

**OBJECTION TO THE ISSUANCE OF  
FESOP – NEW SOURCE CONSTRUCTION MINOR (PSD/EO)  
PERMIT NO. 089-44042-00660  
FULCRUM CENTERPOINT, LLC  
2024 OEA 032, OEA CAUSE NO: 22-A-J-5216**

Official Short Cite Name:	Fulcrum CenterPoint, 2024 OEA 032
OEA/INcite Cause Nos.:	22-A-J-5216 / IDEM-2209-000437
Topics/Keywords:	Biorefinery New Source Construction Federally Enforceable State Operating Permit Motion for Summary Judgment IC 13-15-6-2 IC 13-30-3 IC 13-14-2-6 326 IAC 2-8-3(c) 326 IAC 2-7-1(22) 326 IAC 2-1.1-5 326 IAC 2-8-13(c)(8)(C) 326 IAC 1-3-2(b)(4)(A)
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Petitioners: Kim E. Ferraro, Esq. Michael J. Zoeller, Esq. Permittee/Respondent: Bradley R. Sugarman, Esq. Daniel P. McInerney, Esq. Jackson L. Schroeder, Esq. IDEM/Respondent: Valerie Tachtiris, Esq. John Pritchard, Esq.
Date of Order:	April 18, 2024
Index Category:	Air
Further Case Activity:	



(FESOP) under 326 IAC 2-8.<sup>2</sup> The notice provided information on how the public could review and provide comments on the proposed permit and set a 30-day timeframe in which to submit.<sup>3</sup> The notice also announced that a public hearing would be held on April 27, 2022.<sup>4</sup>

3. IDEM issued the FESOP (FESOP or Permit) on August 16, 2022<sup>5</sup> under Permit No. 089-44042-00660. A FESOP requires a permittee to limit its emissions below major source thresholds as defined in 326 IAC 2-7-1(22) or lower than 100 tons per year (tpy) of any regulated pollutant, lower than 25 tpy or more of any combination of hazardous air pollutants as listed in Section 112(b) of the Clean Air Act or 10 tpy of any individual hazardous air pollutant.<sup>6</sup>

4. 326 IAC 2-8-3(c) sets forth the information an applicant must submit in a permit application and requires a FESOP application to include the information listed in the rule to the extent necessary to determine applicable requirements, compliance with applicable requirements and compliance with the terms and conditions of the Permit.<sup>7</sup> The rule requires an applicant to submit all emissions of regulated air pollutants and describe all emissions of regulated air pollutants emitted from any emissions unit.<sup>8</sup> The rule does not control IDEM's review of the application or its decision to issue the Permit. The Permit limits Fulcrum's emissions below major source thresholds.

5. On September 6, 2022, Petitioners timely filed their initial Petition for Administrative Review.

6. On November 16, 2022, OEA held a prehearing conference, issued a report of the conference and ordered case management deadlines. Specifically, the deadline ordered for the completion of discovery pursuant to Ind. T. R. 26 was April 14, 2023.

7. On December 16, 2022, Petitioners filed an Amended Petition for Administrative Review (Amended Petition) alleging 3 deficiencies: (1) Fulcrum's application did not describe "feedstock" sufficient to determine or regulate emissions as required by 326 IAC 2-8-3(c)(3); (2) Fulcrum's application does not sufficiently provide the bases for certain emission rates as required by 326 IAC 2-8-3(c); and (3) IDEM failed to satisfy its obligation to adequately consider and protect public health.

8. On November 13, 2023, Petitioners, IDEM and Fulcrum filed Motions for Summary Judgment and Memorandum in Support (Petitioners' Memo, IDEM's Memo and Fulcrum's Memo). "The fact that [all three] parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether

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<sup>2</sup> See ATSD at p. 8 of 92.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Permit No. 44042f.

<sup>6</sup> 326 IAC 2-7-1(22).

<sup>7</sup> 326 IAC 2-8-3(c).

<sup>8</sup> 326 IAC 2-8-3(c)(3)(A).

there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992); *see also Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

9. On December 13, 2023, IDEM and Fulcrum filed responses to Petitioner’s Motion for Summary Judgment. On that same date, Petitioners filed responses to IDEM’s and Fulcrum’s Motions for Summary Judgment.

