



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Our ref: CER34.17/RH/SK
Date: 18 August 2014

Dear Mr Munyai

Comments on the Draft National Atmospheric Emissions Inventory System (NAEIS) Reporting Regulations (“the draft Regulations”) published under sections 12(b) and (c) and 53(aA), (o) and (p) as read with section 57 of the National Environmental Management: Air Quality Act 39 of 2004 (AQA)

1. We address you on behalf of groundWork, Earthlife Africa Johannesburg, the Vaal Environmental Justice Alliance, and the South Durban Community Environmental Alliance.¹

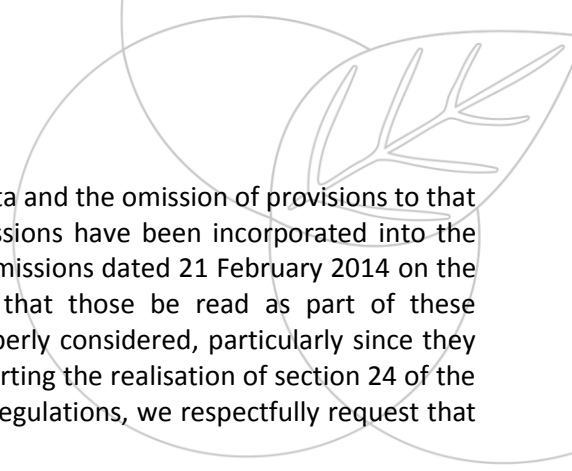
Introduction

2. On behalf of our clients, we made submissions on the first draft of the regulations (“previous draft regulations”),² on 21 February 2014. In these submissions, we particularly focused on access to information, the

¹ groundWork is a non-profit environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices. SDCEA is an environmental justice organisation based in south Durban. It is made up of 16 affiliate organisations, and it has been active since its formation in 1996. It is considered successful for many reasons, one of which is that it is a vocal and vigilant grouping in terms of lobbying, reporting and researching industrial incidents and accidents in this area. It contributes to the struggle against environmental racism for environmental justice and environmental health. VEJA is a democratic alliance of empowered civil society organisations in the Vaal Triangle, who have the knowledge, expertise and mandate to represent the determination of the communities in the area to control and eliminate emissions to air and water that are harmful to these communities and to the environment. Among other things, it aims to promote a culture of environmental awareness and sustainable development.

² Draft National Atmospheric Emissions Reporting Regulations dated 21 January 2014.

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need to ensure that the public is able to access atmospheric emission data and the omission of provisions to that effect in the previous regulations. We note that none of these submissions have been incorporated into the current draft regulations published on 18 July 2014.³ We attach our submissions dated 21 February 2014 on the previous draft regulations again, marked **Annexure A**, and request that those be read as part of these submissions. Our clients are entitled to have all these submissions properly considered, particularly since they are making these submissions in the public interest with a view to supporting the realisation of section 24 of the Constitution. To the extent that these are not incorporated in the final regulations, we respectfully request that the Minister provide detailed reasons for not doing so.

3. We reiterate our clients' submission that information relevant to the reporting of atmospheric emissions must be made publicly accessible as provided for by explicit public participation provisions in terms of our Constitution, the National Environmental Management Act 107 of 1998 (NEMA), AQA, and the 2012 National Framework for Air Quality Management - all of which highlight the importance of public participation in air quality management.
4. In these submissions, we amplify certain of the submissions we made on 21 February 2014, particularly with reference to comparative international experience, and raise a few additional concerns.

Confidentiality of Information: Comparative international law and regulatory best practice

5. In our submissions dated 21 February 2014, we made detailed submissions about the regulatory approach in the United States of America (U.S.) to the disclosure of emissions data. In this section, we provide some further perspective as to how this specific draft regulation compares to regulations in the U.S., the European Union (EU) and the United Kingdom (UK) with respect to information disclosure and the scope of confidentiality. It is our submission that the draft regulations include an unreasonably broad restriction on public disclosure of environmental information that is vastly different from frameworks adopted in the EU and US. This is addressed below.

