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7

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

10 THE NATIONAL ASSOCIATION OF HOME )  
11 BUILDERS, )

12 Plaintiff, )

13 v. )

14 THE SAN JOAQUIN VALLEY UNIFIED AIR )  
15 POLLUTION DISTRICT; and THE GOVERNING )  
16 BOARD OF THE SAN JOAQUIN VALLEY )  
UNIFIED AIR POLLUTION CONTROL )  
DISTRICT, )

17 Defendants, )

18 and )

19 ENVIRONMENTAL DEFENSE; and SIERRA )  
20 CLUB, )

21 Defendant-Intervenor-Applicants. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Case No. 1:07-cv-00820-LJO-DLB

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
ENVIRONMENTAL DEFENSE, *ET AL.*'S  
MOTION TO INTERVENE

Date: September 7, 2007

Time: 8:30 a.m.

Judge: Hon. Lawrence J. O'Neill

Place: Courtroom 4

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1 **INTRODUCTION**

2 On December 15, 2005, in response to overwhelming health concerns, Defendants, the San  
3 Joaquin Valley Unified Air Pollution Control District through its Governing Board (collectively,  
4 “District”), adopted rules designed to mitigate pollution from new construction in the San Joaquin  
5 Valley (“Valley”). Rule 9510 (“Indirect Source Review”) and Rule 3180 (“Administrative Fees for  
6 Indirect Source Review”) (collectively, “ISR Rules”) require that developers of larger residential,  
7 commercial and industrial projects incorporate pollution-reducing elements into their projects, or pay  
8 a fee to the District for required emission reductions that are not achieved. The fees, in turn, will be  
9 used by the District for funding emission reduction projects. Plaintiff National Association of Home  
10 Builders (“NAHB”) brought this action on June 6, 2007 challenging the ISR Rules.

11 The Proposed Intervenors are non-profit corporations with a history of interest in this matter.  
12 They seek to become parties to this action and unite with the District in defending against NAHB’s  
13 claims. The Proposed Intervenors have a direct and immediate interest in the outcome of this  
14 litigation, as many of their members reside in the San Joaquin Valley and breathe its polluted air.  
15 Without the ISR Rules, construction-related pollution will continue to increase unchecked, and the  
16 health of the Proposed Intervenors’ members, especially those who already suffer from asthma and  
17 other respiratory conditions, will worsen.

18 Proposed Intervenors therefore respectfully request that this Court grant them leave to  
19 intervene on behalf of the defendant District. Proposed Intervenors satisfy the requirements for  
20 intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, as well as the  
21 requirements for permissive intervention under Rule 24(b)(2).

22 **BACKGROUND**

23 **Air Pollution in the Valley**

24 Nearly four decades after Congress enacted the Clean Air Act to provide clean, healthy air to  
25 the public, the San Joaquin Valley remains one of the nation’s most dangerous places to breathe.  
26 Valley residents get no “off season” in which to enjoy clean air. The Valley suffers from significant  
27 levels of ozone during the hot summer months and dangerously high particulate matter levels during  
28 the winter. Air pollution is of special concern in the Valley as Fresno and Kern counties have the

1 highest childhood asthma rates in the State with approximately one in five children diagnosed with  
2 the disease – a number that is double the national average. *See* Declaration of Sarah Jackson in  
3 Support of Motion to Intervene (“Jackson Decl.”), Ex. 1 at 9 and 16. An estimated 157,000 children  
4 and adolescents in the San Joaquin Valley have been diagnosed with asthma, a number that has  
5 increased approximately 200% over the past twelve years. *Id.*, Ex. 1 at 11 and 15. The impacts of  
6 air pollution, including missed school and work days, increased hospital and emergency room visits,  
7 and increased reliance on medications, cost Valley residents a conservatively estimated \$3.2 billion  
8 each year. *Id.*, Ex. 2 at 10.