10. On January 2, 2024, IDEM and Fulcrum filed replies to Petitioners’ Response to their Motions for Summary Judgment. Petitioners filed a Reply in Support of their Motion for Summary Judgment.

11. Pending are motions filed by Fulcrum and Petitioners to exclude each other’s designated experts, and a motion to strike certain Petitioners’ exhibits. Given that Summary Judgment is granted to Fulcrum and IDEM, the motions are moot.

### **Conclusions of Law**

1. IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per IC § 13-13, *et seq.* OEA has jurisdiction over the decisions of the Commissioner of IDEM pursuant to IC § 4-21.5-7, *et seq.*

2. This is a Final Order issued under IC § 4-21.5-3-23. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; IC § 4-21.5-3-27(d). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004); *see also* IC § 4-21.5-3-14 and IC § 4-21.5-3-27(d).

4. The Court may enter summary judgment for a party if it finds that “the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Tr. R. 56(C); IC § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant, and all doubts as to the existence of a material issue must be resolved against the moving party. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000); *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

5. On November 13, 2023, Petitioners, IDEM and Fulcrum all filed Motions for Summary Judgment and Memorandum in Support (Petitioners' Memo, IDEM's Memo and Fulcrum's Memo). The fact that all three parties requested summary judgment does not alter the standard of review. Instead, the Court must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). Here, each party has the burden of showing whether IDEM's decision to issue the Permit either complied with or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *Aquasource Services and Technology*, 2002 OEA 41. Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. IC § 4-21.5-3-14(c); IC § 4-21.5-3-

6. A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of their pleading but must set forth specific facts showing that there is a genuine issue for trial. *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009).

7. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *Page Road*, 2022 OEA 150, 152; *Wolf Lake*, 2023 OEA 001, 006; *American Suburban Utilities*, 2019 OEA 48, 53.

OEA's review is limited to determining whether IDEM complied with applicable statutes and regulations pertaining to permits when it issued the Permit. *Berkshire Pointe WWTP*, 2023 OEA 105, 110; *Blue River Valley*, 2005 OEA 1, 11. OEA's jurisdiction is limited to and cannot be extended beyond those matters over which the General Assembly has determined that it may exert subject matter jurisdiction. *Alcoa, Inc.*, 2004 OEA 30, 33; *LTV Steel Company v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000).

**Petitioners did not comply with mandatory statutory and regulatory requirements in their Amended Petition.**

8. IC § 13-15-6-2 requires a request for an adjudicatory hearing of an issued permit to include the following information:

...

(4) Statement, with particularity, the reasons for the request.

(5) Statement, with particularity, the issues proposed for consideration at the hearing.

(6) Identification of the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

In a cause involving an appeal of a permit, 315 IAC 1-3-2(b)(4)(A) also requires a petitioner to include:

(i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.

(ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

In the Amended Petition, Petitioners did not include the requirements of either IC § 13-15-6-2 or 315 IAC 1-3-2(b)(4)(A) in their Amended Petition. Petitioners did not identify any permit terms and conditions IDEM allegedly failed to consider during the permitting process in their pleadings, let alone establish IDEM failed to do so. Consequently, Petitioners have failed to provide sufficient evidence to create a genuine issue of material fact in their Amended Petition. *Page Road*, 2022 OEA 150. Thus, Petitioners cannot establish a genuine issue of material fact as to any of their three claimed deficiencies.

**Petitioners contend that OEA's review should be limited to documents contained in IDEM's Virtual File Cabinet (VFC) in making its decision on the parties' Motions for Summary Judgment, although IC § 4-21.5-3-25 and Ind. Trial Rule 56 set no such limit.**

9. Unsupported by statute, regulation or trial rule, Petitioners contend OEA should be limited to consider only evidence contained in IDEM's Virtual File Cabinet.<sup>9</sup> Petitioners cite sundry Fulcrum and IDEM Exhibits<sup>10</sup> to contend "if the evidence is not posted on the VFC, IDEM did not consider it in issuing the FESOP" without citing authority or proffering evidence to support their contention; thus, Petitioners' contention is without merit.

