

1 Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Sierra Club, Natural
2 Resources Defense Counsel and Environmental Defense ("Applicants") seek leave to intervene
3 (either as of right or permissively) on behalf of the Defendant Catherine Witherspoon, who is
4 sued in her official capacity as Executive Officer of the California Air Resources Board
5 ("CARB").

6 Plaintiffs are automobile manufacturers and dealers seeking to overturn proposed CARB
7 regulations designed to curb global warming by limiting motor vehicle emissions of greenhouse
8 gasses (the "Pavley regulations"). As described below, Applicants satisfy the requirements for
9 both intervention as of right and permissive intervention under Rule 24.

10 **BACKGROUND**

11 Sierra Club is a national nonprofit environmental organization with approximately
12 700,000 members nationwide, including thousands of members in California. Sierra Club is
13 dedicated to exploring, enjoying and protecting the wild places of the earth; to practicing and
14 promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting
15 humanity to protect and restore the quality of the natural and human environments; and to using
16 all lawful means to carry out these objectives. One of Sierra Club's major programs is its
17 national Global Warming and Energy Campaign, which seeks to promote solutions to global
18 warming using current and cutting-edge technologies, and securing promulgation of the Pavley
19 regulations was among the top priorities of this Campaign.

20 Natural Resources Defense Council ("NRDC") has approximately 489,000 members
21 nationally, with 94,000 members in California. NRDC uses law, science, and the support of its
22 members and the public to protect the Earth's wildlife and wild places, and to ensure a safe and
23 healthy environment for all living things. One of NRDC's top priorities is to reduce air pollution
24 that endangers public health and welfare, including the air pollution that is causing global
25 warming.

1 Environmental Defense ("ED") has over 400,000 members nationally, with more than
2 30,000 in California. ED specializes in the development of innovative, scientifically sound,
3 market-based solutions to environmental problems. Through its Climate and Air Program, ED
4 works extensively on the international, national and state levels to address the causes and effects
5 of global warming.

6 **California's Global Warming Law**

7 As the California Legislature recognized in enacting A.B. 1493, the statute that mandated
8 that CARB promulgate the Pavley regulations, global warming threatens California with a
9 variety of specific harms, including 1) a reduction in water supply due to reduced snowpack; 2)
10 adverse health impacts associated with increased air pollution; 3) adverse impacts to food
11 production; 4) increased drought and wildfires; 5) damage to coastal and ocean ecosystems; and
12 6) increased costs of consumer goods and increased costs borne by public infrastructure.

13 Faced with these impending threats, the Legislature passed A.B. 1493 (codified at section
14 43018.5 of the California Health & Safety Code) in 2002.¹ This statute required CARB to adopt
15 regulations that achieve the maximum feasible reduction of greenhouse gases emitted by certain
16 classes of vehicles, which together are responsible for about 40% of California's total greenhouse
17 gas emissions. And, on September 24, 2004, CARB voted to "initiate steps toward final
18 adoption" of the Pavley regulations. On December 7, 2004, automobile manufacturers and
19 dealers filed this case, seeking to enjoin the Pavley regulations on the grounds that the
20 regulations are preempted and/or run afoul of various federal laws.

21 **Applicants' involvement with A.B. 1493 and the Pavley Regulations**

22 Applicants were among the most active and vocal supporters of the Pavley regulations
23 during both the legislative and administrative processes that led to their passage. Their extensive
24

25 ¹ Because A.B. 1493 was sponsored by Assemblywoman Fran Pavley, it is often called the
"Pavley Bill", and the regulations promulgated thereunder the "Pavley regulations."

1 activities in support of A.B. 1493 and the challenged regulations are described in the
2 accompanying Declarations of Bill Magavern ("Magavern Decl."), Roland Hwang ("Hwang
3 Decl."), and James Marston ("Marston Decl."). Among other actions, Applicants' staff and
4 members lobbied extensively to secure passage of A.B. 1493, they testified at CARB's hearings
5 on the Pavley regulations; and they worked to educate the public about the importance of the law
6 and regulations through the media and other means. Indeed, Applicants are officially recognized
7 as "co-sources" of A.B. 1493 in the California Legislature's analysis of the bill in recognition of
8 their consistent and vigorous support for its enactment. Magavern Decl., Ex. A, p. 1.

