ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5305

MINGO LOGAN COAL COMPANY, INC.,
Plaintiff-Appellant,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee.

On Appeal from the U.S. District Court for the District of Columbia
Case No. 10-cv-00541 (Hon. Amy Berman Jackson)

***AMICUS CURIAE* FINAL BRIEF OF WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, OHIO VALLEY ENVIRONMENTAL COALITION, AND SIERRA CLUB IN SUPPORT OF APPELLEE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND IN SUPPORT OF AFFIRMANCE**

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DATED: December 4, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rules 29 and 28(a)(1), Environmental Amici hereby certify as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

Defendant-Appellee is the United States Environmental Protection Agency. Plaintiff-Appellant is Mingo Logan Coal Company, Inc., a subsidiary of Arch Coal Inc.

Environmental Amici in this case include the following, and all participated as amici before the district court:

West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club.

See EPA's Certificate for the full list of Amici who participated in the district court and/or in the previous appeal in this litigation.

(ii) Circuit Rule 26.1 Disclosures

See disclosure form filed below.

(B) Ruling Under Review

Appellant seeks review of the Order and Memorandum Opinion issued by the Honorable Amy Berman Jackson in *Mingo Logan Coal Company Inc. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014), JA158-59.

(C) Related Cases

See EPA's Certificate. Some of Environmental Amici are the plaintiffs in the case challenging the U.S. Army Corps of Engineers' permit for the Spruce No. 1 mine.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29, Environmental Amici West Virginia Highlands Conservancy *et al.* make the following disclosures:

1. **West Virginia Highlands Conservancy** ("WVHC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in WVHC. WVHC, a corporation organized and existing under the laws of the State of West Virginia, is a nonprofit organization which aims to protect West Virginia's land and water resources, including from the harm caused by mountaintop removal mining.

2. **Coal River Mountain Watch** ("CRMW") has no parent companies, and no publicly held company has a 10% or greater ownership interest in CRMW. CRMW, a corporation organized and existing under the laws of the State of West Virginia, is a nonprofit organization whose mission is to stop the destruction of local communities and the environment by mountaintop removal mining, to improve the quality of life, and to help rebuild sustainable communities.

3. **Ohio Valley Environmental Coalition** ("OVEC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in OVEC. OVEC, a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in West Virginia, is a nonprofit organization dedicated to the improvement and preservation of the environment.

4. **Sierra Club** has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club. Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

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GLOSSARY

§ 1344(b)(1) Guidelines	40 C.F.R. Part 230, implementing 33 U.S.C. § 1344(b)
AR	Administrative Record
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
Mingo Br.	Principal brief of Plaintiff-Appellant Mingo Logan Coal Company
Mingo Logan	Mingo Logan Coal Company
SJA	Supplement to Joint Appendix Submitted by Amici
Spruce permit	U.S. Department of the Army Permit No. 199800436-3 (Section 10: Coal River), JA294
Spruce Veto or Final Determination	Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, JA792

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

As local and national nonprofit conservation organizations, West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club ("Environmental Amici"), respectfully submit this brief in support of the Final Determination of the U.S. Environmental Protection Agency ("EPA") to veto the Spruce mine fill discharges under Clean Water Act Section 404(c), 33 U.S.C. § 1344(c). JA889-90. Environmental Amici seek to protect their members' interests in preventing the irreversible loss of the wildlife and aquatic ecosystems in the Coal River watershed, including Pigeonroost and Oldhouse Branches and their tributaries that are protected by the Final Determination, and preventing other environmental and health impacts associated with the type of extreme mountaintop removal mining that would occur under the Spruce permit.[1] *Id.*; JA885-88. Separate litigation brought by several Environmental Amici shed light on the controversy over this mine and successfully ensured that the headwater streams at issue were not destroyed while scientific evidence was amassed revealing the extent of the harm this mine would cause and showing the need for EPA action after the Corps forged ahead with its problematic

[1] The parties consent to Environmental Amici's submission of this brief, which is thus authorized by Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29(b). Notice of Written Representation of Consent, DN1530983.

decision to issue an individual permit. *See Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999); JA810-11 (describing *Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs*, No. 3:05-0784, 2007 WL 2200686 (S.D. W. Va. June 13, 2007)); EPA Br. at 7-8. Environmental Amici also worked to bring to EPA's attention new scientific developments that revealed the full environmental harm of the Spruce mine. *See, e.g.*, SJA066-103 (AR002401-38), AR006263-64.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

STATUTES AND REGULATIONS

Pertinent statutes and regulations not already provided by the parties are included as an Addendum.

SUMMARY OF ARGUMENT

EPA's Final Determination Concerning the Spruce No. 1 Mine prevents the worst impacts of what would otherwise be one of the most destructive coal mines in the history of Appalachia—a history that is already rife with land scarred and water poisoned by coal mining. *See* JA797. The scale of the impacts of the proposed Spruce mine is staggering. Appellant Mingo Logan Coal Company seeks to destroy over six miles of the last pristine streams in a West Virginia watershed that has been ravaged by widespread surface mining, known as mountaintop removal. JA804, JA840-41. For the sole purpose of obtaining coal, it intends to eviscerate a natural area nearly the size of downtown Pittsburgh—over 2,000 acres or 3.5 square miles. JA806. Mingo Logan seeks to dump its mining waste into the targeted headwater streams, which supply the lifeblood of local rivers, burying those streams and releasing significant amounts of noxious pollutants into downstream waters that are already crippled by the coal mining industry. JA864, JA869-70. Overwhelming scientific evidence, including significant research published since the Corps issued the individual permit for the Spruce mine, firmly establishes that filling headwater streams with millions of cubic yards of mining waste would cause unacceptable harm to wildlife.

