

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
AGRIFOS FERTILIZER L.L.C.	)	DOCKET NOs.
PASADENA, TEXAS	)	RCRA-06-2011-0960 and
	)	CAA-06-2011-3317
RESPONDENT	)	
	)	

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**CONSENT AGREEMENT AND FINAL ORDER**

The Director, Compliance Assurance and Enforcement Division, United States Environmental Protection Agency (EPA), Region 6, and Agrifos Fertilizer L.L.C. (Respondent) in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

**I. PRELIMINARY STATEMENT**

1. This proceeding for the assessment of civil penalties pursuant to Section 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, and Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), is simultaneously commenced and concluded by the issuance of this CAFO against the Respondent pursuant to 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and (3), and 22.34.
2. Notice was given to the State of Texas prior to the issuance of this CAFO, as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).
3. For the purposes of this proceeding only, the Respondent admits the jurisdictional allegations herein; however, the Respondent neither admits nor denies the specific factual allegations or the conclusions of law contained in this CAFO.

4. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

5. Compliance with all the terms and conditions of this CAFO shall resolve only those causes of action which are set forth herein.

6. The Respondent consents to the issuance of this CAFO, and to the assessment and payment of the stated civil penalty in the amount and by the method set forth in this CAFO.

7. The Respondent represents that it is duly authorized to execute this CAFO and that the party signing this CAFO on behalf of the Respondent is duly authorized to bind the Respondent to the terms and conditions of this CAFO.

8. The Respondent agrees that the provisions of this CAFO shall be binding on the Respondent, and its officers, directors, employees, successors, and assigns.

9. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

## **II. STATUTORY AND REGULATORY BACKGROUND**

### **A. RESOURCE CONSERVATION AND RECOVERY ACT**

10. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, was enacted on October 21, 1976, and establishes a comprehensive program to be administered by the Administrator of EPA (Administrator), regulating the generation, transportation, treatment, storage, and disposal of hazardous waste.

11. Pursuant to its authority under RCRA, EPA promulgated regulations at 40 C.F.R. Parts 260 through 272 that are applicable to generators, transporters, and treatment, storage, and

disposal facilities. These regulations provide detailed requirements governing the activities of persons who generate hazardous waste. These regulations generally prohibit the treatment, storage, and disposal of hazardous waste without a permit or equivalent “interim status.”

These regulations also prohibit land disposal of certain hazardous waste.

12. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, and 40 C.F.R. Part 271, the Administrator may authorize a state to administer a RCRA hazardous waste program in lieu of the federal program when he or she deems the state program to be substantially equivalent to the federal program. When a state obtains such authorization, federally-approved state regulations apply in lieu of the federal RCRA regulations in that state. Federally-approved state RCRA regulations are enforceable by the United States pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

13. The Administrator granted final authorization to Texas to administer its Hazardous Waste Management Program in lieu of the federal program on December 12, 1984, effective December 26, 1984 (49 Fed. Reg. 48300; *see also* 40 C.F.R. § 272.2201), and there have been subsequent authorized revisions to the federal program.

14. In Texas, the federal hazardous waste program is managed by the Texas Commission on Environmental Quality (TCEQ), pursuant to the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361, and the rules and regulations promulgated thereunder at 30 Texas Administrative Code (T.A.C.) Chapter 335. For ease of reference, the Texas regulations are cited below followed by the applicable federal hazardous waste regulation.

## **B. CLEAN AIR ACT**

15. On December 29, 1992, EPA promulgated the National Emission Standards for Hazardous Air Pollutants from Phosphoric Acid Manufacturing Plants. These regulations are

set forth at 40 C.F.R. Part 63, Subpart AA (Subpart AA). Subpart AA applies to emissions of hazardous air pollutants (HAPs) emitted from new or existing affected sources at a phosphoric acid manufacturing plant. Among other things, Subpart AA applies to evaporative cooling towers at a phosphoric acid manufacturing plant.

16. Section 112(l) of the CAA enables EPA to approve a state program for implementation and enforcement of the NESHAP program. 42 U.S.C. § 7412(l). As part of its CAA Title V submission, TCEQ stated that it intended to use the mechanism of incorporation by reference to adopt Section 112 of the CAA into its regulations. 60 Fed. Reg. 30037, 30044 (June 7, 1995); 61 Fed. Reg. 32693, 32698 - 99 (June 25, 1996). On December 6, 2001, EPA promulgated final full approval of Texas' operating permits program effective November 30, 2001. 66 Fed. Reg. 63318. EPA has also delegated many Part 63 requirements to the State of Texas, including Subpart AA. 40 C.F.R. § 63.99(a)(43)(i). Section 112(l)(7) of the CAA, 42 U.S.C. § 7412(l)(7), also states that approval of a state program does not prohibit the Administrator from enforcing any applicable emission standard or requirement under Section 112 of the CAA, 42 U.S.C. § 7412.