9 ARGUMENT

10 I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

11 Applicants satisfy the four-part test for intervention as a matter of right under Rule 24(a).

12 An applicant is entitled to intervene as of right upon establishing that:

13 (1) it has a significant protectable interest relating to the property or transaction that is the
14 subject of the action; (2) the disposition of the action may, as a practical matter, impair or
15 impede the applicant's ability to protect its interest, (3) the application is timely; and (4)
16 the existing parties may not adequately represent the applicant's interest.

17 United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002) (quoting Donnelly v.
18 Glickman, 159 F.3d 405, 409 (9th Cir. 1998)). Moreover, in assessing these factors, Rule 24
19 should be construed liberally in favor of intervention. City of Los Angeles, 288 F.3d at 397-98.

20 Applicants satisfy this four-part test.

21 A. Applicants Have A Protectable Interest In The Subject Matter Of 22 This Litigation.

23 Rule 24(a)(2) requires that an intervenor have an interest that is protectable and related
24 "to the property or transaction which is the subject of the action." This prong does not require "a
25 specific legal or equitable interest," but rather "is primarily a practical guide to disposing of
lawsuits by involving as many apparently concerned persons as is compatible with efficiency and

1 due process.” County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (quoting Nuesse v.
2 Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)). Applicants have a vital interest in the Pavley
3 regulations and in the environmental resources that the regulations aim to protect.

4 **1. Applicants Were Directly Involved in the Enactment of the Law and**
5 **Regulatory Program at Issue in this Case.**

6 The Ninth Circuit has held repeatedly that a public interest group has a sufficient interest
7 to intervene as of right when, as here, it was “directly involved in the enactment of” a challenged
8 measure, “or in ‘the administrative proceedings in which it arose.’” Bates v. Jones, 127 F.3d
9 870, 874 (9th Cir. 1997) (quoting Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837
10 (9th Cir. 1996)). Thus, “[a] public interest group is entitled as a matter of right to intervene in an
11 action challenging the legality of a measure it has supported.” Idaho Farm Bureau Federation v.
12 Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995)(granting intervention to environmental group that
13 had participated in the process of listing a snail as an endangered species in a challenge to the
14 listing); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (environmental
15 group allowed to intervene as of right in suit challenging designation of conservation area to
16 protect its interest “in the preservation of birds and their habitat”); Washington State Bldg. &
17 Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982)(public interest
18 group allowed to intervene as of right in action challenging ballot measure it supported).

19 Applicants extensively participated in the legislative and administrative processes that led
20 to the enactment of the state law and regulations challenged here. Applicants’ staff and members
21 lobbied extensively to secure passage of A.B. 1493; testified at legislative and administrative
22 hearings that preceded the proposed regulations; submitted numerous sets of comments on the
23 proposed regulations and educated the public about the importance of the law and regulations
24 through media and other means. See Magavern Decl. ¶¶ 4-6; Hwang Decl. ¶¶ 6-7; Marston
25 Decl. ¶ 8. Indeed, all three Applicants are officially recognized as “co-sources” of A.B. 1493 in
the California Legislature’s analysis of the bill. Magavern Decl. Ex. A, p. 1. Thus, there can be

1 no dispute that Applicants have a significant, protectable interest in the subject matter of this
2 action.

3 **2. Applicants' Members Use And Enjoy The Resources Protected By**
4 **the Pavley Regulations.**

5 Applicants also have a strong interest in the Pavley regulations because their members
6 use and enjoy the environmental resources that the program aims to protect. Applicants'
7 members use and enjoy the coastal, aquatic, and riparian resources threatened by global
8 warming, and they have consistently worked to protect those resources. This interest in
9 protecting those resources satisfies the requirement that they have a "protectable interest" in this
10 litigation. Sagebrush Rebellion, 713 F.3d at 528 (environmental group entitled to intervene as of
11 right because "[a]n adverse decision in this suit would impair the [group]'s interest in the
12 preservation of birds and their habitats."); see also Mausolf v. Babbitt, 85 F.3d 1295, 1302-3 (8th
13 Cir. 1996).

