



MARINE MAMMAL COMMISSION

31 January 2022

Ms. Athlene Clark, NOAA Superintendent
Papahānaumokuākea Marine National Monument
1845 Wasp Blvd., Building 176
Honolulu, HI 96818

ATTN: PMNM-Sanctuary Designation

Dear Ms. Clark:

On 19 November 2021, the National Oceanic and Atmospheric Administration's (NOAA) Office of National Marine Sanctuaries (ONMS) published in the *Federal Register* a Notice of Intent (86 Fed. Reg. 64904) to prepare a draft environmental impact statement (DEIS) and hold public scoping meetings to consider designating the marine portions of the Papahānaumokuākea Marine National Monument as a National Marine Sanctuary (NMS). That notice indicated that NOAA is working in cooperation with the U.S. Fish and Wildlife Service, the State of Hawai'i, and the Office of Hawaiian Affairs on the possible sanctuary designation and that "the DEIS will evaluate a reasonable range of alternatives that could include different options for management goals or actions, sanctuary regulations, and potential boundaries." NOAA is inviting comments on the scope of issues to be considered in the DEIS and their significance. The DEIS is expected to inform NOAA's decision on the sanctuary designation and development of a draft sanctuary management plan, proposed sanctuary regulations, and proposed terms of designation.

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, has reviewed the *Federal Register* notice and other relevant documents and offers herein its comments and recommendations. The Commission's primary concern with a sanctuary designation is how it would affect marine mammals that occupy or travel through the Northwestern Hawaiian Islands and surrounding waters (NWHI), and the ecosystems that support those species. The Commission is especially interested in the impacts of potentially permitted human activities on Hawaiian monk seals (*Neomonachus schauinslandi*), the NWHI insular stock of false killer whales (*Pseudorca crassidens*), insular populations of other odontocetes, and the Central North Pacific stock of humpback whales (*Megaptera novaeangliae*) that winters in the Hawaiian Islands.

Background

Threats to Marine Mammals

Because human activities in the Monument are currently limited to research, education, Native Hawaiian practices, and a small number of recreational trips to historical sites at Midway Atoll, current threats to marine mammals associated with those activities are being managed. However, the sanctuary designation process creates the potential for long-prohibited fishing to be

permitted again, and the Commission considers fishing to be a significant threat to a number of marine mammals. In addition, there are at least two longstanding and ongoing significant human-caused threats to marine mammals in the Monument. First, large quantities of marine debris, including derelict fishing gear, can be found in Monument waters. Most of this debris comes from outside the Hawaiian Archipelago (Boland & Donohue 2003). Entanglement of endangered monk seals, especially young animals, is one of the largest sources of injury and mortality for the population in the NWHI. Second, global warming and its secondary and tertiary impacts (e.g., sea level rise, prey impacts) are potential threats to marine mammals in the Monument. The monk seal population relies on a relatively small amount of low-lying island habitat for giving birth, nursing young, and resting. Significant loss and degradation of this critical terrestrial habitat have already occurred and this is expected to continue, representing a threat to the persistence of monk seals in most of the NWHI (Baker et al. 2006, Reynolds et al. 2012, Baker et al. 2020).

