IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

NATIONAL PAINT & COATINGS ASSOC., THE SHERWIN-WILLIAMS CO., AMERON INTERNATIONAL CORP., RUST-OLEUM CORP., THE VALSPAR CORP., TEXTURED COATINGS OF AMERICA, INC. AND TRUE VALUE MANU-FACTURING CO.,	)	
Appellants,	)	
v.	)	C.A. No. 03A-06-003 HDR
DELAWARE DEPT. OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL & DELAWARE ENVIRON-MENTAL APPEALS BOARD,	)	
Appellees.	)	

Submitted: November 24, 2003
Decided: February 26, 2004

Jeremy W. Homer, Esquire, Parkowski, Guerke & Swayze, P.A., Dover, Delaware, Attorney for National Paint & Coatings Association, et al., Appellants.

Matthew P. Chesser, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for DNREC, Appellee.

Kevin R. Slattery, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the Environmental Appeals Board, Appellee.

O P I N I O N

Upon Appeal from a Decision of the Environmental Appeals Board
AFFIRMED

RIDGELY, President Judge

This is an appeal from a decision of the Environmental Appeals Board ("EAB" or "Board") concerning Delaware's regulation of paints and other coatings sold or manufactured by Appellants National Paint and Coatings Association ("NPCA"), Sherwin-Williams Co., Ameron International Corp., Rust-Oleum Corp., Valspar Corp., Textured Coatings of America, Inc., and True Value Manufacturing Co. (collectively "Appellants"). The challenged action stems from the Board's decision to uphold a regulation promulgated by the Delaware Department of Natural Resources and Environmental Control ("DNREC" or "Appellee") which limits the amount of ozone-causing agents found in Appellants' products. Because the decision is supported by substantial evidence and is free from legal error, I affirm the Board's decision upholding the regulation.

I. REGULATORY BACKGROUND: THE CAA, OZONE AND DNREC

The Clean Air Act of 1970 ("CAA" or "Act")[1] effected a marked shift in environmental policy at all levels of government. In passing legislation designed to curb the ill effects of air pollution, Congress sought to protect the nation's air through regulation and research, at both the federal and state levels.[2] A major component of the CAA is its mandate to the Environmental Protection Agency

---

[1] 42 U.S.C. §§ 7401-7671q.

[2] In the CAA, Congress sought to "protect and enhance the quality of the nation's air . . . , initiate and accelerate a national research and development program . . . , provide technical and financial assistance to State and local governments . . . , [and] encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(b) (CAA § 101(b)).

("EPA") to establish precise air quality criteria, or National Ambient Air Quality Standards ("NAAQS"), for certain identified pollutants.[3] Seven sources of air pollution are currently controlled by NAAQS: carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), particulate matter less than 10 microns (PM_{10}), particulate matter less than 2.5 microns ($PM_{2.5}$), sulfur dioxide (SO_2), and ozone (O_3). Under the CAA, each state is responsible for realizing the applicable NAAQS through individual State Implementation Plans ("SIPs"), as well as designated air quality control regions.[4] Failure to do so results in a nonattainment designation,[5] and, subject to various limitations, carries the threat of monetary sanctions.[6]

Among the identified compounds, ground-level ozone presents perhaps the greatest and most complex challenge to effective pollution regulation, for both Delaware and the nation.[7] Unlike the other NAAQS pollutants, which form directly from source emissions, ozone develops in the lower atmosphere through a reaction

---

[3] *See generally* 42 U.S.C. § 7409 (CAA § 109).

[4] 42 U.S.C. § 7410 (CAA § 110) (specifying content of SIPs); 42 U.S.C. § 7407(d) (CAA § 107(d)) (directing submission of air region attainment classifications).

[5] 42 U.S.C. §§ 7501-02 (CAA §§ 171-172) (defining nonattainment and detailing plan submissions).

[6] 42 U.S.C. § 7509(b)(1)(A) (CAA § 179) ("The [EPA] Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding . . . of any grants . . . .").