14 The Pavley regulations seek to protect a host of environmental resources from the harm
15 caused by greenhouse gas emissions. As noted above, A.B. 1493 specifically identifies six
16 categories of harm that global warming will cause in California: 1) reduction in water supply due
17 to reduced snowpack; 2) adverse health impacts associated with increased air pollution; 3)
18 adverse impacts to food production; 4) increased drought and wildfires; 5) damage to coastal and
19 ocean ecosystems; and 6) increased costs of consumer goods and increased costs borne by public
20 infrastructure. Applicants have active campaigns to protect those resources from global warming
21 and other environmental threats. Sierra Club, for example, maintains active coastal protection
22 programs on all of the nation's coastlines, and has active national campaigns to protect fisheries
23 and aquatic ecosystems that depend heavily on healthy water supply. Magavern Decl. ¶ 9.

24 Additionally, Applicants' members actively use and enjoy the nation's forests and
25 shorelines for aesthetic, recreational and commercial interests, and share an interest in clean air,

1 for health, aesthetic and environmental quality reasons. Magavern Decl. ¶ 9; Hwang Decl. ¶ 4;
2 Marston Decl ¶ 13. Finally, Applicants' members live in coastal areas that could be inundated
3 absent government efforts to address the problem of global warming. Magavern Decl. ¶ 9.
4 Thus, Applicants have a significant protectable interest in the subject matter of this action.

5 **B. Applicants' Interests May Be Impaired As A Result Of This**
6 **Litigation.**

7 This lawsuit threatens to undo the results of Applicants' advocacy efforts, and thereby to
8 allow the continued destruction of the natural resources that the Pavley regulations seek to
9 protect. These threats to Applicants' interests are sufficient to meet the third prong of Rule
10 24(a)'s test for intervention of right – *i.e.*, that the applicant be “so situated that the disposition of
11 the action may as a practical matter impair or impede the applicant's ability to protect that
12 interest.” (emphasis added). Rule 24(a)(2) does not require that the applicant's interests be
13 legally impaired; rather, it is enough that the applicant be “substantially affected in a practical
14 sense.” Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001)
15 (citing Fed. R. Civ. P. 24, Advisory Committee Note to 1966 Amendments (“If an absentee
16 would be substantially affected in a practical sense by the determination made in an action, he
17 should, as a general rule, be entitled to intervene.”)); Natural Res. Defense Council v. Nuclear
18 Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978) (“the court is not limited to
19 consequences of a strictly legal nature”).

20 There is no question that the disposition of this case has the potential to impair
21 Applicants' interests in several respects. First, if the court enjoins the Pavley regulations or
22 holds that the State of California has no authority to regulate greenhouse gas emissions from
23 motor vehicles, Applicants' extensive efforts to urge California to enact A.B. 1493 and to
24 promulgate the challenged regulations would be nullified. Their considerable investment in this
25 process, including countless hours of staff and volunteer time and effort, and considerable

1 financial resources, would be lost. See Idaho Farm Bureau, 58 F.3d at 1397-98 (finding
2 impairment where action could have led to reversal of earlier administrative process actively
3 supported by applicants for intervention); Sagebrush Rebellion, 713 F.2d at 528 (court held there
4 “can be no serious dispute” regarding impairment of interest where lawsuit sought to invalidate
5 regulatory measure that proposed intervenors had supported.) Further, Applicants have no other
6 means of guarding against impairment of their interests short of intervention in this suit. See
7 Yniguez v. State of Arizona, 939 F.2d 727, 737 (9th Cir. 1991); Forest Conservation Council v.
8 U.S. Forest Service, 66 F.3d 1489, 1498 (9th Cir. 1995).

