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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, Plaintiff, v. AIR RESOURCES BOARD and DOES 1–50, Defendant, NATURAL RESOURCES DEFENSE COUNCIL, INC., Proposed Defendant-Intervenor.	Case No. 2:11-CV-00384-MCE-GGH REPLY IN SUPPORT OF NATURAL RESOURCES DEFENSE COUNCIL'S MOTION TO INTERVENE Date: May 5, 2011 Time: 2:00 p.m. Judge: Hon. Morrison C. England Courtroom: 7

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Relying on no case law in some instances and uncontrolling law in others, plaintiff California Dump Truck Owners Association ("CDTOA") opposes the Natural Resources Defense Council, Inc.'s ("NRDC") motion to intervene. CDTOA makes two arguments against NRDC's intervention as a matter of right: NRDC does not have a "significantly protectable" interest related to the litigation, and Defendants Nichols and Goldstene (collectively "CARB"[1]) will adequately protect NRDC's interests. Neither argument has merit.

As outlined in its opening papers, NRDC seeks to intervene to defend the Truck and Bus Regulation,[2] which will protect the health of NRDC's members from toxic diesel emissions, especially those who live near freight transportation corridors. NRDC was actively involved in the development of this Regulation. CARB will not adequately represent NRDC's interests in this case because as a public agency CARB must represent the interests of the state as a whole, including the economic interests of CDTOA. As a result, CARB's interests are much broader—and in some respects adverse—to NRDC's interests. The Ninth Circuit has time and again concluded that a prospective intervenor has a "significantly protectable" interest in actions that challenge the legality of a measure it has supported. The Ninth Circuit has also repeatedly held that a prospective intervenor has interests narrower than a government party with whom the intervenor is generally aligned, and on that basis, determined representation by the government to be inadequate. CDTOA makes no attempt to argue against such precedent.

Instead, CDTOA claims that NRDC must make a "compelling" showing that CARB will not represent its interests. However, the Supreme Court has held that the burden of showing inadequate representation, even by a government party, is "minimal," requiring only a showing that the existing government party's representation "may" be inadequate. Further, as discussed below, instances in which the Ninth Circuit has required a compelling showing of inadequate

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[1] "CARB" refers to the California Air Resources Board—the state agency that adopted the regulation challenged in this case.

[2] The Truck and Bus Regulation is formally entitled "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants from In-Use Heavy-Duty Diesel-Fueled Vehicles." Cal. Code Regs. tit. 13 § 2025.

representation include those where the existing party and prospective intervenor have both the same litigation objective *and* identical underlying interests—facts that do not exist here.

CDTOA's arguments against permissive intervention are similarly weak. CDTOA claims that it will be prejudiced by NRDC's intervention because as a "well-funded nationwide organization" NRDC could help CARB mount a formidable defense against CDTOA. CDTOA also claims prejudice from the separate briefing NRDC intends to file if permitted to intervene, and speculates that NRDC's intervention would not assist the Court in the resolution of this case. If these were appropriate grounds for denying intervention, they would apply in every case.

Accordingly, the Court should grant NRDC's motion to intervene as of right under Rule 24(a), or, in the alternative, permissively under Rule 24(b).

I. NRDC IS ENTITLED TO INTERVENE AS OF RIGHT

As outlined in NRDC's motion, the Ninth Circuit liberally applies a four-part test[3] to determine whether intervention as of right under Rule 24(a)(2) is warranted. *Sw. Ctr.*, 268 F.3d at 817. CDTOA concedes that NRDC's motion is timely. It disputes that NRDC has significantly protectable interests related to the litigation and that CARB may not adequately represent those interests.[4] As discussed below, NRDC readily meets the requirements for intervention as of right.

A. NRDC's Interest In The Challenged Regulation And Protecting Its Members From Truck And Bus Pollution Are "Significantly Protectable" Interests Related To The Litigation

As outlined in its motion, NRDC has an interest in protecting the environment and its members from harmful diesel emissions, including diesel emissions emitted by CDTOA's

[3] The four-part test requires the applicant to (1) "timely" move to intervene; (2) have a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) be so situated that the disposition of the action "may," as a practical matter, impair or impede the ability to protect its interest; and (4) demonstrate the interest is not inadequately represented by the parties to the action. *Sw. Ctr. for Biological Diversity v. Berg* (*Sw. Ctr.*), 268 F.3d 810, 817 (9th Cir. 2001).

