UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL INTEGRITY PROJECT; NATURAL RESOURCES DEFENSE COUNCIL, EARTHWORKS; CENTER FOR HEALTH, ENVIRONMENT, AND JUSTICE; WEST VIRGINIA CITIZEN ACTION GROUP D/B/A WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION; RESPONSIBLE DRILLING ALLIANCE; AND SAN JUAN CITIZENS ALLIANCE, *Plaintiffs*, v. GINA McCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency *Defendant*,	Case No. 1:16-cv-00842-JDB

MEMORANDUM IN SUPPORT OF TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION'S MOTION FOR LEAVE TO INTERVENE

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BACKGROUND AND SUMMARY OF ARGUMENT

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Texas Independent Producers and Royalty Owners Association ("TIPRO") seeks leave to intervene as a defendant in the above-captioned case. As an association representing members in Texas who would be significantly impacted by the outcome of this litigation, TIPRO has a direct interest in this proceeding.

Plaintiffs in this case have requested that this Court order the U.S. Environmental Protection Agency ("EPA") to impose new regulations under the Resource Conservation and Recovery Act ("RCRA"). But the requested regulations exceed EPA's statutory authority under RCRA and unnecessarily burden TIPRO members (and others) because existing Texas regulations already provide the protections Plaintiffs say are needed. Moreover, RCRA does not authorize the avenue by which Plaintiffs seek to impose additional federal regulations. Plaintiffs seek to circumvent a distinct statutory framework that unambiguously places authority and control over solid waste programs in the hands of the states. Their grievance does not belong before EPA or this Court; their grievance belongs before Congress.

TIPRO's members have invested significant resources implementing and complying with federal and state regulations applicable to oil and gas waste. These regulations have been frequently reviewed and approved by EPA through a process that ensures the regulations offer robust protection to the environment. Plaintiffs' attempt to override the existing EPA-authorized Texas program with new federal mandates — developed in litigation rather than through the legislative or regulatory process — would directly, substantially, and adversely impact TIPRO's members. TIPRO's membership has a direct interest in this matter, and this interest could be impaired by resolution of this case without TIPRO's intervention. In addition,

as explained herein, TIPRO's interests also are not adequately represented by any current party. Finally, this motion is timely, as no significant activity has occurred in this litigation, and as a result there will be no prejudice to the other parties by TIPRO's participation. Accordingly, TIPRO has the right under Rule 24(a)(2) to intervene in this case. Even if TIPRO does not have a right of intervention under subsection (a), this Court should exercise its discretion under subsection (b) and allow for permissive intervention to ensure the interests of all affected parties are adequately safeguarded.

STATEMENT OF FACTS

I. Proposed Intervenor Texas Independent Producers and Royalty Owners Association

TIPRO is an association representing more than 3,000 independent oil and gas producers and royalty owners in Texas. Longanecker Aff., attached as Exhibit A, ¶ 2. Its members range from small family-owned businesses to the largest publicly traded independent producers in Texas, and also include large and small mineral estates and trusts. *Id*. TIPRO's members include Welder Exploration and Production, Inc. ("Welder"), an independent oil and gas producer that is based in San Antonio, Texas. Welder Aff., attached as Exhibit B, ¶ 2.

Since 1998, Welder specializes in developing and producing hydrocarbons in the southern and coastal bend regions of Texas, and has been subject to Texas regulations governing oil and gas waste operations. Welder Aff. ¶¶ 3, 6. Welder's essential operations include seismic surveying, drilling, fracture stimulating, and producing of oil and natural gas. Welder Aff. ¶ 3. In order to commercially produce oil and natural gas, Welder has disposal wells into which produced formation fluids are injected back into non-fresh water filled rocks. Welder Aff. ¶ 5. The daily and monthly injection volumes and pressures of these injection wells are regulated and monitored by the Texas Railroad Commission ("TRRC"). *Id*. In the

case of oil-based drilling fluids no longer in use, those transported and disposed of by truck or other means are regulated and monitored by the Texas Commission on Environmental Quality ("TCEQ"). *Id*. Every aspect of Welder's essential operations is directly regulated and thus impacted by the various and multifaceted regulations of Texas. Welder Aff. ¶ 6.

Over the past twenty-five years, Welder has developed particular expertise in drilling operations in South Texas's unique topography. Welder Aff. ¶ 4. This essential competitive advantage to Welder is unlikely to be replicated outside of Texas. *Id*. Welder's interests are deeply embedded in Texas, and Welder could not move its operations to another state if regulations in Texas became cost prohibitive. Welder Aff. ¶ 3. In such a scenario, Welder would likely cease its current operations. *Id*. Welder, therefore, has a direct interest in the outcome of this litigation.

TIPRO advocates on behalf of members, like Welder, to preserve the ability of independents to explore for and produce oil and natural gas. TIPRO's activities include advocating on behalf of its membership before state and federal agencies responsible for implementation of environmental laws that affect oil and gas operations. Longanecker Aff. ¶ 4. In particular, TIPRO regularly provides expert feedback to the Texas legislature and regulatory entities — such as the Railroad Commission of Texas and the Texas Commission on Environmental Quality — to evaluate and improve state regulatory programs. *Id*.

