

United States District Court  
N.D. Indiana, Fort Wayne Division.

GREENFIELD MILLS, INC., et al., Plaintiffs,  
v.

Robert E. CARTER, Jr., as Director of the Indiana  
Department of Natural Resources, et al., Defendants.  
No. 1:00 CV 0219.

Jan. 9, 2007.

Eric C. Lewis, McCroskey Feldman Cochrane &  
Brock PC., Muskegon, MI, Neal R. Lewis, Lewis &  
Associates, Orland, IN, for Plaintiffs.  
Sierra L. Cutts, Indiana Attorney General's Office,  
Indianapolis, IN, for Defendants.

*OPINION and ORDER*

WILLIAM C. LEE, United States District Court.

Before the court is the Plaintiffs' Motion for an  
Interim Award of Attorney Fees filed on October 27,  
2006. Defendants responded on November 11, 2006  
to which the Plaintiffs replied on December 7, 2006.  
For the following reasons, the Plaintiffs' request for  
an interim attorney fees award will be DENIED.

*Background*

On May 16, 2000, the Plaintiffs,<sup>FN1</sup> filed their multi-  
count Complaint charging the Defendants with  
violations of the Clean Water Act, 33 U.S.C. § 1365,  
the Civil Rights Act, 42 U.S.C. § 1983 and  
conspiracy to violate the Civil Rights Act, 42 U.S.C.  
§ 1985.<sup>FN2</sup> To oversimplify, Plaintiffs asserted that  
the Defendants violated the Clean Water Act  
("CWA"), 33 U.S.C. § 1311, by failing to obtain a  
permit required by the CWA before conducting  
dredging activities at the Fawn River State Hatchery.  
Plaintiffs further asserted that their First, Fourth,  
Fifth and Fourteenth Amendments were violated by  
the activities of the Defendants.

FN1. The Plaintiffs are riparian owners and  
users of the affected downstream stretch of  
the Fawn River.

FN2. The Plaintiffs voluntarily dismissed  
their conspiracy claims pursuant to 42  
U.S.C. § 1985 against the Defendants.

During this case's first stint before this court, the  
undersigned granted summary judgment to the  
Defendants on all the CWA claims and on the  
constitutional claims related to the Takings Clause of  
the Fifth Amendment and the Due Process Clause of  
the Fourteenth Amendment. Prior to this court's  
ruling, the Plaintiffs, after some urging by this court,  
voluntarily dismissed the remaining § 1983 claims.  
On appeal, the Seventh Circuit reversed this court's  
decision as to one of the CWA claims but affirmed  
the court's grant of summary judgment as to the Fifth  
and Fourteenth Amendment claims. After post-appeal  
proceedings in this Court, the undersigned granted  
summary judgment as to liability under the CWA  
against the Defendants. Thereafter, the parties agreed  
to permanent injunctive relief (docket # s 225 and  
255) and agreed to the appointment of CH2M Hill to  
serve as a neutral expert to: (1) prepare an assessment  
of current conditions of the Fawn River and  
Greenfield Mills pond, and of the presence of excess  
sediments in the Fawn River and Greenfield Mills'  
pond; and (2) prepare, if necessary, specifications for  
removal of any sediments, and plans for remediation  
of the aquatic habitat and aquatic populations, as may  
be necessary to remediate the effects of any excess  
sediment or related damage and to restore the Fawn  
River and Greenfield Mills' pond to pre-May 18,  
1998 condition, together with preparing a cost  
estimate of the same. (See Stipulation, Docket # 248).  
These tasks were to be divided into three phases.  
According to the parties, CH2M Hill is near  
completion of phase one and the "Neutral's report  
regarding phase one should be submitted to the Court  
in the very near future." (Response, p. 3); see also  
Plt's Reply at p. 5 fn. 7, "Phase I has an anticipated  
completion date of March 2007 ..." In the interim,  
Plaintiffs filed the present motion seeking an award  
of fees *pendente lite* in an amount of \$1,232,629.75  
as well as costs and expenses in an amount of  
\$78,803.57.

