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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

SIERRA CLUB, AMERICAN LUNG ASSOCIATION, ENVIRONMENTAL DEFENSE FUND, and NATURAL RESOURCES DEFENSE COUNCIL

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 3:13-cv-02809-EDL

NOTICE OF MOTION TO INTERVENE AND MOTION TO INTERVENE AS DEFENDANTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY PROPOSED DEFENDANT-INTERVENORS NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN PETROLEUM INSTITUTE, AMERICAN WOOD COUNCIL, AUTOMOTIVE AFTERMARKET INDUSTRY ASSOCIATION, BRICK INDUSTRY ASSOCIATION, COUNCIL OF INDUSTRIAL BOILER OWNERS, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL MINING ASSOCIATION, TREATED WOOD COUNCIL, AND UTILITY AIR REGULATORY GROUP

Date: October 1, 2013
Time: 9:00 a.m.
Place: Courtroom E, 15th Floor
Judge: The Hon. Elizabeth D. Laporte

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Act	Clean Air Act
AF&PA	American Forest & Paper Association
AFPM	American Fuel and Petrochemical Manufacturers
Agency	U.S. Environmental Protection Agency
AISI	American Iron and Steel Institute
API	American Petroleum Institute
AWC	American Wood Council
AAIA	Automotive Aftermarket Industry Association
BIA	Brick Industry Association
CAA	Clean Air Act
CIBO	Council of Industrial Boiler Owners
EPA	U.S. Environmental Protection Agency
ICI	Industrial, Commercial and Institutional
IPAA	Independent Petroleum Association of America
ISA	Integrated Science Assessment
NAM	National Association of Manufacturers
NAAQS	National Ambient Air Quality Standards
NOx	Oxides of Nitrogen
NMA	National Mining Association
TWC	Treated Wood Council
UARG	Utility Air Regulatory Group
VOCs	Volatile Organic Compounds

NOTICE OF MOTION AND MOTION TO INTERVENE

TO PLAINTIFFS, SIERRA CLUB, AMERICAN LUNG ASSOCIATION, ENVIRONMENTAL DEFENSE FUND, and NATURAL RESOURCES DEFENSE COUNCIL, and DEFENDANTS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 1, 2013 at 9 a.m. in Courtroom E, 15th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, the National Association of Manufacturers ("NAM"), American Forest & Paper Association ("AF&PA"), American Fuel and Petrochemical Manufacturers ("AFPM"), American Iron and Steel Institute ("AISI"), American Petroleum Institute ("API"), American Wood Council ("AWC"), Automotive Aftermarket Industry Association ("AAIA"), Brick Industry Association ("BIA"), Council of Industrial Boiler Owners ("CIBO"), Independent Petroleum Association of America ("IPAA"), National Mining Association ("NMA"), Treated Wood Council ("TWC"), and Utility Air Regulatory Group ("UARG") (hereafter collectively "Proposed Defendant-Intervenors") will bring for hearing a motion to intervene in support of Defendants in this action.

Pursuant to Federal Rules of Civil Procedure 24(a) and (b), and for the reasons set forth in the following memorandum of points and authorities and the facts set forth in the supporting Declaration of Howard Feldman, NAM, AF&PA, AFPM, AISI, API, AWC, AAIA, BIA, CIBO, IPAA, NMA, TWC, and UARG seek to intervene as of right in this case or, alternatively, permissively, in support of Defendants. Pursuant to Civil L.R. 7-1(b), Movants respectfully request that the Court grant this motion without oral argument or, if the Court wishes to hear oral argument, that the argument take place by telephone conference.

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE TO BE DECIDED

This memorandum addresses whether the National Association of Manufacturers ("NAM"), American Forest & Paper Association ("AF&PA"), American Fuel and Petrochemical Manufacturers ("AFPM"), American Iron and Steel Institute ("AISI"), American Petroleum Institute ("API"), American Wood Council ("AWC"), Automotive Aftermarket Industry Association ("AAIA"), Brick Industry Association ("BIA"), Council of Industrial Boiler Owners ("CIBO"), Independent Petroleum Association of America ("IPAA"), National Mining Association ("NMA"), Treated Wood Council ("TWC"), and Utility Air Regulatory Group ("UARG") (hereafter collectively "Proposed Defendant-Intervenors") are entitled to intervene as of right in this action under Fed. R. Civ. P. 24(a) or, in the alternative, should be granted permissive intervention under Fed. R. Civ. P. 24(b).