In this respect, TIPRO holds regular programmatic activities throughout the year to educate legislators and industry representatives on oil and natural gas issues related to new technologies and drilling methods being utilized by operators, economic contributions from the industry and policy priorities at the local, state and federal level. Longanecker Aff. ¶ 5. For example, TIPRO hosts two annual events where association members, legislators, and industry

professionals meet and hear from industry, state and federal leadership. *Id.* During the state legislative session, TIPRO provides testimony at hearings on legislation that will have an impact on the oil and gas industry and works to advance legislation that will strengthen oil and gas development and combat efforts to prevent responsible operations. *Id.*

Finally, many of TIPRO's members—although directly impacted by EPA regulations—do not have an alternative avenue for ensuring their concerns with such regulations are taken into account. Many are not members of any of the other organizations that are or seek to be parties to this litigation. *See* Longanecker Aff. ¶ 10. Moreover, TIPRO represents members — such as royalty owners and mineral trusts and estates — who are not engaged in oil and gas exploration activities subject to regulation, but nonetheless are economically impacted by regulation. *Id*. Therefore, TIPRO's intervention is appropriate to ensure that these members have their interests represented.

II. The Current Litigation and Statutory Framework

This proceeding involves a lawsuit against EPA brought by Plaintiffs Environmental Integrity Project; Natural Resources Defense Council; Earthworks; Center for Health, Environment and Justice; West Virginia Citizen Action Group d/b/a West Virginia Surface Owners' Rights Organization; Responsible Drilling Alliance; and San Juan Citizens Alliance (collectively "Plaintiffs") pursuant to the citizen suit provisions of RCRA, 42 U.S.C. § 6972(a)(2). Plaintiffs allege that EPA has failed to meet a "non-discretionary" duty under RCRA section 2002(b), 42 U.S.C. § 6912(b), to promulgate additional regulations under Subtitle D of the statute for wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy ("oil and gas wastes"). Compl. ¶ 4. Plaintiffs' position is premised, in part, on their contention that EPA made a determination in July 1988

"that it was necessary to revise the general Subtitle D regulations to promulgate 'tailored' regulations for oil and gas wastes." *See id.*

The determination referenced by Plaintiffs is a Regulatory Determination in which EPA stated that regulation of oil and gas wastes under RCRA Subtitle C — the section of the statute that regulates hazardous wastes — "is not warranted."[1] Although the determination discusses a future "three-pronged strategy" for addressing oil and gas wastes, which included "[i]mproving Federal programs under existing authorities in Subtitle D of RCRA, the Clean Water Act, and Safe Drinking Water Act," it contained no determination that regulation of these wastes was necessary under RCRA Subtitle D for purposes of meeting the requirements of RCRA Subtitle C, as Plaintiffs appear to contend. *Id.*

Plaintiffs further allege that even if EPA made no determination in its 1988 notice that revisions to Subtitle D criteria regulations for oil and gas wastes were necessary, the Agency has failed to perform a non-discretionary duty to review and, where necessary, revise Subtitle D regulations for oil and gas wastes every three years, pursuant to RCRA section 2002(b), 42 U.S.C. § 6912(b). Compl. ¶ 5. Finally, Plaintiffs contend EPA has further failed to abide by a nondiscretionary duty to review guidelines for state solid waste management plans as they apply to oil and gas wastes every three years, pursuant to RCRA section 4002(b), 42 U.S.C. § 6942(b). *Id*. ¶ 6.

A. *RCRA Subtitle D and State Programs*

Subtitle D of RCRA is the federal environmental statute that regulates non-hazardous solid waste. Nonhazardous solid waste is:

- Garbage also known as municipal solid waste (e.g., milk cartons and coffee grounds)

[1] Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446 (July 6, 1988).

- Refuse (e.g., metal scrap, wall board, and empty containers)
- Sludges from waste treatment plants, water supply treatment plants, or pollution control facilities (e.g., scrubber slags)
- Nonhazardous industrial wastes (e.g., manufacturing process wastewaters and nonwastewater sludges and solids)
- Other discarded materials, including solid, semisolid, liquid, or contained gaseous materials resulting from industrial and commercial activities, (e.g., mining waste, oil and gas waste, construction and demolition debris, medical waste, agricultural waste, household hazardous waste, and Conditionally Exempt Small Quantity Generator Waste).[2]

To implement the solid waste program under RCRA, EPA established technical standards and guidelines for state plans to promote environmentally sound management of solid waste. 42 U.S.C. § 6946; 40 C.F.R. pts. 256, 257. Criteria for classification of solid waste disposal practices are captured in 40 C.F.R. Part 257. Guidelines for the development of state solid waste management plans are set forth in 40 C.F.R. Part 256.

There are no federally enforceable standards under Subtitle D, a program designed to be implemented directly by the states. To effectuate this program, each state submits a plan consisting of state rules, permits, and enforcement authority pursuant to Part 256 that is reviewed (along with any subsequent revisions) by EPA. If EPA finds that the plan meets the goals of Subtitle D, EPA authorizes the state to administer the statute directly through its plan.

As a result of this congressionally mandated process, EPA has authorized state programs across the country, achieving exactly what Congress envisioned: a program where states create substantive, localized regulations that ensure the proper disposal of solid waste, including oil and gas waste. In the final notice on the Part 256 Guidelines for Development and Implementation of State Solid Waste Management Plans, EPA explicitly laid out what EPA contends is the congressional mandate under Subtitle D:

[2] https://www3.epa.gov/region9/waste/solid/laws.html

> In discussing the Subtitle D scheme the House Report (H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess. 33 (1976)) specifically stated: It is the Committee's intention that federal assistance should be an Incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient and damaging to local initiative.[3]

Congress did not envision that implementing regulations under Subtitle D would be "one size fits all." Rather, Congress designed Subtitle D to accommodate wide ranging issues found in a given state with respect to the disposal of solid waste. In following Congress's mandate, EPA has reviewed the Subchapter D criteria, sought public comment, and analyzed data when it examined and authorized RCRA programs in every authorized state. All that RCRA section 2002(b) requires is that "[e]ach regulation promulgated under this chapter shall be reviewed and, where necessary, revised not less frequently than every three years."

