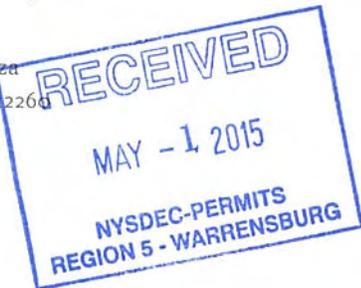


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May 1, 2015

**Via Hand Delivery**

Marc S. Migliore  
Regional Permit Administrator  
Region 5 Warrensburg Sub-Office  
232 Golf Course Road  
Warrensburg, NY 12885

***Re: Request for a Hearing – Renewal of MPM Silicones LLC (“MPM”) Part 373 Hazardous Waste Management Permit (the “Renewal Permit”)***

Dear Administrator Migliore,

Pursuant to 6 NYCRR Part 621.11(g) and 6 NYCRR Part 624, MPM requests a hearing concerning disputed substantive conditions in the Renewal Permit, dated April 2, 2015 and received by MPM on April 6, 2015. There has been no change in permitted activity, environmental conditions or applicable law and regulations justifying the change in permit conditions. It bears emphasis, that at any point in time, Mom.ente remains available to discuss these items with DEC in an effort to achieve a resolution. We also note that DEC acknowledged that the effective date of the Renewal Permit has been stayed until May 2, 2015, subject to the filing of the Request for hearing.

Very truly yours,

Scott N. Fein

Enclosure

cc.: Ben Conlon, DEC (U.S. Mail)

## REQUEST FOR HEARING

MPM requests a hearing on the following substantial terms and conditions of the Renewal Permit:

- 1) The Renewal Permit includes conditions regulating incinerators which are duplicative of regulations contained in MPM's Title V Air Permit and the HWC-MACT regulations (40 CFR Part 63, Subpart EEE). This duplication is unwarranted and inconsistent with the regulatory scheme. While DEC has revised Module VII and removed Exhibit E, the Renewal Permit still contains conditions which seek to regulate air emissions from the incinerators. EPA has clearly expressed its intent that hazardous waste combustor requirements should be consolidated into a single set of regulations and implemented through a single permit.<sup>1</sup> This is being accomplished by moving regulatory requirements for hazardous waste incinerators from RCRA permits to Title V permits. EPA's new and upgraded emission standards are being placed only in 40 CFR Part 63 and implemented through Title V permits. The result is a single permit regulatory approach which minimizes duplication and limits the time that a source might potentially be subject to overlapping and often conflicting requirements of RCRA and CAA. (See Footnote 1).

The requirements and duplication contained in the Renewal Permit are burdensome yet provide no additional environmental protectiveness. Retaining RCRA regulatory requirements in the Renewal Permit will not achieve any additional reduction in emissions from the incinerators. Significant emissions reductions were achieved through the introduction of more stringent HWC-MACT standards. Since these standards are 'maximum achievable', and since the types and quantities of waste incinerated at the facility are fairly consistent, incinerator emissions after the initial MACT reductions have remained fairly flat as expected. No reduction in emissions will be achieved through continuation of the Part 373-2.15 RCRA incinerator program. DEC's stated intent, expressed in its Responsiveness Summary and excerpted below, appears on its face to be consistent with EPA policy and regulations:

*"The DEC will regulate hazardous waste combustor(s) in accordance with the Hazardous Waste Combustors Maximum Achievable Control Technology (HWC-MACT) found at 40 CFR Part 63 Subpart EEE and incorporated by reference into the state regulations in accordance with 6 NYCRR Part 200.10. Accordingly, DEC has removed Exhibit E of Schedule 1 from the draft permit and revised Module VII of the permit to include the applicable RCRA requirements only".*

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<sup>1</sup> See NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828 (Sept. 30, 1999); See also *Wastes-Hazardous Waste-Treatment & Disposal: Frequently Asked Questions on Permitting*, ENVIRONMENTAL PROTECTION AGENCY last accessed May 1, 2015), available at <http://www.epa.gov/waste/hazard/tsd/td/combust/toolkit/permit.htm> ("We changed our approach in the NESHAP final rulemaking to avoid unnecessary regulatory duplication between the RCRA and CAA programs. We did this by placing the new emission standards only in the CAA regulations at 40 CFR part 63 subpart EEE.")