[4] In arguing that NRDC's interests are not related to the instant lawsuit, CDTOA also appears to challenge whether the disposition of this action may impair NRDC's interests. CDTOA Opp. at 4. NRDC addresses this argument below, *infra* at 5–6.

members. *See* NRDC Mot. at 5–7, 2–3 (outlining the health benefits of the Regulation). NRDC also has an interest in defending the Truck and Bus Regulation, which it actively supported. *Id.*; *accord Sw. Ctr.*, 268 F.3d at 820 (a court is to "take all well-pleaded, non-conclusory allegations in the motion to intervene . . . as true absent sham, frivolity or other objections").

CDTOA does not seriously contest NRDC's interests. Instead, CDTOA relies on *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996), to assert that intervention must be denied because NRDC has not identified the "law" under which its interests are protected. CDTOA Opp. at 3. But this is not what the Ninth Circuit requires.

Indeed, while CDTOA correctly states that the requirement of a significantly protectable interest is generally satisfied if (1) the interest is protected by law, and (2) there is a relationship between the legally protected interest and the claims at issue, CDTOA Opp. at 3, CDTOA mischaracterizes how the Ninth Circuit interprets the "interest" test. As outlined in NRDC's motion, the Ninth Circuit does not require an applicant to identify a "specific legal or equitable interest"; the "interest" test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). This Court recently held the same in *In Defense of Animals v. U.S. Department of Interior*, No. 2:10-cv-01852-MCE-DAD, 2011 WL 1085991, at *2 (E.D. Cal. Mar. 21, 2011) (granting motion to intervene as matter of right where outcome of litigation could adversely affect proposed intervenor's interest in "sustainable use conservation" and its members' interests in hunting).

More specifically, a prospective intervenor is not ordinarily required to show that its interest is protected by the statute under which the litigation is brought. *Sierra Club v. U.S. Envtl. Prot. Agency*, 995 F.2d 1478, 1484 (9th Cir. 1993). "It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.* An applicant generally satisfies the "relationship" requirement if the resolution of the plaintiff's claims actually will affect the applicant. *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998).

In a case strikingly similar to this one, the Ninth Circuit agreed that the Teamsters could intervene in a lawsuit in which an association of motor carriers alleged that a state prevailing wage law was preempted by the Federal Aviation Administration Authorization Act ("FAAA")—the same federal statute invoked by plaintiff in this case. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186–89 (9th Cir. 1998). The court determined that because the Teamsters benefited from the state law challenged, the labor union had a significantly protectable interest related to the litigation that would be adversely affected if the state law was enjoined. *Id.* at 1190 (affirming district court's granting of Teamster's motion to intervene as matter of right). Similarly, NRDC and its members benefit from the Truck and Bus Regulation, and their environmental and public health interests could be impaired if CDTOA's FAAA preemption claim is successful.

Further, NRDC's interests are protected under numerous federal and state statutes, including the Clean Air Act, the challenged Truck and Bus Regulation, and the California Health and Safety Code. 42 U.S.C. § 7401(b) (declaring that the purpose of the Clean Air Act is to protect air quality so as to promote public health and welfare); Cal. Code Regs. tit. 13 § 2025(a) (declaring that the purpose of the Truck and Bus Regulation is to reduce diesel emissions); Cal. Health & Safety Code §§ 39000–01 (finding that California residents have a "primary interest in the quality of the physical environment in which they live" and their environment is being degraded, and declaring that "this public interest shall be safeguarded" by efforts to "protect and enhance the ambient air quality of the state").

Moreover, NRDC was actively engaged in the development of the Truck and Bus Regulation, NRDC Mot. at 7, and even CDTOA's case—*Northwest Forest Resource Council*—makes clear that public interest organizations have "significantly protectable" interests and are entitled to intervene in an action challenging the legality of a measure it has supported. 82 F.3d at 837. The Ninth Circuit reached the same holding in, for example, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995), *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 629–30 (9th Cir. 1982), *cert. denied,* 461 U.S. 913 (1983), and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–28 (9th Cir.

