**To:** Senior Partner

**From:** Junior Partners

**Date:** February 2, 2015

**Re:** Intervention in proceedings before the Environmental Hearing Board

**Introduction**

 Our client, the Citizens Against Drinking and Gambling (“CADG”), wishes to intervene in a proceeding before the Pennsylvania Environmental Hearing Board, a quasi-judicial state administrative agency. The following memo addresses whether intervention is likely to be granted and the issues that need to be considered in pursuing intervention.

**Background**

The Environmental Hearing Board (the “Board”) holds hearings and issues adjudications on actions of the Department of Environmental Protection (the “Department”). *See* Environmental Hearing Board Act of 1988, 35 P.S. § 7514(a). The Board’s Rules of Practice and Procedure are located at Chapter 1021 of Title 25 of the Pennsylvania Code. The Board is comprised of five administrative law judges who all have substantial experience in the field of environmental law. All final decisions of the Board are decided by a majority vote. 25 Pa. Code § 1021.116(a). All other decisions are generally made by the individual judge assigned to the particular case.[[1]](#footnote-1)

The Department has issued an underground storage tank (“UST”) general operating permit to the owner of a future gas station in Kendall Township. The permit was appealed to the Board by a third-party appellant. The existing parties are the third-party appellant, the Department, and the gas station permittee. The Board has already scheduled a hearing on the matter, meaning that discovery has already been completed among the parties and any dispositive motions have been resolved. *See* 25 Pa. Code § 1021.101(c) (“After the Board resolves all dispositive motions, it will establish a hearing date for the remaining issues….”)

Our client, CADG, wishes to intervene on the side of the third-party appellant, who also opposes the permit. CADG is an interest group that opposes easier access to alcohol. CADG has members throughout Pennsylvania with two members residing in Kendall Township. CADG does not want the gas station to be built because it will sell beer and CADG believes it will increase the likelihood that minors will be able to obtain alcohol. In addition, CADG is concerned about a potential increase in drunk driving in Kendall Township that it believes would result from the gas station selling beer.

**Intervention Procedurally**

 Section 4 of the Environmental Hearing Board Act provides that “[a]ny interested party may intervene in any matter pending before the board.” 35 P.S. § 7514(e). In addition, the Board’s rule on intervention provides that “[a] person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence.” 25 Pa. Code § 1021.81(a). A petition for intervention must be verified and contain factual averments and legal arguments speaking to the following factors: “The reasons the petitioner seeks to intervene. The basis for asserting that the identified interest is greater than that of the general public. The manner in which that interest will be affected by the Board’s adjudication. The specific issues upon which the petitioner will offer evidence or legal argument.” 25 Pa. Code § 1021.81(b). The other parties to the proceeding may file a response to the petition within 15 days, unless the Board orders otherwise. 25 Pa. Code § 1021.81(d).

**Intervention and Standing**

 One of the most recent comprehensive statements on intervention to come out of the Board is *Tri-County Landfill, Inc. v. DEP*, EHB Docket No. 2013-185-L (Opinion issued Mar. 11, 2014), 2014 Pa. Envirn. LEXIS 8[[2]](#footnote-2), which granted a petition to intervene filed by a group of individuals who live, work, and/or recreate in close proximity to the site of a proposed landfill.[[3]](#footnote-3) The Board approaches intervention by essentially looking to whether the intervenor has standing. The judge in *Tri-County Landfill* stated, “Because the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance, we have held that an intervenor must have standing.” *Tri-County Landfill, supra*, slip op. at 2.[[4]](#footnote-4)

For determining standing, the Board relies on the standard set forth in the seminal case of *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). To have standing, one must have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). A substantial interest is one that is greater than the interest all citizens have in ensuring that others comply with the law. *William Penn Parking*, 346 A.2d 269, 282. A direct and immediate interest means that the intervenor’s interest must not be remote, but rather there must be a sufficiently close causal connection between the asserted interest and the actual or potential harm associated with the challenged action. *Id*. at 282 and 286; *see also Borough of Glendon v. Dep’t of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992).

