

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
	)	AS 2019-002
Petition of Emerald Polymer	)	
Additives, LLC for an Adjusted	)	
Standard from	)	(Adjusted Standard – Water)
35 ILL. ADM. CODE 304.122(b)	)	

**NOTICE OF FILING**

To: Carol Webb ([Carol.Webb@illinois.gov](mailto:Carol.Webb@illinois.gov)); Rex Gradeless ([Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov)); Christine Zeivel ([christine.zeivel@illinois.gov](mailto:christine.zeivel@illinois.gov)); Don Brown ([don.brown@illinois.gov](mailto:don.brown@illinois.gov)); Thomas Dimond ([thomas.dimond@icemiller.com](mailto:thomas.dimond@icemiller.com)); and Kelsey Weyhing ([Kelsey.Weyhing@icemiller.com](mailto:Kelsey.Weyhing@icemiller.com)).

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Comment Supporting IEPA’s Recommendation to Deny the Petition for an Adjusted Standard of Sierra Club, a copy of which is herewith served upon you.

Date: February 21, 2010

/s/Albert Ettinger  
 Albert Ettinger  
 ARDC # 3125045  
 53 W. Jackson Blvd. #1664  
 Chicago, Illinois 60604  
 (773) 818-4825  
[Ettinger.Albert@gmail.com](mailto:Ettinger.Albert@gmail.com)

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**SIERRA CLUB COMMENT IN OPPOSITION TO THE PETITION FOR AN ADJUSTED STANDARD**

**1. Introduction**

The Illinois Chapter of the Sierra Club (“Sierra Club”) submits these comments to support the position of the Illinois Environmental Protection Agency (“IEPA”) and requests that the Illinois Pollution Control Board (“PCB” or “Board”) deny the petition put forth by Emerald Polymer Additives, LLC (“Emerald”) for an Adjusted Standard from 35 Ill. Adm. Code 304.122(b) and Section 28.1 of the Illinois Environmental Protection Act (“Act”).

Emerald requests an adjusted standard for the effluent from the wastewater treatment plant at the Emerald chemical manufacturing facility located in Henry, Illinois (“Henry Plant”) that would allow the plant to discharge total ammonia (N) at levels 46 times higher than the regulatory effluent limit set forth at 35 Ill. Adm. Code 304.122.

IEPA recommends that the Board deny Emerald’s request because Emerald has not met its burden to justify an adjusted standard by establishing the particular elements required under the statute. Because the record and the science shows that Emerald’s discharge of ammonium nitrogen is environmentally harmful and that Emerald has failed to justify its need for a

continued adjusted standard, Sierra Club supports the IEPA recommendation.<sup>1</sup>

Moreover, if any adjusted standard is granted it should be limited in time to no more than five years and should require that Emerald present a report no later than six months before its next NPDES permit expires showing that:

- the mixing zone is as small as practicable considering more advanced treatment at both the Emerald facility and the Mexichem Specialty Resins, Inc. plant (“Mexichem”);
- the discharge will not, alone or in combination with other pollutant loadings, harm mussels or other sensitive species in the Illinois River;<sup>2</sup> and
- the discharge will not cause or contribute to violations of dissolved oxygen standards and has been designed to reduce as much as possible the nitrate loading to the Illinois River and downstream waters.

The Sierra Club is and has been actively engaged for decades in protecting the area of the Illinois River into which the Emerald facility discharges its wastewater. This stretch of the river includes recreation areas valued by area residents and provides refuge for the many species of birds, fish, and other wildlife whose wellbeing depends on the health of the river. Recreation opportunities include camping, at least half a dozen boating sites, and extensive fishing opportunities, including public tournaments for walleye and sauger. According to the U.S. Fish and Wildlife Service (“US FWS”), the Marshall State Wildlife Area “lies in the heart of the mallard flyway;” the Chautauqua National Wildlife Refuge is just three miles south of Emerald and provides an essential sanctuary for migratory birds; and, together with the southern units of

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<sup>1</sup> Further, it does not appear that an NPDES permit granted based on this adjusted standard would comply with 35 Ill. Adm. Code 302.102 because it has not been shown that the discharge to be allowed will not injure aquatic life in the Illinois River or is “as small as is practicable.” 35 Ill. Adm. Code 302.102(b)(12).

<sup>2</sup> Discharges from the Emerald and Mexichem plants have environmental impacts both within the current mixing zone and downstream from the mixing zone. The mixing zone currently has a toxicity level higher than that of any other Illinois facility. *See* Agency July 19, 2019 Recommendation to Deny at 23.

the Chautauqua Refuge, constitute “Important Bird Area[s]” which have “historically provided habitat for 60 to 70 percent of the waterfowl that migrate along the Illinois River corridor.”<sup>3</sup>

Members of the Sierra Club reside and recreate near the plant and are adversely affected by its pollution, as evidenced *inter alia* by its history of action to protect the Illinois River in relation to the Henry Facility. In 2016, the Sierra Club filed a Notice of Intent (NOI) to sue Emerald Performance Materials for violations of Section 301(a) of the federal Clean Water Act, 33 U.S.C. 1311(a) and National Pollution Discharges Elimination System (NPDES) permit No. IL0001392. (see Exhibit A) The Sierra Club sought to ensure the Henry Facility complies with its obligations under the Clean Water Act to ensure that the quality and quantities of water in our rivers, streams, lakes and aquifers are protected and managed to sustain the ecosystems on which all life depends. With the same basic purpose, Sierra Club provides these comments to ensure Emerald is not granted a perpetual exception from our State’s generally applicable protections of the Illinois River.

## **2. Background**

Because regulation of ammonia nitrogen effluent is mandated by state and federal environmental regulations and is crucial to protect the state’s ecosystems and the vital waters of the Illinois River, the Board should closely scrutinize any request to depart from its general standards. There are at least two factors from the procedural history of the Henry Plant that illustrate the need for the Board to treat Emerald’s request with particular scrutiny.

