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Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program

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PERFORMANCE TRACK'S POSTMORTEM: LESSONS FROM THE RISE AND FALL OF EPA'S "FLAGSHIP" VOLUNTARY PROGRAM†

Cary Coglianese and Jennifer Nash***

For nearly a decade, the United States Environmental Protection Agency ("EPA") considered its National Environmental Performance Track to be its "flagship" voluntary program — even a model for transforming the conventional system of environmental regulation. Since Performance Track's founding during the Clinton Administration, EPA officials repeatedly claimed that the program's rewards attracted hundreds of the nation's "top" environmental performers and induced these businesses to make significant environmental gains beyond legal requirements. Although EPA eventually disbanded Performance Track early in the Obama Administration, the program has been subsequently emulated by a variety of state and federal regulatory authorities. To discern lessons useful for similar voluntary programs, we report here the findings from a multi-pronged, multi-year research effort assessing business participation in Performance Track. We find no evidence to support the sweeping assertions EPA made about the program's achievements. Facilities participating in Performance Track simply could not be shown to be top performers. Rather, what most distinguished these participants was a factor distinct from environmental quality, namely their propensity to engage in outreach with government and community groups. Furthermore, drawing on an extensive analysis of business participation in Performance Track and other EPA voluntary programs, we show how Performance Track faced inherent limitations in its ability to induce any dramatic environmental gains, making its model more of a poor substitute for the conventional regulatory system than a plausible means for the system's transformation.

†EPA's Office of Policy, Economics, and Innovation partly supported the research underlying this Article through a cooperative agreement (Grant No. R-83056701). Support was also provided by Harvard University's John F. Kennedy School of Government and the University of Pennsylvania Law School. For research assistance, we thank James Gignac and Gopal Raman, as well as a team from Booz Allen Hamilton consisting of Elizabeth Kyle, Dana Minerva, Sarah Scudder, and Donald Trees. We appreciate the cooperation of Allison Barasz, Laurie Finne, Angela Helman, and Eric Ruder from Industrial Economics, Inc., and Lisa Grogan-McCulloch of EPA in responding to numerous requests for information. Lori Snyder Benneer, Stephen Quinlan, and Gopal Raman offered much helpful input at early stages, and Silvana Burgese, Anna Gavin, Nisha Patel, Tim von Dulm, and Damien Leri assisted in the later stages. Jordi Sabaté formatted our figures, and Matthew McCabe and the team of editors at the *Harvard Environmental Law Review* gave the entire manuscript a careful and much-appreciated review. We owe special thanks to Jonathan Borck, Jennifer Howard-Grenville, and Fei Yu, collaborators and co-authors on some of the research discussed in this article. Their collaborations formed the basis of a much larger report to EPA upon which portions of this article draw, available at <http://perma.cc/L8EP-754M>. We received many helpful comments on the earlier report, contributions acknowledged in the report and gratefully reaffirmed here. We also express gratitude for an additional round of helpful comments and conversations from James Conrad, E. Donald Elliott, Ira Feldman, Dan Fiorino, John Foster, David Guest, Angela Helman, Richard Kashmanian, Chuck Kent, Ira Leighton, Orly Lobel, Eric Ruder, John Walke, and Richard Wells, as well as participants in workshops at the Georgetown University Law Center, the University of Akron Law School, the University of Michigan Stephen M. Ross School of Business, the University of Minnesota Law School, the University of Pennsylvania's Initiative for Global Environmental Leadership, the University of Pennsylvania Law School, and the University of San Diego School of Law. Of course, we alone bear responsibility for our findings and interpretations.

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INTRODUCTION

Following environmental law's dramatic launch in the 1970s, the adoption of new environmental legislation has ground to a virtual standstill for decades — a logjam predating, but most recently exemplified by, the failure to pass climate change legislation during President Obama's first term.¹ In the absence of significant statutory change, much environmental policy innovation at the federal level has occurred through administrative action by EPA. Of the various innovations initiated by EPA over the last twenty years, the development of voluntary environmental programs has been among the most distinctive.²

By the mid-2000s, EPA had created more than sixty different voluntary programs.³ These programs range from well-known efforts such as Energy Star, which offers special product labels to manufacturers of consumer products that meet voluntary energy efficiency standards, to more obscure initiatives such as Burn Wise, which provides consumers with financial incentives to replace older, more polluting wood-burning stoves.⁴ EPA's voluntary programs vary in

¹ See Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 97–98 (2001) (“From the signing of NEPA in 1970 to the adoption of the Superfund law in 1980, the 1970s saw the enactment of what became, and still remains, virtually the entire environmental regulatory system in the United States.”); see generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004); ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY (Norman J. Vig & Michael E. Kraft eds., 6th ed. 2006); DAVID SHOENBROD ET AL., *BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK* (2010). For a discussion of the “watershed” failure to pass a cap-and-trade bill in 2009–2010, see THEDA SKOCPOL, *NAMING THE PROBLEM: WHAT WILL IT TAKE TO COUNTER EXTREMISM AND ENGAGE AMERICANS IN THE FIGHT AGAINST GLOBAL WARMING* (2013), available at <http://perma.cc/A68Q-NP8D>.

² For a review of recent voluntary efforts in the United States as part of a next generation of environmental policy, see generally Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001). The development of voluntary programs has emerged as a global environmental innovation as well. See generally REALITY CHECK: THE NATURE AND PERFORMANCE OF VOLUNTARY ENVIRONMENTAL PROGRAMS IN THE UNITED STATES, EUROPE, AND JAPAN (Richard D. Morgenstern & William A. Pizer eds., 2007); DANIEL J. FIORINO, *THE NEW ENVIRONMENTAL REGULATION* (2006); INDUSTRIAL TRANSFORMATION: ENVIRONMENTAL POLICY INNOVATION IN THE UNITED STATES AND EUROPE (Theo de Bruijn & Vicki Norberg-Bohm eds., 2005); VOLUNTARY APPROACHES IN CLIMATE POLICY (Andrea Baranzini & Philippe Thalmann eds., 2004).

³ Cary Coglianese & Jennifer Nash, *Government Clubs: Theory and Evidence from Voluntary Environmental Programs*, in VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 304 n.10 (Matthew Potoski & Aseem Prakash eds., 2009) (noting that EPA listed sixty-two voluntary programs on its website in October 2005). Today, EPA claims to run somewhat fewer voluntary programs, but the actual number of such programs at EPA is surprisingly difficult to determine with accuracy. EPA's Inspector General has criticized the agency for failing to define voluntary programs consistently. EPA OFFICE OF INSPECTOR GEN., VOLUNTARY PROGRAMS COULD BENEFIT FROM INTERNAL POLICY CONTROLS AND A SYSTEMATIC MANAGEMENT APPROACH: AT A GLANCE (2007), available at <http://perma.cc/QD6E-XNSV> (“Depending on the source, the number of EPA voluntary programs varies between 54 and 133.”). In response to this criticism, EPA tried to clarify its definition of voluntary programs, and for a time it assigned a staff member within the Office of Policy, Economics, and Innovation (now Office of Policy) to maintain a list of programs that fit its definition. However, the agency has since assigned that staff member to other responsibilities, and the agency's list of voluntary programs is no longer maintained.

⁴ EPA has also initiated new programs and modified existing ones without always changing its online list. *Partnership Programs List*, EPA.GOV, <http://perma.law.harvard.edu/0pMzeeTEQyq>.

their details but share a common approach that seeks to encourage individuals, businesses, and other organizations to take environmentally beneficial actions not otherwise required by law.⁵

Lacking new environmental legislation, EPA officials through the years have come to view voluntary programs as a promising way to deliver improved environmental outcomes for society without the investment of government resources needed to engage in rulemaking and enforcement.⁶ Moreover, since participation in these programs is by definition voluntary, businesses only incur additional costs when they perceive countervailing private benefits, thus largely avoiding the common complaint about the undue costs of traditional regulation.⁷ For these reasons, voluntary programs have garnered considerable support from a variety of scholars and public officials who have advocated their prominent role in the U.S. environmental protection system.⁸

Among its many voluntary programs, EPA long viewed its National Environmental Performance Track program as its “flagship” initiative.⁹ Established

For information on the examples we mention in the text, see *About Energy Star*, ENERGYSTAR.GOV, <http://perma.law.harvard.edu/05NBZwBjbqo>, and *Burn Wise*, EPA.GOV, <http://perma.law.harvard.edu/0sUuVbUWS8t>. In 2006, about 2% of the agency’s workforce was dedicated to administering all the agency’s voluntary programs, at an annual cost to the government of about \$350 million. EPA OFFICE OF INSPECTOR GEN., PARTNERSHIP PROGRAMS MAY EXPAND EPA’S INFLUENCE 5 (2006), available at <http://permcc/JS9V-H5JK> (“Partnership program managers said their annual budgets total an estimated \$352 million . . . [and] reported that a total of 365 FTEs run these programs.”). The EPA budget for fiscal year 2008 states that the agency employs a workforce of 17,324 “full-time equivalent” (“FTE”) employees. See EPA, FY 2008: BUDGET IN BRIEF iii (2007), available at <http://perma.cc/TJY5-SMJS>.

⁵ EPA OFFICE OF INSPECTOR GEN., VOLUNTARY PROGRAMS COULD BENEFIT FROM INTERNAL POLICY CONTROLS AND A SYSTEMATIC MANAGEMENT APPROACH 4 (2007), available at <http://perma.cc/C7KA-VHRF> (noting voluntary programs are “designed to motivate people and organizations to take actions, not required by regulation, that benefit the environment”).

⁶ These programs have also enabled a regulatory agency often criticized for regulatory unreasonableness to claim credit for taking more cost-effective action. The EPA’s Inspector General has also observed that voluntary programs “expand EPA’s environmental influence” by “broadening EPA’s potential participant base and addressing environmental problems not governed by regulations.” PARTNERSHIP PROGRAMS MAY EXPAND EPA’S INFLUENCE, *supra* note 4.

⁷ See EPA OFFICE OF POL’Y, ECON., & INNOVATION, THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES FOR PROTECTING THE ENVIRONMENT 174 (2001) [hereinafter ECONOMIC INCENTIVES], available at <http://perma.cc/TM8G-TWHS> (noting that voluntary programs “give companies the flexibility to improve their environmental performance at less cost”).

⁸ See, e.g., FIORINO, *supra* note 2; Stewart, *supra* note 2; E. Donald Elliott, *Toward Ecological Law and Policy*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 174 (Marian R. Chertow & Daniel C. Esty eds., 1997); Madhu Khanna, *Non-Mandatory Approaches to Environmental Protection*, 15 J. ECON. SURVEYS 291 (2001); Andrew Jordan, Rüdiger K.W. Wurzel & Anthony R. Zito, “New” Instruments of Environmental Governance: Patterns and Pathways of Change, in “New” INSTRUMENTS OF ENVIRONMENTAL GOVERNANCE? NATIONAL EXPERIENCES AND PROSPECTS 3 (Andrew Jordan, Rüdiger K.W. Wurzel & Anthony R. Zito eds., 2003); Thomas P. Lyon, *Environmental Governance: An Economic Perspective*, in GOVERNANCE FOR THE ENVIRONMENT: NEW PERSPECTIVES 56 (Magali A. Delmas & Oran R. Young eds., 2009).

⁹ See EPA OFFICE OF POL’Y, ECON., & INNOVATION, FY2006 NATIONAL PROGRAM GUIDANCE: NATIONAL ENVIRONMENTAL PERFORMANCE TRACK PROGRAM 1–2 [hereinafter FY2006 NATIONAL PROGRAM GUIDANCE] (on file with the Harvard Law School Library) (“Launched in 2000, Performance Track . . . is the Agency’s *flagship* innovation program for recognizing facilities that consistently exceed regulatory requirements, address unregulated environmental issues, and produce measurable environmental results.”) (emphasis added). Five years later, the “Performance Track program [was] occupying center stage in regulatory reinvention.” Nicholas A. Ashford &

in 2000, Performance Track attracted throughout its existence some 783 facilities to participate as “members” — those facilities that applied to and were accepted by EPA as meeting Performance Track’s standards.¹⁰ Through Performance Track, EPA sought to recognize and reward environmentally responsible businesses in various ways.¹¹ EPA publicly lauded Performance Track members,¹² designated members as low priority for routine inspections and encouraged states to do the same,¹³ and reduced certain regulatory and administrative requirements for Performance Track members.¹⁴ In exchange for these benefits, members needed to stay in substantial compliance with regulatory requirements and make progress toward self-created environmental improvement goals that exceeded the requirements of existing regulation.¹⁵

Charles C. Caldart, *Government Regulation*, in OCCUPATIONAL AND ENVIRONMENTAL HEALTH 39, 70 (Barry S. Levy & David H. Wegman eds., 2005).

¹⁰ Indus. Econ., Inc., PTrack Member Data (Mar. 22, 2011) (obtained from Angela Helman, Industrial Economics, Inc.) (on file with the Harvard Law School Library). Industrial Economics is a third-party independent consulting firm that was retained by EPA to support the implementation and monitoring of the Performance Track Program. See Jennifer Nash & Cary Coglianese, *EPA’s Performance Track: Origins, Objectives, and Operating Practices*, in BEYOND COMPLIANCE: BUSINESS DECISION MAKING AND THE EPA’S PERFORMANCE TRACK PROGRAM 25 (Cary Coglianese & Jennifer Nash eds., 2006) [hereinafter BEYOND COMPLIANCE], available at <http://perma.cc/LSQ3-E7VE>. When the program ended in March 2009, it had 547 members. Five organizations accounted for 142 of its members: 3M (twenty facilities), Covanta Energy (twenty-one facilities), Forever Resorts (twenty-eight facilities), Johnson & Johnson (thirty-six facilities), and the U.S. Postal Service (thirty-seven facilities). PTrack Member Data, *supra*. Performance Track facilities organized a separate Performance Track Participants Association (“PTPA”) that held an annual conference with EPA and sought other ways to support EPA’s program. See Performance Track Participants Ass’n, *Membership* (on file with the Harvard Law School Library). The PTPA was modeled after the Voluntary Protection Programs Participants’ Association (“VPPPA”), an organization of facilities that are members of an Occupational Safety and Health Administration (“OSHA”) initiative similar to Performance Track. See *infra* notes 68–73 and accompanying text.

¹¹ See *National Environmental Performance Track: History*, EPA.GOV, <http://perma.law.harvard.edu/0MTfTeb3CJB> (stating that EPA sought to encourage participation by offering “exclusive regulatory and administrative benefits, . . . public recognition, networking opportunities, and other benefits” to Performance Track members); see also EPA INNOVATIONS TASK FORCE, AIMING FOR EXCELLENCE: ACTIONS TO ENCOURAGE STEWARDSHIP AND ACCELERATE ENVIRONMENTAL PROGRESS 9 (1999) [hereinafter AIMING FOR EXCELLENCE], available at <http://perma.cc/Q6A6-H4VH> (stating that EPA had “waived or reduced penalties for companies that voluntarily audit[ed], disclose[d], and correct[ed] environmental violations” and that took preventative action).

¹² See *National Environmental Performance Track: Recognition*, EPA.GOV, <http://perma.cc/QQ2S-DLTH> (“Performance Track recognize[d] member facilities locally and nationally through a membership certificate, listing on [its] website, and inclusion in trade journal feature articles.”); see also *Performance Track: History*, *supra* note 11.

¹³ *National Environmental Performance Track: Low Priority for Routine Inspections*, EPA.GOV, <http://perma.cc/5UEY-EGE9>.

¹⁴ See EPA, PERFORMANCE TRACK REGULATORY AND ADMINISTRATIVE BENEFITS FACT SHEET 1–2 (2009) (on file with the Harvard Law School Library) (noting that some of the benefits available were “reduced reporting frequency for minor air sources, flexible air permits, an expedited NPDES permit renewal process, more favorable terms for Clean Water State Revolving Fund loans, . . . reduced self-inspections for certain hazardous waste facilities, [and] an extended accumulation time for large quantity generators of hazardous waste”).

¹⁵ See Memorandum from Steven A. Herman, Assistant Adm’r, EPA Office of Enforcement & Compliance Assurance and Richard T. Farrell, Assoc. Adm’r, EPA Office of Pol’y, Econ. & Innovation to EPA Adm’rs and Reg’l Counsels (Jan. 19, 2001) (on file with the Harvard Law School Library) (noting that in order to receive the program benefits, “[p]articipants [had to] satisfy specific performance criteria designed to ensure that they exceed regulatory requirements”); *Na-*

Performance Track has been one of EPA's best efforts at voluntary environmental protection.¹⁶ After its high-profile launch by then-EPA Administrator Carol Browner of the Clinton Administration, Performance Track continued to be treated as a cornerstone program within the Bush Administration's EPA. The program won consistent internal support from Browner's three immediate successors.¹⁷ Former EPA Administrator Stephen Johnson — appointed by President Bush — declared that Performance Track succeeded in “delivering impressive environmental results” and had “proven to be an important catalyst for helping EPA change the way businesses look at their role in environmental protection.”¹⁸ In terms of membership, the program ranked among EPA's largest facility-based voluntary programs,¹⁹ and observers viewed its entry criteria and programmatic requirements as ambitious.²⁰ According to EPA, Performance Track members realized substantial environmental benefits in terms of energy and water conservation, habitat preservation, use of recycled materials, and reductions in greenhouse gas emissions and other pollutants.²¹

tional Environmental Performance Track: Criteria, EPA.GOV, <http://perma.cc/W95G-F73Q> (further explaining that Performance Track members also needed to demonstrate “continuous improvement” by commit[ing] to four quantitative goals . . . for improving their environmental performance”).

¹⁶ See *Three EPA Programs Nominated for Government “Oscars,”* EPA.GOV, <http://perma.law.harvard.edu/0QvxM5zZwN4> (indicating that Performance Track was recognized as a semi-finalist for its “uniqueness, effectiveness, significance and potential for replication” in a 2006 awards program administered by the John F. Kennedy School of Government at Harvard University). Although both of the authors of this Article were affiliated with the Harvard Kennedy School at the time of this award, neither was involved in any way in the process of screening or reviewing Performance Track's application to this award program.

¹⁷ See Memorandum from EPA Adm'r to Assistant Adm'rs, Gen. Counsel, Inspector Gen., Chief Fin. Officer, Associate Adm'r, Reg'l Adm'rs, Deputy Assistant Adm'rs, Deputy Reg'l Adm'rs, & Staff Office Dirs. (Jan. 26, 2007) (on file with the Harvard Law School Library); FIORINO, *supra* note 2, at 149.

¹⁸ Stephen Johnson, Adm'r, EPA, Remarks at the National Environmental Performance Track Awards Dinner (May 9, 2006), available at <http://perma.law.harvard.edu/0o43TU6KYRM>. Other high-level EPA leaders praised Performance Track as well. For example, Rick Otis, former Deputy Associate Administrator for Policy, Economics, and Innovation, stated in an interview that Performance Track takes a more “holistic” look at regulating the environment: “[The program is] [c]omprehensive . . . [and] take[s] advantage of creating peer groups, creating a world in which somebody is doing it for, in a sense, their own interest.” *Green Scene: The Performance Track Program*, EPA (Feb. 5, 2008) (on file with the Harvard Law School Library). Former EPA Deputy Administrator Marcus Peacock noted that Performance Track was “getting results” because it “tap[s] into the natural desire many companies have to protect Mother Nature. . . . [and] encourages businesses to be good environmental stewards by recognizing facilities that go beyond minimum legal requirements.” Marcus Peacock, Deputy Adm'r, EPA, *On the Right Track*, FLOW OF THE RIVER (Dec. 18, 2007), <http://perma.law.harvard.edu/0BroES4PbyB>.

¹⁹ See Coglianese & Nash, *supra* note 3, at 255 (reporting that the average number of members in EPA voluntary partnership programs is 157).

²⁰ See, e.g., FIORINO, *supra* note 2, at 145–46, 148; ASEEM PRAKASH & MATTHEW POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY REGULATIONS 56, 63–64 (2006). Prakash and Potoski offer a typology of voluntary programs based on the stringency of entry criteria and requirements for ongoing membership, and they characterize Performance Track as a program of the most stringent type. *Id.*

²¹ EPA, PERFORMANCE TRACK FINAL PROGRESS REPORT 1–2 (2009) [hereinafter PERFORMANCE TRACK FINAL PROGRESS REPORT].

To administer Performance Track, EPA dedicated substantial resources in terms of agency staff and funding. EPA's Office of Policy, Economics, and Innovation administered Performance Track through an office run by a director and about eighteen headquarters staff members.²² In addition, each of EPA's ten regional offices designated a Performance Track coordinator who assisted with recruiting members, reviewing applications, delivering incentives, and developing memoranda of agreement with states, among other activities.²³ Nearly all states designated environmental agency staff members as state Performance Track representatives, who helped promote the program at a local level and coordinated Performance Track with related state activities.²⁴ If imitation is the sincerest form of flattery, then Performance Track's model status as a voluntary program was demonstrated by the existence of separate but very similar programs in over twenty states.²⁵

Yet, as much acclaim as Performance Track won both inside and outside government circles, it also generated its share of controversy and criticism.²⁶ Environmental groups criticized the program and opposed its expansion.²⁷ Members of Congress questioned whether Performance Track deserved continued or increased appropriations.²⁸ Even the EPA's own Inspector General inves-

²² EPA, PERFORMANCE TRACK OPERATIONS HANDBOOK 1-2-1-3 (2005) (on file with the Harvard Law School Library) [hereinafter OPERATIONS HANDBOOK].

²³ *Id.* at 1-3-1-4; see also RAND CORP., AN ASSESSMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S NATIONAL ENVIRONMENTAL PERFORMANCE TRACK PROGRAM 25 (2010) (noting that EPA regional offices dedicated fifteen "full-time equivalent" staff to the program from FY 2005 to FY 2009) [hereinafter RAND CORP. ASSESSMENT].

²⁴ OPERATIONS HANDBOOK, *supra* note 22, at 1-5.

²⁵ See Jonathan C. Borck, Cary Coglianese & Jennifer Nash, *Environmental Leadership Programs: Toward an Empirical Assessment of Their Performance*, 35 *ECOLOGY L.Q.* 771, 776 (2008) (listing more than twenty states with voluntary environmental programs similar to Performance Track). Of course, a few of these state programs were started before EPA's Performance Track and actually served as models for the federal program. FIORINO, *supra* note 2, at 172.

²⁶ Performance Track even became the subject of nightly network news like NBC, which aired a report in 2008 chronicling criticisms that EPA had used the program to reward undeserving facilities. *Feds Giving Suspect 'Green' Rewards* (NBC television broadcast Apr. 20, 2008).

²⁷ In 2005, an attorney with the Natural Resources Defense Council ("NRDC") submitted a fourteen-page letter to EPA urging the agency to pull back from its stated aspirations to make Performance Track a "core element of [its] public health and environmental protection systems." Letter from John Walke, Clean Air Dir., NRDC, to EPA, Office of Adm'r Docket 3-4 (Nov. 3, 2005) (on file with the Harvard Law School Library) (characterizing Performance Track as "a poker tournament," which trades away regulatory enforcement and public health protection in an "illegitimate" gamble to improve the environment). In early 2006, some thirty-one environmental organizations wrote to EPA Administrator Stephen Johnson in support of NRDC's criticisms of the program. Letter from Eric Schaeffer, President, Env'tl. Integrity Project, et al., to Stephen Johnson, Adm'r, EPA (Jan. 25, 2006) (on file with the Harvard Law School Library) (expressing concern that Performance Track "may eventually be dismissed as little more than a public relations front for some of the country's biggest polluters").

²⁸ See, e.g., Debra Kahn, *EPA: Two House Dems Question Performance Track Spending*, Results, E&E NEWS PM, Apr. 17, 2007 (on file with the Harvard Law School Library) (noting requests from Representatives Albert Wynn (D-Md.) and Bart Stupak (D-Mich.) to EPA regarding Performance Track expenditure reports); Anthony Lacey, *EPA Performance Track Spending Renews Criticism of Ad Campaign*, INSIDE EPA WKLY. REP., Oct. 19, 2007 (naming specific projects that funds could have supported); Anthony Lacey, *Democrats May Ignore Bush's Request for Steep Cuts to EPA FY09 Budget*, INSIDE EPA WKLY. REP., Feb. 8, 2008 (noting Democrats' likely opposition to proposed increased funding for Performance Track); see also Letter from Hon. Albert R.

tigated Performance Track and concluded that the agency had failed to demonstrate achievement of the program's goals.²⁹

EPA's leadership initially disputed these criticisms and continued to back the program,³⁰ but once President Obama's first EPA Administrator, Lisa Jackson, took office in January 2009, she quickly took steps to dismantle the program.³¹ Although the program's swift demise came as a shock to Performance Track's supporters, the agency's abrupt about-face really should have come as little surprise to anyone who closely followed the program. On December 9, 2008, just six days before then President-elect Obama announced he would nominate Jackson to serve as EPA Administrator, the *Philadelphia Inquirer* quoted Jackson in a front-page investigative story about Performance Track as characterizing the program as "just one of those window-dressing programs that has little value."³² On May 14, 2009, EPA published a *Federal Register* notice officially terminating Performance Track.³³

Although Performance Track is now dead, similar voluntary programs continue to attract attention and consume resources at both the state and federal levels of government. At least fifteen states still maintain environmental leadership programs nearly identical to Performance Track.³⁴ EPA itself still operates

Wynn, Chair, House Subcomm. on Env't and Hazardous Materials and Hon. Bart Stupak, Chair, House Subcomm. on Oversight and Investigations, to Hon. Stephen L. Johnson, Adm'r, EPA, at 2 (Apr. 13, 2007) (on file with the Harvard Law School Library) (noting that legislators "are concerned about taxpayer dollars being wisely used at a time when EPA's core environmental and public health programs, ones that are specifically authorized by Congress, are severely underfunded").