1983) (there "can be no serious dispute" that applicant had a protectable interest that could be adversely affected given applicant's participation in the administrative decision that was the subject of the litigation). CDTOA does not offer a single reason to depart from this long line of authority.[5]

CDTOA also claims that NRDC "fails to show a relationship between the protected interest and the claims at issue." CDTOA Opp. at 3–4. CDTOA explains that the instant case does not impact NRDC's interest in reducing air pollution because CARB "remains free to promulgate any number of regulations" and NRDC can assist in the development of those regulations. CDTOA Opp. at 4. CDTOA cites to no authority to support its claim, which is, in any event, without merit.

First, as explained above, an applicant generally satisfies the "relationship" requirement if the resolution of the plaintiff's claims actually will affect the applicant. *Donnelly*, 159 F.3d at 410. Rule 24(a) does not require an applicant to demonstrate the absence of any relief if its interests are adversely affected by the subject litigation. Second, even if such a demonstration were required, it took CARB over two and a half years to develop the Truck and Bus Regulation. Declaration of Diane Bailey in Support of NRDC's Motion to Intervene, ¶ 5. If CARB loses this case, it cannot simply turn around and adopt a similar regulation the next day that would result in the same level of emissions reductions sorely needed for the state to meet federal air quality standards. Third, CDTOA's lawsuit has implications above and beyond merely seeking a discrete declaration of rights. It has the potential to invalidate not only the Truck and Bus Regulation as it is applies to CDTOA members but also any CARB regulation that applies to "motor carriers" as defined by the FAAA, including CARB's "Drayage Truck Rule," Cal. Code Regs. tit. 13 § 2027, which requires the replacement and retrofit of older port-serving trucks, and

[5] CDTOA asserts that nearly 600 separate parties submitted comments during the rulemaking process and that under NRDC's interpretation of the law any one of those parties could intervene. CDTOA Opp. at 4 n.1. Certainly, any of those parties could intervene if they met the requirements of Rule 24. However, it would be unlikely that all 600 could intervene since it would become harder to demonstrate inadequate representation once similarly situated parties were permitted in the case.

1 which NRDC also championed. As detailed in NRDC's opening papers, CARB estimates that
2 the Truck and Bus Regulation and Drayage Truck Rule are critical to California's efforts to meet
3 federal air quality standards. NRDC Mot. at 2–3.[6] Fourth, the present case is distinguishable
4 from instances in which the Ninth Circuit has concluded that a proposed intervenor's interests
5 lack a relationship to the litigation at issue. *See, e.g., Donnelly v. Glickman*, 159 F.3d at 410
6 (proposed intervenors' interests in protecting male employees from discrimination by the Forest
7 Service had no relationship to female employee Title VII class action lawsuit; resolution of the
8 class action would not affect proposed intervenors' interests).

9 NRDC has demonstrated a sufficient interest related to the litigation to warrant
10 intervention, and such interests would be directly impaired if the Truck and Bus Regulation were
11 invalidated. *See* Advisory Committee Notes to 1966 Amend., Fed. R. Civ. P. 24 ("If an absentee
12 would be substantially affected in a practical sense by the determination made in an action, he
13 should, as a general rule, be entitled to intervene.").