First, Emerald’s regulatory history shows continued efforts to avoid compliance with state regulation levels. Emerald is polluting at a rate far above the 3.0 mg/L limit compelled by the general standard and, as explained by IEPA in its discussion of Emerald’s evaluation of

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<sup>3</sup> Illinois Department of Natural Resources, “Marshall SFWA” <https://www.dnr.illinois.gov/Parks/About/Pages/Marshall.aspx> (last visited Feb. 11, 2020).

alternatives, it has made insufficient efforts to improve this since the plant first received its adjusted standard in 2004.<sup>4</sup>

The current standard was promulgated in 2002 and is considered by the state of Illinois to be “necessary to prevent waters of the State from exceeding water quality standards pursuant to 40 CFR 122.44(d)(1) and 35 Ill. Adm. Code 309.141(d)(3).”<sup>5</sup> The standard establishes a 30-day average ammonia (N) effluent limitation of 3.0 milligrams per liter (“mg/L”). On November 4, 2004, the Board granted Emerald an adjusted standard from the 2002 ammonia nitrogen effluent standard in Section 304.122(b). Under the adjusted standard, the ammonia nitrogen discharge from the Emerald’s facility could not exceed 155 mg/L. On September 28, 2012, Emerald filed a petition requesting that the Board renew its adjusted standard. After a judicial appeal that ordered changes to some of the ancillary conditions of the adjusted standard,<sup>6</sup> the Board reissued an adjusted standard including a daily maximum of 140 milligrams per liter (mg/L) and 1633 pounds per day (lbs/day), as well as a 30-day average of 110 mg/L and 841 lbs/day.

Even before the current standards were in effect, the former owners of the Henry Plant asked for a variance from an older version of the standard in 1992. The Henry Plant then shifted its focus to seek an adjusted standard a decade later because, as a matter of federal regulation, a “variance” requires eventual compliance with the relevant general standard from which relief is requested.<sup>7</sup> In other words, it appears that Emerald has been seeking to avoid general regulations

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<sup>4</sup> See, *inter alia*, Agency July 19, 2019 Recommendation to Deny at 15–19; see also, *Emerald Performance Materials v. IPCB and IEPA*, 2016 IL AP (3d) 150526.

<sup>5</sup> 35 Ill. Adm. Code 355.101 (2003).

<sup>6</sup> Emerald appealed three of the other conditions imposed by the Board, including condition 2(h) which required implementation of agricultural best management practices; a portion of condition 2(b) concerning ammonia reduction as a metric in employee bonus plan; and the portion of condition 1 that provided a five-year sunset. The Court reversed the Board’s decisions as to 2(h) and 2(b) but affirmed the five-year sunset as an “appropriate and a valid means to inspire Emerald to attempt to comply with the pollution regulations.” *Emerald Performance Materials v. IPCB and IEPA*, 2016 IL AP (3d) 150526, ¶¶26–34.

<sup>7</sup> Emerald April 3, 2019 Petition for Adjusted Standard at 3.

on ammonia discharges for nearly thirty years and its aim from the outset has been to make its exception from those regulations permanent rather than work to identify a means to comply.

Second, the history of the Henry Plant evidences a troubling pattern of noncompliance. During 2015 adjusted standard proceedings, the Board granted Emerald's petition but noted that the facility had received Violation Notices three times since the issuance of the facility's permit in 2007.<sup>8</sup> Since the 2015 proceeding, the facility has continued to violate its permit, as evidenced by the facts set forth in the Sierra Club's 2016 NOI (Ex. A). Even more recently, IEPA issued a notice of violation to Emerald in 2018, citing "violations of NPDES numeric limits for TSS...fecal coliform...and failure to comply with reporting requirements."<sup>9</sup> The Sierra Club and the State have taken steps to address these compliance violations, but the point remains that the facility's history indicates a pattern of permit violations.

### **3. Current Proceedings**

Emerald now petitions the Board for an adjusted standard that would continue to apply a daily maximum of 140 milligrams per liter (mg/L) and 1633 pounds per day (lbs/day), as well as a 30-day average of 110 mg/L and 841 lbs/day. Further, Emerald is asking for new terms that alter the provisions of its current adjusted standard, most notably the removal of the five-year sunset provision. Emerald believes it would be "a more effective and meaningful use of monies to evaluate on an ongoing basis new treatment technologies and production methods, and to implement those technologies (if warranted) to ensure the best degree of treatment."<sup>10</sup> Emerald explicitly states that its intent is to reduce regulatory compliance costs. Emerald's suggestion of a resource trade-off between having a sunset provision and improving its compliance efforts

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<sup>8</sup> April 16, 2015 Opinion and Order of the Board in the Matter of Petition of Emerald Performance Materials LLC at 21.

<sup>9</sup> Agency July 19, 2019 Recommendation to Deny at 13.

<sup>10</sup> Emerald Oct. 2019 Response at 8.

cannot be taken seriously: Emerald is simultaneously asking to eliminate both the sunset provision and other provisions requiring specific study and improvements, which together force Emerald to demonstrate such ongoing efforts. Moreover, a sunset provision gives the Board an opportunity to require such efforts formally when the adjusted standard expires.

Specifically, Emerald also asks to eliminate the following provisions of its current adjusted standard for the following reasons:

- Condition 2(e), which requires Emerald to investigate and submit to IEPA studies on the use of granulated activated carbon and the technical feasibility and economic reasonableness of a spray irrigation program, “because those specific studies have been completed and need not be repeated;”
- Condition 2(g), which provides that “if, upon review of the annual reports required by condition 2(f), the Agency determines that new technology to treat ammonia is available that is economically reasonable and technically feasible, the Agency may petition the Board to modify the relief granted by this order,” because Emerald asserts “it is inconsistent with the Board’s procedural rule for a party to seek relief from a final opinion and order;” and
- Condition 2(h), which requires that Emerald comply with the CWA, its NPDES permit, the Board’s water pollution regulations, and any other applicable requirement, “because it purports to incorporate into the adjusted standard requirements that are otherwise applicable to Emerald pursuant to law or the Henry Plant’s NPDES permit and do not relate to the subject of the adjusted standard,” respectively.<sup>11</sup>

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<sup>11</sup> Emerald April 3, 2019 Petition for Adjusted Standard at 27–28; *see also* Emerald Exhibit C with red-lined changes between Dec. 1, 2016 Opinion and Order of the Board and current Emerald proposal.