²⁹ In 2007, EPA's Office of Inspector General examined Performance Track's goals, activities, and performance measures and concluded that the program failed to offer "a new model for achieving environmental protection goals." EPA OFFICE OF INSPECTOR GEN., REP. NO. 2007-P-00013, PERFORMANCE TRACK COULD IMPROVE PROGRAM DESIGN AND MANAGEMENT TO ENSURE VALUE 4, 15 (2007) [hereinafter P-TRACK TO IMPROVE DESIGN & MANAGEMENT], available at <http://perma.cc/85K-YZNM>. The Inspector General also concluded that "EPA cannot show how its program can lead to the desired outcomes" it sought to achieve. *Id.* at 13.

³⁰ In response to a draft of the Inspector General's report, EPA took issue with some of the report's methods and data sources. Memorandum from Brian Mannix, Assoc. Adm'r, EPA, to Jeffrey Harris, Dir. Program Evaluation, Cross-Media Issues (2007), reprinted in P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 29. Mannix stated that the agency was "proud that after five years of securing environmental results, we can undergo this level of scrutiny and confirm what we knew to be true — Performance Track members lead their peers in environmental performance." *Id.*

³¹ Memorandum from Lisa P. Jackson, Adm'r, EPA, to Performance Track Members, Corporate Leaders, and State Env'tl. Comm'rs at 1 (Mar. 16, 2009) (on file with the Harvard Law School Library); Letter from Charles W. Kent, Dir., EPA Office of Cross-Media Programs, to Performance Track Members et al. at 1 (Mar. 25, 2009) (on file with the Harvard Law School Library).

³² John Sullivan & John Shiffman, *Green Club an EPA Charade*, PHILA. INQUIRER (Dec. 9, 2008), <http://perma.law.harvard.edu/Orcu3YPomYv>. One of the authors of this Article (Cary Coglianese) was also quoted in the same story as indicating that EPA had thus far been unable to demonstrate that Performance Track had caused any substantial difference in the environmental performance of member facilities.

³³ 74 Fed. Reg. 22,741, 22,741-42 (May 14, 2009).

³⁴ As of this writing, the active state programs similar to Performance Track include: Arizona Environmental Performance Track, <http://perma.cc/ML8M-4WGD>; Colorado Environmental Leadership Program, <http://perma.cc/QZQ2-NUZZ>; Indiana Environmental Stewardship Program, <http://perma.cc/5JJR-2W76>; Kentucky Excellence In Environmental Leadership ("KY EXCEL"), <http://perma.cc/XV2S-VQ57>; Louisiana Environmental Leadership Program, <http://perma.cc/>

dozens of other voluntary programs — just one of these, Energy Star, costs the agency about \$50 million annually.³⁵ EPA recently initiated a new voluntary program to recognize the “climate leadership” of those companies that are working to reduce their greenhouse gas emissions.³⁶ In addition, after Performance Track’s demise, the U.S. Department of Energy established a program, Save Energy Now LEADER, designed along very similar lines to Performance Track.³⁷ The Occupational Safety and Health Administration (“OSHA”) continues to operate its Voluntary Protection Programs (“VPP”), upon which EPA modeled Performance Track.³⁸ In addition, former Performance Track members and representatives of state environmental agencies with Performance Track-like programs recently formed the non-governmental Stewardship Action Council to continue some of the activities of the now-defunct EPA program.³⁹ The U.S. Council for Energy-Efficient Manufacturing, a public-private partnership that includes representation from the Department of Commerce, Department of Energy, and EPA, has launched a certification program called Superior Energy Performance that offers benefits to companies that operate energy management systems.⁴⁰

NAM-3YM4; Michigan Clean Corporate Citizen Program, <http://perma.cc/5SFH-ATPF>; New Mexico Green Zia Environmental Excellence Program, <http://perma.cc/XB57-8HN6>; North Carolina Environmental Stewardship Initiative, <http://perma.cc/8ENS-KZRE>; South Carolina Environmental Excellence Program, <http://perma.cc/8RBE-W292>; Tennessee Green Star Partnership, <http://perma.cc/867A-SCZ8>; Clean Texas, <http://perma.cc/C3G5-BDGE>; Clean Utah, <http://perma.cc/45CX-Q3ZH>; Virginia Environmental Excellence Program, <http://perma.cc/9S24-NC24>; Vermont Business Environmental Partnership, <http://perma.cc/WV8B-T85F>; Wisconsin Green Tier, <http://perma.cc/793C-LC8H>. See also U.S. ARMY ENVTL. COMMAND, INCENTIVE PROGRAMS FOR IMPLEMENTING ENVIRONMENTAL MANAGEMENT SYSTEMS 9, 11, 16, 21–23, 28, 32, 36–40, 43 (2010) (on file with the Harvard Law School Library).

³⁵ Sonja Ryst, *U.S. Agencies Try to Restore Faith in Energy Star Appliance Testing*, WASH. POST (Jul. 10, 2010), <http://perma.law.harvard.edu/0zmKhrHt3sH>; *List of Programs*, EPA.GOV, <http://perma.law.harvard.edu/0Yv3RtG7hzV> (listing some of EPA’s voluntary programs).

³⁶ See *Center for Corporate Climate Leadership*, EPA.GOV, <http://perma.law.harvard.edu/09sEBkGvRH3> (announcing Corporate Climate Leadership pilot program to continue through 2013).

³⁷ See U.S. DEP’T OF ENERGY, SAVE ENERGY NOW: FREQUENTLY ASKED QUESTIONS (2011), available at <http://perma.cc/9V5Z-WKNC>. In addition, the Better Buildings, Better Plants program, run by the Department of Energy’s Advanced Manufacturing Office, recognizes companies that pledge to reduce their energy intensity; the Superior Environmental Performance program certifies facilities that adopt energy management systems based on the ISO 50001 system standard. See *Better Plants*, U.S. DEP’T OF ENERGY, <http://perma.law.harvard.edu/0nbyAWCXITV>; see also *ISO 50001 Energy Management Standard*, U.S. DEP’T OF ENERGY, <http://perma.law.harvard.edu/0Wd1rF22ySH>.

³⁸ *Current Federal and State-Plan Sites as of 10/31/2013*, OSHA.GOV, <http://perma.law.harvard.edu/0c7brLwbwU/> (showing that eighty-three facilities joined VPP from January–October 2013, bringing total membership in federal and state VPPs to 2,339 facilities).

³⁹ The Stewardship Action Council currently has more than one hundred members. Three founding members are companies that had a large number of facilities join Performance Track: Covanta, Forever Resorts, and Johnson & Johnson. Council members set environmental performance goals and share best practices. See *Creating a Sustainable World*, STEWARDSHIP ACTION COUNCIL, <http://perma.law.harvard.edu/0mad4ShN8yb/>.

⁴⁰ See 2012, U.S. COUNCIL FOR ENERGY-EFFICIENT MFG., <http://perma.law.harvard.edu/0bF2K5TY5Px/>; see also U.S. COUNCIL FOR ENERGY-EFFICIENT MFG., SUPERIOR ENERGY PERFORMANCE: A ROADMAP FOR ACHIEVING CONTINUAL IMPROVEMENTS IN ENERGY PERFORMANCE (2012) (on file with the Harvard Law School Library).

It is hardly surprising that interest in voluntary programs like Performance Track continues unabated. With only remote prospects for statutory and regulatory solutions to environmental concerns about global warming and exposure to toxic substances, among other things, voluntary approaches are one of the few means through which government is currently able to respond. Continued interest in such an alternative path to environmental protection only makes it all the more important to undertake serious research to discern lessons that can be learned from EPA's flagship voluntary program. Admittedly, in its heyday, Performance Track generated considerable attention — both laudatory and critical — from political and business leaders as well as legal practitioners and environmental activists. Yet thus far, the program has managed to escape significant attention from the research community. Earlier voluntary EPA initiatives, such as the 33/50 Program⁴¹ and Project XL,⁴² never matched Performance Track in terms of longevity,⁴³ yet they have received — and continue to receive — substantial attention in the legal and policy literature.⁴⁴ Strikingly, to date, Perform-

⁴¹ EPA created the 33/50 Program in 1989 to encourage voluntary reductions of releases of seventeen targeted chemicals. For further discussion of 33/50, see *infra* notes 43–45, 465–70 and accompanying text.

⁴² Project XL allowed individual facilities to negotiate for exemptions from existing regulatory requirements, provided the facility could demonstrate superior environmental performance. For further discussion of Project XL, see *infra* notes 43–45, 471–77 and accompanying text.

⁴³ Performance Track lasted eight years (2001–2009), while the 33/50 Program lasted about five years (1991–1996) and Project XL lost almost all steam within a few years of operation and closed up shop officially in its ninth year (1995–2003). See Madhu Khanna, *The U.S. 33/50 Voluntary Program: Its Design and Effectiveness*, in REALITY CHECK: THE NATURE AND PERFORMANCE OF VOLUNTARY ENVIRONMENTAL PROGRAMS IN THE UNITED STATES, EUROPE, AND JAPAN, *supra* note 2, at 15, 38; Lisa C. Lund, *Project XL: Good for the Environment, Good for Business, Good for Communities*, ELR NEWS & ANALYSIS, 10,140 (2000) (on file with the Harvard Law School Library); *Project XL*, EPA.GOV, <http://perma.law.harvard.edu/OTUFVYM33x/I/>.

⁴⁴ At least seven research studies have examined the origins and impacts of the 33/50 Program. See Seema Arora & Timothy N. Cason, *An Experiment in Voluntary Environmental Regulation: Participation in EPA's 33/50 Program*, 28 J. ENVTL. ECON. & MGMT. 271 (1995) [hereinafter Arora & Cason, *33/50 Experiment*]; Seema Arora & Timothy N. Cason, *Why Do Firms Volunteer to Exceed Environmental Regulations? Understanding Participation in EPA's 33/50 Program*, 72 LAND ECON. 413 (1996); TERRY DAVIES & JAN MAZUREK, *INDUSTRY INCENTIVES FOR ENVIRONMENTAL IMPROVEMENT: EVALUATION OF U.S. FEDERAL INITIATIVES* (1996) (on file with the Harvard Law School Library); Shanti Gamper-Rabindran, *Did the EPA's Voluntary Industrial Toxics Program Reduce Emissions? A GIS Analysis of Distributional Impacts and By-Media Analysis of Substitution*, 52 J. ENVTL. ECON. & MGMT. 391 (2006); Madhu Khanna & Lisa A. Damon, *EPA's Voluntary 33/50 Program: Impact on Toxic Releases and Economic Performance of Firms*, 37 J. ENVTL. ECON. & MGMT. 1 (1999); Abdoul G. Sam & Robert Innes, *Voluntary Pollution Reductions and the Enforcement of Environmental Law: An Empirical Study of the 33/50 Program* (Univ. of Ariz., Dep't of Agric. & Res. Econ. Working Paper, 2004), available at <http://perma.cc/U4HR-KSEZ>; Khanna, *supra* note 43, at 15. A similar number of studies have been conducted about Project XL, including an entire book. See DAVIES & MAZUREK, *supra*; JAMES BOYD ET AL., *INTEL'S XL PERMIT: A FRAMEWORK FOR EVALUATION, DISCUSSION PAPER 98-11* (1998), available at <http://perma.cc/39ZC-PMPT>; Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENVTL. L.J. 399 (1998); JANICE MAZUREK, *ORG. FOR ECON. CO-OPERATION AND DEV., ENV/EPOC/GEEI(98)27, THE USE OF VOLUNTARY AGREEMENTS IN THE UNITED STATES: AN INITIAL SURVEY* (1998); Dennis D. Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 U. ILL. L. REV. 129 (1998); Magali Delmas & Alfred Marcus, *Firms' Choice of Regulatory Instruments to Reduce Pollution: A Transaction Cost Approach* (Stanford Research Paper No. 1806, 2003), available at

ance Track has escaped all but the most passing mention in the literature and, as of yet, any independent, systematic academic study.⁴⁵

Given the paucity of scholarly literature on Performance Track, we begin in Part I by providing an overview of how the program operated: its goals, entry criteria, and membership requirements, including the information EPA collected about Performance Track members through applications, annual performance reports, and site visits. We also discuss the benefits EPA offered to facilities that joined Performance Track. We then focus on a vital question about the basis on which Performance Track classified — or “tracked” — facilities: Did Performance Track facilities exemplify the type of demonstrable and significant environmental leadership that EPA conceived the program to recognize?

We address this question in Part II using four discrete approaches: (1) a descriptive presentation of data on Performance Track’s membership rolls; (2) a close examination of EPA’s process for screening program applicants; (3) case studies of five sets of matching pairs of Performance Track facilities and other facilities; and (4) findings from a large-scale survey of Performance Track and other facilities.⁴⁶ Although we find no evidence to suggest that, in general, Performance Track facilities were anything but decent environmental actors, we also find little evidence that participating facilities outperformed similar facilities in their sectors. We find instead that what most distinguished Performance Track facilities was the value they placed on government recognition and the propensity they had for seeking out and engaging with the broader community. This “extroverted” quality stands out more clearly as the distinguishing characteristic of participating facilities than any performance-based indicia of environmental leadership.⁴⁷ If those that advance to the “top” of a voluntary program exhibit extroverted qualities but not necessarily distinctive achievement in terms of environmental performance, this fact in itself should lead us to question whether voluntary programs like Performance Track can induce major change in environmental practices throughout the entire economy.

We turn squarely to this issue in Part III. Specifically, we draw on empirical research examining the relationship between the way agencies design voluntary programs and the rates of participation in those programs. We show that, even if it could credibly be said that Performance Track caused some environmental improvements in some facilities, an inherent tension in its design meant that it was unlikely ever to engage a large proportion of the industrial facilities

<http://perma.cc/6UV3-Q8Y7>; ALFRED A. MARCUS ET AL., REINVENTING ENVIRONMENTAL REGULATION: LESSONS FROM PROJECT XL (2002).

⁴⁵ For a comprehensive treatment of other voluntary environmental programs, see Jonathan C. Borck & Cary Coglianese, *Voluntary Environmental Programs: Assessing Their Effectiveness*, 34 ANN. REV. ENV'T & RES. 305 (2009).

⁴⁶ An earlier report of these four studies, all partly funded by EPA, is available as COGLIANESE & NASH, BEYOND COMPLIANCE, *supra* note 10.

⁴⁷ As we explain further at the end of Part II, in characterizing Performance Track facilities as “extroverts,” we do not intend to denigrate them or their efforts to improve their environmental performance. Rather, we use the term clinically to refer to facilities that exhibit “outward” tendencies — something that is different from environmental performance itself. The name of EPA’s program was, after all, “Performance Track,” not “Cooperative Track.”

in the United States. The more that government agencies like EPA offer inducements for facilities to participate in voluntary programs, the more they demand, substantively and procedurally, of their prospective and existing members, a tendency which only dampens participation in the program. For this reason, programs like Performance Track are extremely unlikely to effectuate large-scale change in industry environmental performance. We develop a model of participation in voluntary programs and offer empirical evidence to support it, revealing the inherent constraints in EPA's ability both to offer significant rewards for voluntary participation and set low-cost entry and programmatic requirements.⁴⁸ Due to these constraints, we conclude that, contrary to advocates' claims, programs like Performance Track are unlikely ever to serve as meaningful substitutes for more traditional forms of environmental governance.⁴⁹

I. PERFORMANCE TRACK'S RISE AND DEMISE

In creating Performance Track and other voluntary programs, EPA blazed what has come to be known as the "alternative path"⁵⁰ or "next generation"⁵¹ approach to environmental policy, a vision that has gained widespread support in the United States at both the federal and state levels over the past two decades.⁵² This new vision of environmental protection grows in part from the

⁴⁸ See *infra* Part III.

⁴⁹ The notion of Performance Track serving as a substitute for traditional regulation is not just a straw position. Serious scholars and public officials conceived the program as leading to an alternative path for environmental governance. See *infra* Part I. Indeed, the idea that Performance Track could be part of a "new environmental regulation" was a theme articulated best by one of the most serious and prolific scholar-public servants in environmental policy we have ever known, Dan Fiorino, who claimed that "performance tracks are designed to change the regulatory system." FIORINO, *supra* note 2, at 173. Fiorino was the former director of EPA's Performance Track program.

⁵⁰ See ASPEN INST., *THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT* (1996) (outlining the "alternative path" policy method); see generally George B. Wyeth, "Standard" and "Alternative" Environmental Protection: *The Changing Role of Environmental Agencies*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 5, 41 (2006) (referring to Performance Track as part of an "alternative path").

⁵¹ See generally THINKING ECOLOGICALLY: *THE NEXT GENERATION OF ENVIRONMENTAL POLICY* (Marian R. Chertow & Daniel C. Esty eds., 1997); ENVIRONMENTAL GOVERNANCE: A REPORT ON THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Donald F. Kettl ed., 2002).

⁵² See generally NAT'L ACAD. OF PUB. ADMIN., *RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION* (1997) (endorsing EPA's use of performance-based programs); PRESIDENT'S COUNCIL ON SUSTAINABLE DEV., *SUSTAINABLE AMERICA: A NEW CONSENSUS FOR . . . PROSPER[IT]Y, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE* (1996) (incorporating alternative-path and next-generation principles into policy guidance and goals); NAT'L ACAD. OF PUB. ADMIN., *SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR THE ENVIRONMENTAL PROTECTION AGENCY* (1995) (advocating a more collaborative and clear approach); CTR. FOR STRATEGIC & INT'L STUDIES, *THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION: TOWARD A MORE DESIRABLE FUTURE I* (1998). Cf. AIMING FOR EXCELLENCE, *supra* note 11, at 55, 60-65 (highlighting alternative approaches to environmental problems, including performance tracking); Dennis D. Hirsch, *Lean and Green? Environmental Law and Policy and the Flexible Production Economy*, 79 IND. L.J. 611, 646 (2004) (claiming that performance recognition programs could serve as a "bridge" to "a new form of industrial production"); Alfred R. Light, *Environmental Federalism in the United States and the European Union: A Harmonic Convergence?*, 15 ST.

observation that different regulated facilities exhibit different postures toward environmental performance: some are superior performers, others are laggards, while most facilities' performance lies somewhere between the extremes.⁵³ In an influential report that would provide the intellectual foundation for the agency's efforts to establish Performance Track in 2000, EPA described facilities' variation as a "bell curve along a performance spectrum,"⁵⁴ noting:

At one end, we have companies acting as environmental leaders, adding business value and gaining competitive advantages along the way; they are setting standards of excellence that will define future business practices for themselves and their peers. In the middle, we have the "main streamers" — businesses, industries, and other regulated parties that typically meet requirements, but do little else. And then there are those that have been left behind, who do not meet the most basic environmental standards.⁵⁵

Recognizing these differences, EPA created Performance Track as a means to identify and treat favorably facilities that are environmental leaders.⁵⁶ EPA touted these facilities' names and accomplishments through press releases and on the agency's website, invited their managers to meet with high-ranking EPA officials, and provided qualifying facilities with plaques to hang in their offices and flags to fly outside their plants.⁵⁷ Moreover, EPA relieved these facilities from specific regulatory requirements.⁵⁸

THOMAS L. REV. 321, 341 (2002) ("A symbol of the new 'second generation' approach is EPA's National Environmental Performance Track.").

⁵³ See generally NEIL GUNNINGHAM & DARREN SINCLAIR, *LEADERS AND LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION* (2002); NEIL GUNNINGHAM ET AL., *SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT* (2003).

⁵⁴ AIMING FOR EXCELLENCE, *supra* note 11, at 5.

⁵⁵ *Id.* EPA's assumptions about compliance possess a longer lineage in the field of regulation. Chester Bowles, a former Administrator of the Office of Price Administration during the Roosevelt Administration, once remarked that "a very small percentage of the public — perhaps 2 or 3 percent — are inherently dishonest; while something like 20 percent can be trusted to obey the law regardless of what others do. The remaining 75 percent or so genuinely *want* to be honest, but they are also determined not to confirm P.T. Barnum's assertion that 'a sucker is born every minute'; breaking a law or two is a small price to pay to escape the unpleasant sense of being had." See CHESTER BOWLES, *PROMISES TO KEEP: MY YEARS IN PUBLIC LIFE, 1941–1969*, at 25 (1971); see also Robert A. Kagan, *Environmental Management Style and Corporate Environmental Performance*, in *LEVERAGING THE PRIVATE SECTOR: MANAGEMENT-BASED STRATEGIES FOR IMPROVING ENVIRONMENTAL PERFORMANCE* 31, 36 (Cary Coglianese & Jennifer Nash eds., 2006) (distinguishing between businesses as "laggards," "reluctant compliers," "committed compliers," "environmental strategists," and "true believers").

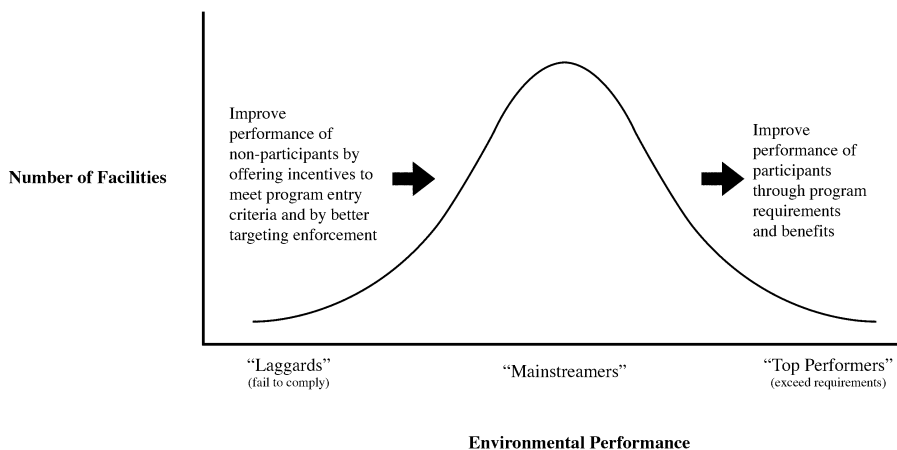
⁵⁶ EPA, *PERFORMANCE TRACK PROGRAM GUIDE 2* (2005); see also PRAKASH & POTOSKI, *supra* note 20, at 64 (describing Performance Track as an example of a program that restricts "membership to only a small cadre of top performers").

⁵⁷ For a description of Performance Track benefits, see OPERATIONS HANDBOOK, *supra* note 22, at 3-1-3-5 (2005). EPA provided similar benefits under other "alternative path" programs, such as its 33/50 Program and Project XL. For a description of the benefits EPA provided members of the 33/50 Program, see Arora & Cason, *33/50 Experiment*, *supra* note 44, at 273–74. For a description of Project XL benefits, see generally MARCUS ET AL., *supra* note 44.

⁵⁸ OPERATIONS HANDBOOK, *supra* note 22, at 4-1-4-5. EPA did not offer any regulatory relief under 33/50, but such relief was integral to Project XL. In Project XL, a facility would commit to achieving superior environmental performance in exchange for EPA developing a facility-specific

In exchange for these incentives, EPA also expected Performance Track members to continue setting goals to improve their environmental performance.⁵⁹ Under such a system, EPA sought to advance its mission of environmental protection by better deploying its resources.⁶⁰ Agency officials believed Performance Track could help economize on traditional enforcement resources, allowing inspectors to focus less attention on facilities identified as top performers and more attention on truly laggard facilities.⁶¹ By rewarding top performers and targeting laggards, EPA also sought to encourage more firms to strengthen their environmental practices. Figure 1, below, provides a graphic depiction of EPA's theory of how Performance Track and other innovative programs would improve overall environmental quality. Adapted from EPA's 1999 *Aiming for Excellence* report, the Figure illustrates the agency's general assumptions about business compliance and the government's strategy for motivating firms to do more than required by law.⁶²

FIGURE 1. ENVIRONMENTAL PERFORMANCE AMONG REGULATED FACILITIES⁶³



In order to join Performance Track, facilities needed to exhibit what EPA considered to be indicia of top environmental performance.⁶⁴ Once admitted, top performers were then required to meet EPA's programmatic requirements

rulemaking, which modified regulatory requirements for the facility. See *MARCUS ET AL.*, *supra* note 44, at 1–2. Under Performance Track, EPA offered more limited incentives that applied to all members, such as reductions in some recordkeeping and reporting requirements. *OPERATIONS HANDBOOK*, *supra* note 22, at 4-3–4-5.

⁵⁹ PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 6.

⁶⁰ *Id.* at 2.

⁶¹ See *OPERATIONS HANDBOOK*, *supra* note 22, at 4-1–4-5.

⁶² *AIMING FOR EXCELLENCE*, *supra* note 11, at 4–5. We have added the two arrows and text to elaborate EPA's theory of how programs like Performance Track could advance environmental goals.

⁶³ *Id.* at 5.

⁶⁴ For EPA's characterization of Performance Track as a program for "top performers," see *infra* text accompanying notes 140–142. For an elaboration of the entry criteria, see *infra* Part I.C.

and continue to improve their environmental performance, extending the environmental performance curve still further to the right.⁶⁵ But EPA intended Performance Track and its other next generation programs not merely to improve the performance of top facilities, it also hoped these programs would more generally “shift . . . the curve toward better performance.”⁶⁶ Facilities that did not yet meet program-entry criteria would likely face greater enforcement scrutiny. Moreover, as the managers of average facilities observed the benefits that Performance Track members enjoyed, they could be expected to improve their facilities’ performance too. In theory, then, the entire performance distribution would shift in the direction of environmental excellence.⁶⁷

A. Performance Track's Predecessors

In creating Performance Track, EPA did not draw on a blank slate. OSHA had created a similar initiative — the Voluntary Protection Programs (“VPP”) — as early as 1982.⁶⁸ Like Performance Track, OSHA’s VPP (which still exists today) sought to encourage facilities to go beyond compliance with existing regulations. To become a member of VPP, facilities must implement a health and safety management system, make a commitment to continuous improvements in workplace safety, and pass an on-site OSHA inspection.⁶⁹ In exchange, members receive public recognition from OSHA and are removed from the agency’s routine inspection list.⁷⁰ VPP’s admissions process has been described as “rigorous”⁷¹ and “arduous.”⁷² For the program’s first decade, its membership level was even more modest than Performance Track’s. By the

⁶⁵ See *infra* Part I.B.