Before completing its determination under the Clean Water Act, 33 U.S.C. § 1344(c), EPA performed one of the most comprehensive administrative and

scientific reviews ever for a § 1344 decision, including public hearings, comment, and dialogue with other agencies and the coal company. JA812-16. EPA's determination, based on the scientific record showing the extreme adverse impacts the Spruce mine would cause, should be upheld because it is a model of thorough, reasoned, and well-documented decisionmaking. The devastating impacts prevented by EPA's rare exercise of its § 1344(c) authority demonstrate exactly why the agency was given a unique role as the "environmental conscience" of the Clean Water Act. Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,081 (Oct. 9, 1979).

Furthermore, just as this Court held that § 1344(c) places no restrictions on the timing of EPA's authority to act and "veto" a fill authorization "whenever" it finds unacceptable harm, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 612-13 (D.C. Cir. 2013) ("*Mingo Logan II*"), *cert. denied*, 134 S. Ct. 1540 (2014), the statute likewise includes none of the additional limitations that Mingo Logan seeks to impose upon EPA's veto power. Contrary to Mingo Logan's argument on Issue III in its brief, EPA not only has the authority to address the downstream impacts of a fill discharge on aquatic ecosystems and wildlife, the agency has a legal duty to consider such harm under § 1344(c) and its own regulations.

And on Mingo Logan's Issues I and II, even if a "serious reliance interest" in discharging fill had been demonstrated (which it was not), EPA's action is lawful

and well-reasoned based on the administrative record. EPA properly declined to place Mingo Logan's alleged economic interest above the focused statutory directive to prevent any "unacceptable adverse effect" to aquatic wildlife and other resources. To do otherwise would be incompatible with § 1344(c), the Clean Water Act's general purposes, and the specific purpose of a permit itself: to eliminate pollution and prevent significant degradation of the integrity of United States waters. 33 U.S.C. §§ 1251(a), 1311(a), 1344(b) (citing § 1344(b)(1) Guidelines, 40 C.F.R. Part 230).

Therefore, Amici respectfully urge this Court to affirm the district court's decision, *Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014) ("*Mingo Logan III*"), and to uphold EPA's well-reasoned scientific determination that the proposed fill discharges would cause unacceptable harm to protected natural resources under the Clean Water Act.

ARGUMENT

I. EPA'S VETO DECISION RESTS ON AN OVERWHELMING RECORD OF SCIENTIFIC EVIDENCE DEMONSTRATING THAT THE SPRUCE MINE WOULD CAUSE UNACCEPTABLE HARM.

A. The Severe Harm Shown Easily Meets the "Unacceptable Adverse Effect" Threshold For Action Under Clean Water Act § 1344(c).

The scope and intensity of impacts of the proposed Spruce mine satisfy the Act's requirements for EPA to exercise its veto authority. 33 U.S.C. § 1344(c)