**IDEM had sufficient information to determine that Fulcrum's Potential to Emit (PTE) exceeded major source thresholds and to properly impose limits to ensure its actual emissions will not exceed those thresholds.**

10. Petitioners claim "Fulcrum's application did not describe 'feedstock' sufficient to determine or regulate emissions as required by 326 IAC 2-8-3(c)(3)."<sup>11</sup> The contents of Fulcrum's Application complied with 326 IAC 2-8-3(c). 326 IAC 2-8-3(c) applies to the Permit Application itself and not the Permit IDEM's process for issuing the Permit.<sup>12</sup> Petitioners contend IDEM should have required additional information about the feedstock but do not specify what information IDEM should have obtained or cite to any statute or regulation that would require IDEM to do so.

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<sup>9</sup> Petitioners' Memorandum, p. 17.

<sup>10</sup> IDEM's Response to First Set of Discovery Requests Ex. 5, pp. 4 – 9; IDEM's Response to Second Set of Discovery Requests Ex. 6, pp. 10 – 11; IDEM Deposition Ex. 7, p. 48; Belt Deposition Ex 9, p.13.

<sup>11</sup> Petitioners' Memorandum, p. 18.

<sup>12</sup> Petitioners contend that the provisions of 326 IAC 2-8-3(c) are "made applicable to IDEM in 326 IAC 2-8-7(b)". (Petitioners' Response, p. 12). That provision, however, states "[t]he submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under 326 IAC 2-2 through 326 IAC 2-5.1."

When issuing a FESOP, IDEM must ensure all potential emissions sources are accounted for and that the permit contains enforceable limits that will keep the permittee's emissions below the major source thresholds. The Permit includes limits, monitoring, recordkeeping and reporting requirements to ensure that all emissions remain below major source thresholds.<sup>13</sup> Regardless of the variability in the feedstock, Fulcrum must still comply with the terms of the Permit. In other words, the potential variability in the feedstock does not provide sufficient grounds for invalidating the Permit.

Moreover, Petitioners' argument that Fulcrum cannot or will not comply with the Permit due to the variability and/or amount of feedstock is speculative. Petitioners assert that the Permit Application did not specifically identify the composition of the feedstock<sup>14</sup> but did not identify any statutory or regulatory provision requiring Fulcrum to provide that information.<sup>15</sup>

"Mere speculation cannot create questions of fact" sufficient to defeat summary judgment. *Beatty v. LaFontaine*, 896 N.E.2d 18, 20 (Ind. Ct. App. 2008) (citing *Briggs v. Finley*, 631 N.E.2d 959, 964-65 (Ind. Ct. App. 1994)). Opinions expressing mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact. *Id.* "OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law." *Jennings Water, Inc. v. Off. Of Env'tl. Adjud.*, 909 N.E.2d 1020, 1026 (Ind. Ct. App. 2009). Petitioners have failed to provide sufficient evidence regarding potential feedstock's variability impact on the issuance of the Permit to create a genuine issue of material fact in their Amended Petition.

#### **IDEM properly prescribed the Permit limits.**

11. Petitioners contend Fulcrum's application does not sufficiently provide the basis for certain emission rates as required by 326 IAC 2-8-3(c).<sup>16</sup> They claim IDEM lacked sufficient information to determine whether Fulcrum "is a 'major' or a 'synthetic minor source'"<sup>17</sup> and cited two documents in support.<sup>18</sup> The first is a report from the EPA's Office of Inspector General. In that report, the Inspector General's broad statement that many FESOP permits are issued with "insufficient underlying support for the basis of the emission factor used" to "facilitate the estimation of emissions from various sources of air pollution."<sup>19</sup> The report was not directed to IDEM or the Permit it issued. Moreover, Petitioners failed to identify any such

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<sup>13</sup> See Permit at 18 – 19 of 67.

<sup>14</sup> Petitioner's Memorandum, p. 19.

<sup>15</sup> The specific composition of the feedstock was provided to both IDEM and Petitioners during the permit review process. Fulcrum's Brief in Opposition to Petitioners' Motion, p

<sup>16</sup> Petitioners' Memorandum, pp. 24 – 32.