⁶⁶ AIMING FOR EXCELLENCE, *supra* note 11, at 6.

⁶⁷ Although originally articulated in a nearly fifteen-year-old EPA report, the performance-shifting theory continued to find expression in more recent discussions of programs like Performance Track. See, e.g., Wyeth, *supra* note 50, at 63 n.321 (“It can be argued, of course, that such [environmental incentive] programs affect the behavior not only of enrolled participants, but also of those tempted to join, or more indirectly, those who are not interested in joining but do not want to have visibly worse records than their most prominent competitors.”); GALE BOYD & GANG ZHANG, MEASURING IMPROVEMENT IN THE ENERGY PERFORMANCE OF THE U.S. CEMENT INDUSTRY (May 2011), available at <http://perma.cc/AMB5-XGSV>; see generally Borck & Coglianesi, *supra* note 45, at 305–06.

⁶⁸ AL IANNUZZI, JR., INDUSTRY SELF-REGULATION AND VOLUNTARY ENVIRONMENTAL COMPLIANCE 68 (2002).

⁶⁹ For a more complete description of VPP’s requirements, see *Voluntary Protection Programs*, OSHA.GOV, <http://perma.law.harvard.edu/06PEdnmd2gsl>. VPP has three distinct membership “levels” — Demonstration, Merit, and Star — each with its own requirements. See IANNUZZI, *supra* note 68, at 70–71; Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 330 (1996). Despite the existence of these three levels, almost all VPP members fall within the Star level. *Current VPP Participants*, OSHA.GOV, <http://perma.law.harvard.edu/031bxsjt928/>.

⁷⁰ See also IANNUZZI, *supra* note 68, at 71.

⁷¹ Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. REG. 535, 559 (1996) (“OSHA completes a rigorous ‘pre-approval review’ of a worksite before it is admitted into the VPP . . .”).

⁷² See IANNUZZI, *supra* note 68, at 71 (“The process for becoming a VPP company is arduous . . .”).

time EPA launched Performance Track in 2000, OSHA's VPP was nearly two decades old and counted 542 facilities as members.⁷³

The idea of EPA implementing a program like VPP first took hold in the early 1990s. At that time, EPA proposed the creation of an Environmental Leadership Program ("ELP") to "recognize and reward . . . only the very best companies."⁷⁴ EPA hoped that ELP would "motivate many companies to apply for participation, so that the Program will result in widespread improvements."⁷⁵ Members of ELP would need to comply with environmental regulations and demonstrate a strong commitment to pollution prevention and sustainability.⁷⁶ In announcing its proposal for ELP in the *Federal Register* in January 1993, EPA also suggested it would ask members to demonstrate that they had in place effective management processes, including environmental goal setting, compliance auditing, and performance monitoring.⁷⁷

EPA received over 130 public comments on its ELP proposal, indicating to the agency a strong degree of "interest in a voluntary program to recognize environmental excellence."⁷⁸ Not all the opinions expressed in the public comments were enthusiastic, however, so the agency decided to implement ELP on just a short-term, pilot basis.⁷⁹ To be admitted into the pilot phase, EPA expected facilities to exhibit "leadership" qualities, including "a commitment to [regulatory] compliance."⁸⁰ EPA said that it wanted ELP facilities to share information about environmental performance with the agency and in particular to "demonstrate a willingness to disclose in some manner" their audit results.⁸¹ EPA instructed facilities to describe their environmental management and auditing programs in their applications to the program. According to EPA, "the greatest potential" for facilities to demonstrate leadership was to put in place a "state-of-the-art" environmental management system ("EMS").⁸²

An EMS consists of a series of internal processes and procedures adopted by business managers to help their organizations comply with applicable laws

⁷³ As of the end of October 2013, there were 1,588 members in VPP. *Current Federal and State-Plan Sites as of 10/31/2013*, *supra* note 38. If members of state VPPs are included, membership numbers were higher, with the number of members in both federal and state VPPs totaling 2,335. *Id.* For a discussion of VPP's membership growth, see U.S. GEN. ACCOUNTING OFFICE, GAO-04-378, OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 19 (2004). As with Performance Track, VPP has its own affiliated participants' association. See *VPP Participants' Association*, VOLUNTARY PROT. PROGRAMS PARTICIPANTS' ASS'N, <http://perma.law.harvard.edu/0PpCdmttGpz/>.

⁷⁴ Environmental Leadership Program, 58 Fed. Reg. 4,802, 4,803 (Jan. 15, 1993).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Environmental Leadership Program: Request for Pilot Project Proposals, 59 Fed. Reg. 32,062, 32,062 (June 21, 1994) [hereinafter Environmental Leadership Program]; see also Ira R. Feldman & Michael C. Schiavo, *Developing New Environmental Excellence Programs: Lessons from EPA's Environmental Leadership Program*, 5 TOTAL QUALITY ENVTL. MGMT. 15, 16 (1995).

⁷⁹ Environmental Leadership Program, 59 Fed. Reg. at 32,062.

⁸⁰ *Id.* at 32,063.

⁸¹ *Id.*

⁸² *Id.*

and reduce their environmental impacts.⁸³ These organizational systems generally contain four components: planning, implementation, monitoring, and corrective action.⁸⁴ When developing an EMS, managers begin by drafting a set of priorities, determining the most significant environmental impacts of their organizations' activities and setting goals for reducing these impacts.⁸⁵ They assign responsibility within their organization for implementing procedures and practices designed to meet these goals, and then they establish auditing mechanisms to assess compliance with internal procedures and progress toward the organizations' goals.⁸⁶ In establishing internal monitoring procedures, managers create a mechanism for obtaining feedback so that they can adjust their organizations' practices when needed to meet their goals.⁸⁷

Interest in the use of EMSs grew throughout the United States in the 1990s, especially after the International Organization for Standardization ("ISO") established a set of voluntary EMS standards called ISO 14001.⁸⁸ ISO also created a process by which organizations could certify that their EMSs met ISO's standards. Beginning with the creation of EPA's ELP pilot projects, EPA consistently emphasized that EMSs, whether conforming to ISO standards or not, have a key role to play in helping facilities improve their environmental performance.⁸⁹

In addition to establishing an EMS, facilities seeking admission into ELP were required to implement pollution prevention activities, help other businesses learn from their activities, and propose measures to track their results.⁹⁰ EPA hoped ELP would generate information on facilities' environmental management that would "improve the public's confidence in and acceptance of industry's self-monitoring efforts."⁹¹ To help promote public acceptance, ELP

⁸³ See Cary Coglianese & Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, in REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? 1 (Cary Coglianese & Jennifer Nash eds., 2001).

⁸⁴ See Jennifer Nash & John R. Ehrenfeld, *Factors that Shape EMS Outcomes in Firms*, in REGULATING FROM THE INSIDE, *supra* note 83, at 61, 77. These four components are often described as "plan-do-check-act." Planning sets broad policies, specific targets, and strategic allocations of authority and resources. Doing puts the strategies and plans into play. Checking is stopping the process and examining how well the targets are being met on the basis of carefully collected information. If performance is meeting targets, then the organization continues to repeat the doing and checking. If deviations exist, then acting involves going back to revise the plans to achieve satisfactory progress. *Id.*

⁸⁵ *Id.* at 67.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ For helpful background on ISO 14001 and external auditing and certification, see PRAKASH & POTOSKI, *supra* note 20, at 81–101. ISO's standards govern the processes by which organizations manage the environmental aspects of their operations; they do not impose any substantive environmental goals. *Id.* at 89–90.

⁸⁹ Environmental Leadership Program, *supra* note 78, at 32,063. For additional discussion of the use of EMSs in environmental policy, see generally E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 MICH. L. REV. 1840 (1994) (discussing the use of EMSs under the rubric of Total Quality Management); LEVERAGING THE PRIVATE SECTOR, *supra* note 55 (providing detailed background on EMSs).

⁹⁰ 59 Fed. Reg. at 32,064.

⁹¹ *Id.* at 32,063–64 ("As part of their proposals . . . facilities should suggest the type and extent of information they would be willing to disclose, the mechanisms they would use to disclose the

facilities also needed to demonstrate sensitivity to their surrounding communities and a readiness to respond to community concerns.⁹²

After EPA solicited proposals for ELP pilot projects in June 1994,⁹³ forty facilities submitted applications. In April 1995, EPA accepted twelve of these facilities into the ELP program: ten private sector facilities and two federal government facilities.⁹⁴ Each of these facilities agreed to experiment with innovative environmental projects in exchange for public recognition and a degree of leniency as they corrected any environmental regulatory violations they might discover during their audits.⁹⁵ The selected facilities carried their pilot projects forward, but within about two years, ELP wound down as EPA shifted priorities to a series of other, higher-profile reinvention projects, such as the agency's better-known Common Sense Initiative and Project XL.⁹⁶

Notwithstanding ELP's short lifespan and limited number of participants, the program provided a model within the agency for a facility-tracking program. EPA next implemented the ELP model through a program called StarTrack, initiated by EPA's regional office located in Boston. Of the ten private sector facilities in ELP, three had belonged to the Boston-based Gillette Company, which had agreed, as part of ELP, to test the use of third-party auditing of regulatory compliance and management operations.⁹⁷ John DeVillars, then Administrator of EPA's Region 1 (New England), had an interest in innovative approaches to environmental policy and sought to make his region a leading force for change within the agency.⁹⁸ DeVillars previously experimented with new ways to focus inspection resources on facilities deemed to present the highest risk of non-compliance.⁹⁹ In particular, DeVillars wanted to explore the feasibility of privatizing inspections using audits similar to those prepared by certified public accountants and relied upon by financial regulators such as the

information, the parties to whom they would disclose the information, and finally, any conditions they would seek from regulators in order to make the disclosure.”)

⁹² *Id.* at 32,064.

⁹³ *Id.* at 32,062.

⁹⁴ See ROBERT C. ANDERSON & ALAN CARLIN, *THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES IN ENVIRONMENTAL POLLUTION CONTROL* § 10.5 (1997); Daniel J. Fiorino, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 *ENVTL. L.* 457, 475 (1996). For a list of the twelve ELP projects, see *id.* at 475 n.129.

⁹⁵ Fiorino, *supra* note 94, at 475.

⁹⁶ For a discussion of the Common Sense Initiative and Project XL, see Cary Coglianese & Laurie K. Allen, *Does Consensus Make Common Sense? An Analysis of EPA's Common Sense Initiative*, *ENV'T*, Jan.-Feb. 2004, at 10; CHRISTOPHER MCGRORY KLYZA & DAVID J. SOUSA, *AMERICAN ENVIRONMENTAL POLICY, 1990-2006: BEYOND GRIDLOCK* 223-28 (2008); MARCUS ET AL., *supra* note 44, at 174-75.

⁹⁷ See JENNIFER NASH ET AL., *ISO 14001 AND EPA REGION I'S STARTRACK PROGRAM: ASSESSING THEIR POTENTIAL AS TOOLS IN ENVIRONMENTAL PROTECTION* 39 (2000) (on file with the Harvard Law School Library) (noting that as part of its ELP commitment, Gillette proposed to “develop[] a system for using third parties to verify compliance and EMS audits.”); see also *ECONOMIC INCENTIVES*, *supra* note 7, at 185.

⁹⁸ JODI PERRAS, *REINVENTING EPA NEW ENGLAND: AN EPA REGIONAL OFFICE TESTS INNOVATIVE APPROACHES TO ENVIRONMENTAL PROTECTION* 34 (2000).

⁹⁹ *Id.* at 30.

Securities and Exchange Commission.¹⁰⁰ DeVillars saw the Gillette Company's ELP proposal for third-party verification of compliance as a vehicle for testing his own ideas for regulatory innovation.¹⁰¹ Within a week of the announcement by EPA headquarters that it had selected Gillette facilities for ELP, DeVillars announced a regional program to identify more facilities interested in testing the ideas contained in Gillette's ELP proposal.¹⁰² He originally called the initiative the Third Party Certification Project but soon changed it to the more catchy name, "StarTrack."¹⁰³

The criteria EPA's Region 1 used for selecting facilities for the StarTrack program were similar to those in ELP. To participate in StarTrack, facilities had to demonstrate commitments to regulatory compliance and continuous improvement in environmental performance.¹⁰⁴ Facilities that signed up for StarTrack agreed to undertake annual compliance and EMS audits, send audit reports to Region 1 as well as to state and local regulatory agencies, and fix any problems discovered through auditing.¹⁰⁵ They also promised to prepare a public report about their environmental performance according to EPA specifications.¹⁰⁶ Every third year, StarTrack facilities would engage a third party to observe and certify their auditing practices.¹⁰⁷ EPA provided detailed guidance concerning the qualifications it expected auditors to meet, as well as the activities that should be undertaken as part of those audits, the content of audit reports, and how managers should correct problems discovered through auditing.¹⁰⁸ Finally, StarTrack facilities agreed to work with environmental regulators and other interested organizations to evaluate and improve StarTrack's compliance and EMS auditing, certification, and reporting guidance.¹⁰⁹

¹⁰⁰ NAT'L ACAD. OF PUB. ADMIN., TRANSFORMING ENVIRONMENTAL PROTECTION FOR THE 21ST CENTURY 43 (2000).

¹⁰¹ See NASH ET AL., *supra* note 97, at 39.

¹⁰² See IANNUZZI, *supra* note 68, at 88 ("The Gillette ELP project audit guidance and the project agreements were used as the basis for the [StarTrack] program.").

¹⁰³ NASH ET AL., *supra* note 97, at 40; see also Gregory J. Hale & Caroline G. Hemenway, *Boon or Bane? ISO 14001 Likely to Join Regulatory Framework*, QUALITY DIG., <http://perma.law.harvard.edu/0mxi3M8eBQj/>.

¹⁰⁴ EPA REGION 1, STARTRACK PROGRAM GUIDANCE DOCUMENT: BETTER ENVIRONMENTAL PERFORMANCE THROUGH ENVIRONMENTAL MANAGEMENT SYSTEMS AND THIRD PARTY CERTIFICATION 3-4 (1998) [hereinafter STARTRACK PROGRAM GUIDANCE] (on file with the Harvard Law School Library). Facilities had to demonstrate a track record of compliance with existing environmental regulations and cooperation with state and federal environmental regulators, creation of a compliance auditing program, commitment to implementing an EMS, and implementation of pollution prevention activities with "measurable results." *Id.*

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See EPA REGION 1, DRAFT STARTRACK PROGRAM GUIDANCE DOCUMENTS, app. II, III (1997) (containing the 1997 Draft Guidance for EMS Audit, EMS Audit Report, and EMS Implementation Plan) (on file with the Harvard Law School Library); EPA, REGION 1, STARTRACK PROGRAM GUIDANCE DOCUMENT (1997 Draft Certification and Facility EMS Improvement Guidance) (on file with the Harvard Law School Library).

¹⁰⁹ STARTRACK PROGRAM GUIDANCE, *supra* note 104, at 2.

In return, EPA Region 1 recognized each StarTrack facility for its commitment to “excellence in environmental compliance.”¹¹⁰ The agency offered participants the promise of a “partnership,” by which the agency meant it would provide “constructive feedback to help improve auditing programs, environmental management systems, and measures for improving overall environmental performance.”¹¹¹ It also offered StarTrack participants the possibility of being exempt from routine compliance inspections by federal, state, and local environmental agencies,¹¹² although it reserved the right to conduct inspections “to aid in the development and implementation of the [StarTrack] project rather than for enforcement purposes.”¹¹³ In addition, EPA promised not to initiate any enforcement actions for violations discovered at StarTrack plants as long as the facility disclosed them in its audit reports and corrected them within sixty days.¹¹⁴ StarTrack’s promotional materials also suggested that members could receive “[e]xpress lane’ service for permits and other regulatory actions.”¹¹⁵

In creating StarTrack, EPA’s Region 1 sought to strengthen the environmental performance of StarTrack facilities as well as facilities that had not yet joined the program — in other words, to shift the environmental performance curve.¹¹⁶ In addition to providing incentives for companies, StarTrack provided EPA with an opportunity to learn from interacting with companies with strong records of environmental performance.¹¹⁷ According to Ira Leighton, who in the late 1990s served as director of Region 1’s Office of Environmental Stewardship and oversaw StarTrack, EPA hoped that experience with StarTrack would help the agency learn how to define “top performance” as more than simply an absence of compliance problems: “We know how to define bad, but [we] don’t know what a good performer looks like. If we asked around the agency, we’d get ten different views.”¹¹⁸

Perhaps not surprisingly, it took over a year for EPA to select members for StarTrack. By the end of the program’s first year of full operation in 1997, the program had attracted eight facilities.¹¹⁹ To solicit additional applications, Re-

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.*

¹¹² EPA, STARTRACK PROJECT AGREEMENT, FIRST YEAR PARTICIPANTS 2 (1998) (on file with the Harvard Law School Library) (noting that federal, state, and local officials “may choose not to conduct routine regulatory compliance inspections [even though] agency officials reserve the right to observe audits conducted by the company [as well as] conduct random audits of [members’] performance as a ‘spot check’ for the program as a whole”).

¹¹³ STARTRACK PROGRAM GUIDANCE, *supra* note 104, at 8.

¹¹⁴ *Id.* at 9. EPA reserved the right to take corrective action in cases of criminal violations, violations that resulted in “serious actual harm,” violations that resulted in economic benefit to facilities, and repeat violations.

¹¹⁵ EPA, STARTRACK: CERTIFIED ENVIRONMENTAL PERFORMANCE 1 (program brochure) [hereinafter STARTRACK PROGRAM BROCHURE] (on file with the Harvard Law School Library).

¹¹⁶ NASH ET AL., *supra* note 97, at 39–41.

¹¹⁷ STARTRACK PROGRAM BROCHURE, *supra* note 115 (noting one of StarTrack’s goals was to “increase public [including agencies’] understanding of a company’s environmental performance”).

¹¹⁸ NASH ET AL., *supra* note 97, at 40–41.

¹¹⁹ EPA REGION 1, STARTRACK YEAR 1 SUMMARY 2, 4 (1998) (on file with the Harvard Law School Library).

gion 1 sent letters to 1,300 potential members encouraging their participation; however, by 1999, the number of participating facilities had only grown to fifteen.¹²⁰ Managers of facilities in the program raised concerns about the costs of participation and about EPA's failure to deliver promised benefits.¹²¹ From EPA's perspective, one of StarTrack's chief limitations lay in its relatively small number of program participants. In considering options for expanding StarTrack, DeVillars commissioned a study in 1998 to find out how many facilities around the country likely met StarTrack's entry criteria already.¹²² That study claimed that more than 100,000 facilities nationwide could be eligible to participate.¹²³

Notwithstanding the small proportion of potential participants involved in either StarTrack or ELP, officials within EPA still believed these programs provided a foundation for launching a national program.¹²⁴ The agency's experience with StarTrack and ELP, along with its familiarity with OSHA's VPP as well as several environmental tracking programs that had begun to emerge in states like New Jersey, Oregon, and Wisconsin,¹²⁵ generated interest in creating a large-scale, national program that used a simpler design and imposed lower transaction costs on potential members.¹²⁶ In a major report issued in 1999, EPA affirmed its support for the concept of giving "top performers more flexibility in how they meet regulatory requirements *if* they do more to protect the environment and assure accountability."¹²⁷ Beginning in 2000, staff in EPA head-

¹²⁰ RHEA HALE, THE NATIONAL EXPANSION OF STARTRACK: ISSUES REGARDING THE DELEGATION OF ENVIRONMENTAL COMPLIANCE OVERSIGHT 21 (1998) (on file with the Harvard Law School Library). EPA sent many of its letters to the region's largest emitters of toxic substances based on data from the Toxics Release Inventory.

¹²¹ Nash & Ehrenfeld, *supra* note 84, at 78.

¹²² HALE, *supra* note 120, at 11.

¹²³ *Id.* at 33.

¹²⁴ See, e.g., EPA OFFICE OF POL'Y, ECON., & INNOVATION, TOP PERFORMERS. SOLID RESULTS 3 (2003) [hereinafter TOP PERFORMERS] (on file with the Harvard Law School Library) ("Performance Track builds on lessons that EPA has learned from state environmental leadership programs and from its own efforts, such as the Common Sense Initiative, the Environmental Leadership Program, and EPA Region 1's StarTrack program."). At least one other related regional effort within EPA existed at the time: Region 9's Merit Partnership for Pollution Prevention ("Merit") program. See John MacArthur & Gordon Bellen, *ISO 14001 in State Regulatory Offices: A Survey of Activities*, ENVTL. QUALITY & MGMT., Summer 1998, at 19, 22; JOHN VOORHEES & ROBERT A. WOELLNER, INTERNATIONAL ENVIRONMENTAL RISK MANAGEMENT: ISO 14001 AND THE SYSTEMS APPROACH 158-59 (1998). The Merit Partnership program included efforts by EPA to work "with a number of industry partners to implement ISO 14001 environmental management systems." *Id.* at 158. But it was not nearly as ambitious or prominent a program as StarTrack.

¹²⁵ FIORINO, *supra* note 2, at 172. ("In designing its own Performance Track in early 2000, EPA studied the programs and experiences of states like Oregon, New Jersey, and Wisconsin.")

¹²⁶ See TOP PERFORMERS, *supra* note 124, at 3-6.

¹²⁷ AIMING FOR EXCELLENCE, *supra* note 11, at 13. According to EPA, "[t]he Performance Track program is the outcome of the July, 1999 report, 'Aiming for Excellence: Actions to Encourage Stewardship and Accelerate Environmental Progress[.]' [in which] the Agency committed to developing a Performance Track program to encourage good environmental performers to continue striving to improve their environmental performance." Agency Information Collection Activities: Proposed Collection; Comment Request; Performance Track Program — Environmental Achievement Track, 65 Fed. Reg. 11,305, 11,305 (Mar. 2, 2000).

quarters took the first steps to launch the National Environmental Performance Track.¹²⁸

B. The Performance Track Vision

EPA publicly proposed Performance Track at a series of meetings held around the country in the fall of 2000.¹²⁹ At the first such meeting, held in Washington, D.C. in October 2000, EPA officials cited the agency's experience with ELP, StarTrack, and similar state programs as evidence of a movement toward what it termed a "performance-based system" of environmental protection.¹³⁰ EPA initially proposed a two-tiered Performance Track program: a less-demanding tier would be called the "Achievement Track," while another, more-demanding tier would be called the "Stewardship Track."¹³¹

Although EPA did not publish its formal description of the Performance Track program in the *Federal Register* until July 2000, the agency began accepting applications to the Achievement Track in June of that year. By December 2000, EPA had selected the first 227 members of the program — all initially designated as members of the Achievement Track.¹³² The agency planned to wait another year before beginning to consider applications for the more rigorous Stewardship Track. During the course of that subsequent year, however, agency officials came to realize that implementing the additional, more demanding tier would prove more difficult than anticipated, as it was not clear what EPA should expect of facilities in the Stewardship Track.¹³³ In addition, agency officials found themselves busy implementing the Achievement Track, a track the agency already touted as recognizing "top" performers. It appeared to some within the agency that adding a higher track would suggest that current members might actually be no longer at the "top."¹³⁴ Consequently,

¹²⁸ See generally EPA, A SUMMARY OF EPA'S PERFORMANCE TRACK PROPOSAL 1 (2000) [hereinafter SUMMARY OF PERFORMANCE TRACK PROPOSAL] (on file with the Harvard Law School Library) (noting EPA sought to solicit initial applications for the first level of the Performance Track in June of 2000). As EPA launched its National Environmental Performance Track in 2000, Region 1 dismantled StarTrack in that same year. See Jennifer Nash, *Tiered Environmental Regulation: Lessons from the StarTrack Program*, in INDUSTRIAL TRANSFORMATION, *supra* note 2, at 253–54.

¹²⁹ Program Description of the National Environmental Achievement Track, 65 Fed. Reg. 41,655, 41,656 (Jul. 6, 2000) ("In March of this year, EPA released a draft program description and held five public meetings across the country on this proposal.")

¹³⁰ See EPA, NATIONAL PERFORMANCE TRACK PROGRAM, FIRST PHASE PUBLIC MEETINGS ON THE DESIGN OF THE STEWARDSHIP TRACK (2000) [hereinafter SUMMARY OF FIRST PHASE PUBLIC MEETINGS] (on file with the Harvard Law School Library).

¹³¹ 65 Fed. Reg. at 41,656, 41,662; RAND CORP. ASSESSMENT, *supra* note 23, at 26; see generally Allison F. Gardner, *Beyond Compliance: Regulatory Incentives to Implement Environmental Management Systems*, 11 N.Y.U. ENVTL. L.J. 662, 689–93 (2003) (discussing requirements for participation in the Achievement and Stewardship Tracks); Dennis D. Hirsch, *Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1, 13–14 (2001) (discussing qualifications for Achievement Track status).

¹³² TOP PERFORMERS, *supra* note 124, at 3.

¹³³ See SUMMARY OF FIRST PHASE PUBLIC MEETINGS, *supra* note 130, at 1–2, 4–6, 10.

