

1 DAVID PETTIT (SBN 67128)
2 dpettit@nrdc.org
3 MELISSA LIN PERRELLA (SBN 205019)
4 mperrella@nrdc.org
5 ADRIANO MARTINEZ (SBN 237152)
6 amartinez@nrdc.org
7 NATURAL RESOURCES DEFENSE COUNCIL
8 1314 Second Street
9 Santa Monica, California 90401
10 Telephone: (310) 434-2300
11 Facsimile: (310) 434-2399

12 Attorneys for Proposed Defendants-Intervenors
13 Natural Resources Defense Council, Inc., Sierra
14 Club and Coalition for Clean Air.

15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 AMERICAN TRUCKING ASSOCIATION,
18 INC.,

19 Plaintiffs,

20 v.

21 THE CITY OF LOS ANGELES, THE
22 HARBOR DEPARTMENT OF THE CITY
23 OF LOS ANGELES, THE BOARD OF
24 HARBOR COMMISSIONERS OF THE
25 CITY OF LOS ANGELES, THE CITY OF
26 LONG BEACH,

27 Defendants,

28 NATURAL RESOURCES DEFENSE
COUNCIL, INC., SIERRA CLUB, AND
COALITION FOR CLEAN AIR,

Defendants-Intervenors.

Case No. CV08-04920 CAS
(CTx)

NOTICE OF MOTION AND
MOTION TO INTERVENE
OF NATURAL RESOURCES
DEFENSE COUNCIL,
SIERRA CLUB AND
COALITION FOR CLEAN
AIR; MEMORANDUM OF
POINTS AND
AUTHORITIES AND
DECLARATIONS IN
SUPPORT THEREOF

Date: August 25, 2008

Time: 10:00 a.m.

Judge: Hon. Christina
Snyder

Courtroom: 5

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on August 25, 2008 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 5 of the above-entitled court located at 312 North Spring Street, Los Angeles, California, Proposed Intervenors Natural Resources Defense Council, Inc. (“NRDC”), Sierra Club, and Coalition for Clean Air (“CCA”) will and hereby do respectfully move this Court to intervene as Defendants as of right pursuant to Federal Rule of Civil Procedure 24(a), or in the alternative, for leave for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

The motion will be made on the grounds that good cause exists therefore because (a) this motion, which is filed before any substantial activity has occurred in the case, is plainly timely; (b) NRDC’s, Sierra Club’s and CCA’s members’ interests in reducing diesel emissions that harm their health, as well as the Proposed Intervenors’ active engagement in and support of the Ports of Los Angeles’ and Long Beach’s right to adopt concession plans aimed at making port trucking more efficient which is at issue in this case, are “significantly protectable interests” in the subject matter of the case; (c) a decision in Plaintiff’s favor enjoining the implementation and enforcement of the Clean Trucks Plans would directly impair NRDC’s, Sierra Club’s and CCA’s ability to protect their and their members’ interests in reducing diesel emissions from the more than 16,000 port-serving diesel trucks in the Los Angeles and Long Beach areas and in upholding regulations the adoption of which they actively advocated; and (d) Defendants may not adequately represent NRDC’s, Sierra Club’s and CCA’s interests because, as public proprietary entities, they must balance resource constraints and the interests of various constituencies – some of which (such as those of Plaintiff) are at odds with the proposed intervenors’ interests – and have often taken positions on port-

1 related policy and regulatory matters contrary to NRDC's, Sierra Club's and
2 CCA's position.

3 This Motion is based on this Notice of Motion and accompanying
4 Memorandum of Points and Authorities, the concurrently filed Declarations of
5 David Pettit, Tom Politeo, and Martin Schlageter, the pleadings and papers on file
6 herein, and such other matters as may be presented to the Court at the time of the
7 hearing.

8
9 Dated: July 31, 2008 Respectfully submitted,

10
11 DAVID PETTIT
12 MELISSA LIN PERRELLA
13 ADRIANO MARTINEZ
14 NATURAL RESOURCES DEFENSE COUNCIL
15 1314 Second Street
16 Santa Monica, CA 90401
17 Telephone: (310) 434-2300
18 Facsimile: (310) 434-2399

19
20 By: /s/ David Pettit
21 DAVID PETTIT

22 Attorneys for Proposed Defendants-Intervenors
23 Natural Resources Defense Council, Inc., Sierra
24 Club and Coalition for Clean Air.
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND 2

III. THE INTERESTS OF NRDC, SIERRA CLUB AND
COALITION FOR CLEAN AIR 5

 A. Natural Resources Defense Council..... 5

 B. Sierra Club..... 6

 C. Coalition for Clean Air..... 8

IV. ARGUMENT..... 9

 A. NRDC, Sierra Club and CCA Are Entitled to Intervene as of
 Right Under FRCP 24(a)..... 9

 1. This Motion to Intervene Is Timely..... 10

 2. NRDC, Sierra Club and CCA Have Protectable Interests
 in this Action..... 11

 3. Absent Intervention, NRDC’s, Sierra Club’s and CCA’s
 Interests Would Be Impaired. 13

 4. NRDC’s, Sierra Club’s and CCA’s Interests in this Action
 are not Adequately Represented by the Named
 Defendants. 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. Alternatively, Permissive Intervention is
Warranted. 15

V. CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Bureerong v. Uvawas, 167 F.R.D. 83 (C.D. Cal. 1996)16

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980)..... 1, 11, 14

Donnelly v. Glickman, 159 F.3d 405 (9th Cir. 1998)10

Engine Manufacturers Ass’n v. SCAQMD, 498 F.3d 1031 (9th Cir. 2007)6, 9

Forest Conservation Council v. U.S. Forest Serv.,
66 F.3d 1489 (9th Cir. 1995) 10, 13

Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.,
528 U.S. 167 (2000)12

Greene v. United States, 996 F.2d 973 (9th Cir. 1993)15

Idaho Farm Bureau Fed’n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995)..... 11, 12

In re Cal. Micro Devices Sec. Litig., 168 F.R.D. 276 (N.D. Cal. 1996)11

Legal Aid Soc’y v. Brennan, 608 F.2d 1319 (9th Cir. 1979)12

Northwest Forest Resource Council v. Glickman,
82 F.3d 825 (9th Cir. 1996).....11

NRDC v. City of Los Angeles, 103 Cal.App.4th 268 (Cal. Ct. App. 2002)9

NRDC v. United States Army Corp of Engineers, No. CV-02-04793 MMM(Ex)
(C.D. Cal. filed June 18, 2002).....9

Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967)11

Pacific Merchant Shipping Ass’n v. Goldstene, 517 F.3d 1108 (9th Cir. 2008)...6, 9

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 12, 13

Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994)..... 14, 15

Sierra Club v. Env’tl. Prot. Agency, 995 F.2d 1478 (9th Cir. 1993) 10, 11, 13

Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001).....10

Trbovich v. United Mine Workers, 404 U.S. 528 (1972).....13

United States ex rel. Killingsworth v. Covington Techs. Co.,
967 F.2d 1391 (9th Cir. 1992)10

1 *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990).....10
2 *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989).....15
3 *Washington State Bldg. & Constr. Trades Council v. Spellman*,
4 684 F.2d 627 (9th Cir. 1982)12
5 **Statutes**
6 28 U.S.C. § 136715
7 Advisory Committee Notes to 1966 Amend., Fed. R. Civ. P. 24.....13
8 Federal Rule of Civil Procedure 24(a) passim
9 Federal Rule of Civil Procedure 24(b)..... 1, 15, 17

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rule of Civil Procedure 24(a), Natural Resources
4 Defense Council (“NRDC”), Sierra Club, and Coalition for Clean Air (“CCA”)
5 respectfully move to intervene as of right as defendants in this action, in which the
6 American Trucking Association, Inc. (“Plaintiff”) challenges the validity of tariffs
7 (the “Clean Trucks Plans”) enacted by the Port of Los Angeles and the Port of
8 Long Beach (the “Ports”) designed to clean up the deadly public health problem
9 caused by the more than 16,000 diesel trucks serving the Ports.

10 In the alternative, NRDC, Sierra Club and CCA seek leave for permissive
11 intervention under Federal Rule of Civil Procedure 24(b). Defendants, the City of
12 Los Angeles, the Harbor Department of the City of Los Angeles, the Board of
13 Harbor Commissioners of the City of Los Angeles, the City of Long Beach, the
14 Harbor Department of the City of Long Beach, and the Board of Harbor
15 Commissioners of the City of Long Beach, do not oppose this motion and Plaintiff
16 stated that “[t]he American Trucking Associations, Inc. does not agree with the
17 fundamental basis for your clients' intervention, that is that the clean air aspects of
18 the Program's will be undercut. However, the ATA does not object to your clients'
19 participation as long as that participation does not delay the prosecution of the case
20 including the preliminary injunction request.” *See* Declaration of David Pettit in
21 Support of Motion to Intervene of NRDC, Sierra Club, and CCA (“Pettit Decl.”),
22 at ¶¶ 15, 16, 17.

23 NRDC, Sierra Club and CCA satisfy the four requirements under Rule 24(a)
24 for intervention as of right. Fed. R. Civ. P. 24(a); *see generally County of Fresno*
25 *v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). First, this motion, which is filed
26 before any substantial activity has occurred in the case, is plainly timely. Second,
27 NRDC’s, Sierra Club’s and CCA’s members’ interests in reducing diesel emissions
28 that harm their health, as well as the proposed intervenors’ active engagement in

1 and support for the right of the Ports to adopt concession plans, are “significantly
2 protectable interests” in the subject matter of the case. Third, a decision in
3 Plaintiff’s favor enjoining the implementation and enforcement of the Clean
4 Trucks Plans would directly impair NRDC’s, Sierra Club’s and CCA’s ability to
5 protect their and their members’ interests in reducing diesel emissions from the
6 more than 16,000 Port-serving diesel trucks and in upholding a clean-up program
7 that they worked hard to achieve. Finally, Defendants may not adequately
8 represent NRDC’s, Sierra Club’s, and CCA’s interests because, as public
9 proprietary entities, they must balance resource constraints and the interests of
10 various constituencies – some of which (such as those of Plaintiff) are at odds with
11 the proposed intervenors’ interests – and have often taken positions on port policy
12 and regulatory matters contrary to NRDC’s, Sierra Club’s and CCA’s interests.