While the focus of these comments is on the numeric standard requested by Emerald and its request to remove the sunset provision, the Sierra Club agrees with the Agency that these other requested changes should also be rejected. Each of these terms relates directly to compliance and accountability and are necessary to push Emerald toward reducing its ammonia discharge in the event that the Board elects to approve an adjusted standard in the present proceedings.

**4. Emerald has not provided sufficient technical or financial information to carry its burden to justify an adjusted standard under § 28.1(c).**

Emerald has failed to adequately justify, from either a technological or economic standpoint, that it should receive its requested adjusted standard, much less an adjusted standard that is stripped of the current sunset and set of compliance provisions. Accordingly, Emerald has failed to meet its burden to justify an adjusted standard under each of the relevant factors in § 28.1(c).

**a. Emerald has failed to provide evidence of technical factors substantially and significantly different from those considered by the Board in setting the generally applicable standard.**

Pursuant to Section 28.1(c), the burden of proof is on Emerald to present adequate proof not only that factors relevant to its petition are different from what the Board contemplated during promulgation of the current standard, but that those differences are substantial and significant.<sup>12</sup> Because Emerald has not presented evidence that its circumstances are substantially and significantly different from those which the Board contemplated in promulgating the rule, it has failed to carry its burden under this provision and its petition should be denied.

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<sup>12</sup> 415 ILCS 5/28.1.



Emerald points to the presence of MBT (Mercaptobenzothiazole) in its discharge,<sup>13</sup> but has provided insufficient evidence of how the presence of MBT makes compliance with the ammonia nitrogen effluent standard either technologically or financially more difficult.<sup>14</sup> Emerald's petition emphasizes that "[MBT's] presence in the plant's wastewater inhibits the growth of bacteria that would otherwise nitrify ammonia, thereby reducing the concentration of ammonia (as N) in the Henry Plant discharge."<sup>15</sup> Emerald argues that the Board found in 2004 that it had not anticipated the manufacturing processes employed at the Henry Plant when it promulgated the ammonia (N) effluent limit set forth in Section 304.122(b).<sup>16</sup> However, that MBT was considered indispensable to the Henry Plant in 2004 does not mean there are or will never be alternatives to MBT that the Plant could use and avoid this purported technical problem.

Still further, the MBT which is claimed to render nitrification difficult or impossible at the Emerald plant is not claimed to be present in the Mexichem process. With Mexichem creating much of the ammonia,<sup>17</sup> it is unclear why Mexichem is not required to treat its ammonia. Mexichem could either obtain its own permit, which would require it to meet the 3/6 mg/L ammonia effluent limit while Emerald could discharge a greatly reduced amount of ammonia into the Illinois River, thereby reducing the total loading and the size of the necessary mixing zone. Even if the wastewater streams continue to be commingled, just because Emerald relies on Mexichem wastewater volumes to dilute levels of pollution prior to its ultimate discharge,<sup>18</sup> does not mean it is infeasible to pretreat Mexichem's wastewater before it is

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<sup>13</sup> See Emerald's April 3, 2019 Petition for an Adjusted Standard at 3, 15, 24.

<sup>14</sup> It appears that there is now no MBT in the effluent past the secondary clarifier (Feb. 4, 2020 Hearing Record Tr. 161) which certainly raises the question as to why Emerald cannot treat the ammonia down to the 3/6 mg/L as many Illinois POTWs are now required to do.

<sup>15</sup> Emerald's April 3, 2019 Petition for an Adjusted Standard at 3.

<sup>16</sup> *Id.*, citing Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS-2002-05, Order of the Board, 17-18 (Nov. 4, 2004).

<sup>17</sup> February 4, 2020 Hearing Transcript at 56.

<sup>18</sup> *Id.* at 20.

comingled with MBT from Emerald's processes. The dilution argument is also insufficient to establish that there is no environmental benefit from separating the two facilities' wastewater discharges through decreasing overall ammonia loading, even if the concentration of ammonia in Emerald's wastewater increases.

Further, if it is true that MBT is necessary to the current process employed by Emerald and that its presence inhibits the growth of nitrifying bacteria, Emerald still has not established the substantiality of this factor because it has not explained whether there are viable alternatives to either MBT or the overall makeup of the combined wastewater from both facilities that could be implemented upstream from its treatment infrastructure.

Further, while the Board's 2004 adjusted standard Opinion and Order stated that it did not directly anticipate the Henry Plant's precise operations when it promulgated the standard, it also specified that the regulation was "applicable mainly to other industrial dischargers."<sup>19</sup> These industrial dischargers, the Board knew, would have wastewater treatment streams made up of a variety of chemical components. Naturally, the promulgation of a general standard was not focused on the discharge of any particular industrial discharger—a "general" standard of course looks to the general characteristics, costs, and treatment options for industrial dischargers as a heterogenous group. The Board intentionally drew a distinction in the language of the regulation between publicly-owned treatment works (POTWs) and non-POTWS, such as Emerald: 304.122(a) relates to entities whose discharge is measured in "population equivalents" and (b) is for those dischargers with "waste load[s that] cannot be computed on a population equivalent basis comparable to that used for municipal waste treatment plants."<sup>20</sup> In other words, the Board clearly intended to regulate the entire class of dischargers to which Emerald belongs as distinct

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<sup>19</sup> *Id.* at 17.

<sup>20</sup> 35 Ill. Adm. Code 304/122(a) and (b).

from POTWs, eliminating the need to address the particularities of the chemical processes of each of those facilities whose operations would fall under the regulation.