¹³⁴ Telephone Interview with Richard Wells, Institutional Affiliation President, The Lexington Group (Apr. 17, 2008) (on file with the Harvard Law School Library).

it took little time before EPA officials ceased referring to the Achievement Track altogether; facilities simply joined Performance Track.¹³⁵

As with StarTrack and ELP, the Performance Track program purported to single out individual facilities for environmental excellence.¹³⁶ Just as ELP sought to engage “the very best companies”¹³⁷ and StarTrack’s members were by definition “stars,” Performance Track reached out to “superior” environmental performers.¹³⁸ The agency sought “to recognize and encourage top environmental performers — those who go beyond compliance with regulatory requirements to attain levels of environmental performance that benefit people, communities, and the environment.”¹³⁹ As then-EPA Administrator Carol Browner put it, “Performance Track is targeted at the pace-setters, the environmental leaders in the corporate world.”¹⁴⁰

EPA intended Performance Track to “deliver . . . measurable [environmental] results.”¹⁴¹ It would do so by offering to “recognize and reward facilities that consistently exceed regulatory requirements, work closely with their communities, and excel in protecting the environment and public health.”¹⁴² After identifying the “top” performers,¹⁴³ Performance Track would “spotlight . . . such companies as models of a higher level of environmental achieve-

¹³⁵ Notice to Terminate the National Environmental Performance Track Program, 74 Fed. Reg. 22,741, 22,742 (May 14, 2009). In an assessment of Performance Track commissioned by EPA shortly before the program was shut down, researchers at the RAND Corporation concluded that EPA’s failure to develop a second membership tier of higher-level performers undermined Performance Track. RAND CORP. ASSESSMENT, *supra* note 23, at 84 (“Once Performance Track consisted of a single group of members, it was not possible to provide differentiated benefits based on performance. As a result, members gained access to recognition and benefits by being accepted into the program rather than by attaining a particular level of performance.”). It would not be until 2004 that EPA would launch a separate “track” of sorts: its Corporate Leaders program. *See infra* Part I.E.

¹³⁶ *See* SUMMARY OF FIRST PHASE PUBLIC MEETINGS, *supra* note 130, at 4.

¹³⁷ *See* Environmental Leadership Program, 58 Fed. Reg. 4,802, 4,803 (Jan. 15, 1993).

¹³⁸ EPA, EPA DOC. NO. 190-R-03-003, 2003–2008 STRATEGIC PLAN: DIRECTION FOR THE FUTURE 118 (2003) [hereinafter 2003–2008 STRATEGIC PLAN], *available at* <http://perma.cc/Y2S8-4V5F>; *see* Carol Browner, Adm’r, EPA, Remarks Delivered at Performance Track Launch (June 26, 2000) (stating the program would recognize members for “their extraordinary environmental accomplishments”) [hereinafter Browner Remarks], *available at* <http://perma.law.harvard.edu/ODDzWVRTtRQ/>.

¹³⁹ PROGRAM GUIDE, *supra* note 56, at 2.

¹⁴⁰ Browner Remarks, *supra* note 138.

¹⁴¹ BEYOND COMPLIANCE, *supra* note 10, at 2; *see also* TOP PERFORMERS, *supra* note 124, at 3; EPA OFFICE OF POL’Y, ECON., & INNOVATION, BUILDING ON THE FOUNDATION: PERFORMANCE TRACK SECOND ANNUAL PROGRESS REPORT 3 (2004) [hereinafter BUILDING ON THE FOUNDATION] (on file with the Harvard Law School Library); EPA OFFICE OF POL’Y, ECON., & INNOVATION, LEADING CHANGE: PERFORMANCE TRACK FOURTH ANNUAL PROGRESS REPORT 24 (2006) [hereinafter LEADING CHANGE] (on file with the Harvard Law School Library); 2003–2008 STRATEGIC PLAN, *supra* note 138, at 115 (announcing that Performance Track would “achieve measurably improved environmental performance”).

¹⁴² TOP PERFORMERS, *supra* note 124, at 3; BUILDING ON THE FOUNDATION, *supra* note 141, at 3; EPA OFFICE OF POL’Y, ECON., & INNOVATION, GROWTH & RENEWAL: PERFORMANCE TRACK THIRD ANNUAL PROGRESS REPORT 4 (2005) [hereinafter GROWTH & RENEWAL].

¹⁴³ *See* Report on ECOS-EPA Performance-Based Environmental Programs: Proposed Initial Implementation Actions, 71 Fed. Reg. 28,026, 28,026 (May 15, 2006); *see also* PROGRAM GUIDE, *supra* note 56, at 2; TOP PERFORMERS, *supra* note 124; GROWTH & RENEWAL, *supra* note 142, at 3; LEADING CHANGE, *supra* note 141, at 24.

ment.”¹⁴⁴ Once admitted into the program and recognized as environmental leaders, facilities would be expected to improve their performance still further. Performance Track members would not be allowed to “rest on their laurels.”¹⁴⁵ If they desired to remain members, they would need to demonstrate continuous improvement in areas not governed by regulation.¹⁴⁶ EPA expected that benefits would not only reward the top performers but would also encourage other facilities to work harder to strive to meet the program’s standards. EPA viewed Performance Track as establishing a “‘gold standard’ for environmental performance — a standard that facilities will strive to attain.”¹⁴⁷

Even as EPA characterized Performance Track principally as a program to improve environmental quality, the agency also articulated broader goals, such as improving relationships between regulators and regulated facilities and between regulated facilities and their surrounding communities. EPA hoped to help “transform”¹⁴⁸ relationships with industry so that they could become more “collaborative, cooperative, and focused on results.”¹⁴⁹ Rather than solely punishing businesses when they broke the rules, EPA viewed Performance Track as giving the agency an opportunity to praise and reward businesses that ranked as top performers. In addition, by including community outreach as a membership criterion, EPA hoped that those living near Performance Track plants would also gain confidence and trust in these facilities.¹⁵⁰

EPA sought to use Performance Track to encourage innovation in both companies and government.¹⁵¹ The program aimed to contribute to a broader problem-solving culture in which facility managers would openly share with EPA their best practices as well as their challenges.¹⁵² Performance Track sought to serve as a blueprint for a “new generation of programs” that would encourage facilities to strive for environmental excellence instead of merely complying with government rules.¹⁵³

EPA predicted — and until the arrival of the Obama Administration, continued to maintain — that Performance Track would induce broader, systematic changes in the U.S. environmental regulatory system. It “depart[ed] . . . from traditional models of regulation”¹⁵⁴ in order “to change business-as-usual ap-

¹⁴⁴ Daniel J. Fiorino, *Performance Track Places Trust in the Carrot over the Stick*, ENVTL. QUALITY MGMT., Spring 2001, at 9.

¹⁴⁵ GROWTH & RENEWAL, *supra* note 142, at 4.

¹⁴⁶ BUILDING ON THE FOUNDATION, *supra* note 141, at 4; LEADING CHANGE, *supra* note 141, at 15.

¹⁴⁷ TOP PERFORMERS, *supra* note 124, at 15; BUILDING ON THE FOUNDATION, *supra* note 141, at 17.

¹⁴⁸ TOP PERFORMERS, *supra* note 124, at 3; BUILDING ON THE FOUNDATION, *supra* note 141, at 3.

¹⁴⁹ BUILDING ON THE FOUNDATION, *supra* note 141, at 3.

¹⁵⁰ As an employee of a Performance Track member would later explain, the program “establishes a climate of respect and trust with the community. It keeps the people who live near you comfortable that you are not polluting.” LEADING CHANGE, *supra* note 141, at 22.

¹⁵¹ See PROGRAM GUIDE, *supra* note 56, at 2; TOP PERFORMERS, *supra* note 124, at 3; BUILDING ON THE FOUNDATION, *supra* note 141, at 3; GROWTH & RENEWAL, *supra* note 142, at 3–4.

¹⁵² Performance Track annual reports frequently featured stories about members that had implemented innovative practices. See, e.g., EPA OFFICE OF POL’Y, ECON., & INNOVATION, PERFORMANCE TRACK FIFTH ANNUAL PROGRESS REPORT: TODAY’S COMMITMENTS. TOMORROW’S WORLD. FIVE YEARS OF ENVIRONMENTAL LEADERSHIP 21–28 (2007) [hereinafter TODAY’S COMMITMENTS].

¹⁵³ *Id.* at 3.

¹⁵⁴ LEADING CHANGE, *supra* note 141, at 5.

proaches to environmental protection.”¹⁵⁵ According to the agency, Performance Track would be “leading change” by promoting an incentive-based approach that operated alongside traditional environmental regulation.¹⁵⁶ In 2006, Dan Fiorino, the long-time Director of EPA’s Performance Incentives Division which ran Performance Track, wrote that changing members’ regulatory treatment constituted Performance Track’s “core premise,” asserting that “[f]acilities with a strong compliance record, a sound EMS, community outreach, and demonstrated performance beyond what the law specifies do not require the same level of regulatory oversight as others.”¹⁵⁷

C. *Joining Performance Track*

In an effort to induce broad participation in the program, EPA designed Performance Track with the intention of keeping the costs of entry to a minimum.¹⁵⁸ Membership in Performance Track was open to any facility in the U.S. regardless of size or industrial sector; even non-profit and government-owned facilities could apply. Yet the program’s entry requirements were still intended to make membership somewhat selective, because “otherwise the value of differentiation [would be] lost.”¹⁵⁹ To qualify for membership in Performance Track, a facility needed to be able to demonstrate to EPA that it met the following four criteria:¹⁶⁰

- *Environmental Management System.* The facility was required to have in place an audited EMS. EPA Performance Track materials defined an EMS as a “facility’s systematic efforts to meet environmental requirements and improve environmental performance.”¹⁶¹ In 2004, EPA added the requirement that facilities must have their EMSs independently audited; prior to that time, EPA allowed facilities to self-audit.¹⁶² EPA also outlined qualifications for independent auditors and established a protocol for auditors to follow.¹⁶³
- *Regulatory Compliance.* The facility was required to sustain a “record of compliance” with environmental standards.¹⁶⁴ For instance, a facility was not allowed to have had a conviction or guilty plea

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 23.

¹⁵⁷ FIORINO, *supra* note 2, at 147.

¹⁵⁸ TOP PERFORMERS, *supra* note 124, at 3.

¹⁵⁹ Daniel J. Fiorino, Environmental Performance and Green Clubs: A New Tool for Governance? 4 (June 29, 2007) (unpublished manuscript) (on file with the Harvard Law School Library); *see also* PRAKASH & POTOSKI, *supra* note 20, at 56 (describing Performance Track as having “[s]tringent club standards” and noting that an “advantage of stringent standards is that the club brand [is] very credible and serve[s] as a low-cost tool for signaling club members’ commitment to protect the natural environment”).

¹⁶⁰ *National Environmental Performance Track: Criteria*, *supra* note 15.

¹⁶¹ EPA, PERFORMANCE TRACK APPLICATION INSTRUCTIONS 3-1 (on file with the Harvard Law School Library).

¹⁶² GROWTH & RENEWAL, *supra* note 142, at 6.

¹⁶³ *See Independent EMS Assessment*, EPA.GOV (on file with the Harvard Law School Library).

¹⁶⁴ PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 8.

for any criminal environmental offense within the previous five years, nor was it allowed to have incurred significant civil environmental violations within the previous three years.¹⁶⁵

- *Beyond-Compliance Commitments.* The facility was required to show specific environmental achievements and make measurable commitments to meet performance goals to a degree that would exceed existing regulatory requirements.¹⁶⁶ To show a record of past achievements, a prospective applicant was required to show improvements for at least two environmental indicators.¹⁶⁷ Managers could choose their own indicators using agency-selected categories and measuring units.¹⁶⁸ Such categories included improving supply-chain environmental performance, as well as reducing energy use, air emissions, and noise levels, among others.¹⁶⁹ Facilities were also required to commit to future improvements based on at least four agency-selected indicator categories.¹⁷⁰
- *Community Outreach.* The facility needed to communicate with its local community about its environmental activities. Potential members needed to describe how they would “identify and respond to community concerns” and how they would “inform community members of important matters that affect them.”¹⁷¹

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.* Small facilities — that is, those with fewer than fifty employees — needed only to report one improvement.

¹⁶⁸ EPA, ENVIRONMENTAL PERFORMANCE TABLE 1 (2008) (on file with the Harvard Law School Library). It was also possible for facilities to propose goals from outside the specified categories. *National Environmental Performance Track: Instructions for Making Alternate Goals*, EPA.GOV, <http://perma.cc/ZZ68-T9P9>.

¹⁶⁹ ENVIRONMENTAL PERFORMANCE TABLE, *supra* note 168, at 3. EPA described the complete set of goal categories as follows: 1) “Upstream” goals, namely “Material Procurement” and “Suppliers’ Environmental Performance”; 2) “Inputs” goals, namely “Material Use,” “Water Use,” “Energy Use,” and “Land and Habitat”; 3) “Nonproduct Outputs” goals, namely “Air Emissions,” “Discharges to Water,” “Waste,” “Noise,” and “Vibration”; and 4) “Downstream” goals, namely “Products.” PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 5. In addition, the agency specified that these goals had to be based on real improvements in business processes: “Performance Track does not give credit . . . [for] environmental indicators that would improve automatically as a result of core business expansion. . . . Examples include: a facility that recycles electronics cannot commit to take back more electronics for recycling; [and] a MSW [municipal solid waste] recycling center cannot commit to increase the volume of MSW recycled.” P-TRACK APPLICATION INSTRUCTIONS, *supra* note 161, at 5-1.

¹⁷⁰ Small facilities needed only make two commitments instead of four. Additionally, any facility, large or small, that made a designated “challenge commitment” — a commitment in areas specified by EPA to be of “regional or national environmental priority” — was allowed to count one challenge commitment as fulfilling two ordinary ones. EPA, CHALLENGE COMMITMENT POLICY FOR THE NATIONAL ENVIRONMENTAL PERFORMANCE TRACK PROGRAM (on file with the Harvard Law School Library).

¹⁷¹ EPA, PERFORMANCE TRACK SAMPLE FACILITY APPLICATION 20 [hereinafter SAMPLE FACILITY APPLICATION] (on file with the Harvard Law School Library); *see also National Environmental Performance Track: Criteria*, *supra* note 15.

To demonstrate that it met these four criteria, a facility needed to complete a twenty-nine page application form.¹⁷² The form called for the facility to provide basic information about its size, industry, and environmental management system.¹⁷³ In addition, the facility was required to quantify its proposed improvements, specifying measurable units of performance.¹⁷⁴ However, EPA did not define how ambitious a facility's commitments had to be, stating only that they should be "significant" and should exceed performance dictated by environmental regulations.¹⁷⁵ EPA encouraged each facility to "document and commit to a level of performance consistent with its own situation, capabilities, and goals."¹⁷⁶

In addition to information about each facility's environmental performance, EPA's application form asked for information about the facility's relationships with its local community, its relevant state and federal permit identification numbers, and a signature of a senior facility manager who certified the accuracy of the application and declared that the facility was in full compliance with environmental standards.¹⁷⁷

EPA did not conduct site visits during the application process.¹⁷⁸ Agency officials simply reviewed each application to ensure that, on its face, the application showed that the applicant met the Performance Track criteria. Facilities that cleared an internal screening on both regulatory compliance and application completeness were admitted into Performance Track and thereby singled out by the program as top environmental performers. After facilities were admitted, EPA selected a small fraction of members to visit each year.¹⁷⁹ Over the life of the program, EPA conducted approximately 250 site visits, amounting to less than one-third of all facilities admitted into Performance Track.¹⁸⁰

¹⁷² Applicants submitted their information online, but EPA's scan of a sample online submission spans twenty-nine pages. SAMPLE FACILITY APPLICATION, *supra* note 171. The instructions for completing the application, on the other hand, were over fifty pages. P-TRACK APPLICATION INSTRUCTIONS, *supra* note 161. In addition, EPA issued a twenty-five page guidance document explaining how facilities should normalize their environmental impacts on the application form and in annual reports. EPA, GUIDANCE FOR NORMALIZING ENVIRONMENTAL PERFORMANCE RESULTS (Mar. 5, 2004) (on file with the Harvard Law School Library).

¹⁷³ SAMPLE FACILITY APPLICATION, *supra* note 171, at 1, 3–4.

¹⁷⁴ *Id.* at 8–10.

¹⁷⁵ PROGRAM GUIDE, *supra* note 56, at 6.

¹⁷⁶ *Id.*

¹⁷⁷ SAMPLE FACILITY APPLICATION, *supra* note 171, at 19–24.

¹⁷⁸ PROGRAM GUIDE, *supra* note 56, at 9.

¹⁷⁹ P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 15.

¹⁸⁰ Typically, site visit teams included a representative of EPA headquarters, the EPA regional Performance Track coordinator, and someone from the state environmental agency. David W. Guest & Andrew L. Teplitsky, *High-Performance Environmental Management Systems: Lessons Learned from 250 Visits at Leadership Facilities*, ENVTL. QUALITY MGMT, Autumn 2010, at 25–26, 28. EPA conducted seventy-nine site visits in the first two years of the program, twenty-four in 2003, twenty-five in 2004, and thirty-one in 2005. TOP PERFORMERS, *supra* note 124, at 6; BUILDING ON THE FOUNDATION, *supra* note 141, at 5; GROWTH & RENEWAL, *supra* note 142, at 6; LEADING CHANGE, *supra* note 141, at 14.

EPA required all Performance Track members to submit Annual Performance Reports (“APRs”).¹⁸¹ In their APRs, members needed to describe progress made toward their performance commitments and provide additional information to help EPA verify that they continued to meet all eligibility requirements.¹⁸² While EPA encouraged facilities to set ambitious commitments and did not expect them to achieve every commitment within three years, the agency purportedly did expect progress toward goal achievement. EPA told members that “an inability to make any progress [toward goals], or a decline in overall facility performance, may result in removal from the program.”¹⁸³

In addition to filing annual reports, members needed to re-apply every three years if they wished to stay in Performance Track.¹⁸⁴ The renewal process required that facilities again set a series of performance commitments, just as they did when they first joined the program.

D. Membership Benefits

What benefits or privileges did facilities receive upon becoming members of Performance Track? EPA offered three types of benefits: recognition, networking opportunities, and regulatory and administrative incentives.

First, the agency gave members several forms of public recognition. EPA issued press releases and listed members on its website.¹⁸⁵ It sent letters to relevant elected officials announcing a facility’s acceptance to the program, submitted articles to trade journals, and regularly highlighted news coverage about members’ environmental management on its website.¹⁸⁶ EPA allowed members to display a Performance Track flag at their worksites and to use the program’s logo in promotional materials.¹⁸⁷ The agency created five awards that only Performance Track members could receive.¹⁸⁸ In addition, EPA eventually convinced some social investment advisory firms to use Performance Track membership as a factor in calculating company ratings.¹⁸⁹

¹⁸¹ EPA terminated the memberships of facilities that did not submit timely APRs. OPERATIONS HANDBOOK, *supra* note 22, at 6-4.

¹⁸² PROGRAM GUIDE, *supra* note 56, at 10–11.

¹⁸³ *Id.* at 11. The Operations Handbook stated: “Qualitative issues to note in the review [of the APRs] include assessment and audit results, progress toward achieving commitment goals, and extent of public outreach activities; these are typically issues to monitor but not necessarily to follow up on.” OPERATIONS HANDBOOK, *supra* note 22, at 6-2.

¹⁸⁴ PROGRAM GUIDE, *supra* note 56, at 7-3.

¹⁸⁵ *National Environmental Performance Track: Recognition*, EPA.GOV, <http://perma.cc/3C8L-C2WT>.

¹⁸⁶ *See id.* The agency also established a “Performance Track Endorser Network” that promoted the program among NGOs, trade associations, and other organizations. *National Environmental Performance Track: Performance Track Endorser Network*, EPA.GOV, <http://perma.cc/6FY-CE4Y>.

¹⁸⁷ EPA, NATIONAL ENVIRONMENTAL PERFORMANCE TRACK BROCHURE 4 (on file with the Harvard Law School Library).

¹⁸⁸ *National Environmental Performance Track: Hall of Fame*, EPA.GOV, <http://perma.cc/G2VF-HWA8> (listing five awards for 2006).

¹⁸⁹ *National Environmental Performance Track: Green Investment Firms Recognize Performance Track*, EPA.GOV, <http://perma.cc/C2SY-B7NQ>.

Second, EPA provided networking opportunities for Performance Track members. It held information sessions at which members could meet with senior EPA officials to share lessons, discuss membership incentives, and exchange ideas for improving the program.¹⁹⁰ Working with a separate non-profit entity called the Performance Track Participants Association, EPA organized an annual members' event, regional roundtables, and a mentoring program that matched current Performance Track members with potential members to facilitate the sharing of information about the application process and methods to improve environmental performance.¹⁹¹

Finally, EPA offered members various types of regulatory and administrative benefits.¹⁹² It deemed Performance Track facilities to be a low priority for routine EPA inspections¹⁹³ — those “majority of EPA inspections” that take place “when there is no specific reason to believe that a violation exists at a specific facility.”¹⁹⁴ In addition to reducing routine inspection priority, EPA allowed Performance Track members to submit less frequent and less detailed reports under the Clean Air Act's Maximum Achievable Control Technology provisions.¹⁹⁵ Member facilities that were large-quantity generators of hazardous waste were allowed to accumulate hazardous wastes on-site for as much as two times — and in some cases even three times — the normally allowable time periods.¹⁹⁶ They could also apply for permission to inspect equipment and operations susceptible to spills less frequently than otherwise required.¹⁹⁷ In addition, Performance Track members could receive expedited processing of their National Pollutant Discharge Elimination System (“NPDES”) permit renewals under the Clean Water Act.¹⁹⁸

¹⁹⁰ *National Environmental Performance Track: Networking*, EPA.GOV, <http://perma.cc/W425-UYGS>.

¹⁹¹ *Id.*; Nash & Coglianesi, *supra* note 10, at 18, 27.

¹⁹² *See National Environmental Performance Track: Regulatory and Administrative Benefits*, EPA.GOV, <http://perma.cc/Q5XG-JCEJ>.

¹⁹³ *See* Memorandum from Steven A. Herman, *supra* note 15; Memorandum from Sylvia K. Lowrance, Acting Assistant Adm'r, EPA Office of Enforcement & Compliance Assurance and Thomas J. Gibson, Assoc. Adm'r, EPA Office of Pol'y, Econ. & Innovation to EPA Reg'l Adm'rs and Enforcement Coordinators (Apr. 23, 2002) (on file with the Harvard Law School Library); Memorandum from John Peter Suarez, Assistant Adm'r, EPA Office of Enforcement & Compliance Assurance and Jessica L. Furey, Assoc. Adm'r, EPA Office of Pol'y, Econ. & Innovation to EPA Reg'l Adm'rs and Enforcement Coordinators (Oct. 29, 2003) (on file with the Harvard Law School Library).

¹⁹⁴ Memorandum from John Peter Suarez, *supra* note 193.

¹⁹⁵ National Environmental Performance Track Program, 69 Fed. Reg. 21,737, 21,745 (Apr. 22, 2004). The rule required major sources and area sources required to hold Title V permits to continue submitting semi-annual reports as required by the Clean Air Act. *Id.* at 21,742.

¹⁹⁶ *Id.* at 21,746–49; *see also* 40 C.F.R. § 262.34(a) (2010); EPA, NATIONAL ENVIRONMENTAL PERFORMANCE TRACK FACT SHEET: REDUCED SELF-INSPECTIONS FOR CERTAIN TYPES OF RCRA UNITS (2004) (on file with the Harvard Law School Library).

¹⁹⁷ Resource Conservation and Recovery Act Burden Reduction Initiative, 71 Fed. Reg. 16,862, 16,881–83 (Apr. 4, 2006). EPA officials believed that Performance Track members, because of their records of regulatory compliance and operating EMSs, would better avoid spills and other waste problems. *See, e.g., id.* at 16,881 (“It is expected that Performance Track facilities would have an EMS providing sufficient oversight to prevent and detect leaks and spills.”).

¹⁹⁸ *National Environmental Performance Track: Water Benefits*, EPA.GOV, <http://perma.cc/LS6F-D3L8>. EPA encouraged states to review Performance Track members' National Pollutant Dis-

Throughout the program's history, EPA continued to formulate additional benefits for Performance Track members.¹⁹⁹ For example, in September 2007, EPA's Office of Air and Radiation issued a proposed rule to allow facilities to make operational or structural changes without triggering the need to apply for a new or modified air permit, potentially saving facilities significant time and expense.²⁰⁰ In the preamble to its proposed flexible air permits rule, EPA stated its intention to give Performance Track members priority in applying for these flexible permits.²⁰¹ In addition, EPA considered ways to streamline the hazardous waste permitting process and offer other "members-only" regulatory incentives under its Resource Conservation and Recovery Act ("RCRA") program.²⁰²

Under most major environmental statutes, EPA is authorized to delegate implementation responsibility to states.²⁰³ Consequently, the states rather than the EPA are responsible on a day-to-day basis for granting regulatory and administrative flexibility to facilities. Recognizing states' important role in environmental implementation, EPA made extensive efforts to encourage states to offer their own regulatory and administrative incentives to Performance Track members.²⁰⁴ States varied in their willingness to support EPA's efforts to give preferential treatment for Performance Track facilities. But by September 2006, fifteen states had agreed to make such facilities a low priority for routine state inspections, although three of those states provided that benefit only to facilities that had joined a state-based program similar to Performance Track — and one

charge Elimination System ("NPDES") permits on an expedited basis as part of an EPA strategy to reduce the backlog of state environmental permitting. *See* Report on ECOS-EPA Performance-Based Environmental Programs: Proposed Initial Implementation Actions, 71 Fed. Reg. 28,026, 28,029 (May 15, 2006).

¹⁹⁹ For a description of various proposed benefits, see *National Environmental Performance Track: Benefits*, EPA.gov, <http://perma.cc/C6BE-M9LE>.

²⁰⁰ Flexible Air Permitting Rule, 72 Fed. Reg. 52,206, 52,208, 52,210 (Sept. 12, 2007). The EPA published the final flexible air permits rule only after Performance Track had been dismantled. Flexible Air Permitting Rule, 74 Fed. Reg. 51,418 (Oct. 6, 2009).

