

1 CROWELL & MORING LLP
Kirsten L. Nathanson (DC Bar #463992)*
2 Thomas Lundquist (DC Bar # 968123)*
Sherrie A. Armstrong (DC Bar #1009642)*
3 1001 Pennsylvania Avenue, NW
Washington, DC 20004
4 T: (202) 624-2500 F:(202) 628-5116

5 CROWELL & MORING LLP
Janine L. Scancarelli (SBN 197202)
6 275 Battery Street, 23rd Floor
San Francisco, CA 94111
7 T: (415) 365-7821 F: (415) 986-2827

8 **Application for admission pro hac vice to be submitted*

9 *Attorneys for Proposed Intervenor-Defendant CropLife America*

10

11

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

12

13

CENTER FOR BIOLOGICAL
DIVERSITY,

14

Plaintiff,

15

v.

16

U.S. DEPARTMENT OF THE
17 INTERIOR, et al.,

18

Defendants,

19

and

20

CROPLIFE AMERICA,

21

Proposed Intervenor-
22 Defendant.

23

24

25

26

27

28

Case No. 3:15-cv-00658-JCS

**NOTICE OF MOTION AND MOTION OF
CROPLIFE AMERICA TO INTERVENE AS
DEFENDANT AND MEMORANDUM IN
SUPPORT**

(Hon. Joseph C. Spero)

Date: June 12, 2015

Time: 9:30 am

Place: Courtroom G, 15th Floor

NOTICE OF MOTION

1
2 Please take notice that on June 12, 2015, or as soon thereafter as this matter may be heard,
3 in the Courtroom of the Honorable Joseph C. Spero (Courtroom G, 15th Floor), CropLife
4 America (“CropLife”) will and hereby does respectfully move to intervene as of right as a
5 defendant in the above-entitled action pursuant to Federal Rule of Civil Procedure 24(a)(2) and to
6 file the proposed answer submitted contemporaneously with this motion. In the alternative,
7 CropLife seeks permission to intervene under Rule 24(b)(1) to protect its members’ vital interests
8 in their registration, sale, and distribution of pesticide products. This Motion is based upon this
9 notice of Motion and Motion to Intervene, the Memorandum in Support thereof, Exhibit A, the
10 Proposed Order, and the Proposed Answer filed pursuant to Federal Rules of Civil Procedure 12
11 and 24(c), all pleadings and papers filed in this action, and upon such other matters the Court may
12 entertain.

STATEMENT OF RELIEF SOUGHT

13
14 As explained in the accompanying memorandum of points and authorities, CropLife
15 (which was granted intervention in related previous litigation regarding the same challenged
16 products and similar legal claims) seeks to intervene as of right as a defendant under Federal Rule
17 of Civil Procedure 24(a)(2) because its members have substantial interests in the property that is
18 the subject of this case, and those interests are not adequately represented by the existing parties.
19 In the alternative, CropLife seeks permission to intervene under Rule 24(b)(1) because its
20 members are obviously affected by this litigation aimed at restricting or suspending their pesticide
21 registrations. CropLife also seeks to file the proposed answer submitted with this motion under
22 Rule 24(c).

23
24
25
26
27
28

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

NOTICE OF MOTION i.

STATEMENT OF RELIEF SOUGHT ii.

