FMC Corporation
2929 Walnut Street
Philadelphia, PA 19104
USA

215.299.6000
fmc.com

Transmitted via Overnight Mail and Email to DEP.R9@dec.ny.gov

October 19, 2017

Ms. Michelle Woznick
Environmental Analyst
New York State Department of Environmental Conservation
Region 9
270 Michigan Avenue
Buffalo, NY 14203-2915

Re: FMC Corporation; Middleport New York Facility
EPA ID No. NYD002126845
AOC Docket No. II-RCRA-90-3008(h)-0209
DER Site No. 932014
FMC Comments on NYSDEC's Draft Part 373 Permit

Dear Ms. Woznick:

The New York State Department of Environmental Conservation ("NYSDEC") issued a Notice of Complete Application, Notice of Availability of a Draft Part 373 Permit, Notice of Public Comment Period, and Notice of Part 624 Legislative Public Hearing, for FMC Corporation's ("FMC") Middleport, New York facility ("Facility" or "Site") in August 2017.[1] As stated in Module I, General Condition R.8., of the Draft Permit, NYSDEC proposes that after permit issuance, the substance of the Draft Permit will replace, in its entirety, the Administrative Order on Consent ("AOC") (Docket No. II-RCRA-90-3008(h)-0209) entered into in 1991 by FMC, NYSDEC and the United States Environmental Protection Agency ("USEPA," and collectively with NYSDEC, the "Agencies").[2]

As part of the public review process for the Draft Permit, the NYSDEC provided for a comment period that ends on October 20, 2017. By this letter, FMC is providing its

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[1] NYSDEC also publicly disseminated the New York State 6 NYCRR Part 373 Permit Fact Sheet for FMC Corporation, Middleport, New York, Niagara County, EPA ID No. NYD002126845, dated August 2017 (the "Fact Sheet"), as well as the draft permit for the Facility under the Resource Conservation and Recovery Act ("RCRA") and Article 27, Title 9, of the Environmental Conservation Law (the "Draft Permit").

[2] A copy of the AOC is enclosed with the submission as **Attachment 2**.

comments on the Draft Permit. FMC's general comments are provided below, with all directed comments to individual provisions of the Draft Permit included as Attachment 1 to this letter.[3]

As noted in greater detail below, FMC fervently disagrees with NYSDEC that there is a need for, or that it is appropriate in this circumstance to pursue, a Part 373 permit for the Facility. On that basis, the comments included in this submittal are being provided solely to address deficiencies and/or issues identified in the Draft Permit, and should not be viewed as FMC agreeing with, or consenting to, the issuance of any final permit. FMC hereby reserves all of its rights to raise additional or revised comments or objections throughout the regulatory-based permit review process, and as appropriate, at any informal, formal, or adjudicatory hearings or proceedings that could follow.

FMC General Comment No. 1: The Draft Permit is not necessary or required.

Hazardous waste is not currently treated, stored or disposed of at the Facility in the units that are subject to Part 373 permitting requirements, and has not been for several decades. As noted in the Fact Sheet and the Draft Permit, all hazardous waste generated at the Facility is accumulated in containers or tanks prior to off-site disposal within 90 days of generation in accordance with applicable state and federal regulations, or managed in water treatment units exempt from RCRA permitting requirements pursuant to 6 New York Code Rules and Regulations ("NYCRR") § 373-1.1(d)(1)(xii). Therefore, the Draft Permit is unnecessary to regulate any current hazardous waste management activity at the Facility.

The Draft Permit has two principal purposes: (1) to govern the final closure of three former hazardous waste management units/surface impoundments; and, (2) to govern corrective action for historical contamination. The current status and final closure of the hazardous waste management units/surface impoundments are addressed by the AOC. Similarly, the AOC establishes the framework for investigating historical contamination, taking interim corrective action to address problems requiring immediate attention, evaluating alternative corrective action, and selecting final corrective action.[4]

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[3] All documents incorporated by reference, or that are enclosed as an attachment with this submission, are to be considered in their entirety for purposes of responding in the public comment process.

[4] Under the AOC, remedies are to be selected by USEPA—not NYSDEC—using federal law—not state law—by use of specific Corrective Action Objectives ("CAOs"). The CAOs are documented in a March 26, 2009 letter published jointly by the Agencies. A copy of the March 26, 2009 letter is enclosed with the submission as **Attachment 3**.

The CAOs identify a series of risk-based factors to be considered in the decision-making process, including, but not limited to: site-specific data and information; the reasonably anticipated future use of a property; contaminant concentration and routes; likelihood of exposure; health and non-health carcinogenic risks; long-term protection of human health and the environment (*e.g.* residual lifetime

The Draft Permit is absolutely unnecessary, and a thinly veiled unlawful effort to unilaterally modify and terminate the AOC. Although the AOC does not give NYSDEC direct authority to compel corrective action, NYSDEC has statutory authority to compel FMC to perform remediation; that authority is subject to limits and conditions NYSDEC has historically refused to honor.

FMC is not aware of NYSDEC currently seeking issuance of any other Part 373 permits at this time for facilities that are not actively treating, storing or disposing hazardous waste outside of a traditional generator status. It is improper for NYSDEC to be singling out FMC simply because it no longer is interested in abiding by the agreement it voluntarily entered into in 1991.

FMC General Comment No. 2: *The Permit Application is not technically and administratively complete.*

Contrary to the statement in Paragraph 1 of the Fact Sheet, the permit application is not technically and administratively complete. New York State regulations require that "in order for an application to be determined complete, the applicant must, among other things, "(1) satisfy the general requirements for complete applications contained in part 621 of this Title [ ]; (2) include all information required, both general and specific to the type of facility [ ] . . ." Based on FMC's review of the Draft Permit, there are substantial discrepancies between the Draft Permit conditions and plans that are to be incorporated by reference. Should any of those revisions constitute a "major" change, as defined in 6 § NYCRR 373-1.7, and need to be addressed post-permit issuance, the revised permit would need to be treated as a new application, as noted in 6 NYCRR § 621.11(i). Finalizing a permit with known and identified issues would represent a complete waste of NYSDEC's and FMC's resources and time. Three specific concerns highlighting the issues posed by the status of the Draft Permit, and the underlying materials utilized to finalize it, are stated below.

First, FMC submitted updates to a number of plans required under the AOC, all of which require approval by the Agencies pursuant to the AOC. Some of these plans required significant revisions, as they did not accurately reflect FMC's operations due to changes that had occurred in the normal course over time. The Agencies have never formally responded to any of the plans submitted, notwithstanding the fact that these plans were submitted in a timely fashion, and in some instances, have been pending for over two years. RCRA Permit Condition 6 of the

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cancer risk as $1x10^{-4}$ to $1x10^{-6}$); ecological impacts; the potential for migration; minimization of disruption to the community and its character; community participation; and, green remedial standards.

FMC negotiated and bargained for each one of these provisions in exchange for its agreement to investigate, and if necessary, to remediate arsenic contamination in Middleport, New York. The Agencies agreed, and these requirements must be included in any corrective action decision-making process codified in any issued Part 373 permit.

Draft Permit identifies nine of the fourteen plan attachments[5] to FMC's Amended Application Hazardous Waste Management Facility Permit ("FMC Permit Application") that have been incorporated by reference in to the Draft Permit, and expressly include "DRAFT" in their title. As an overwhelming majority of the proposed plans included in the proposed Draft Permit are still in draft form, and have not been formally approved, the FMC Permit Application cannot be considered technically and administratively complete.

Second, Module I, General Condition R.8., of the Draft Permit states that the NYSDEC will address "[a]ny on-going approved work plans that were approved pursuant to the [AOC] . . .," and that such work plans are "hereby incorporated into this permit." However, there is no formal discussion and/or cross-reference as to what specific plans are being incorporated by reference under this pretext, nor does it address the contradiction in incorporating by reference "DRAFT" plans attached to the FMC Permit Application, but not others that may be in existence. The lack of consistency demonstrates that the Draft Permit cannot be deemed technically and administratively complete at this time, and that the Agencies still have further work to be completed under the AOC prior to addressing this specific deficiency.

Finally, it is inappropriate to expect that FMC and the public can adequately review and comment on the Draft Permit, as its incorporation of draft and unapproved documents provides uncertainty and ambiguity as to what requirements may actually exist. Parts 621 and 624 place a significant emphasis on public and stakeholder participation in the permitting process, as does USEPA under the RCRA program, generally. Parties cannot clearly understand all facts and requirements associated with the Draft Permit when substantial ambiguity and a lack of consistency exists. Simply forcing through a permit in the name of expediency is wholly improper, and should not be allowed. Indeed, FMC has reviewed several Part 373 permits issued by NYSDEC as part of its review process, and none included draft or unapproved plans that were incorporated by reference. Any permit issued to FMC should be no different than any other permit issued in New York State in this regard.

