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STATE OF DELAWARE

WILLIAM T. ALLEN
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 1980'

November 1, 1985

Richard G. Abrams, Esquire
Richard G. Elliott, Jr., Esquire
Stephen E. Herrmann, Esquire
Richards, Layton & Finger
P. O. Box 551
Wilmington, Delaware 19899

Jean Langdon, Esquire
Fred S. Silverman, Esquire
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19899

Re: Formosa Plastics Corporation v. John E. Wilson, III, et al. - C. A. 8216
Date Submitted: October 31, 1985

Dear Counsel:

The pending application for a temporary restraining order by Formosa Plastics Corporation requires this Court, on the abbreviated record available on such a motion, to evaluate contesting claims involving fundamental rights and interests. On the one hand Formosa asserts that its right to elementary procedural fairness has been violated and it is or will be seriously injured as a result unless this Court acts to enjoin the defendants. Defendants, the Department of Natural Resources and Environmental Control and John Wilson, Secretary of that Department, assert the right and the duty to take the action complained of to protect the health, safety and welfare of the citizens of

Delaware, particularly those who live and work in the vicinity of Formosa's Delaware City manufacturing plant which produces polyvinyl chloride.

Formosa seeks in this action to have this Court enjoin Secretary Wilson from revoking a series of permits issued to Formosa by the Department and essential for the legal operation of its Delaware City facility. After an involved recent history of difficulty between the Department and Formosa concerning the safe operation of the Delaware City plant, the Secretary on October 25, 1985, delivered to Formosa notice that the Department would revoke, effective midnight November 1, 1985, all of the permits issued to it. That notice contained purported reasons for the action in 19 separate paragraphs which are quoted in full below. The October 25 notice stated that Formosa could request a hearing "on this revocation" before November 1, 1985.

Formosa on October 29 requested that the Secretary stay the revocation of its permits and sought de novo review of the proposed action before the Environmental Appeals Board pursuant to Section 6008 of Title 10. The Secretary denied the requested stay and fixed a hearing before the Department for October 31. He appointed a hearing officer for such purpose. Formosa objected, contending that the hearing scheduled would serve no useful purpose since, in its view, the Secretary had "predetermined that Formosa's operating permits should be revoked". Instead it turned to this Court.

On October 30, 1985, the complaint in this action was filed along with a motion for a temporary restraining order. The Court scheduled a hearing on the application on an emergency basis for 10:30 a.m. October 31. Formosa has filed a brief and affidavits in support of its motion. Defendants have appeared and filed counter-affidavits. This is the Court's decision on Formosa's request for a restraining order or preliminary injunction staying the effectiveness of the proposed revocation.

I.

An understanding of the background out of which the challenged action grows is provided by the statement of reasons contained in the Secretary's October 25 notice. Certain of the facts and conclusions stated in that notice are contested by Formosa. In pertinent part that notice provides as follows:

> 1. Between May, 1981, when Formosa acquired the Delaware City Plant and December, 1984, there

have been at least 40 separate dates on which vinyl chloride monomer, an explosive gas and a known carcinogen, was released from equipment at the plant. These releases were estimated by the company to have ranged between 1.2 pounds and 28,006 pounds.

2. On June 11, 1984, an order to Cease and Desist was issued pursuant to 7 Del.C. §6018, requiring Formosa to cease immediately all violations of certain regulations governing hazardous air pollutants. On 10 separate occasions after the issuance of the Order to Cease and Desist, Formosa has released vinyl chloride monomer in violation of the order. (These were also violations referred to in paragraph 1.)

3. At an inspection of Formosa's plant on April 26, 1984, it was discovered that a rupture disc, necessary to prevent vinyl chloride monomer from bleeding through partially lifted relief valves, had failed some time earlier but had not been replaced. This was a violation of the regulations, which require the installation of a rupture disc between equipment and the relief valve.

4. At the inspection on April 26, 1984, it was discovered that the test methods that are required to be used to test for vinyl chloride monomer content in the finished product and in waste gas streams (test methods 107 and 106) were being improperly performed by Formosa in five different aspects. The inaccurate results reported to the State as a result of the improper test methods cannot be relied upon by the State, and seriously undermines Delaware's environmental program which depends upon reliable self-reporting by permit holders.