MEMORANDUM OF POINTS AND AUTHORITIES 1

INTRODUCTION 1

STATEMENT OF THE ISSUE TO BE DECIDED 2

BACKGROUND 2

A. REGULATORY FRAMEWORK 2

 1. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)..... 2

 2. The Endangered Species Act (“ESA”)..... 3

B. CROPLIFE AMERICA AND ITS INTEREST IN THIS LITIGATION 3

C. PROCEDURAL HISTORY 4

ARGUMENT 5

I. CROPLIFE IS ENTITLED TO INTERVENE AS OF RIGHT. 5

 A. This Motion Is Timely. 5

 B. CropLife’s Members Have Legally Protectable Interests..... 6

 C. Those Significantly Protectable Interests May Be Impaired By The Disposition Of This Case..... 7

 D. CropLife’s Members’ Interests May Not Be Adequately Represented By Existing Parties..... 9

II. IN THE ALTERNATIVE, CROPLIFE SHOULD BE GRANTED PERMISSIVE INTERVENTION..... 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Cal. Dump Truck Owners Ass'n v. Nichols</i> , 275 F.R.D. 303 (E.D. Cal. 2011)	9, 10
<i>Chinatown Neighborhood Ass'n v. Brown</i> , No. C-12-3759, 2012 WL 4059896 (N.D. Cal. Sept. 14, 2012)	12
<i>Citizens for Balanced Use v. Montana Wilderness Ass'n</i> , 647 F.3d 893 (9th Cir. 2011).....	<i>passim</i>
<i>Cnty. of Fresno v. Andrus</i> , 622 F.2d 436 (9th Cir. 1980).....	6
<i>Ctr. for Biological Diversity v. EPA</i> , No. 11-cv-00293-JCS (N.D. Cal. Apr. 22, 2013)	12
<i>Ctr. for Biological Diversity v. EPA</i> , No. 3:07-cv-02794-JCS (N.D. Cal. Dec. 17, 2009)	1, 4
<i>Ctr. for Biological Diversity v. U.S. Fish & Wildlife</i> , No. C 11-05108 JSW (N.D. Cal. Mar. 22, 2012).....	7, 11
<i>Ellis v. Bradbury</i> , No. C-13-1266 MMC, 2013 WL 4777201 (N.D. Cal. Sept. 6, 2013)	7, 8, 11
<i>Forest Conservation Council v. U.S. Forest Serv.</i> , 66 F.3d 1489 (9th Cir. 1995).....	10
<i>Freedom from Religion Found., Inc. v. Geithner</i> , 644 F.3d 836 (9th Cir. 2011).....	12
<i>Greene v. United States</i> , 996 F.2d 973 (9th Cir. 1993).....	6
<i>Idaho Farm Bureau Fed'n v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995).....	6
<i>Kootenai Tribe of Idaho v. U.S. Forest Serv.</i> , 313 F.3d 1094 (9th Cir. 2002).....	12
<i>League of United Latin Am. Citizens v. Wilson</i> , 131 F.3d 1297 (9th Cir. 1997).....	5, 6, 12
<i>Merrell v. Thomas</i> , 807 F.2d 776 (9th Cir. 1986).....	2

1 *Natural Res. Def. Council, Inc. v. United States,*
 2 578 F.2d 1341 (10th Cir. 1978)..... 8

3 *Nw. Coal. for Alternatives to Pesticides v. EPA,*
 4 No. C10-1919 (Feb. 17, 2011) 11

5 *Nw. Forest Res. Council v. Glickman,*
 6 82 F.3d 825 (9th Cir. 1996)..... 6

7 *Pesticide Action Network N. Am. v. U.S. EPA,*
 8 No. C 08-01814 MHP (N.D. Cal. July 8, 2008) 8, 11,13

9 *Reckitt Benckiser Inc. v. EPA,*
 10 613 F.3d 1131 (D.C. Cir. 2010) 7

11 *Sierra Club v. EPA,*
 12 995 F.2d 1478 (9th Cir. 1993)..... 6

13 *Spangler v. Pasadena City Bd. of Educ.,*
 14 522 F.2d 1326 (9th Cir. 1977)..... 12

15 *Sw. Ctr. for Biological Diversity v. Berg,*
 16 268 F.3d 810 (9th Cir. 2001)..... *passim*

17 *Trbovich v. United Mine Workers of Am.,*
 18 404 U.S. 528 (1972)..... 9

19 *United Farm Workers v. U.S. EPA,*
 20 No. C 07-3950, 2008 U.S. Dist. LEXIS 79332 (N.D. Cal. Aug. 26, 2008)..... 11

21 *United States v. Alisal Water Corp.,*
 22 370 F.3d 915 (9th Cir. 2004)..... 6

23 *United States v. City of Los Angeles,*
 24 288 F.3d 391 (9th Cir. 2002)..... 5, 9

25 *United States v. Oregon,*
 26 839 F.2d 635 (9th Cir. 1988)..... 5

27 *Wilderness Soc’y v. U.S. Forest Serv.,*
 28 630 F.3d 1173 (9th Cir. 2011) (*en banc*) 5, 6, 12

Federal Statutes

5 U.S.C. § 551(8) 7

5 U.S.C. § 706(1) 1

7 U.S.C. §§ 136, *et seq.*..... 2

1 7 U.S.C. § 136(bb) 2

2 7 U.S.C. § 136a 2, 3

3 7 U.S.C. § 136a-1 3

4 7 U.S.C. § 136a(c)(5) 1, 2

5 7 U.S.C. § 136a(g) 3

6 7 U.S.C. § 136d(c)(1) 3

7 7 U.S.C. § 136j(a)(2)(G) 3

8 7 U.S.C. § 136k(a) 3

9 16 U.S.C. §§ 1531, *et seq.* 3

10 16 U.S.C. § 1533 3

11 16 U.S.C. § 1536(a)(2) 1, 3

12 28 U.S.C. § 1331 12

13 **Federal Regulations**

14 40 C.F.R. Part 152 3

15 **Federal Rules**

16 Federal Rule of Civil Procedure 12 i

17 Federal Rule of Civil Procedure 24 *passim*

18

19

20

21

22

23

24

25

26

27

28

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

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Center for Biological Diversity (“Plaintiff”) brought this suit against the U.S. Department of the Interior, the U.S. Fish and Wildlife Service (“FWS”), and agency officials (collectively, “Defendants”) alleging that Defendants have violated Section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), and Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1). This case is a companion to prior litigation brought by Plaintiff against the U.S. Environmental Protection Agency (“EPA”) alleging an absence of ESA consultation in deciding to register (*i.e.*, approve for sale and use) numerous pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136a(c)(5).¹ That prior case resulted in a settlement and interim conditions for the challenged products until the completion of ESA Section 7(a)(2) consultation.²