It is important to distinguish the language Congress chose here from other statutes where Congress gave EPA a mandatory duty to act. Section 2002(b) does not direct EPA to take a particular action in a particular timeframe, unlike other environmental statutes where Congress chose to create a mandatory duty. In particular, Section 110(k) of the Clean Air Act expressly directs EPA to act in a prescribed manner and in a prescribed timeframe.[4] Here, by contrast, Congress does not direct EPA to act in a particular manner in a particular timeframe.

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[3] Guidelines for Development & Implementation of State Solid Waste Management Plans, 44 FED. REG. 45,066 (July 31, 1979).

[4] Contrast the language of RCRA Section 2002(b) with that of the Clean Air Act Section 110(k) Environmental Protection Agency Action on Plan Submissions. In 110(k), Congress mandates that EPA act in a certain way within a specified timeframe, for example:

> (B) Completeness finding. Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met... (2) Deadline for action. Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

What section 2002(b) requires is that EPA "review" the regulations promulgated under Subpart D no less than every three years and act only if the Agency determines that a revision is necessary to properly implement the program. There is no prescribed process, timeframe, or dictate about how EPA must act.

By undertaking an authorization review of a state's program proposal, EPA in effect reviews the underlying federal RCRA regulations in order to make a finding that a compliant state program is adequate. If during this review EPA finds that a state program is inadequate, RCRA section 2002(b) directs EPA to go back to the state and require program revisions under Part 256. In the same way, EPA can also identify inadequacies in its underlying program. If EPA found the federal program lacking, it could elect to amend the Part 257 criteria. To date, after numerous state program reviews, EPA has made no such determination.

Just because EPA has chosen not to amend its guidelines or criteria, does not mean it has an obligation to do so. As discussed below, the Texas RCRA program is a prime example of how Congress intended EPA and the states to implement Subtitle D.

B. The Federally Authorized RCRA Program in Texas

The RCRA program in Texas is a prime example of a state-run program that far exceeds the minimum required federal guidelines in Part 257, particularly with respect to the regulation of oil and gas activities. In Texas, the regulation of oil and gas activities falls primarily under the jurisdiction of the TRRC. 16 Tex. Admin Code. § 3.30. Hazardous and nonhazardous wastes associated with the exploration, development, or production of oil and gas is regulated by the TRRC, while waste not regulated by the TRRC is regulated by TCEQ. *Id.* Both TRRC[5]

[5] See Title 16, chapter 3 of the Texas Administrative Code for oil and gas regulations promulgated by the TRRC. In particular, see Rules § 3.8, § 3.9, § 3.57, and § 3.98 for specific provisions related to oil and gas waste:

- § 3.8(d)(1) requires rule authorization or a permit to dispose of oil and gas wastes

and TCEQ[6] have promulgated comprehensive rules to regulate the disposal of oil and gas wastes in Texas.

The Texas program includes regulations covering every issue raised in the Complaint to address the on-the-ground issues encountered by oil and gas operators in Texas. The members of TIPRO, like other operators, already are subject to these standards.

- § 3.8(d)(2) requires a permit prior to the use or maintenance of any pit for oil and gas fluid storage or disposal of wastes
- § 3.8(d)(4)(H) details backfill requirements for authorized pits
- § 3.8(d)(5) requires waste haulers and receivers to have appropriate permits and prohibits improper disposal
- § 3.8(e) entitled "Pollution Prevention" lays out comprehensive rules intended to prevent pollution of waters of the Texas offshore and adjacent estuarine zones
- § 3.8(f) details the permitting and other requirements for oil and gas waste haulers
- § 3.57 sets out permitting requirements for oil and gas waste reclamation activities
- § 3.91 details requirements for clean-up, remediation and reporting when a release of crude oil occurs
- § 3.98 sets out standards for the management of hazardous oil and gas waste

In addition, see Title 16, chapter 4 of the Texas Administrative Code for oil and gas regulations promulgated by the TRRC that are directed toward naturally occurring radioactive material (NORM). See Rules §4.611 and §4.614 for specific provisions related to NORM waste.

[6] In conjunction with the TRRC, TCEQ has jurisdiction over:

- Waste associated with transportation of crude oil and natural gas by railcar, truck, barge, or oil tanker and refined petroleum products by pipeline;
- Wastes generated at oil field service facilities that provide equipment, materials, or services to the oil and gas industry;
- Wastes from oil and gas activities that are processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ; and
- Residential-like waste generated from the living quarters located on the lease.

Title 30, Part 1 of the Texas Administrative Code outlines oil and gas regulations promulgated by TCEQ:

- § 30(e) outlines qualifications for licensing of individuals who supervise leaking petroleum storage tank corrective actions
- § 37(i) and §37(q) require financial assurance for petroleum underground storage tank systems and underground injection control wells
- § 106(o) details requirements for exemptions from permits for oil and gas activities
- § 106(x) details requirements for exemptions from permits for waste processes and remediation
- § 115(d) details requirements for air quality for oil and gas processes
- § 205 details requirements for obtaining a waste discharge permit
- § 305(g) details additional requirements for hazardous and industrial waste storage, processing, or disposal permits
- § 305(h) sets out additional requirements for obtaining injection well permits
- § 323 sets the evaluation criteria for waste disposal facilities
- § 324(a) sets out requirements for recycling used oil
- § 329 imposes Texas Water Code requirements on drilled or mined shafts and associated facilities
- § 331 implements the provisions of the Injection Well Act from the Texas Water Code to prevent pollution of fresh water.