17. Section 113(d)(1) of the Act, authorizes EPA to bring an administrative action for penalties that exceed \$295,000<sup>1</sup> and/or the first alleged date of violation occurred more than twelve (12) months prior to the initiation of the action, if the Administrator and the United States Attorney General jointly determine that the matter is appropriate for administrative action.

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<sup>1</sup> The maximum penalty that can be assessed (without a waiver) under Section 113 of the Clean Air Act was increased by the Civil Monetary Penalty Inflation Adjustment Rule codified at 40 C.F.R. Part 19 to \$220,000 for violations occurring between January 30, 1997 and March 15, 2004, to \$270,000 for violations occurring between March 15, 2004 and January 12, 2009, and to \$295,000 for violations occurring after January 12, 2009.

18. EPA and the U.S. Department of Justice have jointly determined that the Complainant can administratively assess a civil penalty even though the alleged violations have occurred more than twelve (12) months prior to the initiation of the administrative action.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. GENERAL PRELIMINARY ALLEGATIONS**

19. The Respondent is a limited liability company formed under the laws of the State of Delaware, and authorized to do business in the State of Texas.

20. The Respondent is a “person” as defined by 30 TAC § 3.2 (25) [40 C.F.R. § 260.10], Section 1004 (15) of RCRA, 42 U.S.C. § 6903 (15), and Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

21. The Respondent owns and operates the Agrifos Site, located at 2001 Jackson Road, Pasadena, Texas 77506 (Agrifos Site or Facility).

22. Agrifos purchased the majority of the Agrifos Site (approximately 509 acres) in September 1998 from the Mobil Oil Corporation through an Asset Purchase Agreement, in which Mobil Oil Corporation retained responsibility for the closure of all existing gypsum stacks at the Agrifos Site.

23. Mobil Oil Corporation was subsequently merged into ExxonMobil Corporation (ExxonMobil) in 1999, with ExxonMobil assuming Mobil’s contractual obligations for the Agrifos Site.

24. In September 2009, Agrifos permanently ceased accepting sulfuric acid from Air Products L.L.C. (Air Products).

25. In March 2011, Agrifos permanently ceased manufacturing phosphoric acid from phosphate ore and in April 2011, Exxon Mobil commenced closure of the south gypsum stack complex.

**B. RCRA PRELIMINARY ALLEGATIONS**

26. “Owner” is defined in 30 T.A.C. § 335.1(107) (40 C.F.R. § 260.10) as “the person who owns a facility or part of a facility.”

27. “Operator” is defined in 30 T.A.C. § 335.1(108) (40 C.F.R. § 260.10) as “whoever has legal authority and responsibility for a facility that generates, transports, processes, stores or disposes of any hazardous waste.”

28. “Owner or operator” is defined in 40 C.F.R. § 270.2 as “the owner or operator of any facility or activity subject to regulation under RCRA.”

29. “Facility” is defined in 30 T.A.C. § 335.1(59) (40 C.F.R. § 260.10) as meaning “all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations thereof).”

30. The Agrifos Site identified in Paragraph 21 above is a “facility” as that term is defined by 30 T.A.C. § 335.1(59) [40 C.F.R. § 260.10].

31. The Respondent is the “owner” and “operator” of the Agrifos Site identified in Paragraph 21 above, as those terms are defined at 30 TAC § 335.1(107) & (108) [40 C.F.R. § 260.10] and 40 C.F.R. § 270.2.

32. On or about May 25 – 27, 2004 and April 19 – 21, 2006, EPA conducted inspections of the facility pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.

**C. RCRA VIOLATIONS**

**Count One - Disposal of Hazardous Waste without a RCRA Permit or Interim Status**

33. Pursuant to Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and 30 T.A.C. § 335.43(a) [40 C.F.R. § 270.1(b)], a RCRA permit or interim status is required for the processing (treatment), storage, or disposal of hazardous waste.

34. The Agrifos Site includes a mineral processing facility that extracts phosphates from mineral ores (to produce phosphoric acid).

35. The byproduct wastes include phosphogypsum, which is accumulated as large piles of solids, known as gypsum stacks at the Agrifos Site, and process wastewater, which is discharged into the gypsum stacks.

36. Pursuant to 30 T.A.C. § 335.1(138) [40 C.F.R. § 261.2], the phosphogypsum and process wastewater identified in Paragraph 35 above are “solid wastes” because the phosphogypsum was disposed of when placed on the land and the process wastewater was disposed of when discharged into the gypsum stacks.