9 Second, this lawsuit threatens harm of Applicants’ interest in the preservation of natural
10 resources that the global warming regulations aim to protect. As the challenged state law recites,
11 greenhouse gas emissions threaten, inter alia, a reduction in water supply, increased air pollution,
12 and damage of Pacific coastal systems. Those threats impair Applicants’ interest in those
13 resources within the meaning of Rule 24(a). See Sagebrush Rebellion, 713 F.2d at 528
14 (impairment prong satisfied where “[a]n adverse decision in this suit would impair the
15 [applicants’] interest in the preservation of birds and their habitat.”); Idaho Farms Bureau, 58
16 F.3d at 1398 (finding impairment where “disposition in the present action would impair
17 [applicants’] ability to protect their interest in the Springs Snail and its habitat.”).

18 **C. This Motion To Intervene Is Timely.**

19 Three factors determine if a motion to intervene is timely: “(1) the stage of the
20 proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and
21 (3) the reason for and length of the delay.” United States v. Alisal Water Corp., 370 F.3d 915,
22 921 (9th Cir. 2004). Applicants are requesting to intervene at the earliest possible stage of this
23 litigation. The complaint was filed on December 7, 2004; CARB has not filed an answer; no
24 motions have been filed; and the Court has not issued any orders. Thus, the proposed
25 intervention will not prejudice the other parties, nor will it cause any delay in the proceedings.

1 Accordingly, the motion to intervene is timely. See, e.g., Idaho Farm Bureau, 58 F.3d at 1397
2 (motion to intervene was timely when it was filed four months after the original action was filed
3 and “before any hearings or rulings on substantive matters”); 7C Charles A. Wright & Arthur R.
4 Miller, Federal Practice and Procedure, § 1916 & n.13 (2d ed. 1986) (application for intervention
5 made before parties have joined issue in the pleadings is “clearly timely”); Nikon Corp. v. ASM
6 Lithography B.V., 222 F.R.D. 647, 649 (N.D. Cal. 2004) (motion to intervene filed over twenty
7 months after plaintiff filed an amended complaint was timely because the court had not
8 addressed any of the parties dispositive motions and the real substance of the litigation had not
9 begun).

10 **D. Applicants’ Interests Are Not Adequately Represented by Defendant**
11 **CARB.**

12 Finally, defendant CARB does not adequately represent the Applicants’ interests. “The
13 requirement of [Rule 24(a)(2)] is satisfied if the applicant shows that representation of his
14 interest ‘may be’ inadequate; and the burden of making that showing should be treated as
15 minimal.” Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); Southwest Center
16 for Biological Diversity, 268 F.3d at 823. To determine whether an applicant’s interest is
17 adequately represented by the existing parties, courts consider: (1) whether the interest of a
18 present party is such that it will undoubtedly make all the intervenor’s arguments; (2) whether
19 the present party is capable and willing to make such arguments; and (3) whether the would-be
20 intervenor offers any necessary elements to the proceedings that other parties would neglect.
21 Sagebrush Rebellion, 713 F.2d at 528 (emphasis added).

22 Applicants meet this test. Based on discussions between Applicants’ counsel and counsel
23 for CARB, Applicants can state that they will be making at least one major dispositive argument
24 in defense of the Pavley regulations that CARB will not be making. That alone is enough to
25 satisfy this test; as the Ninth Circuit as held, a proposed intervenor is not “adequately

1 represented" under Rule 24 if "it is likely that Defendants will not advance the same arguments
2 as Applicants." Southwest Center for Biological Diversity, 268 F.3d at 824.

3 The Applicants' interests clearly will not be adequately represented by the Defendant
4 representing the State of California, whose perspective substantially differs from theirs. The
5 State, first, does not share many of the Applicants' expertise, including its specific, and
6 exclusive, interest in conservation; the State must, instead, represent the public's broader
7 interests. In Sagebrush Rebellion, the Audubon Society was granted permission to intervene in a
8 suit against the Department of the Interior challenging the creation of a conservation area in
9 Idaho. 713 F.2d at 526. The court found that, "[i]n addition to having expertise apart from that
10 of the Secretary, the intervenor offers a perspective which differs materially from that of the
11 present parties to the litigation." Id. at 528. Here, Applicant environmental organizations have
12 particular expertise, which is not shared by the State, in global warming, related conservation
13 issues and in this particular legislation.