FMC General Comment No. 3: *The AOC is a binding Contractual Obligation of the Agencies that governs corrective action decision making and cannot be unilaterally terminated or modified.*[6]

The AOC is a negotiated compromise that provided certainty to both FMC and the Agencies that certain investigatory and/or corrective actions would be performed by FMC

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[5] Attachment P is a topographic map, and as such, does not include specific plan requirements.

[6] The substance of the issues described in FMC General Comments No. 3 and No. 4 are codified in FMC Corporation's Notice of Dispute and Request for Resolution Pursuant to Sections XI and XXIX of Administrative Order on Consent, dated August 2, 2017, which was submitted to the Agencies that same date (the "Notice of Dispute"). The Notice of Dispute, and all arguments included therein, are hereby incorporated by reference, and are submitted for the NYSDEC's review and consideration as part of its

without the need for protracted administrative and legal proceedings. The Agencies benefited from the certainty that FMC had a legal obligation to conduct all RCRA-based corrective action obligations; and for FMC, that USEPA would make corrective action decisions using a federal RCRA risk-management based process, with NYSDEC concurrence. This was reaffirmed eighteen years after the execution of the AOC, when all parties agreed to the CAOs that expressly adopted a federal RCRA risk-management based remedial approach to corrective action.

FMC does not dispute that NYSDEC is authorized, pursuant to Section XXII of the AOC, to issue the Draft Permit. However, it does object to the substance of the proposed Draft Permit, and the attempt by NYSDEC to unilaterally terminate and replace the AOC. Operative language from the AOC expressly states that issuance of a Part 373 permit would only be appropriate where it "incorporate[s] the requirements of [the] [o]rder by reference . . . [and] [a]ny requirements . . . shall not terminate upon the issuance of a permit unless . . . expressly replaced by equivalent or more stringent requirements in the permit and EPA approves such termination."[7] The Draft Permit would not comply with that requirement. In fact, Module I, General Condition R.8., states that the Draft Permit "expressly replaces the Consent Decree Docket No. II-RCRA-90-3008(h)-0209," that "[a]ny substantive requirements of the order are incorporated into this [p]ermit and the [p]ermit requirements are equivalent or more stringent than that order," and that "[a]fter the effective date of this [p]ermit EPA will move to terminate the Consent Decree in Federal District Court."[8]

The Draft Permit does not incorporate the requirements of the AOC, but instead, expressly replaces the AOC with modules governing the corrective action process. Those modules impose requirements that are neither equivalent to, nor more stringent than, the provisions of the AOC; they are fundamentally and essentially different. Specifically, the Draft Permit: (i) changes the corrective action decision-maker from USEPA to NYSDEC; and, (ii) improperly replaces the governing standards for corrective action decision-making under the AOC (namely, the federal RCRA-based corrective action objectives developed pursuant to the AOC) with New York guidance (Division of Environmental Remediation Program Policy 10 – Technical Guidance for Site Investigation and Remediation ("DER-10")) that is not applicable to RCRA corrective action.

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public comment review process. A copy of the Notice of Dispute is enclosed with this submission as **Attachment 4**.

7 *See* AOC, Section XXII.

8 *See* Draft Permit, at I-19. The use of the language "equivalent or more stringent than the order" appears to have been intentionally included to nominally satisfy the obligations of Section XXII of the AOC. No discussion has been provided to explain how the provisions of the Draft Permit expressly replacing the AOC impose "equivalent or more stringent" requirements. FMC hereby requests that NYSDEC provide a document identifying each and every instance where replacement of an AOC provision is purported to have occurred in order to substantiate its express statement.

A legal analysis of the Draft Permit and its incorporated requirements supports the point that the Draft Permit would be wholly improper under the express terms of the AOC. An administrative order on consent has a contractual character, and therefore, should be reviewed in such a light.[9] As such, the provisions of the AOC must be treated as bargained-for promises. If NYSDEC wishes to terminate or to modify provisions of the AOC, it must meet the specific requirements for doing so included in the AOC. The Draft Permit would not comply with the AOC's provisions for issuance of a Part 373 permit, and would not provide the conditions for unilateral termination or modification of the AOC by the Agencies.

One needs to look no further than Section XXII of the AOC to evidence this fact, as that provision does not contemplate a termination of the entire AOC by issuance of a Part 373 permit; Section XXII of the AOC only provides for terminating individual "***requirements***" of the AOC, and even then, only when the replacement is equivalent to, or more stringent than, the operative provision of the AOC. Given that the AOC includes a different section that deals specifically with termination (Section XXI),[10] the language of Section XXII of the AOC cannot be read to authorize NYSDEC or USEPA to terminate, or to seek to terminate, the entire order. To claim otherwise would render other provisions of the AOC meaningless, violating a basic tenet of contract law.[11]

As previously noted, the Draft Permit would not replace each and every provision of the AOC; one cannot find any discussion in the Draft Permit, nor in the Fact Sheet, where NYSDEC has enumerated how each individual provision of the AOC would be replicated and/or supplanted. This is apart from the fact that the Draft Permit would also not impose conditions equivalent to, or more stringent than, the AOC provisions being displaced; they are fundamentally and essentially different. The Draft Permit leaves no doubt that NYSDEC wishes to substitute the presumptive excavation and removal remedy of its DER-10 guidance document for the risk-based corrective action mandated by RCRA, the AOC, and the CAOs. This completely contradicts the substantive terms of the AOC.

Consequently, there is no proper factual or legal basis for termination of the AOC, and replacement of the RCRA-based decision-making process imbedded in it.

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[9] *See Amoco Chem. Co. v. Tex Tin Corp.*, 902 F. Supp. 730, 735 (S.D. Tex. 1995) ("Interpretation of the AOC, like the interpretation of all contracts between federal government agencies and private parties, is governed by federal law"); *see also United States v. Rand Motors*, 305 F.3d 770, 774 (7th Cir. 2002) ("A settlement agreement is essentially interpreted as a contract."); *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982) (citations omitted) ("An agreement to settle a legal dispute is a contract.").

[10] Issuance of a RCRA permit is not an enumerated basis for termination under the AOC.

[11] *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) ("A reading of the contract should not render any portion meaningless."); *see also Pandit v. Saxon Mortg. Servs., Inc.*, 2012 WL4174888, at *4 (E.D.N.Y. Sept. 17, 2012).

FMC General Comment No. 4: *The Draft Permit impermissibly treats DER-10—a guidance document—as if it is binding.*

The Draft Permit treats DER-10—a guidance document—as if it is binding, which is wholly improper for two principal reasons.

First, the AOC requires that corrective measure alternatives at the Site be selected on the basis of the AOC, the CAOs and ***federal*** law. At the heart of DER-10 is the use of New York state presumptive remedies requiring excavation and removal of soils until the remaining soils contain no more than assumed background concentrations of contaminant,[12] rather than focusing on site-specific factors and circumstances. RCRA has no remedial preference for excavation and removal of soils. RCRA corrective action decisions turn on the evaluation of residual risk, and do not affirmatively ascribe any talismanic importance to removal of constituents or materials. By contrast, the final remedy selection process ascribed in Module II requires that "the final corrective measure(s) [be developed] in accordance with DER-10 . . . ."[13] This is not consistent with RCRA-based remedial action priorities, and is in direct contrast to the remedial decision-making process imbedded within the AOC.

Second, New York courts have routinely struck down agency attempts to apply a standard in a guidance document as though it is a rule or statute,[14] including where the agency requires ***strict*** adherence to the guidance document without giving due consideration to attendant facts and circumstances.[15] Therefore, the mere requirement that corrective action activities be directly driven by DER-10 is wholly inappropriate.

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[12] "[W]hen the [d]epartment, as part of this [p]ermit, requires the [p]ermittee to prepare any component (e.g. work plan, report, study, design, remedy, etc.) of a specific RCRA [p]rogram element . . . the [p]ermittee must utilize DER-10 . . . ." *See* DER-10, at II-5 to II-7.

Importantly, DER-10 does not even reference the RCRA-delegated statutory and regulatory provisions applicable to it in the Draft Permit. Specifically, Item 1 of Section D of the Draft Permit acknowledges this fact, when it notes that DER-10 utilizes nomenclature from a New York analog to the Comprehensive Environmental Response, Compensation, and Liability Act, not RCRA, and includes cross-references to address the distinction between the elements of the expected corrective action to be taken.

[13] *See* Draft Permit, at II-8 and II-9.