The citizen-suit provision of CWA authorizes a court  
to award the "costs of litigation (including reasonable  
attorney fees) to any prevailing or substantially  
prevailing party[.]" 33 U.S.C. § 1365(d). Under fee-  
shifting statutes such as the one above, courts may  
order an interim fees award, but "only when a party  
has prevailed on the merits of at least some of his  
claims." *Hanrahan v. Hampton*, 446 U.S. 754, 758  
(1980). To qualify as "prevailing," a party "must  
have succeeded on 'any significant issue in the  
litigation which achieves some of the benefit'  
sought." *Earth Island*, 838 F.Supp. at 464 (quoting

*Hensley*, 461 U.S. at 433, 103 S.Ct.1933). Or, put in slightly different terms, a “prevailing party” is one that achieves “a material alteration of the legal relationship of the parties.” *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598, 604,(2001)).

In *Webster v. Sowers*, 846 F.2d 1032 (6th Cir.1988), the Court summarized the law concerning interim awards of attorney's fees as follows:

Interim attorney fees awarded during the pendency of litigation are permissible and thus within the authority of the district court when the court has entered a concrete order that determines substantial rights of the parties, meaning when a party has prevailed on the merits of at least some of his claims. Interim fees are especially appropriate when a party has prevailed on an important matter in a case, even if the party ultimately does not prevail on all issues. The Supreme Court has declared that, particularly in complex cases of long duration, delaying a fee award until the conclusion of litigation would work substantial hardship on plaintiffs and their counsel and discourage the institution of actions that Congress intended to encourage by passage of attorney fee statutes.

It is precisely for the above reasons, namely the duration of this case and the importance of the liability finding that Plaintiffs believe they are entitled to an award of interim fees. The Defendants naturally oppose Plaintiffs' petition for an award of fees and costs. In their brief, Defendants initially argued that the Court should defer awarding any fees and costs until after the damages phase of the litigation is complete. Defendants concede that in some circumstances an interim award of attorney's fees is appropriate but argue that the decision on liability was only a partial outcome and that the true measure of the case is whether remediation is required. Defendants also argue that Plaintiffs are not entitled to attorney's fees for the whole case because they have only prevailed on one claim.

Throughout the entirety of this case, the Plaintiffs have not only asserted that the Defendants violated the permitting requirements of the CWA but have asserted that the Defendants “caused immediate, severe and widespread damage to the entire downstream reach of the Fawn River from the Orland Fish Hatchery to the Greenfield Mills dam, covering the stream bottom with sediment and debris, causing catastrophic death and loss to the aquatic biosystem of the river and causing severe loss to the aesthetic,

recreational and economic value and uses of the river.” (Complaint, p. 2 ¶ 3). Plaintiffs have also alleged that this damage to the Fawn River is “permanent, and this small stream cannot recover without removal of the material deposited into it by the Defendants.” (*Id.* at ¶ 4). To date, there have been multiple, conflicting expert reports presented wherein the experts dispute the existence of materials deposited into the Fawn River as well as the extent to which any deposited materials, assuming the presence of such materials, could be removed. For this reason, the court requested the parties to employ the services, at the Defendants' expense, of CH2M Hill.

At this stage of the litigation, the Plaintiffs have prevailed in that this court found as a matter of law that the actions of the Defendants violated the CWA. But, as Defendants point out, the crux of the Plaintiffs' case is in their allegation that the violation caused substantial damage to the Fawn River. As of yet, no determination has been made that *any* materials were deposited into the Fawn River or whether any materials that may have been deposited caused damage. The sole issue that has been determined is that the Defendants should have obtained a permit prior to the dredging activities they conducted. While it is true that the liability determination was the impetus for the agreed permanent injunction, a fact that Plaintiffs rely heavily upon in their briefs in support of interim fees, the Plaintiffs have yet to prove any damages from the violation. And, as Defendants are quick to point out, if the Phase One damage assessment is favorable to their position that the Fawn River has not been damaged by their actions, they have prevailed on all the claims brought against them except one, for which there would ostensibly be little or no damages. As noted above, the Phase One damage assessment is due to be presented to the court within a few months. Since damage to the Fawn River is the crux of their lawsuit, the court concludes that until such time as the Phase One assessment by CH2M Hill is completed, the request for interim fees is premature and will be DENIED.

Moreover, after the Phase One damage assessment is completed, Plaintiffs may renew their request for interim fees. However, prior to submitting said request to this court, Plaintiffs shall submit to the Defendants a request for interim attorneys fees and costs. After Plaintiffs submit their request, the parties will attempt in good faith to negotiate a reasonable interim attorney fees award. If, after sixty (60) days

from Plaintiffs submitting their request, the parties are unable to agree upon a figure, the Plaintiffs will submit their fee application to the Court.

SO ORDERED.