Moreover, Emerald has claimed technological infeasibility to justify its unwillingness to adopt the alternative technologies that have been suggested; the Sierra Club supports IEPA's positions on the inadequacy of Emerald's technical justification for this claim. Emerald relies on a general statement from its consultant as proof, finding that "all of the alternatives examined by B&C were rejected as not technically feasible, not economically reasonable or both."<sup>21</sup> As such, Emerald is unwilling to implement nitrification of its ammonia-laden wastewater after its secondary clarifiers, a position it justifies only by stating that "[d]uring secondary clarification, solids removed "are primarily biomass and are returned to the biotreaters."<sup>22</sup> Emerald is similarly unwilling to evaluate granular activated carbon followed by biological treatment, as evidenced by its request to remove the related 2016 Board provisions.<sup>23</sup>

At the same time as it rejects these possible solutions as infeasible, Emerald touts ongoing efforts to improve operations as simultaneously sufficient to justify the adjusted standard and insufficiently studied to support any binding conditions. Emerald claims that it "currently has several initiatives underway, including improvements to the control and reaction processes at Henry Plant and renovations to put the west biotreater back online. However, data is not yet available to assess the impact of these efforts on ammonia nitrogen discharge levels or the cost and economic reasonableness of the efforts."<sup>24</sup> First, if such process improvements have the potential to control ammonia nitrogen discharge levels, why is Emerald only undertaking them now, decades after knowing that it could not meet the generally applicable ammonia

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<sup>21</sup> Emerald's April 3, 2019 Petition for an Adjusted Standard at 24.

<sup>22</sup> *Id.* at 17.

<sup>23</sup> See Exhibit C to Emerald's April 3, 2019 Petition for an Adjusted Standard.

<sup>24</sup> Emerald's April 3, 2019 Petition for an Adjusted Standard at 7.

standard? Second, if Emerald is pursuing several initiatives and is not yet able to assess their effects, then eliminating the sunset provision would be particularly inappropriate. As noted by the Board in its January 6, 2020 Order, a sunset provision is essential to provide incentive for Emerald to continue to investigate and provide justification that it maintains a need for an adjusted standard or one lower than its current rate.<sup>25</sup>

**b. Emerald has failed to meet its burden of demonstrating that cost considerations support an adjusted standard.**

Emerald claims that the economic infeasibility of alternative technologies justifies an exception from the general standard. To support its claims about economics, Emerald relies principally on the conclusion of its consultant, “that there were no economically feasible treatment alternatives that would reliably reduce the effluent ammonia nitrogen concentrations low enough to comply with applicable requirements ....”<sup>26</sup> The consultant’s report speaks to the potential costs of alternatives, but provides no indication of Emerald’s financial situation that makes those costs prohibitive. Without information regarding feasibility, this is simply a statement of cost in a vacuum and not proof that the cost would be impossible *for Emerald* to bear. Moreover, any analysis of costs should consider the margin of profit being made on the sale by Emerald and Mexichem of the products made in their plants.

Moreover, just because it may be costly for a particular entity to comply with a general standard does not justify excusing that entity from the standard. Emerald must demonstrate that its costs are substantially and significantly different than the costs of treatment initially considered when the Board set the standard.<sup>27</sup> Emerald has failed to make this showing. Instead, Emerald admits that “there is technology capable of meeting the ammonia nitrogen as N

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<sup>25</sup> Board January 6, 2020 Hearing Officer Order at 1.

<sup>26</sup> Emerald’s April 3, 2019 Petition for an Adjusted Standard at 22.

<sup>27</sup> 415 ILCS 5/28.1.

limitation set forth in 35 Ill. Adm. Code 304.122 for municipal POTWs and other large volume dischargers,” but argues that its studies prove that, for the Henry Plant, “there are no alternatives that are both technologically feasible and economically reasonable to achieve the ammonia reduction necessary to comply with 35 Ill. Adm. Code 304.122(b).”<sup>28</sup> Emerald provides no evidence about compliance costs at other industrial facilities nor a sufficient technical explanation of distinctions among other large volume dischargers to support this point.

Not only has Emerald failed to present evidence that establishes what costs other dischargers have incurred or might incur to meet the general standard, Emerald has refused to provide even evidence about its own financial context. On December 20, 2019, Emerald filed a motion to the Board asking for exclusion of evidence and argument relating to the financial condition of Emerald or its corporate parent or affiliates. On the same day, the IEPA filed a motion to compel Emerald’s financial information. On January 6, 2020, the Board issued an order granting the Agency’s motion to compel financial information, stating that “the FY 2015-2019 balance sheets, income statements, cash flow statements and annual audits must be served on the Agency by January 9, 2020.”<sup>29</sup> The Board’s order was based on the potential relevance of this financial material in its “economic reasonableness review.” Sierra Club agrees that Emerald’s ability to finance wastewater treatment study and improvements is relevant to evaluate whether a departure from the general ammonia standard is justified here.<sup>30</sup>

As of the date of this comment and from publicly available information, it does not appear that Emerald has its full financial information in compliance with this Order and has thus likely failed to produce evidence the Board has determined is necessary and relevant to its

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<sup>28</sup> Emerald’s April 3, 2019 Petition for an Adjusted Standard at 30.

<sup>29</sup> See Board January 6, 2020 Hearing Officer Order.

<sup>30</sup> *Id.* at 1.

economic claims<sup>31</sup> Though Sierra Club cannot fully evaluate the financial information available to the Board, the Board should consider any and all financial resources available to Emerald when evaluating whether Emerald has met its burden to establish that financial circumstances prevent the implementation of alternative technologies to reduce its ammonium nitrogen effluent discharge.

**c. The requested adjusted standard poses a significant environmental threat.**

Section 28.1(c) further requires that a requested adjusted standard can only be issued if it will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability. Because Emerald's rate of ammonia nitrogen effluent is more than 46 times that of the state regulation and its practices result in significant, ongoing chemical discharges into the Illinois River, it has not met its burden to establish that there is no significant environmental threat.