5. At the inspection on April 26, 1984, it was discovered that a section of the continuous emission monitor line had been cut and removed, rendering the monitor inoperative. Although the missing section was replaced on June 8, 1984, tests on two later occasions showed that the system was not operating properly. The continuous emission

monitor is an integral part of the self-reporting system and is required by the regulations.

6. On December 17, 1984, the State filed suit against Formosa for the above violations. That suit was settled out of court on March 20, 1985, with the entry of a consent order which required the payment of a civil penalty of $100,000 and established a timetable for major improvements to the plant which would significantly reduce the probability of releases of vinyl chloride monomer to the atmosphere.

7. On April 23, 1985, the Formosa plant was inspected for the purpose of determining whether the Company was in compliance with the terms of the consent order. Several violations with [sic] the consent order were discovered:

a) The instruments on 6 of 31 reactors, required to be calibrated immediately, had not been calibrated. Calibration of the remaining reactors was not completed until May 9, 1985, 50 days after the entry of the consent order.

b) The air system feeding the instruments was not capable of assuring oil-free, clean, -40° dew point air capable of continuous dew point monitoring, as required by the consent order. The equipment required by the consent order was not installed until July 15, 1985, 117 days after the entry of the consent order.

c) One rupture disc, required by the regulations and required by the consent order to be replaced within 24 hours of detection of failure, was not replaced until three days after the failure was detected.

8. The consent order requires a quarterly stack test of the primary vinyl chloride waste gas incinerator. Despite warnings that Formosa's agent could not perform the test properly, the Company did not take steps to ensure that the test could be performed properly. The test was delayed past the deadline until the correct test

method could be performed, then delayed again when the testing equipment failed. The test was correctly performed 18 days after the deadline.

9. A second quarterly stack test of the primary incinerator was due on August 20, 1985. On August 8, 1985, Formosa asked DNREC's representative to be present at the plant for the second test. The test could not be performed because of excessive levels of vinyl chloride monomer in the air around the incinerator, caused by a leak in the flexible hose which feeds vinyl chloride into the incinerator. Because of the leak, the primary incinerator was removed from service until it could be repaired. The repairs were estimated to take eight to ten weeks.

10. The consent order required the construction of a new, secondary incinerator. Construction of this incinerator had been completed, so when the primary incinerator was removed from service for repairs, the secondary incinerator was placed in on-line operation, although the required stack test had not been performed and no operating permit had been obtained.

11. Suit was filed in Chancery Court on August 28, 1985 to require Formosa to perform the stack test on the secondary incinerator and obtain an operating permit. The Court entered an order requiring that the stack test be performed before Friday, August 30, or be enjoined from operation.

12. Shortly after the Court issued the restraining order, DNREC learned that Formosa planned to return the old, primary incinerator to service because operational problems with the new incinerator might have caused the Company to miss the Court ordered stack test deadline. When Formosa attempted to perform the stack test, two additional leaks were discovered in a flange and in the flexible hose. These leaks, combined with the prior history of leaking and Formosa's admission that the incinerator had been unsafe to run only three weeks before, indicated that the incinerator had

not been properly and safely repaired. This conclusion was confirmed by an inspection by the incinerator manufacturer's representative, who inspected the unit on September 6, 1985, and noted sixteen deficiencies with the incinerator.

13. On August 23, 1985, Formosa's plant was inspected for the purpose of determining compliance with the terms of the consent order since the previous inspection in April, 1985. One rupture disc had not been replaced within the 24 hour requirement. In addition, a random sample of records of rupture disc failures showed that the majority of the records did not contain all of the information required by the consent order.

14. On September 6, 1985, Formosa sent to the State two checks of $1,000 each, the stipulated penalty under the terms of the consent order for two violations of the consent order. One was the stipulated penalty for a release of 7.6 pounds of vinyl chloride monomer. The other was for a failure to perform the weekly test of the continuous emission monitor.