In this case, Plaintiff alleges that FWS has failed to timely complete ESA consultation on three of the pesticides that were named in the prior litigation: atrazine, alachlor, and 2,4-D. *See* Compl. ¶¶ 24-46 [Dkt. 1]. Plaintiff claims those pesticides may affect two listed species in the California Bay Delta. *Id.* Plaintiff seeks declaratory and injunctive relief, including an order directing FWS to complete ESA consultations with EPA regarding those products, and an order restricting, or prohibiting the use of, those pesticides until such consultation is complete. *Id.*; *see also id.*, Prayer For Relief, ¶¶ 1-6.

Plaintiff’s claims directly threaten the valuable property rights and economic interests of the members of Proposed Intervenor-Defendant CropLife America (“CropLife”). As explained further below, when EPA grants a FIFRA registration, it issues a valuable nationwide license. The challenged licenses are owned by CropLife’s members and they are legally protectable

¹ *See* Second Amended Complaint, *Ctr. for Biological Diversity v. EPA*, No. 3:07-cv-02794-JCS (N.D. Cal. Dec. 17, 2009) [Dkt. 103] (hereafter identified as “the *Goby II* litigation”).

² *See* Order Approving Stipulated Injunction and Order, No. 3:07-cv-02794 (May 17, 2010) [Dkt. 121]; *see also* Joint Motion for Entry of Stipulated Injunction, Attachment 1, No. 3:07-cv-02794 (Jan. 12, 2010) [Dkt. 104-1].

1 property rights. Declaration of Rachel G. Lattimore ¶¶ 2-5, attached as Exhibit A.

2 As it did in the previous litigation, CropLife has moved to intervene because it has an
3 interest in defending the validity and finality of its members' registrations. Lattimore Decl. ¶¶ 6-
4 7. Granting CropLife's motion will ensure that the Court has the view of the regulated entities
5 that hold the licenses for the challenged products before the Court rules on the matter.

6 **STATEMENT OF THE ISSUE TO BE DECIDED**

7 Whether CropLife America may intervene as a Defendant under Rule 24 to protect its
8 members' property interests in the challenged pesticide products and other affected product
9 registrations.

10 **BACKGROUND**

11 **A. REGULATORY FRAMEWORK**

12 **1. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")**

13 FIFRA regulates the distribution, sale, and use of pesticides. 7 U.S.C. § 136, *et seq.*
14 Under FIFRA, pesticide products must be registered by EPA before they can be marketed, sold,
15 or distributed in the United States. 7 U.S.C. § 136a. A registration operates as a product-specific
16 license. To become registered, an applicant must submit extensive scientific data to demonstrate
17 to EPA that use of the product will not pose "unreasonable risk to man or the environment, taking
18 into account the economic, social, and environmental costs and benefits" of the product." *Id.* §
19 136(bb). EPA can only register a pesticide if it determines that the pesticide "will perform its
20 intended function without unreasonable adverse effects on the environment" and that "when used
21 in accordance with widespread and commonly recognized practice it will not generally cause
22 unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(C), (D); *see also* 7 U.S.C. §
23 136(bb) (defining "unreasonable adverse effects"). "The FIFRA standard distinctly balances the
24 environmental harm of using a pesticide against its economic, social, and environmental
25 benefits." *Merrell v. Thomas*, 807 F.2d 776, 780 (9th Cir. 1986)).

26 In evaluating whether registration is appropriate, EPA reviews extensive data pertaining to
27 the pesticide's active ingredient as well as formulations and particular uses of the pesticide. 7
28

1 U.S.C. § 136a; 40 C.F.R. Part 152. Every registered product is required to display an EPA-
 2 approved label that enumerates approved uses and applications. Use of a pesticide in a manner
 3 inconsistent with that label is prohibited. 7 U.S.C. § 136j(a)(2)(G).

4 After registration, EPA is required to conduct a regular “Registration Review” of every
 5 registered pesticide to confirm that it continues to meet statutory requirements. 7 U.S.C.
 6 §§ 136a(g), 136a-1. EPA also may suspend a registration if “necessary to prevent an imminent
 7 hazard during the time required for cancellation” of a particular registration. *Id.* § 136d(c)(1); *see*
 8 *also id.* § 136k(a) (giving EPA the authority to issue a “stop sale, use or removal” order).