In its request that the Board deny Emerald's petition, IEPA identified the facility's overall whole effluent toxicity (WET) as an overarching concern.<sup>32</sup> As stated by the IEPA:

Besides the toxicity from ammonia, there are other substances that are likely toxic to aquatic life. These substances are those, at least, that Petitioner claims interferes with nitrifying bacteria and prevents them from removing ammonia from its effluent. A test conducted in 2017 showed a LC50 result of 3.87%, which is technically permissible given the amount of mixing Petitioner has been given. However, the results of this test leave the amount of dilution required to achieve a non-toxic condition undetermined. In the present day, LC50 values this toxic are not found at any other Illinois facility.<sup>33</sup>

The LC50 test result means, practically speaking, that half of the organisms tested were killed by water comprised of just 3.87% of Emerald's discharge. It is little comfort that this discharge may not cause or contribute to a violation of the Illinois ammonia standard outside the

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<sup>31</sup> Emerald has submitted depositions from Emerald comptroller Amy Harding and Emerald CEO Ed Gotch, along with exhibits it describes as financial information, but these documents have been designated non-disclosable and are not publicly available. *See* Board Hearing January 14, 2019.

<sup>32</sup> Agency July 19, 2019 Recommendation to Deny at 23.

<sup>33</sup> *Id* at 23–24.

mixing zone. The record reflects no consideration of whether mussels and fingernail clams are found in the mixing zone or nearby. Even if not now present, the area near the discharge and within the mixing zone probably had mussels and fingernail clams known to be sensitive to ammonia historically. Even if the areas meets the Illinois ammonia standard, that standard is not protective of mussels as shown by recent U.S. EPA ammonia science and criteria.<sup>34</sup>

Further, the nitrogenous oxygen demand (NBOD) of the ammonia discharge certainly contributes to lowered dissolved oxygen (DO) levels in the Illinois River. While the Illinois River is not currently listed by IEPA as impaired by low DO levels, it is known that violations of the DO levels do occur in the Illinois River below the Emerald plant.<sup>35</sup>

Also, of course, the ammonia discharged to the Illinois River, after taking up dissolved oxygen, contributes to nitrate problems in the Mississippi River and the Gulf of Mexico. Emerald should explore ways to remove all forms of nitrogen out of the river.

While the discharge at issue is, of course, only one of the causes of higher ammonia levels, lower DO levels, and higher nitrate levels, sources of pollution cannot properly be considered in isolation, but should be considered together with other sources of pollution.<sup>36</sup> Like Emerald, most agricultural operations and POTWs contributing ammonia, NBOD, or nitrate to the Illinois River can claim that, considered in isolation, they are not causing an environmental problem. Collectively, however, these sources are clearly having an impact. Because the Henry

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<sup>34</sup> <https://www.epa.gov/sites/production/files/2015-08/documents/aquatic-life-ambient-water-quality-criteria-for-ammonia-freshwater-2013.pdf>, [https://www.epa.gov/sites/production/files/2015-08/documents/presentation\\_aquatic\\_life\\_ambient\\_water\\_quality\\_criteria\\_for\\_ammonia\\_freshwater\\_final\\_2013.pdf](https://www.epa.gov/sites/production/files/2015-08/documents/presentation_aquatic_life_ambient_water_quality_criteria_for_ammonia_freshwater_final_2013.pdf)

<sup>35</sup> See Exhibit B. USGS Data for Henry Illinois 2018-19, Sierra Club believes the Illinois River should be listed as violating standards for unnatural algal growth, 35 Ill. Adm. Code 302.203, and probably with improved monitoring, dissolved oxygen.

<sup>36</sup> 35 Ill. Adm. Code 355.201 (reasonable potential of a discharge to cause or contribute to a violation of the applicable ammonia nitrogen water quality standard); *Massachusetts v. E.P.A.* 549 U.S. 497 (2007) (pollution from one source could be addressed although many sources of pollution contributed to problem).

plant is a large facility with the potential to create significant negative environmental impact, a request for continued or extended regulatory flexibility should be rejected.

**d. The adjusted standard Emerald has requested may be inconsistent with applicable federal law.**

It is true that under the IEPA permitting system, some adjusted standards expire after a set number of years, but others are permanent.<sup>37</sup> But the Board should not switch approaches for this particular adjusted standard. To ask now to remove the sunset provision indicates that Emerald desires to achieve a permanent adjusted standard and absolve itself of its federal and state responsibilities to reduce its ammonia emissions or even the Board requirement that it make real attempts to do so over time. There is no evidence that the IPCB or IEPA ever intended for this adjusted standard to be anything more than a temporary relaxation of requirements while the Henry Plant adopted new technologies to eliminate its need for an adjusted standard. Though Emerald has emphasized that they are committed to the adoption of new technologies with their underway projects, its performance and positions undercut that assertion.

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<sup>37</sup> See Illinois Pollution Control Board, *Citizens' Guide to the Illinois Pollution Control Board*, <https://pcb.illinois.gov/DocumentFiles/CitizensGuideFinal113017.pdf>.



## 5. Conclusion

Because of the history of this case and the deficiencies in information and compliance exhibited by Emerald, combined with the risks to the health and welfare of the citizens and natural resources of Illinois, we support IEPA's request that the Board deny Emerald's request for an adjusted standard.