STATEMENT OF RELEVANT FACTS

I. Legal and Factual Background

On June 19, 2013, Plaintiffs Sierra Club, American Lung Association, Environmental Defense Fund and Natural Resources Defense Council (hereafter collectively "Environmental Groups") filed a complaint alleging that the United States Environmental Protection Agency and its then-Acting Administrator (hereafter collectively "EPA" or "Agency") have failed to complete review and revision of the national ambient air quality standards ("NAAQS") for ozone and that this constitutes a failure to perform an act or duty that is not discretionary within the meaning of sections 109(d)(1), 304(a)(2) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7409(d)(1), 7604(a)(2) (2013). Compl. ¶¶ 5, 37, 38. They allege that EPA has acknowledged that the current ozone NAAQS "are inadequate to protect the public from the adverse effects of ozone pollution" and seek "to compel" EPA to "adopt overdue" revisions to the ozone NAAQS. Compl. ¶¶ 4, 6.

EPA promulgates NAAQS for certain air pollutants that the Agency anticipates endanger public health or welfare. CAA §§ 108(a)(1), 109(a), 42 U.S.C. §§ 7408(a)(1), 7409(a) (2013).

"Primary" NAAQS are at the level "requisite to protect the public health" and "allowing an adequate margin of safety," and "secondary" NAAQS "specify a level of air quality" that "is requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b)(1) & (2); 42 U.S.C. § 7409(b)(1) & (2) (2013). NAAQS are "based on" air quality criteria that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of" effects of the pollutant "on public health or welfare," CAA §§ 108(a)(2), 109(b)(1) & (2); 42 U.S.C. §§ 7408(a)(2), 7409(b)(1) & (2) (2013), and promulgated through a rulemaking process defined by the Act. CAA § 307(d), 42 U.S.C. § 7607(d) (2013). EPA must review both the NAAQS and the air quality criteria on which they are based at least every five years and may revise them "as may be appropriate." CAA § 109(b)(1) & (2), (d)(1), 42 U.S.C. § 7409(b)(1) & (2), (d)(1) (2013).

The first ozone NAAQS were promulgated in 1979. 44 Fed. Reg. 8202 (Feb. 8, 1979). Since that time, EPA has repeatedly reviewed those NAAQS, and has revised them several times. *See e.g.,* 75 Fed. Reg. 2938 (Jan. 19, 2010); 73 Fed. Reg. 16436 (Mar. 27, 2008); 68 Fed. Reg. 614 (Jan. 6, 2003); 62 Fed. Reg. 38856 (July 18, 1997); 58 Fed. Reg. 13008 (Mar. 9, 1993). The current ozone NAAQS are codified at 40 C.F.R. §§ 50.9, 50.10, 50.15 (2012).

EPA continues to review the ozone NAAQS. In April, 2011, EPA released its plans for a review that is presently ongoing. 76 Fed. Reg. 23755 (Apr. 28, 2011). Earlier this year, EPA issued revised air quality criteria in a document that EPA calls an Integrated Science Assessment ("ISA"), 78 Fed. Reg. 11172 (Feb. 15, 2013), and EPA continues to consider their implications for the adequacy and possible revision of the current NAAQS. The Agency's Regulatory Agenda indicates there is no legal deadline for completion of this activity. *See* EPA, Spring 2013 Regulatory Agenda at 114 (July 3, 2013), Doc. ID No. EPA-HQ-OA-2013-0514-0001. Prematurely forcing EPA to a decision on review of the NAAQS could deny EPA the benefit of fully analyzing the latest scientific studies and result in action that adversely impacts the member companies of Proposed Defendant-Intervenors.

Member companies of Proposed Defendant-Intervenors are subject to costly and extensive regulatory controls as a result of the ozone NAAQS that Environmental Groups seek to be revised. Decl. of Howard J. Feldman ("Feldman Decl.") ¶¶ 4, 7. If EPA were to adopt more stringent NAAQS as Plaintiffs demand, *see* Complaint ¶ 6, Proposed Defendant-Intervenors would face additional costly and burdensome control requirements, Feldman Decl. ¶ 7. Proposed Defendant-Intervenors have participated in past rulemakings concerning the ozone NAAQS and are actively participating in the ongoing review process. Feldman Decl. ¶¶ 9, 10. They and their members therefore have substantial economic and procedural interests in both the outcome of the ongoing review and in ensuring that they have adequate time to develop and present to EPA information concerning the present ozone NAAQS and possible alternative ozone NAAQS, and that EPA has adequate time to review, evaluate and take into account information provided by Proposed Defendant-Intervenors.

II. Description of Proposed Defendant-Intervenors

Proposed Defendant-Intervenors represent a broad spectrum of industries affecting every aspect of the U.S. economy. Because their operations are directly affected by regulations promulgated by EPA under the CAA and other environmental statutes, including the ozone NAAQS, Proposed Defendant-Intervenors routinely participate in EPA's NAAQS rulemakings, submitting comments on proposed actions accompanied by scientific on the NAAQS.

