WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: November 29, 2005
Oral Decision: November 29, 2005
Written Decision: December 2, 2005

Albert M. Greto
1701 Shallcross Avenue, Suite C
P.O. Box 756
Wilmington, DE 19899

Robert F. Phillips
Deputy Attorney General
Carvel State Office Building
Wilmington, DE 19801

Re: *Sierra Club v. DNREC, et al.*
Civil Action No. 1724-N

Dear Counsel:

This letter decision will memorialize my November 29, 2005 bench ruling in this case. Following oral argument on Sierra Club's motion for a preliminary injunction, I denied the motion. My reasons for refusing injunctive relief are as follows.

I.

This case involves the never-ending controversy over the dredging of the Assawoman Canal, a roughly four-mile long man-made canal that was dug in the early 1950s to connect the Indian River Bay to the Little Assawoman Bay in Sussex County. Over the many intervening years, natural silting and erosion have left the canal as an almost impassable waterway with an average depth of two feet below mean low tide. The State of Delaware acquired ownership of the canal in 1990. In the last ten years, the State has made repeated attempts to begin dredging the canal so as to restore it to its historic navigability by watercraft and to increase the "flushing" of the connected bays. After several starts and stops in the process, the Department of Natural Resources and Environmental Control ("DNREC")

issued, on August 16, 2004, a permit to dredge the canal, in accordance with 7 *Del. C.* § 7205 (the Subaqueous Lands Act or "SLA"). Plaintiff Sierra Club appealed the August 16 permit order to the Environmental Appeals Board ("EAB"), alleging (among many other complaints) that DNREC failed to perform a proper cost/benefit analysis of the canal dredging as required by its own regulations. After two hearings, the EAB informed counsel on May 10, 2005, that it intended to remand the matter to the Secretary of DNREC to perform an amended cost/benefit analysis. The EAB issued a final opinion and order on July 26, 2005. That decision rejected all of the Sierra Club's arguments regarding environmental harm to the canal. Instead, the EAB's remand was focused on one issue: the cost to the State of Delaware of policing and enforcing a "no wake" speed limit on the canal after it is dredged, as a factor in DNREC's cost-benefit analysis. Importantly for the issue before me, the EAB made it clear that the result of the amended cost-benefit analysis would not itself determine whether the dredging would proceed. The decision to go forward in light of that analysis, said the EAB, remained with the Legislature.[1]

On June 30, 2005—almost one month *before* the EAB issued its remand opinion—the General Assembly adopted the Bond Bill. Section 81 of the Bond Bill states as follows:

> Section 81. Assawoman Canal Dredging. It is the express finding of the General Assembly that the benefits of dredging and maintaining the Assawoman Canal exceed the costs of such project and the Secretary of Natural Resources and Environmental control is hereby directed to initiate all necessary actions to dredge the Canal pursuant to all terms and conditions provided for in the state and federal permits issued for the project and initially authorized by Secretary's order 200-W-0047 dated August 12, 2004.

In light of Section 81 of the Bond Bill, DNREC announced its intentions to go forward with the canal dredging without preparing a new cost/benefit analysis that reflects the policing and enforcement costs of increased boat traffic through the canal.

[1] EAB, Final Order and Decision, at Attachment, pp. 2-3.

This lawsuit was filed roughly three weeks later. The gravamen of the Sierra Club's complaint is that DNREC is violating the SLA by dredging the canal without a valid permit. It insists that Section 81 of the Bond Bill is unconstitutional because it (1) violates the separation of powers doctrine, (2) contravenes the single-subject rule of the Delaware Constitution (article II, § 16), and (3) deprives the Sierra Club and its members of their due process rights of appeal under the SLA. Based on these claims, the Sierra Club has moved for a temporary restraining order or a preliminary injunction to prevent DNREC from commencing the dredging project.

II.

The test for the granting of a preliminary injunction is well settled. First, one seeking injunctive relief must establish a reasonable likelihood of success on the merits of their claims. Second, the Court must be persuaded that failure to grant the relief sought will result in injury that will not be remediable by later injunctive relief or compensable by an award of damages. Finally, the Court must evaluate the chance that the defendants (or other persons) will be injured by the improvident granting of the relief sought and whether any injury of that kind could itself be remedied later. In sum, the Court must weigh and balance all of the equities. *See, e.g.*, *Ivanhoe Partners v. Newmont Mining*, Del. Supr., 535 A.2d 1334 (1987). This motion hinges on whether there is a threat of irreparable harm.

III.