13 **II. FACTUAL AND PROCEDURAL BACKGROUND**

14 NRDC, Sierra Club, and CCA (“Proposed Intervenors”) have been working
15 for years to clean up diesel particulate pollution resulting from the transport of
16 freight. One of the highlights of this struggle has been our effort to clean up the
17 Ports, collectively the largest and most polluted port complex in the United States.
18 The Ports are the largest fixed source of air pollution in the South Coast Air Basin,
19 accounting for more smog and particulate-forming nitrogen oxides than the 6
20 million cars in the region. Pettit Decl., at ¶ 10. The Ports emitted more than 2,200
21 tons of diesel particulates in 2006, which amounts to roughly 25% of the diesel
22 particulate matter emissions in the region. *See Id.* Emissions from Port-serving
23 diesel trucks account for roughly half of all Ports-related diesel particulate
24 emissions. *Id.* Because of the chaotic structure of port trucking, the Ports tend to
25 attract amongst the oldest, dirtiest trucks in the fleet. As the saying goes, the Ports
26 are where old, inefficient trucks go to die. *Id.* at ¶ 11.

27 The United States Environmental Protection Agency (“EPA”) and the
28 California Air Resources Board (“CARB”) have each concluded that diesel

1 particulate matter (“PM”) is carcinogenic.¹ Increased incidence of cancer, asthma,
2 respiratory and cardiac conditions are attributed to inhalation of diesel PM.²
3 CARB has estimated that pollution from goods movement in California contributes
4 to 3,700 premature deaths per year, and that most of this pollution comes from
5
6
7

8 ¹ See CARB, Diesel Particulate Matter Exposure Assessment Study for the
9 Ports of Los Angeles and Long Beach, Final Report (Apr. 2006), *available at*
10 <http://www.arb.ca.gov/regact/marine2005/portstudy0406.pdf>; Control of Emissions
11 From New Marine Compression-Ignition Engines at or Above 30 Liters per
12 Cylinder; Proposed Rule, 72 Fed. Reg. 69522 (proposed Dec. 7, 2007) (to be
13 codified at 40 CFR pts. 9 & 94), *available at* [http://www.epa.gov/fedrgstr/EPA-](http://www.epa.gov/fedrgstr/EPA-AIR/2007/December/Day-07/a23556.pdf)
14 [AIR/2007/December/Day-07/a23556.pdf](http://www.epa.gov/fedrgstr/EPA-AIR/2007/December/Day-07/a23556.pdf); U.S. EPA Health Assessment
15 Document for Diesel Engine Exhaust (May 2002), *available at*
16 <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060>.

17 ² In its Emission Reduction Plan for Ports and Goods Movement in
18 California (March 2006), (*available at*
19 http://www.arb.ca.gov/planning/gmerp/march21plan/march22_plan.pdf), CARB
20 stated that goods movement-related air pollution can increase all-cause mortality,
21 cardiopulmonary mortality and lung cancer mortality in adults, infant mortality,
22 hospital admissions for all pulmonary illnesses, chronic obstructive pulmonary
23 disease, pneumonia, asthma, and all cardiovascular illnesses. It can also contribute
24 to pre-term births and lower birth weight. Sensitive groups, including children and
25 infants, the elderly, and people with heart or lung disease, can be at increased risk
26 of experiencing harmful effects from exposure to air pollution. CARB also found
27 that people living in communities close to the source of goods movement-related
28 emissions, such as ports, rail yards and inter-modal transfer facilities are likely to
suffer greater health impacts and these impacts will likely add to an existing health
burden. CARB noted that studies have shown associations between traffic-related
pollution and effects in children, including chronic bronchitis symptoms, wheeze,
cough, allergic rhinitis, asthma induction, and upper and lower respiratory tract
infections. Recent evidence indicates that air pollution exposure can impair lung
function growth in children. The long-term consequences of lower lung function
can include shorter lifespan, as lung function peaks in young adulthood and
declines thereafter; lung function is the most significant predictor of mortality in
the elderly.

1 trucks.³ NRDC and the Coalition for Clean and Safe Ports recently released a
2 study on the exposure of port truck drivers to diesel exhaust at the Port of Oakland.
3 The study, which included measurements of pollution inside the cab of trucks
4 while drivers were working, found that port drivers are exposed to 2,000 time
5 higher cancer risk than in surrounding Oakland neighborhoods. Pettit Decl., at ¶ 7.
6 The recently released version of the Multiple Air Toxic Exposure Study by the
7 South Coast Air Quality Management District found that 84% of the air toxic risk
8 in the South Coast Air Basin is from diesel PM, which also contributes 87% of the
9 potency-weighted emissions of carcinogens. Pettit Decl., at ¶ 13.