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The American Forest & Paper Association serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday

life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative. *See* AF&PA, *Better Practices, Better Planet 2020*, http://www.afandpa.org/sustainability. The forest products industry accounts for approximately 4.5 percent of the total U.S. manufacturing gross domestic product ("GDP"), manufactures approximately $200 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top ten manufacturing sector employers in forty-seven states.

American Fuel and Petrochemical Manufacturers is a national trade association of more than 450 member companies. Its members include virtually all U.S. refiners and petrochemical manufacturers and they account for 98 percent of the United States' refining capacity. AFPM members supply consumers with a wide variety of products and services that are used in homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine and computers. AFPM's members are strongly committed to clean air, water and waste reduction, have an outstanding record of compliance, and have invested hundreds of billions of dollars to reduce emissions.

The American Iron and Steel Institute is a non-profit, national trade association headquartered in the District of Columbia. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI represents member companies accounting for more than three quarters of U.S. steelmaking capacity.

The American Petroleum Institute is a national trade association that represents all segments of America's technology-driven oil and natural gas industry. It includes more than 500 members—including large integrated companies, exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms—providing most of the nation's energy. The industry also supports 9.2 million U.S. jobs and 7.7 percent of the U.S.

economy, delivers $85 million a day in revenue to our government, and, since 2000, has invested over $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The American Wood Council is the voice of North American traditional and engineered wood products, representing over 60 percent of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs 360,000 men and women in well-paying jobs. AWC's engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced government policies that sustain the wood products industry.

The Automotive Aftermarket Industry Association is recognized as the pre-eminent trade association and voice for the $297.5 billion motor vehicle aftermarket, which employs four million people and contributes more than two percent of the U.S. GDP. AAIA's more than 23,000 members and affiliates manufacture, distribute, and sell motor vehicle parts, accessories, service, tools, equipment, materials, and supplies across the country. AAIA works to impact public policy such that its membership can continue to produce and distribute products that are necessary to ensure the effective, efficient, and safe operation of the nation's transportation fleet.

The Brick Industry Association is a national trade association representing small and large brick manufacturers and associated services. Founded in 1934, the BIA is the recognized national authority on clay brick construction, representing approximately 270 manufacturers, distributors, and suppliers that generate approximately $9 billion annually in revenue and provide employment for more than 200,000 Americans.

The Council of Industrial Boiler Owners is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with members representing twenty major industrial sectors. CIBO members have facilities in every

region of the country and a representative distribution of almost every type of industrial, commercial and institutional ("ICI") boiler and fuel combination currently in operation. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for ICI boilers.

The Independent Petroleum Association of America is a national trade association that represents the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 68 percent of domestic oil, and produce 82 percent of American natural gas. IPAA has over 6400 members, including companies that produce oil and natural gas ranging in size from large publicly traded companies to small businesses, companies that support this production such as drilling contractors, service companies, and financial institutions.

The National Mining Association is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The Treated Wood Council, based in the District of Columbia, is a not-for-profit corporation organized in 2003 under the laws of the District of Columbia, representing more than 490 companies and organizations throughout the United States that produce pressure-treated wood products, manufacture wood preservatives, harvest and saw wood, and serve the treated wood industry. TWC monitors and responds to legislation and regulatory activities related to the treated wood industry, including environmental issues, and advocates for environmentally sound standards for treated wood manufacture and use.

The Utility Air Regulatory Group is a voluntary, non-profit group of individual electric generating companies and industry trade associations. UARG's purpose is to participate on behalf of its members collectively in EPA's rulemakings under the CAA and other related proceedings that affect the interests of electric generators, and in related litigation.

ARGUMENT

I. Proposed Defendant-Intervenors Are Entitled To Intervene As Of Right.

Proposed Defendant-Intervenors satisfy all of the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). The Ninth Circuit has described these requirements as follows: "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). These requirements must be "broadly interpreted in favor of intervention," and the Court's review is "guided primarily by practical considerations, not technical distinctions." *Id.*; *see also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (Ninth Circuit construes intervention requirements broadly to support its "liberal policy in favor . . . [of] both efficient resolution of issues and broadened access to the courts.") (internal quotation marks omitted).