15. On October 15, 1985, Formosa informed DNREC that approximately 7½ hours before, there had been a release of vinyl chloride monomer. The release was the result of steam corroding a hole in a pipe which carries vinyl chloride monomer under pressure. The applicable permit requires that the State be notified of the incident immediately and not several hours later. There is no record of this incident on the vinyl chloride monitoring system because Formosa employees had incorrectly reconnected the system some eleven days earlier and had failed to detect that the system was not operating properly.

16. On Monday, October 21, 1985, the State learned through an anonymous source that Formosa had had a release of vinyl chloride monomer on the previous Thursday, October 17, 1985. According to the source, and confirmed by DNREC investigators, Formosa operators had begun filling the reactor vessel without first checking the drop valve on the reactor and two butterfly valves. All three valves had been left partially open, allowing

vinyl chloride monomer to escape from the reactor. The indoor sprinkler system was activated, operators donned self-contained breathing apparatus, yet no note was made of the incident and the State was not notified because the incident was considered minor. There is no record of the incident on the vinyl chloride monitoring system because a Formosa instrument technician had disconnected the recording system moments before the incident. There is no written record of this incident because the batch card, or record of this reaction, has been misplaced.

17. Formosa discharges wastewater from two sources into the Delaware River pursuant to a permit issued by DNREC. Discharge 001 consists of process wastewater from the manufacture of polyvinyl chloride resin. The permit for this discharge establishes limits for surfactants, which have been violated in sixteen of the twenty-four months between October, 1983 and September, 1985. Discharge 002 consists of sanitary wastewater from the plant. The permit for this discharge establishes limits for biochemical oxygen demand, suspended solids, fecal coliform, total residual chlorine and pH, which have been violated in 44 of the 45 months between January, 1982 and September, 1985.

18. On September 27, 1985, Hurricane Gloria passed through Delaware. Of the hundreds of waste-water treatment plants in the State, only one owner, Formosa, did not adequately prepare for the storm. Only Formosa reported overflows from treatment lagoons as a result of the abnormal rains.

19. It is apparent from this pattern of repeated violations that Formosa cannot or will not comply with the laws of the State of Delaware concerning the protection of the environment. Formosa has not complied with the conditions under which its air and water discharge permits were issued, and cannot reasonably be expected to comply with those conditions in the future. For these reasons, the Department of Natural Resources and Environmental Control has determined that the permits should be revoked.

An additional statement or finding by the Secretary in connection with this matter is relevant to determination of the pending application. In denying Formosa's request that the effective date of his action be extended pending the outcome of an appeal to the Environmental Appeals Board, the Secretary stated as follows:

> While it is indisputable that the closing of the plant will have a substantial economic impact on Formosa (and on the State as well, through lost jobs and lost tax revenues) any economic harm to Formosa must be balanced against the health, safety, and environmental repercussions of continued operation of the plant. It is clear from past experience (as outlined in my letter of October 25, 1985) that Formosa's Delaware City plant cannot be operated in a safe and environmentally sound manner. The risk facing plant employees, as well as residents of the surrounding area, is unacceptable and outweighs any economic harm of closing the plant.

It was represented by counsel for defendants that the October 25, 1985 notice reflects, and should be construed to constitute, a determination by the Secretary that Formosa's continued operation of its Delaware City facility represents a continuing threat to the health and welfare of citizens of this State and that that threat itself creates an emergency justifying the action taken and the procedure employed. The State concedes that so far as it currently knows the plant is presently in compliance with applicable law. It is apparently the purported history of repeated problems and not any isolated incident or specific threatened injury that is said to justify this action.

II.

The standards informing the exercise of this Court's discretion to grant a temporary restraining order are similar to the familiar standards governing the issuance of preliminary injunctive relief. Thus, it is essential for the applicant to show that with respect to the merits of its claim there is a likelihood of his ultimate vindication; that absent judicial intervention he will be irreparably injured before that final judicial determination may be made; and that a balancing of the other interests implicated counsels granting the relief sought.

A.