The Board has acknowledged that there is a low standard for intervention. *See Wilson v. DEP*, EHB Docket No. 2013-192-M, slip op. at 2 n.1 (Opinion issued Jan. 2, 2014), 2014 Pa. Envirn. LEXIS 28.[[5]](#footnote-5) In addition, Pennsylvania Commonwealth Court has previously held that the EHB Act in fact requires the Board to grant intervention to interested parties, likening an “interest” to a “concern.” *Browning-Ferris, Inc. v. Dep’t of Envtl. Res.*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). For CADG to be able to intervene in the appeal in front of the Board, CADG will need to demonstrate that it has standing.

**Organizational Standing**

 There is a long-standing concept that an organization or association has standing to participate in a lawsuit if one of its members has standing. The Pennsylvania Supreme Court recently reiterated the concept by stating:

[A]n association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate.

*Pa. Med. Soc’y v. Dept. of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012). Commonwealth Court has likewise stated that an organization needs only a single member suffering immediate or threatened injury to qualify for standing. *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd.*, 965 A.2d 1254, 1263 (Pa. Cmwlth. 2009) (quoting *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd.*, 881 A.2d 37, 42 (Pa. Cmwlth. 2005)). The concept of organizational standing is also long-accepted at the Board. *See* *Citizen Advocates United to Safeguard the Env't, Inc. v. DEP*, 2007 EHB 632, 674 (citing *Groce v. DEP*, 2006 EHB 856, 895, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007)); *Wurth v. DEP*, 2000 EHB 155, 170-71 (citing *Valley Creek Coal. v. DEP*, 1999 EHB 935, 942; *Raymond Proffit Found. v. DEP*, 1998 EHB 677, 680).

 Under federal law, the concept of associational standing has added requirements, which seem to be absent from Pennsylvania law.[[6]](#footnote-6) For our purposes, the notable requirement is that under federal law, “the interests at stake must be germane to the organization’s purpose.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). However, Pennsylvania does not seem to explicitly adopt this concept. In *Pennsylvania Medical Society*, for instance, the Pennsylvania Supreme Court cited to the U.S. Supreme Court case *Warth v. Seldin*, 422 U.S. 490, 511 (1975) for the concept of organizational standing. Notably, *Warth* is one of the last U.S. Supreme Court cases to discuss organizational standing and exclude the “germane purpose” language that appears to have originated two years later in *Hunt, supra*.

While it appears that under federal law the “germane purpose” language could be fatal to CADG’s standing in this matter since it would likely need to have an organizational purpose related to the environment, under Pennsylvania law, it follows that so long as one of CADG’s members has standing, CADG will have standing to intervene. However, as discussed immediately below, another concept of standing may preclude CADG’s intervention.

**Zone of Interests**

 Although Pennsylvania does not seem to adopt the concept that the interests at stake must be germane to the organization’s purpose, a number of Pennsylvania cases have held that a way of satisfying the immediacy prong of standing is to demonstrate that one is in the zone of interests that are intended on being protected by the act or statute at issue. These cases have held that an immediate interest “is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.” *Pa. Med. Soc’y, supra*, 39 A.3d 267, 278. Accordingly, the interest that the organization’s member or members seek to protect must be within the zone of interests of the statute.

 The Board has also at times employed the zone of interests tests.[[7]](#footnote-7) In *Matthews Int’l Corp. v. DEP*, 2011 EHB 402, 2011 Pa. Envirn. LEXIS 40, the Board considered the issue in terms of whether competitive interests were among those sought to be protected by the Pennsylvania Air Pollution Control Act. The Board looked to another case in which it employed the zone of interests test to determine that a company did not have standing:

The Board applied the abovementioned rule in *McCutcheon v. DER,* 1995 EHB 6. There we held that a company which had developed an alternative daily landfill cover had no standing to appeal a permit modification for a landfill to use a competing form of landfill cover. The Board held that this interest was not protected by the Solid Waste Management Act. The enumerated purposes of the Solid Waste Act do "not contain any statement regarding the protection of one's private enterprise interest over that of another." *Id.* at 9.