The courts have allowed intervention by private parties in cases involving claims EPA failed to perform nondiscretionary duties, including cases alleging that EPA had failed to review a standard by a statutory deadline. *See, e.g.*, Order Granting in Part and Denying in Part Mot. to Intervene, *Our Children's Earth Found. v. EPA*, No. 05-cv-0094-CW (N.D. Cal. May 4, 2005), Doc No. 26 (API entitled to intervene in remedy stage of CAA deadline suit regarding revision of standards of performance for refineries); Order Granting Mots. to Intervene, *Sierra Club v. Jackson*, No. 09-cv-00152-SBA (N.D. Cal. Apr. 27, 2009), Doc. No. 34 (industry group granted leave to intervene in CAA deadline suit regarding revision of standards of performance for pulp

mills); Minute Order, *Am. Nurses Ass'n v. Johnson*, No. 08-cv-02198-RMC (D.D.C. Mar. 2, 2009) (UARG entitled to intervene in CAA deadline suit seeking to compel promulgation of emission standards for hazardous air pollutants from fossil fuel-fired power plants); *New York v. Thomas*, 613 F. Supp. 1472, 1478 (D.D.C. 1985) (trade association and industrial power companies entitled to intervene in CAA case seeking to compel EPA to abate transboundary air pollution), *rev'd on other grounds*, 802 F.2d 1443 (D.C. Cir. 1986); *Am. Canoe Ass'n v. EPA*, 138 F. Supp. 2d 722, 727 & n.7 (E.D. Va. 2001) (association granted leave to intervene in suit alleging failure to perform mandatory duties under Clean Water Act). This Court should grant intervention as of right for Proposed Defendant-Intervenors because this motion is timely and because none of the existing parties will adequately represent Proposed Defendant-Intervenors' economic, ownership, and procedural interests, which could be impaired by the disposition of this case.

A. This Motion for Leave To Intervene Is Timely.

Proposed Defendant-Intervenors' application for intervention is timely. The timeliness of a motion to intervene is in the court's discretion and "is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). The Ninth Circuit considers three criteria in assessing timeliness: "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996).

Proposed Defendant-Intervenors are filing this motion less than two months after the Environmental Groups filed their complaint and before Defendants' answer or any other substantive pleading or motion has been submitted in this case. *See Citizens for Balanced Use*, 647 F.3d at 897 (motion to intervene filed less than three months after complaint and after defendants filed answer was timely). The existing parties have yet to complete their preliminary discussions: the Court's Order of June 19, 2013 establishes a deadline of August 27, 2013 for the parties to meet and confer, and it schedules an initial case management conference for September 17, 2013. Order June 19, 2013, Doc No. 4. Accordingly, there has been no delay by

Proposed Defendant-Intervenors weighing against intervention. *See Nw. Forest Res. Council*, 82 F.3d at 837 (no intervenor delay where no substantive proceedings had yet taken place). Allowing intervention at this early stage in the proceedings will not delay this action or otherwise prejudice the parties, since there will be no need to reopen or re-litigate any prior proceedings between the parties. Therefore, Proposed Defendant-Intervenors' motion is timely.

B. Proposed Defendant-Intervenors' Members Have Significant Protectable Interests that Are Affected by This Litigation.

Proposed Defendant-Intervenors have a "significant protectable interest" in preserving their ability to adequately and effectively participate in any rulemaking that results from this litigation. A proposed intervenor has a "significant protectable interest" justifying intervention as of right if (1) the interest is "protectable under some law" and (2) "there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use*, 647 F.3d at 897. "The 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.'" *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)). The relationship requirement is met if the resolution of the plaintiffs' claims actually will affect the intervenor. *Id.* "The requisite interest need not be direct as long as it may be impaired by the outcome of the litigation." *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 306 (E.D. Cal. 2011) (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967)).

Courts are required to make a "practical, threshold inquiry" to discern whether allowing intervention would be "compatible with efficiency and due process." *City of Los Angeles*, 288 F.3d at 398. "By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Id.* (internal quotation marks omitted) (emphasis in original). Economic interests may give rise to a protected interest. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (concrete

economic interest sufficient for intervention). Intervention may also be based on an interest that is "contingent upon the outcome of the litigation," such as the terms of a settlement. *See City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)) (non-settling parties had significantly protectable interest in contribution claims that would be extinguished by settling parties' agreement with agency if consent decree was approved).

This case is not merely an action to spur EPA to assess the adequacy of its current standards: Plaintiffs describe the "non-discretionary duties" that this action seeks to compel as a "non-discretionary duty to . . . *adopt*" new NAAQS for ozone, and they seek an order to enjoin EPA "from continuing to violate the above-described nondiscretionary duties . . . ." Compl. ¶¶ 6, 41(b) (emphasis added). Such an order would remove the issue of whether revision of the NAAQS is appropriate from the procedural safeguards of the administrative rulemaking arena and force EPA to exercise its discretion in a particular way by adopting new, more stringent standards. Thus, granting the relief requested by Plaintiffs—an order compelling EPA's promulgation of a revised NAAQS for ozone—would directly harm Proposed Defendant-Intervenors' interests.[1]