Turning to the merits of plaintiffs' arguments, first I am satisfied on the limited record created that Formosa is threatened with imminent irreparable injury if the Secretary's revocation decision becomes effective. Certainly compliance with the order will involve the expenditure of funds and the loss of the productivity of a large investment. These financial impacts, even if unauthorized and wrongful, will likely not be compensable by an award of damage given the governmental function that supplies the reason for the injury. Dept. of Community Affairs and Econ. Development v. M. Davis & Sons, Inc., Del. Supr., 412 A.2d 939 (1980); Donovan v. Delaware Water and Air Resources Comm., Del. Supr., 358 A.2d 717 (1976); Shellhorn & Hill v. State, Del. Supr., 187 A.2d 71 (1962). Equally significant, injury to Formosa will doubtless arise from the impact that closure of its Delaware City plant will have on employee and customer relationships. While the record contains no specific data on these subjects (see, McAuliffe Affd. ¶ 3), it would offend commonplace understanding to deny that an unplanned closure of an essential plant could be accomplished without significant injury to business relations of various kinds. This Court has no available technique to protect against these consequences once they occur. Thus, I conclude that Formosa has satisfied its burden to demonstrate the threat of imminent irreparable injury that forms the sine qua non of the relief sought.

B.

I turn then to an evaluation of the merits of Formosa's claims that these injuries constitute legal wrongs. In making that evaluation I do so only for the purpose of attempting to assess the probability that, when a court reviews the propriety of the Secretary's action after a full review of the facts and applicable law it will sustain one or more of plaintiff's contentions.

Those contentions are several. First Formosa contends that the Secretary lacks statutory power to revoke its permits. It suggests that the remedies afforded the Secretary under Subchapter II of Chapter 60 of Title 7 are specifically set forth and do not include the power he has purported to exercise in this instance. Secondly, Formosa argues that even if the Secretary is deemed to have such a power, the manner in which it was exercised here denied to it procedural rights — including most importantly the right to be heard before a decision that deprives it of an important property interest is made. The rights assertedly violated in that connection are said to derive both from the Delaware Administrative Procedure Act and from our federal and state constitutions. Thirdly, Formosa contends that the Secretary has not articulated a concrete standard against which its conduct is to be measured and this asserted vagueness is claimed to also constitute a violation of its right to procedural due process.

As to the first of these substantive positions, Formosa is correct that the statute specifically sets out certain remedies available to the Secretary but does not seem to contemplate a revocation by him of a permit once granted. The Secretary's enforcement powers are set forth in Section

6005 of Title 7. Subsection (a) provides in sweeping terms "The Secretary shall enforce this chapter". Subsection (b) provides that anyone who violates "this chapter or any rule or regulation...or any condition of any permit...or any order of the Secretary shall be punishable as follows." There follows two subsections. The first authorizes a fine to be imposed by the Superior Court. The second authorizes the Secretary to seek injunctive relief in this Court if a violation is continuing or threatening.

Section 6018 gives the Secretary power to issue a cease and desist order valid for a period of thirty days. Section 6013 creates a criminal penalty for, among other things, any willful or negligent violation of Section 6003 or any condition or limitation included in a permit issued pursuant to that Section.

Thus, Formosa is correct in its assertion that the relevant statute does not expressly confer authority to revoke permits. It clearly does contemplate, however, that the Secretary will have the power to impose conditions and limitations upon permits issued pursuant to Section 6003. See, e.g., 7 Del.C. §6005(b) (Whoever violates...any condition of a permit issued pursuant to §6003 of this title...shall be punishable...); §6005(c) (Any person who is found to have violated...a...condition of a permit issued pursuant to

§6003...shall be liable for all expenses incurred by the Department...).

The authority to place conditions upon the grant of a permit implies the power to revoke permits when such conditions are not satisfied. Since the Secretary could, as a routine matter, place conditions in all permits issued to the effect that the permit is valid only so long as the permittee complies with all requirements of the statute and all rules and regulations adopted to implement the statute, the Secretary has available the power to in effect revoke permits for such non-compliance. Thus, it cannot be concluded that the General Assembly, in enacting Subchapter II, intended the Secretary to have no power to revoke permits once granted.