9       People living in the Valley are exposed to concentrations of ozone pollution that exceed the  
10 national ambient air quality standards established by the Environmental Protection Agency. *See* San  
11 Joaquin Valley Unified Air Pollution Control District, “2007 Ozone Plan,” at 1-7 (April 30, 2007)  
12 (available at [www.valleyair.org/Air\\_Quality\\_Plans/AQ\\_Final\\_Adopted\\_Ozone2007.htm](http://www.valleyair.org/Air_Quality_Plans/AQ_Final_Adopted_Ozone2007.htm)). Ozone is  
13 formed by the reaction of volatile organic compounds (“VOC”) and nitrogen oxides (“NO<sub>x</sub>”) in the  
14 atmosphere in the presence of sunlight. 69 Fed. Reg. 23858, 23859 (April 30, 2004). VOC and NO<sub>x</sub>  
15 are emitted by many types of pollution sources, including cars and trucks. *Id.* Exposure to ozone is  
16 a significant health concern, particularly for children and people with asthma and other respiratory  
17 diseases, and is associated with increased hospital and emergency room visits, school absences, and  
18 reduced activity and productivity due to suffering from ozone-related symptoms. *Id.* The Valley has  
19 been classified by the U.S. Environmental Protection Agency (“EPA”) as a serious nonattainment  
20 area for 8-hour ozone pollution. *Id.* at 23888-89. In April 2007, the District adopted a plan  
21 requesting that EPA reclassify the region to extreme nonattainment, the worst possible classification  
22 under the Clean Air Act, in order to reflect the severity of the Valley’s ozone pollution problem.  
23 2007 Ozone Plan, at 11-3.

24       The Valley also violates air quality standards for both fine and coarse particulate matter.  
25 “Particulate matter” describes a broad class of chemically and physically diverse substances existing  
26 as distinct solid or liquid particles that become suspended in the ambient air. *See* 62 Fed. Reg.  
27 38652, 38653 (July 18, 1997). These tiny particles bypass the body’s natural defenses to be inhaled  
28 deep into the lungs and may even pass into the bloodstream. Exposure to particles with a diameter

1 of 10 micrometers and smaller (“PM<sub>10</sub>”) can lead to aggravation of asthma, increased upper  
2 respiratory illness, and even chronic effects due to long-term exposure. *Id.* at 38668. In October  
3 2006 EPA made a finding that the Valley is attaining the standard for PM<sub>10</sub> in spite of several  
4 violations of the national standard. 71 Fed. Reg. 63642 (Oct. 30, 2006). Following that finding,  
5 monitors in the Valley recorded further violations. *See* Jackson Decl. ¶¶ 5, 6. EPA’s attainment  
6 finding does not change the Valley’s designation as a serious nonattainment area for PM<sub>10</sub>. 71 Fed.  
7 Reg. at 63663.

8 Valley residents breathe some of the highest concentrations of fine particulate air pollution in  
9 the State. *See* Jackson Decl., Ex 3. This term describes particles with a diameter of 2.5 micrometers  
10 or smaller (“PM<sub>2.5</sub>”), which come mainly from combustion activities. 71 Fed. Reg. 61144, 61146  
11 (Oct. 17, 2006). The health effects associated with PM<sub>2.5</sub> exposure are very serious and include  
12 aggravation of respiratory and cardiovascular diseases, lung disease, asthma attacks, heart attacks,  
13 and premature death. *See* 70 Fed. Reg. 65984, 65988 and 65991 (Nov. 1, 2005). Individuals with  
14 heart and lung disease, the elderly, and children are most sensitive to PM<sub>2.5</sub> exposure. *Id.* at 65988.  
15 Recognizing the seriousness of PM<sub>2.5</sub> exposure, EPA recently reduced the standard for maximum 24-  
16 hour concentrations of PM<sub>2.5</sub> from 65 micrograms per cubic meter (µ/m<sup>3</sup>) to a more health-protective  
17 level of 35 µ/m<sup>3</sup>. 71 Fed. Reg. at 61144 and 61146. Designations under the new standard have not  
18 yet been made, but the Valley remains a nonattainment area for the 1997 annual and 24-hour PM<sub>2.5</sub>  
19 standards. 70 Fed. Reg. 944, 956-57 (Jan. 5, 2005).