10 In February and March, 2008, the Ports, after years of advocacy by NRDC,
11 Sierra Club, CCA, and other community and labor groups, enacted clean trucks
12 programs based on the idea that the Ports can and must control which trucks come
13 onto their property. The plans are each premised on the requirement that trucking
14 companies that want to serve the Ports need to enter into concession agreements
15 that contain certain environmental standards, including a progressive ban on older,
16 dirtier trucks. The two plans differ in that the Los Angeles plan will phase in a
17 requirement for employee drivers and the Long Beach plan will not, but this
18 difference is not significant in terms of most, if not all, of the underlying legal
19 issues that may arise during the course of this litigation.⁴ Beginning in October,
20 2008, trucks older than 1989 will be denied admittance to the Ports. Pettit Decl., at
21 ¶ 11. The purchase or lease of new, relatively clean trucks by trucking companies

23 ³ CARB, Methodology for Estimating Premature Deaths Associated with
24 Long-term Exposures to Fine Airborne Particulate Matter in California, p. 37 (May
25 2008), available at [http://www.arb.ca.gov/research/health/pm-mort/pm-](http://www.arb.ca.gov/research/health/pm-mort/pm-mortdraft.pdf)
26 [mortdraft.pdf](http://www.arb.ca.gov/research/health/pm-mort/pm-mortdraft.pdf); see also Janet Wilson, *Up to 24,000 Deaths a Year in California Are*
27 *Linked to Air Pollution*, L.A. Times, May 22, 2008, at B3, available at
<http://articles.latimes.com/2008/may/22/local/me-deaths22>.

28 ⁴ Descriptions of the Clean Trucks Programs may be found at:
<http://www.portoflosangeles.org/environment/ctp.asp> and
<http://www.polb.com/environment/cleantrucks/default.asp>.

1 who sign concession agreements will be funded through fees on cargo containers
2 imposed by both ports, to be paid by the beneficial cargo owners (e.g., Wal-Mart).
3 Pettit Decl., at ¶ 11. In Proposed Intervenor’s view, and the views of Long Beach
4 Mayor Foster and Los Angeles Mayor Villaraigosa, these programs are essential to
5 cleaning up the Ports.

6 On July 28, 2008, Plaintiff filed this suit. The Complaint seeks to have this
7 Court “declare void and permanently enjoin the enforcement of two ‘Concession
8 Plans’” based on claims that the plans are preempted by the Federal Aviation
9 Administration Authorization Act of 1994 (“FAAA”), 49 U.S.C. §14501 *et. seq.*
10 and “violat[ion of] the right and ability of Plaintiff’s members to be free of
11 unreasonable burdens on interstate commerce.” *See American Trucking*
12 *Association, Inc. Complaint For Declaratory Judgment and Injunctive Relief*
13 *(“Plaintiff Complaint”)*, at ¶¶ 2, 3. No substantive proceedings have occurred.

14 **III. THE INTERESTS OF NRDC, SIERRA CLUB AND CCA**

15 **A. Natural Resources Defense Council.**

16 NRDC is a national non-profit organization with offices in Santa Monica,
17 California, and other cities. NRDC has more than 429,000 members nationwide,
18 many of whom reside in communities adjacent to the Port of Los Angeles. Pettit
19 Decl., at ¶ 2. One of NRDC’s organizational purposes is to protect the
20 environment and public health, including the environment and health of its
21 members. *Id.* Reducing harmful diesel pollution is a key component of this work.
22 *Id.* NRDC has identified port operations as a significant source of diesel pollution
23 in California. *Id.* NRDC has maintained a long-standing commitment to advocate
24 for significant reductions in diesel pollution from port operations and has
25 developed substantial expertise in the legal and scientific issues surrounding diesel
26 pollution. *Id.*

27 NRDC has actively participated in developing state and regional plans to
28 reduce goods movement pollution. *Id.* at ¶ 3. For example, NRDC participated in

1 the development of CARB’s Emission Reduction Plan for Ports and Goods
2 Movement by submitting comments and providing testimony at hearings. *Id.*
3 NRDC also has a seat on the Clean Air Action Plan (“CAAP”) stakeholder
4 advisory group, a collection of stakeholders including industry, government,
5 environmental and community groups that provide input on CAAP
6 implementation.

7 Specific to the Los Angeles and Long Beach ports, NRDC provided written
8 comments and public testimony on the development of the CAAP, which was
9 adopted by the Ports of Los Angeles and Long Beach in 2006. Pettit Decl., at ¶ 4.
10 In that plan, the Ports directed their staffs: “to work expeditiously to bring forward
11 a plan with the following elements for further future approval of these boards: a.
12 The Ports undertake a 5-year, focused effort to replace or retrofit the entire fleet of
13 over 16,000 trucks that regularly serve our Ports with trucks that at least meet the
14 2007 control standards and that are driven by people who at least earn the
15 prevailing wage.”⁵ NRDC also provided comments and public testimony on the
16 programs Plaintiff challenge in this case. Pettit Decl., at ¶ 6.

17 In addition, NRDC has experience litigating some of the issues that are
18 expected to be at the center of this case, including the nature and scope of the
19 market participant exception to federal preemption. *See Engine Manufacturers*
20 *Ass’n v. SCAQMD*, 498 F.3d 1031 (9th Cir. 2007); *see also Pacific Merchant*
21 *Shipping Ass’n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008).