Whether in fact the Secretary explicitly imposes such a condition strikes me as a matter of form that ought not be construed as limiting the power to revoke a permit. The Secretary has the statutory power to do it and the statutory obligation to "enforce this chapter". 7 Del.C. §6005(a). Thus it is fair, I think, to imply such a limitation on all permits issued under the authority of Section 6003. Such a construction of the statute is consistent with the holdings of myriad cases to the effect that, absent express statutory recognition of the power to revoke a license, the power to grant a license implies the power to revoke one for good cause. See, e.g., Carroll v. Tarburton, Del.Super., 209 A.2d 86 (1965); Bartlett v. State Real Estate Commission, Neb.Supr., 199 N.W.2d 709 (1972); Arrow Express Forwarding Co. v. Iowa State Commerce Commission, Ia.Supr., 130 N.W.2d 451 (1964); State Board of Cosmetology v. Maddox, Colo.Supr., 428 P.2d 936 (1967); State ex rel. Morris v. W. Va. Racing Commission, W. Va. Supr., 55 S.E.2d 263 (1947).

Accordingly, I conclude for purposes of the pending application, that plaintiff has failed to demonstrate a probability of ultimate success with respect to its claim that the Secretary lacked statutory power to revoke the permits that he or his predecessors in office have issued pursuant to Section 6003.

Formosa's second proffered basis for the asserted invalidity of the imminent revocation involves the procedure employed by the Secretary in reaching his decision. Specifically, plaintiff asserts that Delaware law and the federal constitution require that it be accorded fair notice of the proposed revocation and an opportunity to be heard before its rights and property are so grievously affected as they will be in this instance.

As to the Delaware statutory law, it seems clear that the provisions of the Administrative Procedure Act that govern the revocation of licenses (and which, absent an express finding of emergency, require prior notice of the proposed action and twenty days notice of a hearing if one is requested, see 29 Del.C. §§10131-34) have no application to action taken by the Secretary, see, 29 Del.C. §10161, although they do apply to actions of the Environmental Appeals Board. This argument appears to be premised on the assertion that the Secretary has no power himself to revoke the permits in issue. If he has such power (as it seems likely he has) and if such power has been properly exercised, then the revocation has been effectuated. In such circumstances it makes little sense to say, as plaintiff must, that in reviewing that action the Appeals Board "proposes to revoke...a license". Thus I conclude that plaintiff's argument, premised on the provisions of 29 Del.C. §10132(b), that the effectiveness of any revocation order is stayed until a final order of the Environmental Appeals Board on its pending appeal does not appear to have merit.[1]

This is not to say that Formosa does not have a right to procedural due process in these circumstances. Few rights

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[1]Section 10132(b) provides in full as follows:

> (b) Whenever an agency proposes to revoke, suspend, annul or withdraw a license, such action shall not be effective until a final order is issued, except when the public health, safety or welfare clearly requires emergency action and the agency's order so states.

are more basic in our system than the right to require the government to accord a citizen fair and regular procedures before the government acts to deprive that citizen of an important right or interest. The licenses that the Secretary by his October 25 action has revoked constitute the kind of legal interest that qualifies for such protection. See, Milford Liquor Store, Inc. v. Delaware Alchoholic Beverage Control Commission, Del. Supr., 445 A.2d 337 (1981); Cook v. Oberly, Del.Ch., 459 A.2d 535 (1983).

The constitutional requirement of due process does not fix an unyielding procedural format on all government actions that trigger its application. Mathews v. Eldridge, 424 U.S. 319 (1976). Ordinarily, the elements necessary to satisfy the requirement for procedural fairness will include a notice of the proposed or intended action, and an opportunity to be heard prior to the the deprivation that such action will involve. See, Parratt v. Taylor, 451 U.S. 527 (1981); Boddie v. Connecticut, 401 U.S. 371 (1971). In this instance defendants say that this minimum standard has been met. The October 25 notice contained a clear statement of the intended action, a detailed statement of the course of conduct purportedly justifying that action and an opportunity to be heard before the action became effective.

Formosa contends that the notice is inadequate (i.e., it does not adequately explain the basis for the action) and that the hearing offered was inadequate because (1) the hearing officer was a subordinate of Mr. Wilson and Mr. Wilson had already made up his mind and (2) in all events, Formosa would not have been accorded a reasonable opportunity to prepare its position before the hearing was to be held.