However, the Renewal Permit as drafted does not effectuate this intent. Rather, RCRA conditions remain, creating a regulatory burden that not only confers no benefit to human health or the environment, but additionally creates irreconcilable conflicts which may materially impair the facility's ability to operate.

In order to fully implement incinerator regulation pursuant to the HWC-MACT rather than RCRA, and allow the facility to continue to operate in compliance with both RCRA and the CAA, the following provisions need be omitted from the Renewal Permit:

- i) Module VII, Condition B (Waste Analysis). This condition states that waste fed to the incinerators must conform to the Waste Analysis Plan ("WAP") incorporated by reference. This is inconsistent with EPA's approach to incinerators, not necessary to protect human health and the environment and in irreconcilable conflict with Momenive's Title V permit and Feedstream Analysis Plan.

Momenive is required to have a Feedstream Analysis Plan ("FAP") pursuant to the HWC-MACT regulations and its Title V Air Permit. It is also required to have a WAP, but per EPA guidance, the WAP is no longer to include analysis of wastes fed to the incinerators for the purpose of calculating default values. The WAP, dated March 26, 2013, which is incorporated by reference in the Renewal Permit and which is also incorporated by Module I, Condition I, must be revised. Given the requirement for a FAP (which regulates all incinerator feedstreams including wastes, process vents and fuels) Momenive's WAP should no longer contain feedstream analysis or feedstream related operating requirements.<sup>2</sup> The WAP is used to identify waste and prepare waste profiles for wastes to be shipped off site, while the FAP addresses the waste before being fed to the combustor to ensure that the feedstream is adequately characterized<sup>3</sup>.

Critically, Momenive's WAP and FAP requirements are in irreconcilable conflict. Module VII, Condition B.1 bars any waste from being fed to the incinerator if it does not conform with the WAP. Pursuant to Momenive's Title V permit, it must combust certain process vents in the incinerators to meet emission control requirements. Because the WAP does not include process vents, the Renewal Permit prohibits process vents from being burned in the incinerators, materially impairing the facility's ability to operate. Conflict also exists in that if Momenive were to follow the requirements of the WAP rather than the FAP, it might be out of compliance with its Title V permit and HWC-MACT regulations. Conflict may also result if the WAP and FAP produce two separate default values which attempt to control the same feedrates.

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<sup>2</sup> See *Waste Analysis at Facilities that Generate, Treat, Store and Dispose of Hazardous Waste – Final* EPA 530-R-12-001 April 2015 ENVIRONMENTAL PROTECTION AGENCY last accessed May 1, 2015 available at <http://www.epa.gov/epawaste/hazard/tsd/permit/tsd-regs/tsdf-wap-guide-final.pdf>

<sup>3</sup> *Id.*

- ii) Schedule 1 of Module 1, Condition D.1 Development of an Electronic Waste Management Database. This provision also improperly requires waste stream sampling pursuant to the WAP. A subtle revision to the language in footnote 2 of this Condition negates the substantial revisions to Module VII and the removal of Exhibit E. Footnote two requires that the waste management database “*shall have the capability of interfacing with the incineration system computers to provide a proper feed rate associated with each waste stream to maintain compliance with other permit’s limits (e.g., maximum number of drums fed per hour, maximum weight of solids fed per hour, maximum weight per drum fed, etc.)*” (emphasis added). The Draft Permit required such interfacing to monitor “*other permit limits*” (emphasis added), limiting the requirement to those conditions that are in the RCRA permit. Footnote 2 now extends such monitoring requirements to other permits and extends WAP regulation to that governed by the FAP. As a result, the net effect is to retain incinerator requirements in the RCRA permit.

