

Interim Guidance: Proposed Revised Environmental Hearing Board Rules on Attorney Fees and Costs

ATTORNEY COSTS AND FEES AUTHORIZED BY STATUTE

§ 1021.181. Scope.

This subchapter applies to requests for costs and attorney fees when authorized by statute. When a statute provides procedures inconsistent with these procedures, the statutory procedures will be followed.

§ 1021.182. Application for costs and fees.

(a) If statutorily authorized, a party may initiate a request for costs and fees by filing a Fee Application with the Board. The Fee Application shall conform to any requirements set forth in the statute under which costs and fees are being sought and §§ 1021.181 – 1021.191.

(b) A Fee Application shall be verified by the applicant, and shall set forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees, which identifies all legal issues upon which the applicant contends it prevailed and the degree to which the relief sought in the appeal was granted. The Fee Application shall set forth in numbered paragraphs the facts in support of the Fee Application and the amount of fees and costs requested. The Fee Application may not be accompanied by a supporting memorandum of law unless otherwise ordered by the Board.

(3) An affidavit, or affidavits, signed by each of the applicant's lawyers and each consultant or expert witness whose costs and fees the applicant seeks to recover, setting forth in detail all reasonable costs and fees incurred for or in connection with issues in which the party prevailed.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation, and ability of the individual or individuals performing the services.

(5) The name of each party from whom costs and fees are sought.

(c) An applicant shall file a Fee Application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the Fee Application upon the other parties to the proceeding.

(d) The Board may deny a Fee Application sua sponte or require an applicant to amend its Fee Application within a specified time frame if the applicant fails to provide all the information required by this section in sufficient detail to enable the Board to fully evaluate the request for relief.

Comment: For the purpose of establishing the number of hours an attorney or consultant/expert witness worked under § 1021.182(b)(4), the Board encourages the submission of records that avoid grouping multiple tasks into a single time entry.

§ 1021.183. Response to Fee Application.

A response to a Fee Application shall be filed within 30 days of service, unless a longer period of time is ordered by the Board following a Fees Conference pursuant to §1021.184(a). The factual bases for the response shall be supported by affidavits signed by the parties from whom the fees are sought or others with relevant knowledge. A response to a Fee Application shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the Fee Application. Material facts set forth in a Fee Application that are not denied may be deemed admitted for the purposes of deciding the Fee Application.

§ 1021.184. Disposition of Fee Application.

(a) Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fees Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery, and evidentiary hearings, if any. Following the Fees Conference, the Board will issue a Fees Conference Order establishing case management procedures for these and any other issues that the Board may address.

(b) The applicant has the burden of proving its entitlement to the recovery of costs and fees.

(c) The Fee Application process will be stayed if one of the parties files an appeal from the Board's final order in the underlying appeal.

ATTORNEY COSTS AND FEES UNDER MORE THAN ONE STATUTE

§ 1021.191. Application for counsel fees under more than one statute.

An applicant seeking to recover costs and fees under more than one statute shall file a single Fee Application which sets forth, in separate counts, the basis upon which costs and fees are claimed under each statute. The Fee Application shall comport with the requirements at § 1021.182.