The Texas program is a model of how Congress and EPA meant for Subtitle D to be implemented. In its 1979 Federal Register notice explaining how Subtitle D should be implemented the Agency described the role of the State Plan as follows:

> The State solid waste management plan is the centerpiece of the subtitle D System. Through the plan the State identifies a general strategy for protecting public health and the environment from adverse effects associated with solid waste disposal, for encouraging resource recovery and resource conservation, for providing adequate disposal capacity in the State, and for dealing with other issues relevant to solid waste management. The plan must also set forth the institutional arrangements that the State will use to implement this strategy.
> . . .
> Thus, the State plan is the organizing mechanism in the subtitle D system which ties the goals and requirements of the Act to State priorities and institutional arrangements. The other components of the subtitle D system (the open dump inventory, the annual work program and Federal financial assistance) are designed to support the State plan.[7]

Both Congress and EPA intended the state plans to be the mechanism to achieve the statutory goals. Texas has gone far beyond the federal criteria by setting even more stringent standards for local industry, thus achieving that goal.

Texas frequently updates its state RCRA program as federal or state regulations evolve, and EPA has reviewed and approved updates in the formal notice and comment rulemaking processes. For example, the RCRA program in Texas has been authorized and then reauthorized by EPA 17 times since 1984.[8] This program review was done pursuant to the authority in RCRA section 2002, and other authorities, and EPA determined that the state program met the federal requirements and authorized and reauthorized the program.[9] By reviewing and authorizing these programs in Texas, EPA has followed Congress's clear

[7] Guidelines for Development & Implementation of State Solid Waste Management Plans, 44 FED. REG. 45,066 (July 31, 1979).

[8] The RCRA program in Texas was authorized and reauthorized in 1984, 1985, 1987, 1990, 1991, 1992, 1994, 1997, 1999, 2000, 2005, 2008, 2011, 2012, 2014, and 2015. *See* Texas: Final Authorization of State Hazardous Waste Management Program Revision, 80 FED. REG. 63,691–95 (Oct. 21, 2015).

[9] *Id.*

direction. With the exception of the period from 2000 to 2005, EPA performed this review "no less frequently than every 3 years." 42 U.S.C. § 6912(b). Moreover, the public notice and comment process in all of the actions gave citizens the opportunity to raise issues particular to the Texas program for EPA and the state to consider in the authorization.

In Texas, EPA has satisfied its statutory duty under section 2002(b). The statute does not prescribe a method for EPA to review the regulations, only that EPA review the program to be implemented by the states. Thus, the state authorization process readily satisfies EPA's statutory duty to review the regulations promulgated under section 2002. In the process of reviewing state programs over the years, had EPA identified deficiencies in the federal guidelines, EPA likely would have acted to revise them.

In addition to the 17 program authorizations granted since 1984, EPA also formally reviewed Texas's enforcement program in 2009 and 2012 as part of the national "State Review Framework Process." The review and the results are public.[10] As part of that process, EPA conducted a comprehensive review of Texas's enforcement programs across all statutes and noted areas where EPA concluded the state could improve performance under federal environmental programs. Notably, the report did not identify any concerns or "gaps" related to the regulation of oil and gas wastes in Texas.

III. TIPRO's Interests in this Litigation

TIPRO's members would be directly regulated by the actions that the Plaintiffs demand the Court order EPA to undertake in this litigation. Because EPA has fully authorized Texas to implement the federal and state RCRA program, and because TIPRO members have invested heavily in developing programs to comply with stringent Texas regulations, TIPRO has a

[10] See https://www.epa.gov/compliance/texas-state-review-framework.

distinct and direct interest in protecting the integrity of both the federal–state framework and the Texas RCRA program.

TIPRO members have invested considerable resources in assuring compliance with Texas regulations that address and ensure the proper handling and disposal of the very wastes targeted by Plaintiffs' lawsuit. *See* Longanecker Aff. ¶ 6. Regulatory requirements and costs associated with complying with oil and natural gas regulations substantially affect the overall cost of oil and natural gas production. *Id.* For example, from April 2015 to April 2016, TIPRO members disposed of approximately 994 million barrels of water at commercial saltwater disposal sites (SWDs) at an average disposal cost of $0.50 per barrel or $497.25 million total. *Id.* Additionally, another 2.1 billion barrels were disposed of at private SWDs at a cost of $0.25 per barrel or $547.4 million total.[11] *Id*. Most recently, TIPRO members must also comply with revisions to statewide rules 3.9 and 3.46 that were put in place to address concerns surrounding the uptick in seismic events throughout the state. *Id*. These additional compliance measures address disposal and injection permits in areas where seismic conditions may exist to eliminate risks that fluid may not be confined to the appropriate injection interval. *Id.*

In addition to complying with the robust regulatory framework in Texas, the oil and natural gas industry also currently faces more than 40 new or proposed regulations at the federal level, including regulations related to ozone standards, methane emissions, venting and flaring, disposal and waste, to name a few.[12] Longanecker Aff. ¶ 7. The U.S. oil and natural gas

[11] These figures only include water that was trucked and do not include piped volumes, nor does it include the cost of trucking which averages from $1.26 to $1.75 per barrel. Longanecker Aff. ¶ 6.

[12] On May 12, 2016 the EPA passed new regulations to cut methane emissions from U.S. oil and gas production by nearly half over the next decade. Longanecker Aff. ¶ 7. Officials estimate the new regulation would cost the industry approximately $530 million in 2025. *Id.* The EPA's Clean Power Plan alone will cost industry an estimated $39 billion a year in compliance costs. *Id.* This far outpaces the costs of compliance for all EPA rules for power plants in 2010 ($7 billion) and the annual cost of the Mercury and Air Toxics Standards rule ($10 billion). *Id.*

industry has proactively invested billions of dollars to reduce its environmental footprint and improve exploration and production methods, in addition to the cost of complying with all state and federal regulations. *Id*. As an example, between 2000 and 2014, the U.S. oil and gas industry invested nearly $100 billion in greenhouse gas-mitigating technologies. *Id*.