[14] *See, e.g., Destiny USA Dev. v. N.Y. State Dep't of Envtl. Conservation*, 63 A.D.3d 1568, 1570 (4th Dep't 2009) ("[A]n agency . . . is not allowed to 'legislate' by adding 'guidance requirements' not expressly authorized by statute.") (quotation marks and citation omitted); s*ee also Lighthouse Pointe Prop. Ass'n, LLC v. N.Y. State Dep't of Envtl. Conservation*, 14 N.Y.3d 161 (2010) (NYSDEC exceeded its authority in excluding parcel from Brownfields Cleanup Program on grounds inconsistent with the Brownfields law).

[15] *See Destiny USA Dev.*, 63 A.D.3d at 1571 ("[B]y their own terms [the 'guidance' and 'guide factors'] are explanatory and advisory, to be followed 'under appropriate conditions' ", and thus they are appropriate inasmuch as they facially "do not represent 'a fixed, general principle to be applied by an administrative

Consequently, the use of DER-10 to drive RCRA corrective action decision-making under the Draft Permit is entirely contrary to the approach of the AOC, the CAOs, and guiding law, and cannot be used in the Draft Permit.

FMC General Comment No. 5: *The Draft Permit either does not, or improperly describes in insufficient detail, the current status of each of the Solid Waste Management Units ("SWMUs"), Areas of Concern, and Operable Units ("OUs").*

The Draft Permit either fails to describe, and in some instances, incorrectly describes, the current status of each of the SWMUs, Areas of Concern, and OUs.[16] This is a significant issue, as it is nearly impossible for FMC, let alone public stakeholders, to be able to ascertain what NYSDEC understands the current status of each of these specific areas to be. Without a substantive discussion of each specific area in the Draft Permit, it is not possible to provide appropriate and detailed comments as to the full extent of potential issues, objections, and/or questions that may exist for each. In fact, NYSDEC acknowledged the need for such a description for the existing OUs, when it noted in Paragraph F of the Fact Sheet that "[t]he current status of the[] operable units is detailed in the draft permit." Unfortunately, FMC's review of the Draft Permit did not identify any location that provided a detailed discussion of the OUs.

The type of substantive discussion called for in Paragraph F of the Fact Sheet needs to be included throughout the Draft Permit. And in instances where a brief reference has been included in the Draft Permit, such as for the SWMUS and Areas of Concern in Module II, A.1. and 2., the single sentence summary is nowhere near sufficient enough to allow interested parties to understand the true status. Given the amount of work completed across various locations since 1991, and the number of open submittals to the Agencies, FMC cannot realistically be assumed to understand NYSDEC's position as to each of these locations. Significant revision is necessary to the Draft Permit to address these deficiencies to appropriately clarify for all of these locations.

The Draft Permit also fails to clearly address the ongoing litigation between FMC and NYSDEC regarding the remedy decision for OUs 2, 4 and 5. Given that FMC has been successful thus far at the trial court and appellate level, the Draft Permit may require major modifications once the pending appeal to the New York State Court of Appeals is decided, which

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agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers' ") (citation omitted).

[16] FMC's Specific Comments in Attachment 1 include a more detailed discussion of instances where this is the case.

could result in having to redo the entire permitting process. At a minimum, this fact should be disclosed to the public in detail, and be accounted for in any obligations pertinent to such OUs.

FMC General Comment No. 6: *The Draft Permit does not acknowledge the roll of public participation and comment in remedial decisions made pursuant to it.*

The Draft Permit does not discuss specific requirements for public review and comment on key documents to be submitted pursuant to it, such as Remedial Facility Investigation ("RFI") reports, Corrective Measures Studies ("CMS"), and corrective measures decision documents. The Draft Permit also fails to state that public meetings or comment periods will be held to solicit public comments on any submittals, remedy decisions, or Statement of Bases that are issued, and that public comments will be considered during the corrective measures decision process. The NYSDEC needs to expressly affirm in the Draft Permit that public review and comment will apply to it, and state those requirements throughout the Draft Permit, where appropriate.

The failure to expressly address the need for public review and comment in the Draft Permit is inappropriate for two principal reasons. First, the majority of the OUs consist of non-FMC owned properties, which will have a direct effect on third-party property owners, community groups, and other community stakeholders, all of which are entitled to opine based on the State's regulatory scheme and process. Historically, there has been significant participation by these parties, including the Middleport Remedial Advisory Group, the Middleport Advisory Panel, and the Middleport Community Input Group. NYSDEC is well aware of this fact, as it has also been an active participant. Not keeping these key stakeholders involved in the process directly contradicts the open and transparent nature of the State's remedial program, and its underlying regulatory scheme.

Second, a lack of public participation is not consistent with federal guidance for public participation pursuant to a delegated RCRA permit, which is described in detail in the USEPA's "Resource Conservation and Recovery Act Public Participation Manual," dated January 11, 2017. As the Draft Permit is to be issued pursuant to delegated authority, USEPA's position on such matters must be considered by NYSDEC.

FMC General Comment No. 7: *The Draft Permit should include approval of a corrective action management unit ("CAMU").*

Part 373-1.7(d)(13) specifies that approval of a CAMU is a major modification to any existing Part 373 permit, thus requiring a formal restart of the entire permitting process in order to be added. The NYSDEC has already approved the designation of a CAMU at the Facility in its May 2013 Final Statement of Basis for Air Deposition Area #1 (OU2 and OU4) and Culvert 105 (OU5). However, the Draft Permit fails to reference that fact in it. The Draft

Permit should be revised to incorporate the designation, design, construction, and use of a CAMU at the eastern portion of the Facility, consistent with May 2013 Final Statement of Basis for Air Deposition Area #1 (OU2 and OU4) and Culvert 105 (OU5).

FMC General Comment No. 8: *The proposed scheduling of corrective action submittals and/or activities in the Draft Permit is arbitrary, unduly burdensome and unrealistic.*

The compliance schedules included throughout the Draft Permit fail to contemplate concurrently running timeframes for the submittal of deliverables, as well as for undertaking certain corrective action activities. Many of these dates are highly expedited, and completely unrealistic in nature, given the breadth of work to be addressed on an ongoing and parallel basis. In many instances, the language included in the Draft Permit is also confusing, as it utilizes both a specific date and language referencing the sooner of a period of time from the effective date that is nowhere near a similar range of time.

Simply assigning artificial deadlines, on a concurrent basis, without additional thought is not practical, unduly burdensome, and arbitrary in nature. And given NYSDEC's limited resources, and the length of time it has historically taken for it to respond to FMC deliverables, a reasonable and systematic approach to implementing the Draft Permit's obligations will not be able to proceed. To compound potential concerns, should the Draft Permit be finalized as constituted, the need to modify compliance dates and schedules in the future may constitute a major change, thus requiring a full permit review process to do so. This would result in a significant waste in NYSDEC's and FMC's resources and time, and result in a failure to timely effectuate any type of corrective action.

In order to address this issue, FMC would propose that a permit condition be incorporated in the Draft Permit to develop a project implementation plan to be submitted to the NYSDEC for its review and approval. This will allow for both parties to work cooperatively to develop a realistic approach to address the requirements in the Draft Permit, and account for the need to also consider public participation, construction seasons, and other implementation-based issues.

FMC General Comment No. 9: *The dispute resolution process in the Draft Permit is limited in nature, and should be expanded to all aspects of disagreement under it.*

As presented in the Draft Permit, the dispute resolution process described in the Draft Permit only applies to the corrective action-related submittals pursuant to Module II or Exhibit B of Schedule 1 of Module I, and allows for unilateral action by the NYSDEC under Condition A.7.f. for non-corrective action approvals. This is inconsistent with other NYSDEC Part 373 permits reviewed by FMC, including those for the MPM Silicones/Momentive

Performance Materials facility, the Kodak Eastman Business Park facility, the Norlite, LLC facility, and several other facilities in New York State. All of those permits include a dispute resolution process that allows for "any dispute" to be submitted to the NYSDEC in writing within 15 days, and a designated process to follow after submission. Limiting FMC's ability to invoke dispute resolution, especially in light of the approach taken in all of its other recently issued Part 373 permit, is arbitrary and capricious, and should be revised accordingly.

FMC General Comment No. 10: No justification has been provided for the purported financial assurance obligation figure listed in the Draft Permit, nor can the figure be reasonably discerned.

Schedule 1 of Module I, Condition D, Item 1 (Financial Assurance Requirements) requires that FMC provide financial assurance in the amount of $144,000,000.00. This amount is not justified based on the information in the Draft Permit, nor from any information provided in the FMC Permit Application.

The FMC Permit Application included estimated costs as follows:

- $410,000.00 for the Western Surface Impoundment ("WSI") closure;
- $2,300,000.00 for the Eastern Surface Impoundment ("ESI") closure;
- $42,100,000.00 for post-closure obligations; and,
- $27,300,000.00 for the implementation of corrective measure alternative ("CMA"), which is FMC's recommended CMA in OUs 2, 4 and 5.