37. Solid waste from the extraction, beneficiation, and processing of ores and minerals to generate a saleable product are excluded from the definition of hazardous waste pursuant to 30 T.A.C. § 335.1(69) [40 C.F.R. § 261.4(b)(7), known as the “Bevill Exemption”].

38. The Bevill Exemption applies to two wastes generated from phosphoric acid mineral processing operations: “phosphogypsum from phosphoric acid production” and “process wastewater from phosphoric acid production” 30 T.A.C. § 335.1(69) [40 C.F.R. § 261.4(b)(7)(ii)(D) & (P)].

39. Mineral processing products that are saleable, either as raw materials or as feedstocks to other types of industrial processes [e.g., chemical manufacturing such as monoammonium phosphate (MAP) and diammonium phosphate (DAP)] or as finished products, are considered final products. 54 Fed. Reg. 26592, 36620 (Sept. 1, 1989). Chemical manufacturing wastes, cleaning wastes, scrubber wastes, and wastes generated after the first saleable product are not “process wastewater from phosphoric acid production” and do not qualify for the Bevill Exemption.

40. When Bevill-exempt phosphogypsum and process wastewater from phosphoric acid production are mixed with characteristic hazardous non-exempt wastes, if the resulting mixture continues to exhibit a hazardous characteristic of the non-exempt waste, then the entire mixture is a hazardous waste pursuant to the Bevill Mixture Rule, promulgated at 40 C.F.R. § 261.3(a)(2)(i) [incorporated by reference into 30 T.A.C. § 335.1(69)].

41. “Disposal” is defined in 30 T.A.C. § 335.1(44) (40 C.F.R. § 260.10) as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.”

42. Historically, 2,4 Dinitrotoluene (DNT) hazardous waste (D030) from the adjacent facility owned and operated by Air Products, and hazardous waste from MAP/DAP fertilizer production and cleaning operations (D002) have been disposed by ExxonMobil and the Respondent into the gypsum stacks.

43. The mixture of Bevill-exempt process wastewater, the hazardous MAP/DAP wastes and cleaning wastes (pH of less than 2 due to phosphoric and sulfuric acid concentration –



D002), and DNT waste (DNT concentration equal to or above 0.13 mg/l – D030) is a hazardous waste and is not subject to the Bevill exemption.

44. “Surface impoundment” is defined in 30 T.A.C. § 335.1(145) (40 C.F.R. § 260.10) as “a facility or part of a facility, which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds and lagoons.”

45. The gypsum stacks are “surface impoundment[s]” as that term is defined at 30 T.A.C. § 335.1(145) [40 CFR § 260.10].

46. The Respondent disposed of the hazardous waste identified in Paragraphs 42 and 43 into the gypsum stacks.

47. The Respondent does not have a RCRA permit or interim status to dispose of hazardous waste into the gypsum stacks.

48. Therefore, the Respondent violated Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and 30 T.A.C. § 335.43(a) [40 C.F.R. § 270.1(b)] by disposing of hazardous waste without a RCRA permit or interim status into the gypsum stacks.

### **Count Two - Failure to Meet Land Disposal Restrictions Standards**

49. Pursuant to 30 T.A.C. § 335.431(c)(1) (40 C.F.R. §§ 268.40 and 268.48), D002 hazardous waste is prohibited from land disposal unless the generator deactivates the waste to remove its corrosive characteristic in accordance with the treatment standards set forth at 30 T.A.C. § 335.431(c)(1) [40 C.F.R. § 268.48].

50. Pursuant to 30 T.A.C. § 335.431(c)(1) [40 C.F.R. §§ 268.40 and 268.48], D030 hazardous waste is prohibited from land disposal unless the generator treats the waste to reduce the DNT concentration to 0.32 mg/l or below (wastewaters).

51. “Land disposal” is defined in 30 T.A.C. § 335.431(c)(1) (40 C.F.R. § 268.2) as meaning the “placement in or on the land, except in a corrective action management unit or staging pile, and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt-dome formation, salt-bed formation, underground mine or cave, or placement in a concrete vault, or bunker intended for disposal purposes.”

52. The Respondent placed waste from MAP/DAP fertilizer production and cleaning operations (D002 hazardous waste) into the gypsum stacks without deactivating the waste to remove its corrosive characteristic.

53. The Respondent placed D030 hazardous waste into the gypsum stacks without treating the waste to reduce the DNT concentration to 0.32 mg/l or below (wastewaters).