Members of Proposed Defendant-Intervenors have significant economic, property, and other interests in how they operate the facilities they own, at what costs, and under what regulations. *Id*. If Plaintiffs prevail in this case and obtain an order "compel[ing] the Administrator of the EPA to . . . adopt . . . national ambient air quality standards for ozone," Complaint ¶ 6, members of Proposed Defendant-Intervenors with facilities located in areas that do not meet (or are deemed to be "nonattainment" for) the revised NAAQS would face imposition of costly controls, new emission reduction requirements, and fees. Feldman Decl. ¶

[1] Although EPA can complete its review of a NAAQS without promulgating a revision, when the Agency finds that a revision is appropriate, it publishes that revised rule simultaneously with the finding. *See, e.g.,* 78 Fed. Reg. 3086, 3120-21, 3164, (Jan. 15, 2013) (both finding that revision of the primary NAAQS for $PM_{2.5}$ is needed and revising the NAAQS).

7. These new measures would include the mandatory installation of "reasonably available control technology" at existing sources of volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx"), CAA §§ 172(c)(1), 182(a)(2)(A), (b)(2) & (f), 42 U.S.C. §§ 7502(c)(1), 7511a(a)(2)(A), (b)(2) & (f) (2013), and new or modified sources of VOCs and NOx in these areas would have to obtain emission offsets and install controls that limit emissions to the lowest achievable emission rate. CAA §§ 173(a)(1) & (2), 182(a)(2)(C)(i), (4), (b)(5), (c)(10), (d)(2), & (e)(1); 42 U.S.C. §§ 7503(a)(1) & (2), 7511(a)(2)(C)(i), (4), (b)(5), (c)(10), (d)(2), & (e)(1) (2013). Sources with facilities in areas with the most intractable problems with attaining a revised ozone NAAQS would eventually be subject to penalty fees for their emissions. CAA § 185, 42 U.S.C. § 7511d (2013).

Moreover, Proposed Defendant-Intervenors have a significant protectable interest in the terms of any remedial order or settlement that might result from this case. If Plaintiffs prevail on the allegations set forth in their complaint, it will be incumbent upon this Court to establish a reasonable schedule for EPA to complete its review of the current ozone NAAQS, decide whether revision is necessary, and if so, engage in the notice-and-comment rulemaking procedure required by section 307(d) of the CAA to promulgate a revised ozone NAAQS. Moreover, Plaintiffs ask that this difficult multi-stage process be completed by September 30, 2014. Compl. ¶ 41(c). Proposed Defendant-Intervenors believe this schedule would be unfair and unreasonable. Proposed Defendant-Intervenors have a vital interest in participating meaningfully in each stage of this NAAQS process to provide input informing EPA's decisions, and Plaintiffs' schedule would frustrate the development of sound scientific support on the need for NAAQS revisions.

Section 307(d) of the CAA provides a role for Proposed Defendant-Intervenors in NAAQS rulemakings. That provision sets forth detailed procedural requirements that are designed to provide interested parties, including the regulated community, with a meaningful opportunity to influence EPA's actions. CAA § 307(d), 42 U.S.C. § 7607(d) (2013). EPA must accept "written comments and documentary information" from interested persons, provide an

opportunity for oral presentation of data, publish a statement of basis and purpose for both its proposed and final rules containing the factual data, methodology, and legal and policy considerations underlying its decision, and respond to all significant comments and new data submitted during the comment period. *Id.* § 307(d)(3)-(6), 42 U.S.C. § 7607(d)(3)-(6) (2013). Furthermore, Congress directs EPA to provide a "reasonable period for public participation" in promulgating any regulation, "including a regulation subject to a deadline." *Id.* § 307(h), 42 U.S.C. § 7607(h) (2013). Proposed Defendant-Intervenors have actively participated in this process in the past and continue to do so in EPA's current review of the ozone NAAQS. Feldman Decl. ¶¶ 8-10.

Proposed Defendant-Intervenors have a substantial interest in their ability to participate effectively in this rulemaking process to develop a sound scientific record for final NAAQS decisions. *See id.* § 307(d)(6)(C), 42 U.S.C. § 7607(d)(6)(C) (2013) (final rule may not be based on any information not placed in rulemaking docket). EPA must set NAAQS at a level that is "requisite to protect the public health" (or, for secondary NAAQS, the public welfare), meaning that the standard must be no more and no less stringent than necessary. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475-76 (2001) (EPA must set NAAQS at level that is "not lower or higher than is necessary" to protect the public health with an adequate margin of safety.) This delicate balancing act is informed in part by scientific data and analysis submitted by commenters like Proposed Defendant-Intervenors. Several members of Proposed Defendant-Intervenors are currently preparing scientific studies to support EPA's ongoing review of the current ozone NAAQS. Feldman Decl. ¶¶ 9, 14. If EPA is forced to conduct its review and promulgate revised NAAQS on a compressed timeline, Proposed Defendant-Intervenors will be unable to complete and submit their studies or to otherwise provide adequate input on the ozone NAAQS, depriving them of their interest in participating meaningfully in the EPA rulemaking. An abbreviated timeline for administrative review would also inevitably deny EPA the time that it requires to adequately weigh the scientific evidence and develop NAAQS that are "requisite"

to protect the public health and welfare, resulting in uninformed decision-making that would ultimately harm Proposed Defendant-Intervenors' interests.