22 **B. Sierra Club.**

23 The Sierra Club is a national nonprofit organization of approximately 1.3
24 million members and supporters dedicated to exploring, enjoying, and protecting
25 the wild places of the earth; to practicing and promoting the responsible use of the
26

27 ⁵ San Pedro Bay Ports Clean Air Action Plan, in Statements of the Presidents
28 of the Los Angeles Board of Harbor Commissioners and the Long Beach Board of
Harbor Commissioners, (November 2006) *available at*
http://www.polb.com/environment/air_quality/clean_air_action_plan.asp.

1 earth's ecosystems and resources; to educating and enlisting humanity to protect
2 and restore the quality of the natural and human environment; and to using all
3 lawful means to carry out these objectives. Declaration of Tom Politeo in Support
4 of Motion to Intervene of NRDC, Sierra Club, and CCA ("Politeo Decl."), at ¶ 3.
5 The Sierra Club's concerns encompass ensuring that communities have clean air
6 and helping clean up air pollution in areas that have unhealthy levels of pollution.
7 *Id.* The Angeles Chapter of the Sierra Club has approximately 49,000 members in
8 Los Angeles and Orange Counties. *Id.* Thousands of these members reside near
9 the ports and/or major corridors where port trucks traverse. *Id.* The Sierra Club
10 has involved itself in issues affecting San Pedro Bay since the 1970s or sooner,
11 before the Sierra Club Harbor Vision Task Force ("SCHVTF") was organized. *Id.*
12 Founded in January 2001, SCHVTF is a volunteer group in Southern California.
13 *Id.* at ¶ 2. It has more than forty participants, including a majority residing near the
14 Ports of Los Angeles and Long Beach. *Id.* SCHVTF focuses on environmental
15 and social issues affecting San Pedro Bay, including methods of decreasing the
16 negative environmental and social impacts of the Ports while permitting the Ports'
17 volumes to grow. *Id.*

18 Sierra Club has deployed several strategies to protect its members from
19 deadly diesel pollution and goods movement-generated noise. Politeo Decl., at ¶ 5.
20 The SCHVTF has led public awareness efforts regarding health impacts of goods
21 movement. *Id.* In particular, SCHVTF has worked on developing plans to reduce
22 "goods movement" pollution and noise. *Id.* For example, SCHVTF and SCHVTF
23 members participated in the development of the CAAP through submission of
24 comments and testimony. *Id.* Moreover, SCHVTF members have participated in
25 development of regional transportation plans through providing input and comment
26 to the Southern California Association of Governments. *Id.* Finally, SCHVTF has
27 worked extensively on mobilizing support for federal legislation aimed at reducing
28

1 diesel pollution such as the Marine Vessel Emission Reduction Act of 2007
2 introduced by Senator Boxer. *Id.*

3 Sierra Club and Sierra Club's members have intimate knowledge of port
4 pollution issues, and in particular, have spent significant time advocating for
5 reductions of the impacts from port trucking. *Id.* at ¶ 10. Should the clean trucks
6 programs be taken away, Sierra Club and its members would be greatly impacted.
7 *Id.*

8 **C. Coalition for Clean Air.**

9 Founded in 1971, CCA is a nonprofit organization based in California. *See*
10 Declaration of Martin Schlageter in Support of Motion to Intervene of NRDC,
11 Sierra Club, and CCA ("Schlageter Decl."), at ¶ 2. It has more than 3,000
12 supporters throughout the state, including many members residing near California
13 ports. *Id.* Consistent with its role as an organization committed to restoring clean,
14 healthy air to all of California, CCA has identified port operations as a significant
15 source of diesel pollution in California. *Id.*

16 CCA has deployed several strategies to reduce diesel pollution. Schlageter
17 Decl., at ¶ 4. In particular, CCA has worked on developing state and regional
18 plans to reduce "goods movement" pollution. *Id.* For example, CCA participated
19 in the development of CARB's Emission Reduction Plan for Ports and Goods
20 Movement by submitting comments and providing testimony at hearings. *Id.*
21 CCA has also been actively involved through commenting and providing oral
22 testimony on the development of the CAAP, including predecessor plans such as
23 the Port of Los Angeles' Clean Air Program and the Port of Long Beach's Green
24 Port Policy. *Id.* Finally, CCA participated in the No Net Increase process at the
25 Port of Los Angeles. *Id.*

26 CCA has been a party to several cases related to reducing diesel pollution in
27 California. For example, CCA intervened on behalf of the defendant South Coast
28 Air Quality Management District to protect a series of rules requiring that

1 additions to certain fleets of vehicles use alternative fueled engines. *See Engine*
2 *Mfrs. Ass'n. v. South Coast Air Quality Management District*, 498 F.3d 1031 (9th
3 Cir. 2007). CCA also intervened on behalf of CARB to help defend critical marine
4 vessel regulations aimed at reducing pollution from ship auxiliary engines. *See*
5 *Pacific Merchant Shipping Association v. Goldstene*, 517 F.3d 1108 (9th Cir.
6 2008). In 2001, CCA and other environmental organizations filed lawsuits against
7 the City of Los Angeles, the Port of Los Angeles and the United States Army
8 Corps of Engineers over an illegal expansion project at the China Shipping
9 terminal at the Port of Los Angeles. *NRDC v. City of Los Angeles*, 103
10 Cal.App.4th 268 (Cal. Ct. App. 2002); *NRDC v. United States Army Corp of*
11 *Engineers*, No. CV-02-04793 MMM(Ex) (C.D. Cal. filed June 18, 2002).