²⁰¹ Flexible Air Permitting Rule, 72 Fed. Reg. 52,206, at 52,214; *see also* *National Environmental Performance Track: Air Benefits*, EPA.gov, <http://perma.cc/Q3GL-AKQC>.

²⁰² RCRA Incentives for Performance Track Members, 72 Fed. Reg. 23,274 (Apr. 30, 2007) (indicating EPA consideration of "streamlined process for permit modifications," "performance-based standards for tanks," "[a]lternative requirements for small-quantity generators that experience episodic generation events," and "reduced duplication between RCRA and [Clean Air Act] standards").

²⁰³ *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410(a)(1) (2006); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1342(b) (2006); Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b) (2006); *see also* LAWRENCE S. ROTHENBERG, ENVIRONMENTAL CHOICES: POLICY RESPONSES TO GREEN DEMANDS 134 (2002) (noting that "much American environmental policy is still conducted at least partially at the subnational level — alternatively labeled cooperative or conjoint federalism — including the regulation of hazardous waste, industrially generated air pollution, and virtually all water pollution").

²⁰⁴ *See, e.g.*, *National Environmental Performance Track: State Programs*, EPA.gov, <http://perma.law.harvard.edu/0ZktNsZwv3d> (noting EPA's efforts to "coordinate[] closely" with states in "[d]eveloping and delivering a range of incentives that will reduce administrative burdens and encourage current and prospective program participants to boost their environmental performance").

state provided inspection relief only on a case-by-case basis.²⁰⁵ Similarly, thirty-seven states and the District of Columbia agreed to support giving hazardous air pollutant permit incentives to Performance Track facilities, while sixteen states agreed to allow Performance Track plants to store hazardous wastes on-site for extended periods.²⁰⁶ Another twelve states entered into memoranda of understanding with EPA to offer coordinated incentives to participating facilities, joint recruiting and recognition activities, and in some cases a joint application process so that facilities could apply to Performance Track and a relevant state environmental leadership program simultaneously.²⁰⁷

To put these varied forms of preferential regulatory and administrative treatment in some perspective, consider that in 2004 EPA estimated that the special treatment given to members would yield, in the aggregate, cost savings of about \$700,000 over three years from reduced monitoring costs and increased flexibility. This may seem like a large overall amount, but when divided by the number of Performance Track members at the time, the average estimated cost savings per facility totaled only about \$1,350 annually.²⁰⁸ In response to a November 2006 survey commissioned by EPA, Performance Track's regulatory incentives ranked as the least important of twelve possible motivations for joining the program,²⁰⁹ suggesting that the preferential regulatory treatment available under the program was rather insignificant to many businesses.

E. Corporate Leaders

From its founding, Performance Track was designed to attract and reward individual facilities, not necessarily their corporate parents.²¹⁰ In 2004, EPA branched out in a different direction by announcing a related program: Per-

²⁰⁵ See *National Environmental Performance Track: State By State Summary of Available Performance Track Incentives*, EPA.GOV, <http://perma.law.harvard.edu/0HsmVnASnnr>. One factor that discouraged states from making Performance Track facility inspections a low priority was that EPA evaluated state environmental agency performance based in part on the number of inspection audits the state conducted. *Id.* By not inspecting Performance Track facilities, a state's number could go down, causing its inspection programs to fare worse in EPA evaluations. *Id.* For additional information on state efforts to support Performance Track, see ENVTL. COUNCIL OF THE STATES, SURVEY OF STATE SUPPORT FOR PERFORMANCE-BASED ENVIRONMENTAL PROGRAMS AND RECOMMENDATIONS FOR IMPROVED EFFECTIVENESS: FINAL REPORT 1, 15–16 (on file with the Harvard Law School Library).

²⁰⁶ *National Environmental Performance Track: State By State Summary of Available Performance Track Incentives*, *supra* note 205.

²⁰⁷ See *National Environmental Performance Track: Performance Track/State Memoranda of Agreement (MOAs)*, EPA.GOV, <http://perma.law.harvard.edu/0DVbD6WEB13>.

²⁰⁸ National Environmental Performance Track Program, 69 Fed. Reg. 21,737, 21,749 (Apr. 22, 2004).

²⁰⁹ ABT ASSOC. INC., RESULTS OF 2006 PERFORMANCE TRACK CUSTOMER SATISFACTION SURVEY 16, 24, 27 (2007) [hereinafter 2006 SURVEY] (on file with the Harvard Law School Library).

²¹⁰ See SUMMARY OF PERFORMANCE TRACK PROPOSAL, *supra* note 128, at 1. For example, in its March 2000 proposal, EPA stated that the goal of Performance Track was “to recognize and encourage facilities that achieve better environmental performance than is required under existing regulations.” *Id.* (emphasis added).

formance Track Corporate Leaders.²¹¹ The Corporate Leaders program sought to recognize companies that had at least 25% of their U.S. operations, or at least twenty-five of their U.S. facilities, in Performance Track or a similar state environmental leadership program.²¹² Members of the Corporate Leaders program committed to increasing within five years their level of participation to 50% of their U.S. operations or to at least fifty U.S. facilities.²¹³ EPA expected members of Corporate Leaders to improve their own environmental performance as well as the environmental performance of their value chain.²¹⁴ In 2005, EPA admitted its first three members to the Corporate Leaders program: Baxter Healthcare Corporation, Johnson & Johnson, and Rockwell Collins.²¹⁵ It admitted its fourth and final Corporate Leader in 2006, Xanterra Parks and Resources.²¹⁶ Although we note here the establishment of Performance Track's Corporate Leaders program, given its limited scope we focus throughout the rest of this article on the core National Environmental Performance Track that targeted facilities.

F. Performance Track's Dissolution

When then-EPA Administrator Lisa Jackson announced her decision to end Performance Track on March 16, 2009, she offered the simple explanation that "Performance Track was developed in a different era and may not speak to today's challenges."²¹⁷ At the request of "[m]embers of Congress and stakeholders," she said she decided "to halt the current Performance Track Program with the intent of refining those concepts that can lead us to a stronger system of environmental protection."²¹⁸

In the week following Jackson's announcement, Chuck Kent, Director of EPA's Office of Policy, Economics, and Innovation, sent a memorandum to Performance Track members explaining how EPA would go about shutting down the program.²¹⁹ Performance Track facilities could continue to display Performance Track membership certificates "in recognition of past achievement," but could no longer refer to themselves as members.²²⁰ While EPA en-

²¹¹ See *National Environmental Performance Track: Performance Track Corporate Leaders*, EPA.GOV, <http://perma.law.harvard.edu/0XDBiuWSQWt>.

²¹² *Id.* The Performance Track Corporate Leaders program can be traced to the agency's earlier iterations of the "alternative track" idea. Recall that EPA originally proposed a corporate-level commitment as part of its Environmental Leadership Program. See *Environmental Leadership Program*, *supra* note 74. Richard Wells, who convened discussions about the design of the "Stewardship Track" on behalf of EPA, recalled that this tier was envisioned as a corporate-level initiative. Wells, *supra* note 134.

²¹³ *National Environmental Performance Track: Performance Track Corporate Leaders*, *supra* note 211.

²¹⁴ *Id.*

²¹⁵ LEADING CHANGE, *supra* note 141, at 11–12.

²¹⁶ See Press Release, EPA, Xanterra Parks and Resorts Earns Designation as EPA Performance Track Corporate Leader (May 9, 2006), *available at* <http://perma.law.harvard.edu/0PpFvJaRyQF>.

²¹⁷ Memorandum from Lisa P. Jackson, *supra* note 31.

²¹⁸ *Id.*

²¹⁹ Letter from Charles W. Kent, *supra* note 31.

²²⁰ *Id.*

couraged those facilities to continue “to track . . . future efforts for continuous improvement,” they did not need to submit a 2008 Annual Performance Report to the agency.²²¹ EPA also cancelled the memoranda of agreement it had established with state environmental agencies.²²² The program’s official last day was May 14, 2009, when the agency’s notice of termination appeared in the *Federal Register*.²²³

A memorandum to EPA staff one month later explained that the agency would immediately cease providing regulatory incentives.²²⁴ Performance Track members would no longer be considered a low priority for routine inspections.²²⁵ They would no longer be allowed to store hazardous waste at their facilities for extra time, self-inspect their hazardous waste storage and disposal facilities less frequently, or file certain air pollution reports less frequently than other facilities.²²⁶ Prior to ending the program, EPA had kept track of which facilities were Performance Track members and thereby eligible for regulatory benefits by flagging their names in its online regulatory compliance database.²²⁷ After the program ended, EPA removed those flags so enforcement personnel would no longer give Performance Track plants any special treatment.²²⁸

Shortly after EPA announced the end of Performance Track, in May 2009, the agency held its annual National Environmental Partnership Summit.²²⁹ In the past, the summit had served as the annual meeting of Performance Track members — a chance for facility environmental personnel involved in the program to meet face-to-face with EPA staff members.²³⁰ EPA used the May 2009 meeting instead to consider next steps for its environmental leadership programs. Two leaders of what had been the Performance Track Participants Association held a workshop on “Life After Performance Track,” proposing options for how former Performance Track members might continue certain program activities even without EPA involvement.²³¹ One option was to focus on state environmental leadership programs rather than a new national program. That effort resulted in the establishment of the Stewardship Action Council, which

²²¹ *Id.* at 2.

²²² *Id.* at 3.

²²³ Notice to Terminate the National Environmental Performance Track Program, 74 Fed. Reg. 22,741 (May 14, 2009).

²²⁴ Memorandum from Catherine R. McCabe, Deputy Assistant Adm’r, EPA Office of Enforcement & Compliance Assurance and Marcia E. Mulkey, Acting Assoc. Adm’r, EPA Office of Pol’y, Econ. & Innovation to Reg’l Adm’rs, Enforcement Coordinators, et al. (June 25, 2009) (on file with the Harvard Law School Library).

²²⁵ *Id.* at 2.

²²⁶ *Id.* at 2–4.

²²⁷ *Id.* at 4.

²²⁸ *Id.*

²²⁹ EPA, 2009 NATIONAL ENVIRONMENTAL PARTNERSHIP SUMMIT: HARNESSING THE POWER OF COLLABORATION 1 (2009) [hereinafter 2009 NATIONAL ENVIRONMENTAL PARTNERSHIP SUMMIT], available at <http://perma.cc/Y2WB-C347>.

²³⁰ See *Home*, NATIONAL ENVIRONMENTAL PARTNERSHIP SUMMIT 2006, <http://perma.law.harvard.edu/07zygkd3LBM>.

²³¹ 2009 NATIONAL ENVIRONMENTAL PARTNERSHIP SUMMIT, *supra* note 229, at 5.

today includes among its membership a number of former Performance Track members and about twenty state environmental agencies.²³²

Performance Track was not the only voluntary program then-Administrator Jackson decided to terminate. Shortly after ending Performance Track, EPA ended Climate Leaders, another high-profile EPA voluntary program.²³³ EPA established Climate Leaders in 2002 to provide private sector managers with tools to inventory their emissions, set goals, and track reductions, and to recognize companies that met emissions reduction milestones.²³⁴ In a letter to program members announcing EPA's decision to halt the program in September 2010, then-Assistant Administrator Gina McCarthy explained that the "context in which Climate Leaders is operating is far different from when it was launched."²³⁵ She cited the agency's Mandatory Reporting Rules for greenhouse gases and climate programs run by states and environmental NGOs as examples of the new "context."²³⁶

Concerns about agency resources probably provided an additional reason for ending both Performance Track and Climate Leaders. Some staff throughout the agency held the view that voluntary programs took scarce resources away from EPA's regulatory programs. For example, shortly before announcing the termination of Climate Leaders, McCarthy told a group of EPA air advisers that in order to regulate more effectively, "voluntary programs may no longer be the priority . . . and we may want to shift resources [to regulatory programs]."²³⁷ Officials in some of EPA's regulatory offices raised similar concerns about Performance Track, questioning whether the staff time required to create special regulatory benefits for Performance Track facilities was a wise use of agency resources, especially given that the benefits applied to so few plants.²³⁸ Attorney John Walke of the Natural Resources Defense Council ("NRDC") echoed this view, arguing that in times of tight resources, voluntary initiatives inherently deprived regulatory programs of necessary funds.²³⁹

Yet despite having ended Performance Track and Climate Leaders, EPA did not terminate other major voluntary programs. On the contrary, by 2012 EPA announced the launch of the Center for Corporate Climate Leadership to "build on the successes and legacy of the former Climate Leaders program — as well as EPA's other voluntary partnership programs."²⁴⁰ The Center's main activity is an awards program that "recognizes and incentivizes exemplary cor-

²³² *Stewardship Action Council*, STEWARDSHIPACTIONCOUNCIL.ORG, <http://perma.law.harvard.edu/0NUV8EQWsoW> (displaying a list of all members of the Stewardship Action Council under the "SAC Members Map" link).

²³³ See Letter from Gina McCarthy, Assistant Adm'r, EPA, to Climate Leaders Program Members (Sept. 15, 2010) (on file with the Harvard Law School Library).

²³⁴ See *id.*

²³⁵ *Id.*

²³⁶ See *id.*

²³⁷ Robin Bravender, *EPA's Voluntary Programs Under Scrutiny as Regulatory Obligations Rise*, N.Y. TIMES (Feb. 5, 2010), <http://perma.cc/QUQ6-54ZD>.

²³⁸ See RAND CORP. ASSESSMENT, *supra* note 23, at 58 & n.23.

²³⁹ Letter from John Walke, *supra* note 27, at 9; see Bravender, *supra* note 237.

²⁴⁰ Flyer from EPA, Ctr. for Corp. Climate Leadership (on file with the Harvard Law School Library).

porate, organizational, and individual leadership in response to climate change.”²⁴¹ Given the failure of Congress to enact climate change legislation, interest in voluntary programs appears to be rising again. A recent report from the National Research Council, for example, specifically directed EPA to “utilize partnerships”²⁴² and “create incentives for sustainable behavior” through a broad range of activities beyond regulation, including “sustainable best-practice and innovation awards that are high profile and well publicized” — activities that are common to many voluntary programs and were part and parcel of Performance Track.²⁴³

II. WHAT WAS PERFORMANCE TRACK REALLY TRACKING?

The continued interest in programs like Performance Track makes it important to look back and gauge how well the program actually worked.²⁴⁴ Throughout Performance Track’s history, EPA repeatedly claimed that the program identified facilities that were among the nation’s finest performers and that in so doing it induced significant environmental improvements. How well did the program work? Did EPA actually identify and reward the true top environmental performers through Performance Track? What, if anything, distinguished those facilities that participated in Performance Track? Until now, the scant empirical research on Performance Track, both inside and outside the agency, has left the answers to these questions speculative at best.

A. *Claims of Success . . . and Skepticism*

Beginning with the agency’s first progress report on Performance Track in 2003 — entitled “Top Performers. Solid Results” — the EPA confidently proclaimed that the program worked as intended.²⁴⁵ EPA’s second annual report declared, “One of Performance Track’s key environmental benefits is its ability to promote voluntary progress on unregulated environmental issues.”²⁴⁶ Its third annual report waxed glowingly about “the program’s ability to attract and retain the nation’s top environmental performers.”²⁴⁷ In its fourth annual report,

²⁴¹ *Climate Leadership Awards*, EPA.GOV, <http://perma.law.harvard.edu/OPPAAtGw5x8J>.

²⁴² NAT’L RESEARCH COUNCIL, SUSTAINABILITY AND THE U.S. EPA 107 (2011) (Finding 6.9).

²⁴³ *Id.* at 104.

²⁴⁴ See Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 UNIV. ILL. L. REV. 1111, 1114 (2002) (observing that “empirical analysis provides decision makers and scholars with the means for making more informed choices”); Cary Coglianese & Lori D. Snyder Benneer, *Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making*, in DECISION MAKING FOR THE ENVIRONMENT: SOCIAL AND BEHAVIORAL SCIENCE RESEARCH PRIORITIES 246 (Garry D. Brewer & Paul C. Stern eds., 2005) (“Obtaining systematic answers to the question of whether environmental policies work is vital”); Cary Coglianese, *Evaluating the Impact of Regulation and Regulatory Policy*, OECD EXPERT PAPER NO. 1 at 7 (Aug. 2012), available at <http://perma.cc/R2VU-EMFW> (“To know how well regulation and regulatory policy actually work in practice, governments [need] to conduct more ex post evaluation.”).

²⁴⁵ See TOP PERFORMERS, *supra* note 124, at 2.

²⁴⁶ BUILDING ON THE FOUNDATION, *supra* note 141, at 7.

²⁴⁷ GROWTH & RENEWAL, *supra* note 142, at 3.

EPA proclaimed, “Performance Track motivates facilities to go beyond legal requirements . . . [and] improves on the level of environmental protection achievable by regulations alone.”²⁴⁸ Then-EPA Administrator Stephen Johnson was quoted in a promotional flyer claiming that “Performance Track members are at the forefront of innovation and environmental stewardship.”²⁴⁹ In EPA’s sixth annual report, the agency claimed that Performance Track “drives environmental excellence,”²⁵⁰ with then-Administrator Johnson continuing to refer to members as “leading companies.”²⁵¹

Even in EPA’s final program report, released after Performance Track ended, EPA characterized the “core value” of the program as “[c]ontinuous improvement . . . for both members and the program itself.”²⁵² The agency lauded the cumulative results reported by member facilities, specifically:

- 2.87 billion gallons in water use reductions,
- 366,948 metric tons of carbon dioxide equivalent reductions in greenhouse gas emissions,
- 1.26 million tons of reduced non-hazardous waste generation,
- 68,146 tons of hazardous waste eliminated, and
- 24,864 acres of land conserved.

The final progress report noted that many of these achievements were in areas “not covered by current regulations.”²⁵³

Against EPA’s claims that Performance Track recognized top performers and helped spur major environmental results, voices within the environmental community and within the agency itself began to raise questions at least as early as five years into the program’s operation. In a November 2005 letter to the agency, NRDC attorney John Walke cautioned that “EPA’s evaluation of Performance Track accomplishments must be careful not to confuse correlation with causation.”²⁵⁴ The mere fact that Performance Track members may have achieved environmental improvements does not necessarily mean that they

²⁴⁸ LEADING CHANGE, *supra* note 141, at 5.

²⁴⁹ EPA, REACHING FOR A BRIGHTER FUTURE 1 (2007) (on file with the Harvard Law School Library). This same flyer also said that the program led “the way toward a cleaner, safer environment.” *Id.*

²⁵⁰ EPA, PERFORMANCE TRACK SIXTH ANNUAL PROGRESS REPORT 1 (2008) (on file with the Harvard Law School Library).

²⁵¹ Press Release, EPA, New EPA Report Shows Environmental Achievements of Performance Track (May 14, 2008), *available at* <http://perma.law.harvard.edu/0GWNbvLuqi1>. Similarly, the EPA manager who oversaw the Performance Track program referred to its members as “high-performing facilities.” FIORINO, *supra* note 2, at 148. OSHA has used strikingly similar language to describe worksites in its Voluntary Protection Programs. For example, in a statement to the U.S. House of Representatives Subcommittee on Workforce Protections, OSHA’s Deputy Assistant Secretary called VPP participants “models for effective employee protection . . . the best of the best.” *Statement by Jordan Barab, Deputy Assistant Sec’y for U.S. Dep’t of Labor Occupational Safety & Health Admin. Before the Subcommittee on Workforce Protections, Comm. on Education and the Workforce, U.S. House of Representatives, June 28, 2012*, U.S. DEP’T OF LABOR, <http://perma.law.harvard.edu/0RmytqeHQhh>.

²⁵² PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note 21, at 1.

²⁵³ *Id.* at 1–3.

²⁵⁴ Letter from John Walke, *supra* note 27, at 6.

made their improvements *because of* Performance Track. As Walke urged in his letter, “EPA should fairly and objectively evaluate the reductions, the reasons for them, whether they would have occurred anyway, and whether they were caused by performance incentives or program membership.”²⁵⁵

In January 2006, the non-profit advocacy group Environmental Integrity Project (“EIP”) joined with about thirty local and regional environmental organizations to support Walke’s letter.²⁵⁶ EIP argued further that some Performance Track members were delivering less than top performance — noting that fourteen members “appear to have violated one or more federal environmental laws” at least six times in the previous twelve quarters.²⁵⁷ EIP also issued a briefing paper that argued that “some of the manufacturers reaping Performance Track rewards are releasing *more* toxic pollution to the environment than they were before signing up for the program.”²⁵⁸ EIP questioned the wisdom of relaxing inspections and reporting requirements for facilities that were increasing their pollution levels.²⁵⁹

At about the same time, EPA’s Office of Inspector General (“IG”) opened an investigation into Performance Track and, in a report issued in 2007, reached conclusions similar to those expressed by the environmental groups. The IG concluded that EPA could not demonstrate that the program led to significant environmental improvements.²⁶⁰ It also found that most members failed to achieve the commitments they made in their applications.²⁶¹ Out of a random sample of forty Performance Track facilities, the IG found that most of these members had lower toxic releases than the average levels for facilities in the same sectors.²⁶² However, it called attention to its finding that some Performance Track members’ performance was worse than average for their sectors.²⁶³ The IG worried that, “while program criteria may deem an applicant a top performer, this designation may not hold true when the facility is compared with other facilities in its sector.”²⁶⁴ The IG feared that the existence of “underperforming” facilities in the program would undermine EPA’s credibility and diminish the value of Performance Track’s “brand.”²⁶⁵

²⁵⁵ *Id.*

²⁵⁶ Letter from Eric Schaeffer, *supra* note 27, at 1.

²⁵⁷ *Id.*

²⁵⁸ ENVTL. INTEGRITY PROJECT, WRONG TRACK? SOME PERFORMANCE TRACK FACILITIES REPORT INCREASED LEVELS OF TOXIC POLLUTION 1 (2006) (emphasis in original), *available at* <http://perma.cc/J3T6-PBF6>.

²⁵⁹ *Id.* at 2.

²⁶⁰ P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 11–15.

²⁶¹ *Id.* at 18 (noting just two of the thirty facilities assessed met all commitments in a three-year commitment cycle).

²⁶² *Id.*

²⁶³ *Id.* at 23 (“[S]ome facilities had more compliance problems or released more pounds of toxic substances than the average for their peers.”).

²⁶⁴ *Id.* at 25.

²⁶⁵ *Id.* at 23 (“The presence of underperforming facilities [in this leadership program] reduces the integrity and value of the Performance Track brand.”). The U.S. Government Accountability Office (“GAO”) has raised similar concerns about OSHA’s VPP, finding that “some sites that no longer met the definition of an exemplary worksite remained in the VPP.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-395, OSHA’S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVER-

EPA disputed the criticisms from both the environmentalists and the IG. For example, in a letter EPA sent to EIP in March 2006, the agency questioned EIP's claims about increases in toxic emissions from Performance Track facilities.²⁶⁶ The agency asserted that some, though by no means all, of the pollution increases at Performance Track facilities stemmed from production increases at facilities as well as changes in estimation techniques²⁶⁷ — with the implication being that at least some of these increases could not be said to stem from environmental irresponsibility. EPA also publicly disputed some of the more critical aspects of the IG's report, contending that parts of the IG's analysis suffered from poor data and methods.²⁶⁸ EPA did not dispute the IG's finding that most facilities did not meet their stated environmental commitments, but the agency did characterize many facilities' commitments as explicitly ambitious "stretch goals" that could not reasonably be expected to be fully achieved.²⁶⁹ The agency noted that, altogether, over half of the environmental commitments made by the facilities studied by the IG had been met, something the agency considered "an indication of significant success."²⁷⁰

Regardless of the agency's response, Performance Track's critics forcefully raised the question of whether Performance Track plants truly represented what Administrator Browner had called "models of a higher level of environmental achievement."²⁷¹ Performance Track's critics gained widespread attention when, in April 2008, NBC Nightly News aired a report on the program's members, focusing specifically on the question of "How green are these firms really?"²⁷² The report quoted Representative Edward Markey as stating that "undeserving companies are now being given a recognition which they did not earn."²⁷³ In the words of NBC reporter Lisa Meyers, the controversy over Performance Track raised "questions about how carefully EPA screens members of the program."²⁷⁴ In December 2008, the *Philadelphia Inquirer* ran a front-page story,

SIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY 0 (2009). GAO found that "for 12 percent of the sites, at least one of their 3-year average injury and illness rates was *higher* than the average industry and illness rates for their industries." *Id.* at 14 (emphasis added).

²⁶⁶ Letter from Jay Benforado, Dir., Nat'l Ctr. for Env'tl. Innovation, EPA, to Eric Schaeffer, President, Env'tl. Integrity Project 3 (Mar. 3, 2006) (on file with the Harvard Law School Library).

²⁶⁷ *Id.*

²⁶⁸ See Memorandum from Brian F. Mannix, *supra* note 30, at 29–38. The EPA response asserted, for example, that the initial IG draft report included incorrect compliance information for one Performance Track facility and that another facility included in the IG's analysis had reported its toxic release data incorrectly. *Id.* at 36–37.

²⁶⁹ *Id.* at 30.

²⁷⁰ *Id.*

²⁷¹ *EPA Rewards Top Green Performers*, GREENBIZ (Jul. 2, 2000), <http://perma.cc/WU8H-VVK8>. Even an EPA-funded report on Performance Track conducted by the RAND Corporation after the program's termination noted that EPA failed to specify membership criteria adequately, making it vulnerable to criticisms that some facilities in the program "[w]ere [u]ndeserving of [m]embership." See RAND CORP. ASSESSMENT, *supra* note 23, at 15, 55.

²⁷² *NBC Nightly News: Feds Giving Suspect Green Rewards* (NBC television broadcast Apr. 20, 2008), available at <http://perma.cc/L6VR-AEJT>.