54. Therefore, the Respondent violated 30 T.A.C. § 335.431(c)(1) [40 C.F.R. §§ 268.40 and 268.48] by disposing of hazardous wastes into surface impoundments without meeting the applicable land disposal restriction standards.

### **Count Three – Failure to Make a Hazardous Waste Determination**

55. Pursuant to 30 T.A.C. § 335.62 [40 C.F.R. § 262.11], a person who generates a solid waste must determine if that waste is hazardous pursuant to 30 T.A.C. § 335.504 [40 C.F.R. § 262.11].

56. The Respondent discharged DNT waste from the adjacent facility owned and operated by Air Products into the gypsum stacks.

57. The Respondent discharged waste from MAP/DAP fertilizer production and cleaning operations into the gypsum stacks.

58. Pursuant to 30 T.A.C. § 335.1(138) [40 C.F.R. § 261.2], the waste identified in Paragraphs 56 and 57 are “solid wastes” because the material was disposed of into the gypsum stacks.

59. The Respondent failed to determine whether the wastes identified in Paragraphs 56 and 57 were hazardous wastes prior to disposing of the wastes into the gypsum stacks.

60. Therefore, the Respondent violated 30 T.A.C. § 335.62 [40 C.F.R. § 262.11] by failing to make a hazardous waste determination for the wastes that were disposed of into the gypsum stacks.

**Count Four – Processing (Treating) Hazardous Waste without a RCRA Permit or Interim Status**

61. Pursuant to Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and 30 T.A.C. § 335.43(a) [40 C.F.R. § 270.1(b)], a RCRA permit or interim status is required for the processing (treatment), storage, or disposal of hazardous waste.

62. The Respondent sent 98% sulfuric acid to Air Products through a dedicated pipeline.

63. When Air Products could no longer use the 98% sulfuric acid due to contamination and reduced strength, it sent 72% sulfuric acid back to the Respondent through a dedicated pipeline.

64. Pursuant to 30 T.A.C. § 335.1(138) [40 C.F.R. § 261.1(c)(1)], a spent material is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

65. A spent material is a “solid waste” when it is used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land. 30 T.A.C. § 335.1(138) [40 C.F.R. § 261.2(c)(1)(B)].

66. The 72% sulfuric acid sent to the Respondent from Air Products was a “spent material” as defined in 30 T.A.C. § 335.17(a)(1) [40 C.F.R. § 261.1(c)(1)].

67. The Respondent used the 72% sulfuric acid to produce fertilizers, which were placed on the land.

68. Pursuant to 30 T.A.C. § 335.1(138) [40 C.F.R. § 261.2], the 72% sulfuric acid was a “solid waste” because it was used to produce fertilizer which is placed on the land.

69. Samples taken of the 72% sulfuric acid showed a concentration of DNT of 0.13 mg/l or greater using the Toxicity Characteristic Leaching Procedure (TCLP).

70. The 72% sulfuric acid is a characteristic hazardous waste (D030).

71. “Processing” is defined in 30 T.A.C. § 335.1(117) as:<sup>2</sup>

The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the

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<sup>2</sup> “Processing”, as used by Texas is essentially equivalent to the term “treatment”, as used Section 1004(34) of RCRA, 42 U.S.C. § 6903(34) and 40 C.F.R. § 260.10.

administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*, as amended.

72. The Respondent processed the 72% sulfuric acid to produce phosphoric acid.

73. The Respondent did not have a RCRA permit or interim status to process (treat) the 72% sulfuric acid.

74. Therefore, the Respondent violated Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and 30 T.A.C. § 335.43(a) [40 C.F.R. § 270.1(b)], by processing the 72% sulfuric acid without a RCRA permit or interim status.

#### **Count Five – Improper Storage of Used Oil**

75. 30 T.A.C. § 324.1 [40 C.F.R. § 279.22(c)] provides that containers and above-ground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words “Used Oil.”

76. 40 C.F.R. § 279.1 defines “used oil” as meaning “any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.”

77. 40 C.F.R. § 279.20(a) defines “used oil generator” as “any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation.”

78. The Respondent is a “used oil generator” as that term is defined by 40 C.F.R. § 279.20(a).

79. The Respondent stored used oil at its facility.

80. On or about the May 25 – 27, 2004 Inspection, the Respondent was storing sixty-five 55 gallon drums of used oil in its Oil Storage Area that were not labeled “Used Oil”.

81. Therefore, the Respondent violated 30 T.A.C. § 324.1 [40 C.F.R. § 279.22(c)] by failing to label sixty-five 55-gallon drums of used oil with the words “Used Oil”.

**D. CAA PRELIMINARY ALLEGATIONS**

82. 40 C.F.R. Part 63, Subpart AA applies to emissions of hazardous air pollutants (HAPs) emitted from new or existing affected sources at a phosphoric acid manufacturing plant.