Two dozen species of marine mammals are found in the NWHI. Because of the remoteness of the islands, we know relatively little about most of the species or stocks, with the exception of the endangered Hawaiian monk seals, which have been studied intensively for decades. Because the islands are largely uninhabited by humans, the number of threats to these species and stocks from human activities is low compared to archipelagoes with or near large population centers. As elsewhere in the nation and the world, fishing poses the greatest threat to most species and stocks of marine mammals in the NWHI. Almost all fishing is currently prohibited in the Monument, but fishing was a concern in the past and could be again should regulations change. We know from scientific studies and data gathered in the Main Hawaiian Islands and elsewhere where the same or similar species occur that cetaceans and monk seals are at considerable risk from a variety of fishing gear types. In the Hawaiian Islands, fisheries that pose the greatest threat include those that deploy various types of hook and line gear (e.g., long lines, short lines, bottom hook and line, trolling lures), gill nets, and trap gear. The deep-set long-line fishery is known to kill or seriously injure substantial numbers of odontocetes, and is especially a problem for the pelagic stock of false killer whales (Carretta et al. 2021). In recent decades, bycatch of pelagic false killer whales within the U.S. Exclusive Economic Zone (EEZ) has often exceeded NMFS's sustainability reference point, the potential biological removal level (PBR). If long-line fishing were to be allowed within Monument waters, then it certainly would pose a significant threat to the insular population of false killer whales that occurs there, and possibly to other insular populations of odontocetes (e.g., pantropical spotted (*Stenella attenuata*) and spinner (*Stenella longirostris*) dolphins) (Baird et al. 2015). In the early 1990's, monk seal injuries in the NWHI resulted from interactions with the longline fleet (Nitta and Henderson 1993). If once again permitted in the NWHI, bottomfish hook and line gear has the potential to hook, snag or entangle cetaceans and monk seals. A wide variety of gear types is used in fisheries in near-shore waters of the MHI, many of which are known to cause in hookings and entanglements of small cetaceans and monk seals. If such gear types were allowed to be used in the NWHI, they would pose a similar threat to the same species. Finally, elsewhere in the world, entanglement in gill nets and the buoy lines of trap gear is known to be a significant source of mortality for large whales, and the same could be true if certain types of these gears were allowed beyond the coral reefs in the NWHI.

Protection of Marine Mammals in the NWHI

Early Fisheries Management Measures—In response to hookings and injuries of monk seals and other species, NMFS prohibited long-line fishing within 50 nm of the NWHI in 1991.¹ Commercial lobster fishing, which began in the NWHI in 1983, experienced declining catch rates over the next two decades, prompting the Western Pacific Fishery Management Council (WesPac) and NMFS to close the fishery temporarily several times in the 1990s. Apparently in response to a lawsuit brought by several environmental organizations and a recommendation from the Commission, NMFS set the annual harvest limit to zero for the 2000 season, and continued that policy through 2006, when the fishery closure was made permanent by a presidential proclamation (see below).

*Executive Order 13178*²— President Clinton issued E.O. 13178 on 4 December 2000, (subsequently amended by E.O. 13196)³ creating the Northwest Hawaiian Islands Coral Reef Ecosystem Reserve (the Reserve) under the authority of the NMSA (16 U.S.C. § 1431 et seq.). Section 3 of E.O. 13178 defined the Reserve to “include submerged lands and waters of the Northwestern Hawaiian Islands, extending approximately 1,200 nautical miles (nm) long and 100nm wide.” Section 2 stated that the Reserve’s purpose was “to ensure the comprehensive, strong, and lasting protection of the coral reef ecosystem and related marine resources and species (resources) of the Northwestern Hawaiian Islands.” The Reserve’s management principles, established in section 4, and its management plan, in section 5(b), provided for:

- “The long-term conservation and protection of the coral reef ecosystem and related marine resources and species of the Northwestern Hawaiian Islands in their natural character” as the Reserve’s principal purpose;
- Using “available science and applying a precautionary approach with resource protection favored when there is a lack of information regarding any given activity, to the extent not contrary to law;”
- “The restoration or remediation of any degraded or injured resources of the Reserve;”
- The “enforcement and surveillance” of the Reserve’s regulations;
- The “identification of potential tourism, recreational, and commercial activities within the Reserve and actions necessary to ensure that these activities do not degrade the Reserve’s resources or diminish the Reserve’s natural character;” and
- Promulgation of “any regulations, in addition to the conservation measures and Reserve Preservation Areas established under [E.O. 13178], that the Secretary determines are necessary to manage the Reserve....”

Of particular interest to the Commission are the Reserve’s fishing regulations. The E.O. allowed commercial and recreational fishing to continue at levels no greater than were occurring in

¹ 50 C.F.R. § 665.806(a)(1)

² <https://www.federalregister.gov/documents/2000/12/07/00-31313/northwestern-hawaiian-islands-coral-reef-ecosystem-reserve>

³ <https://www.federalregister.gov/documents/2001/01/23/01-2214/final-northwestern-hawaiian-islands-coral-reef-ecosystem-reserve>

December 2000 (E.O. 13178 Section 7), except in the Reserve Preservation Areas established in Section 8 of the E.O., within which all fishing was prohibited.