14 **B. CARB May Not Adequately Represent NRDC's Interests**

15 Under Rule 24(a)(2), "inadequate representation" is established "if the applicant shows
16 that representation of his interest 'may be' inadequate; and the burden of making that showing
17 should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10
18 (1972). As a general matter, the Ninth Circuit considers three factors in applying this test: "(1)
19 whether the interest of a present party is such that it will undoubtedly make all the intervenor's
20 arguments; (2) whether the present party is capable and willing to make such arguments; and (3)
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23 [6] A decision in CDTOA's favor could also jeopardize elements of the Ports of Los Angeles and
24 Long Beach's Clean Truck Programs, which require motor carriers that haul cargo for those ports to retire the use of older, more polluting diesel trucks in favor of newer, less polluting
25 trucks. *See* The Port of Los Angeles, About the Port of Los Angeles Clean Truck Program, http://www.portoflosangeles.org/ctp/idx_ctp.asp (last visited Apr. 27, 2011); Port of Long
26 Beach, Clean Trucks Program, http://www.polb.com/civica/filebank/blobdload.asp?
27 BlobID=3759 (last visited Apr. 27, 2011). NRDC championed these programs and intervened to help defend them in court. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, No. CV 08-4920
28 CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010). Note that the truck replacement component of the ports' programs was not challenged in this lawsuit; other aspects of the programs were challenged under the FAAA and Commerce Clause.

whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Sw. Ctr.*, 268 F.3d at 822. CDTOA argues against application of the "minimal" showing articulated in *Trbovich*, and asserts that where a state is already a party to an action, the applicant must make a "compelling showing" of inadequate representation. CDTOA Opp. at 4–5. As discussed below, CDTOA's claims should be rejected.

1. NRDC's Interests Sufficiently Diverge From CARB's

As described in NRDC's motion, NRDC and its members have a specific and personal interest in protection against diesel pollution-induced cancer, asthma and other health harms that is different, and far narrower, than that of CARB. NRDC Mot. at 6. CARB is charged with "protect[ing] public health . . . *while recognizing and considering the effects on the economy of the state*." *See* ARB Mission, Goal, and Strategic Plan, *available at* http://www.arb.ca.gov/html/mission.htm (last visited Apr. 27, 2011) (emphasis added).[7]

In defending this litigation, CARB will consider the health interests of California residents affected by diesel pollution, but CARB *must* also weigh the broader economic interests of the State as a whole, including the interests of CDTOA's members. Because NRDC does not share the need to balance its members' health interests against other parties' economic concerns, NRDC's interests are not only *not* identical to CARB's, they are in some respects *adverse*. This divergence resulted in CARB making a series of changes to the Regulation in December 2010 in response to industry requests that CARB "roll back" certain compliance provisions and the Regulation's implementation schedule. NRDC Mot. at 9.[8] Similar disagreements can be

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[7] Given that the outcome of this litigation could adversely affect the Ports of Los Angeles and Long Beach's Clean Truck Programs, *supra* at n.6, NRDC's interests are also "broader" in some respects than CARB's, who is interested in preserving its own regulations, while NRDC is also interested in protecting the Ports' Clean Truck Programs in addition to CARB's regulation.

[8] *See also* CARB Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Proposed Amendments to the Truck and Bus Regulation, the Drayage Truck Regulation and the Tractor-Trailer Greenhouse Gas Regulation (Oct. 2010), *available at* http://www.arb.ca.gov/regact/2010/truckbus10/truckbus10isor.pdf, at 1–2 (stating that CARB directed its staff to develop amendments to the Truck and Bus Regulation "that would provide economic relief" to truck and bus fleets in light of the recession and perceived reduced emissions).