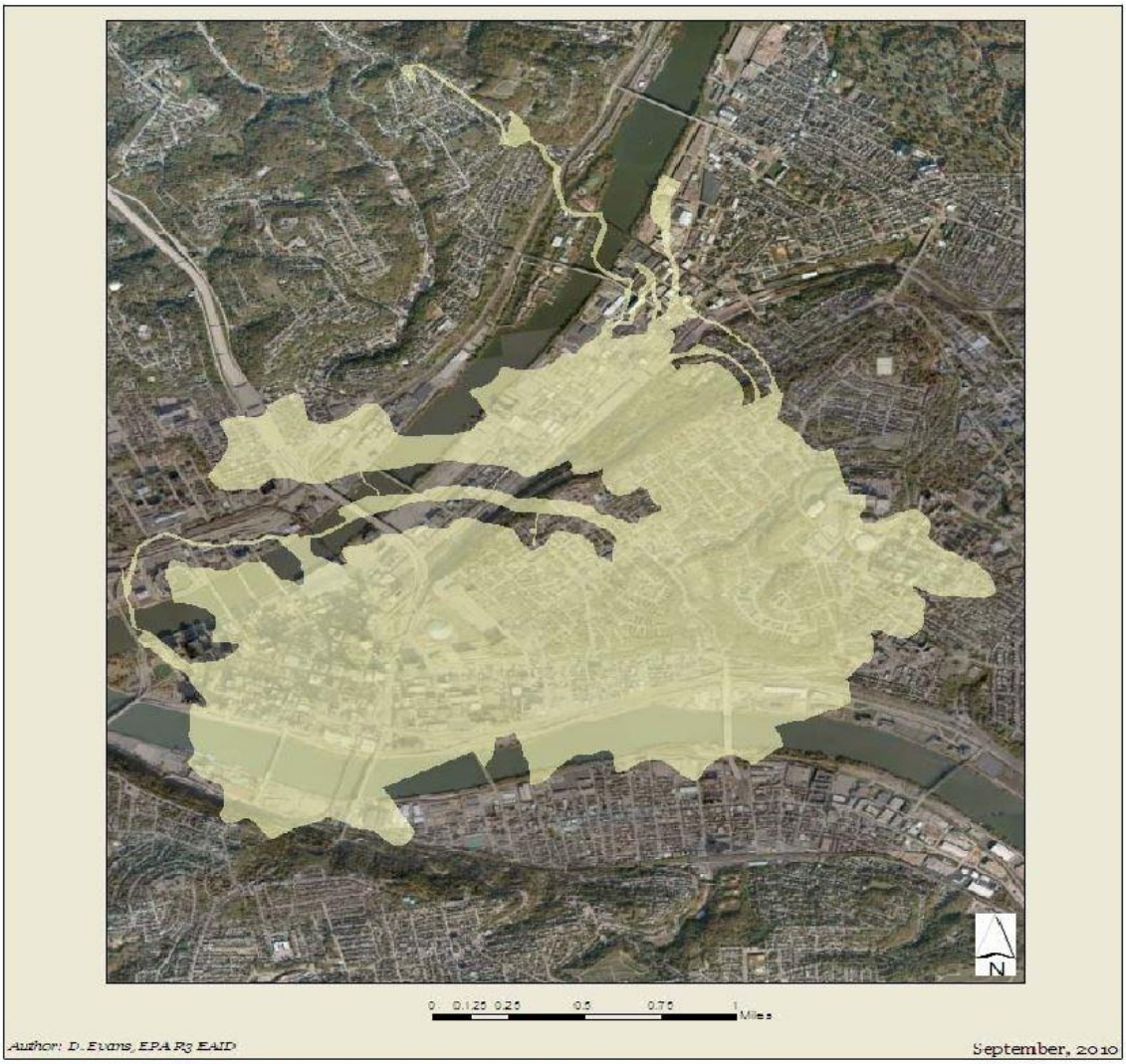

Figure 2. Spruce No. 1 Mine compared to downtown Pittsburgh, PA

(authorizing action if a fill discharge would have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"); *see also* 40 C.F.R. § 231.2(e). As shown in Figure 2 in the record, the Spruce mine would disturb an area nearly the size of downtown Pittsburgh. *See* JA806-07.

The scientific evidence that EPA relied on to make its determination—including significant findings not available when the Corps issued the Spruce

permit—demonstrates that both the direct burial of over six miles of high quality streams and the resulting downstream impairment would lead to unacceptable harm to wildlife that depend on healthy aquatic ecosystems. JA797-99. EPA's 99-page Final Determination cites nearly 100 scientific articles and studies that were developed after the permit was issued. JA811. EPA's Final Determination was accompanied by six technical appendices and detailed responses to public comments. The studies cited by EPA supported the agency's conclusion that the Spruce mine's proposed "valley fills" would harm aquatic ecosystems and that Mingo Logan's mitigation measures would be insufficient to replace the critical ecological functions of destroyed headwater streams. JA807-08 (describing the use of valley fills in mountaintop removal mining). EPA's decision was also supported by the U.S. Fish and Wildlife Service, which agreed that the Spruce permit would cause unacceptable harm to wildlife. JA800, JA812-13, JA890, SJA062-65 (AR006524-27).

In sum, EPA defined the "unacceptable adverse effects" in this case as "the direct burial of 6.6 miles of high quality stream habitat, including all wildlife in this watershed that utilize these streams for all or part of their life cycles (e.g., macroinvertebrate, amphibian, fish, and water-dependent bird populations)." JA797-98. EPA stated that "[s]treams within the Central Appalachian ecoregion have some of the greatest aquatic animal diversity of any area in North America."

Id.; JA822 (fig. 6). The two streams that Mingo Logan wants to fill "provide important habitat for 84 taxa of macroinvertebrates, up to 46 species of amphibians and reptiles, 4 species of crayfish, and 5 species of fish, as well as birds, bats, and other mammals." JA798. The streams provide "some of the last remaining high-quality, least-disturbed headwater stream habitat within the sub-basin." *Id.* EPA found that the mine "will transform these headwater streams from high quality habitat into sources of pollutants (particularly total dissolved solids and selenium) that will travel downstream and adversely impact the wildlife communities that utilize these downstream waters." *Id.* In addition, "[i]ncreased pollutant levels will lead to loss of macroinvertebrate communities and population shifts to more pollution-tolerant taxa, specifically the extirpation of ecologically important macroinvertebrates." *Id.* Furthermore, this loss will, "in turn, [have] substantial effects on fish, amphibian, and bird populations that rely on these communities as a food source." *Id.*; *see also* JA799. EPA stated the adverse impact of the mine was "particularly large" and "one that the aquatic ecosystem cannot afford." JA841; *see* JA889-90 (summary of conclusions).

EPA's regulations require that the agency consider the § 1344(b)(1) Guidelines (developed pursuant to the statute, 33 U.S.C. § 1344(b)(1), to establish criteria for the issuance of permits) when making a determination under § 1344(c). EPA found that the mine, as permitted, would violate these Guidelines in three

respects. Mingo Logan's application for the Spruce mine failed to adequately evaluate less environmentally damaging alternatives, would cause or contribute to significant deterioration of waters of the United States, and lacked compensatory mitigation to reduce stream impacts to insignificant levels. JA804. EPA found that these violations of the Guidelines "provide additional support for EPA's conclusion that the adverse impacts are unacceptable." *Id.*; *see* JA865-81.

EPA therefore had clear factual support for its conclusions that: "The Spruce No. 1 Mine will eliminate the entire suite of important physical, chemical and biological functions provided by the streams of Pigeonroost Branch and Oldhouse Branch including maintenance of biologically diverse wildlife habitat and will critically degrade the chemical and biological integrity of downstream waters," at a scale associated with "significant degradation." JA868. And, each of EPA's two major grounds for the Final Determination (summarized at JA840, JA864) provides an independent and firm foundation for its decision, as the district court recognized. *Mingo Logan III*, 70 F. Supp. 3d at 175, 183.