The total of FMC's calculated costs is $72,110,000.00, which reflects the proper figure generated consistent with the requirements of 6 NYCRR Part 373-2.8 and the FMC Permit Application. In NYSDEC's May 2013 Statement of Basis for OUs 2, 4, and 5, it unilaterally selected a final remedy that it estimated to cost approximately $58,000,000.00. Even when replacing this figure with FMC's estimated cost,[17] the total figure is $102,810,000.00. This figure is still approximately $42 million dollars less than the amount specified in the Draft Permit. FMC can find no factual or regulatory basis to justify this figure, or such a large discrepancy in the amount identified by NYSDEC.

A detailed analysis as to how NYSDEC calculated the $144,000,000.00 figure in accordance with existing regulatory requirements must be provided in the Draft Permit. This figure appears to have been arbitrarily decided upon, outside the scope of existing regulatory

[17] NYSDEC's unilateral selection and implementation of CMA#9 is the subject of pending litigation. FMC won at the trial court level, which was upheld by the 3rd Department, Appellate Division. This matter is currently on appeal by NYSDEC before the New York State Court of Appeals. Therefore, FMC objects to the use of this figure for any purpose, including, but not limited to, the calculation of any financial assurance obligation.

requirements, which is wholly improper. Given the significant financial obligation tied to it, NYSDEC must provide legitimate justification.

If there are any questions regarding anything included in this submission, or if additional information is needed at this time, please contact me at Christina.Kaba@fmc.com or at (215) 299-6435.

Sincerely,

Christina Kaba
Director, EHS Remediation & Governance
(215) 299-6435

Copies via email to:

M. Infurna, USEPA Region 2
S. Badalamenti, USEPA Region 2
R. Schick/M. Ryan, NYSDEC – Albany
N. Freeman/S. Dewes/D. Gardell/T. Killeen, NYSDEC – Albany
Michael S. Caruso, Esq., NYSDEC - Albany
A. Guglielmi, NYSDEC - Albany
M. Hinton, NYSDEC Region 9 Buffalo
S. Selmer/C. Bethoney, NYSDOH
Rick Kennedy, Esq., Hodgson Russ LLP
David Mandelbaum, Esq., Greenberg Traurig, LLP
Victoria Hollinger, Esq., Philadelphia
N. Schapman, FMC, Philadelphia
R. Kloda, FMC Middleport

ATTACHMENT 1

ATTACHMENT 1

FMC SPECIFIC COMMENTS
DRAFT PART 373 HAZARDOUS WASTE MANAGEMENT PERMIT FOR
FMC CORPORATION – MIDDLEPORT, NEW YORK FACILITY
EPA ID NO. NYD002126845

October 19, 2017

All defined terms used below, and not otherwise defined in this Attachment 1, shall have the same meaning as ascribed to it in the cover letter attaching this document.

DRAFT PERMIT PAGE/SECTION	SPECIFIC COMMENT
Page 1 of 7: Permittee and Facility Information; Permit Issued To	**1.** An improper corporate address for FMC is listed. The address should be revised to 2929 Walnut Street, Philadelphia, PA 19104.
Page 2 of 7: RCRA Permit Conditions, Items 1, 2, 3 and 6	**2.** Attachments C, D, E, J, M, N, R, S, and T of FMC's permit application have not been finalized or approved pursuant to the AOC, nor has the NYSDEC and/or USEPA provided comments on the most recent drafts of these documents. For example, attachment B of the permit application—the RCRA Contingency Plan, dated May 13, 2016—is outdated and is not the current version for the Facility. This fact directly implicates concerns regarding the following permit conditions: • Item 1 – This condition requires conformance with all approved plans included as part of the FMC Permit Application. However, as noted here and in FMC General Comment No. 2, nine of the plans included in the previously listed attachments are still in draft form, and have not been approved by the Agencies pursuant to the AOC. FMC cannot confirm strict adherence to draft plans, especially when such plans may be outdated and/or still subject to further comment. • Item 2 – This condition states that the Draft Permit assumes that the application is complete and accurate. Since draft documents are incorporated by reference, it cannot be assumed that the application is administratively and technically complete and accurate. • Item 3 –This condition requires compliance with all terms and conditions of the permit, which includes reference to any attachments and incorporated documents. Since draft documents are incorporated by reference, it cannot be assumed that the application is administratively and technically complete and accurate.

DRAFT PERMIT PAGE/SECTION	SPECIFIC COMMENT
	• Item 6 - This condition requires that FMC shall operate the facility in strict accordance with the requirements of all permit modules, attachments, and incorporated documents. FMC cannot confirm strict adherence to draft plans and documents, especially when such plans may be outdated and/or still subject to further comment. It is inappropriate to expect that FMC and the public can adequately review and comment on the Draft Permit since it incorporates draft/unapproved documents. Finally, Item 6—Documents Incorporated by Reference—should include direct reference to the Agencies' final CAOs that are to be used for all off-site soil and sediment study areas under the terms and conditions of the AOC. The CAOs need to be included to govern the remedy selection process for all FMC off-site OUs, and should be referenced throughout the Draft Permit when discussing remedial decision-making. Also, see FMC General Comment No. 2.
Page 6 of 7: General Conditions, Items 3 and 5	**3.** This condition addresses applications for permit renewals, modification, or transfers. As situated, there are several items that are not properly addressed in the Draft Permit, and which could result in a major modification under Part 371, and the need to go through the modification process. For example: • It is possible that certain actions, such as finalization of the current draft and unapproved ESI and WSI Closure Plans and the Post-Closure Plan (included as Attachment C to the Draft Permit), would result in the need to repeat the permit application process. Accordingly, formal comment and approval pursuant to the AOC for those documents is required. • Part 373-1.7(d)(13) specifies that approval of a CAMU is a major modification. The NYSDEC approved the designation of a CAMU at the FMC Facility in its May 2013 Final Statement of Basis for Air Deposition Area #1 (OU2 and OU4) and Culvert 105 (OU5). To that end, the Draft Permit should incorporate the designation, design, construction and use of a CAMU at the eastern portion of the Facility. See FMC General Comment No. 7. Also, see FMC General Comment No. 2.
Module I, page I-1 & I-2: Conditions A.2. and A.3.	**4.** Conditions A.2. and A.3. identify potentially relevant guidance and Commissioner policies that FMC shall consider. However, as discussed in FMC's General Comment No. 4, references in the Draft Permit treat NYSDEC's guidance and policies as if they are binding and are equivalent to a rule or statute. For example, Module II, D., 1., 2., and 3. all direct FMC that it must utilize DER-10 for compliance with the Draft Permit. All such references must be removed, and reference to Attachments I and II of the AOC, as well as to the Agencies' final CAOs, should be

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	added, given their approved status for all corrective action decision-making pursuant to the AOC for off-site study areas pertaining to soil and sediment.
Module I, page I-2: Condition A.5.	**5.** See FMC General Comment No. 1.
Module I, page I-2: Condition A.6.	**6.** See FMC Specific Comment No. 2 and No. 3.
Module I, page I-4, Condition A.7. – Document Approval/Disapproval Process	**7.** As discussed in FMC General Comment No. 9, the dispute resolution process described in Condition A.7.d. *only* applies to the corrective measures submittals related to Module II or Exhibit B of Schedule 1 of Module I. This is inconsistent with other NYSDEC Part 373 permits reviewed by FMC (*e.g.*, MPM Silicones/Momentive Performance Materials facility, the Kodak Eastman Business Park facility, the Norlite, LLC facility, and other facilities in New York State), which include a dispute resolution process to allow for "any dispute" to be submitted to the NYSDEC in writing within 15 days and resolution by designated individual. Exclusion of FMC's right to a dispute resolution process for disputes other than those applicable to Condition A.7.d is arbitrary and capricious, and should be revised accordingly. Also, see FMC Specific Comment No. 64 below.
Module I, page I-6, Condition B.2.a. – Action Levels Definition	**8.** The definition for Action Levels is inappropriate, as it must allow for the use of the final Agencies' CAOs applicable to off-site study areas pertaining to soil and sediment (see Specific Comment No. 2 and FMC General Comments No. 3 and No. 4). The Agencies' final CAOs include an obligation to: • focus on "FMC-related contamination," meaning the incremental contamination above background; • state that final corrective action should not be dictated by certain laws, rules and regulations, including Action Levels specified in the Draft Permit; • state that the final corrective action off-site study areas must be based on site-specific data, including site-specific risk assessments and current and reasonably anticipated future land uses; • seek to achieve a reduction in health risk to a residual risk within a "range appropriate for residential communities" (*e.g.*, acceptable residual lifetime cancer risk as $1x10^{-4}$ to $1x10^{-6}$) that meet the Agencies' risk criteria specified in the final corrective action objectives; and • establish site-specific background concentrations as a "point of departure" or "starting point" for corrective action decisions. The CAOs were intended to guide the corrective measures decision making pursuant to the AOC, and must be part of any issued Part 373 permit.