12 **IV. ARGUMENT**

13 **A. NRDC, Sierra Club and CCA Are Entitled to Intervene as of** 14 **Right Under FRCP 24(a).**

15 The Ninth Circuit applies a four-part test to determine whether intervention
16 as of right under Rule 24(a)(2) is warranted:⁶ (1) the applicant must “timely” move
17 to intervene; (2) the applicant must have a “significantly protectable” interest
18 relating to the transaction that is the subject of the litigation; (3) the applicant must
19 be so situated that the disposition of the action “may,” as a practical matter, impair
20 or impede the ability to protect its interest; and (4) the interest must be
21 inadequately represented by the parties to the action. *Sw. Ctr. for Biological*
22

23 ⁶ Rule 24(a)(2) provides, in pertinent part:

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

1 *Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001); *Sierra Club v. Env'tl. Prot.*
2 *Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993); *Smith v. Marsh*, 194 F.3d 1045, 1049
3 (9th Cir. 1999).

4 In assessing these factors, the Ninth Circuit construes Rule 24(a) liberally in
5 favor of intervention. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d
6 1489, 1493 (9th Cir. 1995); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.
7 1998) (“[W]e are guided primarily by practical and equitable considerations. We
8 generally interpret the requirements broadly in favor of intervention.”). Allowing
9 interested persons to participate serves “both efficient resolution of issues and
10 broadened access to the courts” and often prevents or simplifies future related
11 litigation. *Forest Conservation Council*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995).
12 The Ninth Circuit has routinely allowed interested organizations to intervene.⁷
13 Because NRDC, Sierra Club and CCA meet the four-part test for intervention here,
14 their motion should likewise be granted.

15 **1. This Motion to Intervene Is Timely.**

16 The Ninth Circuit considers three criteria in determining whether a motion to
17 intervene is timely: (1) the stage of the proceedings; (2) potential for prejudice to
18 other parties; and (3) the reason for any delay in moving to intervene. *United States*
19 *v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991);
20 *United States ex rel. Killingsworth v. Covington Techs. Co.*, 967 F.2d 1391, 1394
21 (9th Cir. 1992).

22 Here, the Complaint has just been filed and discovery has not commenced.
23 While Plaintiff has filed a motion for a preliminary injunction, that motion was
24
25
26

27 ⁷ See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th
28 Cir. 1995); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684
F.2d 627, 629-30 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Sagebrush
Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983).

1 filed only one day before Proposed Intervenors filed their motion to intervene.⁸ In
2 short, NRDC, Sierra Club and CCA are moving to intervene at the outset of this
3 case.

4 Under these circumstances, it is clear this motion to intervene is timely. *Cf.*,
5 *e.g.*, *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.
6 1996) (holding that a “motion to intervene does not appear to have prejudiced
7 either party in the lawsuit, since the motion was filed before the district court had
8 made any substantive rulings.”); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d
9 1392, 1397 (9th Cir. 1995) (allowing environmental groups to intervene four
10 months after the complaint was filed, even though plaintiff had already moved for
11 a preliminary injunction); *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 276,
12 277 (N.D. Cal. 1996) (finding timely a motion for permissive intervention filed at
13 pleading stage).

14 **2. NRDC, Sierra Club and CCA Have Protectable Interests**
15 **in this Action.**

16 Rule 24(a)(2) requires the proposed intervenor to assert “an interest relating
17 to the property or transaction which is the subject of the action.” The Ninth Circuit
18 has explained that this requirement is “primarily a practical guide to disposing of
19 lawsuits by involving as many apparently concerned persons as is compatible with
20 efficiency and due process.” *County of Fresno*, 622 F.2d at 438 (quoting *Nuesse v.*
21 *Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). The Ninth Circuit has therefore
22 “rejected the notion that Rule 24(a)(2) requires a specific legal or equitable
23 interest,” *id.*, or even that an intervenor must have an interest “protected by the
24 statute under which the litigation is brought.” *Sierra Club*, 995 F.2d at 1484.
25 Rather, the intervenor need only show an interest, “protectable under some law,”
26

27
28 ⁸ Proposed Intervenors intend to lodge opposition papers to Plaintiffs Motion
for a Preliminary Injunction on Counts I and II of Plaintiff’s Complaint on or
before August 11, 2008.

1 and a “relationship” between that interest and the claims at issue. *Id.* NRDC,
2 Sierra Club and CCA readily meet this standard.

3 First, Proposed Intervenor’s members have significant, direct, and personal
4 interests in the Clean Trucks Programs. NRDC, Sierra Club and CCA have many
5 thousands of members in California, who live near the Ports and along the goods
6 movement routes that port trucks traverse. Because the Clean Trucks Programs
7 will result in significant reductions of diesel particulate emissions – and associated
8 health risks reductions – Proposed Intervenor’s members stand to benefit directly
9 from the Clean Trucks Programs implementation. Such interests would be more
10 than sufficient to establish Article III standing in a case concerning regulation of
11 pollution, *see, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,
12 528 U.S. 167, 180-86 (2000) (holding that exposure to a potential chemical risk is
13 an Article III injury), and are, *a fortiori*, sufficient to support intervention as a
14 defendant. *See, e.g., Legal Aid Soc’y v. Brennan*, 608 F.2d 1319, 1328 n.9 (9th
15 Cir. 1979) (holding that parties that satisfy Article III standing requirements
16 “necessarily possess the interest required to support intervention under [Rule 24]”).