## 20 **The ISR Rules**

21 Section 110(a)(5) of the federal Clean Air Act allows states to include indirect source review  
22 programs as part of their plans to achieve national ambient air quality standards. 42 U.S.C.  
23 § 7410(a)(5)(A)(i). The Clean Air Act defines an indirect source as “a facility building, structure,  
24 installation, real property, road, or highway which attracts, or may attract, mobile sources of  
25 pollution.” *Id.* § 7410(a)(5)(C). An indirect source review program is “the facility-by-facility  
26 review of indirect sources of air pollution, including such measures as are necessary to assure, or  
27 assist in assuring, that a new or modified indirect source will not attract mobile sources of air  
28 pollution . . . .” *Id.* § 7410(a)(5)(D).

1 In 2003, in response to worsening air conditions, the California legislature passed Senate Bill  
2 709, which was codified as California Health and Safety Code Section 40604. This law mandated  
3 that the District regulate indirect sources of emissions, *i.e.*, those not directly emitted from activities  
4 at a location, but from vehicles traveling to and from a location, including construction sites.

5 The District's ISR Rules are designed to reduce nitrogen oxides and particulate matter  
6 emissions throughout the Valley by requiring developers to mitigate these emissions from their  
7 larger residential, commercial and industrial projects. *See* Jackson Decl., Ex. 4 at 9. If developers  
8 cannot make the necessary emissions reductions, they can mitigate any shortfall by paying a fee to  
9 the District, which would, in turn, fund clean-air projects. *Id.*, Ex. 4 at 13. However, developers can  
10 dramatically reduce the new fees by incorporating various pollution-reducing elements into their  
11 projects, such as sidewalks, bike lanes, and energy-efficient construction. *Id.*, Ex. 4 at 15-16.

### 12 **Proposed Intervenors and their Interest in this Litigation**

13 Each of the Proposed Intervenors in this case has a long history of working to improve air  
14 quality in the Valley. Environmental Defense is a national non-profit organization representing  
15 more than 1,800 San Joaquin Valley residents. Declaration of Megan Contakes in Support of  
16 Motion to Intervene ("Contakes Decl.") ¶ 5. Since the 1970's, Environmental Defense has been  
17 active in efforts to represent the health and environmental concerns of its San Joaquin Valley  
18 members. Declaration of Kathryn Phillips in Support of Motion to Intervene ("Phillips Decl.") ¶ 3.  
19 Environmental Defense's interest in the ISR Rules began in August of 2004, when it established a  
20 Central Valley air project to specifically address air pollution issues in the San Joaquin Valley. *Id.*  
21 ¶¶ 3, 5. Through this project, Environmental Defense spearheaded a successful campaign for the  
22 ISR Rules by investing significant time and effort in educating the public about the dangers of  
23 unchecked sprawl and pollution, and by soliciting significant donations in support of its efforts. *Id.*  
24 ¶¶ 5-10. It organized numerous meetings with District staff members and air quality advocates to  
25 discuss the ISR Rules and plans for development; solicited detailed explanations from air  
26 regulators of the model used to estimate indirect emissions; attended the District's public  
27 workshops on the proposed rules; drafted written comments on the new rules; produced a report on  
28 the ISR Rules' benefits; and coordinated with local and national media outlets to continue to

1 educate the public and raise awareness of the benefits of the ISR Rules. *Id.* It also organized  
2 editorial board meetings for other air advocates, testified in support of the ISR Rules at the  
3 District’s hearing preceding, monitored implementation progress with the District staff, and hired  
4 consultants to analyze cost-effective measures to mitigate indirect source emissions. *Id.*