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Module I, page 1-7, Conditions C.1. and C.2.	**9.** Conditions C.1. and C.2. require reporting of certain circumstances of noncompliance. However, these conditions are not precisely contained in the FMC RCRA Contingency Plan that was incorporated into the Draft Permit by reference. See FMC Specific Comments No. 2 and No. 3. This highlights the need to finalize all existing plans prior to having them incorporated by reference into the Draft Permit. In addition, conditions C.1. and C.2. are not consistent with the Draft Permit condition K.3. on page I-13. This needs to be addressed.
Module I, page 1-9, Condition D – Permit Modification	**10.** See FMC Specific Comments No. 2 and No. 3.
Module I, page I-11, Condition G – Facility Operation	**11.** See FMC General Comment No. 1.
Module I, page I-12, Condition I1 – Waste Analysis	**12.** See FMC Specific Comments No. 2 and No. 5.
Module I, page I-13, Condition K.3	**13.** See FMC Specific Comments No. 9. In addition, Condition K.3.b. requires a written report "*f*or any fire, explosion or release to the environment, except if the release is less than or equal to one (1) pound and immediately cleaned up." This requirement is contrary to Part 373-2.4(g)(10), which requires a written report when there is any incident that requires implementing the contingency plan. It should be noted that existing Part 373 permits for the Kodak Eastman Business Park facility, the MPM Silicones/Momentive Performance Materials facility, and the Norlite, LLC facility, do not contain Condition K.3. Condition K.3. should be deleted.
Module I, page I-13, Condition L – Waste Reduction	**14.** See FMC Specific Comment No. 5. The FMC Facility has been implementing a Hazardous Waste Reduction Plan ("HWRP"), as a large quantity generator, consistent with Section 27-0908 of the Environmental Conservation Law ("ECL"). Condition L is not necessary and should be deleted.
Module I, page I-13, Condition N – Data and Document Standards, Item 1	**15.** Submittal of analytical data to the NYSDEC within 30 days of receipt from the laboratory is not an appropriate timeframe in order for data to be validated by a third party. Accordingly, this item should be revised to identify that the Electronic Data Deliverable ("EDD") for validated data will be submitted to the NYSDEC as specified in the NYSDEC approved Quality Assurance Project Plan ("QAPP"), other approved plan, or within 30 days of validation completion, if not specified in an approved plan or document.

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	With respect to the QAPP, see FMC Specific Comment No. 2.
Module I, page I-15, Condition O.4. – NYSDEC Approved Cost Estimates	**16.** See FMC General Comment No. 10. Condition O.4. states that the NYSDEC approved closure, post-closure and corrective action cost estimates are incorporated by reference into the permit by Condition B of Schedule 1. Condition B of Schedule 1 is entitled "Closed Units Subject to Post Closure" and does not discuss cost estimates. This should be revised accordingly.
Module I, page I-19, Condition R.8. – Permit replaces AOC	**17.** See FMC General Comments No. 1 and No. 3.
Schedule 1 of Module I, page S1-1, Condition A.1.a.	**18.** See FMC General Comment No. 5. For clarification, Condition A.1.a. of the Draft Permit should be revised to reflect the following: The ESI (SWMU #50) was constructed in 1978 and was determined to be regulated under RCRA in the mid-1980s. The ESI was used for the management of stormwater from 1978 through 1988. The ESI was constructed within a larger area identified as SWMU #3 that was used for the storage of process wastewater. SWMU #3 was used from 1964 through 1977, and was closed in 1977 - 1978. While the ESI is subject to the RCRA closure regulations (6 NYCRR Part 373-2), the portion of SWMU #3 that is beyond the limits of the ESI is not. The entire Eastern Parcel (OU11) is subject to RCRA corrective action.
Schedule 1 of Module I, page S1-1, Condition A.1.b.	**19.** See FMC General Comment No. 5. For clarification, Condition A.1.b. should be revised to reflect the following: The WSI was constructed in 1977 as a lined system for the storage of contaminated stormwater prior to the on-site treatment and discharge under the terms and conditions of a State Pollutant Discharge Elimination System ("SPDES") permit. The WSI was determined to be regulated under RCRA in the mid-1980s. In 1988, Phase I of the WSI closure activities was completed by removal and replacement of the liner (including removal of ballasts and sediment in the WSI) pursuant to an approved closure plan, and the WSI was returned to use as a non-hazardous stormwater retention basin. An underdrain groundwater collection system was also constructed under the WSI liner to minimize the potential uplifting of the liner and to collect and control off-site migration of contaminated groundwater. The groundwater collected by the underdrain is pumped to on-site storage tanks and not the WSI. The contaminated

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	groundwater is treated on-site and discharged pursuant to the Facility SPDES permit.
Schedule 1 of Module I, page S1-1, Condition C – Permit Documents	**20.** See FMC Specific Comment No. 2
Schedule 1 of Module I, page S1-5, Condition D – Compliance Schedule, Item 1	**21.** See FMC General Comment No. 10. Notwithstanding the discrepancies with the amount subject to financial assurance, the Compliance Date included in this condition should not be based on the effective date of the as-issued permit. Given the discrepancies between the appropriate financial assurance amounts to be addressed (which may be due, in part, to the draft nature of the Closure Plan and/or Post-Closure Plans for the WSI, ESI, and Central Surface Impoundment ("CSI")), as well as the pending resolution of the appeal before the New York Court of Appeals on the remedy for OUs 2, 4 and 5, there is still open questions present. As the regulations in 6 NYCRR Part 373-2.8 generally reference a date by which waste is first received as to when the assurance mechanism is in place, which is not applicable to ongoing operations at the Facility, such requirements do not place a strict deadline to be adhered to. An alternative deadline should be utilized here, should a final permit be issued.
Schedule 1 of Module I, pages S1-6 and S1-7, Condition D – Compliance Schedule, Items 3, 4 and 5 – Closure and/or Post-Closure Care Plans for the WSI, ESI and CSI	**22.** FMC submitted draft Closure and/or Post-Closure Plans for the WSI, ESI and CSI along with its permit application materials, but has not received comments or approval from NYSDEC on the most recent drafts. The reference here needs to be revised to reflect this fact. The schedule for closure of the ESI does not reflect the fact that a CMS will need to be performed to identify corrective measures for the Eastern Parcel (OU11). Since the ESI is situated within OU11, the selected corrective measure would impact the impoundment closure activities. It should be noted that the AOC requires that the ESI inactive status be maintained pending the results of a CMS for the Eastern Parcel (including SWMU Group C), and that an ESI closure plan modification may be submitted. Similarly, the final closure of the WSI is dependent on the final corrective measures to be determined for that portion of the Site (OU1 and OU10). The AOC states that the WSI must be operated as an interim corrective measure ("ICM"), pending the results of a CMS, and that a closure plan modification may be submitted after the CMS. As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Items 3, 4, and 5 could be subject to. If such a condition is not to be incorporated, Items 3 and 4 should be revised to reflect performance of the WSI and ESI closures concurrent with the facility corrective measures implementation for OU1 (Facility

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	soil, sediment, and surface water), OU10 (groundwater), and OU11 (Eastern Parcel). FMC also submitted a Post-Closure Plan for the three impoundments, but has not received comments or approval on the most recent drafts. The Post-Closure Plan activities described in the plan are not specific to any one impoundment, but consist of site-wide remedial system operations, maintenance and monitoring. Post-Closure Plan activities consist of the current ICMs (i.e., WSI, North Site Cover, groundwater extraction systems) and the current groundwater monitoring program for remedial system effectiveness monitoring. Therefore, the impoundment-specific Post-Closure Plan requirement should be removed from Items 3, 4 and 5 and a new item should be established for the Post-Closure Plan, and the schedule should appropriately reflect that the plan has been prepared and submitted to NYSDEC.
Schedule 1 of Module I, page S1-8, Condition D – Compliance Schedule, Item 6, On-Site facility/Site ISMP	**23.** The Draft Permit states that the on-site Integrated Site Management Plan ("ISMP") "will include the specific OM&M requirements for item numbers 2, 3, 4 and 5 in this Table and all previously approved OM&M plans under the 1991 AOC." On-site related OM&M plans previously approved under the AOC, as well as plans required in Items 2, 3, 4 and 5 of Condition D, were revised and submitted to the Agencies as part of the FMC Permit Application. NYSDEC has not provided comments or approval of these latest version of these documents to date. This should be reflected in the Draft Permit. An on-site ISMP is a duplicative effort and is not necessary. And even if that was not the case, as noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 6 could be subject to.
Schedule 1 of Module I, page S1-9, Condition D – Compliance Schedule, Item 7, Off-Site facility/site ISMP	**24.** An off-site ISMP is a duplicative effort and is not necessary. And even if that was not the case, as noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 7 could be subject to.
Schedule 1 of Module I, pages S1-9 through 11, Condition D – Compliance Schedule, Items 8, 9 and 10	**25.** Items 8, 9 and 10 refer to the implementation of remedial actions in OUs 2, 4 and 5, respectively. NYSDEC and FMC have been in litigation regarding NYSDEC's selected remedy and associated unilateral remedial action taken by it for OUs 2, 4 and 5 during the pendency of this litigation. Items 8, 9 and 10 should be removed or appropriately revised to refer to the final outcome or resolution of the litigation on this matter. It is not appropriate for NYSDEC to attempt to circumvent judicial opinions on such matters through the issuance of a final permit.