*Matthews Int’l*, 2011 EHB at 406-07. Finding that the only interest asserted by the appellant was that of an economic competitor, and the only harm alleged was possibly being placed at a competitive disadvantage, the Board found that this was not one of the interests protected by the Air Pollution Control Act. Therefore, the Board held that the appellant did not have standing and it granted the Department’s motion to dismiss.

 For our purposes, the UST general operating permit program is administered pursuant to the Storage Tank and Spill Prevention Act, 35 P. S. §§ 6021.101 – 6021.2104. The legislative findings section of the Act contains an enumerated list of findings:

(1) The lands and waters of this Commonwealth constitute a unique and irreplaceable resource from which the well-being of the public health and economic vitality of this Commonwealth is assured.

(2) These resources have been contaminated by releases and ruptures of regulated substances from both active and abandoned storage tanks.

(3) Once contaminated, the quality of the affected resources may not be completely restored to their original state.

(4) When remedial action is required or undertaken, the cost is extremely high.

(5) Contamination of groundwater supplies caused by releases from storage tanks constitutes a grave threat to the health of affected residents.

(6) Contamination of these resources must be prevented through improved safeguards on the installation and construction of storage tanks.

35 P.S. § 6021.102(a).[[8]](#footnote-8)

Arguably, there is no stated purpose that comes close to protecting CADG’s interest in reducing access to alcohol and preventing minors from purchasing alcohol. Even if CADG’s concern over drunk drivers is construed in a way that reflects a concern over increased traffic, there does not appear to be anything in the regulations that require the Department to consider any aspect of traffic when permitting an UST. It is uncertain whether a member of an association can purport to have an interest that is completely unrelated to the interests of the organization and still qualify for organizational standing, but it might be the only way that CADG could successfully intervene. For instance, if CADG put forth environmental concerns related to the substance of the UST permit, even if those interests were not germane to CADG’s general purpose, it might be a way to get around the zone of interests test.

If the zone of interests test precludes CADG from having standing, we may consider representing either Miley or Britney, or both of them.

**Standing of CADG’s Members**

Undertaking an analysis of the standing of CADG’s members, there is a stronger argument for Miley’s standing. Her produce stand is nearby the site of the UST, approximately one-half mile down the road. There is a reasonable threat that any structural breach of the UST could result in a contamination plume that could potentially contaminate her groundwater and have a significant detrimental impact to her ability to grow produce. In addition, if Miley uses a drinking water well as a water supply, she is at an even greater risk from a potential contamination event since any contamination to her drinking water could force her to purchase and transport water to her home. However, Miley has stated that her concerns are related to her safety while she is working at her produce stand in terms of an increase in traffic along Crosby Road and a potential increase in DUI-related accidents from the beer sales.

 Standing with regard to Britney is not as clear. She lives approximately three miles away from the gas station. However, the Board has held that it is a person’s use of an area and a project’s potential threat to that use that matters for purposes of standing, as opposed to mere proximity. *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07. We do not have much information on Britney’s use of the area of the proposed gas station.

 As stated above, CADG’s standing depends on the standing of its members. In terms of the zone of interests, it appears that the interests of concern to Miley are likewise not within the zone of interests of the Storage Tank and Spill Prevention Act. However, perhaps if Miley were made aware of the potential environmental risks to her home and her produce, she would have a concern about the UST. We do not know at this point what Britney’s interests are in the gas station and UST permit.

**Other Issues—Timeliness**

 One of the other issues to keep in mind is the timeliness of the intervention. The hearing date has already been set by the Board’s Pre-Hearing Order No. 2. As mentioned above, the existing parties have already completed the 180-day discovery period and any dispositive motions have been resolved. This should not preclude us from intervening, since the Board’s rule permits intervention at any point before the initial presentation of evidence at the hearing on the merits, but it may limit the scope of participation if intervention is granted. Subsection (f) of the Board’s rule on intervention states, “If the Board grants the petition, the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention.” 25 Pa. Code § 1021.81(f).