1 anticipated to result regarding, for example, factual and equitable balancing issues that will arise
2 in response to any preliminary injunction motion CDTOA may file.
3 CDTOA attempts to argue that NRDC's interests are the same as CARB's because they
4 both seek to defend the Truck and Bus Regulation. CDTOA Opp. at 5. However, having the
5 same "objective" in a case is not the same as having identical interests. *Sw. Ctr.*, 268 F.3d at
6 823–24. In fact, the Ninth Circuit has time and again found a proposed intervenor has interests
7 narrower or more parochial than a government party with whom the intervenor is generally
8 aligned, and on that basis, determined representation to be inadequate. For example, in
9 *Californians for Safe & Competitive Dump Truck Transportation*, the Ninth Circuit held that the
10 Teamsters could intervene as of right "because the employment interests of [the Teamsters']
11 members were *potentially more narrow and parochial* than the interests of the public at large."
12 152 F.3d at 1190 (emphasis added).
13 In *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995),
14 *abrogated on other grounds by Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173 (9th
15 Cir. 2011), the Ninth Circuit held that the State of Arizona and one of its counties could properly
16 intervene on behalf of the Forest Service in an action alleging violations of applicable federal
17 law in connection with animal habitat guidelines, because a government agency "is required to
18 represent a broader view than the more narrow, parochial interests of the [intervenors]." *Id.* at
19 1492, 1499. So, too, in *Sw. Ctr.*, the Ninth Circuit allowed a contractor and building trade
20 association to intervene in an Endangered Species Act challenge to certain local and federal
21 conservation and development plans, recognizing that "the priorities of the defending
22 government agencies *are not simply to confirm the Applicants interests in the [plans at issue]* . .
23 ." 268 F.3d at 823–24 (emphasis added).
24 Recently, this Court reached a similar result in *In Defense of Animals v. U.S. Department*
25 *of Interior*, No. 2:10-cv-01852-MCE-DAD, 2011 WL 1085991 (E.D. Cal. Mar. 21, 2011). In
26 that case, the Court held that the proposed intervenor, the Safari Club, "ha[d] specific interests . .
27 . that may not be shared by the Federal Defendants, who represent a wide variety of sometimes
28 competing interests held by various segments of the general public. The requirement that

existing parties may not adequately represent the Safari Club's interests is therefore satisfied." *Id*. at *3 (granting intervention as a matter of right); *see also In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (holding that the Sierra Club was not adequately represented by South Carolina in an action brought by hazardous waste facility owners and operators challenging certain hazardous waste regulations, and finding that while the state "should represent all of the citizens of the state, including the interests of those citizens who also may be [proponents and owners of hazardous waste facilities]," the Sierra Club "represent[s] only a *subset of citizens* concerned with hazardous waste" (emphasis added)).

Indeed, the situation here is not dissimilar from that in *Trbovich*, the seminal Supreme Court case on intervention as of right, which explicitly held that Rule 24(a)'s inadequate representation prong is satisfied where an applicant makes a "minimal" showing that representation of his interest by an existing party (in that case, the government) "'may be' inadequate." 404 U.S. at 538 n.10. There, too, the existing government party shared one underlying interest with the intervenor, but not another. *Id*. at 538–39. In such circumstances, the Court held, intervention should be granted. *Id*. at 539. Such circumstances exist here.

2. CDTOA's Opposition Incorrectly Demands a "Compelling Showing" of Inadequacy

CDTOA asserts that where a state is already a party to an action, the applicant must make a "compelling showing" of inadequate representation. CDTOA Opp. at 4–5. CDTOA relies on *U.S. v. Hooker Chemicals & Plastics Corp*., 101 F.R.D. 451 (D.C. N.Y. 1984), and *Attorney General v. Brockton Agricultural Society*, 456 N.E. 2d 1130, 1133 (Mass. 1983), in support of its claim.

While the Ninth Circuit has sometimes recognized a presumption of adequate representation when an applicant shares the same "ultimate objective" with a government party already in the case, that presumption is readily rebuttable by showing that the applicant and government party "do not have sufficiently congruent interests." *Sw. Ctr*., 268 F.3d at 823–24. Moreover, the Ninth Circuit does not require an applicant to make a "compelling showing" of

inadequate representation *unless* the applicant and party share, not only the same ultimate objective, but also identical underlying interests:

> When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's *interest is identical* to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added; internal citations omitted) ("In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the *same* interest.") (emphasis added). CDTOA's case, *Attorney General v. Brockton Agricultural Society*, holds the same. 456 N.E.2d 1130, 434 (Mass. 1983) (stating that a compelling showing of inadequate representation is required if the interest of the applicant and the party whose side intervention would support is "identical"). Because, as we have shown, CARB's interest in balancing health harms against economic costs is not shared by NRDC, the "compelling showing" test has no place here.

Moreover, *U.S. v. Hooker Chemicals & Plastics Corp.*, upon which CDTOA also relies, CDTOA Opp. at 4, highlights that it is "not uncommon for courts to depart" from the presumption that a government party will adequately represent the interests of all its citizens "when the action is one in which government regulations are challenged and private parties who benefit from such regulations seek to intervene as defendants." 101 F.R.D. at 458 n.5. Accordingly, even if a "compelling showing" were required here, CDTOA's own authority demonstrates ample reason to depart from that requirement.