In addition, Proposed Defendant-Intervenors' participation in the rulemaking process affects their ability to protect their interests in any subsequent judicial review of any final action EPA takes. The record for judicial review of a NAAQS rulemaking consists exclusively of the administrative record, and petitioners may only present objections to a rule that were raised during the public comment period. *Id.* § 307(d)(7), 42 U.S.C. § 7607(d)(7). Accordingly, Proposed Defendant-Intervenors' ability to seek redress for any harm they suffer from EPA's ultimate action regarding the ozone NAAQS depends on their ability to participate fully during the rulemaking process.

This case involves significant interests of Proposed Defendant-Intervenors and its members that warrant intervention as of right. The revised ozone NAAQS that Plaintiffs seek will cause Proposed Defendant-Intervenors to incur additional costs at their facilities, and any remedial timetable for the promulgation of that standard will harm their procedural interest in participating effectively in that rulemaking.

C. The Disposition Of This Case Threatens To Impair Or Impede Proposed Defendant-Intervenors' Interests.

Intervention is appropriate where disposition of the case "may as a practical matter impair or impede" the ability of the intervenor to protect its interests. *See Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). In considering whether an applicant's interests may be impaired by an action, the Ninth Circuit follows the guidance of the Rule 24 Advisory Committee notes, which state: '"[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."' *See Sw. Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citation omitted). Thus, both legal harms and practical impediments should be considered.

As discussed above, Plaintiffs' claims and requested relief threaten the economic, property, and procedural interests of Proposed Defendant-Intervenors. Plaintiffs do not merely

seek to compel EPA to review its current NAAQS for ozone, leaving the Agency to exercise its own discretion regarding the adequacy of the current standard and the need for revised NAAQS Rather, but Plaintiffs seek to establish in this action that the current ozone NAAQS is inadequate and that, by not completing a review and revision of the ozone NAAQS, EPA has breached its nondiscretionary duty. *See* Compl. ¶ 6 ("This is an action to compel the Administrator . . . to adopt" revised NAAQS.); *see also id.* ¶¶ 4-5, 37-38. Furthermore, the Environmental Groups are asking this Court to enjoin continuation of this alleged breach by September 30, 2014. *Id*. ¶ 41(a)-(c). Therefore, if the Plaintiffs prevail in this case, EPA will be compelled to adopt more stringent NAAQS for ozone, which would impose significant financial burdens on members of Proposed Defendant-Intervenors and complicate the permitting process for new and existing facilities they own. Furthermore, because Plaintiffs seek to remove the issue of whether revision of the NAAQS is appropriate from the procedural safeguards of the administrative rulemaking arena, Proposed Defendant-Intervenors' procedural interests are at risk as well.

Any potential remedy or settlement agreement that confines EPA to a judicially enforceable timeline to review the current ozone NAAQS and to promulgate a revised standard as necessary would also impair the procedural interests of Proposed Defendant-Intervenors in participating effectively in the rulemaking. Any timeline must be sufficient to develop necessary scientific and technical information and to allow interested parties to prepare meaningful comments. Proposed Defendant-Intervenors' economic, property, and other interests would also be harmed if unreasonably short deadlines prevent EPA from developing scientifically supportable ozone NAAQS decisions. The abbreviated time frame that Plaintiffs demand—mandating completion of the "required review" by September 30, 2014—is plainly inadequate. Feldman Decl. ¶¶ 15-17. Plaintiffs would have EPA finalize its risk assessment and policy analysis, complete its consultation with CASAC, publish a proposed rule in the Federal Register, solicit comments, review those comments and respond to them as necessary, send its final rule to the Office of Management and Budget for mandatory review, and publish the final rule in the Federal Register, all in the span of one year or less. To meet this arbitrary deadline, EPA would

be forced to truncate the public comment period, depriving Proposed Defendant-Intervenors of their ability to fully represent their interests to EPA. The Agency would also likely be unable to adequately review and address issues raised in those comments before finalizing its rule. Moreover, EPA would have no time to respond to unforeseen issues that might arise during the rulemaking.

Because disposition of this action will impair the interests of Proposed Defendant-Intervenors and their members, this Court should grant them leave to intervene and defend those interests.