International Law - Aarhus Convention

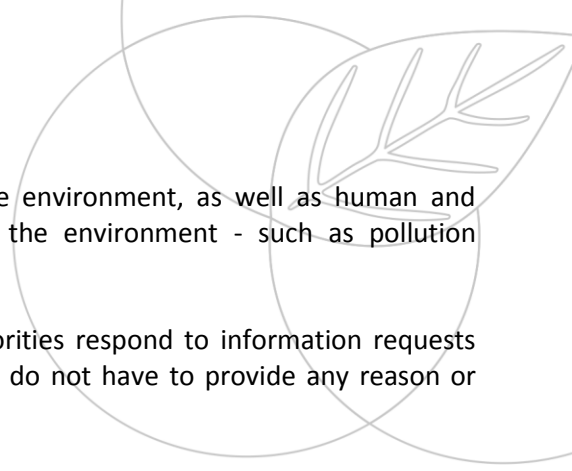
6. The best example of an international standard for public access to environmental information is embodied in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention.⁴ The Aarhus Convention is the most important agreement with regard to the right of the public to obtain information about the environmental impact of development activities. The purpose of the Convention is to guarantee access to information, public participation in decision and access to justice in environmental matters.
7. The Convention is regional in scope and it is considered by far the most impressive elaboration of principle 10 of the Rio Declaration,⁵ which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities.
8. The Aarhus Convention, in concert with the EU Environmental Information Directive,⁶ has greatly influenced domestic law throughout the European region. The convention defines environmental information expansively

³ Draft National Atmospheric Emissions Reporting Regulations GN 572 GG 37830 dated 18 July 2014.

⁴ Available at <http://www.unece.org/env/pp/documents/cep43e.pdf> .

⁵ Adopted at the Fourth Ministerial Conference by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992.

⁶ Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information of 28 January 2003, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF> .



and includes any form of information that relates to the state of the environment, as well as human and non-human factors and activities that affect or are likely to affect the environment - such as pollution emissions.⁷

9. Article 4 directs parties to the Convention to ensure that public authorities respond to information requests from the public promptly (within one month). Members of the public do not have to provide any reason or interest to justify their right to receive information.
10. An important aspect of the Convention is its approach to confidentiality. Contrary to section 11 of the current draft regulations, article 4(4) provides a clear explanation of the circumstances under which environmental information may be withheld for confidentiality reasons. For example, if disclosure will adversely affect the confidentiality of:
 - 10.1. the proceedings of public authorities (where confidentiality is protected by law);
 - 10.2. commercial or industrial information necessary to protect a legitimate economic interest; or
 - 10.3. personal data or other information about natural persons where consent has not been obtained,the information request may be refused.
11. Other grounds for refusing to release information are also clearly defined in the Convention. Using this narrowly-tailored approach, the Convention creates a presumption that environmental information is to be publicly disclosed and limits the discretion of authorities and regulated facilities to withhold such information. This is supported by a 2012 decision in which the Aarhus Convention Compliance Committee found in favour of citizens who sought to obtain air quality monitoring data collected by a city council in Scotland.⁸

EU - Environmental Information Directive

12. In recognition of the importance of public access to environmental information, the Council of the European Union (Council) adopted an environmental information directive in 2003 (“the Directive”).⁹ EU member states were required to adopt legislation implementing the Directive by early 2005. The Council included a lengthy preamble to the Directive in which it acknowledged that disclosure of environmental information fosters a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making, and, eventually, to a better environment.¹⁰
13. Certain key elements of the Directive are worth noting. The Directive includes within the definition of “environmental information” “any information on the state of the elements in the environment, such as air and atmosphere and factors, such as ... emissions ... affecting or likely to affect the elements of the environment”.¹¹
14. Public authorities are required to make available any environmental information upon request without the applicant having to state an interest.¹² The exceptions to disclosure are limited and are described in Article 4.
15. With regard to commercial and business interests, environmental information may be withheld from public release if disclosure will adversely affect the confidential business information that is necessary to protect a

⁷ Article 2(3).