ARGUMENT & AUTHORITIES

I. TIPRO Is Entitled to Intervene as a Matter of Right

Rule 24 of the Federal Rules of Civil Procedure sets forth the standards for intervention in the federal district courts. Rule 24(a)(2) provides for intervention as of right where the party seeking to intervene demonstrates: (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposing of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) its interest is not adequately represented by existing parties to the action. Fed. R. Civ. P. 24(a)(2); *see Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

A. The Intervention Motion Is Timely.

There can be no dispute that TIPRO's motion to intervene is timely. "Timeliness is determined by all of the circumstances in a case and is determined by the court in the exercise of its sound discretion." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007) (citing *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)). Here, all of the circumstances at play demonstrate that TIPRO's intervention at this stage is timely and appropriate. TIPRO's motion to intervene is being filed just days after EPA made its first substantive filing, less than three months after the Complaint was filed, and well in advance of an initial conference or status hearing of the Court. *See Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Sur.*

Co., 272 F.R.D. 26, 29 (D.D.C. 2010) ("[I]t is undisputed that the petitioner's motion [to intervene], which was filed before the scheduling of an initial status hearing in this matter, is timely."); *Cnty. of San Miguel*, 244 F.R.D. at 38, 46 (finding the motion to intervene timely when filed almost four months after the complaint was filed); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (finding intervention is timely when sought prior to the beginning of discovery and before the court issued a decision on the merits). In addition, given this case is still in the early stages, there is no risk of disruption or prejudice to the parties. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties.").

B. TIPRO Has an Interest Related to a Property or Transaction that Is a Subject of this Action.

TIPRO also has clear interests in the matter that are more than adequate to justify intervention under Rule 24(a)(2). Courts regularly allow parties to intervene in matters involving the regulation of their activities or operations. *See, e.g., Natural Res. Def. Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1979) (allowing intervention of regulated parties in settlement proceedings involving initiation of rule-making proceedings under the Clean Water Act); *Natural Res. Def. Council, Inc. v. U.S. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) ("*NRDC*") (pesticide manufacturers entitled to intervene in suit challenging pesticide registration procedures); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 15 (D.D.C. 2010) (allowing the National Mining Association to intervene in a case challenging certain agencies' decision to authorize lease of certain public lands for coal mining operations because the intervener "is the national trade organization for the mining industry, and the only national organization representing mining interest, which indisputably extend to the availability and regulation of

coal leasing on federal lands"); *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 122 (D.D.C. 2015) (allowing a trade association representing businesses involved in oil and gas exploration activities in Alaska to intervene in an action by environmental groups challenging an agency's regulation that would allow companies engaged in oil and gas exploration activities to unintentionally take Pacific walruses in the Chukchi Sea and along the adjacent western coast of Alaska).

Similarly, courts have recognized that a party's economic interests, when impacted by federal regulations or other government activity, provide adequate grounds for intervention. *See New England Petroleum Corp. v. Fed. Energy Admin.*, 71 F.R.D. 454, 457-58 (S.D.N.Y. 1976) (granting oil company intervention in action by refiner against Federal Energy Administration where impact of lawsuit would have substantial adverse economic effects); *see also Cnty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 44 (D.D.C. 2014) (allowing trade associations to intervene in a suit brought by environmentalist groups challenging an agency's decision not to list the Gunnison sage-grouse as an endangered species because "the Gunnison sage-grouse and its habitat are integral components of the environmental make-up of their members' property or the public property they utilize for their livelihoods and business operations").

In this case, TIPRO members would face direct regulatory impacts and potentially significant economic impacts if Plaintiffs prevail or the parties settle the case in a manner that compromises TIPRO's position. Not allowing TIPRO to intervene in the case would be especially egregious in light of the collateral attacks Plaintiffs make on the statutorily mandated federal–state framework in place for regulating oil and gas wastes, and the important legal

questions presented by Plaintiffs' positions, which TIPRO should have the opportunity to address.

1. TIPRO Has a Compelling Interest in Protecting the Federal–State Framework Under RCRA and the Texas Program in Particular

Plaintiffs' Complaint implies that state waste programs as a whole are deficient and provide inadequate protection from environmental harm associated with the disposal of oil and gas wastes, thereby necessitating new federal requirements. Compl. ¶ 7. Plaintiffs accurately note that EPA "gave great weight in particular to the adequacy of state and federal regulatory programs" in determining not to regulate oil and gas wastes under RCRA Subtitle C. Compl. ¶ 69. Indeed, EPA concluded that no federal regulation of oil and gas wastes was necessary, in part because "[e]xisting State and Federal regulatory programs are generally adequate for controlling oil, gas, and geothermal wastes."[13] The Agency added that "[r]egulatory gaps in the Clean Water Act and UIC program are already being addressed, and the remaining gaps in State and Federal regulatory programs can be effectively addressed by formulating requirements under Subtitle D of RCRA and by working with States." *Id.*

Plaintiffs now contend that this general finding, and EPA's corresponding three-prong strategy, equated to a determination that an entirely new federal program regulating oil and gas wastes under RCRA is necessary and mandated; a conclusion that contradicts the very determination EPA made at the time. EPA's decision not to regulate oil and gas wastes under RCRA Subtitle C was premised on EPA's conclusion that state programs in place were adequate. Moreover, Plaintiffs' demand comes more than 28 years after this determination was made. They demand a new federal program that could potentially supplant or otherwise

[13] Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446-47 (July 6, 1988).

significantly impact existing state programs, but fail to take into account nearly three decades worth of efforts undertaken and experience gained by the states in developing and implementing regulations governing the handling and disposal of oil and gas wastes.