Additionally, the fact that NRDC and CARB may share a general objective of defending the Regulation does not make their interests identical—let alone ensure that CARB will "undoubtedly," *Sw. Ctr.*, 268 F.3d at 822, make all of NRDC's arguments.[9] In many, and

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[9] *See, e.g., In re Sierra Club*, 945 F.2d at 780 ("Although the interests of [applicant] and [agency defendant] may converge at the point of arguing that [the challenged regulation] does not violate the Commerce Clause, the interests may diverge at points . . ."); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (holding that the fact that an agency party had "a

perhaps most, cases involving a government defendant where intervention is granted as of right, the objective of the existing party and the intervenor is the same—either to preserve a government action or invalidate it.[10] Intervention is granted, however, because the parties' underlying interests are different, warranting intervention to ensure that those interests were adequately represented.

CDTOA also argues that there is no indication that CARB may weaken the Regulation or settle this case in a manner adverse to NRDC's interests, and thus, NRDC offers only "speculation" that CARB will not adequately represent NRDC's interests. CDTOA Opp. at 5. However, NRDC is not required to wait to intervene until CARB actually fails to defend NRDC's interests adequately (by which time intervention might well be too late, in any event). *Sw. Ctr.*, 268 F.3d at 824 ("The district court concluded that Applicants had not "identif[ied] any argument that the City is either incapable or unwilling to make" . . . it is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy. It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants.").

Moreover, CARB's Answer indicates that the agency is considering weakening the Regulation to ease compliance for CDTOA's members. CARB Answer at 4 ("Fourth

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shared general agreement with [applicants] that the regulations should be lawful does not necessarily ensure agreement in all particular respects about what the law requires").

[10] *See, e.g.*, *Californians for Safe & Competitive Dump Truck Transp.*, 152 F.3d at 1190 (common objective that California Prevailing Wage Law be found not preempted under FAAA); *Forest Conservation Council*, 66 F.3d 1489 (that guidelines be upheld against National Environmental Policy Act and National Forest Management Act claims, and timber sales be allowed to go forward); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (that Endangered Species Act listing of the Springs Snail not be set aside); *Sierra Club v. U.S. Envtl. Prot. Agency*, 995 F.2d 1478 (9th Cir. 1993) (that EPA not be compelled to promulgate regulations establishing water quality standards or to submit lists of impaired waters); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (that a designated conservation area be upheld as lawful); *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (that state law prohibiting transportation and storage within the state of radioactive waste produced out of state be found constitutional and not preempted); *Sw. Ctr.*, 268 F.3d 810 (that Implementation Agreement, Multi-Species Conservation Program and Sub-Area Plan, and City's Incidental Take permit be upheld and remain in effect).

1 Affirmative Defense . . . Plaintiff's claim will soon be moot because the Air Resources Board is
2 presently considering amending the regulation at issue to make it less stringent for dump trucks
3 and other heavy duty trucks and buses."). As a result, there is every reason to believe that such a
4 weakening could occur in the context of settling CDTOA's claims, and that NRDC's interests
5 would be adversely affected. In fact, given CDTOA's lawsuit, it would make little sense for
6 CARB to amend the Regulation absent a release of CDTOA's claims.

7 None of the remaining cases cited by CDTOA provide a basis for denying NRDC's
8 motion. CDTOA cites *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969); *Peterson v.*
9 *U.S.*, 41 F.R.D. 131 (D.C. Minn. 1966), and *Stadin v. Union Electric Co*., 309 F.2d 912 (8th Cir.
10 1962), for the proposition that "representation is adequate if no collusion is shown between the
11 representative and an opposing party, if the representative does not have or represent an interest
12 adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his
13 duty." CDTOA at 6. This standard, however, is not controlling in this district. *See supra* at 6–9
14 (citing *Sw. Ctr.*, 268 F.3d at 822; *Trbovich*, 404 U.S. at 538 n.10). And even if it were, NRDC
15 meets this standard because, as discussed above, CARB "ha[s] or represent[s] an interest adverse
16 to the proposed intervenor."