*Presidential Proclamation 8031*⁴—President George W. Bush issued this proclamation on 15 June 2006 and a subsequent amendment later that year,⁵ using his authority under the Antiquities Act⁶ to establish the Papahānaumokuākea Marine National Monument (PMNM or the Monument).⁷ Presidential Proclamation 8031 required the Secretary of Commerce, in consultation with the Secretary of the Interior and the State of Hawaii, to develop a management plan for the Monument that would “preserve the marine area of the Northwestern Hawaiian Islands and certain lands as necessary for the care and management of the historic and scientific objects therein.” The PMNM management plan was based on a management plan then being developed for a prospective NMS in the NWHI. The proclamation prohibited a number of activities within the Monument, including:

- “Exploring for, developing, or producing oil, gas, or minerals”;
- “Removing, moving, taking, harvesting, possessing, injuring, disturbing, or damaging or attempting to remove, move, take, harvest, possess, injure, disturb, or damage any living or nonliving monument resource;” and
- “Possessing fishing gear except when stowed and not available for immediate use during passage without interruption through the monument.”

The proclamation set the lobster harvest limit within the Monument to zero, but allowed commercial fishing for bottom and pelagic species to continue, subject to harvest limits and other requirements, for a five-year period, after which all commercial fishing would be prohibited. The Monument’s fishing prohibitions superseded the Reserve provisions that had allowed limited fishing indefinitely. The proclamation also allowed the Secretary to issue permits for other activities regulated by the proclamation, such as research, education, Native Hawaiian practices, and those that “will assist in the conservation of the monument, provided that the activity meets certain requirements,” including that:

- “The activity can be conducted with adequate safeguards for the resources and ecological integrity of the monument;”
- “The activity will be conducted in a manner compatible with the management direction of this proclamation, considering the extent to which the conduct of the activity may diminish or enhance monument resources, qualities, and ecological integrity, any indirect, secondary, or cumulative effects of the activity, and the duration of such effects;”
- “There is no practicable alternative to conducting the activity within the monument;”
and

⁴ <https://www.federalregister.gov/documents/2006/06/26/06-5725/establishment-of-the-northwestern-hawaiian-islands-marine-national-monument>

⁵ <https://www.govinfo.gov/content/pkg/WCPD-2007-03-05/pdf/WCPD-2007-03-05-Pg237-2.pdf>

⁶ 16 U.S.C. § 1431 et seq.

⁷ The boundaries of the Monument are defined by a map included with the proclamation (71 Fed. Reg. 36453)

- “The end value of the activity outweighs its adverse impacts on monument resources, qualities, and ecological integrity.”

*Presidential Proclamation 9478*⁸—President Obama issued this proclamation on 25 August 2016, expanding the PMNM from the boundaries established in 2006 “to the extent of the seaward limit of the ... U.S. EEZ.” Proclamation 9478 relied on the authority of the Antiquities Act and noted that the extended waters contain “objects of historic and scientific interest.” This proclamation specifically referenced the area’s “biological resources,” “75 seamounts,” “unique biodiversity,” and value as a “sacred cultural, physical, and spiritual place for the Native Hawaiian community.” Further, the proclamation recognized that 24 species of marine mammals are found within the expanded area, several of which are endangered, and that the Hawaiian monk seal forages well beyond the original boundaries in demersal habitats almost 2,000 feet deep, and therefore, would receive protection throughout its foraging range.

Proclamation 9478 preserved all of the protections created under Presidential Proclamations 8031 and 8112, required the Secretary of Commerce to “consider initiating the process under the National Marine Sanctuaries Act...to designate the [expanded monument]...as a National Marine Sanctuary to supplement and complement existing authorities,” and established that the “Monument Expansion shall be the dominant reservation.” Importantly, the proclamation clarified one portion of Proclamation 8031, stating that “the Secretaries may permit...non-commercial fishing, provided that the fish harvested, either in whole or in part, cannot enter commerce through sale, barter, or trade, and that the resource is managed sustainably.”