Plaintiffs further state that in the absence of "comprehensive federal regulations… regulation of oil and gas wastes is largely left to the states." Compl. ¶ 63. They then speculate that this, in turn, results in a "state-by-state patchwork of regulations that incentivizes operators to send their wastes to states with the weakest regulations." *Id.* This allegation not only unfairly impugns TIPRO's members, it also demonstrates a fundamental misunderstanding of how the industry works. TIPRO has an interest in setting the record straight as to the many factors that control determinations about disposal of such wastes.

More fundamentally, however, any relief granted on the basis of those arguments would unnecessarily and detrimentally implicate TIPRO's interests by imposing additional, duplicative requirements on its members. TIPRO thus has a right to intervene and protect its interest by countering Plaintiffs' erroneous legal and factual conclusions regarding the adequacy of existing state programs.

First, there is no evidence to suggest that state programs *as a whole* are inadequate to ensure proper handling and disposal of oil and gas wastes. Indeed, Texas's experience — which has involved multiple reviews and approvals by EPA of its comprehensive waste program — suggests precisely the opposite. Moreover, even if *some* states do have inadequate programs, there is no justification for a federal regulation that imposes requirements on operations in *all* states. Rather, it calls for EPA — as envisioned in the 1988 strategy — to continue to work with individual states to improve their specific programs. Since TIPRO members operate in

Texas, they have a compelling interest in ensuring the Texas program in particular is not undermined through this litigation. They cannot do so absent intervention.

Second, Plaintiffs' requests for relief are not supported by the RCRA program in Texas, because, as noted, EPA has reviewed and approved the Texas program and found that it meets all regulatory criteria under both Subtitles C and D. Beyond these allegations, Plaintiffs' allegations of harm do not touch any matter that is regulated under the solid waste program. Indeed, the allegations in the Complaint seek to address general issues Plaintiffs have with the "modern oil and gas industry"—which go far beyond what EPA and the states were authorized to address under Subtitle D of RCRA. Compl.¶ 7. For example, the Complaint cites to issues with the underground disposal of process water and identifies concerns with listed RCRA hazardous wastes. Compl. ¶ 57. TIPRO disagrees with the allegations regarding Texas oil and gas operations, and these are operations that would be regulated under Subtitle C had Congress not expressly exempted such regulations, or under statutes such as the Safe Drinking Water Act. *See* 42 U.S.C. §§ 300h–300h-8. This suit asks the court to exceed its authority under Subtitle D by ordering EPA to regulate waste disposal practices for the oil and gas industry.

Even if Plaintiffs were correct that there are regulatory gaps in the hazardous waste regulations, EPA has no power to address such gaps under Subtitle D without authorization by Congress. "[N]o matter how important, conspicuous, and controversial the issue, an administrative agency's power to regulate in the public interest must always be grounded in the valid grant of authority from Congress." *FDA v. Brown & Williamson,* 529 U.S. 120, 161 (2000); *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *11 (D. Wyo. June 21, 2016). Here, Congress has expressly prohibited EPA from performing the specific relief requested by plaintiff under Subtitle C of RCRA. Just because Plaintiffs do

not agree with that prohibition, "[t]he Executive Branch is not permitted to administer [an]Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988); *Wyoming*, 2016 WL 3509415, at *10. Thus, what Plaintiffs seek in this lawsuit is not to have EPA exercise a mandatory duty, but that EPA make an end-run around the exemption in Subtitle C. Such action goes beyond the Agency's congressionally mandated authority under Subtitle D.

TIPRO believes no changes to the RCRA Subtitle D are necessary. As previously mentioned, TRRC has numerous state regulations to ensure proper disposal. Longanecker Aff. ¶ 9. Any federal regulations relating to the rules promulgated by TRRC would only introduce an unnecessary layer of regulation that would disrupt production and increase costs on producers through higher disposal costs — especially for producers who operate marginal wells and are hurt by low commodity prices. *Id.* Moreover, unnecessary regulations would undermine the strong Texas regulatory programs created by geologists, geoscientists, petroleum engineers, seismologists, and industry professionals who understand the diverse geology of our large state. *Id.*

2. TIPRO Has a Compelling Interest in Challenging Plaintiffs' Other Erroneous Legal and Factual Positions

Plaintiffs' Complaint also is based on a series of erroneous legal and factual conclusions that could result in regulations that are neither authorized, justified, or necessary. First, Plaintiffs appear to allege that EPA's determination not to regulate oil and gas wastes under RCRA Subtitle C, because it was accompanied by a strategy that included a review of existing authorities for regulation of these wastes under Subtitle D, amounts to a regulation subject to periodic review under RCRA section 2002(b). Compl. ¶ 4. They further contend that EPA's decision to review Subtitle D authorities as part of its three-prong strategy amounted to a

determination that regulation is necessary under Subtitle D. Plaintiffs' premise would effectively circumvent the statutorily mandated agency review process that would be required even if RCRA section 2002(b) applied. The result, if Plaintiffs were to prevail on this position, would be the automatic development and imposition of regulations under Subtitle D, without any assessment or public input as to whether such regulations are appropriate or even necessary. TIPRO, of course, has a clear and compelling interest in both challenging Plaintiffs' position and providing such input.

Plaintiffs also contend that even if EPA's determination not to regulate oil and gas wastes under Subtitle C (accompanied by its decision to review Subtitle D authorities) does not amount to a regulation that is reviewable under RCRA section 2002(b) — which it is not — the Agency still is under an obligation to review Subtitle D criteria regulations for oil and gas wastes. Compl. ¶ 5. Further, Plaintiffs argue that EPA failed to meet a non-discretionary duty under Section 4002(b) of RCRA, 42 U.S.C. § 6942(b), to review guidelines it established for state solid waste management plans. Compl. ¶ 6. Both of these arguments, however, ignore the long history of EPA reviews of state hazardous waste programs, including the Texas program, that have taken place since (and, indeed, even before) the Agency's determination to leave regulation of oil and gas wastes to the states.

