Minnesota Center for Environmental Advocacy

April 30, 2021

To: Members of the SF 959 Conference Committee (Chair Ingebrigtsen, Senators Ruud, Tomassoni, Eichorn and Westrom, and Chair Hansen, Representatives Wazlawik, Morrison, Fischer, and Heintzeman)
From: Kara Josephson, Legislative Director, Minnesota Center for Environmental Advocacy
Re: SF 959 - Environment and Natural Resources Budget Bill

Dear Conferees:

Thank you for your service to the people of Minnesota and for your work on SF 959, the Environment and Natural Resources omnibus bill. Minnesota Center for Environmental Advocacy (MCEA) is a nonprofit organization with almost 50 years of experience using law and science to protect Minnesota's environment and the health of its people. This memo outlines our position on SF 959, identifies areas of concern, and suggests provisions that should be included in the final bill. Throughout this memorandum, we refer to the House and Senate versions of SF 959, which correspond to the 1st unofficial engrossment of SF 959 (House) and the 3rd engrossment of SF 959 (Senate).

We are relieved by a narrowing of differences between the House and Senate on Articles 3 and 4 (Environment and Natural Resources Trust Fund appropriations), and encourage conferees to continue finding common ground to approve the over $120 million in ENRTF funded projects. However, we are concerned that policy language is so divergent in each body, particularly Section 2 of the Senate bill which contains dozens of policy provisions that would roll back environmental protections, especially for water. And we encourage the House and Senate to address the structural, long-term solvency of agency budgets by increasing general fund spending, allowing appropriate changes in fees and licenses to replenish dedicated funds, and refraining from using inappropriately using dedicated funds, such as the Heritage Enhancement Account, to provide base-level funding for agency activities.

This memorandum will not go line-by-line through Section 1 of SF 959, but will identify several examples of budgeting that we are concerned with.

## ENVIRONMENT AND NATURAL RESOURCES BUDGET APPROPRIATIONS

MCEA has concerns with the Senate's approach to the Environment and Natural Resources appropriations contained in SF 959. The overall $15 million general fund cut in the Senate's version of SF 959 leads to a series of dramatic shifts that inappropriately uses other funds dedicated in statute to provide additional funding for natural resources. In a biennium with a projected budget surplus, cutting already limited general fund spending is irresponsible and these shifts create harm to long-term investment in Minnesota's natural resources.

The Senate approach would result in permanent funding shifts from general fund dollars to other funds. In particular, there are several instances where general fund spending is cut and replaced with funding from "lottery-in-lieu" revenue. These shifts violate the purpose of this revenue source, as described in Minn. Stat. 297A.94(i), which states this money "may not be

used as a substitute for traditional sources of funding for the purposes specified, but the dedicated revenue shall supplement traditional sources of funding for those purposes."

One specific example of this is the Senate's permanent cut of $1.5 million per biennium from the general fund for Metropolitan Council - Regional Parks and replacement with $1.5 million per biennium in "lottery-in-lieu" appropriations (see lines 35.9 - 35.26 of SF 959 3rd Engrossment and lines 193 and 194 in the Senate's spreadsheet on SF 959 3E.) The purpose of these funds is to supplement traditional sources of funding. Replacing general fund spending is clearly using these funds as a substitute, rather than a supplement.

Another example is the Senate's permanent cut of $238,000 per biennium from the general fund for Minerals Cooperative Environmental Research (see lines 91 and 112 of the Senate's spreadsheet on SF 959 3E) and replacement with $238,000 per biennium from the minerals management account in the Natural Resources Fund. The net effect of this shift would be to stop $238,000 per year from being transferred from the minerals management account to the Permanent School Fund, Permanent University Fund and other taxing districts (including counties, towns and school districts.) Under Minn. Stat. 93.2236(b), if the balance in the minerals management account exceeds $3 million at the end of a quarter, the balance above $3 million is transferred to these funds.

In summation, the Senate's approach of cutting general fund appropriations and replacing them with dedicated funds violates the intent of these funds, spreads cuts downstream to other funds and units of government, and depletes funds that are already threatened. Making a $15 million cut in the general fund in a biennium with a budget surplus is both unnecessary, and potentially devastating for future projects.