17 Second, Proposed Intervenor worked with port staff for years to develop
18 programs to clean up port trucking. *See* Pettit Decl., at ¶ 6; Politeo Decl., at ¶ 8;
19 Schlageter Decl., at ¶¶ 8, 9. This involvement is independently sufficient to
20 support intervention, for a “public interest group is entitled as a matter of right to
21 intervene in an action challenging the legality of a measure it has supported.”
22 *Idaho Farm Bureau*, 58 F.3d at 1397; *see also Sagebrush Rebellion, Inc. v. Watt*,
23 713 F.2d 525, 526-27 (noting participation of proposed intervenor in
24 administrative process to establish conservation area subject to the litigation);
25 *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630
26 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

27 In sum, NRDC, Sierra Club and CCA, as well as the members that they
28 represent, have significant, specific interests, protectable under law, with a plain

1 and direct relationship to the instant litigation. These interests are sufficient under
2 Rule 24(a)(2). *See Sierra Club*, 995 F.2d at 1484.

3 **3. Absent Intervention, NRDC's, Sierra Club's and CCA's**
4 **Interests Would Be Impaired.**

5 Rule 24(a)(2)'s "impairment" prong requires a proposed intervenor to show
6 that the disposition of an action "may, as a practical matter," impede the
7 intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ.
8 P. 24(a)(2) (emphasis added). In evaluating this question "the court is not limited
9 to consequences of a strictly legal nature." *Forest Conservation Council v. U.S.*
10 *Forest Serv.*, 66 F.3d 1489, 1497-98 (9th Cir. 1995).

11 There is no question that the disposition of Plaintiff's claims "may" impair
12 Proposed Intervenors' and their members' interests. As explained above, Plaintiff
13 requests this Court to "declare void and permanently enjoin the enforcement of two
14 'Concession Plans'." *See* Plaintiff Complaint, at 2. If Plaintiff is successful,
15 Proposed Intervenors' efforts to reduce diesel emissions in Southern California
16 will be significantly impaired and the health benefits to their members from the
17 Ports' Clean Trucks Programs lost. This impact is all Rule 24(a)(2) requires. *See*
18 *Advisory Committee Notes to 1966 Amend.*, Fed. R. Civ. P. 24 ("If an absentee
19 would be substantially affected in a practical sense by the determination made in
20 an action, he should, as a general rule, be entitled to intervene.").

21 **4. NRDC's, Sierra Club's and CCA's Interests in this Action**
22 **are not Adequately Represented by the Named Defendants.**

23 The "inadequate representation" prong of Rule 24(a)(2) "is satisfied if the
24 applicant shows that representation of his interest 'may be' inadequate; and the
25 burden of making that showing should be treated as minimal." *Trbovich v. United*
26 *Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Sagebrush Rebellion*, 713 F.2d at
27 528. In evaluating this question, the Ninth Circuit has considered three issues:
28 first, whether "the interests of a present party to the suit are such that it will

1 *undoubtedly* make all of the intervenor’s arguments”; second, whether “the present
2 party is capable of and willing to make such arguments”; and third, whether “the
3 intervenor would not offer any necessary element to the proceedings that the other
4 parties would neglect.” *County of Fresno*, 622 F.2d at 438-39 (emphasis added).

5 NRDC, Sierra Club and CCA represent concerns that at the very least “may”
6 not, *Trbovich*, 404 U.S. at 538 n.10, be adequately represented by the existing
7 parties. Plaintiff is directly at odds with the proposed intervenors. The Ports, for
8 their parts, must take into account both their own political and resource constraints,
9 and also the interests of the Ports’ many diverse constituencies – including even
10 those of the economic actors represented by Plaintiff. *Cf.*
11 *Forest Conservation Council*, 66 F.3d at 1499 (noting that a government agency
12 was “required to represent a broader view than the more narrow, parochial interests
13 of” the intervenors); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994). As
14 proprietary agencies of the Cities of Los Angeles and Long Beach, it is not the
15 Ports’ responsibility to align their regulatory policies or litigation positions with
16 Proposed Intervenors’ interests or positions. The Ports instead represent what they
17 perceive to be the interests of the port communities as a whole, including the
18 economic interests of industry groups whose positions are contrary to the Proposed
19 Intervenors.

20 This is not a hypothetical concern: The Ports have in past instances
21 frequently taken positions that NRDC, Sierra Club or CCA opposed. *See* Pettit
22 Decl., at ¶ 9; Politeo Decl., at ¶ 7; Schlageter Decl., at ¶ 7. The Ports’ legal
23 arguments in this litigation and their positions in any settlement negotiations will
24 be influenced by the Ports’ own interests, and could, for example, result in the
25 Ports “voluntarily” vacating portions of the Clean Trucks Programs, a position
26 Proposed Intervenors would likely oppose. The substantial historical and current
27 evidence of divergence between the Ports and Proposed Intervenors is more than
28

1 enough to satisfy the inadequacy-of-representation prong of Rule 24(a). *See*
 2 *Forest Conservation Council*, 66 F.3d at 1499; *Epsy*, 18 F.3d at 1208.