9 **2. The Endangered Species Act (“ESA”)**

10 The ESA, 16 U.S.C. §§ 1531, *et seq.* protects endangered species and threatened species
 11 (together, “listed species”) that have been listed pursuant to the rulemaking process in ESA
 12 Section 4, 16 U.S.C. § 1533. ESA Section 7(a)(2) provides, in relevant part, that:

13 Each Federal agency shall, in consultation with and with the assistance of the Secretary,
 14 insure that any action authorized, funded, or carried out by such agency...is not likely to
 15 jeopardize the continued existence of any...[listed] species or result in the destruction or
 16 adverse modification of [designated critical] habitat of such species.

16 U.S.C. § 1536(a)(2).

17 **B. CROPLIFE AMERICA AND ITS INTEREST IN THIS LITIGATION**

18 CropLife America is a national, private, not-for-profit trade association, which represents
 19 companies that develop and sell crop protection products for agriculture and pest management in
 20 the United States. Lattimore Decl. ¶ 2. CropLife’s 25 registrant member companies produce most
 21 of the crop protection products registered under FIFRA for use in the United States. *Id.* Those
 22 registrations are valuable property rights. *Id.* ¶¶ 3-4. Companies must invest substantial funds in
 23 product research, development, and testing before a new pesticide active ingredient is brought to
 24 market, with over 120 tests typically conducted. *Id.* ¶ 4. On average, companies spend \$256
 25 million in bringing a product to market. *Id.*

26 CropLife’s members own all of the registrations for the challenged pesticide products
 27 atrazine, alachlor, and 2,4-D, including the technical products (*i.e.*, active ingredients) and the end-
 28 use products formulated with those pesticides. At least 11 member companies hold registrations

1 for atrazine and the end-use products formulated with that active ingredient. *Id.* ¶ 5. At least 1
2 member company holds the registration for alachlor. *Id.* At least 7 member companies own
3 registrations for 2,4-D and the end-use products formulated with that active ingredient. *Id.*
4 CropLife's members also are the owners of thousands of other registrations issued by EPA that
5 may be affected by the disposition of this case. *Id.* To protect its members' plain and direct
6 interests in this litigation, CropLife seeks to intervene.

7 **C. PROCEDURAL HISTORY**

8 This case follows from Plaintiff's prior litigation against EPA. In 2007, Plaintiff
9 challenged EPA's failure to consult with FWS under the ESA in registering over 40 pesticides,
10 which Plaintiff alleged have adverse effects on 11 listed species in the Bay Area, including the
11 Goby salamander ("the *Goby 11* litigation"). *See* Complaint, *Ctr. for Biological Diversity v. EPA*,
12 et al., No. 3:07-cv-02794-JCS (N.D. Cal.) [Dkt. 1]. The three pesticides at issue in this case were
13 among the products Plaintiff challenged in the *Goby 11* litigation. *See, e.g., id.* ¶¶ 133-34, 215.
14 As in this case, Plaintiff sought declaratory and injunctive relief. *See id.*, Prayer for Relief, 1-5.
15 CropLife was granted Intervenor-Defendant status in the remedy phase of that litigation. *See*
16 Order, No. 3:07-cv-02794 (Mar. 19, 2008) [Dkt. 46].

17 In 2010, EPA resolved the *Goby 11* litigation by entering into a settlement agreement with
18 Plaintiff. *See* Order Approving Stipulated Injunction and Order, No. No. 3:07-cv-02794 (May 17,
19 2010) [Dkt. 121]; *see also* Joint Motion for Entry of Stipulated Injunction, Attachment 1, No.
20 3:07-cv-02794 (Jan. 12, 2010) [Dkt. 104-1]. The stipulated injunction imposed interim
21 conditions on the challenged products until ESA consultation was complete for each product,
22 including for atrazine, alachlor, and 2,4-D. *See id.*

23 Plaintiff now has filed suit against FWS for allegedly failing to complete ESA
24 consultation with EPA on atrazine, alachlor, and 2,4-D and their purported effects on the
25 Alameda whipsnake and the Delta smelt. As in the *Goby 11* litigation, CropLife seeks to
26 intervene in this matter to continue to represent its members' interests in their products.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ARGUMENT

For the reasons discussed below, CropLife is entitled to intervene in this case as a matter of right under Rule 24(a)(2). In the alternative, CropLife should be granted permission to intervene under Rule 24(b)(1).

I. CROPLIFE IS ENTITLED TO INTERVENE AS OF RIGHT.

An applicant for intervention is entitled to intervene as a matter of right under Rule 24(a)(2) if it satisfies four conditions:

(1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the 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.