**ENVIRONMENT AND NATURAL RESOURCES TRUST FUND APPROPRIATIONS**

MCEA was heartened by the adoption of an amendment on the Senate floor that removed unconstitutional allocations for wastewater infrastructure grants. As MCEA has previously testified and as the plain language of the constitutional amendment that established the Environment and Natural Resources Trust Fund (ENRTF) states, these are unconstitutional uses of the fund. The Minnesota Constitution allows for loans up to 5% of the corpus of the ENRTF for wastewater treatment, but does not allow the use of the Fund for grants. We thank the Senate for these changes, and hope this opens the path for agreement between the bodies that will unlock long-stalled ENRTF projects.

We generally believe that ENRTF bills ought to travel as standalone legislation, but encourage conferees to use SF 959 to finally release ENRTF funds after nearly two years of gridlock. This would support hundreds of jobs and make important investments in scientific research and habitat protection and restoration across Minnesota. We hope that the Senate and House will be able to reach agreement on language and pass a badly needed package this session that respects the recommendations of the LCCMR.

During this process, please uphold the recommendations of the LCCMR and rely on their careful vetting of projects. We are pleased that FY22 appropriations in both the Senate and House versions of SF 959 contains the full package of LCCMR recommended projects.

Unfortunately, Section 3 of the Senate bill makes substantial changes from the LCCMR's list of vetted and recommended projects for FY 21. While LCCMR was not able to make a recommendation on the full package of projects for FY 21, this is not a reason to substitute millions of dollars in unvetted projects. This would set a dangerous precedent for approving ENRTF projects through the legislature as opposed to the LCCMR.

**POLICY PROVISIONS**

MCEA appreciates the effort by both bodies to resolve a backlog of policy provisions caused by the COVID-shortened 2020 session, particularly in regards to game and fish regulations and lands. We are particularly glad to see provisions in both bills that include tribal governments in statutes related to land conveyance, and language that would protect Minnesota's groundwater from being sold to distant users.

*POLICY PROVISIONS MCEA SUPPORTS IN BOTH BILLS*
Senate Art. 2, Section 22 / House Art. 10, Section 2
[Easement Conveyance to Tribal Governments/Reimbursement of DNR Costs]
Senate Art. 2, Sections 87 and 88 / House Art. 5 Sections 86 and 87
[Prohibition on Appropriating Water from Mt. Simon-Hinckley Aquifer] and [Prohibition on Bulk Transfer of Water]
Senate Art. 2, Section 117 / House Art. 4, Section 24
[Tribal Eligibility for Recycling Grants]

*POLICY PROVISIONS MCEA SUPPORTS IN THE SENATE BILL (3rd Engrossment)*
Section 1 [Investment of Financial Assurance Money Under Permit to Mine]
Section 21 [Conveyance of Conservation Easements]
Section 83 [Water Management Policy Coordination]
Section 131 [School Trust Lands Strategic Plans]

*POLICY PROVISIONS MCEA SUPPORTS IN THE HOUSE BILL (1st Unofficial Engrossment)*

**MCEA strongly supports the House's inclusion of significant enforcement changes, added resources, and enhancements for environmental justice**.
[Article 4, Sec. 1-8 enforcement changes, Sec. 9 and 10 define environmental justice and areas, Sec. 31 changes permitting and enforcement in environmental justice areas, Sec. 34 requires informational hearings on non-expiring air permits, Sec. 35 adds MPCA commissioner duties regarding environmental justice areas.]

The burden of pollution in Minnesota falls far more heavily on Black, Indigenous and People of Color (BIPOC) Minnesotans and low-income Minnesotans. MPCA Commissioner Laura Bishop testified to the House Environment and Natural Resources Committee that "a whopping 93%" of BIPOC Minnesotans breathe polluted air beyond health limits. The legacy of siting heavy industry near communities of color is compounded by new pollution sources. This is why reducing the cumulative impact of new pollution is needed, as well as increasing enforcement to reduce existing pollution.

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The environmental justice provisions in the House version of SF 959 are a strong start toward addressing the systemic and historic wrongs that have concentrated pollution and overburdened communities of color and low-income communities across Minnesota. As Minnesota continues to grapple with this legacy, it is critical to continue to engage the communities most affected.