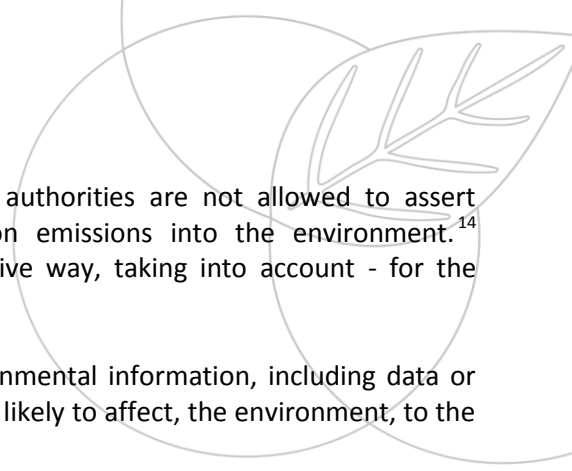
⁸ Available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-40/ece.mp.pp.c.1.2013.3_eng.pdf.

⁹ Directive 2003/4/EC Note 7 above of the European Parliament and of the Council on Public Access to Environmental Information, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>.

¹⁰ Ibid, Preamble at para.1.

¹¹ Art. 2(1)(a)-(b).

¹² Art. 3(1).



legitimate economic interest or intellectual property rights.¹³ Public authorities are not allowed to assert business confidentiality as a ground for withholding information on emissions into the environment.¹⁴ Furthermore, all grounds for refusal shall be interpreted in a restrictive way, taking into account - for the particular case - the public interest served by disclosure.¹⁵

16. The Directive also encourages authorities to proactively release environmental information, including data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment, to the public.¹⁶

U.K. - Environmental Information Regulations

17. As mentioned above, EU member states were required to transpose the EU Environmental Information Directive into national law by 2005. The U.K. did so through the Environmental Information Regulations, 2004.¹⁷ These regulations closely mirror the EU Directive, and there are key provisions that we would like to point out.

18. In terms of the Environmental Information Regulations, public authorities have a duty to disclose environmental information when requested by members of the public and an affirmative duty to disseminate such information by electronic means which are easily accessible.¹⁸ Exceptions to the duty to disclose environmental information are contained in s12. The circumstances under which environmental information may be claimed to be confidential are strictly described.¹⁹ If environmental information to be disclosed relates to emissions, a public authority is not authorised to withhold it on the ground that it is confidential commercial or industrial information.²⁰

U.S. - Clean Air Act

19. The U.S. Clean Air Act unequivocally states that emission records and data - among other information obtained by the Environmental Protection Agency (EPA), through its regulatory activities - shall be available to the public.²¹ The only exception is for records, reports, or information, other than emission data, that if made public, would divulge methods or processes entitled to protection as trade secrets.²² Emission data, by law, cannot be withheld from public disclosure for business confidentiality reasons.

20. The confidentiality provisions are outlined in more detail within the EPA regulations.²³ These regulations help guide the EPA when it evaluates a facility's claim that information must be withheld from public disclosure for confidentiality reasons. Business confidentiality is defined as "the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information..."²⁴

¹³ Art. 4(2)(d), (e).

¹⁴ Art. 4(2)(h).

¹⁵ Art. 4(2)(h).

¹⁶ Art. 7(e).

¹⁷ Available at <http://www.legislation.gov.uk/uksi/2004/3391/contents/made>.

¹⁸ s4 & 5.

¹⁹ Section 12(5)(d), (e), (f).