[7] *See Motiva Enter. LLC v. Dept. of Nat. Resources & Envtl. Control*, 745 A.2d 234, 236 (Del. Super. Ct. 1999); F. William Brownell & Ross S. Antonson, *Implementing the New Eight-Hour NAAQS for Ozone: What Happened to the 1990 Clean Air Act?*, 11 TUL. ENVTL. L.J. 355 (1998).

of nitrogen oxides (NO_x) and volatile organic compounds ("VOCs").[8] VOCs, in turn, are found in automobile exhaust, gasoline vapors, and certain chemical compounds, including those found in commercial and consumer paints.[9] The EPA has designated all three counties in Delaware as nonattainment areas for ozone.[10] Kent and New Castle counties are classified as "severe."[11] In Kent County alone, data collected by the EPA indicates that ozone was most prevalent among the seven regulated pollutants nearly half of the days recorded in 2003.[12]

Ground-level ozone presents a major health threat to humans and ecosystems

---

[8] Department of Natural Resources and Environmental Control, *Delaware Annual Air Quality Report* 12 (2002).

[9] *Id.*

[10] *See* EPA AirData, Nonattainment Areas Map, *at* http://www.epa.gov/air/data/nonat.html?us~USA~United%20States (generating nonattainment maps by pollutant) (last accessed Feb. 25, 2004).

[11] *See* EPA Greenbook, Ozone Information, *at* http://www.epa.gov/oar/oaqps/greenbk/oncs.html#DELAWARE (last accessed Feb. 25, 2004). Delaware regulations define the criteria for these counties' ambient air quality for ozone as follows:

> The average number of days per calendar year with a maximum one hour average value exceeding 235 $\mu g/m^3$ (0.12ppm) shall be equal to or less than one, averaged over three consecutive years.

Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Regulation No. 3, § 6 (1999), *available at* http://www.dnrec.state.de.us/air/aqm_page/docs/pdf/reg_3.pdf (last accessed Feb. 25, 2004).

[12] *See* EPA AirData, Air Quality Index Summary Report, *at* http://oaspub.epa.gov/airsdata/adaqs.aqi?geotype=st&geocode=DE&geoinfo=%3Fst%7EDE%7EDelaware&year=2003&sumtype=co&fld=gname&fld=gcode&fld=stabbr&fld=regn&rpp=25 (last accessed Feb. 25, 2004). Ozone prevailed 105 out of the 279 days recorded.

alike. Individuals, especially those suffering from respiratory problems, are susceptible upon exposure to a variety of ailments, including aggravated asthma, reduced lung capacity, and increased risk of pneumonia and bronchitis.[13] Prolonged exposure to ground-level ozone also adversely influences flora growth, reducing crop and forest yields through an increased vulnerability to disease, pests, and inclement weather.[14] In particular, the EPA has estimated that ground-level ozone is responsible for thousands of cases of asthma and lung-function decreases each year.[15]

In an effort to curb ozone precursor emissions and address Delaware's nonattainment status, DNREC adopted Section 1 of Air Regulation 41 ("Regulation 41"), a rule that establishes allowable limits on the level of VOCs used in architectural and industrial maintenance ("AIM") coatings for sale and use in Delaware.[16] The AIM coatings include various paints, stains, and sealers used by both industry and consumers, including those manufactured and sold by

---

[13] *See* EPA: Health and Environmental Impacts of Ground-level Ozone, *at* http://www.epa.gov/air/urbanair/ozone/hlth.html (last accessed Feb. 25, 2004).

[14] *Id*.

[15] Ophelia Eglene, *Transboundary Air Pollution: Regulatory Schemes & Interstate Cooperation*, 7 ALB. L. ENVTL. OUTLOOK 129, 132 (2002).

[16] Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products: Architectural and Industrial Maintenance Coatings*, Regulation No. 41, § 1 (2002).

Appellants.[17] In promulgating the regulation, DNREC specifically cited the need to reduce two tons of VOCs per day in Delaware.[18]

II. REGULATION 41: ORIGINS, APPEAL HEARING, AND THE EAB DECISION

DNREC based a substantial portion of Regulation 41 on a model AIM rule developed by the California Air Resources Board ("CARB"), an agency which provides assistance and guidance to that state's air control districts. This model established Suggested Control Measures ("SCM") for producing low-VOC AIM coatings, and served as a resource for Delaware's regulation. Additionally, several other groups influenced the adoption of Regulation 41, including the State and Territorial Air Pollution Program Administration ("STAPPA") and the Association of Local Air Pollution Control Officials ("ALAPCO"), two national associations that serve to assist state agencies in developing air quality initiatives. Furthermore, a CAA-authorized regional organization, the Ozone Transport Commission ("OTC"), of which Delaware is a member state, developed a model AIM rule based in part on the CARB paradigm.[19] The OTC rule, the product of a joint effort among member states, was developed in response to EPA concerns over ozone pollution

---

[17] *See id*. at Table 1.