3 **A. Alternatively, Permissive Intervention is Warranted.**

4 If this Court denies intervention as of right, then in the alternative NRDC,
 5 Sierra Club and CCA respectfully request that the Court grant permissive
 6 intervention under Federal Rule of Civil Procedure 24(b).⁹ The Ninth Circuit has
 7 stated that a court may grant permissive intervention if the proposed intervenor
 8 satisfies three threshold requirements: “(1) the movant must show an independent
 9 ground for jurisdiction; (2) the motion must be timely; and (3) the movant’s claim
 10 or defense and the main action must have a question of law and fact in common.”
 11 *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff’d* 495 U.S. 82 (1990);
 12 *see also Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). Each of these
 13 prerequisites is met here.

14 As discussed above, this motion to intervene is timely and Proposed
 15 Intervenors’ intervention in this case will result in no prejudice to the current
 16 parties. This Court has jurisdiction over NRDC, Sierra Club and CCA and their
 17 anticipated defenses, which involve precisely the issues of federal law raised by
 18 Plaintiff’s Complaint.¹⁰ Proposed Intervenors’ defenses and the main action raise
 19 questions of law and fact in common, including the scope of preemption under the
 20

21 ⁹ Federal Rule of Civil Procedure 24(b) provides, in pertinent part:

22 Upon timely application anyone may be permitted to intervene
 23 in an action...when an applicant’s claim or defense and the
 24 main action have a question of law or fact in common.... In
 25 exercising its discretion the court shall consider whether the
 26 intervention will unduly delay or prejudice the adjudication of
 the rights of the original parties.

27 ¹⁰ The Court also retains supplemental jurisdiction over NRDC, Sierra Club
 28 and CCA pursuant to 28 U.S.C. § 1367(a), which provides jurisdiction over
 “claims that involve the joinder or intervention of additional parties.” As this is a
 federal question case rather than a diversity case, none of the exceptions stated in
 28 U.S.C. § 1367(b) apply.

1 federal statute identified in the Complaint and the Port's authority to adopt and
2 implement their clean truck programs. *See Bureerong v. Uvawas*, 167 F.R.D. 83,
3 85 (C.D. Cal. 1996) (noting that the existence of a common question is liberally
4 construed). Because intervention would contribute to the just and equitable
5 adjudication of the legal questions presented, it should be permitted.

6 **V. CONCLUSION**

7 For the foregoing reasons, this Court should grant the motion of NRDC, Sierra
8 Club and CCA to intervene as of right under Rule 24(a) or, in the alternative,
9 permissively under Rule 24(b).

10
11 Dated: July 31, 2008 Respectfully submitted,

12 DAVID PETTIT
13 MELISSA LIN PERRELLA
14 ADRIANO MARTINEZ
15 NATURAL RESOURCES DEFENSE COUNCIL
16 1314 Second Street
17 Santa Monica, CA 90401
18 Tel: (310) 434-2300
19 Fax: (310) 434-2399

20 By: /s David Pettit
21 DAVID PETTIT

22 Attorneys for Proposed Defendants-Intervenors
23 Natural Resources Defense Council, Inc., Sierra
24 Club and Coalition for Clean Air
25
26
27
28

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1314 Second Street, Santa Monica, California 90401.

On July 31, 2008 I served the within document described as **NOTICE OF MOTION AND MOTION TO INTERVENE OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB AND COALITION FOR CLEAN AIR; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS IN SUPPORT THEREOF** on the interested parties in said action by placing a true copy thereof in a sealed envelope and by causing such envelope to be delivered by hand by a messenger service to the office of the addressee as indicated below:

Christopher C. McNatt Jr.
Scopelitis, Garvin, Light, Hanson & Feary, LLP
2 North Lake Ave., Suite 460
Pasadena, CA 91101

In addition, I electronically mailed courtesy copies on the interested parties as indicated below:

Christopher C. McNatt Jr.	cmcnatt@scopelitis.com
W. Stephen Cannon	scannon@constantinecannon.com
Seth D. Greenstein	sgreenstein@constantinecannon.com
Stephen S. Anderson, Jr.	tanderspn@constantinecannon.com
Richard O. Levine	rlevine@constantinecannon.com
Robert Digges	rdigges@trucking.org
Dominic Holzhaus	dominic_holzhaus@longbeach.gov
Joy Crose	jcrose@portla.org
Simon Kann	skann@portla.org
Thomas Russell	trussell@portla.org
Steve Rosenthal	srosenthatl@kayescholer.com
Jonathan Benner	jonathan.benner@troutmansanders.com

1 I declare under penalty of perjury under the laws of the State of California
2 that the foregoing is true and correct.

3 Executed on July 31, 2008 at Santa Monica, California.
4

5 
6

7 Penny Primo
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28