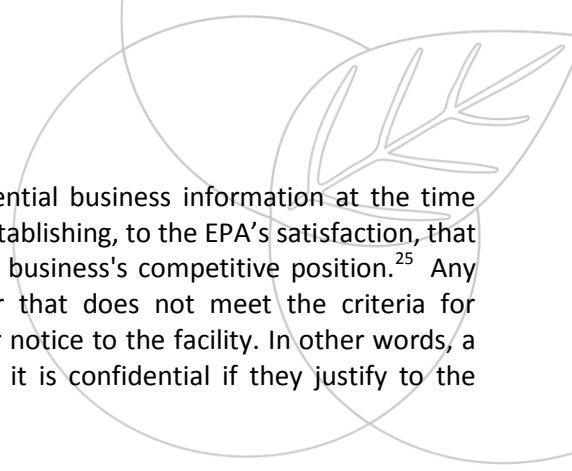
²⁰ s12(9).

²¹ 42 U.S.C. § 7414(c) available at <http://www.law.cornell.edu/uscode/text/42/7414>.

²² Ibid.

²³ 40 C.F.R. § 2.201(emphasis added) (available at http://www.ecfr.gov/cgi-bin/text-idx?SID=2fa7518af7e1d859278279c103038171&tpl=/ecfrbrowse/Title40/40tab_02.tpl).

²⁴ Ibid.

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21. The EPA places the burden on regulated facilities to designate confidential business information at the time information is submitted to the EPA and to justify this classification by establishing, to the EPA's satisfaction, that disclosure of the information is likely to cause substantial harm to the business's competitive position.²⁵ Any information that is not claimed to be confidential by the facility or that does not meet the criteria for confidentiality is automatically subject to public disclosure without prior notice to the facility. In other words, a data-provider must provide all emission data and can only claim that it is confidential if they justify to the regulator why they claim that it is confidential.
22. The EPA also published special rules that pertain to information it gathers under the Clean Air Act. These rules define emission data and set out other standards governing public access to information submitted by regulated facilities to the EPA.²⁶ It is practically unnecessary to file a public information request in the US, to obtain pollution information from the EPA. To facilitate public access to all types of pollution data, the EPA maintains a web-based clearinghouse called Envirofacts.²⁷ The database publishes information from a number of different facility-generated reports, including those for water discharges, air emissions, releases of toxic or hazardous substances, and greenhouse gas emissions. EPA has been publishing new rules to require regulated facilities to submit their monitoring and emissions data to it in electronic as opposed to hard-copy format; in part to speed up information disclosure efforts.²⁸ One of proposed rules requiring electronic reporting of pollutant discharges to water, is a regulatory approach used to harness the power of public disclosure to improve performance through public accountability and is expected to increase government effectiveness and enhance transparency.²⁹

Regulation 12: Publishing data and information

23. In our submissions of 21 February 2014 (**Annexure A** to this document), we made detailed submissions regarding what our clients regard as necessary amendments to draft regulation 12 in the previous draft regulations. In particular, we argued that:
- 23.1. Draft sub-regulation 12(1)(a) should be deleted (see paragraph 16).
 - 23.2. The word "may" in draft sub-regulation 12(a) should be amended to "must" (see paragraph 17)
24. None of these amendments are reflected in the draft regulations. For all the reasons set out in our submissions of 21 February 2014, our clients are of the view that the information contained in the EI must be disclosed to give effect to statutory provisions that include sections 24 and 32 of the Constitution, NEMA and its principles, and AQA itself, and that making disclosure only discretionary makes this provision vulnerable to Constitutional challenge.