The requirement to develop an electronic waste management database is not grounded in the regulations nor is it necessary to protect human health or the environment. MPM currently conducts an extensive monitoring system data review on a semiannual basis for all CMS and CEMS information as required by the HWC-MACT. Reports summarizing this data review are submitted to, and reviewed by, the DEC Division of Air. The RKI alone utilizes forty-five CMS which record 15-second readings resulting in 64,800,000 data points in a typical year. A separate on-going review of this same data by the DEC Division of Environmental Remediation would be a duplication of MPM’s current efforts as well as that of the Division of Air.

Moreover, the feasibility of satisfying the requirement for the database to interface with the incineration system computers to provide a proper feed rate associated with each waste stream is uncertain.

- iii) Momentive objects to the inclusion of language in Module VII, Condition C.1. suggesting a trial burn will be performed. Given that incinerators will be governed by MACT standards, all testing going forward will be pursuant to a Comprehensive Performance Test. Additionally, Momentive objects to language suggesting that a risk assessment would be necessary if chlorine feed rates are increased beyond levels demonstrated during past assessments. An increase in feed rate does not necessarily result in increased stack emissions or risk. Feed rates can be increased and operation can still be well within MACT/Title V limits. The facility is currently limited to 1% of the chlorine feed rate that is allowed under the MACT program due to RCRA imposed restrictions. A risk assessment is generally only appropriate when MACT alone may not be protective of human health and the environment. See 70 FR 59504 (October 12, 2005).

- 2) "Air Emissions Standards for Equipment Leaks" added as Document #16 incorporated by reference. These air emissions standards consist of Leak Detection and Repair ("LDAR") component documents. The DEC is without authority to include these documents in the facility's RCRA permit because it is regulated under the HWC-MACT regulations. The incorporated documents are also outdated (2009) and represent an inferior technological approach to that employed by Momentive today. Substantial subsequent updates and improvements have been made to the LDAR system. Nevertheless, notwithstanding these improvements, Momentive, not of its choice, would be out of compliance upon the effective date of the Renewal Permit.
- 3) The requirements in Module IV, Exhibit D, Condition C.2 related to control of emissions from Tank 599A should be removed because they lack a rational basis and exceed regulatory authority. It should be noted that this provision was not in the Draft Permit. Emissions from Tank 599A are routed to a large scrubber designed to handle MCS process vents and tank farms, which is regulated under DEC Part 212 regulations. The air permit requires large flow rates for this scrubber except when the facility is shut down. The Renewal Permit incorporated these scrubber flow rates, but without any rational basis and made no allowance for annual facility shutdowns, despite notice from Momentive that the scrubbers do not maintain these high flow rates during the 10-to-14- day annual shutdown periods when it is necessary to reduce flow. Consequently, if this condition remains, the facility will be in violation of its RCRA permit whenever there is a plant shutdown notwithstanding the provisions in its air permit.
- 4) Momentive objects to the provisions in Exhibit C to Module III, Conditions A.3, A.4, B and C.3 because they exceed DEC's regulatory authority under 6 NYCRR § 373-2.29. See also 40 CFR § 264.1080 (b)(7). These conditions attempt to regulate certain tanks and tankwagons under § 373-2.29, even though they are exempt by virtue of their certified compliance with MACT. See 6 NYCRR § 373-2.29 (a) (2) (vii). On June 5, 2014, DEC acknowledged that 18 of 20 hazardous waste tanks and 6 of 11 tankwagon containers were exempt from § 373-2.29; yet these tanks and containers are included in Condition A.3 indicating that § 373-2.29 applies to them. In addition, Conditions B and C.3 refer to all containers listed in Condition A.3, improperly indicating that RCRA regulation will apply to all tanks and containers, even those that are exempt.
- 5) For containers (tankwagons) that are properly regulated under RCRA Part 373-2.29 (formerly Subpart CC), Momentive objects to the requirement of Method 27 testing for Level 2 compliance contained in Exhibit C to Module III, Condition C.3, as opposed to operation with no detectable emissions. Requiring Method 27 exceeds DEC's regulatory authority, is not necessary to protect human health or the environment, and creates unnecessary potential for releases. The regulations in 6 NYCRR 373-2.29(g)(4) allow Momentive to use either operation with no detectable emissions or a container that has been Method 27 tested within the last year to achieve Level 2 compliance. Based on the nature of the waste that Momentive handles, operation with no detectable emissions is more than sufficient to detect leaks, and is the means of compliance chosen by the facility as allowed by the regulations and as outlined in

documentation provided to DEC dated June 27, 2014. In addition, Momentive believes that Method 27 would actually increase the likelihood of releases and contact with hazardous substances and result in unnecessary generation of wastes.