SIERRA CLUB,

/s/Albert Ettinger\_\_\_\_\_

Albert Ettinger  
ARDC # 3125045  
53 W. Jackson Blvd. #1664  
Chicago, Illinois 60604  
(773) 818-4825  
Ettinger.Albert@gmail.com

Robert Weinstock  
ARDC# 6311441  
Catherine Steubing  
(Law Student, Not Admitted To Practice Law)  
University of Chicago Law School  
Abrams Environmental Law Clinic  
6020 S. University Ave.  
Chicago, IL 60637  
(773) 702-9611  
rweinstock@uchicago.edu

**CERTIFICATE OF E-MAIL SERVICE**

I, the undersigned, on oath of affirmation state the following:

That I have served the attached Sierra Club's Comment Supporting IEPA's Recommendation to Deny the Petition for an Adjusted Standard by e-mail upon the following individuals at the following e-mail address: Carol Webb ([Carol.Webb@illinois.gov](mailto:Carol.Webb@illinois.gov)); Rex Gradeless ([Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov)); Christine Zeivel ([christine.zeivel@illinois.gov](mailto:christine.zeivel@illinois.gov)); Don Brown ([don.brown@illinois.gov](mailto:don.brown@illinois.gov)); Thomas Dimond ([thomas.dimond@icemiller.com](mailto:thomas.dimond@icemiller.com)); and Kelsey Weyhing ([Kelsey.Weyhing@icemiller.com](mailto:Kelsey.Weyhing@icemiller.com)).

That my e-mail address is [Ettinger.Albert@gmail.com](mailto:Ettinger.Albert@gmail.com).

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Date: February 21, 2020

/s/Albert Ettinger  
Albert Ettinger  
ARDC # 3125045  
53 W. Jackson Blvd. #1664  
Chicago, Illinois 60604  
(773) 818-4825  
[Ettinger.Albert@gmail.com](mailto:Ettinger.Albert@gmail.com)

**EXHIBIT A**



THE UNIVERSITY OF  
**CHICAGO**

ABRAMS ENVIRONMENTAL LAW CLINIC AT  
THE UNIVERSITY OF CHICAGO LAW SCHOOL

August 18, 2016

BY CERTIFIED MAIL—  
RETURN RECEIPT REQUESTED

Emerald Performance Materials  
1550 County Road 1450 N  
Henry, Illinois 61537

Emerald Performance Materials  
2020 Front Street, Suite 100  
Cuyahoga Falls, OH 44221

PolyOne Corporation  
1546 County Road 1450 N  
Henry, Illinois 61537

PolyOne Corporation  
33587 Walker Road  
Avon Lake, OH 44012

Mexichem Specialty Resins, Inc.  
1546 County Road 1450 N  
Henry, IL 61537

Mexichem Specialty Resins, Inc.  
33653 Walker Road  
P.O. Box 277  
Avon Lake, Ohio 44012-0277

CT Corporation System  
Registered Agent, Emerald Performance  
Materials and PolyOne Corporation  
208 S. LaSalle St., Suite 814  
Chicago, IL 60604

National Registered Agents, Inc.  
Registered Agent, Mexichem Specialty  
Resins, Inc.  
208 S. LaSalle St., Suite 814  
Chicago, IL 60604

**RE: Notice of Intent to Sue for Violations of the Clean Water Act**

To Whom It May Concern:

I am writing on behalf of the Sierra Club and Prairie Rivers Network, whose members reside and recreate near the Emerald Performance Materials chemical-manufacturing facility in Henry, Illinois. The facility discharges its wastewater into a stretch of the Illinois River north of Peoria, Illinois. Members of the Sierra Club and Prairie Rivers Network recreate on this stretch of the Illinois River and are adversely affected by pollution from the Emerald Performance Materials facility. This letter constitutes the Sierra Club and Prairie Rivers Network's notice of intent to sue for violations of the Clean Water Act resulting from the facility's operation in violation of the law. The violations upon which this notice letter is based are more fully set forth below.

Emerald Performance Materials obtained a National Pollutant Discharge Elimination System (NPDES) permit, No. IL0001392, from the Illinois Environmental Protection Agency. The permit establishes effluent limits for wastewater discharges from the facility; any discharges in excess of these limitations constitute a violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Based on publicly available discharge-monitoring reports, we have reason to believe that Emerald Performance Materials, PolyOne Corporation, and Mexichem, PolyOne's apparent successor, have repeatedly violated, and will continue to violate, Section 301(a) of the federal Clean Water Act, 33 U.S.C. § 1311(a), and NPDES permit No. IL0001392. The Emerald Performance Materials facility has routinely discharged wastewater containing BOD<sub>5</sub>, fecal coliform, and other pollutants in excess of the levels allowed by its NPDES permit. The specific limits for these pollutants, and the facility's repeated violations, are discussed below.

## **I. Permit Limits**

The Illinois Environmental Protection Agency issued the current version of NPDES Permit No. IL0001392 on February 9, 2007, with an effective date of May 1, 2007. The permit was modified on April 27, 2010. The permit expired on April 30, 2012; the Illinois Environmental Protection Agency is currently in the process of issuing the facility a new permit. Permit No. IL0001392 includes the following limits:

*Ammonia (as N).* The permit contains a daily-maximum concentration limit of 155 mg/L for combined ammonia discharges from outfalls A01 and B01.

*BOD<sub>5</sub>.* The permit contains a 30-day-average concentration limit of 20 mg/L and a daily-maximum concentration limit of 40 mg/L for BOD<sub>5</sub> discharges from outfall A01. The permit also contains a 30-day-average load limit of 183.5 lbs/day and a daily-maximum load limit of 477 lbs/day for BOD<sub>5</sub> discharges from outfall A01.

*Chlorobenzene.* The permit contains a 30-day-average concentration limit of 0.015 mg/L and a daily-maximum concentration limit of 0.028 mg/L for chlorobenzene discharges from outfall A01. The permit also contains a 30-day-average load limit of 0.097 lbs/day and a daily-maximum load limit of 0.18 lbs/day for chlorobenzene discharges from outfall A01. Chlorobenzene samples are only required once annually.

*Cyanide.* The permit contains a 30-day-average concentration limit of 0.1 mg/L and a 30-day-average load limit of 0.764 lbs/day for cyanide discharges from outfall A01. Cyanide samples are only required once annually.

*Fecal Coliform.* Under the permit, the daily-maximum fecal-coliform count shall not exceed 400 per 100 mL for discharges from outfall A01.

*Methylene Chloride.* The permit contains a daily-maximum concentration limit of 0.089 mg/L for methylene chloride discharges from outfall A01. Methylene chloride samples are required only once per month.