**MCEA supports the House's inclusion of resources and policy language to address PFAS "forever chemical" pollution**
The House bill contains a number of policy changes that address PFAS pollution, and these sections increase enforcement tools on PFAS. Article 4, Section 42 prohibits PFAS in food packaging, Section 44 requires a water quality standard for PFOA/S, and Section 45 creates a health risk limit for PFOS.

**MCEA supports language in the House bill to allow local control over certain pollinator-lethal pesticides and to limit similar pesticide use on state lands managed for wildlife and habitat.**
Article 5, Section 16 and 17 allow cities to ban pollinator-lethal pesticides and ban the use of these pesticides were banned, Section 30 Prohibits a person from using certain insecticides (neonicotinoids and chlorpyrifos) in a wildlife management area (WMA), state park, state forest, aquatic management area (AMA), or scientific and natural areas (SNA).

**MCEA supports language in House bill to elevate the role of carbon sequestration in forest management**
Art. 5, Sections 20 and 21 adds carbon sequestration to the list of purposes of Minnesota forests for the future program and carbon sequestration to the factors used for selecting lands for the program, Section 90 Adds natural carbon sequestration to the list of roles forests play in context of the purpose of the Sustainable Forest Incentive Act (SFIA).

**MCEA supports the use of nontoxic shot**
Art. 5., Section 69 Requires the use of nontoxic shot when hunting small game on a WMA in the farmland zone beginning July 1, 2022.

**MCEA supports public input into large water appropriations permits**
Art. 5, Section 83 Requires the DNR to hold a public meeting prior to issuing a water-use permit if the permit is for the average use of more than 216,000 gallons per day.

**MCEA supports the House definition of "sustainable water use"**
Art. 5, Section 86 Requires the DNR to make a determination that the level of recharge to an impacted aquifer is sufficient to replenish the supply to meet the needs of future generations when determining whether a water-use is sustainable.

**MCEA supports the creation of a water quality and storage program**
Art. 6, Section 6 sets up the framework for a program to create financial incentives for willing landowners to begin to resolve water retention and water quality issues around the state, and in the Minnesota River basin in particular. Creating this framework provides an opportunity to leverage Federal, state and local funds.

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**POLICY PROVISIONS MCEA OPPOSES**

There are many provisions of concern in the 3rd engrossment (Senate version) of SF 959. We believe that all Minnesotans are entitled to clean air to breathe and clean water to drink, and many of the sections in Article 2 of the Senate bill move us further away from that vision. Below, we have grouped together similar sections and provide our position and analysis. All of the section references here are in Article 2 of SF 959, 3rd engrossment.

**MCEA opposes a Wild Rice Stewardship Council that circumvents government-to-government negotiations and the Clean Water Act responsibilities of the State of Minnesota.**

Section 19 [Wild Rice Stewardship Council Establishment] delegates inappropriate tasks to the Council. These include recommending a "a road map for protecting wild rice from harmful levels of pollutants and other stressors through a holistic approach that addresses the water quality standard for sulfate in conjunction with enhanced monitoring, management, and education efforts" and recommending "a structured approach to listing wild rice waters and potential implementation of a water quality standard for sulfate to maximize protection of wild rice while limiting the scope and extent of burdens to Minnesota communities caused by the difficulty of treating sulfate." Both of these delegate to the Council tasks that are appropriately done by the Minnesota Pollution Control Agency and U.S. Environmental Protection Agency under the Clean Water Act. They presume the water quality standard for sulfate can be politically negotiated by the stakeholders through the Council, as opposed to a scientifically set standard that protects wild rice.

MCEA CEO Kathryn Hoffman was part of the Wild Rice Task Force whose final report included a recommendation to form a Wild Rice Stewardship Council, but we oppose Section 19 of the Senate's SF 959. The Task Force did not recommend any specific legislative language and it is incorrect to assert that MCEA approved this section by participating in the Task Force.

The issue of wild rice and the federally-approved water quality standard to protect wild rice waters is the subject of government-to-government negotiations between the State of Minnesota and tribal governments. Treating tribal governments as stakeholders equivalent to industry and nonprofit organizations is inappropriate.