 In *Giordano v. DEP*, 2000 EHB 1154, 2000 Pa. Envirn. LEXIS 90, a prospective party sought to intervene three months before the start of the hearing, after the completion of discovery and the deadline for filing dispositive motions. One of the existing parties argued that the petition to intervene was untimely, pointing to Pennsylvania Rule of Civil Procedure 2329(3). However, the Board Judge found that the rule did not apply to Board proceedings because the Board had adopted its own rule on intervention and “that rule does not authorize this Board to deny petitions as untimely unless they are filed after the merits hearing has begun.” *Giordano*, 2000 EHB 1154, 1159. The intervention was granted and the Board accommodated the intervening party, but significantly limited its participation in the matter. The intervening party was not permitted to conduct any discovery against the other parties. It was not allowed to put on any expert testimony, although it could present evidence and legal argument concerning the specific issues addressed in its petition to intervene. It was also not permitted to make any prehearing motions. The other parties were allowed to conduct expedited discovery against the intervenor over the course of 30 days, with the intervenor required to respond to discovery requests within ten days.

 *Giordano* suggests that the Board must let an interested party intervene in any proceeding, but the intervenor’s role may be increasingly limited the closer one gets to the hearing. It may already be too late for us to conduct any discovery for our client and we may incur a significant burden in complying with an expedited discovery process. A more recent decision suggests that the intervenor’s scope of participation may be determined by the objections raised by the existing appellants. In *Wilson v. DEP, supra*, Judge Mather granted a petition to intervene, but limited the participation of the intervenor to the objections listed by the appellant in its notice of appeal.

**Other Issues—Miscellany**

 Something to keep in mind is that intervention may only be an issue if it is contested by the other parties. Petitions to intervene that are unopposed are often granted. *See Consol Pa. Coal Co., LLC v. DEP*, EHB Docket No. 2014-027-B, Order dated May 7, 2014 (granting unopposed petition to intervene).[[9]](#footnote-9) Although this seems to be common practice, it may depend on the individual preferences of the judges. *See XTO Energy, Inc. v. DEP*, EHB Docket No. 2014-170-M, Order dated Dec. 23, 2014 (granting petition to intervene following conference call and no responses in opposition filed).[[10]](#footnote-10) However, given the timing of the intervention and the interests of our client, it is reasonably likely that CADG’s intervention will be met with opposition from the existing parties. Note that when evaluating a challenge to standing presented in the answer to a petition to intervene, the Board accepts “as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide[s] whether the averments nevertheless fail to establish a basis for standing as a matter of law.” *Tri-County Realty*, slip op. at 4 (citing *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3; 2000 Pa. Envirn. LEXIS 13).

 When crafting the petition to intervene, it is important to keep in mind what is being appealed and what is the Board’s standard of review. The question the Board will be asking is: was the issuance of the general operating permit unreasonable, not supported by the facts, or contrary to the law? *See* *Solebury School v. DEP*, EHB Docket No. 2011-136-L, Jul. 31, 2014, 2014 Pa. Envirn. LEXIS 32. In making that determination, the Board will likely look at the underground storage tank regulations located at Chapter 245 of Title 25 of the Pennsylvania Code. Specifically, the Board will likely look at 25 Pa. Code § 245.222, which contains the application requirements for a general operating permit. The greater our ability to speak to the substance of the matter, the greater the likelihood it will be found that we have standing to intervene in the appeal.

**Conclusion**

 Intervention before the Board is generally treated as an analysis of whether one has standing. In Pennsylvania, an organization has standing so long as one of its members would have standing. However, Pennsylvania law also holds that the purported interests of a party must come under the penumbra of the zone of interests that the statute seeks to protect. Our client CADG’s interests generally relate to limiting access to alcohol. While CADG has two members in the area of the proposed gas station, we only have information on the interests of one of those members. Her concerns are generally related to safety due to increased traffic and the potential for DUI-related accidents. The Storage Tank and Spill Prevention Act does not appear to contemplate any issued related to alcohol or traffic. Therefore, unless CADG’s two members elucidate environmental concerns that are related to the particular Underground Storage Tank permit at issue, the Board is unlikely to grant intervention.