Sanctuary Designation Process

As explained by ONMS in the *Federal Register* notice, “the primary objective of the NMSA is to protect the resources of the National Marine Sanctuary System, including biological and cultural resources, such as coral reefs, marine animals, archaeological sites, historic structures and historic shipwrecks.” The notice further states that “any proposed sanctuary regulations would be separate from, but supplementary and complementary to, existing Monument regulations and management provisions from the establishing executive order and proclamations.”

An important element in designating most sanctuaries is the inclusion of effective regulations specifying whether and what fishing activities are permitted. Section 305(a)(5) of the NMSA provides the opportunity for the appropriate Regional Fishery Management Council to prepare draft regulations pertaining to fishing within the proposed NMS. The NMSA states that “regulations prepared by a Council...shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council’s action fails to fulfill the purposes and this chapter and the goals and objectives of the proposed designation.” Further, the Act states that “in preparing draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation.” In the case where a council’s draft regulations are rejected by the Secretary, the Secretary is required to prepare fishing regulations for the sanctuary. However, in this case, the

⁸ <https://www.federalregister.gov/documents/2016/08/31/2016-21138/papahamacrnaumokuamacrkea-marine-national-monument-expansio>

Presidential Proclamations establishing the pre-existing PMNM, with which the sanctuary is expected to overlap, already address fishery issues in this area.

A 19 November 2021 letter from ONMS to WesPac describes the section 305(a)(5) consultation process and clarifies that, in this specific instance:

- “The goals and objectives of the sanctuary designation..., together with the purposes and policies of the National Marine Sanctuaries Act, as well as the existing Presidential Proclamations 8031, 8112, and 9478 specific to Papahānaumokuākea Marine National Monument, are the benchmarks against which the Council’s action shall ultimately be measured;”
- “For the area designated by Proclamation 8031, NOAA believes the current Magnuson-Stevens Fishery Conservation and Management Act regulations under 50 CFR 404 are consistent with both the relevant provisions of Proclamations 8031 and 8112 and the goals and objectives for the proposed sanctuary. However, in order to rely on Magnuson-Stevens Fishery Conservation and Management Act authority for sanctuary purposes within the Monument Expansion Area designated by Proclamation 9478, **NOAA recommends the Council propose regulations for the Monument Expansion Area that are consistent with both the fishing provisions of Proclamation 9478, and the goals and objectives of the proposed sanctuary**” (emphasis added).

In the documents described above, NOAA identifies the following elements, among others, as necessary components of this sanctuary designation:

- “develop objectives and actions that ensure lasting protections consistent with the existing Monument proclamations and regulations;”
- “safeguard natural and cultural values of the marine environment of the Monument;”
- “authorize NOAA to assess civil penalties for violations of sanctuary regulations or permits and to enforce provisions of the NMSA;”
- “prohibit destruction or loss of sanctuary resources and provide natural resource damage assessment authorities for loss of or injury to any sanctuary resource;”
- “require interagency consultation for any Federal agency action that is likely to destroy, cause the loss of, or injure any sanctuary resource;”
- “augment existing authorities under the Antiquities Act; Presidential Proclamations 8031, 8112 and 9478; Executive Order 13178; and 50 CFR 404 to provide additional regulatory and non-regulatory tools for management and protection of Monument resources.”

Summary of Existing Protections

The PMNM and the Reserve already are subject to a variety of protections under Executive Orders, Presidential Proclamations, and related documents. Key provisions are:

- Ensure strong, comprehensive conservation and protection of the coral reef ecosystem and related marine resources and species in their natural character (E.O. 13196)
- Ensure that degraded or injured resources are restored or remediated, and that ongoing permitted activities do not degrade Reserve resources (E.O. 13196)
- Prevent the actual or attempted removing, moving, taking, harvesting, possessing, injuring, disturbing, or damaging of any living or nonliving Monument resource (Proclamation 8031)
- Ensure that permitted activities are subject to adequate safeguards, are compatible with provisions of applicable proclamations, consider the extent to which the activity may diminish or enhance Monument resources, have a value that outweighs any adverse impacts, and lack a practicable alternative (Proclamation 8031).