**MCEA opposes unnecessary and cumbersome legislative approval requirements for water fees.**

Section 96 [PCA Training Fee]
Section 98 [Wastewater & Water Supply System Operator Certification Fee]
Sections 99 & 100 [Wastewater Laboratory Certification Fee]
Section 123 [Water Permit Fees]

User fees are a necessary component of funding state permit programs. The MPCA has not increased most water permit fees for more than 28 years. These fees cover the cost of reviewing applications, certifying personnel for wastewater treatment and water supply systems, and certifying laboratories. There is no need for an additional layer of approval.

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**MCEA opposes changes to water appropriation permitting that favor large industrial users over rare wetlands and other nearby well owners.**

Section 86 [Review of Calcareous Fen Decisions] would threaten some of the rarest wetland habitats in Minnesota with large water appropriation permits nearby that can drain them of the groundwater they depend on. This section gives applicants whose permits are denied because of the damage caused to a nearby wetland several additional "bites at the apple," and require taxpayers to pay for third party analyses that may undermine the analysis conducted by the Minnesota DNR.

Section 89 [Transfer of Water Use Permits] prevents DNR from requiring testing or putting new conditions in a water appropriation permit that is being transferred. DNR should be able to review the adequacy of a permit at any time, including when it is transferred, in order to protect groundwater resources. The transfer of a permit should result in administrative review of the terms of the permit, and modification as necessary to prevent depletion of water supplies. Minnesota property owners do not own

Section 90 [Analysis of Effect on Land Values] assumes that the impact of groundwater management plans on land values are negative and directs the DNR commissioner to study and address this one factor. Depleted groundwater tables, which groundwater management plans seek to prevent, also have negative impacts on property values. That side of the question should also be included in any study of land values.

Section 91 [Groundwater Management Area Plan Development] is a gag rule that prevents DNR from providing public information about a water management plan under development by limiting the information that DNR can provide to "direct factual responses." This provision is in direct conflict with the Data Practices Act, which requires public data to be provided upon request, including drafts, and also requires state staff to explain the meaning of data. Preventing a state agency from open communication with the public about its activities is just poor public policy. State policy should be to support greater transparency, not less transparency.

Section 92 [Definition of Sustainable] defines "sustainable" use of groundwater to mean a change of 20 percent or less with regard to the "August median stream flow," which has nothing to do with what is actually sustainable in terms of long-term Minnesota water supplies. This arbitrary figure will prevent real preservation of sustainable water resources, which must be based on actual data from a particular water source and scientific evidence.
Section 93 [Well Interference and Testing] harms those hurt by well interference by forcing the DNR to consider the "condition of the impacted well," which requirement has the intent of forcing DNR to reduce any awards to individuals harmed if their wells are older. This provision will harm low-income persons who cannot easily afford new wells in favor of irrigators who want additional water. Similarly, the legislation favors parties who are interfering with existing wells by limiting the ability to contest the commissioner's award to parties ordered to pay an affected well owner.

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**MCEA opposes changes to public water laws that would make it unnecessarily easy for landowners to make public waters private.**
Section 85 [Public Waters Inventory Revisions] should be removed from SF 959. Minnesota public waters belong to all Minnesotans. The State holds public waters in trust for the benefit of the people and has the obligation to protect public waters.The Legislature defined public waters broadly in Minn. Stat. 103G.005, subd. 15 and all waters that meet the definition of a public water are protected. In the 1970s, the Legislature mandated the Minnesota Department of Natural Resources (DNR) to publish the Public Waters Inventory (PWI) to list waters in Minnesota that met the statutory definition. The Legislature later gave DNR power to correct errors in the PWI.

The PWI is an important informational tool for protecting Minnesota's water resources. This amendment undermines the DNR's authority to correct errors in the PWI because, if a county objects, the DNR cannot list a water even though it meets the statutory definition of "public water." The DNR is the proper agency to determine what waters meet the definition of a "public water," based on the existing state law definition. If a county disputes the DNR's analysis, that dispute should be addressed by administrative procedures, and not by county veto.

If this provision becomes law, it would limit the ability of the DNR to correct errors in the PWI, create uncertainty, and lead to litigation. MCEA opposes this language which weakens DNR's authority to protect public waters by ensuring the PWIs accuracy.