²⁷³ *Id.*

²⁷⁴ *Id.*

under the headline “Green Club an EPA Charade,” that raised similar questions about Performance Track’s credibility.²⁷⁵

B. Performance Track’s Screening: How Well Did EPA Track?

In order to understand what types of facilities Performance Track actually tracked, we begin by considering what EPA was able to track through its application screening process. After all, if Performance Track sought to attract “top environmental performers,” EPA needed a screening process that could distinguish between the strongest environmental performers and those facilities with average or below-average performance. To assess the adequacy of EPA’s process, we consider both what EPA’s screening *could* determine as well as the results it actually yielded. We report data comparing applicants accepted and not accepted into the program, as well as data on the types of facilities that called themselves Performance Track members. We find that the agency was generally able to determine whether facilities had met the stated membership criteria, but was never able to compare facilities with their in-sector peers. That said, we do find that, based on Toxic Release Inventory (“TRI”) measures, the facilities admitted into the program tended to have lower toxic releases than those applicants the agency turned away. However, once these TRI data are weighted by the risk to the community based on the quantity and toxicity of the pollutants discharged, Performance Track facilities actually tended to pose disproportionately higher risks to their communities than did non-members.

Performance Track members were a rather diverse lot. Altogether, member facilities came from seventeen industrial sectors: thirteen manufacturing sectors and four non-manufacturing sectors.²⁷⁶ EPA reported that, as of July 2007, over 60% of Performance Track’s membership came from seven manufacturing sectors: electronic and other electrical equipment (13%); chemical products (12%); wood products, paper, and printing (8%); pharmaceutical products (8%); transportation equipment and supplies (7%); rubber and plastics products (7%); and

²⁷⁵ Sullivan & Shiffman, *supra* note 32. Similar media charges have been leveled against OSHA’s VPP. In a series of articles entitled “Model Workplaces, Imperiled Workers,” the Center for Public Integrity, a nonpartisan investigative news organization, documented workers who had been seriously injured while working at VPP sites. The Center found that eighty workers had been killed in workplace accidents at VPP sites since 2000 and, during the period 2000–2008, approximately 13% of VPP sites had safety performance worse than comparable businesses in the same industry. Chris Hamby, “Model Workplaces” *Not Always So Safe*, CTR. FOR PUB. INTEGRITY (Jul. 7 2011), <http://perma.law.harvard.edu/0v2P2gUQL7B>; *see also* Mona Iskander, *Safety Matters: Injuries and Fatalities at ‘Model’ Workplaces*, NEED TO KNOW ON PBS (July 8, 2011), <http://perma.cc/YJ6U-G28W> (video feed starting at 02:34) (noting that “evidence suggests that once a worksite achieves VPP designation, OSHA seldom takes it away, even after extremely serious accidents have occurred”); Celeste Monforton, *No Shortage of Ideas from OSHA Staff to Improve Oversight of Agency’s Voluntary Protection Program*, PUMP HANDLE (Aug. 22, 2012), <http://perma.law.harvard.edu/0T2ivZgZBpk> (noting that “serious questions have been raised about the integrity of the program and whether all VPP sites genuinely deserve a ‘model workplace’ designation.”).

²⁷⁶ *National Environmental Performance Track: Members by Sector*, EPA.GOV, <http://perma.cc/U98S-7MRR>.

medical equipment and supplies (6%).²⁷⁷ In some of the later application rounds, a notable number of non-manufacturing facilities joined the program, including: “miscellaneous” sites (e.g., corporate headquarters and government facilities) (8%); arts, recreation, and entertainment sites (7%); and research and educational facilities (5%).²⁷⁸ Strikingly, by the time the program ended, about 10% of Performance Track facilities were owned and operated by government entities, the bulk of these being federal facilities including post offices.²⁷⁹

Performance Track facilities were geographically distributed throughout the United States. As of July 2007, EPA Region 4 (Southeastern United States) had the largest number of members (seventy-seven), while EPA Region 8 (Rocky Mountains) had the fewest (twenty-two).²⁸⁰ California was the state with the largest number of facilities (thirty-nine), followed by Texas (thirty-four), New York (twenty-four), Georgia (seventeen), Pennsylvania (seventeen), Puerto Rico (seventeen), and New Jersey (sixteen).²⁸¹ Performance Track facilities tended to be located in more densely populated communities with relatively low poverty levels and relatively high levels of education.²⁸² This demographic distribution of Performance Track facilities was about the same as the demographic distribution of regulated entities generally.²⁸³ The only characteristic that stood out from the norm was that a slightly higher proportion of rural facilities could be found in Performance Track than in the broader universe of facilities.²⁸⁴

Performance Track facilities were also fairly diverse in terms of size. About 22% of all member facilities had fewer than 100 employees, and 14% had fewer than 50.²⁸⁵ The remaining facilities were distributed as follows: firms with 100–499 employees (32%); those with 500–1,000 employees (20%); and those with over 1,000 employees (26%).²⁸⁶

²⁷⁷ *Id.*

²⁷⁸ *Id.* By comparison, the top five sectors participating in OSHA’s VPP are chemicals (22%), utilities (13%), professional services (7%), couriers (U.S. Postal Service) (6%), and transportation equipment (6%), which together make up 54% of VPP worksites. *Top 15 Industries in the VPP*, OSHA.GOV, <http://perma.law.harvard.edu/0jf5M4nwsc8> (reporting data on worksites in the federal VPP as of September 30, 2013).

²⁷⁹ PTrack Member Data, *supra* note 10. When Performance Track ended in 2009, its membership included thirty-seven U.S. post offices (nearly 7% of total membership). *Id.* Similarly, 160 VPP sites (or about 10% of the total membership in OSHA’s VPP) are federal facilities, including seventy-five U.S. post offices. OSHA, *Federal Government Active VPP Sites – as of 2/18/13* (on file with the Harvard Law School Library).

²⁸⁰ *National Environmental Performance Track: Members by EPA Region*, EPA.GOV, <http://perma.cc/LBC5-ZLJT>.

²⁸¹ *National Environmental Performance Track: Members by State*, EPA.GOV, <http://perma.cc/BVZ8-W35Q>.

²⁸² See BOOZ ALLEN HAMILTON & HARVARD UNIV. CTR. FOR BUS. & GOV’T, PERFORMANCE TRACK DATABASE OVERVIEW: FINDINGS REPORT 16–17 (2005) [hereinafter PERFORMANCE TRACK DATABASE OVERVIEW] (data from this report came from Performance Track facility applications through Round 7, or February 2004).

²⁸³ *See id.*

²⁸⁴ *See id.* at 16. EPA provided demographic data on about 740,000 facilities nationwide. *Id.*

²⁸⁵ *See* LEADING CHANGE, *supra* note 141, at 24.

²⁸⁶ *Id.*

Many, but by no means all, Performance Track facilities were highly regulated. As of May 2005, about half of all Performance Track facilities (47%) held major environmental permits under the Clean Water Act, Clean Air Act, or Resource Conservation and Recovery Act.²⁸⁷ About 30% had been designated large quantity hazardous waste generators under RCRA; 25% had been designated major sources of air pollution; 9% were major sources of water pollution; and 7% were hazardous waste treatment, storage and disposal facilities.²⁸⁸ This still means, though, that half of all Performance Track facilities did not hold any major environmental permits at all.²⁸⁹

At least for those facilities that were covered under major environmental permits, Performance Track's critics asked whether — instead of leading the way toward ever-higher levels of environmental performance — EPA was offering regulatory relief to facilities that did not truly deserve it.²⁹⁰ Their questions and criticisms inevitably became more salient whenever EPA announced plans to expand Performance Track by offering more substantial regulatory incentives,²⁹¹ raising the question of whether the information EPA collected through its application process allowed it to screen adequately for “top” performance.²⁹² Was Performance Track just environmental “window-dressing” as Lisa Jackson had claimed before she became EPA Administrator?²⁹³

Recall that for facilities to become members, EPA required them to have a clean compliance record, adopt a comprehensive EMS, commit to beyond-compliance environmental goals, and engage with their communities about their environmental activities.²⁹⁴ The agency screened applicants based on whether they cleared a compliance check and whether they adequately completed a twenty-nine page application form. The details of EPA's application and review process may seem rather trivial on first impression, but what EPA did to screen applications is in fact crucial in how well it could identify top environmental performers through the Performance Track program.

EPA accepted applications twice each year during designated application periods. Once a facility submitted a completed application, the agency committed to passing judgment on it within ninety days.²⁹⁵ EPA retained an independent contractor, Industrial Economics, Inc. (“IEC”), to help with the application

²⁸⁷ See PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 15.

²⁸⁸ See *id.*

²⁸⁹ See *id.*

²⁹⁰ See Letter from John Walke, *supra* note 27, at 6, 9; ENVTL. INTEGRITY PROJECT, WRONG TRACK? SOME PERFORMANCE TRACK FACILITIES REPORT INCREASED LEVELS OF TOXIC POLLUTION, *supra* note 258; P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 11–15, 18.

²⁹¹ See Report on ECOS-EPA Performance-Based Environmental Programs: Proposed Initial Implementation Actions, 71 Fed. Reg. 28,026, 28,026–30 (May 15, 2006) (describing the proposal to improve implementation of Performance Track and similar programs at the state level).

²⁹² See Fei Yu & Cary Coglianese, *Recognizing and Encouraging Environmental Leaders: An Assessment of Performance Track's Selection Process*, in BEYOND COMPLIANCE, *supra* note 10, at 84.

²⁹³ See Sullivan & Shiffman, *supra* note 32.

²⁹⁴ See Yu & Coglianese, *supra* note 292, at 85.

²⁹⁵ See *National Environmental Performance Track: Implementation*, EPA.GOV, <http://perma.cc/YD6X-96CS>.

review process. IEc reviewed applications for completeness and accuracy, identifying issues needing EPA's attention.²⁹⁶ IEc frequently encountered application problems, large and small. For example, in its review of the seventh round of applications in 2004, IEc discovered that some applicants included information that was incorrect or simply neglected to answer certain questions at all.²⁹⁷ EPA Performance Track officials and regional Performance Track coordinators, with input from state environmental departments, determined the fate of all applications.²⁹⁸ When deficiencies were identified in application information, regional Performance Track coordinators were tasked with working with facilities to address the problems.²⁹⁹

Beyond reviewing applications, EPA also screened each applicant for compliance with applicable federal, state, and local environmental regulations.³⁰⁰ As noted, to be eligible for Performance Track, a facility's owner or operator must not have had, within designated time periods prior to applying, any conviction or guilty plea under criminal provisions of environmental laws nor any major civil violation of environmental standards.³⁰¹ EPA undertook three steps to screen for regulatory compliance. First, agency officials undertook an initial screen for the facility within EPA's enforcement databases.³⁰² Second, Performance Track staff double-checked with staff at EPA program offices and at the Department of Justice to make sure nothing was missed.³⁰³ Finally, EPA consulted with staff within its own Office of Enforcement and Compliance Assurance to confirm the applicant had no other outstanding compliance issues.³⁰⁴

For obvious reasons, we could not independently assess the adequacy of EPA's screening for regulatory compliance; the publicly available compliance databases are less comprehensive than the agency's internal (and not publicly available) system and records. But we were able to access the agency's Performance Track Approval Status Database to determine whether EPA's screening succeeded in turning up deficiencies in applications based on the remaining three membership requirements: EMSs, performance goals, and community engagement. We reviewed in detail the first four years of Performance Track's operation, August 2001 through February 2004, and we also examined summary data available on the agency's screening through 2008.³⁰⁵

²⁹⁶ Yu & Coglianese, *supra* note 292, at 85.

²⁹⁷ See *id.* at 85–86 (providing a summary table of errors contained in applications).

²⁹⁸ See *National Environmental Performance Track: Implementation*, *supra* note 295.

²⁹⁹ See generally Memorandum from Steven A. Herman, *supra* note 15 (discussing the EPA review process for Performance Track applications and how the agency addressed the problem of incomplete compliance data for a particular applicant).

³⁰⁰ See *National Environmental Performance Track: Sustained Compliance*, EPA.gov, <http://perma.cc/XY85-2YZM>.

³⁰¹ PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 8.

³⁰² See LEADING CHANGE, *supra* note 141, at 24.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See generally Yu & Coglianese, *supra* note 292, at 84 (reviewing information gathered on application rounds for membership in Performance Track from April 2001 to February 2004).

One thing became apparent at the outset: it was relatively easy for facilities to gain acceptance into the program. Of those facilities that applied to Performance Track throughout its history, the agency admitted 75% (783 out of 1,044 applications).³⁰⁶ Of those facilities rejected or withdrawn even before being formally admitted, compliance problems were by far the most common reason given by the agency for keeping these facilities out (31%).³⁰⁷ Only 6% of applicants were turned away for problems with their environmental management systems, such as their failure to have an independent assessment.³⁰⁸ Another 7% failed to develop or specify adequate environmental commitments, typically because they lacked sufficient measures of past performance to be able to provide required baseline performance data or failed to provide an adequate basis for normalizing performance data over time.³⁰⁹ For about 3% of the facilities that applied but were not admitted, the reason had nothing to do with Performance Track's entry criteria, but rather related to miscellaneous factors ranging from the sale of the facility, the reorganization of the facility's company, or even an application apparently submitted by mistake.³¹⁰ For a substantial portion of facilities not accepted into the program (35%), EPA provided in its Approval Status Database no reason whatsoever for the facility's rejection.³¹¹

Although EPA's screening process identified relatively few problems with applicants' EMSs, during Performance Track's first eighteen months, EMS deficiencies were among the agency's primary reasons for asking members to withdraw from the program.³¹² The application screening process only infrequently revealed EMS problems, but they showed up with more regularity when EPA visited Performance Track plants. Of the twenty-four facilities visited in 2003, for example, EPA found fifteen had substandard EMSs.³¹³ EPA responded by asking facilities to withdraw and by establishing a new membership requirement that applicants obtain third-party certification that their EMS met Performance Track criteria. Once EPA imposed that certification requirement on applicants, EMS problems declined.³¹⁴

EPA worked extensively with facilities to ensure that their applications would meet program standards. The application process became iterative, with

³⁰⁶ See PTrack Member Data, *supra* note 10. Gaining admission to OSHA's VPP has also been easy. OSHA regional offices track the number of facilities that apply to VPP and are approved as members. Some regions have collected these data only sporadically, but four of OSHA's ten regions have tracked the number of applications and approvals for most years since 1982, when VPP began. These regions report approval rates of 83% to 99%. OSHA, *Number of VPP Applications Received/Accepted by OSHA Regions - CY 1982 - CY 2013 (as of 2/28/13)* (on file with the Harvard Law School Library). By comparison, consider that elite colleges can have acceptance rates closer to 10%. Jenna Johnson, *Colleges Announce 2013 Acceptance Rates*, WASH. POST, April 1, 2013, <http://perma.cc/P63G-4DZU>.

³⁰⁷ See PTrack Member Data, *supra* note 10.

³⁰⁸ See *id.*

³⁰⁹ See *id.*; see also Yu & Coglianese, *supra* note 292, at 86.

³¹⁰ See PTrack Member Data, *supra* note 10.

³¹¹ See *id.*; see also Yu & Coglianese, *supra* note 292, at 86.

³¹² TOP PERFORMERS, *supra* note 124, at 6.

³¹³ BUILDING ON THE FOUNDATION, *supra* note 141, at 5.

³¹⁴ See PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 3; see also Yu & Coglianese, *supra* note 292, at 85-86.

IEC and EPA identifying problems, EPA informing facilities about application deficiencies, and facilities responding to feedback. An application might initially have been submitted without, for instance, appropriate normalizing factors for measuring a facility's environmental improvement over time. Absolute improvements represented the actual changes in a facility's environmental impact, measured in units such as pounds of toxic pollution, while normalized improvements adjusted those changes to take into account increases or decreases in a facility's production.³¹⁵ Normalized improvements sought to measure the "eco-efficiency" of a facility's operations (that is, its environmental impact relative to its level of production).³¹⁶ If an application was submitted without suitable normalizing factors, EPA worked with the facility to determine appropriate measures. When applications proved deficient in this way, or in other ways, the agency worked with applicants to obtain missing data or correct problems. Many applications received more than one round of iteration during the screening process.³¹⁷ In this way, the agency's screening process provided a reasonable basis for EPA to ensure that admitted facilities met the letter of Performance Track's entry requirements — albeit with the agency's coaching.

Meeting Performance Track's entry requirements did not necessarily mean that a facility was a "leader" or "top performer" in the sense of having better environmental performance than other similar facilities. Nothing in the application process called for anyone to make any comparison of the applicant facility with other facilities in the same sector. However, after the fact, we can report on just such a comparison made as part of our larger study of Performance Track.

When the toxic releases from the facilities that applied to Performance Track from June 2000 to February 2004 were analyzed, it appeared that EPA succeeded in choosing the "better" facilities — at least from among those that applied to the program.³¹⁸ That is, the facilities admitted to the program released fewer toxic chemicals than did facilities that the EPA rejected. Of course, the agency never used toxic release data as a membership criterion. However, all users of large quantities of toxic chemicals are required to report their releases as part of TRI as mandated by the Emergency Planning and Community Right-to-Know Act;³¹⁹ as a result, we can look to the TRI data as a readily available proxy for environmental performance across different facilities, just as other researchers have done in other contexts.³²⁰ Our results, shown in Table 1, below, suggest that EPA's screening process appears to have effectively (even if unintentionally) discriminated between applicants on the basis of absolute

³¹⁵ See, e.g., EPA, GUIDANCE FOR NORMALIZING ENVIRONMENTAL PERFORMANCE RESULTS 1, 3–4 (2004), available at <http://perma.cc/N2N4-QM54>.

³¹⁶ Yu & Coglianese, *supra* note 292, at 86.

³¹⁷ See Nash & Coglianese, *supra* note 10, at 24–25 (discussing trends in Performance Track applications, including that "[p]roblems . . . ar[o]se in nearly every aspect of the application").

³¹⁸ Fei Yu conducted the data collection and analysis reported in this paragraph and Table 1. See Yu & Coglianese, *supra* note 292, at 94.

³¹⁹ See 42 U.S.C. § 11023(a) (2006).

³²⁰ Cf. Lori S. Bennear & Cary Coglianese, *Measuring Progress: Program Evaluation of Environmental Policies*, 47 ENV'T 22, 33 (2005).

levels of toxic releases.³²¹ As indicated by the negative sign on the coefficient for “Admitted Status” in each of the three separate regression models summarized in Table 1, each of which used different sets of control variables,³²² Performance Track members admitted during the program’s first several application rounds had significantly lower overall TRI releases compared with the facilities that applied to the program during the same period but were not admitted.³²³ In two of the models, the average applicant admitted into Performance Track had three million pounds fewer TRI releases than the average applicant not admitted into the program.

TABLE 1. TRI RELEASES FROM ADMITTED VERSUS NOT ADMITTED APPLICANTS

	Model		
	1	2	3
Admitted Status ³²⁴	-851,801	-3,043,971	-3,047,569
Control variables I ³²⁵		Yes	
Control variables II ³²⁶		Yes	Yes
R-squared	0.0247	0.1088	0.1071
Number of Observations ³²⁷	3022	1574	1574

A comparison of admitted and non-admitted facilities cannot, however, answer the question of whether Performance Track facilities out-performed similar facilities *that did not apply to the program*. Are Performance Track

³²¹ Yu & Coglianese, *supra* note 292, at 91 tbl.5.4.

³²² The coefficient of “Admitted Status” reports the difference in TRI releases (in pounds) between Performance Track members and non-members, the latter defined as applicants who were rejected or withdrew their application. A negative coefficient means that that applicants admitted to the program had lower TRI releases. All the coefficients were significant at the 5% level. *Id.* at 90–91.

³²³ “Control Variables I” included each facility’s two-digit Standard Industrial Classification code, the size of its parent company (that is, the number of U.S. facilities owned by the parent), the EPA region in which the facility was located, and the percentage of the population within a five-mile radius of the facility that lived below the poverty line. *Id.* at 89 n.6.

³²⁴ “Control Variables II” included the facility’s size (based on number of employees) and the percentage of the population within a five-mile radius of the facility that held a college degree. *Id.*

³²⁵ Only about 200 facilities had TRI data for the period under analysis, but the analysis drew on a fifteen-year panel dataset containing TRI emissions from 1988–2002. As such, each facility’s TRI emissions for each year constituted a separate observation, thus explaining why there can be over 3,000 observations for a program that has fewer than 500 businesses as members. *Id.* at 88–89.

³²⁶ The regression analyses broke down the control variables into two classes: “Control Variables I” and “Control Variables II.” *Id.* at 91 tbl. 5.4.

³²⁷ *Id.* Panel data for TRI releases were available for fifteen years from 1988 to 2002. Similar tests using alternative environmental performance measures did not yield statistically significant differences between admitted facilities and rejected or withdrawn facilities. The alternative measures included risk-weighted TRI releases and water discharge measures. *Id.* at 89, 91.

facilities truly the leaders in their fields? Perhaps surprisingly, given all the agency's rhetoric about recognizing "top performers," the screening process was entirely unable to answer this central question. The only facilities submitting data on environmental achievements and commitments were the *applicants* to the program. Without comparable data on the environmental performance of other similar firms that did not apply, the agency had no basis for claiming to have identified and recognized "top" performers or environmental "leaders."³²⁸

In its 2007 study, the EPA's Office of Inspector General attempted to make a "rough" comparison of the compliance records and toxic releases of randomly selected Performance Track facilities with the averages for each facility's corresponding industrial sector.³²⁹ The IG found that twenty-two out of twenty-seven facilities it examined had lower toxic releases than the average facility in their sector, and twenty-two out of thirty-five facilities outperformed the average firm in terms of compliance.³³⁰ EPA interpreted the IG's results to "confirm what [the agency] knew to be true — Performance Track members lead their peers in environmental performance."³³¹ But merely being "better than average" is hardly the same as being a "top performer." Unfortunately, the IG's report did not indicate how much better than average the Performance Track facilities it examined were, so the IG's report cannot confirm that such facilities were top performers, or just slightly above the mean. The implications of the IG's results were more disconcerting if they generalize across the program, as they would indicate that a non-trivial portion of Performance Track members performed at levels *worse than* their sector's average. The IG found that 37% of the Performance Track facilities it examined had experienced more compliance problems than the average firm within each applicable sector, while 19% of the facilities released more toxic pollutants than their sector average.³³²

The ability to make a credible claim that Performance Track attracted top performers becomes still harder once the health risks associated with toxic releases are taken into account. Not every release of toxic pollutants poses the same level of risk to the public. For this reason, EPA has developed a Risk-Screening Environmental Indicators ("RSEI") model that estimates the health risks associated with facilities' TRI releases.³³³ RSEI takes into account the amount of chemicals a facility releases, as well as the toxicity of those chemicals, their movement throughout the environment, the probable pathways to individual exposure, and the number of individuals exposed.³³⁴ The RSEI model

³²⁸ *Id.* at 95 ("EPA is inherently unable to discern the true top performers with the information it gathers during the Performance Track application process, since that information is not gathered from similar facilities that have not applied to Performance Track.").

³²⁹ P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 24.

³³⁰ *Id.*

³³¹ Memorandum from Brian Mannix, *supra* note 30.

³³² P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 24–25.

³³³ See PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 3. This database analysis by Booz Allen Hamilton included Performance Track facilities through Round 7, February 2004. The RSEI rankings were based on the 2000 release of TRI data.

³³⁴ *Risk Screening Environmental Indicators*, EPA.GOV, <http://perma.law.harvard.edu/09JP1Do8Agw>.

does not indicate a facility's absolute risk level, but instead measures its relative risk compared to other facilities by ranking facilities on the basis of the pounds of chemicals they release and generating a score that takes into account such factors as toxicity and population exposure estimates.³³⁵

TABLE 2. RELATIVE RISK OF PERFORMANCE TRACK FACILITIES³³⁶

Quartile	RSEI Rank by Pounds		RSEI Rank by Score	
1	27	21%	26	20%
2	19	15%	20	16%
3	28	22%	46	36%
4	55	43%	37	29%
Total	129		129	

Since Performance Track facilities that reported chemical releases pursuant to TRI protocols were a subset of all TRI facilities, RSEI can be used to compare the risks associated with releases from a subset of Performance Track facilities with risks posed by other facilities in the RSEI database.³³⁷ Table 2, above, shows the distribution of 129 Performance Track members based on their RSEI rankings compared to the RSEI rankings of all other facilities reporting under TRI. Facilities with the lowest relative risk ("best") ranked in the first quartile; those with the highest relative risk ("worst") ranked in the fourth quartile. The data indicate that only about 20% of active member facilities in 2004 ranked in the first quartile for the lowest relative risk. By contrast, more than half ranked in the bottom two quartiles (that is, they posed higher risk) based on pounds of releases and overall score. Overall, this RSEI analysis indicates that Performance Track facilities posed a slightly higher-than-average risk to public health compared to all facilities subjected to EPA's TRI requirements.

³³⁵ See *id.*

³³⁶ PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 17–18. Percentages do not sum to 100% due to rounding.

³³⁷ At our direction, a team from Booz Allen Hamilton ("BAH"), a strategy consulting firm, examined the RSEI rankings of Performance Track facilities. BAH generated a list of Performance Track facilities using EPA's Facility Registry System ("FRS"). The FRS is EPA's system for assigning identification numbers to various sites that it regulates, whether permitted facilities, hazardous waste cleanup sites, or other locations falling under the agency's jurisdiction. *Facility Registry System*, EPA.GOV, <http://perma.cc/P82B-VJYG>. In February 2004, when BAH collected information on Performance Track facilities, the FRS included 391 facilities designated as Performance Track members. This number was higher than the number of facilities EPA Performance Track staff counted as members because in several cases a "facility" that EPA Performance Track staff members considered to be a single facility was assigned several FRS identification numbers. For example, the Performance Track website listed the Georgia facility of Collins and Aikman Floor Covering with one address, but the FRS showed three different Collins and Aikman "facilities" at this same address. PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 11. The RSEI analysis shown in Table 2 and accompanying text was based on 129 of these 391 facilities (33%) that had risk-ranking information available in RSEI.