1. Decisions on whether to grant or deny a petition to intervene will generally be decided by a single Board judge. [↑](#footnote-ref-1)
2. Opinion also located on the Board’s website at http://ehb.courtapps.com/efile/documentViewer.php?documentID=20682. [↑](#footnote-ref-2)
3. In granting intervention, the judge found that the intervenors averred that the landfill is likely to have a detrimental impact on the intervenors’ quality of life and their use and enjoyment of their environment. The judge found that this interest was not remote. [↑](#footnote-ref-3)
4. We should note that the *Tri-County Landfill* opinion frequently cites the Pennsylvania Supreme Court case of *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), portions of which only received a plurality of support. Pennsylvania Commonwealth Court, which has jurisdiction to review final decisions of the Board, recently declined to follow the plurality portions of *Robinson Township*, suggesting that it was not binding precedent on Commonwealth Court. *See Pa. Envtl. Defense Fund v. Cmwlth.*, No. 228 M.D. 2012, Jan. 7, 2015, slip op. at 28-29 n.37. However, the portions cited by the Board are confined to issues of standing, which received the support of four of six justices. [↑](#footnote-ref-4)
5. Citing *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166 (“[I]t does not take much to be able to intervene in Board proceedings.” (quoting *TJS Mining v. DEP*, 2003 EHB 507, 508)); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606 (“The Board's governing statute and rules do not make it difficult to intervene in a pending matter.”). [↑](#footnote-ref-5)
6. Note that there are significant differences between federal Article III standing and standing in Pennsylvania. Pennsylvania courts are not bound by Article III. *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)). The Pennsylvania Constitution states that the Pennsylvania Supreme Court "shall have such jurisdiction as shall be provided by law." PA. CONST. art. V, § 2; *see also* PA. CONST. art. V, § 4 (likewise vesting Commonwealth Court with “jurisdiction as shall be provided by law"). The fact that a party lacks standing does not deprive a Pennsylvania court of jurisdiction as it would for an Article III court. *Housing Auth. of the Cty. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 941 (Pa. 1999). Standing is not a jurisdictional matter and may be waived. *Beers v. Unemployment Comp. Bd. of Review*, 633 A.2d 1158, 1161 n.5 (Pa. 1993); *In re Nomination Petition of Paulmier*, 937 A.2d 364, 368 n.1 (Pa. 2007). [↑](#footnote-ref-6)
7. *See Citizen Advocates United to Safeguard the Env’t v. DEP*, 2007 EHB 632, 674 n.5, 2007 Pa. Envirn. LEXIS 58 at \*65: “The person's interests must be within the zone of interests protected by a statute, *Florence Township v. DER*, 1996 EHB 282, 289, but that will rarely be a concern in Board cases. CAUSE's members' interests in a safe environment, for example, are obviously protected by the Solid Waste Management Act and the Clean Streams Law.” This language implicitly suggests that an organization must be representing interests of its members that relate to environmental concerns. [↑](#footnote-ref-7)
8. The Act also contains a declaration that reads as follows:

The General Assembly declares these storage tank releases to be a threat to the public health and safety of this Commonwealth and hereby exercises the power of the Commonwealth to prevent the occurrence of these releases through the establishment of a regulatory scheme for the storage of regulated substances in new and existing storage tanks and to provide liability for damages sustained within this Commonwealth as a result of a release and to require prompt cleanup and removal of such pollution and released regulated substance.

35 P.S. § 6021.102(b). [↑](#footnote-ref-8)
9. http://ehb.courtapps.com/efile/documentViewer.php?documentID=21359. [↑](#footnote-ref-9)
10. http://ehb.courtapps.com/efile/documentViewer.php?documentID=24379. [↑](#footnote-ref-10)