**MCEA opposes changes in the statutes and rules regarding how "ordinary high water levels" (OHWL) are set.**
Section 94 [Notification of OHWL Determinations] and Section 95 [Appeal of OHWL Determinations] should both be rejected. The primary problem with Section 95 is that it limits appeals to one unit of government, excluding all other stakeholders and parties who may wish to appeal an OHWL. OHWLs for water bodies are complex to set and analysis may take longer than 90 days, so that deadline is unreasonable and should be removed. Setting them requires a field study, geological information, and historical water level information. These sections should be amended to allow all relevant parties to appeal and to fix the 90 day deadline.

**MCEA opposes giving industrial polluters 16 years to comply with stronger water quality standards.**
Section 97 [Effluent Limitation Compliance] gives industrial polluters a blanket 16-year exemption from complying with stronger water quality standards, if investments are made in wastewater treatment works. This section violates the federal Clean Water Act and will only result in regulatory uncertainty.

**MCEA opposes exempting facilities that convert plastics into fuel from Minnesota rules regarding solid waste.**
Sections 101 - 106 [Advanced Recycling Definitions] , Section 107 [Advanced Recycling Is Not Waste Processing], Section 108 [Fuels Produced Using Advanced Recycling], Section 109 [Recovered Feedstock Definition], Section 110 [Advanced Recycling Is Not Waste Recovery], Section 111 [Advanced Recycling Facilities Are Not Waste Recovery Facilities], Section 112 [Solvolysis Definition], Section 113 [Advanced Recycling Feedstock Is Not Waste], Section 114

[Advanced Recycling Facilities Are Not Waste Facilities], Section 115 [Advanced Recycling Is Not Waste Management], Section 121 [Advanced Recycling Materials Are Not Solid Waste]

This broad swath of statutory language would create a whole new industrial category in Minnesota statutes and exempt it from a number of rules and statutes that apply to similar recycling operations in Minnesota. Existing recycling operations have testified against these provisions, arguing that there is no reason to exempt "waste to fuel" operations from standards that others in the recycling industry have to meet.

**MCEA opposes legislative efforts to prevent or repeal air quality standards regarding motor vehicles.**

Section 122 [Repeal of Vehicle Emissions Standards Authority] has been previously heard as SF 450, and would repeal the statutory authority of the MPCA to set standards for automobile emissions. Not only would this repeal the Clean Cars Minnesota rulemaking, it would prevent any future state regulations on automobile pollution. Transportation is the top source of greenhouse gas pollution in Minnesota, and the MPCA is properly using its authority to reduce that pollution.

Section 127 [Zero Vehicle Emission Vehicle Choice] imposes an open-ended requirement on the MPCA to use the environmental fund to purchase any zero-emission vehicle on a dealer's lot that remains for 90 days. That's unlike any other product in the state of Minnesota and a poor use of the environmental fund.

**MCEA opposes attempts to repeal common sense manure management practices in the general permit for concentrated animal feeding operations.**

Section 124 [Manure Spreading Changes Repeal] would prevent the MPCA from requiring permittees who choose coverage under the general feedlot permit to reduce nitrogen impacts from manure when it is applied in the fall and winter. Nitrogen pollution is increasing, and fall and winter manure application is part of the problem. The Minnesota Department of Agriculture's rules prohibit fall application of commercial nitrogen fertilizer in many areas. The MPCA general feedlot permit does not prohibit fall application of manure, but instead gives producers four options: (1) wait until the ground is cold; (2) add a nitrification inhibitor product; (3) plant a cover crop; (4) apply a portion of the allowed application in the spring. Section124 unreasonably restricts these best management practices, which many agricultural producers have already adopted.

**MCEA opposes confusing and counterproductive "unadopted rules" language that would limit the ability of agencies to clarify Minnesota rules and statutes.**

Sections 17 and 125 [Unadopted Rules] are anti-public information, unnecessary and overbroad. First, the sections define all guidance as unadopted rules, effectively "gagging" agencies by preventing publication of any documents that would help regulated parties understand and comply with complicated statutes and rules. Second, these provisions are unnecessary. Under Minn. Stat. 14.381, agencies are not allowed to enforce "unpromulgated rules." Similarly, Minn. Stat. 14.07 prohibits agencies from incorporating documents into rules unless standards are met. The sections do not help regulated parties or the public and will result in a reduction of public information or massively expensive and unnecessary rulemaking.