5 The Sierra Club is a national environmental organization that represents nearly 5,000 San  
6 Joaquin Valley residents. Declaration of Steve Yaver in Support of Motion to Intervene (“Yaver  
7 Decl.”) ¶ 5. Over the last few years, Sierra Club has brought numerous actions against developers  
8 to hold them accountable for indirect source emissions. Declaration of Gordon Nipp in Support of  
9 Motion to Intervene (“Nipp Decl.”) ¶ 5. In fact, it was these lawsuits that provided the precedent  
10 for the new ISR Rules adopted by the District. *Id.* Along with Environmental Defense, the Sierra  
11 Club has been involved in the development and adoption of the ISR Rules. *Id.* ¶ 6. Its members  
12 have attended numerous public meetings and workshops on the ISR Rules, discussed the ISR Rules  
13 with District staff, and submitted written comments to the District Governing Board. *Id.*

## 14 ARGUMENT

### 15 I. Proposed Intervenors Are Entitled to Intervene as of Right in this Litigation.

16 Federal Rule of Civil Procedure 24(a) provides:

17 Upon timely application anyone shall be permitted to intervene in an action . . . when  
18 the applicant claims an interest relating to the property or transaction which is the  
19 subject of the action and the applicant is so situated that the disposition may as a  
20 practical matter impair or impede the applicant’s ability to protect that interest, unless  
the applicant’s interest is adequately represented by existing parties.

21 Fed. R. Civ. P. 24(a).

22 The Ninth Circuit “construe[s] Rule 24(a) liberally in favor of potential intervenors.”

23 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006). According to the  
24 Ninth Circuit:

25 A liberal policy in favor of intervention serves both efficient resolution of issues and  
26 broadened access to the courts. By allowing parties with a *practical* interest in the  
27 outcome of a particular case to intervene, [courts] often prevent or simplify future  
28 litigation involving related issues [and] at the same time . . . allow an additional  
interested party to express its views before the court.

1 *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (emphasis  
2 in original). “Courts are to take all well-pleaded, nonconclusory allegations in the motion to  
3 intervene, the proposed complaint or answer in intervention, and declarations supporting the motion  
4 as true absent sham, frivolity or other objections.” *Southwest Ctr. for Biological Diversity v. Berg*,  
5 268 F.3d 810, 820 (9th Cir. 2001).

6 The Ninth Circuit has established a four-part test to determine whether intervention as a  
7 matter of right is warranted:

8 (1) the motion must be timely; (2) the applicant must claim a “significantly  
9 protectable” interest relating to the property or transaction which is the subject of the  
10 action; (3) the applicant must be so situated that the disposition of the action may as a  
practical matter impair or impede its ability to protect that interest; and (4) the  
applicant’s interest must be inadequately represented by the parties to the action.

11 *California ex rel. Lockyer*, 450 F.3d at 440 (quoting *Sierra Club v. Environmental Prot. Agency*, 995  
12 F.2d 1478, 1481 (9th Cir. 1993)). Proposed Intervenors in this case readily satisfy these elements.

13 **A. Proposed Intervenors’ Motion to Intervene Is Timely.**

14 “Courts weigh three factors in determining whether a motion to intervene is timely: (1) the  
15 stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties;  
16 and (3) the reason for and length of the delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915,  
17 921 (9th Cir. 2004) (quotation omitted).

18 Under this test, Proposed Intervenors’ motion is timely. Only two months have passed since  
19 NAHB filed its Complaint, and this action is in its very early stages. No administrative record has  
20 been filed, and the Court has not yet issued any substantive orders or rulings. Proposed Intervenors  
21 are able to abide by the Court’s Scheduling Order. Under these circumstances, intervention will not  
22 prejudice the existing parties or delay the proceedings. *See, e.g., Idaho Farm Bureau Fed’n v.*  
23 *Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that intervention is timely when “filed at a very  
24 early stage, before any hearings or rulings on substantive matters”); *Modesto Irrigation Dist. v.*  
25 *Gutierrez*, No. CIV-F-06-00453 (OWW) (DLB), 2007 WL 164953, at \*1 (E.D. Cal. 2007) (finding a  
26 motion to intervene timely where no substantive motions had yet been filed).