- 6) Momentive objects to the requirement in Exhibit B, Supplement to Module II, Condition A.1.b that it submit an RFI Work Plan for Areas of Concern (“AOC”) related to the Mudderkill Creek and the unnamed tributary (Item #941-20.1, Tributary H-244). This requirement exceeds DEC’s authority and lacks rational basis. The Creek and tributary do not qualify as separate AOCs. See DER-10 – Technical Guidance for Site Investigation and Remediation (“DER-10”). There is no basis for requiring investigation of the Creek and tributary as sources of contaminants. The Mudderkill Creek and the tributary are already being monitored and remediated under the site-wide plan pursuant to the Consent Order in Civil Action No. 83-CV-77, and therefore additional investigation is not necessary to protect human health and the environment.

If DEC persists in requiring additional investigation, Momentive objects to the requirement in Exhibit B, Supplement to Module II, Condition A.1.b that requires it to submit an RFI Work Plan for Areas of Concern related to past discharges associated with the Mudderkill Creek and the unnamed tributary (Item #941-20.1, Tributary H-244). This condition is inconsistent with the requirement in the Schedule of Deliverables in Schedule 1 of Module 1, Condition D, Item #7 requiring submission of an RFA work plan, not an RFI work plan.

- 7) The Renewal Permit contains numerous “best management practices” and other requirements without the necessary regulatory basis. A list of such requirements is provided at Exhibit A. For each of these items, DEC has failed to make a showing that the requested condition is necessary to protect human health and the environment. Moreover, DEC has not specified what type of instrument or monitoring is required for a majority of the best management practices included in the permit, leaving the permittee without notice in violation of due process. To the extent DEC seeks to develop new standards or best practices as “boilerplate” in MPM’s Part 373 permit, DEC is improperly exercising its authority and circumventing the rulemaking process. DEC has not evidenced a finding that site specific circumstances warrant supplementation of the regulatory scheme.
- 8) Exhibit A of the Supplement to Module I, Condition D should be revised to reflect that the Financial Assurance may not only be increased by the DEC, but also decreased based on factors including the achievement of remedial objectives. Failure to credit closure and post-closure cost estimates when such estimates decrease is inconsistent with DEC regulations, which provide for the possibility of reduced financial assurance. See 6 NYCRR 373-2.8(d)(3)(vii); 6 NYCRR 373-2.8(f)(3)(vii). MPM made this request in its comments to the Draft Permit submitted on October 20, 2014 and the DEC’s responsiveness summary indicated that the requested changes were made. The changes, however, were not made. Rather, DEC took a contrary position and revised the condition to state: “The base amount will not be adjusted downward.” MPM takes exception to this change.

9) The Renewal Permit contains numerous items which require certification by a Professional Engineer prior to submission to DEC. MPM acknowledges that in some instances, DEC's regulations specify in what circumstance a P.E. certification is required. However, the Renewal Permit contains many new instances in which P.E. certification is required which go beyond the scope of the regulations and are without any basis (i.e., no threat to the environment). There are no new circumstances which merit such P.E. involvement. Specifically, MPM is concerned with P.E. certification requirements in the following instances:

- Footnote 2 on p. S-13, Preparation of an Engineering Design Report for Landfill 2;
- Module III, Condition K.1 on p. III-4, secondary containment assessment;
- Module X, Condition E.1 on p. X-3, independent assessment of miscellaneous units.

In other instances (set forth below), the Renewal Permit requires P.E. certification, or other "qualified environmental professionals" acceptable to the DEC under DER-10. The DEC's effort to convert the DER-10 guidance to a binding permit condition is unwarranted.