As noted above, the Texas program alone has been reauthorized at least 17 times since 1984, most recently in October 2015. 80 Fed. Reg. 63,691. Through this process, EPA has had the opportunity to assess the viability and effectiveness of state regulations, such as Texas's program, and require changes where programs fall short. The existing federal–state framework, therefore, provides for periodic review of criteria and state-plan guidelines.

At least with respect to Texas, TIPRO contends that state regulations, which are based on existing Subtitle D regulations and guidelines for state plans, are more than adequate to provide strong environmental protection from hazards associated with the handling and disposal of oil and gas wastes. Forcing EPA to revise the underlying regulations and guidelines would disrupt, perhaps significantly, a regulatory program that already works in Texas. TIPRO has a significant interest in ensuring that the impacts of Plaintiffs' proposed revisions, and the corresponding impacts to entities regulated under the Texas program, are fully considered in this litigation. At a minimum, TIPRO has a compelling interest in ensuring that if this litigation results in a review process, it is subject to full notice-and-comment rulemaking procedures. If its request for intervention is denied, TIPRO will not be in a position to protect these vital interests and could be left with no opportunity for input into decisions that directly impact its members and the Texas RCRA program.

As noted above, in its implementation of the Subtitle D program, EPA explicitly reviews the applicable federal RCRA requirements each time it authorizes or re-authorizes the Texas state program. The relief requested by Plaintiffs here extends beyond an order requiring EPA to comply with timing requirements. It seeks an order that EPA "issue necessary revisions" to existing regulations. Such an order would eliminate EPA's discretion under RCRA not to act after conducting the required review. It also raises the specter of a court order potentially setting not just the timing but also the terms of the regulation, in violation of RCRA and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Accordingly, it would not only implicate TIPRO's interests but also impair the ability to protect that interest by making an end-run around the protections of the APA.

C. **TIPRO's Interests Are Not Adequately Represented by the Existing Parties**.

Rule 24(a)'s requirement that intervenors show that other parties cannot adequately represent their interests "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (burden of showing that existing parties to litigation will not adequately represent a prospective intervenor's interests is "not onerous," and applicant need only show that "representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate"); *Crossroads Grassroots Policy Strats. v. FEC*, 788 F.3d 312 (D.C. Cir. 2015) (same).

Although TIPRO generally shares EPA's interest in defending the agency's regulatory position, EPA's participation in this litigation is not adequate to represent TIPRO's interests. EPA acts to protect the public interest in general; it does not and cannot advocate for or on behalf of a private party's interests, including TIPRO and its members. *See, e.g.*, *Dimond*, 792 F.2d at 192 (noting "the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances"); *Costle*, 561 F.2d at 912 ("[An]agency's interest in content of regulation will differ from the interest of one governed by those regulations."); *NRDC*, 99 F.R.D. at 610 ("Facially, it would seem that EPA and the intervenors have the same interest in demonstrating that the Reform Measures are lawful. Yet the interests of EPA and the intervenors cannot always be expected to coincide.").

In addition, just as there is no guarantee EPA will account for TIPRO's interests in formulating its defenses to this litigation, there similarly is no guarantee that EPA will

adequately consider TIPRO's interests if it elects to settle the matter. It is not unforeseeable that the Agency would settle the litigation on terms unfavorable to TIPRO.

TIPRO also is not adequately represented by other proposed intervenors in this litigation, assuming the Court grants one or more of the motions to intervene filed by the state of North Dakota, the American Petroleum Institute, and the Independent Petroleum Association of America. For the same reasons that apply to EPA, North Dakota cannot adequately represent the interests of a private party in Texas. North Dakota is participating in its capacity as a state regulator in this case, and thus its interests diverge from TIPRO's. *See Dimond*, 792 F.2d at 192-93 ("Since State Farm's interest cannot be subsumed within the shared interest of the citizens of the District of Columbia, no presumption exists that the District will adequately represent its interests."). In addition, while North Dakota is in a strong position to defend the adequacy of its own regulations for oil and gas wastes, it is not necessarily in a position to defend the oil and gas waste regulations of other states, such as Texas. TIPRO members, who are regulated under the Texas program, have an interest in demonstrating, and are uniquely positioned to demonstrate, how Texas regulations provide adequate environmental protection.

While many of the interests of proposed intervenors API and IPAA align with those of TIPRO, these organizations also are not in a position to fully protect TIPRO's interests. First, many of TIPRO's members are not members of either of these organizations. Longanecker Aff. ¶ 10. Second, TIPRO represents members who are not necessarily engaged in the oil and gas exploration activities that would be subject to regulation, but who would nonetheless be economically impacted by the regulation. *Id.* These include royalty owners and mineral trusts and estates. *Id*. Only TIPRO is positioned to adequately represent their unique interests.

While TIPRO will strive to avoid duplicating arguments by EPA and other intervenors, none of these parties' or proposed parties' interests are equivalent to those of TIPRO and its members. Thus, absent intervention, TIPRO will not be in a position to adequately protect its interests in this matter. In particular, absent intervention, disposition of the action may as a practical matter impair or impede TIPRO's ability to protect its interests as it may not have the ability to relitigate these issues in a separate suit. *See Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387, 392 (D.C. Cir. 1962) (observing that "a judgment invalidating [an] order or regulation will result in substantial injury to those deriving direct benefit therefrom and will be as final and conclusive to them as if they were bound by it under the doctrine of res judicata").