27 **B. Proposed Intervenors Have Significant Protectable Interests in the ISR Rules.**

28 An applicant for intervention “must claim a significantly protectable interest relating to the

1 property or transaction which is the subject of the action.” *California ex rel. Lockyer*, 450 F.3d at  
2 440 (quotations omitted). According to the Ninth Circuit, the interest requirement “is primarily a  
3 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is  
4 compatible with efficiency and due process.” *Southern California Edison Co. v. Lynch*, 307 F.3d  
5 794, 803 (9th Cir. 2002) (quotations omitted). Thus, “[a]n applicant has a ‘significant protectable  
6 interest’ in an action if (1) it asserts an interest that is protected under some law, and (2) there is a  
7 ‘relationship’ between its legally protected interest and the plaintiff’s claims.” *California ex rel.*  
8 *Lockyer*, 450 F.3d at 441 (quotations omitted). *Cf. California State Grange v. Nat’l Marine*  
9 *Fisheries Serv.*, No. 1:06-CV-00308 (OWW) (DLB), 2006 WL 3147681, at \*2 (E.D. Cal. 2006).  
10 Proposed Intervenors meet this test.

11 **1. Proposed Intervenors’ Interests in the ISR Rules Are Protected By Law.**

12 As set forth above, Proposed Intervenors are nonprofit organizations whose purposes and  
13 missions include the protection and restoration of the environment. *See* Contakes Decl. ¶ 3; Yaver  
14 Decl. ¶ 2. Members of the Proposed Intervenors live, work and recreate in the Valley and, along  
15 with the professional staff of the Proposed Intervenors, have been actively engaged in the  
16 development, adoption and implementation of the ISR Rules. *See* Declaration of Dr. David  
17 Lighthall in Support of Motion to Intervene (“Lighthall Decl.”) ¶¶ 2, 5; Nipp Decl. ¶¶ 5, 6, 8, 9.

18 Proposed Intervenors need not show that their interest in air quality and the ISR Rules is  
19 protected by the Supremacy Clause – the law under which this litigation is brought. Instead, “[i]t is  
20 enough that the interest is protectable under *any statute*.” *Alisal Water Corp.*, 370 F.3d at 919  
21 (emphasis added). *See also Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003) (upholding order  
22 allowing private citizens to intervene in Voting Rights Act preclearance case even though they could  
23 not have filed the suit on their own and would not have been properly named as original defendants).  
24 Accordingly, it is sufficient that Proposed Intervenors’ interests in air quality are protectable under a  
25 number of environmental statutes. For example, Proposed Intervenors’ interest in clean air in the  
26 Valley is protected under the federal Clean Air Act. *See, e.g.*, 42 U.S.C. §§ 7401(b)(1) (identifying  
27 protection and enhancement of air quality to promote public health and welfare as one purpose of the  
28 Clean Air Act), 7604(a)(1) (creating citizen suit authority to enforce state pollution control measures

1 adopted under the Clean Air Act). The District adopted the ISR Rules as a key part of the District's  
2 strategy to meet the federal Clean Air Act requirement to achieve the national ambient air quality  
3 standards for ozone and particulate matter. *See* Jackson Decl., Ex. 4 at 23. Thus, Proposed  
4 Intervenors' involvement in this case to defend the legality of the ISR Rules is likewise key to  
5 protecting their interests in improving the air quality in the Valley.

6 **2. There Is a Relationship Between Proposed Intervenors' Interests and**  
7 **NAHB's Claims in this Case.**

8 There also exists the requisite "relationship" between Proposed Intervenors' interests in the  
9 ISR Rules and NAHB's claims in this case. The Ninth Circuit has "taken the view that a party has a  
10 sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a  
11 result of the pending litigation." *California ex rel. Lockyer*, 450 F.3d at 441. Accordingly, "[t]he  
12 relationship requirement is met if the resolution of the plaintiff's claims actually will affect the  
13 applicant." *Southern California Edison Co.*, 307 F.3d at 803 (quotations omitted).

