws.

Currently, the ORV management plan/EIS and special regulation are the subject of a complaint that was filed by a coalition of ORV organizations with the US District Court in the District of Columbia on February 9, 2012. The Memorandum of Order to transfer the complaint to the US District Court of North Carolina was issued on December 23, 2012.

Mr. Chairman, that concludes my testimony. I would be glad to answer any questions that you or other members of the subcommittee may have.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by S. 486, as ordered reported.

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