[18] DNREC, Secretary's Order No. 2002-A-0009 (Feb. 6, 2002) (amended March 11, 2002).

[19] 42 U.S.C. § 7511c (CAA § 184) (establishing an ozone transport region comprising Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia, and the District of Columbia).

in the Northeast.[20] Specifically, the rule identifies AIM coatings as a primary source of the transport region's ozone problems.[21] Delaware's contribution to the model AIM rule also aided DNREC in adopting Regulation 41.

At the appeal hearing, both parties called experts to testify to the process surrounding Regulation 41's passage. Gene Pettingill, a chemical engineer employed by DNREC in its regulatory development group, recounted Delaware's involvement in enacting the OTC AIM model rule as well as the modifications DNREC made to it in enacting Regulation 41. James F. Nyarady, a CARB employee and professional engineer, testified to the details of the CARB SCM, including low- vs. high-VOC paint performance. Another expert, Robert G. Sliwinski, a professional engineer employed by the New York Department of Environmental Conservation, described that state's efforts at curbing its nonattainment ozone levels and the activities of STAPPA-ALAPCO.

Other witnesses included Madelyn Kazen-Harding, manager of compliance and registration for Sherwin-Williams, who criticized the preparation that went into the CARB rule, and Douglas Gardner, professor of Wood Science and Technology at the University of Maine, who described the performance of wood and wood stains under various climatic conditions. In all, the EAB heard fifteen experts over

---

[20] *See* Ozone Transport Commission, *Memorandum of Understanding Among the States of the Ozone Transport Commission Regarding the Development of Specific Control Measures to Support Attainment and Maintenance of the Ozone National Ambient Air Quality Standards* (June 1, 2000), *available at* Index of Formal OTC Action, http://www.otcair.org/Formal%20Actions/mou003.htm.

[21] *Id.*

two days of hearings.

In a decision dated June 2, 2003, the EAB affirmed DNREC's passage of Regulation 41.[22] Noting the "extraordinary effort by the agency to involve both the public and [industry] in the comment and public hearing process . . . .," the Board found the regulatory procedures were supported by a reasonable basis in the record.[23] The Board concluded, pursuant to 7 *Del. C.* § 6008(c), that Appellants had failed to meet their burden to show the agency's means of decisionmaking were arbitrary and capricious. This appeal followed.

III. PARTIES' ARGUMENTS

Appellants first contend there are three conflicting standards applicable to the Court's review of a decision of the EAB: the so-called *unlawful manner*, *arbitrary and capricious*, and *substantial evidence* tests.[24] In the alleged absence of any statutory preference, they urge the Court to review the Board's action under 7 *Del. C.* 6008(c)'s *arbitrary and capricious* standard. In addition, Appellants suggest the Court adopt this standard as interpreted by the United States Supreme Court.[25] Appellees counter by stressing it is proper only to review the Board's decision

---

[22] *Nat. Paint & Coatings Assoc. v. Dept. of Nat. Resources & Envtl. Control*, EAB Appeal No. 2002-03 (June 2, 2003) (hereinafter *EAB Appeal*).

[23] *Id.* at 43.

[24] *See* 29 *Del. C.* § 10141(e), 7 *Del. C.* § 6008(c), and 7 *Del. C.* 6009(b), respectively.

[25] *Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (holding an agency action arbitrary and capricious where it "entirely failed to consider an important aspect of the problem, offered an [inconsistent] explanation . . . , or is so implausible that it cannot be ascribed to a difference in view . . . .").

according to the *substantial evidence* standard, as intended by 7 *Del. C.* § 6009.

Appellants next assert Regulation 41 is invalid, regardless of which standard of review the Court applies. Specifically, they claim DNREC's determination that low-VOC paint will effectively decrease the emission of ozone-causing agents is based on speculation, and that the integrity of such paints is questionable. Because of this uncertainty regarding performance, constant reapplication may be required, thereby increasing the aggregate release of VOCs into the atmosphere. As a result, according to Appellants, the efficacy of Regulation 41 – whether mandating the use of low-VOC paints will actually decrease the prevalence of such compounds in the environment – is unknown and therefore contrary to the reasoning employed by the EAB.