Wilderness Soc’y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*); *accord Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). The Ninth Circuit interprets Rule 24 “broadly in favor of proposed intervenors” to allow “parties with a *practical* interest in the outcome of a particular case to intervene.” *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citation omitted) (internal quotation marks omitted); *accord United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988) (“We construe the rule broadly in favor of applicants for intervention”). The intervention inquiry is “guided primarily by practical considerations, not technical distinctions.” *Berg*, 268 F.3d at 818 (citation omitted) (internal quotations omitted). In considering a motion to intervene, “a district court [also] is required to accept as true the non-conclusory allegations made in support of an intervention motion.” *Id.* at 819.

CropLife satisfies all four requirements for intervention as of right, as demonstrated below.

A. This Motion Is Timely.

Timeliness is “the threshold requirement” for intervention as of right. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (internal quotation marks omitted). “In determining whether a motion for intervention is timely, [a court] consider[s] three

1 factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice
2 to other parties; and (3) the reason for and length of delay.” *Id.* at 1302 (internal quotation marks
3 omitted). “Timeliness is a flexible concept; its determination is left to the district court’s
4 discretion.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Because this
5 case has just begun, CropLife easily clears this threshold. Plaintiff’s Complaint was filed on
6 February 12, 2015. [Dkt. 1]. Defendants have not filed a responsive pleading, and the Court has
7 extended the deadline for doing so through May 7, 2015. [Dkt. 14]. No motions have been filed
8 and no hearings have been held. As a result, this motion is timely.³

9 **B. CropLife’s Members Have Legally Protectable Interests.**

10 CropLife is a trade association whose members have sufficiently legally protectable
11 interests sufficient for intervention under Rule 24(a)(2). The interest test seeks to involve “as
12 many apparently concerned persons as is compatible with efficiency and due process.” *Cnty. of*
13 *Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). The inquiry focuses on whether an
14 applicant for intervention has a significantly protectable interest in the proceeding to warrant
15 intervention as of right. *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). An interest
16 is “significantly protectable” if it is “protectable under some law” and “there is a relationship
17 between the legally protected interest and the [plaintiff’s] claims.” *Berg*, 268 F.3d at 818
18 (citation omitted); *accord Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.
19 1996).

20 CropLife’s members have significantly protectable property interests under Rule 24(a)(2)
21 because they hold the EPA registrations (licenses) for challenged pesticide products containing

22 _____
23 ³ See, e.g., *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir.
24 2011) (holding that a motion to intervene was timely because it was filed less than three months
25 after the complaint was filed and within two weeks after the defendant had filed its answer);
26 *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (motion was timely
27 when motion filed “four months after [plaintiff] filed the action” and “before any hearings or
28 rulings on substantive matters”); *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)
(holding intervention was clearly timely where it was filed “before the EPA had even filed its
answer”), *overruled in part on other grounds, Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d
1173 (9th Cir. 2011).

1 atrazine, alachlor, and 2,4-D that are protected by law. *See Reckitt Benckiser Inc. v. EPA*, 613
2 F.3d 1131, 1133 (D.C. Cir. 2010); *see also* 5 U.S.C. § 551(8) (under the Administrative
3 Procedure Act (“APA”), a “license” includes “the whole or part of an agency permit, certificate,
4 approval, registration . . . or other form of permission”); *Ellis v. Bradbury*, No. C-13-1266 MMC,
5 2013 WL 4777201, *1 (N.D. Cal. Sept. 6, 2013); Lattimore Decl. ¶¶ 3-5. CropLife’s members
6 also hold other FIFRA registrations that may be impacted by the outcome of this case. Lattimore
7 Decl. ¶ 2.

8 Those registrations also are a valuable property right because CropLife’s members invest
9 enormous financial resources in obtaining them. Lattimore Decl. ¶ 4. On average, a company
10 spends \$256 million in product research, development, and testing before a new pesticide active
11 ingredient is brought to market, with over 120 tests typically conducted. *Id.* Accordingly, FIFRA
12 registrations have been widely deemed to be significantly protectable interests in determining a
13 third party’s right to intervene in an action. *See, e.g., Ellis*, 2013 WL 4777201, at *1 (ruling that
14 CropLife had demonstrated an interest sufficient for intervention because “at least four of
15 CropLife’s members . . . hold registrations that plaintiffs, by the instant action, are challenging . .
16 . and, consequently, each of those members has a significantly protectable interest” (citations
17 omitted)); Order Granting CropLife’s Motion to Intervene at 2-3, *Ctr. for Biological Diversity v.*
18 *U.S. Fish & Wildlife*, No. C 11-05108 JSW (N.D. Cal. Mar. 22, 2012) [Dkt. 27] (finding that
19 “CropLife has made a sufficient showing that it has a significant protectable interest”).
20 As a trade association, CropLife shares its members’ legally protectable interests for purposes of
21 intervention. *See, e.g., Berg*, 268 F.3d at 821-22 (holding that a trade association had a
22 sufficiently protectable interest when several of its members had protectable interests in the
23 challenged action); *Ellis*, 2013 WL 4777201, at *1 (“Where, as here, at least some of the members
24 of [the] applicant trade association [CropLife] have a significantly protectable interest, the
25 association likewise has such interest.”).