83. The facility identified in Paragraph 21 is a phosphoric acid manufacturing plant.

84. The requirements of Subpart AA applies to evaporative cooling towers at a phosphoric acid manufacturing plant. 40 C.F.R. § 63.600(b)(2).

85. On or about April 19 – 21, 2006, EPA conducted an inspection of the facility pursuant to Section 114 of the CAA, 42 U.S.C. § 7414.

**E. CAA VIOLATIONS**

**Count Six – Improper Routing of Effluent from Scrubber through Cooling Tower**

86. 40 C.F.R. § 63.603(e) provides that “no owner or operator shall introduce into any evaporative cooling tower any liquid effluent from any wet scrubbing device installed to control emissions from process equipment.”

87. The gypsum pond receives scrubber effluent from the Teller scrubber located in the Prayon Unit, the Cominco scrubber located in the Sulfuric Acid Plant, and the North and South stack scrubbers located in the Granulation Plant. The gypsum pond water containing the scrubber effluent is then sent to the Prayon cooling tower.

88. The Prayon cooling tower is an evaporative cooling tower.

89. The scrubbers identified in Paragraph 87 are wet scrubbers installed to control emissions from their respective process equipment.

90. Therefore, the Respondent violated 40 C.F.R. § 63.603(e) by introducing liquid effluent from wet scrubbers into the Prayon cooling tower.

**Count Seven - Failure to Certify Compliance with the Requirements of 40 C.F.R. § 63.603(e)**

91. 40 C.F.R. § 63.603(e) requires that “each owner or operator of an affected source subject to this paragraph (e) must certify to the Administrator annually that he/she has complied with the requirements contained in this section.”

92. The Respondent failed to certify that it is in compliance with the requirement to not introduce any liquid effluent from any wet scrubbing device installed to control emissions from process equipment into a cooling tower.

93. Therefore, the Respondent violated 40 C.F.R. § 63.603(e) by failing to certify compliance with 40 C.F.R. § 63.603(e).

**IV. TERMS OF SETTLEMENT**

**A. CIVIL PENALTY**

94. For the reasons set forth above, the Respondent has agreed to pay a civil penalty of **One Million Eight Hundred Thousand Dollars (\$1,800,000)**. The penalty shall be paid in five payments as follows:

Payment No. 1: \$360,000 within thirty (30) days of the effective date of this CAFO.

Payment No. 2: \$365,971.81 (\$360,000 civil penalty plus interest of \$5,917.81) within one hundred eighty (180) days of the effective date of this CAFO.

Payment No. 3: \$365,326.03 (\$360,000 civil penalty plus interest of \$5,326,03) within one year of the effective date of this CAFO.

Payment No. 4: \$363,550.68 (\$360,000 civil penalty plus interest of \$3,550.68) within  
five hundred forty (540) days of the effective date of this CAFO.

Payment No. 5: \$361,775.34 (\$360,000 civil penalty plus interest of \$1,775.34) within  
two years of the effective date of this CAFO.

95. The Respondent shall pay the assessed civil penalty by certified check, cashier's  
check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6".  
Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified  
mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified  
mail, or U.S. Postal Service express mail, the checks should be remitted to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the checks should be remitted to:

U.S. Bank  
Government Lockbox 979077 US EPA Fines & Penalties  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101  
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental  
Protection Agency"



In the Matter of Agrifos Fertilizer L.L.C. - Docket Nos. RCRA-06-2011-0960 and  
CAA-06-2011-3317

**PLEASE NOTE:** Docket numbers RCRA-06-2011-0960 and CAA-06-2011-3317 shall be  
clearly typed on the checks, or other method of payment to ensure proper credit. If payment is  
made by check, the check shall also be accompanied by a transmittal letter and shall reference  
the Respondent's name and address, the case name, and docket numbers of this CAFO.

If payment is made by wire transfer, the wire transfer instructions shall reference the  
Respondent's name and address, the case name, and docket numbers of this CAFO.

The Respondent shall also send a simultaneous notice of such payment, including a copy  
of the checks, transmittal letters, or wire transfer instructions to the following:

Guy Tidmore, Chief  
Compliance Enforcement Section (6EN-HE)  
Compliance Assurance and Enforcement Division  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

David Eppler  
Enforcement Officer  
Toxics Enforcement Section (6EN-AT)  
Compliance Assurance and Enforcement Division  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Lorena Vaughn  
Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

The Respondent's adherence to this request will ensure proper credit is given when penalties are  
received by EPA and acknowledged in the Region.