D. No Existing Party To This Case Will Represent Proposed Defendant-Intervenors' Interests Adequately.

Finally, the existing parties do not adequately represent the Proposed Defendant-Intervenors' interests. The required showing of inadequate representation is "minimal" and the standard is whether representation by current parties "*may* be" inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). As a practical matter, intervention should be granted when there is a serious possibility that the absentee's interest may not be adequately protected by any existing party. *United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980).

The Ninth Circuit considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898. The "most important factor" is "how the [intervenor's] interest compares with the interests of existing parties." *Id.*

Neither the Plaintiffs, who are seeking to compel the promulgation of more stringent air quality standards that would impose additional costs on Proposed Defendant-Intervenors, nor EPA, which would promulgate those standards, can be expected to represent the interests of Proposed Defendant-Intervenors. Although the government is typically presumed to represent

the interests of its constituents, *see id.*, in the present case the general interests of EPA are in fact distinct from the particularized interests of Proposed Defendant-Intervenors. EPA must consider a broad array of public interests, while Proposed Defendant-Intervenors, as members of the regulated community that resolution of this case will directly impact, have unique economic and procedural interests that are not likely to be advocated by EPA. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (intervenors' economic interests were "potentially more narrow and parochial than the interests of the public at large"); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (government represents "the broad public interest," not "the economic concerns" of a particular industry); *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 8 (D.D.C. 1993) (government's mandate to design and enforce an entire regulatory system precludes it from adequately representing particularized interest of a regulated individual). In these circumstances, agency representation of the regulated entities may (and most likely will) be inadequate.

If granted leave to intervene, Proposed Defendant-Intervenors are likely to assert arguments that EPA may not make. An applicant for intervention is not required to describe "specific differences in trial strategy" in order to demonstrate a possibility of inadequate representation. Proposed Defendant-Intervenors need only show that, "because of the difference in interests, it is likely that Defendants will not advance the same arguments." *Sw. Center for Biological Diversity*, 268 F.3d at 824 ("[I]t is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy."). At this early stage of litigation, before EPA has filed a responsive pleading, it is impossible to predict the Agency's ultimate position on the issues in this case. But it is safe to predict that EPA will not make all of Proposed Defendant-Intervenors' arguments, particularly arguments related to Proposed Defendant-Intervenors' information development and timing needs.

Moreover, beyond their different interests and objectives in this case, Proposed Defendant-Intervenors and EPA may disagree about issues during the course of litigation, especially the nature of any potential remedy or the terms of any potential settlement of the case.

Courts have recognized that an intervenor's interest in the terms of an action's resolution may differ substantially from that of the party the intervenor seeks to support. *See Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132-33 (2d Cir. 2001) (defendant may have interest in ending litigation through settlement that is against interest of potential intervenors); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 906-08, 912-13 (D.C. Cir. 1977) (interest in implementation of settlement sufficient grounds for intervention as of right). If the parties to this case propose a settlement agreement, EPA and Proposed Defendant-Intervenors may have substantially different views on the timeline for any potential remedy, particularly as to the appropriate comment period for any subsequent EPA rulemaking. Furthermore, because EPA is already performing the review of the 2008 ozone NAAQS that Plaintiffs seek, the Agency may present a less vigorous defense against this suit seeking to compel that review than would Proposed Defendant-Intervenors, and may be more willing to reach a settlement without contesting the merits of Plaintiffs' claims. *See Citizens for Balanced Use*, 647 F.3d at 900 (inadequate representation where agency less inclined to defend its action against merits of plaintiffs' claims); *Cal. Dump Truck Owners Ass'n*, 275 F.R.D. at 308 (California air agency did not adequately represent environmental group where agency's "current willingness to amend the Regulation" at issue indicates the agency is "willing to compromise unnecessarily to appease Plaintiff and settle this action.").

Accordingly, Proposed Defendant-Intervenors' interests will not be adequately represented by any existing party to this litigation. Proposed Defendant-Intervenors are likely to assert arguments that EPA is unlikely to make itself and will bring the otherwise unrepresented perspective of the regulated community to important elements of the case, such as discussions regarding the timeline of any potential remedy.

II. In the Alternative, Proposed Defendant-Intervenors Should Be Granted Permissive Intervention.

Even if this Court were to deny Proposed Defendant-Intervenors leave to intervene as of right, the Court should still grant them permissive intervention under Federal Rule of Civil

Procedure 24(b). Rule 24(b) provides the Court discretion to grant permissive intervention "[o]n timely motion" to anyone 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); *see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) ("[I]f there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention."), *abrogated on other grounds*, *Wilderness Soc'y. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)).

