

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 )  
Petition of Emerald Polymer )  
 ) AS 19-002  
Additives, LLC for an Adjusted )  
 ) (Adjusted Standard)  
Standard from 35 Ill. Adm. Code )  
 )  
304.122(b) )

**NOTICE OF ELECTRONIC FILING**

TO: Persons Identified on the Attached Certificate of Service

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board this **Notice of Electronic Filing** and the attached **Motion to the Hearing Officer to Exclude Evidence and Argument at Hearing**, copies of which are attached herewith and served upon you.

Respectfully submitted,

Emerald Polymer Additives LLC

Date: December 20, 2019

By: /s/ Thomas W. Dimond  
One of Its Attorneys

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
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Petition of Emerald Polymer	)	
Additives, LLC for an Adjusted	)	AS 19-002
Standard from 35 Ill. Adm. Code	)	(Adjusted Standard)
304.122(b)	)	

**MOTION TO THE HEARING OFFICER  
TO EXCLUDE EVIDENCE AND ARGUMENT AT HEARING**

Emerald Polymer Additives, LLC (“Emerald”) hereby moves the Hearing Officer for entry of an order pursuant to Section 101.610(l) of the Board’s procedural rules excluding evidence and argument at hearing related to the financial performance or condition of Emerald or its corporate parent or affiliates. In support thereof, Emerald states as follows:

1. Board hearing officers have the “duty . . . to ensure development of a clear, complete and concise record.” 35 Ill. Adm. Code 101.610. To accomplish that goal, hearing officers may rule upon objections and evidentiary questions. *Id.*, 101.610(l). This motion asks the Hearing Officer to ensure a clear, complete and concise record that does not veer off the rails into subjects that are entirely irrelevant to the proceeding.

2. The Illinois Environmental Protection Agency (“Agency”) has sought detailed and confidential information from Emerald regarding its financial condition and profitability. The purpose of these discovery requests is not entirely clear, but it appears that the Agency intends to introduce this information as evidence at hearing. Because none of that evidence is relevant to any issue at the hearing, Emerald objects to its introduction and asks the Hearing Officer to enter an order excluding all such evidence and any arguments that would be based on such evidence.

3. Emerald filed a petition seeking an adjusted standard from the ammonia nitrogen effluent limitation in the Board's rules at 35 Ill. Adm. Code 304.122(b). The issuance of an adjusted standard is governed by Section 28.1 of the Illinois Environmental Protection Act (the "Act"). Under Section 28.1, an adjusted standard is to be justified consistent with Section 27(a) of the Act. 415 ILCS 5/28.1(a). Section 27(a), in turn, directs the Board to take into account a number of factors, including the "economic reasonableness of measuring or reducing the particular type of pollution." 415 ILCS 5/27(a).

4. As the Appellate Court held, the test for economic reasonableness involves a cost-benefit analysis comparing the costs of implementing controls against the public benefits to be derived from those controls. *E.P.A. v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 751 (2d Dist. 1999). This explanation of the test is well-established and consistent with how the Board has applied that test in numerous rulemakings and adjusted standard cases. For example, in granting an adjusted standard to Ford for its emissions of volatile organic materials ("VOM"), the Board compared Ford's estimated control costs of \$45,500/ton of VOM reduction to costs for controls that had already been adopted. The Board found the additional controls for Ford were not economically reasonable because that cost per ton of emissions reduced "far exceeds the level at which the Board has generally found emissions reduction not economically reasonable." *In the Matter of: Petition of Ford Motor Company (Chicago Assembly Plant) for an Adjusted Standard from 35 Ill. Adm. Code 218.986*, AS 00-6, 5 (Apr. 6, 2000).

5. A Board proceeding for adopting amendments to some printing operations is particularly instructive. To analyze economic reasonableness in that matter, the Board first analyzed evidence on the costs expected to be incurred to comply with the proposed regulations. It then accepted the Agency's evidence of the quantity of emissions to be reduced and calculated

the cost per ton of reduced emissions for four different control technologies. *See In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 215: Flexographic and Rotogravure Printing*, R85-21, Final Order, 11-13 (Oct. 29, 1987). The Board found that the range of costs per ton “was not trivial,” but it was still less than the “rough upper bound of cost reasonableness.” *Id.*, 14. One company protested that the costs were too high and that its costs of compliance, in particular, would exceed the “rough upper bound.” But, neither the company nor the Board evaluated cost reasonableness in terms of the financial condition or profitability of that one company. Both simply evaluated what the cost of control was over the operating life of the control equipment and what emissions reductions were expected from the application of the controls. *Id.*, 14-15. The company's financial condition had nothing to do with it.