In further detail, first, EPA explained why the unacceptable impacts to wildlife and habitat would occur as a result of the direct loss of vital headwater streams. JA837-41. Because headwater streams act like capillaries for the ecosystem, "just as a loss of blood flow through capillaries can lead to organ failure, alteration of headwater streams has the potential to affect the ecological

integrity of aquatic ecosystems at broad spatial scales." JA817. Healthy headwater streams sustain aquatic life and, "as the early stages of the river continuum, provide the most basic and fundamental building blocks to the remainder of the aquatic environment." *Id.* The fills would eliminate the essential functions that the streams perform, including provision of wildlife habitat, movement of water and sediments, and transformation of organic matter, such as leaves, into nutrients and energy needed by wildlife throughout the aquatic ecosystem. JA817-18, JA824 (illustration "highlighting the importance of aquatic macroinvertebrates to other stream and riparian wildlife"). Headwater streams not only provide habitat for full-time resident wildlife, but also serve as refugia and spawning grounds for aquatic life that inhabit the larger watersheds and allow recolonization of nearby waters following drought or disturbance. JA798, JA811, JA829.

The headwater streams that would be destroyed—Pigeonroost Branch, Oldhouse Branch, and their tributaries—"support least-disturbed conditions and represent some of the last remaining high quality stream and riparian resources within the Headwaters Spruce Fork sub-watershed and the Coal River sub-basin." JA835. The Spruce valley fills, if allowed, will bury "all wildlife living in these streams, their tributaries, and associated riparian areas"; "will eliminate habitat for wildlife that depend upon those streams"; and "will also adversely impact wildlife

within this watershed that depend on headwater streams for all or part of their life cycles." JA838. Filling these streams with waste from the Spruce mine would cause severe harm because the streams perform critical hydrologic and biological functions (*i.e.*, ecosystem services) and serve as important habitat for more than 100 wildlife taxa and species. JA840. EPA reached a reasonable scientific conclusion to protect the wildlife that depend on the continued integrity of these headwater streams.

As a second, independent ground for its determination, EPA found that the watershed impacts of the construction of the Spruce valley fills would cause unacceptable harm to wildlife downstream.

As EPA determined, based on impacts observed at adjacent mines and from existing discharges at the Spruce mine, the fills of mining waste would transform headwater streams that now act as sources of clean water into sources of pollution, including contaminants such as total dissolved solids and toxic selenium. JA841-51. As a result, the fills would increase conductivity in downstream waters to levels associated with the extirpation of entire genera of aquatic life. JA841.[2] Additionally, the burial of the headwater streams would remove them forever as sources of dilution to clean downstream water and thus help offset or reduce the

[2] Conductivity, often correlated with total dissolved solids, is a water quality metric which measures a solution's ability to carry an electrical current, represents its salinity, and is associated with harm to aquatic life. JA849-50.

impacts of other sources of pollution in the watershed. JA848, JA850. These combined impacts would harm native macroinvertebrates that are the starting point for the food-chain and cycle of life in this aquatic ecosystem, and harm wildlife dependent on these species and clean water, including fish, salamanders, and water-dependent birds. JA859.

The record also shows that the mitigation measures required by the Spruce permit are nothing more than protections on paper: they would not prevent or alleviate those impacts. As EPA and the Fish and Wildlife Service agree and have explained: "[t]here is no evidence in the peer-reviewed literature that the type of stream creation included in the [Spruce mitigation plan] will successfully replace lost biological function and comparable stream chemistry to high quality stream resources, such as Pigeonroost Branch and Oldhouse Branch." JA876; *see also* SJA141-54 (AR010234-47), AR032677-78.

Moreover, EPA found that wildlife in these downstream areas is particularly vulnerable because past mining-related impacts have already resulted in major impairment of the aquatic ecosystems' ability to support life. The headwater streams that EPA's veto determination protects are located in the Spruce Fork sub-watershed, which is part of the larger Coal River sub-basin. In the Coal River sub-basin, 257 past and present surface mining permits occupy more than 13% of the land area, while in the Spruce Fork sub-watershed, 34 permits occupy more than

33% of the land area. JA869. Some sub-watersheds in the Coal River sub-basin have more than 55% of the land covered by mining permits. JA818.

Scientific research indicates that when surface disturbances reach a significant percentage of a watershed, as low as 3 to 5%, the ecosystem suffers "dramatic declines in aquatic biodiversity and water quality." AR032680. The Spruce Fork watershed's existing impacts already exceed that threshold by an order of magnitude. For example, about 33% and 34% of the streams are biologically impaired within the Coal River sub-basin and the Spruce Fork watershed, respectively, due to contamination by coal mining waste. JA891; *see also* JA841, JA868 (concluding the Spruce valley fills would lead to "significant degradation … particularly in light of the extensive cumulative stream losses in the Spruce Fork and Coal River watersheds"), JA868-74 (discussing consideration of cumulative effects), SJA155-56 (AR010264-65) (same); *cf. James City County v. EPA*, 12 F.3d 1330, 1337-39 (4th Cir. 1993) (upholding Ware Creek veto in part due to need to prevent "profound cumulative loss").

Mingo Logan does not and cannot dispute the fact that environmental harm would indeed occur, or that the record contains science proving that harm. Its disagreement is with the expert agency's conclusion that the impacts to wildlife, including macroinvertebrates, fish, salamanders, and birds, are "unacceptable" under the Act. But this is a scientific and policy determination well-founded in the

record, and on which the agency receives substantial deference. EPA Br. at 17-18. The coal company's unsupported contrary opinion is unavailing in view of the Final Determination's "detailed explanation" based on substantial evidence which fully establishes the requisite "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fox v. FCC*, 556 U.S. 502, 515 (2009).