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**MCEA opposes limits on which Minnesotans can petition for environmental review of a proposal.**
Section 128 [EAW Petitions] limits petitions for environmental review to residents of the county (or adjacent county) where a project is proposed. Air and water pollution do not respect county boundaries. Projects undertaken in one county can significantly impact downstream or downwind communities across the state, as when an important fish spawning area is located miles upstream from where anglers seek to fish. This provision would limit the rights of affected persons to petition for environmental review.

**MCEA opposes expensive efforts to legislatively modify technical measurements of pollution that would result in dirtier water for downstream users.**
Section 159 [Whole Effluent Toxicity] contains highly technical language which modifies how MPCA would calculate and enforce concepts like “acute toxic units” and modifying “mixing zone” calculations and boundaries for one industry (sugar beet processing.) These changes make it clear this section goes far beyond the proper role of the Legislature. At a minimum, the impact of this provision on Minnesota’s water needs to be made very clear before any legislative changes to this highly technical area are considered. Lines 7.8 - 7.11 of SF 959 3E appropriates $671,000 for these rules and they will cost $41,000 per year permanently.

**MCEA opposes legally dubious and unnecessary changes to Minnesota’s Clean Air Act State Implementation Plan.**
Section 162 [State Implementation Plan Revision] is a legally dubious attempt to direct the MPCA to seek a change in Minnesota’s State Implementation Plan for the Clean Air Act. The U.S. Environmental Protection Agency would need to approve it and it’s likely to be challenged in court, which would create additional uncertainty for regulated parties. Ambient air quality standards are critical to protecting public health, and must be applied uniformly for all facilities to be effective.

**MCEA opposes setting a bad precedent for energy and utility companies to not follow current law on permitting.**
Section 163 [Oriented Strand Board Facility; Itasca County] would exempt a potential oriented strand board (OSB) on Minnesota Power property near the Boswell Energy Center from “any law” that prevents clearing the land and preparing the site and requires issuance of several permits. This amendment has not been subject to public testimony, the project proposer is not yet known, and no details of the proposal are public at this time. In addition, this section is unnecessary, since provisions exist in state rules (Minnesota Rules 4410.3100 subparts 4-8) that allow a variance to the environmental review process for construction under certain conditions. MCEA supports a just transition for all fossil fuel workers, including those at Boswell, and has testified in favor of just transition planning this session (HF 1750). But this overbroad provision would set a dangerous precedent of creating a blanket exemption from Minnesota’s environmental laws for a proposal that is currently shrouded in secrecy.

**MCEA opposes the open-ended extension of mining permits that should be reexamined in light of changing practices in the global mining industry.**
Section 164 [Preservation of Permits if Mining Permit Revoked] would prohibit the Minnesota DNR from revoking mining permits for the Mesabi Metallics/Essar Steel/Minnesota Steel Industries proposal if mineral leases are revoked. The permits in question were issued in 2008

and would allow the construction of an expanded mine tailings dam of an upstream design. Since these permits were issued in 2008, several disasters at mines in North and South America have led the mining industry and national governments to limit or ban upstream tailings dams. If DNR is forced to revoke the leases for the project, it should also require an up-to-date permit based on current mining practices.

**MCEA opposes exempting a specific drainage project from Minnesota drainage laws.** Section 166 [Drainage Pilot Project; Bois De Sioux Watershed District] exempts a specific drainage project from Minnesota Statutes Chapter 103E. This policy section was not heard in any policy committee, and bypassed the Drainage Work Group. Minnesota has well-established drainage law, and exempting a project from all of it through a floor amendment to a budget bill is not good practice. In addition, this section would upend the usual way nearby landowners are assessed for the cost of this project without any clear idea about how it would impact them.

**CONCLUSION**

Members of the conference committee, thank you again for your service to the people of Minnesota. MCEA's policy and legal experts are happy to discuss any of the above testimony with you and your staff as you continue your work to assemble the budget for FY 2022-2023.

Sincerely,

Kara Josephson
Legislative Director
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