6. As these precedents show, the test for economic reasonableness under Section 27, which is incorporated into Section 28.1, is an objective test that evaluates the costs and benefits of a control technology. It is certainly appropriate to consider if some facilities have higher control costs because of unique factors. That is one of the issues raised in this case because Emerald’s Henry Plant has unique factors that make the costs of reducing ammonia nitrogen significantly higher than for other facilities. Still, the economic reasonableness test is not related to profitability or financial condition. That approach makes sense. If economic reasonableness depended on profitability or some other measure of financial health, the most successful companies would have to apply more stringent controls, almost certainly at higher costs, while companies in difficult financial straights (whether from poor management or out-of-state competitors not subject to the same requirements) would be allowed to pollute more. That would create an unlevel playing field and an economic incentive for companies to operate at the margin of viability. Such an approach would be unwise policy.

7. In accordance with the well-established law on how the economic reasonableness test is measured, Emerald filed the expert report of T. Houston Flippin, who will testify at trial. Mr. Flippin analyzed a number of alternatives for the reduction of ammonia nitrogen in Emerald's effluent, estimated implementation costs for those alternatives, estimated the quantity of ammonia nitrogen that each alternative would reduce and then computed the cost per pound of ammonia nitrogen removed for each alternative. *See* Notice of Service of Discovery Documents (Oct. 14, 2019) (includes Mr. Flippin's report). This method of analysis allows a comparison of the cost-effectiveness of various alternatives for reducing ammonia nitrogen in effluent, as envisioned by the economic reasonableness test.

8. Contrary to the well-established precedent, the Agency has requested financial information of Emerald that has no relationship to a showing of economic reasonableness. On September 6, 2019, the Agency served requests to produce and interrogatories on Emerald. *See* Exs. A and B, respectively. The Agency requested the production of "All of Petitioner's financial balance sheets, and any annual shareholder reports for" 2015-2019. Ex. A, No. 4. The Agency also requested that Emerald "Provide Petitioner's assets, liabilities, and expenses, including operation and maintenance costs" for 2015-2019 and "Petitioner's projected annual operation and maintenance costs for" 2020-2024. Ex. B, Interrogatories 3 and 4. The Agency even went so far as to demand that Emerald produce accountings of its counsel's time, the costs and expenses paid by Emerald to its counsel and Emerald's fee arrangement with its counsel and its counsel's hourly fees. Ex. A, Nos. 20 and 21; Ex. B, Interrogatories 10 and 11.

9. Despite believing that document request No. 4 and Interrogatories 3 and 4 were not reasonably calculated to lead to the discovery of admissible evidence, Emerald provided balance sheets and statements of operations (i.e., income statements) for 2015-2018 and for 2019

through August 31. Those documents were produced subject to claims of confidentiality and were marked with the label **Public Record Claimed Exempt/NON-DISCLOSABLE INFORMATION** in accordance with the Agency's (2 Ill. Adm. Code 1828.401) and the Board's rules (35 Ill. Adm. Code 130.404(b)). *See* Notice of Service of Discovery Documents (Oct. 14, 2019) (including letter to Agency counsel). Emerald continued to cooperate with the Agency's overbroad discovery requests by providing a corporate controller and a chief executive officer to testify at depositions about the financial information produced.

10. Then, on December 19, 2019, the Agency served a subpoena duces tecum on Emerald's corporate parent, Emerald Performance Materials, LLC ("EPM"), seeking similar financial information from it.

11. Enough is enough. A company's profitability (or lack thereof), the amount of its maintenance expenses or the total amount of its assets is simply not relevant to showing that a control technology is, or is not, economically reasonable. *See* ¶¶ 3-6, above. While Emerald can only make an educated guess, it seems the Agency may be confusing this request for an adjusted standard with a petition for variance. Issuance of a variance requires proof that complying with a general standard would "impose an arbitrary and unreasonable hardship." 415 ILCS 5/35(a). In a variance proceeding, the Agency might be able to legitimately request some of this information to rebut a claim of hardship. Perhaps Emerald could make such an assertion, but it has not. This is not a variance proceeding.