Ordinarily, I would not conclude that the procedures followed in this instance satisfied the minimum requisites of a fair procedure to which we as a people have committed ourselves. Mr. Wilson has not announced a proposed or intended act. A fair reading of his October 25 letter is that the revocation was at that point a fait accompli. It is reasonable to conclude on this limited record that the hearing, to be held but on very short notice, was designed as a ritual to meet the formal dictates of the law. The Secretary relies upon the case of Cook v. Oberly, Del.Ch., 459 A.2d 535 (1983) for the proposition that a hearing following the revocation of a license satisfied the requirement of procedural due process. That case provides poor guidance to the Secretary not only because the interest being affected was far less important[2] than the interest involved in this matter but

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[2]One of the factors determining what process is due in any particular instance is the importance of the interest of which the citizen will be deprived. Thus, the procedures required in a criminal trial, for example, will inevitably be more elaborate than those required where e lesser interest than liberty is at stake.

also because in that case there was a readily available technique to permit the automatic restoration of the interest pending hearing.

However, summary administrative action (as I consider the Secretary's act to be) may be justified in certain circumstances. The flexible requisites of procedural fairness are satisfied by a hearing after the deprivation has been effectuated where a threat to the public health, safety or welfare is legitimately involved. Hodel v. Virginia Surface Mining, 452 U.S. 264, 298 (1981); Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The executive branch of government must have the legal power to act immediately to foreclose an imminent and serious threat to the public health. As the United States Supreme Court has said, "Protection of the health and safety of the public is a paramount government interest which justifies summary administrative action." Hodel v. Virginia Surface Mining, 452 U.S. at 300. Obviously, as the power to proceed in a summary fashion may deprive individuals of some of the ordinary elements of fair process, that power should be availed sparingly and when an emergency is said to justify summary action, it is an inevitable part of the judicial function to evaluate that claim.

These principles that justify summary action in appropriate circumstances are implicated in this action.

On the limited record available, I am persuaded that while the Secretary did not expressly declare that an imminent threat to the public health and safety was involved in the continued operation of Formosa's Delaware City facility, it is likely that the October 25 action was motivated by such a determination. It was so stated by counsel at oral argument and it is a reasonable inference from the action taken and all that was said. But it is admitted by the State that the Delaware City facility is not currently in violation of any requirement of federal or state law governing emissions. Moreover, the Secretary can not point to any specific threat that he has reason to believe currently exists. Rather his summary action is justified, if at all, by a lengthy course of conduct involving what the Secretary has concluded is a demonstrated inability to operate the plant safely within the requirements of the law. Thus, while the Secretary would be unable to point to any specific threat today, he could truthfully state that on October 14th of this year he could not have predicted the problem that occurred on October 15th (the details of which I need not now recite) nor could he have identified on October 16 the threat that lead to the incident of October 17.

The Court's function in evaluating the justification for summary action is a delicate one. An appropriate respect for the rights of private interests necessitates a judicial evaluation of such justification and not a blind or automatic deference to the judgment of the executive. However, because courts are poorly equipped to make judgments concerning what actions are necessary to safeguard the public health and welfare — particularly so where as here the fact development process of a trial has not had an opportunity to function — deference to the executive department's expertise and an acknowledgement of it's primary responsibility in that area, counsel some degree of deference. The standard that is appropriate is whether the finding of the agency is supportable by substantial evidence. Kreshtool v. Delmarva Power & Light Co., Del.Super., 310 A.2d 649 (1973). In this context I take that test to require deference to the agency's finding unless the Court is able to characterize the agency's determination as arbitrary or motivated by an inappropriate consideration. Gunnip v. Lautenklos, Del.Ch., 94 A.2d 712, 716 (1953). I cannot so conclude at this time and thus am unable to find a probability of ultimate success with respect to Formosa's procedural due process claim.