B. Definitive New Scientific Information Regarding The Kinds Of Irreversible Harm That Spruce Would Cause Came To Light Between the Corps' Issuance of the Permit and EPA's Veto.

As this Court previously found, § 1344(c) does not restrict when EPA may exercise its veto authority. *Mingo Logan II*, 714 F.3d at 612-13. And, contrary to Mingo Logan's contention that the agency was wrong in finding new scientific information supported its decision to act here, the record shows just that.

In the time between the Corps' permit issuance and EPA's final veto determination—while the Pigeonroost Branch and Oldhouse Branch watersheds remained undisturbed pursuant to an agreement between the parties to the Spruce permit challenge in the Southern District of West Virginia—the scientific literature regarding the devastating impacts of Appalachian surface mining valley fills on aquatic life reached a new level of consensus that supports EPA's action. JA811-12. Although evidence of harm existed before the Corps issued the Spruce permit, the scientific research turned a corner soon afterward such that no expert

environmental agency could ignore the definitive evidence of grave environmental harm to wildlife threatened by the Spruce mine. The weight of that new information amplified and cemented EPA's longstanding concerns with the proposed permit and provided definitive proof that EPA determined was key to its final action here. *See, e.g.*, JA335-36, JA799-800, JA811-12; *see also* JA995, JA1116, JA1160, JA1163-66, JA1232-33, JA1243-45, JA1258.

For example, EPA consulted over 100 scientific articles, studies, and data sources that became available after the Corps issued the permit. JA811, JA957-58, AR010588-614; EPA's Notice of Substantial New Information Upon Which It Relied (filed July 29, 2014 as Doc. 104 in *Mingo Logan II*, No. 1:10-cv-00541-ABJ (D.D.C.) (summarizing record)), SJA001-028. As one major turning point, in 2008 an EPA scientist released a ground-breaking new study finding that 93% of streams below valley fills are biologically impaired, compared with 0% of unmined streams surveyed. SJA048 (AR033427); *see, e.g.*, JA853. Additionally, a 2010 study released by scientists at Duke University was "the first to demonstrate that the rapid increase in mining activity within regional headwaters is degrading water quality and freshwater ecosystems at very low mining intensities and over very large geographic scales," to the detriment of wildlife there. SJA105 (AR026631). Likewise, a January 2010 scientific article found that, previously, "little attention has been given to the growing scientific evidence of the negative

impacts of [mountaintop removal and valley fills]" on wildlife but that "analyses of current peer-reviewed studies and of new water-quality data from WV streams revealed serious environmental impacts that mitigation practices cannot successfully address." SJA060 (AR032707).

In addition to new scientific literature, EPA based its determination in part on significant new information highlighting the pollution flowing from the valley fill in the Right Fork of Seng Camp Creek, the portion of the Spruce mine that was constructed prior to EPA's veto action. JA847-48. These data showed discharges of harmful levels of toxic selenium—discharges that were likely to be repeated at the proposed valley fills in Pigeonroost Branch and Oldhouse Branch. *Id.*

In issuing its final determination, EPA recognized that the new scientific evidence "reflected a growing consensus" on the ecological value of the aquatic resources that the Spruce permit would destroy and the permanence of the resulting harm to wildlife, due to the fact that "recent research has shown that stream restoration projects based upon channel design [like that described in the Spruce permit conditions] … are not effective in restoring ecological function and biodiversity." JA811; *see also* JA1243-45.

EPA's comprehensive administrative record amply documents that Mingo Logan's proposed discharges would severely harm aquatic wildlife and ecosystems already stressed by coal mining impacts. The record demonstrates that the surface

mining impacts proposed by Mingo Logan would be "immense in scale and lead to irreversible alterations of impacted watersheds …. Once filled, streams are completely destroyed and those streams remaining below the fills are impacted significantly." AR032679, SJA061 (AR032708) ("impacts are pervasive and irreversible"). If the Spruce mine's extreme impacts do not meet § 1344(c)'s threshold of unacceptability, it is unclear what sort of destruction would be required to warrant EPA's exercise of its "broad environmental 'backstop' authority." *Mingo Logan II*, 714 F.3d at 612-13.

This Court should thus uphold EPA's determination just as courts have repeatedly done in reviewing prior EPA veto determinations. *See, e.g.*, *James City County*, 12 F.3d at 1338; *Bersani v. EPA*, 850 F.2d 36, 47 (2d Cir. 1988); *City of Alma v. United States*, 744 F. Supp. 1546, 1556 (S.D. Ga. 1990); *Creppel v. U.S. Army Corps of Eng'rs*, CIV A. No. 77-25, 1988 WL 70103, at *4, *12 (E.D. La. June 29, 1988); *see also Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 493 (D. Colo. 1996) (dismissing challenge to EPA determination due to lack of standing and noting that determination was not arbitrary and capricious). EPA's exercise of its authority here is reasonable and the scientific record that grounds its determination is at least as, if not more, robust than in the other twelve previous determinations. *See* EPA, Chronology of 404(c) Actions,

http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm (last updated Sept. 23, 2013).