12. Beyond the irrelevance of Emerald's financial information, the Agency has no apparent plan as to how it would introduce testimony about the meaning of the financial information. Even if hardship, or lack thereof, was an issue, merely tossing a company's financial information into the record is improper. Having a financial expert analyze the

information as the basis for some sort of opinion testimony might be permissible. But, that does not seem to be the Agency's plan. The Hearing Officer set November 8 as the deadline for the Agency to identify expert witnesses. The Agency identified none. And, the depositions of the Agency employees identified as possible witnesses did not reveal any financial expertise. As near as Emerald can figure, the Agency's plan is to just toss financial information about Emerald and/or its parent into the record and then foist the burden of analyzing it on the Board and its technical staff. That is not proper and is another reason to preclude the Agency from introducing this evidence at Hearing.

WHEREFORE, Emerald requests that the Hearing Officer enter an order barring the Agency from introducing any documents or other evidence regarding the profitability or financial condition of Emerald, or its corporate parents or other affiliates, and barring any argument at hearing based on such documents or other evidence.

Respectfully submitted,

Emerald Polymer Additives LLC

Date: December 20, 2019

By: /s/ Thomas W. Dimond  
One of Its Attorneys

Thomas W. Dimond  
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**ICE MILLER LLP**  
200 West Madison, Suite 3500  
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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on December 20, 2019, I have served the attached **Notice of Electronic Filing and Motion to the Hearing Officer to Exclude Evidence and Argument at Hearing** upon the following persons by electronic mail:

Rex L. Gradeless, #6303411  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
[Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov)

Don Brown, Clerk, Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
[Don.Brown@Illinois.gov](mailto:Don.Brown@Illinois.gov)

Carol Webb, Hearing Office, Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, Illinois 62794-9274  
[Carol.Webb@Illinois.gov](mailto:Carol.Webb@Illinois.gov)

/s/ Thomas W. Dimond



# **EXHIBIT A**

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 ) AS 19-002  
Petition of Emerald Polymer )  
Additives, LLC for an Adjusted ) (Adjusted Standard)  
Standard from 35 Ill. Adm. Code )  
304.122(b) )

**ILLINOIS EPA’S FIRST REQUEST FOR  
PETITIONER TO PRODUCE DOCUMENTS**

COMES NOW the Illinois Environmental Protection Agency (hereafter “Illinois EPA”), by and through its counsel, and pursuant to 35 Ill. Adm. Code 101.616, directing EMERALD POLYMER ADDITIVES (hereafter “Petitioner”) to produce for inspection, copying, reproduction, and photographing at the Illinois EPA, 1021 North Grand Ave East, Springfield, Illinois, 62794, twenty-eight (28) days after receipt of this request, the following documents, objects or tangible things:

1. All statements (whether signed or unsigned, written or recorded) of persons having knowledge of any and all occurrences within the petition for adjusted standard, filed April 03, 2019 (hereafter “petition for adjusted standard”), and any and all other matters or facts within the petition for adjusted standard.

**RESPONSE:**

2. All other documents containing facts or opinions of persons having knowledge of any and all occurrences in the petition for adjusted standard or any other matters or facts within the petition for adjusted standard, including, but not limited to, notes or memoranda of conversations, untranscribed tapes, court reporter notes, and correspondence with such persons.

**RESPONSE:**

3. Any books, reports, documents, articles, or other information relied upon by

persons having knowledge of any and all occurrences within the petition for adjusted standard or any other matter or facts within the petition for adjusted standard.

**RESPONSE:**

4. All of Petitioner's financial balance sheets, and any annual shareholder reports, for fiscal years 2015, 2016, 2017, 2018, and 2019.

**RESPONSE:**

5. Pursuant to 35 Ill. Adm. Code 101.306(a), all documents and materials to be incorporated by the Pollution Control Board from *Noveon, Inc. for and Adjusted Standard from 35 Ill. Adm. Code 304.122, AS-2002-005*, and *Petition of Emerald Performance Materials LLC for an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS-2013-002*.

**RESPONSE:**

6. All documents, electronically stored information, and tangible things that Petitioner may use to support its petition for adjusted standard. For each document, if it is not apparent from the face of the document, indicate what the document is and the date such report was made and documented.

**RESPONSE:**

7. All objects, photographs, videotapes, slides, motion pictures, diagrams, models, samples, drawings, or other things of a tangible nature relating to any and all matters in the petition for adjusted standard.

**RESPONSE:**

8. All documents relating to any investigation or examination of matters in the petition for adjusted standard.

**RESPONSE:**

9. All income tax records of Petitioner for the past six (6) years preceding the date of this request.

**RESPONSE:**

10. All reports and notes of experts, correspondence to or from experts, test reports, authorities, books, articles, or other documents relied upon by experts relating to the petition for adjusted standard.