Sierra Club argues that it will be deprived of its right to appeal and the victory it won on appeal if DNREC proceeds with the dredging without complying with the EAB remand opinion to calculate the costs of policing/enforcement of the speed zone on the canal. In other words, the dredging will irreparably damage the Sierra Club's procedural rights to have its objection to DNREC's costs/benefit analysis considered anew by the Secretary of DNREC, as ordered by the EAB.

I am not persuaded by the Sierra Club's assertions of threatened irreparable harm. At the outset, it is important to bear in mind that the EAB rejected *all* of the Sierra Club's contentions regarding environmental and ecological harm to the canal as a result of dredging. The EAB stated:

> [T]he Sierra Club raises several issues related to the Secretary's determination of the environmental impacts to the dredge and disposal sites, impacts on water quality,

> and the long term effects of the dredging on biologically productive areas.… [W]ith regard to all these issues, the Sierra Club failed to satisfy its burden of proving that the permit decisions were not supported by the evidence on record before the Board.[2]

Instead, the EAB focused on one deficiency in DNREC cost/benefit analysis: the failure to calculate and consider the enforcement and policing costs associated with increased boat traffic through the canal.[3] As the EAB expressly noted, the additional enforcement costs would "depend[] upon potential funding from the General Assembly."[4] With this important fact in mind, it is evident that the Sierra Club cannot argue that the dredging *itself* will cause it irreparable harm. Instead, the argument is that the dredging will deprive the Sierra Club of its "procedural rights" to insist on DNREC undertaking a new cost/benefit calculation. The alleged interference with the Sierra Club's procedural due process rights, however, cannot be equated (in my opinion) with the irreparable injury required to justify the extraordinary relief of an injunction. The Sierra Club has not lost any substantive right or privilege. At most, it has endured an abbreviation, or short-circuiting, of an appellate review procedure that was available to it. That is, the amended cost-benefit analysis would have served to inform the General Assembly of the relative benefit of this project. Instead, the General Assembly reached its own conclusion, and instructed DNREC that the extra costs of policing and enforcement associated with increased boat traffic are insufficient to outweigh the public benefits of dredging the canal. Of course, this is entirely within the prerogative of the General Assembly, which has plenary authority to tax, borrow and appropriate money for public purposes.[5] Put simply, Section 81 of the Bond Bill instructed the Secretary of DNREC that all additional enforcement and policing expenses would be provided for in existing and future appropriations in connection with the dredging project. This act cannot be characterized as inflicting irreparable harm upon Sierra Club. At most, Sierra Club has seen its procedural victory disappear, but that in no way constitutes irreparable injury to it, or its members. The Sierra Club's procedural right to have its appeal heard and considered has been enforced. But it had no right to *preclude* the dredging of the canal. Even the EAB noted that the recalculation of the cost/benefit analysis was merely a "relational comparison," not

[2] EAB, Final Order and Decision at 40 (July 26, 2005).
[3] *Id*. at 44.
[4] *Id*.
[5] Del. Const., art. II, § 1, art. VIII, §§ 2, 3, 6.

a substantive right to halt the dredging of the canal.[6] In fact, the EAB explicitly noted that even if the recalculation based on enforcement costs showed that costs were in excess of benefit, proceeding with the dredging project was still within "the purview of the legislature."[7]

When pressed on the irreparable harm issue, the Sierra Club's counsel could only point to one authority to support its view that injury to a procedural right of appeal constitutes irreparable harm: *Couch v. Delaware Power & Light Co.*, 593 A.2d 554 (Del. Ch. 1991). But the *Couch* decision does not so hold. All that *Couch* stands for is the proposition that a failure by government to follow its own rules or regulations may give parties adversely affected by that action an opportunity to seek relief. The question it begs is whether the adverse affect is irreparable in nature. In this case, nothing in this record even remotely suggests that the injury to the Sierra Club is irreparable in nature.[8] For this reason, injunctive relief is not warranted. I therefore deny Sierra Club's motion for a temporary restraining order or for a preliminary injunction. DNREC may proceed with its canal-dredging project under its order 200-W-0047 dated August 12, 2004.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

William B. Chandler III

WBCIII:meg

[6] EAB, Final Order and Decision, at Attachment A, pp. 2-3.
[7] *Id.*
[8] It is not at all clear that Sierra Club's procedural rights have been violated. And, indeed, I harbor serious doubts as to the merits of its claims. The injury posed by the wrongful (if wrongful it was) failure of DNREC to amend its cost-benefit analysis can at most, and indirectly, lead to some financial harm to Delaware and its taxpayers. As a tax-exempt entity, it is not clear to me on what basis the Sierra Club has standing to pursue the merits of its claims, in any event.