26 **C. Those Significantly Protectable Interests May Be Impaired By The Disposition**
27 **Of This Case.**

28 CropLife’s members’ significantly protectable interests – and by extension, CropLife’s

1 interests – may be impaired by the disposition of this case. As the Ninth Circuit has explained,
2 “[i]f an absentee would be substantially affected in a practical sense by the determination made in
3 an action, he should, as a general rule, be entitled to intervene.” *Citizens for Balanced Use*, 647
4 F.3d at 898 (internal quotation marks omitted) (quoting advisory committee notes to Rule 24); *see*
5 *also Berg*, 268 F.3d at 822 (relying on the advisory committee notes and granting intervention
6 where a trade association’s members’ legally protectable interests “may be affected” by the
7 litigation).

8 This case plainly could “legally and practically” impair the interests of at least eight of
9 CropLife’s members because Plaintiff seeks an order restricting, or prohibiting the use of, the
10 three challenged pesticides. *Berg*, 268 F.3d at 822; *see* Compl., Prayer For Relief, ¶ 4; Lattimore
11 Decl. ¶ 5. That alone is sufficient to satisfy the third prong of the intervention test. *See Ellis*,
12 2013 WL 4777201, at *2 (granting intervention as of right and holding that “because plaintiffs
13 seek, *inter alia*, an order . . . to ‘vacate’ the challenged registrations . . . disposition of the . . .
14 action may impair the protectable interests of certain members of CropLife America, and, by
15 extension, CropLife America”).

16 In addition, other registrations held by CropLife’s members that are not directly
17 challenged here also may be affected by this case if Plaintiff succeeds in altering the FIFRA
18 administrative registration process, such as by conditioning or suspending other registrations until
19 the FWS completes ESA consultation with EPA. *See, e.g.*, Memorandum and Order at 5,
20 *Pesticide Action Network N. Am. v. U.S. EPA*, No. C 08-01814 MHP (N.D. Cal. July 8, 2008),
21 [Dkt. 4] (“PANNA Order”) (ruling, where both CropLife and a registrant sought intervention, that
22 “it is clear that the disposition of this action may impair or impede the applicants’ ability to
23 protect their interest in the existing registrations and the registration process”); *see also Natural*
24 *Res. Def. Council, Inc. v. United States*, 578 F.2d 1341 (10th Cir. 1978) (reversing the district
25 court’s denial of intervention for future applicants for licenses and recognizing that their interests
26 in future licenses would be directly and adversely affected if the plaintiff prevailed). This Court
27 has recognized in other cases that CropLife “has a vested interest in maintaining the current
28

1 regulatory scheme for the benefit of its members.” PANNA Order at 5. This Court has also
2 recognized that “any change in the regulatory scheme will likely lead to large financial
3 consequences for [CropLife] members.” *Id.*

4 A finding in Plaintiff’s favor thus could directly impair CropLife’s members’ interests in
5 their registrations for products containing atrazine, alachlor, and 2,4-D, as well as members’
6 interests in other FIFRA registrations, satisfying the third prong of the test for intervention as of
7 right.

8
9 **D. CropLife’s Members’ Interests May Not Be Adequately Represented By Existing Parties.**

10 CropLife also meets the final requirement for intervention as of right: that the existing
11 parties may not adequately represent its members’ interests. “The burden of showing inadequacy
12 of representation is ‘minimal’ and satisfied if the applicant can demonstrate that representation of
13 its interests ‘may be’ inadequate.” *Citizens for Balanced Use*, 647 F.3d at 898; *id.* at 900 (“We
14 stress that intervention of right does not require an absolute certainty that a party’s interests will
15 be impaired or that existing parties will not adequately represent its interests.”); *see also Trbovich*
16 *v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (“The requirement . . . is satisfied if
17 the applicant shows that representation of his interest ‘may be’ inadequate . . .”).

18 To determine whether the existing parties adequately represent a putative intervenor’s
19 interests, courts will consider:

20 (1) whether the interest of a present party is such that it will undoubtedly make
21 all the intervenor’s arguments; (2) whether the present party is capable and
22 willing to make such arguments; and (3) whether the would-be intervenor would
neglect.