Appellants also insist there is a dearth of evidence for three affected product groups. As to stains, varnishes, and sanding sealers, they emphasize that the testimony of Mr. Pettingill and others all point to the substandard performance of low-VOC paints. In the area of non-flats, exterior flats, and high gloss paints, Appellants charge DNREC with ignoring certain performance studies in freeze-thaw cycles, a weather pattern typical in Delaware but allegedly uncommon in other states DNREC studied. Appellants bolster their argument with the testimony of Mr. Pettingill, who stated DNREC based Regulation 41 on the California model, and Mr. Nyarady, who conceded he was unaware of the effects of inordinate temperature fluctuations on low-VOC paints. Finally, in addressing specialty primers, Appellants accuse DNREC of failing to articulate any rationale for limiting VOC content, as the record evidence indicates that minimizing VOCs correlates to

an increase in application frequency. Thus, any benefit inhering to mandating an industry-wide VOC ceiling would be offset by the need to constantly repaint.

Next, Appellants argue that Regulation 41 is void *ab initio*. Appellants specifically target DNREC's method of decisionmaking, maintaining the agency unlawfully decided to adopt the regulation before the official comment process began.[26] Similarly, Appellants attack Regulation 41's administrative public-commenting provisions, as the regulation's industrial reporting requirements were modified by DNREC in the latter stages of the rulemaking process, allegedly without public input.[27]

Because the EPA also has not established a fixed VOC-reduction schedule, Appellants profess that implementing the restrictions will not actually result in lower precursor emissions. Thus, according to Appellants, Regulation 41 unnecessarily increases expense and aggravation for industry and consumers alike. Appellants tie these arguments together in their reply brief, denouncing the EAB for failing to articulate the evidence supporting DNREC's decision, and, moreover, indicting the Board for explicitly ignoring industry evidence that contradicted the

---

[26] In support of this proposition, Appellants cite *Delmarva Power & Light Co. v. Tulou*, 729 A.2d 868, 874 (Del. Super. Ct. 1998) (reversing the EAB and noting "[w]hat is lacking here is a detailed, independent scientific examination. Reliance on a group within a committee within an agency without any independent review or analysis of the science is simply insufficient to withstand appellate scrutiny.").

[27] *See* 29 *Del. C.* § 10118(c) ("In the event an agency makes substantive changes in the proposal as a result of the public comments, evidence and information, the agency shall consider the revised proposal as a new proposal subject to the notice requirements . . . of this subchapter.").

regulation's assumptions. For these reasons, Appellants seek reversal, or, in the alternative, modification of the regulation to comply with an NPCA-sponsored VOC proposal.

Appellees counter with four interrelated arguments. First, they contend there exists substantial evidence to support the Board's finding that there are low-VOC products currently available to the consumer, and, conversely, that there is no scientific evidence to support Appellants' repetitive coatings theory. In assessing the credibility of the witnesses and evidence presented, Appellees note, the Board correctly found that Appellants had failed to counter the regulation's statutory presumption of validity.[28]

Second, Appellees argue that even under the more demanding *arbitrary and capricious* standard, Regulation 41 is valid. Noting the purposes behind the CAA and the negative ramifications for noncompliance with federal environmental mandates, as well as Delaware's budgetary constraints for research and development, Appellees respond that Regulation 41 is consistent with DNREC's responsibility for safeguarding the state's natural environment.

Countering the charge that the Rule's reporting requirements are unlawful, Appellees next point to 29 *Del. C.* § 10118(c).[29] This statute mandates a new round of public comment for all substantive alterations; whether a change is substantive

---

[28] *See* 29 Del. C. § 10141(e) ("Upon review of regulatory action, the agency action shall be presumed . . . valid.").

[29] *See supra* note 27 (discussing reporting requirements).

in turn is left to the discretion of the agency head.[30] Appellees state that no additional comment is needed because Regulation 41 was amended in response to Appellants' own criticisms. Similarly, Appellees dispute the charge that the process was predetermined, noting that although DNREC used the California and OTC rules as models, the modifications produced a fluid, Delaware-specific environmental regulation.

IV. STANDARD OF REVIEW

On appeal, the Court may affirm, reverse, or modify a decision of the EAB.[31] The rules governing such actions are furnished in two similar statutory provisions that use disparate language. In particular, the General Assembly has directed in Title 7 that the "Board's findings of fact shall not be set aside unless the Court determines that the records contain no substantial evidence that would reasonably support the findings."[32] However the *Administrative Procedures Act* ("APA")[33] provides:

> [T]he complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner . . . or that the regulation, where required, was adopted without a reasonable basis in

---

30 *Id.*

31 7 *Del. C.* § 6009(b).