- Footnote 1 on p. S-12, all compliance schedule work plans;
- Footnote 1 on p. S-18, all work plans on list of deliverables;
- Module II, Condition D.1.i on p. II-7, all work plans prepared pursuant to Module II;
- Module II, Condition D.2.i on p. II-8, all final reports and final engineering reports prepared pursuant to Module II;
- Module II, Condition D.3.d on p. II-9, periodic review report;
- Module II, Condition D.4.c on p. II-10, resubmissions.

10) The requirement for an on-site monitor contained in Condition E of Schedule 1 of Module 1 should be removed or placed in part-time status, pending scheduled phase-out of the monitoring requirement. The on-site monitor is an artifact of a period prior to 2006 when the facility was owned and operated by a different company. MPM's compliance since acquisition of the facility would not in any circumstance warrant a full-time DEC monitor. The Renewal Permit incorporates an annual environmental monitoring work plan into the permit. Contrary to ECL 27-0917(4)(a), which establishes that a monitor's function "shall be to monitor compliance with permit conditions", the monitoring work plan impermissibly expands the role of the monitor to include oversight related to all programs. The monitor's role is further expanded by Module I, Condition C.2, requiring oral reports for non-compliance that is already legally required to be reported to 24 hour hotlines. Inclusion of this provision as an enforceable permit condition is in excess of DEC's authority.

11) Momentive objects to the Supplemental Spill Reporting condition in Exhibit A, Supplement to Module I, Conditions E.1 and 2. The Supplement Spill Reporting Requirements for MPM, incorporated by reference at Document 15, should be removed or revised on the basis that it

incorporates spills of non-hazardous materials into the RCRA permit, in excess of DEC's regulatory authority. Additionally, Condition E.2 should be omitted on the basis that requiring reporting of non-reportable quantities to the on-site environmental monitor may lead to unnecessary reporting to DEC and potential violations, unwarranted by regulation.

- 12) The requirement to perform a waste stream/waste code audit contained in item 6 of the Schedule of Deliverables has no basis in the regulations and is not necessary to protect human health or the environment.
- 13) Momentive objects to the requirement to develop a final cover program for landfill 2. DEC lacks legal authority to require a new landfill cover pursuant to RCRA on a landfill which was closed prior to the implementation of RCRA regulations in 1980. See, *Interfaith Community Organization v. Alliedsignal, Inc.*, 928 F.Supp. 1339, 1350 (D.N.J. 1996) (RCRA's permitting program is prospective and applies only to active facilities and to facilities closed after November 19, 1980); *McClellan Ecological Seepage Situation v. Cheney*, 763 F.Supp. 431 (E.D. California 1989); 53 Fed. Reg. 31,149 (August 17, 1988) ("Only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require RCRA disposal permits; 45 Fed. Reg. 33068 (May 19, 1980) ("The Agency's intent is not to regulate under subtitle C portions of facilities closed before the effective date of the regulations"; 45 Fed. Reg. 12747 (February 26, 1980) ("RCRA subtitle C regulations do not cover abandoned sites.")
- 14) Momentive objects to Schedule 1 of Module I, Condition C (Compliance Schedule), Item No. 8, which requires upgrades to secondary containment capacity at Building 78 transfer station. Momentive objects to this Item on the basis that it is unnecessary to protect human health and the environment and is unduly burdensome.
- 15) Momentive objects to Schedule 1 of Module I, Condition C (Compliance Schedule), Item No. 5, which requires that Momentive evaluate structural and/or operational improvements to the Tank 28 A & B vault containment systems, and address controls for precipitation run-on and improvement of access/capacity to perform daily inspections. Momentive objects to this Item on the basis that it is unnecessary to protect human health and the environment and is unduly burdensome.
- 16) Momentive notes that it inadvertently requested that waste code D039 be included in the permit in its October 2014 comments to the Draft Permit. This was done to maintain consistency with the permit application. MPM requests that it be removed from the Renewal Permit.

Thank you for your attention to these concerns. We welcome the opportunity to discuss these items with the Department in an amicable fashion prior to the scheduling of a hearing.