**RESPONSE:**

11. All notes, diaries, or other documents prepared by anyone pertaining to the petition for adjusted standard.

**RESPONSE:**

12. All reports, investigation summaries, memoranda, letters, notes, books, articles, tests, texts, written communications, or other authorities relating to the petition for adjusted standard.

**RESPONSE:**

13. Documents in your possession or control relating to any and all administrative, bankruptcy, civil, or criminal matters in which Petitioner has been involved as a party or witness. For each such matter, identify the case caption, forum, and docket number; date of proceedings; presiding judge; name of court reporter who transcribed said proceedings, if it is not apparent from the face of the document; and capacity in which Petitioner was involved in the lawsuit (*i.e.*, plaintiff, defendant, witness for the plaintiff, witness for the defendant, expert witness, etc.).

**RESPONSE:**

14. Any documents that Petitioner may be introducing at hearing or using in any depositions in the case at bar that have not been disclosed and produced as otherwise requested

herein.

**RESPONSE:**

15. True and accurate copies of all notes, diaries, written correspondence, or other documentation related to or supporting Petitioner's claim that any of the alternatives are economically cost prohibitive and/or unreasonable. For each such document, if it is not apparent from the face, identify to whom the document was directed, from whom the document was directed, and the date the document was made.

**RESPONSE:**

16. True and accurate copies of all documents that Petitioner made or has acquired from any source, as they relate to the petition for adjusted standard. For each such document, if it is not apparent from the face, identify to whom the document was directed, from whom the document was directed, and the date the document was made or received.

**RESPONSE:**

17. All electronic mail; text messages; information generated on any type of computer or electronic device; documents; and correspondence that Petitioner had with any person relating to the petition for adjusted standard. For each such document, if it is not apparent from the face, identify to whom the document was directed, from whom the document was directed, and the date the document was made or received.

**RESPONSE:**

18. All pleadings, subpoenas, Freedom of Information Act requests, discovery requests, correspondence, or other written communications that Petitioner or its counsel has not previously served upon any Illinois EPA counsel who has entered an appearance in this case. Such documents include, but are not limited to, subpoenas issued for witnesses or documents.

**RESPONSE:**

19. The responses and documents obtained as a result of the Petitioner or its counsel sending the subpoenas, Freedom of Information Act requests, discovery requests, correspondence, or other written communications as requested in paragraph 18 above. In responding to this request to produce, Petitioner need not produce the documents that the Illinois EPA's counsel have sent or will send to Petitioner or their counsel.

**RESPONSE:**

20. All accountings of the time Petitioner's attorney claims is attributable to this matter. In responding, Petitioner need not identify the subject matter of the hours claimed.

**RESPONSE:**

21. True and accurate copies of all costs and expenses incurred by the Petitioner or any law firm that has represented Petitioner as a result of this case.

**RESPONSE:**

22. True and accurate copies of all contracts that Petitioner has with any attorney representing it in this case.

**RESPONSE:**

23. True and accurate copies of all documents used to respond to the interrogatories in this case. For each such document, specify for which interrogatory the document was used.

**RESPONSE:**

24. If you or your attorney claim a privilege to any document(s) responsive to the requests herein, produce a privilege log, identifying the document in some manner (*i.e.*, by Bates stamp number or other means); the reason for the claimed privilege; when the document was made; who authored the document; who has seen the document; and the location of the document (if a

document has been copied, state the location of all copies).

**RESPONSE:**

You are further requested to furnish along with your production, within 28 days after receipt of this request, an affidavit stating that the production is complete in accordance with the request, and if not complete, to list those items not produced, state the grounds for objection to their production, and give the name and address of the person having custody of such items.

Dated: September 6, 2019

Rex L. Gradeless, #6303411  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544  
Rex.Gradeless@Illinois.gov

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

BY: /s/Rex L. Gradeless  
Rex L. Gradeless

**THIS REQUEST WERE SUBMITTED ELECTRONICALLY**

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation state the following:

That I have served the attached **ILLINOIS EPA'S FIRST REQUEST FOR PETITIONER TO PRODUCE DOCUMENTS** by e-mail upon Thomas W. Dimond at the e-mail address of [Thomas.Dimond@icemiller.com](mailto:Thomas.Dimond@icemiller.com) and upon Kelsey Weyhing at the e-mail address of [Kelsey.Weyhing@icemiller.com](mailto:Kelsey.Weyhing@icemiller.com).

That my e-mail address is [Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov).

That the number of pages in the e-mail transmission is seven (7).

That the e-mail transmission took place before 4:30 p.m. on the date of September 6, 2019.