The *Federal Register* notice and other documents provided by NOAA indicate that these protections will form the foundation for any additional protections and regulatory or non-regulatory tools to be established pursuant to a sanctuary designation and that any new protections will augment the existing authorities. Key new provisions being considered by NOAA include:

- Ensuring lasting protections that safeguard the Monument’s natural and cultural values and that are consistent with the Monument’s existing proclamations and regulations;
- Prohibiting the destruction or loss of sanctuary resources;
- Requiring interagency consultation for any Federal action likely to destroy or injure any Sanctuary resource.

Further, NOAA’s Papahānaumokuākea NMS web page⁹ states that: “Sanctuary designation will provide another layer of protection to continue honoring this place and **will not diminish any existing protections**” (emphasis added). Further, the web page states: “Designation...would **strengthen and increase the long term protections** already existing in the monument, **but cannot diminish them**” (emphasis added). An infographic available on the page adds that: “National marine sanctuary designation would **add the conservation benefits** to the marine areas of Papahānaumokuākea Marine National Monument by providing a stable regulatory framework and **additional protections** to safeguard living, cultural, and maritime heritage resources” (emphasis added).

Recommendations

The Commission supports the Reserve and Monument goals, objectives and regulations. The Commission also supports NOAA’s intention to supplement, complement, strengthen and add to these protections through designation of the Papahānaumokuākea NMS. Moreover, from the Commission’s perspective, the proposed sanctuary designation should adhere tightly to the principles identified by NOAA and the Reserve’s and Monument’s existing protections, which, relative to marine mammals and their ecosystems, should, at a minimum:

⁹ <https://sanctuaries.noaa.gov/papahanaumokuakea/>

- Provide long-term, strong, comprehensive protections from anthropogenic threats;
- Prohibit any activity that would remove, injure or kill marine mammals, except as specifically authorized by a permit; and
- Allow for the issuance of permits for extractive activities or those with potentially adverse impacts only if the applicant, using the precautionary approach, demonstrates to NOAA's satisfaction that the proposed activities are compatible with Sanctuary and Monument goals and regulations, and will have only a negligible impact on sanctuary resources, including marine mammals.

Accordingly, the Commission recommends that these principles be reflected in the alternatives in the DEIS.

The Commission recommends that the DEIS alternatives, draft sanctuary designation and draft regulations explicitly 1) re-affirm that protections provided by the Monument and the Reserve will not be diminished, and 2) describe in detail how existing protections will be strengthened, increased and added to under those alternatives. In particular, the Commission recommends that the DEIS's preferred alternative permanently prohibit all commercial or recreational fishing in Sanctuary waters. As long as sustenance and traditional (subsistence) fishing by Native Hawaiians is accurately monitored, assessed and capped at minimal levels, those forms of fishing should not pose a serious threat to the NWHI marine environment or deplete resources important to marine mammals. As such, the alternatives in the DEIS should include their perpetuation.

The Commission notes that WesPac, at a recent Council meeting,¹⁰ expressed interest in exploring the potential for 'customary exchange' fishing to be permitted in the Sanctuary, and therefore in the Monument. The Commission believes that this practice would be contrary to the goals of the Sanctuary and the Monument, and Monument regulations. 'Customary exchange' is defined in the Magnuson-Stevens Act as:

"The non-market exchange of marine resources between fishermen and community residents, including family and friends of community residents, for goods, and/or services for cultural, social, or religious reasons. Customary exchange may include cost recovery through monetary reimbursements and other means for actual trip expenses, including but not limited to ice, bait, fuel, or food, that may be necessary to participate in fisheries in the western Pacific."

Given this definition, which would allow exchange of fish for goods or services 'customary exchange' does not differ substantively from commercial fishing, which includes not only selling fish, but barter and trade.¹¹ In addition, monetary reimbursements arguably involve, or could involve, commercial aspects. If the DEIS considers alternatives that would allow fishing for purposes of customary exchange, it should explain whether and how this would be consistent with fishing limits applicable to the Monument, examine closely distinctions between commercial fishing

¹⁰ <https://www.wpcouncil.org/press-release-fishery-management-council-recommends-a-new-%ef%bb%bfus-strategy-in-the-pacific-islands-with-the-wcpfc-9-december-2021/>

¹¹ The Magnuson-Stevens Act defines 'commercial fishing' as: "fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter, or trade."

and customary exchange and consider limitations (e.g., gear restrictions) to minimize impacts on marine mammals and other Sanctuary resources.