Of course, this does not necessarily mean that Performance Track facilities are less environmentally responsible than non-member facilities. After all, RSEI only estimates the risks from toxic releases, while Performance Track explicitly sought to address a much broader range of environmental impacts.³³⁸ Moreover, the RSEI model is based on pounds of chemicals released, which means that larger and more chemical-intensive operations will naturally rank worse in RSEI relative to smaller operations that use fewer chemicals. RSEI data are not normalized by facility size, outputs, or sector, nor do the rankings reported in Table 2 reveal anything about trends in risks over time. Performance Track facilities in the two higher-risk quartiles could have been extremely well-managed facilities that were making significant strides to reduce their risks, but they may simply have had higher volumes of production, were located in areas with higher population densities, or were subjected to wind or weather patterns that led to greater exposure to chemical emissions.

These limitations with the RSEI data underscore the challenges EPA faced in identifying top performers. The agency was simply never able to demonstrate that the facilities it recognized and rewarded through Performance Track represented “models of a higher level of environmental achievement.”³³⁹ Although our analysis provides no reason to question any particular Performance Track facility’s environmental goodwill or its reported achievements,³⁴⁰ we have plenty of reason to conclude that EPA could never credibly claim to have identified top performers.³⁴¹ The agency not only never compared Performance Track members with the rest of their industry peers, but the results of the IG’s investigation and the Booz Allen Hamilton analysis of RSEI data suggest, at a minimum, that a significant number of members posed greater public health risks than their typical non-member peers.

The EPA also could never demonstrate that any of the environmental improvements reported by Performance Track members, and heralded by the agency as the program’s achievements,³⁴² surpassed improvements that non-members made during the same time. Some non-members surely made improvements in their environmental performance, as every facility has some economic incentive to make improvements in environmental aspects like water and energy use that have direct cost-saving implications for business. Indeed, Performance Track members tended to prefer precisely those kind of bottom-line-

³³⁸ See PERFORMANCE TRACK SIXTH ANNUAL PROGRESS REPORT, *supra* note 250 (“Performance Track takes a holistic approach to environmental improvement.”).

³³⁹ Fiorino, *supra* note 144, at 9.

³⁴⁰ Of course, others have raised questions about specific Performance Track facilities. See, e.g., Sullivan & Shiffman, *supra* note 32 (raising questions about the environmental responsibility of a Tennessee facility owned by Olin Corp., as well as about other companies with facilities in Performance Track that nevertheless paid fines for environmental regulatory violations).

³⁴¹ In this regard, we find untenable the following claim made by EPA’s manager in charge of the Performance Track program: “Performance Track demonstrate[d] that a formal tiering of regulated and other facilities is feasible. Some firms and facilities do better than others, and it is possible to analytically recognize this, based on the available information.” FIORINO, *supra* note 2, at 151. EPA could never show that Performance Track facilities did “better” than other facilities.

³⁴² See *supra* notes 21–22 and accompanying text; see also PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note 21, at 2–3.

driven environmental improvements, with reductions in water use, energy use, and waste disposal being among the most frequent commitments Performance Track members made.³⁴³

Even if we assume that Performance Track members could have been shown to have made vastly superior improvements in environmental performance relative to their peers, the fact that they voluntarily participated in Performance Track makes it further challenging, if not impossible, for EPA to identify the Performance Track program as the cause of its members' environmental achievements. Facilities that voluntarily applied for membership in Performance Track may well have already made (or planned to make) environmental improvements for other reasons. Neither EPA nor outside observers should assume that members' achievements came about *because of* Performance Track.³⁴⁴

C. Leadership or Public Relations? Why Companies Joined Performance Track

To understand better the factors that led some facilities around the country to join Performance Track, we initiated two studies that compared Performance Track members to facilities that never sought to join the program. The first study comprised a comparative case study analysis of Performance Track facilities and similar non-participating facilities.³⁴⁵ The second study analyzed responses to a large-scale survey of 3,947 facilities, including those that had applied to Performance Track, from four of the sectors with the largest Performance Track membership: electronics and other electrical equipment, chemi-

³⁴³ See, e.g., LEADING CHANGE, *supra* note 141, at 16 (tbl. 1). As we have elsewhere noted:

[M]ost facilities' commitments are in one of five areas: waste, energy use, air emissions, water use, and materials use. Of the 1,228 commitments noted in the program's fourth annual progress report, about 86% addressed one of these five areas. With perhaps the exception of air emissions commitments, these five areas are ones where improvements to environmental performance can often result in cost savings to companies.

Nash & Coglianesse, *supra* note 10, at 23.

³⁴⁴ For a discussion of the problems of drawing inferences from data collected by programs like Performance Track, see Borck, Coglianesse & Nash, *supra* note 25, at 812–15. OSHA faces similar difficulties in evaluating the impact of its VPP. In response to a recommendation from the U.S. Government Accountability Office ("GAO"), OSHA contracted with the Gallup Organization to try to assess the extent to which VPP was bringing about reductions in participants' injury and illness rates. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-378, WORKPLACE SAFETY AND HEALTH, OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED (2004); GALLUP ORG., EVALUATION OF THE VOLUNTARY PROTECTION PROGRAM FINDINGS REPORT (2005). However, the GAO ultimately characterized the Gallup study as "not reliable or valid." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 265, at 17.

³⁴⁵ See generally Jennifer Howard-Grenville, Jennifer Nash & Cary Coglianesse, *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 LAW & POL'Y. 73 (2008).

cal products, transportation equipment, and wood products.³⁴⁶ Together, the findings from these two studies offer important insights about Performance Track, business decision making, and beyond-compliance behavior.

1. Case Studies: Performance Track Facilities vs. Similar Non-Members

Our first study compared matched pairs of facilities: five Performance Track members and five similar facilities that never applied.³⁴⁷ We selected facilities from a single geographical region with a large number of Performance Track plants. Eighteen of the Performance Track facilities in the region had joined the program at its inception, and of these eighteen we eliminated those not subject to the EPA's TRI reporting requirements as well as facilities that were owned by Johnson & Johnson.³⁴⁸ Of the remaining plants, we randomly selected five for study.

We aimed to match facilities as closely as possible so that, within each matched pair, the major difference remaining between the facilities was that one had joined Performance Track and the other had not.³⁴⁹ In selecting matches for these facilities, we took into account all the information we could obtain, matching the facilities based on their four-digit standard industrial classification ("SIC") code, regulatory compliance history, number of employees, and the demographic characteristics of their surrounding communities.³⁵⁰ Of course, we could not control for every conceivable way the pairs of facilities might differ.³⁵¹ But using available data, we identified a match for each Performance Track facility in our sample and then made every effort to study both the Per-

³⁴⁶ Jonathan Borck & Cary Coglianese, *Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 139 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

³⁴⁷ Howard-Grenville, Nash & Coglianese, *supra* note 345, at 75–76.

³⁴⁸ *Id.* at 87. Although pharmaceutical and medical equipment facilities were heavily represented in Performance Track, comprising about 14% of members, we did not include facilities from that sector in our case studies or survey sample. At the time of our analysis, nearly all pharmaceutical and medical equipment facilities that were Performance Track members were owned and operated by a single firm, Johnson & Johnson. *See id.* at 87 n.6. Given this company's exceptionally heavy involvement in the program, its facilities would not be representative of Performance Track members generally.

³⁴⁹ No doubt our matching was not perfect; no matching outside of a laboratory can be. We claim only to have followed a well-accepted research design and to have made the best possible effort to match facilities based on available information. Although there undoubtedly remained some differences across the matched pairs, we have no reason to expect that these modest differences explain the variation in the facilities' decisions. For an example of a research study using a similar research design but in a different context, see Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 1 J. PUB. ADMIN. RES. & THEORY 29, 35 (2002).

³⁵⁰ Howard-Grenville, Nash & Coglianese, *supra* note 345, at 87.

³⁵¹ For example, facilities can undoubtedly differ in their customer bases depending upon whether, for example, their products are sold directly to customers rather than through intermediaries. To the extent that customer base varied by sector, we controlled for this, at least partially, by controlling for sector, but our ability to match on these grounds was limited by externally available data. In our interviews, we asked about customer pressures — and we found little difference in the responses from Performance Track and matched facilities.

formance Track facilities and their matches. Obtaining access to Performance Track facilities was not difficult. With persistence, we were able to conduct an interview at each identified matching, non-member facility as well. Table 3, below, shows how closely we were able to match the size and demographic characteristics of each of the studied facilities.³⁵²

TABLE 3. PERFORMANCE TRACK AND MATCHED FACILITIES: COMPARISON OF SIZE AND COMMUNITY DEMOGRAPHICS³⁵³

Facility Pseudonym	Number of Employees	Annual Sales (\$ in millions)	% Community Designated "Urban" ³⁵⁴
Aero Inc.	500	75	48
<i>Matched Facility</i>	700	60	82
Chem Co.	750	858	98
<i>Matched Facility</i>	620	200	100
Glue Co.	63	33	99
<i>Matched Facility</i>	100	33	100
Rubber Inc.	900	50	99
<i>Matched Facility</i>	700	50	72
Tech Co.	6,000	1,000	99
<i>Matched Facility</i>	8,000	5,000	98

In matching facilities, we also took into account regulatory and compliance status, seeking to control for external government pressures that might affect facilities' beyond-compliance behavior.³⁵⁵ EPA and state environmental agencies had inspected each of the facilities.³⁵⁶ Each of the ten facilities had a "clean" compliance history; none had been found in non-compliance with federal or state environmental regulations for at least the past two years. All ten facilities held hazardous waste permits, while four of the five Performance Track plants and all five matching plants were designated as large quantity generators of hazardous waste. Just three Performance Track facilities had active air discharge permits, while all five of the matching plants were subject to air permitting requirements. Only two of both the Performance Track and matching facilities held water discharge permits.³⁵⁷ Furthermore, the TRI data we collected on each pair for the period 1987 to 2003 suggested the pairs generally

³⁵² Howard-Grenville, Nash & Coglianese, *supra* note 345, at 88 tbl.2.

³⁵³ *Id.*

³⁵⁴ As a rough indicator of community characteristics, we calculated the percentage of each facility's zip code designated as "urban" according to the U.S. Census Bureau. *Id.*; see also Urban Area Criteria for the 2010 Census, 76 Fed. Reg. 53,030 (Aug. 24, 2011).

³⁵⁵ See Howard-Grenville, Nash & Coglianese, *supra* note 345, at 86.

³⁵⁶ *Id.* at 88. Three of the five Performance Track facilities had been recently inspected (one in 2003 and two in 2004) even though EPA offered "low inspection priority" as a benefit to members. *Id.* at 102 n.10.

³⁵⁷ *Id.* at 88.

exhibited similar overall trends in the reduction of TRI releases.³⁵⁸ With only one exception, each of the facilities had made reductions in its TRI releases.

All of the facilities operated some form of an EMS. The Performance Track facilities all had certified their EMSs to ISO 14001, the international standard on which Performance Track's EMS requirements were closely modeled. In contrast, only one matched facility had an ISO 14001-certified EMS, but two of the other four matched facilities had independently certified EMSs and the remaining two operated non-certified EMSs.³⁵⁹ Table 4, below, summarizes the environmental characteristics of the five matched pairs of facilities.

TABLE 4. PERFORMANCE TRACK AND MATCHED FACILITIES: COMPARISON OF COMPLIANCE, TRI RELEASES, AND PERMITTING³⁶⁰

Facility Pseudonym	Subject to Recent Enforcement Action	Trend in TRI Releases	Hazardous Waste Permit	Air Permits	Recent Government Inspection
Aero Inc. <i>Matched Facility</i>	No No	Down Down	Yes Yes	No Yes	No No
Chem Co. <i>Matched Facility</i>	No No	Down Down	Yes Yes	No Yes	Yes Yes
Glue Co. <i>Matched Facility</i>	No No	Down Up	Yes Yes	Yes Yes	No Yes
Rubber Inc. <i>Matched Facility</i>	No No	Down Down	Yes Yes	Yes Yes	Yes No
Tech Co. <i>Matched Facility</i>	No No	Down Down	Yes Yes	Yes Yes	Yes Yes

³⁵⁸ To assess overall trends in TRI releases, we did not attempt to normalize releases, but instead compared each matched pair's trends in aggregate releases over time.

³⁵⁹ The role of third-party certification in bolstering EMS effectiveness is not clear. EPA's history with Performance Track suggests that third-party certification may be important in assuring that an EMS is fully functioning. EPA added a requirement for third-party EMS certification to Performance Track in 2004 after finding deficiencies in EMSs that lacked such certification. See EPA, NATIONAL ENVIRONMENTAL PERFORMANCE TRACK PROGRAM REVISION OF EMS ENTRY CRITERION 1 (on file with the Harvard Law School Library). However, some academic research questions whether third-party certification makes much difference. See, e.g., Haitao Yin & Peter J. Schmeidler, *Does ISO 14001 Certification Enhance Environmental Performance? — Conditions Under Which Environmental Performance Improvement Occurs* 6, 9 (Wharton Risk Ctr. Working Paper 07-07, Sept. 2007).

³⁶⁰ Howard-Grenville, Nash & Coglianesi, *supra* note 345, at 89 tbl.3.

Having matched facilities as best we could, we next interviewed environmental managers at each of the ten plants.³⁶¹ As expected, given our matching process, no significant differences emerged in the interviews in terms of managers' perceptions of the external factors shaping their environmental practices.³⁶² Economic pressures came up only infrequently in both sets of interviews and did not appear to explain facilities' environmental practices or decisions about whether to participate in Performance Track.³⁶³ Social pressures appeared to affect Performance Track members and their matched facilities similarly, as respondents at both types of facilities claimed to have developed good relationships with their local communities.³⁶⁴ All of the managers viewed regulatory requirements as non-negotiable. "It's basically the rule of the land," explained one Performance Track manager. A matching plant manager agreed: "You just can't afford not to pay attention to [the regulations]."³⁶⁵ Nevertheless, managers at both types of facilities also expressed frustration with what they perceived as irrational demands of regulation.³⁶⁶

Despite the lack of significant differences in the ways Performance Track and non-Performance Track facilities perceived and responded to external factors, the managers did express three types of differences in their responses concerning internal factors.³⁶⁷ The first difference emerged in the reported level of support that managers received from their superiors in pursuing participation in voluntary programs like Performance Track.³⁶⁸ Managers of Performance Track facilities indicated that their bosses strongly supported participation in a voluntary environmental program. One reported that her manager had actually suggested joining, while another noted that when he proposed joining his boss "backed [him] up."³⁶⁹ In contrast, managers of the matching facilities reported that their bosses had little enthusiasm for joining a voluntary program. When asked whether agency recognition would matter to their bosses, their responses were, at best, measured. As one respondent said: "Sure [management] would care, but it's a matter of degree. How much would they care?"³⁷⁰

Not surprisingly, these differing perceptions of management support translated into different calculations about the costs and benefits of participating in

³⁶¹ These interviews were taped and later transcribed. *Id.* at 89. Transcripts were reviewed and carefully coded for both external factors and internal factors that interviewees perceived to have influenced their environmental management decisions in general, and their facilities' participation or non-participation in Performance Track specifically. External factors included customer preferences, community pressures, and regulatory demands. Internal factors included management incentives, organizational identity, and self-monitoring behavior. A research assistant unaware of which facilities were Performance Track plants also coded the interviews and helped in their analysis. See *id.* at 90 for a more complete discussion of the interviews.

³⁶² *Id.* at 91.

³⁶³ *Id.*

³⁶⁴ *Id.* at 91–92.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 92.

³⁶⁸ This was despite the fact that the formal structures within each company were largely similar. A majority of the matching plants were part of larger corporations. *Id.* at 93.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 94.

Performance Track. For the managers at Performance Track facilities, joining the program was often an “easy decision” because they were already fulfilling most of the requirements and had an EMS in place.³⁷¹ The matching facilities also appeared eligible, but in contrast, their managers viewed joining as more costly. “You just can’t do everything,” one matching facility manager explained.³⁷² Given that their bosses appeared to find little value in Performance Track, this perception was probably reasonable. Relative to other priorities, these managers saw the requirements of Performance Track and other voluntary programs as distracting from their main focus, which they described as running their businesses as efficiently and safely as possible.

The second difference suggested by the interviews came in managers’ expressions of their facilities’ organizational identity with environmental protection. Performance Track managers portrayed their businesses as giving high priority to environmental issues. One Performance Track facility’s manager spoke of a “mindset of [environmental] excellence” at her plant.³⁷³ She and other Performance Track interviewees sought out opportunities to engage with their communities in ways that communicated an environmental ethic.³⁷⁴ Another Performance Track facility’s manager sought to recover from a “tainted past” beset by environmental problems: “We just thought that this would be another good way to promote ourselves as being environmentally aware and conscious.”³⁷⁵

By contrast, matching facility managers’ statements were less effusive about environmental protection and were more pragmatic, treating environmental performance as only one of many important priorities. They emphasized “doing the right thing” in terms of regulatory compliance, making good business decisions, and avoiding accidents.³⁷⁶ Environmental management was, for their organization, just an important facet of sound business management practices.³⁷⁷ They noted that an environmental problem at the facility would be costly and time-consuming; it was important from a business perspective to stay attuned to environmental concerns and avoid problems that could result in fines or jeopardize sales or production schedules. Considered from such a practical perspective, joining a voluntary environmental program was not worth doing. It was better simply to make sure everything was in order when it came to environmental matters. For the matching plants, their identity was tied to achieving tangible results rather than seeking external recognition and validation for a strong environmental ethos.³⁷⁸

The third striking difference between the Performance Track and matched facilities lay in the Performance Track facilities’ propensity to make outward

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 95.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 95–96.

displays of their behavior in ways that would be appealing to others — a characteristic called “self-monitoring of expressive behavior”³⁷⁹ but which might also be called “organizational extroversion.” Performance Track facility managers were eager to interact with regulators and community groups, and they spoke about how much these relationships meant to them. They talked about Performance Track membership as “advertising” that would appeal to a variety of constituencies. They saw a direct benefit from what they perceived as their ability to use Performance Track participation to build more trusting relationships with regulators and community leaders. If a minor compliance issue should ever arise, they reasoned that they could deal with it openly and amicably since they had taken steps to build trusting external relationships.³⁸⁰

In contrast, matched facility managers sought recognition from customers but displayed little interest in convincing regulators, environmental groups, or community organizations of their environmental friendliness.³⁸¹ In general, these managers disparaged efforts to appear environmentally conscious to external interest groups, viewing such an undertaking as costly in terms of opportunities to get other business done.³⁸² While Performance Track facility managers spoke of an open attitude toward regulators, matching facility managers were much more circumspect and viewed EPA’s expressed desire to forge a “partnership” as misguided. Matching facility managers looked to government to offer a clear set of minimum standards for their environmental operations, not gestures of cooperation.³⁸³

The findings that emerged from the matched facility study suggest that, more than anything else, Performance Track facilities differed from non-participating organizations in their internal organizational dispositions toward environmental rhetoric as well as outward and voluntary participation in public programs. In other words, what made the Performance Track facilities stand apart, it seemed, had more to do with factors inside these facilities. Of course, the matched case study could by no means prove to be definitive, nor was it exhaustive in testing all the factors that could explain beyond-compliance behavior. But its research design, distinctive in the literature in its matching of participants with nonparticipants, provides a basis for surmising that internal factors help explain businesses’ willingness to participate in voluntary programs.³⁸⁴ When it comes to joining Performance Track, these salient internal factors included the internal rewards managers reaped, the importance of environmental excellence to their organizations’ identities, and their organizations’ propensity toward outward engagement.³⁸⁵

³⁷⁹ Mark Snyder, *Self-Monitoring of Expressive Behavior*, 30 J. PERSONALITY & SOC. PSYCHOL. 526, 526 (1974). For a development of the self-monitoring concept in organizational settings, see Howard-Grenville, Nash & Coglianese, *supra* note 345, at 83–84.

³⁸⁰ See Howard-Grenville, Nash & Coglianese, *supra* note 345, at 96.

³⁸¹ See *id.*

³⁸² See *id.*

³⁸³ *Id.* at 97.

³⁸⁴ This conclusion is consistent with other research on firms’ compliance and beyond-compliance behavior. See, e.g., GUNNINGHAM ET AL., *supra* note 53; Kagan, *supra* note 55, at 31.

³⁸⁵ See *infra* Part II.D.

To the question of what Performance Track truly tracked, then, the findings from the matched case studies suggest that EPA drew into its program those facilities that sought out government recognition and emphasized the importance of maintaining good public relations. These were the more extroverted facilities, not necessarily the top environmental performers. Indeed the research underlying the matched facility study uncovered no significant differences in these facilities' environmental performance or their commitment to responsible environmental management. Instead, the matched case studies revealed that Performance Track facilities saw value in telling others (including us, when we sought to interview them) about their good environmental citizenship, while the non-participating plants were more inward-focused and cautious in their interactions with outsiders.

2. *Survey of Performance Track Members and Non-Members*

The matched facility study provided an in-depth look at a small but carefully controlled sample of facilities. To examine the characteristics that distinguished Performance Track facilities more generally, we developed an in-depth survey and sent it to a sample of 3,346 facilities.³⁸⁶ The sample included every facility that had applied to Performance Track since the program's inception in 2000, as well as a random selection of facilities from the chemical, pulp and paper, transportation, and electronics sectors — four sectors with large numbers of Performance Track members.³⁸⁷ The survey findings support what we learned from the matched facility study, namely that Performance Track facilities are distinctive by virtue of their interest in reaching out to and engaging with others.

When comparing survey responses from Performance Track facilities with responses from facilities that did not apply, several differences emerged.³⁸⁸ More Performance Track applicants sold their products directly to consumers (and fewer sold to intermediary organizations), making them more likely to be connected with and visible to the public.³⁸⁹ Performance Track applicants also

³⁸⁶ See Jonathan Borck, Cary Coglianese & Jennifer Nash, *Why Do They Join? An Exploration of Business Participation in Voluntary Environmental Programs*, in *BEYOND COMPLIANCE*, *supra* note 10, at 79.

³⁸⁷ See *id.* at 55–60.

³⁸⁸ See *id.* at 55–56. The Performance Track sample included all facilities that had applied to Performance Track, not merely those that were accepted. We received completed responses from 678 facilities: 153 from Performance Track applicants and 525 from the random sample from four SIC codes, which included some Performance Track facilities. Of the Performance Track sample, 14% of the surveys were returned by the post office as undeliverable. Of the random sample, 26% of the surveys were undeliverable. Thus, the response rate from surveys that were delivered was 33% for the Performance Track sample and 21% for the random sample. These response rates are consistent with much academic survey research, and, based on several tests, the respondents did not differ substantially from what is known about facilities in these sectors overall. *Id.* at 59.

³⁸⁹ Results reported here are differences in means that proved statistically significant using standard tests.

tended to have more employees, but fewer environmental permits and legal obligations.³⁹⁰ These characteristics are summarized in Table 5, below.

TABLE 5. CHARACTERISTICS OF SURVEYED FACILITIES³⁹¹

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Percent publicly traded	182	50.0	45.8	491	0.336
Percent privately held	182	40.1	53.6	491	0.002
Percent government	182	9.3	0.6	491	0.000
Percent non-profit	182	0.6	0.0	491	0.000
Age of facility (mean)	177	46.9	39.0	486	0.260
Age of facility (median)	177	30.0	30.0	486	n.a.
Annual sales (mean)	88	1.7E+09	8.91E+08	293	0.246
Annual sales (median)	88	1.0E+08	8.00E+07	293	n.a.
Total Full-Time Equivalent employees (“FTEs”) (mean)	177	956.0	592.9	488	0.000
Total FTEs (median)	177	450.0	252.2	488	n.a.
FTEs in environment (mean)	174	6.7	3.2	488	0.065
FTEs in environment (median)	174	2.0	1.5	488	n.a.
Percent of facilities that sell product directly to consumers	157	22.9	10.0	468	0.000
Percent of facilities that sell product to intermediaries	157	36.9	62.4	468	0.000
Percent of facilities that sell product to both	157	40.1	27.6	468	0.003
Percent of facilities owned by a parent company	178	86.5	84.9	490	0.602
Number of permits and legal obligations (maximum of 5)	179	3.2	3.6	495	0.000

³⁹⁰ See Borck, Coglianesi & Nash, *supra* note 386, at 60.

³⁹¹ *Id.* at 61 tbl.3.1. This Table compares means of the variables between Performance Track applicants and facilities that never applied, reporting the results of t-tests of the equality of these means by showing the probability that the means are equal (the p-value of the test). *Id.* at 60.

TABLE 6. INTERNAL ATTITUDES AND PERCEPTIONS OF FACILITIES³⁹²

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Top-level management support for voluntary programs	181	4.6	3.7	492	0.000
Level of human resources compared to other facilities	179	2.9	2.5	483	0.000
Frequency of seeking opinions from community or environmental advocacy groups	180	3.1	2.3	491	0.000
Importance of government recognition	181	3.8	3.0	491	0.000
Percent aware of new, proposed environmental regulation	179	63.1	60.7	489	0.575
Likelihood of stringent regulation in the future	181	3.5	3.6	493	0.218

Consistent with the findings from the matched case studies, the survey revealed that Performance Track applicants were substantially more likely to report top-level management support for participating in voluntary programs as well as higher overall levels of human resources available in the Performance Track plants (see Table 6, above). Also consistent with the findings from the matched facilities, Performance Track applicants reported that they sought out the opinions of community and environmental advocacy groups more frequently and placed significantly greater importance on recognition from government.