96. The Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

97. If the Respondent fails to submit payment within thirty (30) days of the effective date of this Order, the Respondent may be subject to a civil action to collect any unpaid portion of the assessed penalty, together with interest, handling charges and nonpayment penalties as set forth below.

98. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

99. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid.

In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. *See* 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day

payment is delinquent. *See* 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

**B. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

100. The Respondent shall install a concrete storm water collection and containment wall (Containment Wall) around the AS Production Unit (former Granulation Unit). The Containment Wall shall be designed and operated to contain all spills and leaks from the process unit, as well as the contaminated storm water runoff. The contaminated storm water runoff shall be reused in the production process. The Containment Wall shall be designed to contain up to a twelve inch, twenty-four hour rainfall event.

101. The Containment Wall shall be completed within six (6) months of the effective date of the CAFO, excepting delays due to force majeure, as set forth in Section IV.C.

102. The Respondent is responsible for the satisfactory completion of the SEP. The total expenditure for the SEP shall be no less than \$600,000 to install the Containment Wall around the Granulation Unit, as described in Paragraph 100 above. Eligible SEP costs do not include inventory on hand, overhead, additional employee time and salary, administrative expenses, legal fees, and oversight of a contractor. The Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP Completion Report.

103. The Respondent hereby certifies that, as the date of this CAFO, the Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is the Respondent required to perform or develop the SEP by any other agreement, grant, or as injunctive relief in this or any other case. The Respondent further certifies that the SEP was not a project that the Respondent was planning or intending to construct, perform, or implement

other than in settlement of this action. Finally, the Respondent certifies that it has not received, and is not presently negotiating to receive credit in any other enforcement action for this SEP.

104. The Respondent's signatory to this CAFO, by signing the CAFO, makes the following additional certification:

The Respondent is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. I further certify that, to the best of my knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purpose of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

105. For federal income tax purposes, the Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

### **SEP Completion Report**

106. The Respondent shall submit a SEP Completion Report to EPA within thirty (30) days after completion of the SEP. The SEP Completion Report shall contain the following information:

- A. A detailed description of the SEP as implemented;
- B. A description of any operating or logistical problems encountered and the solutions thereto;
- C. Itemized final costs with copies of receipts for all expenditures;

D. Certification that the SEP has been fully implemented pursuant to the provisions of this CAFO;

E. Photographs of the SEP construction activities from initiation of the SEP to conclusion; and

F. A description of the environmental, emergency preparedness, and/or public health benefits resulting from implementation of this SEP.

107. The Respondent agrees that failure to timely submit the final SEP Completion Report shall be deemed a violation of this CAFO and Respondent shall become liable for stipulated penalties pursuant to Paragraph 112.F.

108. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the SEP Completion Report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this Paragraph, “acceptable documentation” includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

109. The Respondent shall submit the following certification in the SEP Completion Report, signed by a responsible corporate official:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

110. After receipt of the SEP Completion Report described in Paragraph 106 above, EPA will notify the Respondent, in writing, regarding: (a) any deficiencies in the SEP Report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or (b) indicate that EPA concludes that the project has been completed satisfactorily; or (c) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with Paragraph 112 below.

111. If EPA elects to exercise option (a) in Paragraph 110 above, i.e., if the SEP Report is determined to be deficient but EPA has not yet made a final determination about the adequacy of SEP completion itself, EPA shall permit the Respondent the opportunity to object in writing to the notification of deficiency given pursuant to Paragraph 110 within ten (10) days of receipt of such notification. EPA and the Respondent shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement on changes necessary to the SEP Report. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision on adequacy of the completion of the SEP to Respondent, which decision shall be final and binding upon the Respondent. The Respondent agrees to comply with any requirements imposed by EPA as a result of any failure to comply with the terms of this CAFO. In the event the SEP is not completed as reasonably contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with Paragraph 112 herein.

**Stipulated Penalties for Failure to Complete SEP/Failure to Spend Agreed-On  
Amount**

112. In the event that the Respondent fails to comply with any of the terms or provisions of this CAFO relating to the performance of the SEP described in Section IV.B of this CAFO

and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in Paragraph 102 above, the Respondent shall be liable for stipulated penalties according to the provisions set forth below:

A. Except as provided in subparagraph (B) immediately below, for a SEP which has not been completed satisfactorily pursuant to this CAFO, the Respondent shall pay a stipulated penalty to the United States in the amount of \$300,000 (100% of the amount the penalty was mitigated).

B. If the SEP is not completed in accordance with Paragraphs 100 - 102, but EPA determines that the Respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, the Respondent shall not be liable for any stipulated penalty.