*Phenol.* The permit contains a daily-maximum concentration limit of 0.026 mg/L for phenol discharges from outfall A01. Phenol samples are only required once annually.

*Total Suspended Solids.* The permit contains a 30-day-average concentration limit of 25 mg/L and a daily-maximum concentration limit of 50 mg/L for total suspended solids discharges from outfall A01. The permit also contains a 30-day-average load limit of 229.35 lbs/day and a daily-maximum load limit of 596.3 lbs/day for total suspended solids discharges from outfall A01.

## II. Violations

The violations referred to above include, but are not limited to, the following, all of which occurred at outfall A01 (with the exception of the combined ammonia discharges from outfalls A01 and B01):

### 2016 Violations

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	1/31/2016	24.6 mg/L	30-day average	20 mg/L
BOD <sub>5</sub>	1/31/2016	56 mg/L	Daily maximum	40 mg/L
Fecal Coliform	2/29/2016	520 per 100 mL	Daily maximum	400 per 100 mL
Fecal Coliform	5/31/2016	14000 per 100 mL	Daily maximum	400 per 100 mL
Fecal Coliform	6/30/2016	60000 per 100 mL	Daily maximum	400 per 100 mL
Total suspended solids	4/30/2016	58 mg/L	Daily maximum	50 mg/L
Total suspended solids	6/30/2016	32.496 mg/L	30-day average	25 mg/L
Total suspended solids	6/30/2016	67 mg/L	Daily maximum	50 mg/L

### 2015 Violations

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	2/28/2015	48 mg/L	Daily maximum	40 mg/L
BOD <sub>5</sub>	4/30/2015	34.218 mg/L	30-day average	20 mg/L

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	4/30/2015	<b>130 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	4/30/2015	<b>594.001 lbs/day</b>	Daily maximum	477 lb/day
Chlorobenzene	3/31/2015	<b>0.11 mg/L</b>	Annual average	0.015 mg/L
Chlorobenzene	3/31/2015	<b>0.11 mg/L</b>	Annual maximum	0.028 mg/L
Chlorobenzene	3/31/2015	<b>0.53 lbs/day</b>	Annual average	0.097 lbs/day
Chlorobenzene	3/31/2015	<b>0.53 lbs/day</b>	Annual maximum	0.18 lbs/day
Cyanide	3/31/2015	<b>0.2 mg/L</b>	Annual average	0.1 mg/L
Cyanide	3/31/2015	<b>0.88 lbs/day</b>	Annual average	0.764 lbs/day
Fecal Coliform	6/30/2015	<b>510 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	10/31/2015	<b>1100 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	11/30/2015	<b>3700 per 100 mL</b>	Daily maximum	400 per 100 mL
Methylene chloride	1/31/2015	<b>0.096 mg/L</b>	Monthly maximum	0.089 mg/L
Phenol	3/31/2015	<b>0.031 mg/L</b>	Annual maximum	0.026 mg/L
Total suspended solids	4/30/2015	<b>110 mg/L</b>	Daily maximum	50 mg/L

**2014 Violations**

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	12/31/2014	<b>29.917 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	12/31/2014	<b>130 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	12/31/2014	<b>658.96 lb/day</b>	Daily maximum	477 lbs/day
Fecal Coliform	2/28/2014	<b>540 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	6/30/2014	<b>1500 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	7/31/2014	<b>500 per 100 mL</b>	Daily maximum	400 per 100 mL

Fecal Coliform	8/31/2014	<b>17000 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	10/31/2014	<b>640 per 100 mL</b>	Daily maximum	400 per 100 mL
Total suspended solids	6/30/2014	<b>64 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	8/31/2014	<b>81 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	12/31/2014	<b>77 mg/L</b>	Daily maximum	50 mg/L

**2013 Violations**

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	2/2013	<b>26 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	2/2013	<b>52 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	3/2013	<b>41 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	3/2013	<b>120 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	3/31/2013	<b>219.407 lbs/day</b>	30-day average	183.5 lbs/day
BOD <sub>5</sub>	3/2013	<b>615 lbs/day</b>	Daily maximum	477 lbs/day
BOD <sub>5</sub>	4/2013	<b>24 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	4/2013	<b>53 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	5/2013	<b>47 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	5/31/2013	<b>67 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	5/31/2013	<b>297.103 lbs/day</b>	30-day average	183.5 lbs/day
BOD <sub>5</sub>	9/30/2013	<b>58.227 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	9/2013	<b>120 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	9/30/2013	<b>489.237 lbs/day</b>	30-day average	183.5 lbs/day
BOD <sub>5</sub>	9/2013	<b>988 lbs/day</b>	Daily maximum	477 lbs/day
BOD <sub>5</sub>	10/2013	<b>50 mg/L</b>	Daily maximum	40 mg/L
Chlorobenzene	3/2013	<b>0.13 mg/L</b>	Annual average	0.015 mg/L
Chlorobenzene	3/2013	<b>0.13 mg/L</b>	Daily maximum	0.028 mg/L
Chlorobenzene	3/2013	<b>0.694 lbs/day</b>	Annual average	0.097 lbs/day
Chlorobenzene	3/2013	<b>0.694 lbs/day</b>	Daily maximum	0.18 lbs/day
Fecal Coliform	10/31/2013	<b>60000 per 100 mL</b>	Daily maximum	400 per 100 mL
Total suspended solids	3/31/2013	<b>27.981 mg/L</b>	30-day average	25 mg/L
Total suspended solids	3/31/2013	<b>260 mg/L</b>	Daily maximum	50 mg/L



<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
Total suspended solids	3/31/2013	<b>1283.662 lbs/day</b>	Daily maximum	596.3 lbs/day
Total suspended solids	7/2013	<b>58 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	8/31/2013	<b>96 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	8/2013	<b>695 lbs/day</b>	Daily maximum	596.3 lbs/day
Total suspended solids	9/2013	<b>36 mg/L</b>	30-day average	25 mg/L
Total suspended solids	9/2013	<b>120 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	9/2013	<b>300 lbs/day</b>	30-day average	229.35 lbs/day
Total suspended solids	9/30/2013	<b>1051.085 lbs/day</b>	Daily maximum	596.3 lbs/day
Total suspended solids	10/2013	<b>87 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	10/2013	<b>732 lbs/day</b>	Daily maximum	596.3 lbs/day