/s/Rex L. Gradeless  
September 6, 2019



# **EXHIBIT B**

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
	)	AS 19-002
Petition of Emerald Polymer	)	
Additives, LLC for an Adjusted	)	(Adjusted Standard)
Standard from 35 Ill. Adm. Code	)	
304.122(b)	)	

**ILLINOIS EPA’S FIRST INTERROGATORIES**  
**DIRECTED TO PETITIONER**

The Petitioner, EMERALD POLYMER ADDITIVES (hereafter “Petitioner”), is hereby notified to answer the following interrogatories separately and fully in writing, under oath and within twenty-eight (28) days after service of these interrogatories, all in accordance with 35 Ill. Adm. Code 101.616 and 101.620.

1. State the full name (including any aliases and dates of those aliases), addresses, the dates of birth, and driver’s license numbers of all persons who assisted in drafting responses and/or responding to the interrogatories.

**RESPONSE:**

2. State all authentic, credible, and relevant facts Petitioner has incorporated by reference from the records of *Petitioner of Noveon, Inc. for and Adjusted Standard from 35 Ill. Adm. Code 304.122, AS-2002-005*, and the record in *Petition of Emerald Performance Materials LLC for an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS-2013-002*.

**RESPONSE:**

3. Provide Petitioner’s assets, liabilities, and expenses, including operation and maintenance costs, for fiscal years 2015, 2016, 2017, 2018 and 2019.

**RESPONSE:**

4. Provide Petitioner’s projected annual operation and maintenance costs for fiscal years 2020, 2021, 2022, 2023, and 2024.

**RESPONSE:**

5. On page 7 of the petition for adjusted standard, filed April 3, 2019 (hereafter “petition for adjusted standard”), Petitioner describes a “team comprised of facility personnel, consultants, and process improvement engineers from Emerald corporate services”; state the full name (including any aliases and dates of those aliases), addresses, the dates of birth, and driver’s license numbers of all persons who have any knowledge about this team including, but not limited to, all the members of the team.

**RESPONSE:**

6. On page 24 of the petition for adjusted standard, Petitioner describes the granulated activated carbon alternative as not economically reasonable; state all of the facts that support this claim and the names of the person or persons who will testify to each fact.

**RESPONSE:**

7. On page 24 of the petition for adjusted standard, Petitioner describes the river water dilution alternative as “not economically feasible or economically reasonable”; state all of the facts that support this claim and the names of the person or persons who will testify to each fact.

**RESPONSE:**

8. On page 25 of the petition for adjusted standard, Petitioner describes the river water dilution alternative as not economically reasonable because, *inter alia*, “the economic cost is prohibitive”. Provide the highest dollar figure that would not be cost prohibitive for the Petitioner.

**RESPONSE:**

9. List all other facts that are not in the petition for adjusted standard that Petitioner will rely upon in support of its petition.

**RESPONSE:**

10. State the fee arrangement between Petitioner and each of its attorneys. In responding to this interrogatory, be specific in the terms of the fee agreement and contractual provisions and to which attorney each refers.

**RESPONSE:**

11. State the contractual hourly fee each attorney representing Petitioner regularly and customarily charges their clients. For each such response, state to which attorney you are referring and the type of law for which this payment was made.

**RESPONSE:**

12. Provide the name and address of each witness, including lay witnesses, independent expert witnesses and controlled expert witnesses, who will testify on Petitioner’s behalf at hearing and state the subject of each witness’ testimony.

**RESPONSE:**

13. Provide the amount of ammonia attributable to Mexichem entering Petitioner's treatment plant.

**RESPONSE:**

Dated: September 6, 2019

Rex L. Gradeless, #6303411  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544  
Rex.Gradeless@Illinois.gov

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

BY: /s/Rex L. Gradeless  
Rex L. Gradeless

THESE REQUESTS WERE SUBMITTED ELECTRONICALLY

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation state the following:

That I have served the attached **ILLINOIS EPA'S FIRST INTERROGATORIES DIRECTED TO PETITIONER** by e-mail upon Thomas W. Dimond at the e-mail address of [Thomas.Dimond@icemiller.com](mailto:Thomas.Dimond@icemiller.com) and upon Kelsey Weyhing at the e-mail address of [Kelsey.Weyhing@icemiller.com](mailto:Kelsey.Weyhing@icemiller.com).

That my e-mail address is [Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov).

That the number of pages in the e-mail transmission is five (5).

That the e-mail transmission took place before 4:30 p.m. on the date of September 6, 2019.

/s/Rex L. Gradeless  
September 6, 2019