23 *United States v. City of Los Angeles, Cal.*, 288 F.3d 391 (9th Cir. 2002) (internal quotation marks
24 omitted). “The ‘most important factor’ in assessing the adequacy of representation is ‘how the
25 interest compares with the interests of existing parties.’” *Citizens for Balanced Use*, 647 F.3d at
26 898 (citation omitted). In conducting this analysis, “[a]ny doubt as to whether the existing parties
27 will adequately represent the intervenor should be resolved in favor of intervention.” *Cal. Dump*
28 *Truck Owners Ass’n v. Nichols*, 275 F.R.D. 303, 307 (E.D. Cal. 2011) (citing *Fed. Sav. & Loan*

1 *Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993)).

2 FWS and the other federal Defendants cannot adequately represent CropLife and its
3 members in this litigation because FWS and CropLife do not have “sufficiently congruent
4 interests.” *Berg*, 268 F.3d at 823.⁴ FWS “is a public agency that must balance relevant
5 environmental . . . interests with competing resource constraints and the interests of various
6 constituencies.” *Cal. Dump Truck Owners Ass’n*, 275 F.R.D. at 308. By contrast, CropLife is a
7 private trade association whose members have interests in protecting their valuable property
8 rights. Lattimore Decl. ¶¶ 2-5, 7. FWS has no interest in defending the commercial value of
9 those registrations. And although FWS may have an interest in defending against any increased
10 burdens imposed on FWS, it would not share CropLife’s and its members’ concerns about how
11 those increased burdens could translate to economic uncertainty and delay for FIFRA registrants
12 and their customers.

13 Moreover, the government simply “cannot be expected under the circumstances presented
14 to protect these private interests.” *Berg*, 268 F.3d at 823; *see also Citizens for Balanced Use*, 647
15 F.3d at 899 (holding that the government’s representation of the broader public interest “may not
16 be ‘identical to the individual parochial interest’ of a particular group just because ‘both entities
17 occupy the same posture in the litigation.’” (quoting *WildEarth Guardians v. U.S. Forest Serv.*,
18 573 F.3d 992, 996 (10th Cir. 2009))). CropLife represents the economic interests of the regulated
19 industry, including the eight member companies whose products have been challenged as well as
20 the majority of the holders of other FIFRA registrations. FWS stands in the position of a
21 regulator with much broader concerns. Because “[t]he interests of government and private sector
22 may diverge,” CropLife “would likely offer important elements to the proceedings that the
23 existing parties would likely neglect” and can “offer [its] own unique private perspective[]” in
24 this matter. *Berg*, 268 F.3d at 823; *accord Forest Conservation Council v. U.S. Forest Serv.*, 66
25 F.3d 1489, 1499 (9th Cir. 1995). That divergent perspective demonstrates that FWS’s

26 _____
27 ⁴ It is self-evident from the Complaint in this case that the interests of CropLife and Plaintiff are
28 not aligned, and that Plaintiff would not adequately represent CropLife’s interests.

1 representation of CropLife and its members' interests may be inadequate such that intervention as
 2 of right is warranted. *See Ellis*, 2013 WL 2013 WL 4777201, at *2 (concluding that CropLife
 3 had demonstrated that EPA may not adequately represent its interests); Order Granting
 4 CropLife's Motion to Intervene at 4, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife*, No. C
 5 11-05108 JSW ("The Court is persuaded that . . . Federal defendants stand in the place of the
 6 regulators and the proposed intervenor stands in the place of the regulated."); PANNA Order at 6
 7 (ruling that EPA may be an inadequate representative of the interests of CropLife and its
 8 members); *United Farm Workers v. U.S. EPA*, No. C 07-3950, 2008 U.S. Dist. LEXIS 79332, at
 9 *6 (N.D. Cal. Aug. 26, 2008) (holding that pesticide registrants "have a more parochial and
 10 financial interest not shared by the EPA").

11 For these reasons, CropLife satisfies the requirements for intervention as of right, and its
 12 motion to intervene should be granted. *See, e.g., Ellis*, 2013 WL 4777201, at *1-2; Order
 13 Granting CropLife's Motion to Intervene, *Ctr. for Biological Diversity*, No. C 11-05108 JSW;
 14 Minute Order, *Nw. Coal. for Alternatives to Pesticides v. EPA*, No. C10-1919 (Feb. 17, 2011)
 15 [Dkt. 31] (granting CropLife's motion to intervene, among others, in a FIFRA/ESA case).