**2012 Violations**

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
BOD <sub>5</sub>	3/31/2012	<b>59 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	11/30/2012	<b>47 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	11/30/2012	<b>130 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	11/30/2012	<b>350.962 lbs/day</b>	30-day average	183.5 lbs/day
BOD <sub>5</sub>	11/30/2012	<b>936.281 lbs/day</b>	Daily maximum	477 lbs/day
Fecal Coliform	4/30/2012	<b>450 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	7/31/2012	<b>9000 per 100 mL</b>	Daily maximum	400 per 100 mL
Fecal Coliform	10/31/2012	<b>2600 per 100 mL</b>	Daily maximum	400 per 100 mL
Total suspended solids	2/29/2012	<b>27.714 mg/L</b>	30-day average	25 mg/L
Total suspended solids	3/31/2012	<b>35.524 mg/L</b>	30-day average	25 mg/L

Total suspended solids	3/31/2012	<b>243.119 lbs/day</b>	30-day average	229.35 lbs/day
Total suspended solids	11/30/2012	<b>25.705 mg/L</b>	30-day average	25 mg/L
Total suspended solids	11/30/2012	<b>170 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	11/30/2012	<b>1197.908 lbs/day</b>	Daily maximum	596.3 lbs/day

**2011 Violations**

<i>Pollutant</i>	<i>Date</i>	<i>Measured Value</i>	<i>Type of Allowance</i>	<i>Permit Allowance</i>
Ammonia (from outfalls A01 and B01)	8/31/2011	<b>180 mg/L</b>	Daily maximum	155 mg/L
Ammonia (from outfalls A01 and B01)	9/30/2011	<b>160 mg/L</b>	Daily maximum	155 mg/L
BOD <sub>5</sub>	1/31/2011	<b>43 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	5/31/2011	<b>27.196 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	5/31/2011	<b>87 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	5/31/2011	<b>560.49 lbs/day</b>	Daily maximum	477 lbs/day
BOD <sub>5</sub>	8/31/2011	<b>61 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	10/31/2011	<b>41 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	11/30/2011	<b>32.723 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	11/30/2011	<b>110 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	11/30/2011	<b>213.278 lbs/day</b>	30-day average	183.5 lbs/day
BOD <sub>5</sub>	11/30/2011	<b>808.328 lbs/day</b>	Daily maximum	477 lbs/day
BOD <sub>5</sub>	12/31/2011	<b>22.909 mg/L</b>	30-day average	20 mg/L
BOD <sub>5</sub>	12/31/2011	<b>110 mg/L</b>	Daily maximum	40 mg/L
BOD <sub>5</sub>	12/31/2011	<b>760.32 lbs/day</b>	Daily maximum	477 lbs/day
Total suspended solids	1/31/2011	<b>27.636 mg/L</b>	30-day average	25 mg/L
Total suspended solids	2/28/2011	<b>31.558 mg/L</b>	30-day average	25 mg/L
Total suspended solids	2/28/2011	<b>80 mg/L</b>	Daily maximum	50 mg/L
Total suspended solids	5/31/2011	<b>65 mg/L</b>	Daily maximum	50 mg/L

There have been numerous exceedances of the Emerald Performance Materials NPDES permit within the last five years, as demonstrated by monitoring data reported by Emerald

Performance Materials in its monthly Discharge Monitoring Reports (DMRs). Each of the exceedances represents a violation of the federal Clean Water Act, 33 U.S.C. § 1311(a), and NPDES Permit No. IL0001392.

There also appear to have been reporting violations at the Emerald Performance facility within the last five years. The facility submitted late reports in March of 2013 (phenol) and April of 2011 (flow, ammonia, BOD<sub>5</sub>, fecal coliform, methylene chloride, pH, total suspended solids, temperature). Also, the Illinois Environmental Protection Agency's DMR search (<http://dataservices.epa.illinois.gov/dmrdmsearch.aspx>) appears to be missing a significant amount of the required DMR reports for 2013; it is unclear whether those missing values are due to a lack of reporting by the Emerald Performance or errors in the IEPA's DMR search page.

This notice letter is based on publicly available information. Additional information, including information in the facility's possession, may reveal additional violations. This letter covers all such violations occurring within five years immediately preceding the date of this notice letter.

This letter provides notice of the Sierra Club and Prairie Rivers Network's intent to file a federal enforcement action under the authority of the Clean Water Act's citizen-suit provision, 33 U.S.C. § 1365(a), to secure appropriate relief for these violations. The Sierra Club and Prairie Rivers Network seek to improve water quality in the Illinois River by securing long-term compliance with applicable law.

Should you or your attorney wish to discuss this matter, please feel free to contact me at the address and phone number listed below.

Sincerely,



Mark N. Templeton  
Abrams Environmental Law Clinic  
University of Chicago Law School  
6020 S. University Ave.  
Chicago, Illinois 60637  
(773) 702-6998

Legal counsel for:

Sierra Club, Illinois Chapter  
70 E. Lake St., Suite 1500  
Chicago, IL 60601  
(312) 251-1680

Prairie Rivers Network  
1902 Fox Drive, Suite G  
Champaign, IL 61820  
(217) 344-2371

Cc:

Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
Mail Code 1101A  
1200 Pennsylvania Ave. N.W.  
Washington, D.C. 20460

Alec Messina, Director  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

Robert Kaplan, Acting Regional  
Administrator  
U.S. Environmental Protection Agency,  
Region 5  
77 W. Jackson Blvd.  
Chicago, IL 60604

Lisa Madigan, Illinois Attorney General  
100 West Randolph Street  
Chicago, IL 60601



**EXHIBIT B**