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	FMC has submitted requests under the Freedom of Information Law ("FOIL") for copies of documents associated with the remedial activities conducted to date at OUs 2, 4, and 5, including for CMI work plans, design drawings, specifications, schedules, among others. NYSDEC has not provided FMC with the necessary documents or information in a timely manner. FMC will need significant time to review these documents prior to being in a position to develop a work plan in OUs 2, 4 and 5, if necessary, based on final resolution of the ongoing litigation. This must be considered in the Draft Permit for any specific compliance date obligations. It should also be noted in the Draft Permit that FMC will not be responsible for any liabilities, issues, and/or complaints associated with properties remediated by NYSDEC's contractors and representatives.
Schedule 1 of Module I, page S1-11, Condition D – Compliance Schedule, Items 8, 9 and 10	**26.** As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Items 8, 9 and 10 could be subject to.
Schedule 1 of Module I, page S1-11, Condition D – Compliance Schedule, Item 11	**27.** This condition requires FMC to determine and eliminate the sources of carbofuran entering the WSI. This requirement is not necessary, and is redundant since the approved WSI Operations Plan (which is incorporated by reference into the Draft Permit) includes requirements for identifying and eliminating the source of any hazardous waste when sampling data indicates that the WSI contains hazardous waste. In fact, Exhibit B, Supplement to Module II – Corrective Action, B.5.d.vii., of the Draft Permit specifically references the WSI Operations Plan for this action. FMC has been monitoring for carbofuran in the influent stormwater to the WSI as part of the WSI Operation Plan pursuant to the AOC. Those results have been provided to NYSDEC in quarterly progress reports submitted pursuant to the AOC, and by in various pieces of FMC correspondences regarding the hazardous waste characterization of sediment in the WSI as part of FMC's recent WSI liner replacement project in late-summer 2017. As detailed in a letter submitted by FMC, dated August 4, 2017, to the Agencies, and hereby incorporated by reference, carbofuran has only been detected at estimated concentrations that are below the discharge compliance level established in the Facility's SPDES permit issued by NYSDEC. Given this fact, FMC provided conclusive analysis to the Agencies that the water flowing into and contained in the WSI is not hazardous. This analysis was supplemented by FMC's letter to the Agencies, dated August 9 and 16, 2017, which are also hereby incorporated by reference, and included sampling data that demonstrated that the WSI sediment does not exhibit any hazardous waste characteristics, and does not contain detectable quantities of carbofuran. In response to FMC's August 4, 9 and 16, 2017 letters, NYSDEC submitted a letter on the Agencies behalf, dated August 28, 2017, which is also incorporated by reference, where it was agreed that the sediment in the WSI could

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	be managed as a non-hazardous waste. A copy of the August 4, 9, 16, and 28, 2017 letters are included with this submission as **Attachment 5**. Since the WSI does not contain any hazardous materials, and the WSI Operations Plan specifically addresses a circumstance where evidence is identified noting receipt of hazardous waste to the WSI, there is no need for the work described in Item 11.
Schedule 1 of Module I, page S1-12, Condition D – Compliance Schedule, Footnote Number 4	**28.** Footnote 4 states that the "Post-Closure Plans must identify the activities to be performed and must do so based on the assumption that final closure will include removal of any solid wastes, backfilling and capping." Part 373-2.7(h)(2) states that "[f]or each hazardous waste management unit subject to the requirements of this subdivision, the post-closure plan must identify the activities that will be carried on after closure of each disposal unit and the frequency of these activities," and clearly does not require that the plan assume that final closure will include removal of any solid wastes, backfilling and capping. Therefore, the first sentence in Footnote 4 should be revised to say "Post-Closure Plans must identify the activities to be performed." Also, see FMC Specific Comment No. 22.
Schedule 1 of Module I, page S1-12, Condition D – Compliance Schedule, Footnote Numbers 5, 6, 8 and 9	**29.** Footnotes 5, 6, 8 and 9 discuss requirements for FMC to complete remediation of OUs 2, 4, and 5 based on NYSDEC's Statement of Basis. As discussed in FMC General Comment No. 5 and Specific Comment No. 25, NYSDEC and FMC have been in litigation regarding the CMA chosen for these OUs, and this matter is still pending. Footnotes 5, 8 and 9 should be removed given this fact. Notwithstanding FMC's position that these footnotes should be removed, the requirement in Footnote 5 that FMC complete remediation of un-remediated OU 2, 4, and 5 properties in four years is not realistic, and is at a much faster pace than what the NYSDEC has been able to achieve to date as part of its unilateral activities. Given that there are approximately 130 un-remediated properties that would be subject to the NYSDEC's Statement of Basis, many of which are much larger in area than the 52 properties completed by NYSDEC to date, and require individual access to be provided by third-party owners at times convenient to them, there is no conceivable way this schedule could be met. This footnote should be deleted, no matter the ultimate disposition of Footnotes 6, 8, and 9.
Schedule 1 of Module I, pages S1-12 through S1-16, Condition E – Schedule of Deliverables, Deliverable Dates	**30.** See FMC General Comment No. 8. Also, see FMC Specific Comment No. 31 through No. 38 below. Generally speaking, the deliverable dates in the Schedule of Deliverables are confusing because of previously established submittal dates and the phrasing "whichever date comes first" used in the permit relative to the effective date of

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	the permit. In general, the deliverable dates should be as specified in the final approved work plans associated with the OU-specific study.
Schedule 1 of Module I, pages S1-12 and S1-13, Condition E – Schedule of Deliverables, Item 1	**31.** Item 1 specifies submittal of an engineering plan to optimize ICMs, including "...identifying and eliminating source of carbofuran to site surface water..." This requirement is addressed in Condition D, Item 11, of the Draft Permit, and should be deleted for the reasons specified in FMC Specific Comment No. 27. The remaining requirements of Condition E, Item 1, are not necessary, as those requirements have been addressed as part of FMC's 2012 North Site Cover evaluation and associated recommended actions. All actions taken in that regard were summarized in the North Site Cover Evaluation Addendum Report, which was submitted by cover letter, dated October 7, 2016, pursuant to the AOC, and page 16 of FMC's SPDES permit, and approved by NYSDEC, by letter dated November 7, 2016. Therefore, these requirements should be deleted from the Draft Permit.
Schedule 1 of Module I, pages S1-12 and S1-13, Condition E – Schedule of Deliverables, Item 2	**32.** As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 2 could be subject to.
Schedule 1 of Module I, page S1-14, Condition E – Schedule of Deliverables, Item 3	**33.** As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 3 could be subject to. Notwithstanding this fact, the deliverable date for the OU1 RFI Work Plan specified in the Draft Permit should be revised to only state "January 2, 2023," if that compliance date obligation was to remain. The phrase beginning with "or within 180 days" is not necessary, and ultimately confusing when considering the current status of OU1 (FMC Facility, excluding the Eastern Parcel – OU11). FMC's letter dated June 30, 2015, to the Agencies, provided an update on the status of the RFI/CMS for each of the facility OUs. Consistent with the June 30, 2015 letter, FMC's January 1999 RFI Report describes the nature and extent of contamination at the Facility, including OU1. Additional data related to OU1 has been collected as part of the Site ICMs (reported in FMC's quarterly progress reports submitted pursuant to the AOC) and the North Site Cover evaluation and associated reports. The Agencies have not provided comments regarding the sufficiency of existing data for the OU1 RFI. This input is needed to determine whether additional data collection is needed and, if needed, the scope of information/date need to complete the RFI for OU1. This fact should be considered and reflected in the Draft Permit.
Schedule 1 of Module I, page S1-14, Condition E	**34.** Item 5 requires FMC's submittal of a "Department approved or accepted CMS in accordance with the approved work plan." It should be noted that the Agencies determined that approval of the CMS Work Plan for OU6 was not necessary based