17 Further, neither *Martin*, *Peterson*, nor *Stadin* involve facts, like those here, where NRDC
18 seeks to intervene on the side of a government defendant in a case that challenges a rule it
19 championed.[11] Additionally, the applicants in those cases were very similarly situated with the
20 parties on the side it sought to intervene. *Martin*, 411 F.2d at 553 (shareholder sought to
21 intervene on the side of other shareholders in stockholder's derivative action); *Peterson*, 41
22 F.R.D. at 134 (remainderman sought to intervene on the side of trustees in an action to recover
23 federal estate tax); *Stadin*, 309 F.2d at 919 (minority shareholder sought to intervene on the side
24 of his corporation in a civil antitrust suit).[12]
25

26 [11] For these same reasons, *Kane County v. U.S.*, 597 F.3d 1129 (10th Cir. 2010) and *Perry v.*
27 *Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009), which CDTOA also relies
upon, are distinguishable.
28 [12] CDTOA also argues that NRDC's historical divergence of interests from CARB is not enough,
NRDC's prior disagreements with CARB over the Regulation are irrelevant since CARB is

1 NRDC has amply demonstrated that CARB "may" not, *Trbovich*, 404 U.S. at 538 n.10—
2 and surely will not "undoubtedly," *Sw. Center*, 268 F.3d at 822—present all of NRDC's
3 arguments. Intervention of right should therefore be granted.

4 **II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE**
5 **INTERVENTION**

6 CDTOA makes two arguments against NRDC's motion for permissive intervention: (1)
7 NRDC's intervention will require CDTOA to respond to "the awesome power of the State" as
8 well as "separate briefing by a well-funded national organization," which will delay resolution of
9 the issues and prejudice CDTOA; and (2) NRDC's participation in the case will not assist the
10 Court in the resolution of this case. CDTOA Opp. at 6. Neither grounds serves as an adequate
11 basis to deny NRDC's motion.

12 First, CDTOA's reference to *Brewer v. Williams*, 430 U.S. 387, 409 (1977), does not help
13 its argument. While in that case Justice Marshall, in a concurring opinion, did refer to the state
14 as an "awesome power," it did so in the context of reviewing a petition for writ of habeas corpus
15 by a state prisoner who had been interrogated by the government in the absence of counsel. *Id.*
16 (stating that the government denied prisoner his Sixth Amendment right "to have the protective
17 shield of a lawyer between himself and the awesome power of the State"). The case does not
18 stand for the proposition that permissive intervention should be denied if it would result in a
19 plaintiff having to work harder to prove its case. In fact, the case doesn't reach any holding with
20 respect to Rule 24 at all.

21 Second, complaints about the normal burdens of litigation cannot be the type of prejudice
22 that would justify denying intervention. If they were, permissive intervention would likely never
23 be allowed. Accordingly, the fact that CARB and NRDC may collectively mount a formidable
24
25

26 obligated to defend the Regulation, and that NRDC must demonstrate that such disagreements relate to CDTOA's claims. CDTOA Opp. at 4–5. However, the Ninth Circuit has repeatedly
27 permitted parties like NRDC to intervene in cases with facts nearly identical to this one. *Supra*
28 at 4–5, 8–9. The heightened showing CDTOA attempts to force on NRDC is simply not applicable, and any presumption of adequate representation by CARB is rebutted by a showing of incongruent interests. *Sw. Ctr.*, 268 F.3d at 823–24.