32 *Id.* § 6009(b). This provision covers only appeals from the EAB.

33 29 *Del. C.* §§ 10101-10161.

the record or is otherwise unlawful.[34]

Because the APA was adopted after Section 6009, this latter standard of review controls.[35] Consistent with the prior rulings of this Court, I will review the Board's decision under the standard set forth in the APA.[36]

Absent an abuse of discretion or an error of law, the Board's decision will be upheld if supported by substantial evidence.[37] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[39] It is within the discretion of the agency, not the Court, to weigh the

---

[34] 29 *Del. C.* § 10141(e). This standard applies to most state agencies, including the EAB. *See id.* § 10161(a) (listing forty-eight state agencies controlled by the APA).

[35] *Dept. of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982) ("Although [an earlier statute] was not expressly revoked by the [APA], the latter was more recently enacted; therefore, it must prevail over [the earlier statute] where in irreconcilable conflict."); *Carter v. McLaughlin*, 2000 Del. LEXIS 162, at *10 ("The General Assembly is presumed to be aware of existing law, and statutes are presumed to be consistent with prior law."); *see also* 29 *Del. C.* § 10101 ("The purpose of this chapter is to standardize the procedures and methods whereby certain state agencies exercise their statutory powers and to specify the manner and extent to which action by such agencies may be subjected to . . . judicial review.").

[36] *See, e.g.*, *Motiva Enterprises LLC v. DNREC*, 745 A.2d 234, 242 (Del. Super. Ct. 1999) ("It is well-settled in Delaware that when reviewing a decision of an administrative [b]oard, the Court must . . . determine if there is substantial competent evidence to support the findings and conclusion of the Board."); *Tulou v. Raytheon Service Co.*, 659 A.2d 796, 802 (Del. Super. Ct. 1995) ("On an appeal from the [Environmental Appeals] Board, this Court's role is to determine whether the Board's decision is supported by substantial evidence and is free from legal error.").

[37] *Glade v. DNREC*, 2001 Del. Super. LEXIS 258; *Collazuol v. DNREC*, 1996 Del. Super. LEXIS 453; *cf. Tatman v. Del. Home Maint.*, 2003 Del. Super. LEXIS 426.

[39] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986).

credibility of witnesses and resolve conflicting testimony.[40] Thus, even if it would have reached a different conclusion, the Court will not substitute its judgment for that of the Board.[41]

V. DISCUSSION

At the appeal hearing, the Board heard two connected theories from Appellants, both based on coating performance. The first, premised on AIM integrity, holds that low-VOC coatings are less reliable, and therefore require additional applications. In the aggregate, this repetition increases precursor emissions, thereby undermining any benefit for restricting VOCs in the first place. Second, Appellants contended that DNREC's reliance on the CARB model and its accompanying research was misplaced because of climatic differences between California and Delaware.

The Board rejected both these theories. Calling the reapplication theory "speculative," the EAB favored the testimony of David R. Fuhr, DNREC's expert, over that of Dr. Gardner, expert for Appellants.[42] Both addressed the process of panelization, or cracking, of wood, and its relation to VOC content in coatings. In his research, however, Dr. Gardner was unaware of the brands of coatings he utilized, or their respective VOC contents.[43] Mr. Fuhr, on the other hand, presented

---

[40] *Chrysler*, 213 A.2d at 66; *Motiva Enter.*, 745 A.2d at 242.

[41] *Glade*, 2001 Del. Super. LEXIS 258; *Director of Revenue v. Stroup*, 611 A.2d 24, 26 (Del. Super. Ct. 1992).

[42] *EAB Appeal*, at 41.

[43] *See EAB Appeal*, at 42; Tr. Gardner, at 188.

evidence of low-VOC paint holding stable over a period of years, and the potential for reformulating coatings to address performance issues.[44]

Addressing Appellants' climate theory, the Board noted the CARB SCM was designed for all of California, a state with widely varying climate zones, including several similar to Delaware.[45] Although Mr. Nyarady, the CARB employee, admitted that California's climate does not display the extremes in temperature that characterize Delaware's weather,[46] the studies conducted by STAPPA-ALAPCO and the OTC scrutinized the CARB rule, and modified it to east coast conditions.[47] Regulation 41, in turn, is grounded in the research of all three models.