**EXHIBIT A**

MPM DRAFT PART 373 PERMIT REFERENCE	PAGE	BASIS	COMMENTS
SCHEDULE 1 of MODULE I: FACILITY-SPECIFIC CONDITIONS: C. COMPLIANCE SCHEDULE: Item No. 4. Secondary Containment Capacity – Interconnected Tanks and Containment Areas	S1-7	Regulatory Concern	There is no known regulatory requirement that valves have to be automated to provide tank isolation. Manual valve operation is sufficient to functionally isolate the tanks.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: A. AUTHORIZED STORAGE AREAS, WASTE TYPES AND STORAGE VOLUMES, 1.	C-1	Operational Requirement	Storage restriction for RKI Feed Pad does not allow for storage of wastes to be disposed/reclaimed. Additionally, both DSS areas are restricted to wastes listed in Table C-1 on page C-2. This will pose logistical challenges for managing waste streams not identified on the list. This may also impact hazardous liquid inventories on 90-day pads due to inability to move materials to permitted DSS.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: A. AUTHORIZED STORAGE AREAS, WASTE TYPES AND STORAGE VOLUMES, 2. Authorized Transfer Areas, Footnote 1	C-3	Regulatory Concern	Product containers are not regulated under the RCRA permit.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: A. AUTHORIZED STORAGE AREAS, WASTE TYPES AND STORAGE VOLUMES 3. Authorized Containers Subject to 373-2.29 Level 2 Controls or complying with 373-2.29(j)(10), Permitted Containers	C-4	Regulatory Concern	There is no regulatory requirement for regulating individual containers (e.g. tank wagons) used on-site.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: A. AUTHORIZED STORAGE AREAS, WASTE TYPES AND STORAGE VOLUMES: 3. Authorized Containers Subject to 373-2.29 Level 2 Controls or complying with 373-2.29(j)(10), Permitted Containers, Footnote 1	C-5	Regulatory Concern	There is no regulatory requirement for limiting how much a container may be filled. Assigning a 90% limit is entirely arbitrary. Facility tankwagons are not equipped with gauges that would indicate fill level.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: B. SPECIAL CONDITIONS FOR CONTAINERS (GENERAL), 3.a.	C-6	Regulatory Concern	There is no regulatory requirement to maintain concrete sealants in container storage areas. Sometimes sealants are used in lieu of re-pouring a concrete slab. The facility will take appropriate measures to prevent migration of materials to the environment.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: B. SPECIAL CONDITIONS FOR CONTAINERS (GENERAL), 4.	C-6	Regulatory Concern	There is no regulatory requirement defining where waste containers may be opened.

**EXHIBIT A**

MPM DRAFT PART 373 PERMIT REFERENCE	PAGE	BASIS	COMMENTS
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: B. SPECIAL CONDITIONS FOR CONTAINERS (GENERAL), 6.	C-7	Regulatory Concern	USDOT packaging specifications not required if container is not in commerce.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: C. SPECIAL CONDITIONS FOR CONTAINERS (SPECIFIC), 1.b.	C-7	Operational Requirement	If a container is <90 days of age, operational flexibility would allow the drum to be returned to the 90-day area.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: C. SPECIAL CONDITIONS FOR CONTAINERS (SPECIFIC), 2.b.	C-7	Operational Requirement	If a container is <90 days of age, operational flexibility would allow the drum to be returned to the 90-day area.
EXHIBIT C: SUPPLEMENT TO MODULE III - USE AND MANAGEMENT OF CONTAINERS: C. SPECIAL CONDITIONS FOR CONTAINERS (SPECIFIC), 2.c.	C-7	Clarification	There is no requirement that containers must be opened and visually inspected to verify the amount of material in the drum and its visible physical characteristics.
MODULE IV - TANK SYSTEMS: E. INSPECTIONS AND REPAIR/REMEDIAL ACTION, Nos. 8.a and 8.c	IV-3, IV-4	Regulatory Concern	There is no repair schedule requirements identified in the regulations.