The Commission recognizes that NOAA, in designating a national marine sanctuary within the PMNM, is in part seeking to:

- “provide a more stable regulatory framework and additional protections to safeguard living, cultural, and maritime heritage resources;”
- “develop objectives and actions that ensure lasting protections consistent with the existing Monument proclamations and regulations;” and
- “augment existing authorities...to provide additional regulatory and non-regulatory tools for management and protection of Monument resources.”

A national marine sanctuary arguably provides secure and lasting protections because, once designated, an act of Congress is needed to reverse it. However, applicable prohibitions and protections can be amended through periodic rulemaking. It remains an open question as to whether a marine national monument designation made under the Antiquities Act by Presidential Proclamation can be reversed or significantly downsized by a later President and subsequent Executive Order. Thus, there is some risk that the protections afforded the NWHI as a marine national monument could disappear or be curtailed through executive fiat. This being the case, the protections afforded via a sanctuary designation, even if duplicative of those applicable to the Monument, are necessary. For this reason, NOAA, in designating a Papahānaumokuākea NMS, should look beyond a designation that is merely “separate from, but supplementary and complementary to, existing Monument regulations and management provisions.” Those regulations and management provisions should independently protect the area’s resources at least at the existing level should those provided through national monument status be reduced or lost.

Although not necessarily the case, a marine national monument created by proclamation often is more restrictive in terms of what activities are and are not allowed than would be expected through a sanctuary designation. National marine sanctuaries generally allow multiple uses, including, routinely, the extraction of resources. In contrast, almost all forms of resource extraction and potentially destructive human activities are prohibited in the PMNM. Further, the NMSA explicitly invites the appropriate fishery management council to play a major role in developing fishing regulations. As such, it is not surprising that most national marine sanctuaries allow at least some commercial and recreational fishing, and several are not subject to any sanctuary-specific fishing restrictions. During reviews that led to designation and expansion of the PMNM in 2006 and 2016, WesPac recommended that fishing be allowed in those areas. Moreover, on several occasions since 2006, WesPac has advocated that PMNM fishing prohibitions be removed. Thus, unless specifically tailored to reinforce the precedent established by the Monument with respect to fishing, it is not clear that an independently generated sanctuary designation would provide the same level of protection against impacts from fishing as do the PMNM provisions.

The Commission is pleased that NOAA has advised WesPac that any draft fishing regulations it develops should be “consistent with both the fishing provisions of Proclamation 9478, and the goals and objectives of the proposed sanctuary.” However, given the desirability of bolstering the Monument’s protections and uncertainty surrounding the durability of those

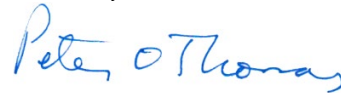
protections, the Commission recommends that NOAA, in developing the draft sanctuary designation and its regulations provide, at a minimum, the same levels of protections to marine resources, including fishery resources and marine mammals, as are afforded by the Monument.

The NWHI are subject to a range of threats beyond those that would come with renewed fishing in the Sanctuary. The Commission supports NOAA in the protections it has implemented against those threats, and for its intention to strengthen and add to those protections with the proposed sanctuary designation. The Commission recommends that NOAA, in its DEIS, provide a range of options for effectively addressing the threats posed to marine mammals and their ecosystems in the NWHI from marine debris and global warming.

Finally, in commenting on and generally supporting the proposal to designate the marine portions of the Papahānaumokuākea Marine National Monument as a National Marine Sanctuary (NMS), the Commission notes that there are other possible sanctuary designations under consideration around the United States. ONMS should consider giving higher priority to designating other areas nominated as sanctuaries (e.g., the St. George Unangan Heritage National Marine Sanctuary and the Chumash Heritage National Marine Sanctuary)¹² that currently lack any site-specific protections, before focusing on Papahānaumokuākea, which already is rather well-protected as a monument and reserve, and which is likely to receive only incremental benefits from the overlay of a sanctuary designation.

We hope these comments and recommendations are helpful. Please contact me if you have questions.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

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¹² The Commission's comment/recommendation letters on these two proposals will be posted to its web site soon.

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