<sup>17</sup> *Id.* at 24.

<sup>18</sup> Petitioners did not comply with the Court's Order Granting the Joint Motion to Amend Case Management Schedule. On October 3, 2023, the Court issued the Order which stated, "the parties shall exchange final witness and exhibit lists and provide any exhibit not previously exchanged on November 13, 2023." Petitioners did not provide the report to either Fulcrum or IDEM during the discovery period. Thus, Petitioners designated evidence to support their Motion 73 days after the close of discovery. Petitioners' Memo, pp. 7 – 9; Petitioners' Designation of Evidence in support of their Motion. Ex. 18 – 25, 29 – 31. This level of pleading practice is unwarranted.

<sup>19</sup> *Id.*, p. 25.

deficiencies in the Permit or proffer permit terms they deemed appropriate. The second document is a decision from the Environmental Appeals Board in which Petitioners note the “EAB criticized the use of AP-42 emission factors ‘to establish both its PET limit and to demonstrate compliance with that limit,’”<sup>20</sup> and like the report, the decision was not directed to IDEM or the Permit and not exchanged during discovery as ordered.

12. Petitioners implied that IDEM merely rubber-stamped Fulcrum’s proposals.<sup>21</sup> IDEM spent 15+ months reviewing the application, and during this review issued 2 Notices of Deficiencies (NOD) requesting additional information regarding multiple aspects of the application. Fulcrum responded to the NODs. IDEM performed air dispersion modeling to ensure the Facility would not exceed the National Ambient Air Quality Standards (NAAQS) even though there was no regulatory requirement to do so. IDEM determined that it was possible that 1 pollutant (PM2.5) could be exceeded unless the stack heights were modified. Fulcrum agreed to the modification.

The Permit sets limits and contains monitoring, recordkeeping and reporting requirements.<sup>22</sup> Allegations without supporting documentation are speculative and insufficient to prove IDEM improperly issued the Permit. *See John A. and Becky S. Stuber*, 2009 OEA 96, 107. Even assuming *arguendo* that Permittee does not comply with statutes, rules or permit conditions in the future, its potential future non-compliance would not determine whether IDEM properly issued the Permit. IDEM addresses non-compliance with a permit through an enforcement action pursuant to IC § 13-14-2-6.

13. Petitioners allege IDEM did not have sufficient information about gases that will be vented to the flare to properly calculate emissions.<sup>23</sup> The majority of the Permit’s limits will be reflected in the monitoring and testing the Permit requires Fulcrum to undertake. Although it is not feasible to measure emissions during a flaring event,<sup>24</sup> emissions can be calculated using the factors from the AP-42 manual. EPA commented on the proposed Permit about the amount of flaring that would occur, but not the rate of emissions that would be associated with flaring events. EPA suggested IDEM define startup and shutdown and limit the amount of gas that can be flared during these events.<sup>25</sup> IDEM complied with EPA’s suggestion, added definitions for “startup” and “shutdown” and noted that since both types of emissions would be included in the annual limit, no additional limits on flaring were needed.<sup>26</sup> EPA allowed the

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<sup>20</sup> Petitioners’ Memorandum, pp. 30 – 31.

<sup>21</sup> Petitioners’ Memorandum, p. 25.

<sup>22</sup> Permit, at 11 – 13, 18 – 19 of 67.

<sup>23</sup> Petitioners’ Memorandum, pp. 29 – 32.

<sup>24</sup> OEA, citing an EPA Order, has acknowledged that direct periodic monitoring of emissions is not always necessary or in some cases, possible, but monitoring of parameters or variables related to emissions may be sufficient in certain situations to assure compliance, “particularly for flare emissions.” *Riverview*, 2020 OEA 63.

<sup>25</sup> Permit, ATSD at 62 – 63 of 92.

<sup>26</sup> *Id.*



Permit to take effect without objection.<sup>27</sup> Petitioners provided no undisputed facts supporting their allegations.