16 **II. IN THE ALTERNATIVE, CROPLIFE SHOULD BE GRANTED PERMISSIVE** 17 **INTERVENTION.**

18 In the alternative, and at a minimum, CropLife should be granted permission to intervene
 19 under Rule 24(b).⁵ Rule 24(b) provides in relevant part:

20 Upon timely motion, the court may permit anyone to intervene who: . . . has a
 21 claim or defense that shares with the main action a common question of law or
 22 fact. . . . In exercising its discretion, the court must consider whether the
 23 intervention will unduly delay or prejudice the adjudication of the original
 24 parties' rights.

25 Fed. R. Civ. P. 24(b)(1), (3). In the Ninth Circuit, "a court may grant permissive intervention
 26 where the applicant for jurisdiction shows (1) independent grounds for jurisdiction; (2) the motion
 27 is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or

28 ⁵ If the Court concludes that CropLife is entitled to intervene as of right, it need not reach the
 question of permissive intervention. *See, e.g., Citizens for Balanced Use*, 647 F.3d at 896.

1 a question of fact in common.” *League of United Latin Am. Citizens*, 131 F.3d at 1308 (internal
2 quotation marks omitted). “The language of the rule makes clear that . . . if there is a common
3 question of law or fact, the requirement of the rule has been satisfied and it is then discretionary
4 with the court whether to allow intervention.” *Kootenai Tribe of Idaho v. U.S. Forest Serv.*, 313
5 F.3d 1094, 1111 (9th Cir. 2002), *overruled in part on other grounds*, *Wilderness Soc’y v. U.S.*
6 *Forest Serv.*, 630 F.3d at 1173 (9th Cir. 2011). “No showing of direct personal interest is
7 required. In addition the court may consider other relevant factors in making its discretionary
8 decision.” *Chinatown Neighborhood Ass’n v. Brown*, No. C-12-3759, 2012 WL 4059896, at *1
9 (N.D. Cal. Sept. 14, 2012) (citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th
10 Cir. 2002); *accord Spangler v. Pasadena City Bd. of Educ.*, 522 F.2d 1326, 1329 (9th Cir. 1977)).

11 CropLife meets the standard for permissive intervention under Rule 24(b). First, because
12 this is a federal question case, this Court has an independent ground for jurisdiction under 28
13 U.S.C. § 1331. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir.
14 2011) (explaining that the jurisdictional requirement for permissive intervention ensures that
15 permissive intervention is not used to destroy complete diversity “[b]ut in federal-question cases,
16 the identity of the parties is irrelevant and the district court’s jurisdiction is grounded in the federal
17 question(s) raised by the plaintiff”). Second, as discussed above, this motion is timely and does
18 not prejudice Plaintiff’s interests in the case.

19 Finally, it is plain that there are common issues of law and fact between CropLife’s defense
20 and this case. Plaintiff has challenged, and seeks to condition or enjoin, registrations for three
21 pesticides whose registrations are owned by CropLife member companies. Lattimore Decl. ¶ 5.
22 Disposition of this case in Plaintiff’s favor also could delay and impose significant cost burdens on
23 other FIFRA registrations. *Id.* ¶¶ 2, 5, 7. As a result, CropLife’s members, and by extension
24 CropLife itself, have a significant interest in the certainty and finality of their product registrations
25 under FIFRA, warranting permission to intervene in this case. *See Order Granting Motion to*
26 *Intervene; Granting Motions to Dismiss and Dismissing Complaint with Leave to Amend* at 10,
27 *Ctr. for Biological Diversity v. EPA*, No. 11-cv-00293-JCS (N.D. Cal. Apr. 22, 2013) [Dkt. 157]
28

1 (granting permissive intervention to CropLife); PANNA Order at 7 (granting permissive
2 intervention in addition to intervention as of right in pesticide registration case where “[p]laintiffs’
3 challenges to the re-registration process raise questions that are important not only to [the
4 intervenor], but also to the regulated industry” and “it is important that the industry’s voice be
5 heard”).

6 **CONCLUSION**

7 For the foregoing reasons, this Court should grant CropLife’s motion to intervene and
8 under Rule 24 and permit CropLife to file its proposed answer under Rule 24(c).

9 Dated: May 6, 2015

10 Respectfully submitted,

11 /s/ *Kirsten L. Nathanson*
12 CROWELL & MORING LLP
13 Kirsten L. Nathanson (DC Bar #463992)*
14 Thomas Lundquist (DC Bar # 968123)*
15 Sherrie A. Armstrong (DC Bar #1009642)*
16 1001 Pennsylvania Avenue, N.W.
17 Washington, D.C. 20004-2595

18 CROWELL & MORING LLP
19 Janine L. Scancarelli (SBN 197202)
20 275 Battery Street, 23rd Floor
21 San Francisco, CA 94111

22 *Attorneys for Proposed Intervenor-Defendant*
23 *CropLife America*

24 **Application for admission pro hac vice to be*
25 *submitted*