C. If the SEP is completed in accordance with Paragraphs 100 - 102, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, the Respondent shall pay a stipulated penalty to the United States in the amount of \$60,000 [20% of the amount the penalty was mitigated penalty (\$300,000)].

D. If the SEP is completed in accordance with Paragraphs 100 - 102, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, the Respondent shall not be liable for any stipulated penalty.

E. If the Respondent fails to timely complete the SEP for any reason other than a force majeure event, the Respondent shall pay stipulated penalties as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 <sup>st</sup> through 14 <sup>th</sup> day
\$2,500	15 <sup>th</sup> through 30 <sup>th</sup> day
\$5,000	31 <sup>st</sup> day and beyond

F. For failure to submit the SEP Completion Report required by Paragraph 106 above, the Respondent shall pay a stipulated penalty in the amount of \$500 for each day after the report was originally due, until the report is submitted.

113. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

114. Stipulated penalties for Paragraphs 112.E and 112.F above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

115. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of Paragraph 94 - 95 herein. Interest and late charges shall be paid as stated in Paragraphs 98 - 99 herein.

116. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of the Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for the Respondent's violation of any applicable provision of law.

117. Any public statement, oral or written, in print, film, or other media, made by the Respondent making reference to the SEP shall include the following language, "This project was



undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the Resource Conservation and Recovery Act (RCRA), and the Clean Air Act.”

118. This CAFO shall not relieve the Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by the Respondent in connection with the SEP undertaken pursuant to this CAFO.

**C. FORCE MAJEURE**

119. A “force majeure event” is any event beyond the control of the Respondent, its contractors, or any entity controlled by the Respondent that delays the performance of any obligation under this CAFO despite Defendant’s best efforts to fulfill the obligation. “Best efforts” includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure” does not include the Respondent’s financial inability to perform any obligation under this CAFO.

120. The Respondent shall provide notice orally or by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time the Respondent’s first knew of, or by the exercise of due diligence, reasonably should have known of, a claimed force majeure event. The Respondent shall also provide written notice, as provided in Section IV.E of this CAFO, within seven days of the time the Respondent first knew of, or by the exercise of due diligence, reasonably should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); the Respondent’s past and proposed actions to prevent or

minimize any delay; a schedule for carrying out those actions; and the Respondent's rationale for attributing any delay to a force majeure event. Failure to give such notice shall preclude the Respondent from asserting any claim of force majeure.

121. If the Complainant agrees that a force majeure event has occurred, the Complainant may agree to extend the time for the Respondent to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the Complainant agrees to an extension of time, the appropriate modification shall be made pursuant to Section IV.J of this CAFO.

122. If the Complainant does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by the Respondent, the Complainant's position shall be binding, unless the Respondent invokes Dispute Resolution under Section IV.D of this CAFO. In any such dispute, the Respondent bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event; that the Respondent gave the notice required by the paragraph above, that the force majeure event caused any delay the Respondent claims was attributable to that event; and that the Respondent exercised its reasonable best efforts to prevent or minimize any delay caused by the event.

#### **D. DISPUTE RESOLUTION**

123. If the Respondent objects to any decision or directive of EPA in regard to Paragraph 112.E or a force majeure event, the Respondent shall notify the following persons in writing of its objections, and the basis for those objections, within fifteen (15) calendar days of actual physical receipt of EPA's decision or directive:

Associate Director  
Hazardous Waste Enforcement Branch (6EN-H)  
Compliance Assurance and Enforcement Division  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

Chief  
RCRA Enforcement Branch (6RC-ER)  
Office of Regional Counsel  
U.S. EPA – Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

124. The Associate Director or his designee (Associate Director), and the Respondent shall then have fifteen (15) calendar days from EPA's actual physical receipt of the Respondent's written objections to attempt to resolve the dispute. If an agreement is reached between the Associate Director and the Respondent, the agreement shall be reduced to writing and signed by the Associate Director and the Respondent, and incorporated by reference into this CAFO pursuant to Section IV.J of this CAFO.

125. If no agreement is reached between the Associate Director and the Respondent within that time period, the dispute shall be submitted in writing by the Associate Director to the Director of the Compliance Assurance and Enforcement Division or his/her designee (Division Director). The Division Director and the Respondent shall then have a 15-day period from the later of the Division Director's or Respondent's receipt of the referral to resolve the dispute. If an agreement is reached between the Division Director and the Respondent, the resolution shall be reduced to writing and signed by the Division Director and Respondent and incorporated by reference into this CAFO pursuant to Section IV.J of this CAFO. If the Division Director and the Respondent are unable to reach agreement within this second 15-day period, the Division Director shall provide a written statement of EPA's decision to the Respondent, which shall be

binding upon the Respondent and incorporated by reference into the CAFO pursuant to Section IV.J of this CAFO.