The widespread destruction of wildlife and vital aquatic ecosystems proposed by Mingo Logan is the type of extreme environmental harm Congress intended to authorize EPA to prevent when it enacted § 1344(c) as a check on the U.S. Army Corps of Engineers' permitting power. *See, e.g.*, 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 177-78 (1973) (Muskie exh. 1) (explaining due to EPA's expertise, "the Conferees agreed that … [EPA] should have the veto over [fill discharges]") ("CWA 1972 Leg. Hist."); *James City County*, 12 F.3d at 1336 (recognizing § 1344(c) is a "broad grant of power" that "focuses only on [EPA's] assigned function of assuring pure water and is consistent with the missions assigned to it throughout the Clean Water Act"); *Newport Galleria Grp. v. Deland*, 618 F. Supp. 1179, 1185 (D.D.C. 1985) ("Congress has entrusted the resolution of [environmental] issues to the expertise of the EPA"). In keeping with the important role Congress directed EPA to perform under § 1344(c), the agency made a well-reasoned, scientific determination based on substantial evidence that it would be unacceptable to allow the Spruce mine to cause severe, irreversible environmental harm in vulnerable watersheds already under ecological stress.

II. THE CLEAN WATER ACT DOES NOT ALLOW EPA TO IGNORE HARM THAT A VALLEY FILL WOULD CAUSE TO WILDLIFE DOWNSTREAM.

This Court should reject Mingo Logan's contention that West Virginia's issuance of a permit for pollution discharges under 33 U.S.C. § 1342 prevents EPA from addressing any downstream harm that the proposed fill discharges would cause. Mingo Br. at 48. Not only does the Act not preclude EPA from addressing downstream harm, as EPA explains in its brief, it in fact requires EPA, and the Corps, to address downstream harm when acting under § 1344.

First, the statute is clear: neither § 1344 nor § 1342 restricts EPA's authority to consider downstream harm. Section 1344(c) does not include any limitation on the location of the unacceptable harm that EPA is authorized to prevent. 33 U.S.C. § 1344(c). Similarly, § 1342 does not say that issuance of a pollutant discharge permit by a delegated state in any way limits EPA's ability to prevent unacceptable harm from a fill under § 1344. *Id.* § 1342. That states have no authority to cramp EPA's veto power is further demonstrated by the statute's requirement that EPA consult only with the Corps, not a state, before issuing a final determination. *Id.* § 1344(c).[3] That the statute contains no limits on EPA's authority to consider

[3] A state may receive delegated authority from EPA to perform the Corps' functions under 33 U.S.C. § 1344(g)-(h). West Virginia, however, has not received that authority and even if it had, it would at most fill the Corps' shoes and have no more ability to prevent a § 1344(c) determination than the Corps does.

downstream impacts "is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

If there were any ambiguity, strong deference is warranted to the EPA and the Corps' coextensive interpretation and application of § 1344, finding that downstream harm is a necessary component of the evaluation of a fill discharge. *Id.* at 844; *see also Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261, 278, 291 (2009). EPA and the Corps' § 1344(b)(1) Guidelines, implementing § 1344, recognize this provision requires consideration of downstream harm, including "impact on an aquatic or wetland ecosystem." 40 C.F.R. § 230.10 (also requiring more specifically, *e.g.*, *id.* § 230.10(c)(2): consideration of harm "outside of the disposal site"; *id.* § 230.10(h)(1): consideration of "secondary effects" that are "associated with a discharge of dredged or fill materials" other than through direct destruction by fill); *see also id.* §§ 230.11(a)-(c), (e), (g), (h), 230.24(b), 230.25(b), 230.45(b). EPA also acknowledged this in promulgating its § 1344(c) regulations. *See, e.g.*, 40 C.F.R. § 231.2(e) (incorporating § 1344(b)(1) Guidelines, 40 C.F.R. Part 230); *see also* 44 Fed. Reg. at 58,078. And the Corps independently affirmed this in promulgating its own permitting regulations. *See, e.g.*, 33 C.F.R. § 320.4(b)(2) (recognizing the importance of "natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics"); *id.* § 320.4(c) (recognizing the

need to prevent "direct *and indirect* loss and damage" of wildlife) (emphasis added). One of the Corps' regulations even makes explicit that, under § 1344, EPA's determination trumps a state's determination on the downstream water quality impacts of a proposed discharge. 33 C.F.R. § 320.4(d) (stating that the Corps gives no weight to a state's certification that a proposed fill will not cause violations of water quality standards if EPA "advises of other water quality aspects to be taken into consideration").

The two agencies' interpretations of § 1344 on downstream harm are consistent with Congress' goal in passing the Clean Water Act. The Act's primary purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also id.* § 1362(19) (defining "pollution"); JA802 (discussing meaning of "biological integrity"). The Act sets "the national goal that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1). Interpreting § 1344(c) as not covering downstream harm, as well as all other types of harm that a fill discharge would cause, would be inconsistent with the statute's purpose to preserve and protect waters' integrity as a whole. Ignoring the physical, chemical, and biological harm that a fill discharge would cause downstream would be like looking at only the tip of the iceberg.

Accordingly, in this case both EPA and the Corps recognized the need to address downstream harm from valley fills, as well as other types of harm. The Corps considered downstream harm in its § 1344 permit decision document, just as EPA considered such harm in its § 1344(c) determination. *See, e.g.*, SJA031, SJA033 (AR025550, AR025554), SJA055 (AR042900), JA841-64. In other prior § 1344(c) determinations, EPA has similarly acted in significant part to prevent unacceptable downstream harm. *See, e.g.*, *James City County*, 12 F.3d at 1336-37, 1339 (citing EPA's findings of harm downstream in the watershed and to the ecosystem from the proposed dam, including in the York River and Chesapeake Bay); Final Determination of the Administrator Concerning North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act at 5 (Jan. 19, 1981) ("The record indicates that placement of solid waste on the site has resulted and will result in significant leaching into these lakes, the adjacent wetlands, the water table, which connects with Biscayne Bay, and ultimately the Bay itself.").[4] The agencies may differ in their views of the action each must take based on the downstream harm found, but they are united on the need to consider such harm under § 1344.