14 Here, NAHB asks this Court to declare that the ISR Rules are invalid and to bar the District  
15 from implementing or enforcing the rules. *See* Complaint for Declaratory and Injunctive Relief  
16 ("Compl.") at 20. Such a result would eliminate the projected emission reductions provided by the  
17 ISR Rules and hamper the ability of the District to achieve clean air in the Valley as required by the  
18 Clean Air Act.

19 In short, because the resolution of NAHB's claims in this case threatens to impair Proposed  
20 Intervenors' legally protectable interests in the ISR Rules, there is a relationship between those  
21 interests and NAHB's claims in this case. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-  
22 28 (9th Cir. 1983) (finding conservation groups' "environmental, conservation, and wildlife  
23 interests" sufficient for intervention as of right under Rule 24(a)); *California State Grange*, 2006  
24 WL 3147681, at \*3 (holding that a challenge to a regulation protecting imperiled steelhead  
25 constitutes sufficient impairment to fishing advocates' interests).

26 **C. Proposed Intervenors' Interests May Be Impaired as a Result of This Litigation.**

27 Under the third prong of the Rule 24(a) intervention test, an applicant for intervention as of  
28 right must be "so situated that the disposition of the action *may* as a practical matter impair or

1 impede the applicant’s ability to protect that interest.” Fed. R. Civ. P. 24(a) (emphasis added). The  
2 Ninth Circuit views this impairment requirement “as a practical matter,” meaning that the analysis  
3 “is not limited to consequences of a strictly legal nature.” *Forest Conservation Council*, 66 F.3d at  
4 1498 (quoting *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345  
5 (10th Cir. 1978)). Rather, “[i]f an absentee would be substantially affected in a practical sense by  
6 the determination made in an action, he should, as a general rule, be entitled to intervene.”  
7 *California ex rel. Lockyer*, 450 F.3d at 442 (citing the Advisory Committee Notes for Rule 24(a)).  
8 In this case, members and staff of the Proposed Intervenors have been actively engaged in the  
9 development, approval and implementation of the ISR Rules. See Lighthall Decl. ¶¶ 4, 5; Phillips  
10 Decl. ¶¶ 5-10; Nipp Decl. ¶ 6. As described above, the ISR Rules are a key part of the District’s  
11 strategy to achieve the national ambient air quality standards in the Valley. Invalidation of the rules  
12 will undermine the efforts of Proposed Intervenors to see these rules adopted, and threaten their  
13 overall interest in achieving clean air in the Valley.

14 **D. The Existing Parties to this Litigation Do Not Represent Adequately Proposed**  
15 **Intervenors’ Interests.**

16 While it is incumbent on Proposed Intervenors to demonstrate that the existing parties to the  
17 litigation do not represent adequately their interests, “the burden of showing inadequacy is  
18 ‘minimal,’ and the applicant need only show that representation of its interests by existing parties  
19 ‘may be’ inadequate.” *Southwest Ctr. for Biological Diversity*, 268 F.3d at 823 (quoting *Trbovich v.*  
20 *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Cf. *Modesto Irrigation Dist.*, 2007 WL  
21 164953, at \*2 (noting that the burden of showing inadequacy of representation is “minimal”).

22 In this case, it is clear that NAHB does not represent Proposed Intervenors’ interests.

23 Proposed Intervenors’ interests are likewise inadequately represented by the District in this  
24 litigation. Although the Ninth Circuit has recognized a general presumption that the government  
25 will adequately represent the interests of the public at large, that presumption is overcome when  
26 there exists “a likelihood that the government will abandon or concede a potentially meritorious  
27 reading of the statute [at issue].” *California ex rel. Lockyer*, 450 F.3d at 444. Of course, it is not  
28 Proposed Intervenors’ burden at this early stage in the litigation to “anticipate specific differences”

1 in the District’s statutory interpretation or litigation position. *See Southwest Ctr. for Biological*  
2 *Diversity*, 268 F.3d at 824. Rather, “[i]t is sufficient for [Proposed Intervenors] to show that,  
3 because of the difference in interests, it is likely that Defendants will not advance the same  
4 arguments as [Proposed Intervenors].” *Id.*

5 In this case, Proposed Intervenors’ interests differ from those of the District. *See also Forest*  
6 *Conservation Council*, 66 F.3d at 1499 (“Inadequate representation is most likely to be found when  
7 the applicant asserts a personal interest that does not belong to the general public.”) (quotation  
8 omitted). The Proposed Intervenors’ interests are in the health of their members. By contrast, the  
9 District’s interest is in the administration of its legal obligations. As such, the District is motivated  
10 by cost and political pressures that are not coextensive with the interests of the Proposed Intervenors.