14 Applicants also have a strong interest in protecting resources outside California on the
15 national level. Greenhouse emissions and global warming threaten environmental impacts far
16 beyond California's borders, impacts with which the Applicants and their members -- but not
17 CARB -- are vitally concerned. Because the federal government has refused to regulate
18 greenhouse gas emissions from cars (or any other source), the only way for other states to
19 regulate their own vehicle greenhouse gas emissions is by adopting California's standards (which
20 they are entitled to do under the Clean Air Act.) The ability of any other state in the Union to
21 enact such controls is entirely dependent on the result of this litigation, and Applicants' interest
22 in this consequence is not shared by CARB.

23 Courts routinely find that government does not adequately represent the unique interests
24 of nonprofit organizations under Rule 24(a) because the government must represent a broader
25 perspective. See Trbovich, 404 U.S. at 538-39 (finding intervention appropriate because

1 government's duty to represent both broad interests of the public and narrower interests of
2 proposed intervenor were "related, but not identical"); Californians for Safe & Competitive
3 Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1190 (9th Cir. 1998) (state agencies did not
4 adequately represent union in defending state wage law because union's interests were
5 "potentially more narrow and parochial than the interests of the public at large"); Sierra Club v.
6 Espy, 18 F.3d 1202, 1208 (5th Cir. 1994) (permitting timber industry to intervene in case
7 brought against government by environmental groups because "[t]he government must represent
8 the broad public interest, not just the economic concerns of the timber industry"); Forest
9 Conservation Council, 66 F.3d at 1499. In this case, the State must weigh conservation interests
10 with industry interests, budgetary concerns, economic considerations, and efficient
11 transportation. Thus, in addition to Applicants' national perspective which CARB does not
12 share, Applicants' conservation interests differ markedly from CARB's.

13 **II. ALTERNATIVELY, THIS COURT SHOULD GRANT APPLICANTS**
14 **PERMISSIVE INTERVENTION.**

15 Should this Court find Applicants are not entitled to intervene as of right, Applicants
16 move that this Court grant them permissive intervention. Under Rule 24(b), "[a]n applicant who
17 seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares
18 a common question of law or fact with the main action; (2) its motion is timely; and (3) the court
19 has an independent basis for jurisdiction over the applicant's claims." Donnelly v. Glickman,
20 159 F.3d 405, 412 (9th Cir. 1998). Like intervention of right, permissive intervention is to be
21 granted liberally. Washington State Bldg. and Const. Trades Council, 684 F.2d at 630 ("Rule 24
22 traditionally has received a liberal construction in favor of applicants for intervention.")

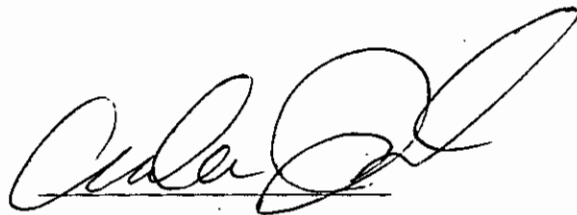
23 Applicants easily meet the substantially less burdensome statutory prerequisites for
24 permissive intervention. As described above, this application is timely and will not prejudice the
25 rights of the existing parties. Additionally, Applicants bring no legal issues to the case aside

1 from those raised by plaintiffs although, as noted above, they will be raising at least one
2 dispositive defense that CARB does not intend to. Finally, the Court's jurisdiction over the
3 present case is based on the federal question raised by the plaintiffs' complaint, and this Court
4 has supplemental jurisdiction over Applicants pursuant to 28 U.S.C. § 1367(a), which provides
5 such jurisdiction for "the intervention of additional parties." Accordingly, Applicants should be
6 granted permission to intervene under Rule 24(b)(2) if intervention as of right is denied.

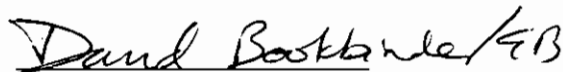
7 **CONCLUSION**

8 For the foregoing reasons, the Court should grant Applicants' motion for intervention as
9 of right or, in the alternative, permissive intervention.

10 Respectfully submitted,

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