1 defense to CDTOA's claims cannot serve as a basis to deny NRDC's intervention, nor should the
2 fact that CDTOA may have to respond to NRDC's briefs. The Ninth Circuit in *U.S. v. City of*
3 *Los Angeles* expressly rejected arguments that intervention should be denied because it would
4 "slow the process." 288 F.3d 391, 404 (9th Cir. 2002) ("[T]he idea of 'streamlining' the
5 litigation . . . should not be accomplished at the risk of marginalizing those . . . who have some of
6 the strongest interests in the outcome "). The Court can ensure efficient and timely resolution of
7 this case through its case management powers.[13]
8 Third, NRDC brings considerable scientific expertise and background to the issues raised
9 in CDTOA's complaint, *see* NRDC Mot. at 7 n.8, and its perspective is likely to be important to
10 this case. For example, the health of NRDC's members will be directly implicated if, for
11 example, CDTOA were to move for a preliminary injunction and require this Court to consider
12 the relative balance of the hardships and other aspects of the public interest. *See, e.g., Oakland*
13 *Tribune, Inc. v. Chronicle Publishing Co*., 762 F.2d 1374, 1376 (9th Cir. 1985). Further, NRDC
14 recently successfully litigated a case in the Central District where it helped defend the Port of
15 Los Angeles' "Clean Truck Program" against a FAAA preemption claim. *Am. Trucking Ass'ns,*
16 *Inc. v. City of Los Angeles*, No. CV 08-4920 CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010).
17 CDTOA's attempts to paint this case as simple and straightforward so as to minimize the
18 role NRDC may play in this case should be rejected. CDTOA states that the legal question
19 presented by its lawsuit is a "binary one: either the regulation is preempted or it is not. There is
20 no middle ground." CDTOA Opp. at 2. CDTOA goes on to state that "the law on preemption is
21 fairly settled, and the relevant facts are likely not to be in dispute." *Id.* The FAAA generally
22 prohibits states from adopting regulations that relate to the price, route, or service of motor
23 carriers. 49 U.S.C. § 14501(c). To find a state law preempted, however, just any effect on motor
24 carrier prices, routes or services will not do. *See Californians for Safe & Competitive Dump*
25
26 [13] An order denying NRDC's motion to intervene could actually delay resolution of the case by
27 forcing an immediate appeal of that order. *See generally In re Benny*, 791 F.2d 712, 720 (9th
Cir. 1986). A parallel, interlocutory appeal has the potential to cause far more delay than an
28 order granting intervention, and could even require this Court to revisit issues it had decided
without intervenor's participation.

Truck Transp., 152 F.3d at 1189 (state wage law not preempted under FAAA where effect of state law on prices, routes, and serves was no more than "indirect, remote, and tenuous," law did not frustrate the purpose of the FAAA, or fall into the field of laws preempted by the FAAA).

Thus, it is not difficult to imagine that only portions of the Regulation may or may not be preempted, or that the parties will disagree heavily on the facts, that is, the degree that motor carrier prices, routes or services might be affected. Finally, NRDC is aware of no case where classic air pollution control regulations adopted by a state pursuant to the rights reserved to it under the Clean Air Act was preempted by the FAAA. Simply put, this case will likely involve not only complex factual issues, but novel questions of law. NRDC has demonstrated that it can assist the Court on these issues.

Finally, as for CDTOA's claim that NRDC can simply submit amicus briefs, CDTOA Opp. at 2, that would not be sufficient for NRDC to protect its interests. *Cf. Forest Conservation Council*, 66 F.3d at 1498 ("We reject [the] claim that *amicus curiae* status is sufficient for appellants to protect their interests by expressing their concerns to the court regarding the propriety and scope of injunctive relief."). As *amici*, NRDC would be precluded from presenting evidence (including evidence on issues, such as the hardship any injunction would impose on NRDC's members' health), from preserving issues for appeal, or appealing an adverse decision if CARB declined to do so. For these reasons, this Court should grant permissive intervention to NRDC if intervention of right is denied.

III. CONCLUSION

Accordingly, the Court should grant NRDC's motion to intervene as of right under Rule 24(a), or, in the alternative, permissively under Rule 24(b).

Dated: April 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of April, 2011, she caused the following:

REPLY IN SUPPORT OF NATURAL RESOURCES DEFENSE COUNCIL'S MOTION TO INTERVENE

to be filed electronically using this Court's CM/ECF system. Pursuant to Civ. L.R. 5-135(a), an electronic Notice of this filing will be sent automatically to all parties**,** and constitutes service pursuant to Fed. R. Civ. P. 5(b)(2)(D).

Date: April 28, 2011

/s/ Lizzeth Henao
Lizzeth Henao