**IDEM complied with all applicable regulations to ensure public participation and protective of human health.**

14. Petitioners contend IDEM failed to satisfy its obligations under the regulations to adequately consider and protect human health.<sup>28</sup> Specifically, Petitioners argued that IDEM has an affirmative obligation under 326 IAC 2-1.1-5 and 2-8-13(c)(8)(C) to protect public health but provided no factual or legal support that IDEM failed to satisfy its obligations. 326 IAC 2-1.1-5(5) states “[t]he commissioner shall not issue preconstruction approval . . . for construction or modification of any source or emission unit” upon a determination the approval does protect human health. Prior to issuing a FESOP, the commissioner *may* impose conditions on the permit as necessary to ensure . . . [p]ublic health will be protected.”<sup>29</sup>

IDEM relied upon the scientific expertise of EPA in its regulation of air pollution.<sup>30</sup> Under the Clean Air Act, EOA developed the NAAQS for six criteria pollutants to protect public health and the environment.<sup>31</sup> NAAQS define levels of air quality which EPA determined are protective of human health with an adequate margin of safety.<sup>32</sup> The Permit complies with NAAQS<sup>33</sup> and thus is protective of human health. EPA’s Title VI guidance specifically references the NAAQS stating air quality that adheres to such standards is presumptively protective of public health in the general population.<sup>34</sup> The guidance specifically states,

If an investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.<sup>35</sup>

Petitioners did not present documentary evidence or provide cogent argument that public health will suffer significant adverse impacts. EPA classified Lake County as attainment or unclassifiable in Indiana for all criteria pollutants excluding portions of northern Lake County under the 2015 ozone standard of 70 ppb.<sup>36</sup> In May 2020, EPA redesignated Lake County as attainment for the 2008 8-hour ozone standard.<sup>37</sup> Comments received expressed concerns about the effect of PM and dust emissions on local air quality. In response, IDEM supplied a

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<sup>27</sup> Pet. Ex. 8 at 19.

<sup>28</sup> Petitioners’ Memorandum, pp. 32 – 33.

<sup>29</sup> 326 IAC 2-8-13(c)(8)(C) (emphasis added).

<sup>30</sup> Permit. ATSD at 224 of 92.

<sup>31</sup> *Id.*

<sup>32</sup> 40 CFR § 50.2(b).

<sup>33</sup> Permit, ATSD at 34 of 92.

<sup>34</sup> See EPA Investigations Guidance, 65 Fed Reg. 39,650 at 39,680.

<sup>35</sup> *Id.*

<sup>36</sup> Permit, ATSD at 25, 28 of 92.

<sup>37</sup> 87 Fed. Reg. 20821 (May 20, 2022).

detailed analysis of the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS attainment status and air quality trends in Lake County.<sup>38</sup> Although not required by regulation, IDEM undertook air quality modeling and determined that the stacks needed to be raised in height to 85 ft to comply with PM standards.

Here, Petitioners produced no evidence that the population in proximity to the Facility has a high concentration of individuals who suffer from asthma as claimed. Petitioners cite *Friends of Buckham v. State Air Pollution Control Board*, 947 F.3d 68, 86 (4<sup>th</sup> Cir 2020). The *Friends of Buckingham* case dealt with a challenge to the Virginia Air Pollution Control Board's decision to award a permit due to the Board's failure to properly consider Environmental Justice concerns. Indiana has no such statutory or regulatory requirement.

### **Final Order**

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioners' Motion for Summary Judgment is **DENIED** and Respondent IDEM and Permittee/Respondent Fulcrum's Motions for Summary Judge are hereby **GRANTED**. Permit No. 089-44042-00660 is hereby **AFFIRMED**.

This cause is **DISMISSED**, and all pending proceedings in this cause are **VACATED**.

*You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. A party is eligible to seek Judicial Review of this Order as stated in applicable provisions of IC § 4-21.5, et seq. Pursuant to IC § 4-21.5-5-5, a Petition for Judicial Review of this Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.*

**IT IS SO ORDERED** this 18<sup>th</sup> day of April, 2024 in Indianapolis, IN.

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Hon. Lori Kyle Endris  
Environmental Law Judge

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<sup>38</sup> Permit, ATSD at 31 – 24 of 92.

**DISTRIBUTION VIA EMAIL**

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