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– Schedule of Deliverables, Item 5	on discussions held in 2016, and requested that FMC perform the CMS under the terms and conditions of Attachment 2 of the AOC, which presents the scope of work for performing a CMS. Accordingly, FMC agreed to perform the CMS pursuant to Attachment 2 of the AOC, and this fact should be reflected in the Draft Permit. As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 5 could be subject to. Regardless, including a reference to a November 1, 2017 compliance date in the Draft Permit is not appropriate, as there was never any possibility that this date would not have passed prior to a permit possibly having been issued. Therefore, if this condition was to remain, this should either be struck or revised accordingly.
Schedule 1 of Module I, page S1-14 and 15, Condition E – Schedule of Deliverables, Items 6 and 7	**35.** The descriptions for the OU7 and OU8 RFIs should be revised to reflect NYSDEC's request for submittal of a supplemental sampling work plan for OU7 and OU8 by November 30, 2017. As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Items 6 and 7 could be subject to. Regardless, any discussion of deliverable dates should be revised to say: "According to timeframes in the approved OU7 and OU8 supplemental work plan."
Schedule 1 of Module I, page S1-15, Condition E – Schedule of Deliverables, Item 8	**36.** As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 8 could be subject to. Notwithstanding this fact, the deliverable date for the OU9 CMS specified in the Draft Permit should be revised to only say "January 2, 2021," if that compliance date obligation was to remain. The phrase beginning with "or within 180 days" is not necessary, given the nature of the OU, and the fact that a specific date was provided. It should also be noted that the NYSDEC has been using the land within OU9 for construction activities (*i.e.*, soil staging, equipment/material storage, etc.) as part of its unilateral OU 2, 4, and 5 remedial activities. FMC cannot confirm what impacts may have incurred in this area due to NYSDEC and its contractors, and it should be clarified that FMC will not be responsible for any impacts to the property caused by NYSDEC and its contractors.

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Schedule 1 of Module I, page S1-15, Condition E – Schedule of Deliverables, Item 9	**37.** As noted in FMC General Comment No. 8, FMC would propose that a permit condition be incorporated to the Draft Permit to develop a project implementation plan to be developed and submitted to the NYSDEC for its review, and for which Item 9 could be subject to. Notwithstanding this fact, the deliverable date for the OU10 CMS specified in the Draft Permit should be revised to only say "January 3, 2022," if that compliance date obligation was to remain.
Schedule 1 of Module I, page S1-16, Condition E – Schedule of Deliverables, Item 10	**38.** The description and deliverable date for the OU11 CMS should be revised to reflect NYSDEC's request for submittal of a CMS Work Plan for OU11 by December 29, 2017, for which FMC has previously agreed.
Exhibit A, Supplement to Module I, General Provisions, page A-1, General Condition A.1.	**39.** General Condition A.1. requires FMC to organize training events for, and inspections by, local fire companies. As discussed in FMC's General Comment No. 1, hazardous waste is not currently treated, stored or disposed at the Facility in units subject to Part 373 permitting requirements. The Facility operates as a large quantity hazardous waste generator that accumulates waste for less than 90 days prior to off-site disposal pursuant to 6 NYCRR Part 373-1.1(d)(1)(iii). Applicable emergency preparedness and prevention requirements in Parts 373-2.3 and 373-3.3 only require that the Facility make arrangements to familiarize the local emergency response organizations with the Facility and associated hazardous waste properties; these regulations do not specifically enumerate a need for inspections, solicitation of recommendations, nor reporting to NYSDEC of the inspections and recommendations. Therefore, this requirement should be deleted from the Draft Permit. Notwithstanding the fact that this condition is not applicable, FMC has, and will continue to, inform local emergency responders and agencies of the Facility layout and potential hazards, and when appropriate, offer Facility inspections and joint emergency response training.
Exhibit A, Supplement to Module I, General Provisions, page A-1, General Condition A.3.	**40.** Impoundment closures will be conducted in accordance with the approved Closure Plan. Accordingly, NYSDEC's criteria for closure and sampling that NYSDEC may request should be specifically enumerated in the final Closure Plan, and not be arbitrarily determined when the permittee notifies NYSDEC of closure. This provision should be removed, or in the alternative, revised to address the need for such closure to be done consistent with the approved Closure Plan. If NYSDEC was to determine that circumstances require additional action and/or sampling activities, the necessary actions can be taken pursuant to Part 621.
Exhibit B, Supplement to Module II – Corrective Action	**41.** As noted in FMC General Comment No. 6, the Draft Permit does not discuss requirements for public review and comment on key documents (*i.e.*, RFI Reports, CMS Reports, corrective measures decision documents) that will be submitted

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	under the permit conditions. The Draft Permit should be revised to incorporate these requirements in every circumstance where it would be applicable.
Exhibit B, Supplement to Module II – Corrective Action, page B-1 through B-4, Condition A.1.	**42.** As noted in FMC General Comment No. 5, Condition A.1. does not describe the status of each of the SWMUs, SWMU Groups and Area of Concern in sufficient detail. Revisions are necessary to the Draft Permit to address these deficiencies.
Exhibit B, Supplement to Module II – Corrective Action, page B-5, Condition A.2.	**43.** The status of the OUs need to be updated, as identified in FMC General Comment No. 5, for the following OUs: • OU1; • OUs 2, 4 and 5; • OU3; ▪ Note - the Draft Permit states that "DEC accepts the CMS for the purposes of developing a remedy." FMC has been awaiting a response from the Agencies on the Draft CMS Report for OU3 that was submitted to the Agencies by letter, dated September 10, 2015. No formal communication has been provided to FMC regarding the Draft CMS submittal until the dissemination of this Draft Permit. FMC has separately requested a written response from the Agencies in accordance with the AOC based on this reference, and reaffirms that request here. It would be improper for the Agencies to include, in writing here, approval of the Draft CMS submittal, but avoid providing a formal notification under the AOC based on the premise of trying to avoid the potential for formal dispute resolution to be invoked under that agreement. • OUs 7 and 8; and, • OU11.
Exhibit B, Supplement to Module II – Corrective Action, page B-6, Condition A.3.	**44.** "any" in the first paragraph should be capitalized. The reference to Vol. I, Section IX, of the FMC Permit Application in the first sentence of the third paragraph is not clear, and the reference to draft permit Condition B of Schedule I of Module I is incorrect, as it is for the condition entitled "Closed Units Subject to Post Closure Care," which provides the approximate area for the closed CSI. These references should be revised accordingly.
Exhibit B, Supplement to Module II – Corrective Action, page B-7, Condition B.1.a.	**45.** Condition B.1.a. states "[a]s detailed in Exhibit B, Condition A.1.b., investigation of the SWMU's are at different stages." However, there is no Condition A.1.***b.***, and Condition A.1. does not describe the status of the SWMUs as noted in FMC Specific Comment No. 42 and FMC General Comment No. 5. This should be revised accordingly.

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Exhibit B, Supplement to Module II – Corrective Action, pages B-7 and B-8, Conditions B.1. and B.3.	**46.** Conditions B.1. and B.3. discuss RFI and CMS requirements, respectively. Condition B.1. does not mention any public participation requirement, but Condition B.3.d. does require a public information meeting. These conditions do not provide sufficient reference and/or detail discussing public meetings and comment periods, which should be required for all RFI reports, CMS submittals, and the NYSDEC's remedy decisions or any Statement of Basis. Also, see FMC General Comment No. 6.
Exhibit B, Supplement to Module II – Corrective Action, pages B-10 through B-11, Condition B.5.d.	**47.** Conditions B.5.d.v. and vi. identify the analyte testing requirements for the WSI inflow/surface water and the WSI sediment, respectively. FMC objects to the need to test for both the WSI inflow and the WSI surface water for all of the analytes listed in Condition B.5.d.v. Currently, the WSI inflow is only tested for total arsenic and carbofuran for evaluation of the efficacy of the ICMs in place. Historical data from the WSI surface water sampling events conducted since the 1990's to date do not justify the need for testing of the inflow or the surface water for all of the listed analytes, as has been discussed with the Agencies many times. Therefore, only arsenic and carbofuran should be listed in Condition B.5.d.v. Similarly, historical sediment sampling data collected from the 1990's to date do not justify the need to test for all of the analytes listed in Condition B.5.d.vi., which has also previously been discussed with the Agencies many time. Therefore, only toxicity characteristic leaching procedure ("TCLP") arsenic should be listed in Condition B.5.d.vi.
Exhibit B, Supplement to Module II – Corrective Action, page B-12 and B-13, Condition B.5.e.	**48.** The reporting requirements identified in the Draft Permit are duplicative and onerous. Condition B.5.e.i. requires certain notifications when the remedial system is shutdown. However, the notification requirements are not consistent with those specified in the applicable plans (*i.e.*, the Groundwater Monitoring Plan ("GMP")) approved under the AOC, nor with the plans submitted with FMC's permit application. Condition B.5.e.i. should be revised to refer to the shutdown notification requirements specified in the applicable remedial system and monitoring plans. Conditions B.5.e. ii., iii., and iv. specify quarterly, annual, and five-year reporting requirements for the remedial systems. The quarterly reports defined in Conditions B.5.e. ii.'a.' require "[a] summary of all activities performed pursuant to this Permit during the previous quarter." This should be revised to specify that such update should only apply to "all activities *associated with the ICMs,*" since there are multiple quarterly reporting requirements in the Draft Permit (*i.e.*, Condition F of Schedule 1 of Module I, page S1-17; Condition E, Item E.3 on page II-10 of Module II). The references in B.5.e. ii.'b' – 'n' should likewise be revised as noted.