Having timely filed a motion to intervene, and having established an interest in the proceedings that is not adequately represented by the existing parties or other proposed intervenors, TIPRO has a right to intervene in this matter.

II. Alternatively, TIPRO Should Be Granted Permissive Intervention.

Rule 24(b) also allows for permissive intervention for any party who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This Court regularly permits business and industry interests to intervene in support of EPA and other federal agencies in cases involving challenges to agency regulatory actions. *See, e.g.*, *Fund for Animals*, 322 F.3d at 731-32; *Cnty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 41-48 (D.D.C. 2007); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 66-71 (D.D.C. 2006); *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 80 & n.3 (D.D.C. 2001); *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000).

Rule 24(b) further states that in considering a motion for permissive intervention, the Court "must consider whether intervention will unduly delay or prejudice the adjudication of

the original parties' rights." Fed. R. Civ. P. 24(b)(3). TIPRO's defense of EPA's regulatory position and actions plainly involves the same questions of law and fact that are the subject of Plaintiffs' Complaint. And TIPRO's intervention at this early stage of the proceedings will not unduly delay or prejudice the adjudication of either the Plaintiffs' or EPA's rights. To the contrary, participation by TIPRO will assure that all interested parties are heard regarding the lawfulness of EPA's activity with respect to the regulation of oil and gas wastes under RCRA, the adequacy of existing state regulations, the impact of potential federal regulation on both states and regulated entities, and other important issues at stake in this case. Indeed, this Court has previously allowed intervention in similar circumstances involving citizen-suit challenges under RCRA. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 41 (D.D.C. 2013) (granting intervention to industry groups in citizen suit action alleging violations of RCRA section 2002(b)).

III. TIPRO Has Standing

To establish its qualification for intervention as of right under Rule 24(a), a prospective intervenor also must demonstrate that it has standing under Article III of the Constitution. *Fund for Animals*, 322 F.3d at 731-32 ("[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties."). To establish standing to intervene, a prospective intervenor must show: (1) injury-in-fact, (2) causation, and (3) redressability. *Id.* at 732-33. In addition, an association must establish standing to bring suit on behalf of its members. An association has such standing when: "(1) 'its members would otherwise have standing to sue in their own right;' (2) 'the interests it seeks to protect are germane to the organization's purpose;' and (3) 'neither the claim asserted nor the relief requested requires participation of individual members in the

lawsuit.'" *Ctr. for Sustainable Econ. v. Sally Jewell & Bureau of Ocean Energy Mgmt.*, 779 F.3d 588, 596 (D.C. Cir. 2015) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

As explained above, TIPRO's members satisfy the Rule 24(a) standard for intervention, and accordingly have standing to sue in their own right. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement."). In particular, TIPRO's members would suffer an injury-in-fact if not permitted to intervene, as they would be denied due process and the ability to provide input into whether regulations that directly impact their operations are indeed necessary if the Court grants the relief requested by Plaintiffs. *See Costle*, 561 F.2d at 912*; Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 539 F. Supp. 2d 331, 339-41 (D.D.C. 2008) (holding that association and its members have standing to challenge permit regulating discharge of dredged or fill materials that would impact their operations.).[14]

The interests TIPRO seeks to protect through intervention — including protecting its members from unauthorized regulations and ensuring that TIPRO members have input on any order or rulemaking process directly regulating their oil and gas operations — are germane to TIPRO's purpose. "Germaneness is required for 'the modest yet important' purpose of 'preventing litigious organizations from forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their

[14] TIPRO is aware of the ruling of the U.S. Court of Appeals for the D.C. Circuit in *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013). TIPRO maintains, however, that this decision is distinguishable, and has no bearing on TIPRO's motion for at least two reasons. First, unlike the consent decree at issue in *Defenders of Wildlife*, the Plaintiffs' Complaint seeks to have this Court order that EPA make a determination that regulations are necessary without undertaking statutorily required notice and comment rulemaking. Only through intervention can TIPRO protect its interests in seeking to prevent an order that TIPRO maintains exceeds the Court's jurisdiction. Second, *Defenders of Wildlife* involved a request for intervention following the lodging of a consent decree. In this case, no such consent decree has been ordered, and indeed, intervention is appropriate to ensure TIPRO's interests are adequately represented in any such negotiations. The issues and questions posed in this case, rather, are similar to those posed in *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1979).

members demonstrably care." *Id*. (quoting *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988)). As noted above, the central purpose of TIPRO is advocating for the continued ability of independent entities to explore for and produce oil and natural gas. As this case demonstrates, environmental regulation is a key factor in the exploration and production of oil and natural gas. TIPRO regularly analyzes, assesses, and provides guidance to its members on environmental regulations affecting their operations, and often participates in rulemaking processes on behalf of its membership. Longanecker Aff. ¶¶ 3-5. TIPRO not only has ample expertise in the subject matter of this litigation, but its members – as demonstrated above – have significant interests that more than adequately show they "demonstrably care" about the outcome.

Finally, TIPRO also meets the last prong of associational standing. "Member participation is not required where a 'suit raises a pure question of law' and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization." *Ctr. for Sustainable Econ.*, 779 F.3d at 597. The issues TIPRO intends to address through litigation turn on whether this Court has jurisdiction to order the relief Plaintiffs demand, and whether EPA is required to undertake the statutorily required notice-and-comment rulemaking process before undertaking any of the actions demanded by Plaintiffs. These are questions of law. Moreover, none of these issues involve or otherwise require consideration of the individual circumstances of any member of TIPRO. Accordingly, TIPRO meets the standard for associational standing established under Article III and the law of this Court.

CONCLUSION

For all of the foregoing reasons, the Proposed Intervenors' motion for leave to intervene as defendants should be granted.

Respectfully submitted,

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