126. If the Dispute Resolution process results in a modification of this CAFO, the modified CAFO must be approved by the Regional Judicial Officer, and filed pursuant to Section IV.J (Modification).

**E. NOTIFICATION**

127. Unless otherwise specified elsewhere in this CAFO, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it shall be directed to the individuals specified below at the addresses given (in addition to any action specified by law or regulation), unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

EPA:

Guy Tidmore, Chief  
Compliance Enforcement Section (6EN-HE)  
Compliance Assurance and Enforcement Division  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Respondent:

Allison Exall  
Curran Tomko Tarski L.L.P.  
2001 Bryan Street  
Suite 2000  
Dallas, TX 75201

**F. RETENTION OF ENFORCEMENT RIGHTS**

128. The EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

129. Nothing in this CAFO shall relieve the Respondent of the duty to comply with all applicable provisions of RCRA and CAA.

130. Nothing in this CAFO shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous waste, pollutants, contaminants, or hazardous substances on, at or from the Respondent's facility, including but not limited to, issuing orders under CERCLA, Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), and Section 7003 of RCRA, 42 U.S.C. § 6973. EPA and the United States also reserve the right to bring an action against the Respondent under CERCLA and any other applicable law for the performance of response actions and/or the recovery of response costs incurred by EPA in connection with any activities conducted at the Agifos Site in response to the release of hazardous substances, including but not limited to, costs of performing corrective action, indirect costs, oversight costs, and past costs, that have not been reimbursed by the Respondent or any other potentially responsible party. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

**G. COMPLIANCE**

131. The Respondent certifies that on or before the effective date of this CAFO, it has ceased producing phosphoric acid from phosphate ore, and that the Prayon cooling tower is not directly or indirectly receiving scrubber effluent.

**H. ADDITIONAL OBLIGATIONS**

132. The Respondent acknowledges that it is obligated to perform closure and/or remediation for facilities or areas containing industrial solid waste or municipal solid waste at the Agrifos Site, as provided by 30 T.A.C. § 335.8 and the Texas Risk Reduction Program, 30 T.A.C. Chapter 350.

133. ExxonMobil is currently conducting required closure and remediation activities pursuant to the CAFO entered into between EPA and ExxonMobil dated September 27, 2010 (Docket No. 06-2010-1101) (ExxonMobil CAFO). In the event that EPA notifies the Respondent that ExxonMobil is not completing its obligations under the ExxonMobil CAFO, but not until that time, the Respondent shall be responsible for completing the required closure and remediation activities covered by the ExxonMobil CAFO.

**I. COSTS**

134. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

**J. MODIFICATION**

135. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except as otherwise specified in this CAFO, or upon the written agreement

of both parties, and approved by the Regional Judicial Officer, and such modification or amendment being filed with the Regional Hearing Clerk.

**K. TERMINATION**

136. At such time as the Respondent completes its final payment as set forth in paragraph 95 of this CAFO, it may request that EPA concur whether all of the requirements of this CAFO have been satisfied. Such request shall be in writing and shall provide the necessary documentation to establish whether there has been full compliance with the terms and conditions of this CAFO. EPA will respond to said request in writing within ninety (90) days of receipt of the request. This CAFO shall terminate when all actions required to be taken by this CAFO have been completed, and the Respondent has been notified by the EPA in writing that this CAFO has been satisfied and terminated. However, the Respondent's responsibility for closure and remediation set forth in Paragraphs 132 and 133 remain until all closure and remediation activities have been completed to the satisfaction of EPA and/or TCEQ.

**L. EFFECTIVE DATE**

137. This CAFO, and any subsequent modifications, become effective upon filing with the Regional Hearing Clerk.

**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:**

**FOR THE RESPONDENT:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Agrifos Fertilizer L.L.C.

In the Matter of Agrifos Fertilizer L.L.C. - Docket Nos. RCRA-06-2011-0960 and  
CAA-06-2011-3317

**FOR THE COMPLAINANT:**

Date: \_\_\_\_\_

\_\_\_\_\_  
John Blevins  
Director  
Compliance Assurance and  
Enforcement Division  
U.S. EPA - Region 6



**V. FINAL ORDER**

Pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928 and Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Consent Agreement. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, directors, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Dated \_\_\_\_\_

\_\_\_\_\_  
Patrick Rankin  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2011, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) were hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and a true and correct copy of the CAFO was delivered to the following by the method indicated below:

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Allison Exall  
Curran Tomko Tarski L.L.P.  
2001 Bryan Street  
Suite 2000  
Dallas, TX 75201

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