[4] *Available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/NorthMiamiFD.pdf (last viewed Oct. 21, 2015).

Mingo Logan cites no authority that has accepted its contrary position. *Coeur Alaska* addressed the different question of what type of discharge requires what type of permit, and its holding in no way limits EPA's action to address fill discharges like those at issue here which undisputedly fall under § 1344(c). 557 U.S. at 273-74. Instead, courts have joined the district court in repeatedly rejecting attempts to argue that § 1342 provides the exclusive route to address downstream harm. *Mingo Logan III*, 70 F. Supp. 3d at 177-80; *see also Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1256 (D. Wyo. 2005) (relying on the § 1344(b)(1) Guidelines to find that the Corps "failed to evaluate the cumulative effect of [a 1344 permit] on … those downstream waters that might feel the secondary effects of [the permit's discharges]"). In addition to the Fourth Circuit in *James City County*, as cited by EPA (Br. at 25), the Eleventh Circuit held that "Congress plainly mandated that the Corps consider downstream water quality when issuing a § 404 permit." *Black Warrior Riverkeeper v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1281 (11th Cir. 2015) (citing 33 U.S.C. §§ 1344, 1343(c)(1), and § 1344(b)(1) Guidelines). As that court also explained in finding standing to challenge a Corps' § 1344 action based on injury downstream: "[t]he discharge of dredged or fill material … may have consequences for water quality and the health of aquatic ecosystems throughout the entire watershed." *Id.* at 1276. Similarly, in considering whether a § 1342 permit objection was the only method

through which EPA could address downstream harm under the Clean Water Act, the Eighth Circuit found that nothing in the text of the Act directs that the § 1342 permit program "must be the *exclusive* means for protecting downstream waters." *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 959 (8th Cir. 2014).

Consequently, a state's issuance of a § 1342 permit regulating some portion of the discharge from the bottom of a valley fill has no bearing on whether that fill should or may actually be authorized by the Corps, or prevented by EPA, in the first place. Regardless of a state's views, it may not trump EPA action by issuing a § 1342 permit in an attempt to force the federal government to allow a valley fill to proceed. It is only if such a fill is allowed to be created that a state receives any authority to add protections for discharges coming from that fill, beyond whatever such protections may be included in a Corps-issued permit. A state acts purely at the pleasure of EPA under § 1342, and its authority extends only so far as it satisfies the Act. 33 U.S.C. § 1342(b)(5), (c)(2). And no state may weaken protections or standards under the federal Clean Water Act. *See, e.g.*, *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994) (explaining that a state may apply only "more stringent" controls).

Finally, even if a state fulfills its obligations under § 1342 regarding water quality, a § 1342 permit addresses only one aspect of the harm that a fill would cause—the discharge of pollutants downstream. By contrast, EPA's § 1344(c)

analysis also considers the impacts to downstream wildlife from the direct loss of buried headwater streams, the loss downstream of the vital functions those streams had provided, and the cumulative harm. JA841-64, JA867-74; *see also* 40 C.F.R. Part 231; *cf. Rapanos v. United States*, 547 U.S. 715, 774-75 (2006) (Kennedy, J., concurring in the judgment) (describing different types of potential downstream harm from fills recognized by the Corps, including direct contamination and loss of biological functions that waters previously provided) (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985)).

III. THERE IS NO "RELIANCE INTEREST" THAT COULD OUTWEIGH THE ACT'S PROHIBITION ON POLLUTING U.S. WATERS.

Mingo Logan contends that EPA made a procedural error by not considering an alleged "reliance interest" in the permit authorization to discharge fill, and that such an interest required EPA to provide a more detailed explanation for its final determination under *Fox*, 556 U.S. at 515. Mingo Br. at 34-37. These new arguments should not be reached, and if reached, should be rejected. EPA Br. at 46-59. In addition to the reasons EPA provides, this Court should reject Mingo Logan's extra-statutory "reliance interest" arguments because they undermine the core purpose of the Clean Water Act, which is to protect waters—not to provide certainty to polluters.

Even if Mingo Logan had shown a serious reliance interest (which it has not), the Clean Water Act itself already struck the required balance favoring clean water. By focusing purely on environmental and public health concerns in § 1344(c), Congress made clear that EPA should not consider a polluter's reliance interest in making its determination. 33 U.S.C. § 1344(c) (not including "reliance" or any other economic factor). As EPA explained in the preamble to its veto regulations, "section 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project. This view is based on the language of 404(c) which refers only to environmental factors …. When Congress intended EPA to consider costs under the Clean Water Act, it said so." 44 Fed. Reg. at 58,078; *see James City County*, 12 F.3d at 1336 (EPA's duty is to assure "pure water"); *Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015) (recognizing that explicitly requiring consideration of "discrete" environmental factors that do not "encompass cost" directs that the provision does not include consideration of cost) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001)).

The strictly environmental focus of § 1344(c) accords with the Act's broader emphasis on protecting the integrity of United States waters. The Act's primary mechanism for carrying out Congress's environmental goals is the statutory prohibition on the addition of any pollutant to the nation's waters except in

compliance with a permit designed to ensure protection of those waters. 33 U.S.C. § 1311(a). The Act makes no exception for any type of "reliance interest." It is § 1311's prohibition that is the "cornerstone" of the Act, not "finality" for polluters as Mingo Logan contends (at 20-25). *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) ("The foremost national goal enunciated by Congress is the complete elimination of the discharge of pollutants.").