Regulation 11: An offence to disclose

25. Draft regulation 11 currently provides:

"It is an offence for any person to disclose confidential information if that information was acquired while exercising or performing any power or duty in terms of these Regulations, except –

- (a) If the information is disclosed in compliance with the provisions of any law*
- (b) If the person is ordered to disclose information by a court of law; or*
- (c) If the information is disclosed to enable a person to perform a function in terms of these Regulations."*

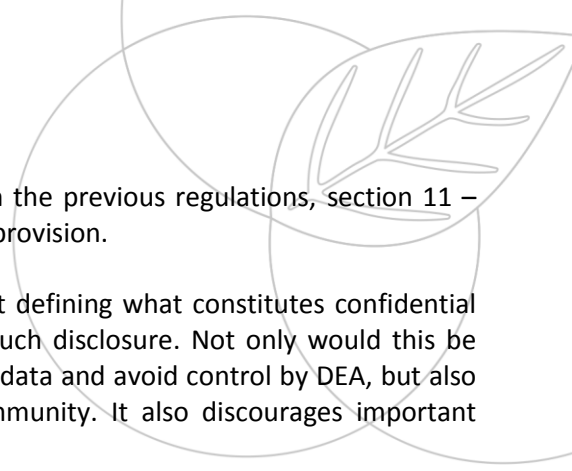
²⁵ See 40 C.F.R. § 2.208 which lists substantive criteria for use in confidentiality determinations.

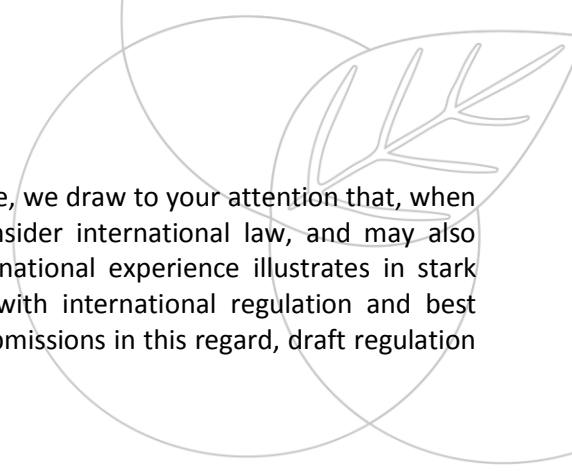
²⁶ See 40 C.F.R. § 2.301.

²⁷ Available at <http://www.epa.gov/envirofacts/>.

²⁸ NPDES Electronic Reporting Rule, 78 Fed. Reg. 46006, 46059 dated July 30, 2013

²⁹ Available at <http://www.gpo.gov/fdsys/pkg/FR-2013-07-30/pdf/2013-17551.pdf>.

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26. Despite our submissions on the inappropriateness of any prohibition in the previous regulations, section 11 – which was previously only prohibition – now reads as a criminal offence provision.
 27. This provision has the effect of protecting the provider of data without defining what constitutes confidential information, and without providing any public interest exceptions to such disclosure. Not only would this be clear loophole through which data-providers could restrict all emissions data and avoid control by DEA, but also effectively excludes all oversight by the public and the scientific community. It also discourages important disclosure in the public interest.
 28. As it stands, draft regulation 11 could apply to a wide group of people, including government officials, but also employees and contractors who are exercising the duty of reporting under the reporting regulations. Not defining what constitutes confidential information and criminalising the provision of confidential information places employees, contractors and others in precarious situations and may lead to the provision of incomplete and inaccurate data due to fear of committing an offence.
 29. Crucially, draft regulation 11 is also misaligned with section 31Q of the National Environmental Management Act, 1998 (NEMA). Section 31Q contains a very similar offence provision to the one provided for in draft regulation 11, but:
 - 29.1. provides an additional exception in section 31Q(1)(d), namely disclosure “for the purposes of the administration of justice”;
 - 29.2. is limited by section 31Q(1A) that excludes from the offence the disclosure of information pertaining to:
 - 29.2.1. environmental quality or the state of the environment (31Q(1A)(a));
 - 29.2.2. any risks posed to the environment, public safety and the health and well-being of people (31Q(1A)(b)); and
 - 29.2.3. compliance with or contraventions of any environmental legislation by any person (31Q(1A)(c)).
 30. Section 5 of AQA provides that AQA “must be read with any applicable provisions of” NEMA, and its interpretation and application (a provision that would also apply to regulations under AQA) “must be guided by” the principles set out in section 2 of NEMA.
 31. Those principles include:
 - 31.1. “The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured” (section 2(f)(4)) – participation that cannot take place in the absence of proper access to information;
 - 31.2. “Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means” (section 2(4)(h));
 - 31.3. “Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law (section 2(4)(k)); and
 - 31.4. “The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people’s common heritage” (section 2(4)(o)). That “environment” held in public trust, as defined in NEMA’s section 1, includes the air.