When summary action is taken, a citizen's due process rights demand that an opportunity to be heard be afforded promptly. That requirement is satisfied in this instance by the available procedure — which Formosa has already invoked — for a de novo hearing before the Environmental Appeals Board, an impartial statutory agency. Judicial review of any adverse determination of that Board is available in the Superior Court. Thus, ultimately Formosa will have the fullest of opportunities to develop its arguments that the Secretary's action in revoking the permits issued to it was unjustified by the facts and applicable law. While these procedures may provide cold comfort to plaintiff as its plant will be shut down as they proceed, they do, in my preliminary opinion, satisfy the balance that must be struck between Formosa's right to orderly and fair procedures and the Secretary's obligation to protect the "water and air resources of the State". 7 Del.C. §6001(b)(2).

Finally, Formosa contends that the Secretary's action is invalid because, assertedly, it is not based upon any statute or regulation and that Formosa cannot know how to defend itself against such vague claims and unauthorized acts. It is also contended that the "Secretary had not made any determination as to the applicable standard of care...(such as negligence, gross negligence or willful conduct) that would warrant the proposed revocation."

As to the second leg of this argument, I am unpersuaded that the Secretary has not impliedly at least determined that Formosa's level of care (e.g., negligence, willfulness) is irrelevant. The pertinent question to the Secretary, it would appear, is simply whether Formosa is able even assuming it exercises due care, to operate this facility in compliance with the conditions of its permits and the statutes and regulations governing it. In this sense then I believe the Secretary has discernibly employed the standard of strict liability that has traditionally been employed by courts when abnormally dangerous activities are carried on. Restatement (Second) of Torts, §519.

The other leg of this argument is more troubling. The October 25 notice recites a long factual history but does not state with respect to each permit being revoked either the specific facts relating to that permit that purports to justify the action taken or the specific legal requirement (i.e., statutory provision, regulation or permit condition) that has been violated. The Secretary has obviously proceeded in a broad-brush fashion.

Since I have evaluated the procedural propriety of the Secretary's action by the standards applied to summary administrative action, the effectiveness of the October 25 letter as adequate notice is moot for present purposes. If a prior hearing could constitutionally be dispensed with in these circumstances, defects in a notice are without legal effect. However, if the forthcoming hearing before the Environmental Appeals Board is to function to satisfy Formosa's right to procedural fairness, then a more detailed statement of the legal basis for each action taken would seem warranted.

Thus, while I find that there is a risk of irreparable injury to Formosa from the forthcoming revocation of its permits, I conclude that Formosa has not established a likelihood of ultimate success on its claims that the Secretary lacks statutory authority to revoke its permits or that the procedures employed in doing so invalidated that action. I make no finding as to the probability of ultimate success on any claims that one, more or all of the permit revocations were unjustified because with respect to such permit no statute, regulation or applicable permit was violated. That detailed analysis will presumably be performed by the Appeals Board subject to the review of the Superior Court as provided by statute.

III.

As an alternative to traditional equitable relief sought in this instance, Formosa seeks a stay of the Secretary's

October 25 action pending final action by the Appeals Board. Such relief is specifically authorized by Section 6008(f) of Title 7 which provides in full as follows:

> (f) No appeal shall operate to stay automatically any action of the Secretary, but upon application, and for good cause, the Secretary or the Court of Chancery may stay the action pending disposition of the appeal.

Formosa has sought such a stay from the Secretary and has been denied.

It is suggested that "good cause" must be satisfied by something other than the standards governing preliminary equitable relief; otherwise Section 6008(f) would be simply redundant. The argument has a certain force. The problem is it gives no guidance as to what more or less than traditional standards are to be employed. In the absence of any case law or other guidance, I am inclined to construe the requirement of "good cause" in §6008 as requiring a sensitive evaluation of the public interest involved in any matter appealed to the Environmental Appeals Board. While the prospects of injury to appellant are of obvious concern, given the purposes of this statute I must conclude that when the action appealed from is the revocation of a permit on safety grounds the public interest is the first concern. For the reasons stated above, see pp. 20-21, I find that Formosa has not established that the finding of the Secretary that a threat exists justifying immediate action is arbitrary or not supported by evidence. Therefore, on this record, I cannot conclude that good cause for a stay of the Secretary's action has been demonstrated.

Plaintiff's motion shall be denied. IT IS SO ORDERED.

Chancellor

WTA/vll
cc: Register in Chancery