While Mingo Logan asserts that its reliance interest in a permit is paramount no matter how grave the associated environmental harm, the Act says the opposite. A permit provides only a limited, conditional authorization to discharge pollutants which at all times depends on the permit's protection of waters. As § 1311 states: "Except as in compliance with [the Act's requirements, including § 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a); *see also id.* § 1251(a). The legislative history of § 1311 explains its protective purpose: "This section clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program …, this legislation would clearly establish that no one has the right to pollute." S. Rep. No. 92-414, at 42 (1972), *reprinted in* 2 CWA 1972 Leg. Hist., at 1460. Because there is no "inherent right to use the nation's waterways for the purpose of disposing of wastes," *id.*, any

interest in "finality" cannot trump an EPA determination, as shown in this record, that unacceptable harm must be prevented under § 1344(c).

Furthermore, Mingo Logan's preference for finality at any environmental cost finds no support in the Clean Water Act's permitting framework that implements § 1311. A permit is never truly final because it always remains subject to potential agency action necessary to protect the environment. The permit in this case stated that it was a temporary authorization that did not convey a legal right, and that could be changed, suspended, or revoked. JA295-96. The Corps' regulations expressly provide for the reevaluation, modification, suspension, or revocation of a § 1344 permit at any time. 33 C.F.R. § 325.7(a) (authorizing the Corps to take such action based on consideration of factors such as the public interest and "the continuing adequacy of … the permit conditions"). The statute, as well as EPA's regulations, make clear to a permit applicant that EPA may act under § 1344(c) "whenever" it finds a discharge may cause unacceptable harm to waters. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1. Further, "[n]otwithstanding any

other provision of this chapter," all permits are subject to EPA's emergency power "to stop the discharge of pollutants." 33 U.S.C. § 1364(a).[5]

Section 1344(p) does not upend Congress's emphasis on ensuring that permits protect the environment. It shields a permittee from enforcement actions only. *Id.* § 1344(p); *see also* 44 Fed. Reg. at 58,077 (explaining that withdrawal of specification under § 1344(c) does not render past discharges illegal). Congress's decision to limit civil and criminal liability for past discharges in compliance with a permit does not make the permit itself immutable. Rather, if EPA decides, as it did here, JA889, that the permit fails to protect waters from unacceptable harm, then environmental concerns must prevail. "The first principle of the statute is … that it is unlawful to pollute at all." *NRDC*, 822 F.2d at 123.

This Court should reject Mingo Logan's request to elevate the finality of a permit for finality's sake instead of applying the text and environmental purpose of the Act. The permit is not an end in itself, and it is not something that can be relied upon unless it indeed protects waters from harm, which EPA has determined the Spruce permit would not do. Whenever wildlife and waters face unacceptable

[5] Moreover, other permits similarly lack the finality Mingo Logan attempts to impute to the Act. *See, e.g.*, 33 U.S.C. § 1317(d) (requiring nationwide compliance with newly promulgated effluent standards for certain toxic pollutants regardless of existing permit limits); 40 C.F.R. § 122.64 (authorizing the termination of a § 1342 permit if "permitted activity endangers human health or the environment").

impacts, EPA has § 1344(c) authority to protect them. It is thus clear that a single mining company's economic "reliance interest," even if proven to exist, cannot outweigh the irreversible and "unacceptable" harm that EPA's extensive record demonstrates would occur here. In enacting the Clean Water Act, Congress already struck the balance and determined that a company's financial interests take a back seat to the fundamental goal of protecting the nation's waters for the benefit of the public. As Senator Muskie explained, "[t]he Conferees believe that the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams." 1 CWA 1972 Leg. Hist., at 178 (Muskie exh. 1).

Even if the Act required EPA to consider a discharger's reliance interests, which it does not, the agency did so here. The record demonstrates that EPA considered Mingo Logan's interest in the permit and even acted to protect that interest. Mingo Logan's brief actually cites to EPA's record discussion of its consideration of the company's alleged "investments." Mingo Br. at 28-29 n.5 (citing JA1236). EPA did not merely consider those investments, it in fact narrowed the scope of its action to protect some of those interests by not withdrawing specification for Seng Camp Creek and its tributaries, where some but not all of Mingo Logan's proposed discharges had already occurred. JA797 n.1, JA803. It did so contrary to comments of Environmental Amici, who urged the

agency to exercise its § 1344(c) authority to prohibit all of the discharges authorized by the Spruce permit, in full. SJA069 (AR002404). The agency thus not only considered but actually tailored its action to address Mingo Logan's claimed reliance interest. Requiring more than this would be at odds with the basic principle of administrative law that courts should not add requirements beyond those enacted by Congress. *Cf. Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-45 (1978)).

CONCLUSION

This Court should affirm the district court's judgment. Amici and people who enjoy the waterways and natural areas threatened by Mingo Logan's fill discharges need this Court to uphold EPA's reasoned determination to prevent unacceptable harm.

DATED: December 4, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rules of Appellate Procedure 32(a)(7)(C), and 29(d) (and except for the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii)), the foregoing ***Amicus Curiae* Final Brief of Environmental Amici** contains 6,865 words, as counted by counsel's word processing system.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

DATED: December 4, 2015

/s/ *Emma C. Cheuse*
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing ***Amicus Curiae* Final Brief Of West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, And Sierra Club In Support Of Appellee United States Environmental Protection Agency And In Support Of Affirmance** on all parties through the Court's electronic case filing (ECF) system.

DATED: December 4, 2015

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