32. With reference to the international conventions and law described above, we draw to your attention that, when interpreting section 24 of the Constitution, a court is obliged to consider international law, and may also consider foreign law. Moreover, the description of comparative international experience illustrates in stark terms how misaligned the current draft regulations 11 and 12 are with international regulation and best practice. At the very least, and without prejudice to any of our other submissions in this regard, draft regulation 11 should be brought into alignment with NEMA's section 31Q(1A).

“Criteria pollutants” and reporting formats

33. The emissions inventory (EI) should capture data on the air emissions of a wide range of substances which have an environmental impact. It is a key tool used to track progress in relation to improving the environment. However, the draft regulations are not clear on which pollutants must be reported on; although the draft regulations refer to the term “criteria pollutants”,³⁰ this term is not defined in AQA or in the draft regulations.

34. The reporting requirements in Annexure 1 of the draft regulations are vague. They fail to provide information on the type of data that should be reported on. In addition, Annexure 1 states that emission reports for Groups A, C and D must be made in the format required for NAEIS, but fails to define this format. The format, which would also specify the specific reporting requirements for each Group of emission sources, is a vital part of the EI, and this absence needs to be addressed to give effect to the purpose of the EI.

Conclusion

35. It is evident that the jurisdictions in paragraphs 12-22 above discussed above recognise the importance of making emission reporting data publicly available. We emphasise the fact that public access to atmospheric emission data is essential to ensuring that good governance in air quality management matters. The September 2013 judgment of Vaal Environmental Justice Alliance (VEJA) v Company Secretary, ArcelorMittal South Africa (AMSA),³¹ highlighted that the public and civil society groups have an important watchdog role and are entitled to monitor, protect and exercise the rights of the public at least by seeking the information to enable them to assess the impact of various activities on the environment. This they can only do with access to emission inventory data that is credible, accurate and complete for environmental decision making - unless data is, in fact, confidential.

36. This, as stated in our submissions of 21 February 2014 (Annexure A) will obviate the need for unnecessary and time-consuming applications under the Promotion of Access to Information Act, 2000, internal appeals and costly court applications. This data should be made automatically available. As in the above-discussed jurisdictions, a data-provider should bear the burden to show that data is confidential at the time of submitting it.

37. Our clients – and other members of the public – are entitled to protect and exercise their Constitutionally guaranteed right to a healthy environment, by seeking information to enable them to assess the impact of atmospheric emission activities on the environment, and to exercise a watchdog role in the preventative and rehabilitative measures taken to avoid further harm to the air they breathe.

38. In the circumstances we, on our clients' behalf, strongly appeal for the draft Regulations to be amended as outlined in our submissions dated 21 February 2014 (Annexure A) as read with the submissions contained in this document.

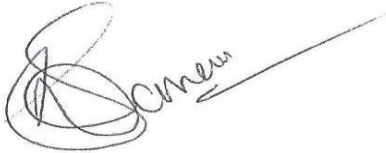
³⁰ Ibid, Annexure 1.

³¹ Case no. 39646/12, South Gauteng High Court.

39. Should you require more information on any aspect of our submissions, please let us know.

CENTRE FOR ENVIRONMENTAL RIGHTS

per:

A handwritten signature in black ink, appearing to read 'S Kamanja', with a long horizontal stroke extending to the right.

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Attorney

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