There is no question that this intervention is timely and advances defenses that share common questions of law or fact with the main action. As described in Section I.A *supra*, this motion is timely, given the limited amount of time that has elapsed since Plaintiffs filed their complaint and given that no answer or substantive motions have yet been filed. Permitting intervention here will not cause any delay or otherwise prejudice the parties to this case because there will be no need to reopen any prior proceedings between them. *See* Fed. R. Civ. P. 24(b)(3) (court must consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights"). In addition, Proposed Defendant-Intervenors' defenses involve numerous common issues of fact and law that overlap with those contained in Plaintiffs' complaint against EPA. Proposed Defendant-Intervenors' defenses in support of EPA and against the relief Plaintiffs seek will respond directly to Plaintiffs' claims, and both will likely address the nature of EPA's duty to review and revise the NAAQS, the legal adequacy of the current ozone NAAQS, and the factual issues related to the appropriate timing of any remedy. *See Kootenai Tribe of Idaho*, 313 F.3d at 1111 (requirements for permissive intervention satisfied where intervenors "assert 'defenses' of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action").

There is some question as to whether there is a third requirement for permissive intervention: that "the court has an independent basis for jurisdiction over the applicant's claims." *See Donnelly*, 159 F.3d at 412. Precedent in the Ninth Circuit is "not entirely uniform as to whether an independent jurisdictional basis is an absolute requirement for permissive

intervention." *Ctr. for Biological Diversity v. Lubchenco*, No. 09–04087 EDL, 2010 WL 1038398, at *9 (N.D. Cal. Mar. 19, 2010) (Laporte, C. Mag. J.). Rule 24 itself makes no mention of a need to demonstrate an independent basis for jurisdiction. *See* Fed. R. Civ. P. 24(b). In some cases, courts have denied applicants leave to intervene for failing to demonstrate an independent basis for jurisdiction, *see, e.g.*, *Nw. Forest Res. Council*, 82 F.3d at 839 (permissive intervention inappropriate because applicant "asserts no independent basis for jurisdiction"), while in many cases courts merely recite it as a necessary element without addressing the issue, s*ee, e.g.*, *Donnelly*, 159 F.3d at 412 (denying intervention for male employees seeking to intervene in female employees' discrimination suit and allege separate claims).

Other courts have indicated that the independent jurisdiction element is only required for permissive intervention where the applicant will also assert additional claims beyond those involved in the existing litigation. *See, e.g.*, *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) ("Here, however, an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits."); *Golden Eagle Ins. Co. v. Moon Marine (U.S.A.) Corp.*, No. C 12–05438 WHA, 2013 WL 594283, at *3 (N.D. Cal. Feb. 14, 2013) ("An independent jurisdictional basis is only required when the intervenor seeks 'to litigate a claim on the merits.'") (citation omitted). Notably, the Ninth Circuit in *Kootenai Tribe of Idaho* stated that although permissive intervention generally only requires a common question of law between the intervenor's claim or defense and the main action, 313 F.3d at 1111, the intervenors in that case were required to establish an independent basis for standing "in this unusual context" where the intervenors pursued the appeal but the government, which was the original defendant, did not, *id.* at 1109. The *Kootenai* court indicated that an independent showing of jurisdiction would not be required in "the more typical context where an entity seeks to intervene at the district court level . . . ." *Ctr. for Biological Diversity*, No. 09–04087 EDL, 2010 WL 1038398, at *10 (discussing *Kootenai Tribe of Idaho*, 313 F.3d at 1111).

In the present case, Proposed Defendant-Intervenors are not required to demonstrate an independent basis for this Court's jurisdiction to support their intervention in this case on behalf of EPA. This case is more akin to "the more typical context" in that Proposed Defendant-Intervenors merely wish to respond to Plaintiffs' claims and will not assert additional claims against any of the existing parties.

However, to the extent that Proposed Defendant-Intervenors must establish an independent basis for jurisdiction, one is provided by 28 U.S.C. § 1367(a) (2011), which states that:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

This supplemental jurisdiction includes "claims that involve the joinder or intervention of additional parties." *Id*. Plaintiffs themselves allege that this Court has original jurisdiction over their own claims. Compl. ¶ 7. The defenses that Proposed Defendant-Intervenors will present are directly responsive to the claims Plaintiffs assert, and thus form part of the same case or controversy. Therefore, Proposed Defendant-Intervenors satisfy all of the requirements for permissive intervention.

Conclusion

For the foregoing reasons, the Court should enter an Order granting Proposed Defendant-Intervenors the status of Intervenors in support of Defendants in this case and ordering that Proposed Defendant-Intervenors' Proposed Answer to Complaint for Declaratory and Injunctive Relief be filed as of the date of that order.

DATED: August 16, 2013

Respectfully submitted,

/s/ Henry V. Nickel

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