Although Delaware may not simply wholesale other programs without a tailored approach to the state's unique climate, physical or otherwise, DNREC may consider the relevant findings of other qualified experts for comparable conditions. The Board heard testimony from experts who represent both industry and organizations dedicated to addressing the environmental problems raised by ozone and its precursor emissions. The EAB assessed the credibility of these witnesses, and determined that DNREC was justified, based on the evidence, in restricting the VOC content of the coatings in issue. Given the comprehensive testimony presented, the Court finds that there is substantial evidence in the record to support

---

[44] *See EAB Appeal*, at 42; Tr. Fuhr, at 658-661.

[45] *EAB Appeal*, at 39; Tr. Nyarady, at 478-79.

[46] Tr. Nyarady, at 496-499.

[47] *EAB Appeal*, at 39; Tr. Sliwinski, at 509-512.

the findings of the Board.

The decision of the EAB is also free from legal error. The Board rejected Appellants' contention that DNREC followed a predetermined route in enacting Regulation 41, finding that "modifications were made as a result of an extraordinary effort to obtain public and industry input."[48] The testimony of Mr. Pettingill, the DNREC employee, is illustrative:

> [W]e did a number of things differently for this rule because the rule is different. . . . This rule was going to cover anybody who manufactured paint . . . specified the use of paint . . . used the paint . . . and people who sold paint. So it covered a very wide spectrum of people in Delaware.
>
> * * *
>
> I felt one meeting wouldn't be enough. . . . So we scheduled three meetings, one in each county, at night to be sure we would give everybody a chance to attend the meetings.[49]

In addition, Mr. Pettingill testified to his efforts to notify those affected via direct mail, a procedure not required under Delaware law.[50]

The expert also described the changes DNREC made in response to public input:

> We had a comment from a stakeholder that the rule did not cover a type of coating[] called *thermoplastic rubber coatings and mastic*, which is in the federal rule. It was not put in the model rule for California, so it didn't get into our model rule. . . . [B]ut he brought the

---

[48] *EAB Appeal*, at 39; *see generally id.* at 43.

[49] Tr. Pettingill, at 529.

[50] *Id*. at 530.

> comment up that it really should be in there and we looked at it and he was right, so [DNREC] added it.[51]

The Board found the witness to be credible and accepted his testimony. Because the record indicates DNREC received, digested, and acted on comments during the rulemaking process, the Court finds the Board properly rejected Appellants' predetermination argument.

I next turn to the allegation that DNREC's change to Regulation 41's industry reporting provisions was unlawful. Delaware law requires any "substantive" change to a proposed regulation be treated as a new proposal for purposes of notice and public comment.[52] Furthermore, if the changes are not substantive, the agency "shall not be required to repropose the regulation change. Whether a change constitutes substantive or nonsubstantive matter shall be determined by the agency head."[53] Appellants contend that certain alterations to Regulation 41's record-keeping provisions — that manufacturers retain compliance records rather than submit them directly to DNREC — were approved without the opportunity for comment.

The Board rejected this proposition, noting that DNREC modified the regulation's requirements in response to manufacturer complaints.[54] The testimony

---

[51] *Id*. at 540 (formatting altered).

[52] 29 *Del. C*. § 10118(c).

[53] *Id*.

[54] *EAB Appeal*, at 42.

of Mr. Pettingill confirms this analysis: "The stakeholder comments started to rise about the reporting requirements[,] which most of the companies felt was onerous . . . ."[55] Implicit with the change is the conclusion by DNREC that the change to the record keeper requirements was not substantive. "Substantive" is defined as "those regulations allowing, requiring, or forbidding conduct in which private persons are otherwise free or prohibited to engage, or regulations which state requirements, *other than procedural*, for obtaining, retaining, or renewing a license or any kind of benefit or recompense."[56] Additional notice and public comments on the regulation change on reporting requirements was not required as a matter of law.

---

[55] Tr. Pettingill, at 569.

[56] *See* 29 *Del. C.* § 10102(9) (emphasis added); *see also Council 81 v. State Personnel Comm.*, 1989 Del. Super. LEXIS 341, at *5 (rejecting argument that certain changes to state merit rules were substantive).

VI. CONCLUSION

Because the decision of the Environmental Appeals Board to affirm the promulgation of Regulation 41 is supported by substantial evidence and is free from legal error, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

jb
oc: Prothonotary
xc: Order Distribution