11 Because the District’s interests do not mirror those of Proposed Intervenors, it is likely that  
12 the District will not advance the same legal arguments as Proposed Intervenors in this case. For  
13 example, the pressures on the District may lead it to avoid admitting or arguing that it has broad  
14 statutory authority to regulate these sources because such claims could open the District to demands  
15 to adopt controls above and beyond those contained in the ISR Rules.

16 In short, because neither NAHB nor the District will “undoubtedly make all” of Proposed  
17 Intervenors’ arguments, Proposed Intervenors’ are inadequately represented by the existing parties in  
18 this litigation. *See Forest Conservation Council*, 66 F.3d at 1498-99. *See also Modesto Irrigation*  
19 *Dist.*, 2007 WL 164953, at \*2 (holding that federal defendants did not adequately represent  
20 environmental groups’ interest because “the parties may take different positions on both the merits  
21 and any appropriate remedy”); *California State Grange*, 2006 WL 3147681, at \*4 (holding that  
22 federal defendants would not adequately represent environmental groups’ interests because they had  
23 a recent history of refusing to advance available arguments in defense of their determinations under  
24 the Endangered Species Act).

## 25 **II. Alternatively, Proposed Intervenors Satisfy the Standard for Permissive Intervention.**

26 As set forth above, Proposed Intervenors meet the requirements for intervention as of right  
27 under Federal Rule of Civil Procedure 24(a)(2). Alternatively, Proposed Intervenors also meet the  
28 requirements for permissive intervention under Federal Rule of Civil Procedure 24(b)(2), which

1 provides that “*anyone* may be permitted to intervene in an action . . . when an applicant’s claim or  
2 defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b)  
3 (emphasis added). *See also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir.  
4 2002) (“[A]ll that is necessary for permissive intervention is that intervenor’s claim or defense and  
5 the main action have a question of law or fact in common.”) (quotation omitted).

6 Proposed Intervenors’ claims and defenses in this case will raise questions of law and fact in  
7 common with the main action. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329  
8 (9th Cir. 1977) (holding that permissive intervention is appropriate when the applicant’s  
9 involvement will “contribute to full development of the underlying factual issues in the suit and to  
10 the just and equitable adjudication of the legal questions presented”).

11 Furthermore, Proposed Intervenors’ intervention will not cause any delay or prejudice to the  
12 existing parties in this case. *See Modesto Irrigation Dist.* 2007 WL 164953, at \*2 (considering  
13 whether permissive intervention “will unduly delay or prejudice the adjudication of the rights of the  
14 original parties”).

15 In sum, given the importance of the issues involved, the significant interests of Proposed  
16 Intervenors in the ISR Rules, and the early stage of this case, permissive intervention is also  
17 appropriate pursuant to Rule 24(b). *See Kootenai Tribe of Idaho*, 313 F.3d at 1111 (holding that an  
18 “interest in the use and enjoyment” of roadless areas was sufficient to support permissive  
19 intervention in a case that challenged rules protecting those areas from harmful development).

## 20 CONCLUSION

21 For all of the forgoing reasons, Proposed Intervenors should be granted intervention as of  
22 right in this case under Rule 24(a). However, should the Court decide that Proposed Intervenors  
23 have not satisfied the requirements of Rule 24(a), Proposed Intervenors ask the Court to exercise its  
24 broad discretion and allow them to intervene pursuant to Rule 24(b).

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Respectfully submitted,

Dated: August 7, 2007

/s/ Paul R. Cort  
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