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Exhibit B, Supplement to Module II – Corrective Action, pages B-15 through B-19, Condition C.	**49.** The groundwater monitoring requirements in Condition C are different than those described in FMC's May 2015 draft GMP, which was included in the FMC Permit Application and incorporated by reference. Since NYSDEC has not provided any comments or rationale for the differing requirements listed in the Draft Permit from that of the incorporated FMC Draft Permit Application, FMC cannot understand or agree with any of the proposed changes. Further clarity for the proposed requirements must be provided. See FMC Specific Comment No. 2. Also, see FMC Specific Comments No. 50 – No. 53.
Exhibit B, Supplement to Module II – Corrective Action, page B-15, Condition C.1.	**50.** The Southern (upgradient) boundary well is improperly noted to be "C86." That should be revised to "C862." Notes (1) and (2) in Item e., which lists the off-site volatile organic compound monitoring wells, needs to be defined.
Exhibit B, Supplement to Module II – Corrective Action, page B-15 and B-16, Conditions C.2. and C.3.	**51.** Please advise the NYSDEC's rationale for increasing the Groundwater Indicator Parameter List ("GIPL") sampling frequency proposed in FMC's May 2015 plan for the GMP to every 2 years, and for the addition of total dithiocarbamates, chlorinated herbicides, and methyl carbamates to the GIPL. FMC is not aware of any justification for this frequency, and would revert the frequency obligation back to the GMP.
Exhibit B, Supplement to Module II – Corrective Action, page B-19, Conditions C.8. and C.9.	**52.** References to "detection" monitoring network should be removed since it is not applicable to the FMC groundwater monitoring network wells. The purpose of FMC's GMP is to monitor the effectiveness of the groundwater remedial systems on a Facility-wide basis. At this point in the groundwater remedial program, there is no need to detect impacts from specific regulated units (*i.e.*, surface impoundments) since the groundwater remedial system was designed to address site-wide groundwater contamination. Therefore, Condition C.9. should be deleted, as it appears to be only applicable to a detection monitoring program that incorporates "statistical trigger levels," which are not part of the GMP described in the Draft Permit or FMC's May 2015 draft GMP, or in the current GMP approved pursuant to the AOC.
Exhibit B, Supplement to Module II – Corrective Action, page B-19, Condition C.10.	**53.** Please define and clarify the term "SAP." This term is not utilized anywhere else in the Draft Permit. Nor has FMC submitted, as part of its application materials, any plans that would address this purported obligation.
Exhibit C, Supplement to Module V – Eastern and Western Surface	**54.** The reference to Compliance Schedule, Item 3, should be revised to Item 4.

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Impoundments, page C-1, Condition A.1.	
Exhibit C, Supplement to Module V – Eastern and Western Surface Impoundments, pages C-1 and C-2, Condition B.1.	**55.** Condition B.1. identifies inspection and soil cover maintenance activities for the ESI. These activities (including mowing and other operations and maintenance obligations applicable to the ESI) will be conducted in accordance with the North Site Cover O&M Plan incorporated in the Draft Permit by Reference 2.c. Therefore, this condition needs to be revised to reference that plan. This would be consistent with Condition B.2.a., which identifies WSI operation activities by reference to the WSI Operations Plan.
Exhibit D, Closure/Post Closure Care, pages D-1 and D-2	**56.** The footnote reference at the bottom of each page in this exhibit identifies the DER Facility Name as "Momentive Performance Materials," and the Exhibit reference to be "MPM Silicones, LLC Schedule 1 Exhibit G." This should be revised to include the proper Draft Permit references.
Exhibit D, Closure/Post Closure Care, page D-1, Conditions A.3. and A.4.	**57.** See FMC General Comment No. 10. A regulatory basis for the cost calculation procedures identified in Conditions 3.a.ii., 3.a.iii., and 4. should be directly cited, including a reference for the "most recent Department-approved discount rate" as of the date of the Draft Permit's circulation. If there is no regulatory basis to support this obligation, these requirements should be deleted, and this section should identify that the permittee must determine the costs in accordance with the applicable provisions of Part 373-2.8 (Financial requirements).
Module II – Corrective Action Requirements, page II-1, Condition B.3.	**58.** Condition B.3. incorrectly refers to "Vol. I, Section VII of the Permit Application," and to "Condition B of Schedule 1 of Module I." Please revise accordingly.
Module II – Corrective Action Requirements, page II-2, Condition B.5.a.	**59.** Condition B.5.a. requires that FMC must provide written notice to NYSDEC within 15 days of discovery that groundwater concentrations beyond the Facility boundary have exceeded an action level. Condition B.5.a should be revised to specifically require written notification when FMC-related constituents exceed action levels in the off-site sentry wells, as defined in Exhibit B, Supplement to Module II, Condition C.1. This condition should also be revised to identify if previously disclosed circumstances are subject to an ongoing notification requirement, and if so, what frequency.
Module II – Corrective Action Requirements, page II-2, Condition B.5.c.	**60.** Condition B.5.c. should be revised to note that such a deed notation or other instrument is only necessary if hazardous waste or constituents are left in place above specific and applicable regulatory levels.
Module II – Corrective Action Requirements,	**61.** Please clarify whether Condition B.6. is to apply to the off-site OUs. With respect to off-site OUs, Condition B.6.c. should not be applicable.

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pages II-3 through II-4, Condition B.6.	
Module II – Corrective Action Requirements, pages II-6 through II-9, Condition D.	**62.** See FMC General Comment No. 4. Also, see FMC Specific Comment No. 4. Strict adherence and citation to DER-10 is not appropriate and should be deleted. Condition D.2. should be deleted in its entirety. Condition D. specifies that DER-10 must be utilized in the preparation of the RCRA program components. However, DER-10 requirements are not consistent with USEPA RCRA Corrective Action guidance and requirements, nor the terms and the condition of the AOC. In fact, Condition D.1. specifically identifies that DER-10 was developed consistent with New York's State Superfund program, which utilizes different remedial goals and presumptions.
Module II – Corrective Action Requirements, pages II-8, Condition D.5.d.	**63.** Notwithstanding FMC's objections to the inclusion of Condition D., D.5.d. requires the submittal of a Site Management Plan ("SMP"). An ISMP is already referenced in the Draft Permit, making this reference unnecessary. See FMC Specific Comments No. 23 and No. 24.
Module II – Corrective Action Requirements, pages II-10 and II-118, Condition E.4.	**64.** Condition E.4. describes the proposed dispute resolution requirements and should be revised to be consistent with the AOC in order to meet the AOC's requirements. See FMC General Comment No. 3. The dispute process is clearly not consistent with the dispute resolution process described in the AOC. For instance, the AOC: 1) identifies the USEPA Air and Waste Management Division Director or equivalent as the dispute decision maker; 2) specifies that USEPA response will be within 30 days of receipt of FMC's Notice of Dispute; and, 3) states that the existence of a dispute "shall excuse, toll and/or suspend during the pendency of the dispute resolution process the compliance obligation or deadline which is demonstrate dependent on the matters in dispute." These obligations must be similar in nature to be consistent with the AOC.
Module V – Requirements for Surface Impoundments	**65.** Module V is not required, and does not apply to the Facility, as neither the WSI, nor the ESI, are being used for the storage of hazardous wastes. See FMC General Comment No. 1. As noted many times in the comments above, and in the Draft Permit itself, the WSI is being operated as an ICM for the storage of non-hazardous stormwater, and the ESI is inactive and has been backfilled with soil removed as part of off-site ICMs. Moreover, the WSI is operated under the WSI Operations Plan, which includes a contingency plan to be implemented in the event monitoring performed pursuant to the plan indicates the WSI is found to contain hazardous materials.