Performance Track applicants also reported being more highly influenced by corporate headquarters than those that had not applied to the program, as shown in Table 7, below. They also reported being more influenced by environmental advocacy groups. Somewhat surprisingly, non-Performance Track plants perceived government as being more influential than those that had applied to the program. However, Performance Track applicants and facilities showed no significant differences in their awareness of new or impending environmental regulations that would affect their operations.

Additionally, the survey asked respondents to rate the importance of benefits from participating in Performance Track and other voluntary programs. For the most part, Performance Track applicants and those that had never applied to the program ranked these benefits about the same. However, perceptions diverged with respect to two benefits. The Performance Track applicants ranked

³⁹² *Id.* at 61 tbl.3.1.

TABLE 7. IMPORTANCE OF VARIOUS INFLUENCES ON ENVIRONMENTAL MANAGEMENT OF FACILITIES³⁹³

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Headquarters	180	4.14	3.86	489	0.003
Competitors	179	2.54	2.47	490	0.493
Customers	179	3.78	3.72	491	0.532
Suppliers	177	2.80	2.83	491	0.757
Shareholders	164	3.32	3.21	446	0.389
Government agencies	178	4.20	4.40	491	0.011
Environmental advocacy groups	175	2.91	2.55	489	0.000
Community groups	178	3.15	2.99	490	0.107

TABLE 8. IMPORTANCE OF POTENTIAL BENEFITS OF PARTICIPATING IN VOLUNTARY PROGRAMS³⁹⁴

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Exempt from inspections	182	3.23	3.22	488	0.885
Report information less frequently	182	3.42	3.51	489	0.269
Flexibility to manage environmental issues	181	3.86	3.77	487	0.243
Recognition as top performer	180	4.19	3.58	488	0.000
Shortens time for permit approval	180	3.70	3.80	488	0.352
Helps if compliance problem	181	3.88	3.96	485	0.270
Single point of contact with regulator	181	3.58	3.45	488	0.162
Boosts employee morale	180	3.50	3.00	483	0.032

recognition as a top performer and employee morale as much more important than the non-Performance Track facilities (see Table 8, above). As for perceptions of costs, Performance Track applicants viewed different types of costs as much less important than did the non-Performance Track plants. As shown in Table 9, below, Performance Track applicants were much less concerned about the costs associated with completing the paperwork required to join or the fact that membership might take away from time available for other work.

³⁹³ *Id.* at 62 tbl.3.3.

³⁹⁴ *Id.* at 62 tbl.3.4.

As shown in Table 10, below, Performance Track applicants rated their own environmental performance more highly than non-participants and reported engaging in more beyond-compliance behavior. Non-applicants also tended to rate their environmental performance as above average (4.2 on a 5-point scale), but not to the same degree as program applicants (who scored 4.6). Those that had applied to Performance Track were also dramatically more likely to be members of other voluntary programs.

TABLE 9. IMPORTANCE OF POTENTIAL COSTS OF PARTICIPATING IN VOLUNTARY PROGRAMS³⁹⁵

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Paperwork takes time	180	3.02	3.44	489	0.000
Takes time away from other work	180	3.09	3.49	489	0.000
Information available to others	181	2.61	3.12	489	0.000
Government scrutinizes more closely	179	2.55	3.24	488	0.000
Top management has other priorities	179	2.85	3.34	486	0.000
Benefits do not outweigh costs	178	3.27	3.78	483	0.000

TABLE 10. PARTICIPATION IN OTHER VOLUNTARY PROGRAMS AND PERCEPTIONS OF BEYOND-COMPLIANCE BEHAVIOR³⁹⁶

	PT facilities		Non-PT facilities		p-value of t-test
	n	Value	Value	n	
Percent active in one of six listed voluntary programs other than Performance Track	175	57.7	15.5	484	0.000
Percent active in any voluntary program other than Performance Track	182	75.3	31.3	496	0.000
Total areas beyond compliance (maximum of nine)	181	4.7	3.4	495	0.000
Environmental performance compared to others	181	4.6	4.2	495	0.000

³⁹⁵ *Id.* at 63 tbl.3.5.

³⁹⁶ *Id.*

D. Summary and Implications

In the past, researchers have tended to emphasize pressures from outside the firm — such as community, economic, and legal pressures — to explain why businesses comply with the law or, more notably, go beyond compliance with the law.³⁹⁷ We find support for these outside factors, but more significantly, we find considerable support for the proposition that internal factors and dispositions are also important variables.

Managers at facilities that joined Performance Track appear to have enjoyed substantial top-level support for participation in this voluntary program. They perceived that participating would complement their organization's identity in that, to quote Performance Track facility managers, joining was “easy” and they were already doing what the program expected.³⁹⁸ The higher level of internal support for environmental activities among Performance Track applicants, and the perception that top management was less likely to have other priorities, showed up both in the matched pairs of case studies and in the survey results. Performance Track facilities were also more likely to report a tendency to seek outside opinions from community and environmental groups than were non-member facilities. Performance Track plants appeared more connected to the public and placed greater importance on the views of external groups. While it is difficult to show direct causation, based on our survey and case studies, we have found that organizations with some reason to “seek out” the opinions of outsiders were also more attracted to the idea of participating in some kind of voluntary environmental effort.³⁹⁹

Performance Track facilities valued government recognition and were much less concerned about the costs of participating in voluntary initiatives. These organizational “extroverts” tended to take part in a spectrum of voluntary activities. However, they simply could not be shown to be “models of a higher level of environmental achievement” as professed by EPA.⁴⁰⁰ While Performance Track members are not necessarily the strongest environmental performers, they appear to have been generally strongest in their desire for public recognition. Of course, if it were not for opportunity costs and scarcity of governmental resources, there would presumably be nothing inherently wrong with EPA engaging with firms that value the agency's attention and appreciation. Yet, if the experience with Performance Track is true with respect to other EPA programs, additional effort to recognize and reward beyond-compliance behavior through a program structured like Performance Track would seem to be on the wrong track, at least if the aim is to identify and reward “top” performers.

³⁹⁷ *Id.* at 53; GUNNINGHAM ET AL., *supra* note 53, at 20–22.

³⁹⁸ BEYOND COMPLIANCE, *supra* note 10, at 5–6.

³⁹⁹ *Id.*

⁴⁰⁰ Fiorino, *supra* note 144, at 9 (quoting former EPA Administrator Carol Browner).

III. THE EXTENT OF PERFORMANCE TRACK'S IMPACT

We have shown that Performance Track did not necessarily attract the types of facilities that EPA had in mind when it launched the program. The businesses that participated in Performance Track could not be shown to be “environmental leaders.” Indeed, nothing in the design or EPA’s evaluation of the program enabled the agency to determine that the program in fact recognized top environmental performers within any industrial sector.⁴⁰¹ We now turn to consider another aspect of the Performance Track model. In contrast with our focus in Part II on understanding which businesses decided to join Performance Track and why, we now focus in Part III on the extent of the program’s appeal and, by extension, its impact on industrial practices and environmental quality.

Recall that EPA set as its goal to have Performance Track shift the environmental “performance curve” throughout the nation.⁴⁰² Both EPA and states that have developed similar Performance Track programs have maintained that these programs contribute uniquely and significantly to environmental protection — e.g., by “stretching the boundaries of innovation and performance”⁴⁰³ at EPA, creating “a healthier, cleaner environment,”⁴⁰⁴ “transform[ing] the way that government and industry address environmental issues and solve problems,”⁴⁰⁵ and “delivering measureable results.”⁴⁰⁶ If these programs do encourage firms to improve their environmental performance in order to reap the recognition and rewards the programs offer, do they really deliver on the promise of substantial, if not pervasive, change in the nation’s environmental quality?

In order to change behavior and affect environmental conditions in a significant way, EPA officials recognized that Performance Track’s membership needed to grow.⁴⁰⁷ Indeed, having heard EPA officials who oversaw Performance Track speak at numerous public meetings over the years, we think it is fair to say that they fixated on increasing membership throughout the program’s history. Performance Track had to engage or at least affect significant numbers of regulated entities if it were to become anything other than a marginal environmental program.⁴⁰⁸ Continuous, rapid growth was always an objective of Performance Track’s managers, who set a goal of increasing the ratio of pro-

⁴⁰¹ See *supra* Part II.B.

⁴⁰² See *supra* notes 64–66 and accompanying text.

⁴⁰³ Browner Remarks, *supra* note 138.

⁴⁰⁴ *Id.*

⁴⁰⁵ TODAY’S COMMITMENTS, *supra* note 152, at 31.

⁴⁰⁶ BUILDING ON THE FOUNDATION, *supra* note 141, at 3.

⁴⁰⁷ See EPA, 2005 RECRUITMENT STRATEGY: NATIONAL ENVIRONMENTAL PERFORMANCE TRACK 1 (Feb. 9, 2005 Draft) (on file with the Harvard Law School Library) (stating that in 2004, Performance Track sent “letters from [Administrator] Leavitt to CEO’s [sic] of 18 major companies, urging them to encourage their facilities to join the program”).

⁴⁰⁸ See David W. Case, *The EPA’s HPV Challenge Program: A Tort Liability Trap?*, 62 WASH. & LEE L. REV. 147, 198 (2005) (“Minimal participation rates are among explanations offered as to why past EPA voluntary programs disappoint both in terms of results and impact.”).

gram applicants to program members by 25% each year — all while increasing overall membership.⁴⁰⁹ Membership growth was essential, they claimed, because “[t]he more organizations that are engaged in the search for continuous improvement, the more [that can be achieved] in terms of environmental results and effective partnerships.”⁴¹⁰ Indeed, consistently low participation rates in similar initiatives are a fundamental concern about voluntary environmental programs more generally, because they contribute to a “perception that EPA voluntary programs are largely insignificant and ultimately ineffectual.”⁴¹¹ Voluntary initiatives with few members are viewed as “suspect” and “likely [to] have no more than a marginal impact on basic environmental problems.”⁴¹²

It is difficult to imagine a program like Performance Track leading to a new generation of environmental protection with only about 500 participating members at any given time, particularly since a surprising number of these members were either federal post offices or facilities within just a few major companies like Johnson & Johnson.⁴¹³ Compared with all of the facilities generating pollution in the country, Performance Track members represented just the tiniest fraction of the nation’s environmental footprint.⁴¹⁴ Only half of Performance Track’s members were subject to environmental permitting requirements,⁴¹⁵ but treating the roughly 700,000 facilities in the United States that *are* subject to such permit requirements as an approximate universe of potential members, Performance Track attracted less than 0.1% of its membership pool.⁴¹⁶ Obviously, the fraction of the true universe of potential members — all facilities impacting the environment including those without any permits — would be even smaller.

Even among businesses that took a systematically proactive environmental posture, Performance Track facilities still constituted only a small percentage. For example, in 2007 about 5,460 facilities in the United States were certified to ISO 14001’s EMS standards.⁴¹⁷ Performance Track membership amounted to less than 10% of that group, notwithstanding the fact that Performance Track’s

⁴⁰⁹ RAND CORP. ASSESSMENT, *supra* note 23, at 20. Rapid growth has also been a fixation of those responsible for running OSHA’s VPP. GAO reported in 2004 that OSHA planned to increase the program eight-fold, from 1,000 to 8,000 worksites. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 344, at 3. In 2003, the Assistant Secretary of Labor for OSHA gave each OSHA region a target for new VPP approvals. Membership subsequently doubled in the period from 2003 to 2008. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 265, at 10–11.

⁴¹⁰ TODAY’S COMMITMENTS, *supra* note 152, at 31.

⁴¹¹ Case, *supra* note 408, at 198.

⁴¹² Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1286 (1995).

⁴¹³ PTrack Member Data, *supra* note 10; *see also supra* note 10.

⁴¹⁴ *Cf.* Wyeth, *supra* note 50, at 63 (“Although the number of participants in such programs continues to grow, the programs still enroll only a tiny percentage of regulated organizations.”).

⁴¹⁵ *See supra* note 293 and accompanying text.

⁴¹⁶ *See Enforcement & Compliance History Online (ECHO)*, EPA.GOV, <http://perma.law.harvard.edu/0g6AUdPUjs5>. As a point of comparison, OSHA’s VPP membership of approximately 2,300 worksites represents only about 0.03% of the more than eight million worksites in the United States. *Commonly Used Statistics*, OSHA.GOV, <http://perma.law.harvard.edu/0DZwiq1L2V2>.

⁴¹⁷ INT’L ORG. OF STANDARDIZATION, THE ISO SURVEY – 2007 25 (2008), *available at* <http://perma.cc/D994-LBKW>.

membership requirements overlapped substantially with the ISO 14001's standards.⁴¹⁸

Despite extensive efforts by EPA officials to recruit new members throughout the program's history, membership growth was generally quite slow. In the next Section, we document that slow growth and explain — by comparing membership in Performance Track with membership in other federal and state voluntary environmental programs — why Performance Track was destined to attract only the most modest level of participation and, by extension, to have only the most modest overall impact on the nation's environmental quality.

A. Performance Track Membership

Performance Track started off with a burst of interest, by comparison with later years: 227 facilities joined Performance Track in the initial “Charter Round” in December 2000.⁴¹⁹ Subsequently, however, membership grew by less than forty facilities annually through 2009,⁴²⁰ notwithstanding an active recruitment process on EPA's part.

When EPA launched Performance Track in 2000, agency officials contacted firms that already participated in other EPA voluntary programs and encouraged them to consider joining Performance Track.⁴²¹ EPA officials used a “two-pronged” approach to recruitment: contacting facilities that were already likely to qualify for membership, and working through various professional associations to identify facilities that might have an interest in participating.⁴²² They also worked with facilities that expressed interest in joining but did not meet entry criteria in an effort to understand what these facilities would need to do to qualify in the future. The program accepted applicants twice yearly, in the spring and fall.⁴²³

Since environmental management systems were a key prerequisite of membership in Performance Track, EPA staff looked for potential applicants that had those systems in place.⁴²⁴ Officials routinely contacted facilities that met ISO 14001 standards for environmental management systems.⁴²⁵ Before

⁴¹⁸ See PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note 21, at 3 (listing 539 Performance Track members in 2007); QMI-SAI GLOBAL, ISO 14001 AND U.S. EPA PERFORMANCE TRACK PROGRAM, *available at* <http://perma.cc/4C6G-HNHH> (comparing ISO 14001 and Performance Track membership).

⁴¹⁹ PTrack Member Data, *supra* note 10.

⁴²⁰ See PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note 21, at 3 (charting Performance Track's membership statistics from 2000–2008).

⁴²¹ Interview with John Foster, Manager of Performance Track Recruiting, EPA (Aug. 14, 2007).

⁴²² EPA, RECRUITER'S HANDBOOK 12 (2001) (on file with the Harvard Law School Library).

⁴²³ EPA, AIMING HIGH HAS ITS REWARDS: IS YOUR ENVIRONMENTAL PERFORMANCE BEING RECOGNIZED? 5 (2008).

⁴²⁴ Interview with John Foster, *supra* note 421.

⁴²⁵ *Id.*

each application round, EPA staff sent each such facility a postcard announcing the open enrollment period and followed up with a telephone call.⁴²⁶

EPA staff also engaged in outreach through trade associations and visits to trade shows and conventions, often at the invitation of trade associations seeking to encourage member companies to improve their EMSs.⁴²⁷ For example, Performance Track managers attended conferences for various groups, such as: the Air and Waste Management Association; the National Association of Environmental Engineers; the Semiconductor Environment, Safety, and Health Association; and the American Society for Quality.⁴²⁸ They distributed information about Performance Track at these meetings and subsequently followed up with contacts they met.⁴²⁹

EPA officials offered assistance to potential applicants through several programs and information sources. For instance, facilities that were interested in developing and implementing EMSs could also obtain guidance from state programs listed in EPA's National Directory of EMS Technical Assistance Providers.⁴³⁰ Similar technical assistance resources were made available on an industry-sector basis.⁴³¹ Finally, several states — such as Colorado, North Carolina, South Carolina, Texas, and Virginia — developed programs and initiatives similar to Performance Track through which facilities could obtain assistance in improving their environmental performance and EMSs.⁴³² EPA saw many of these state programs as “feeders” for the federal Performance Track program.

Once admitted into Performance Track, a facility's membership under normal circumstances lasted three years, at which time it had to reapply to remain in the program.⁴³³ Over 200 facilities left the program over the years, whether as a result of closure or sale, failure to meet program requirements, or voluntary reasons.⁴³⁴ Table 11 and Figure 2, below, show movement in and out of the program during the years of its existence.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Technical Assistance*, EPA.GOV, <http://perma.cc/U6KU-WV29>.

⁴³¹ *Environmental Management Systems*, EPA.GOV, <http://perma.cc/3FTL-5RKZ>.

⁴³² Borck, Coglianesi & Nash, *supra* note 25, at 785, 798.

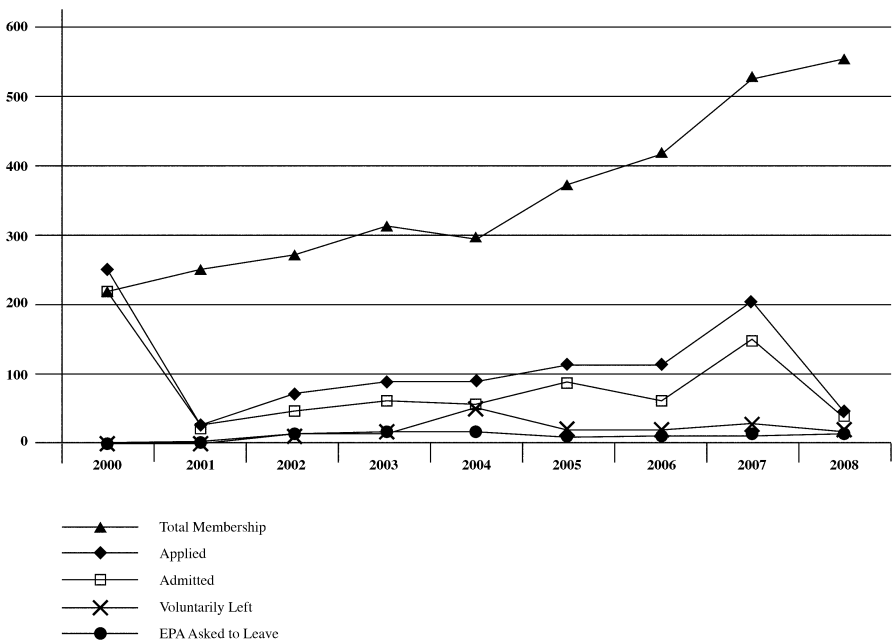
⁴³³ PERFORMANCE TRACK PROGRAM GUIDE, *supra* note 56, at 9.

⁴³⁴ PTrack Member Data, *supra* note 10.

TABLE 11. PERFORMANCE TRACK MEMBERSHIP TRENDS⁴³⁵

Year	Applied	Admitted	EPA Asked to Leave/Did Not Accept Renewal	Voluntarily Left	Total Membership	Annual Membership Change
2000	254	227	0	0	227	
2001	33	25	1	0	251	10%
2002	78	55	13	11	282	11%
2003	94	62	15	18	311	9%
2004	95	58	15	56	298	-4%
2005	115	93	7	14	370	19%
2006	115	69	8	14	417	11%
2007	201	152	7	24	538	22%
2008	52	42	16	17	547	2%
Totals	1044	783	82	154	547	

FIGURE 2. FACILITIES APPLYING, ADMITTED, AND LEAVING

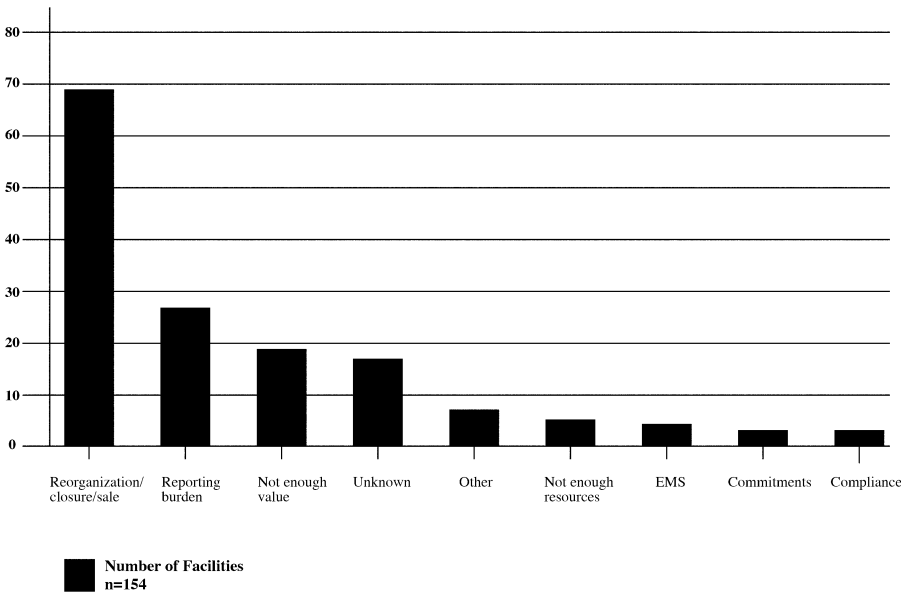


⁴³⁵ *Id.* Note that no application date was given for seven applications.

The largest membership loss occurred in 2004, when membership terms expired for the facilities that had joined Performance Track in the initial Charter Round.⁴³⁶ Of the over 200 charter members, approximately 25% chose not to reapply.⁴³⁷ While 2004 was the year when the greatest membership loss occurred, the program suffered significant attrition in every year after 2001.⁴³⁸ Although net membership increased in every year except 2004, steady membership loss impeded the program's overall growth.

The reason cited most frequently by managers for withdrawing from the program (or simply not renewing) was the closure, sale, or reorganization of their facility.⁴³⁹ A significant number of departing members also found the program's reporting requirements burdensome or failed to find that the program delivered meaningful value to the business.⁴⁴⁰ Figure 3, below, illustrates the main reasons facilities gave EPA for leaving Performance Track.

FIGURE 3. REASONS FACILITIES GAVE FOR LEAVING OR NOT RE-ENROLLING⁴⁴¹



⁴³⁶ Nash & Coglianese, *supra* note 10, at 19.

⁴³⁷ *Id.*

⁴³⁸ *Id.* As a point of comparison, 979 worksites have voluntarily left VPP since its inception. OSHA, *Voluntary Withdrawals – CY 1982–2013* (last visited Feb. 28, 2013) (on file with the Harvard Law School Library).

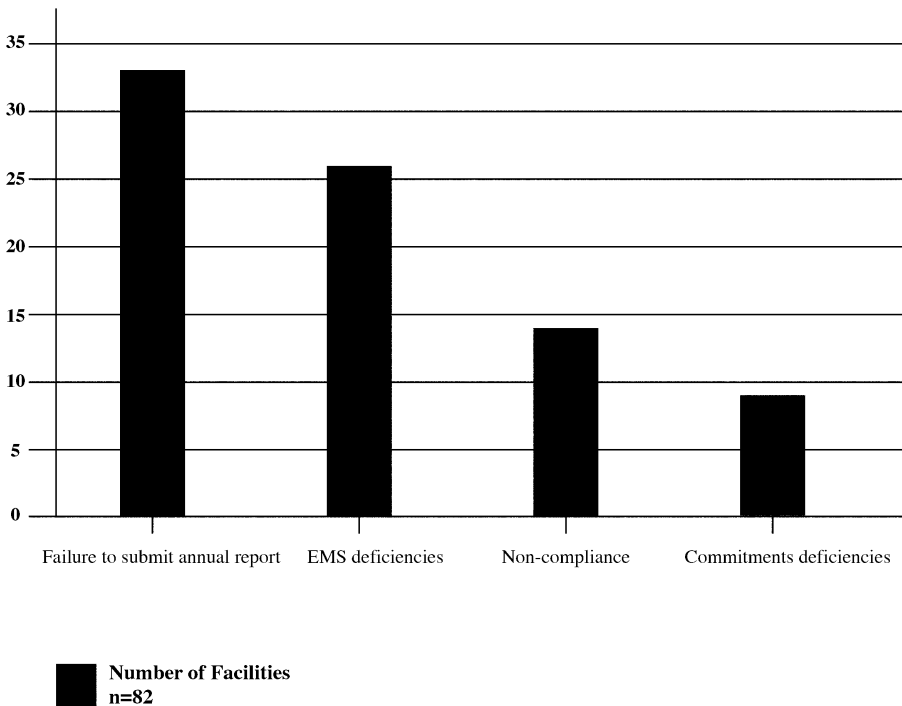
⁴³⁹ Nash & Coglianese, *supra* note 10, at 19.

⁴⁴⁰ *Id.* at 19–20.

⁴⁴¹ *Id.* at 20.

EPA asked forty-nine facilities either to leave or not re-enroll in Performance Track.⁴⁴² Most often, EPA's reason for asking a facility to leave or not continue had to do with the facility manager's failure to submit an annual report, a program requirement. Deficiency in a facility's environmental management system was the second most common reason EPA ended a facility's membership.⁴⁴³ EPA also asked facilities to leave because they were found in non-compliance with environmental regulations or had problems with their commitments.⁴⁴⁴ Figure 4, below, summarizes the reasons EPA asked facilities not to continue.

FIGURE 4. REASONS CITED BY EPA FOR ASKING FACILITIES TO LEAVE OR NOT RE-ENROLL⁴⁴⁵



⁴⁴² *Id.* at 19. Again, for a point of comparison, we note that over its history OSHA has asked only twenty-two worksites to leave its VPP. See OSHA, *Number of Sites Asked to Leave (Terminated) from VPP – CY 1982–2013* (on file with the Harvard Law School Library).

⁴⁴³ See OSHA, *supra* note 442.

⁴⁴⁴ Nash & Coglianese, *supra* note 10, at 19, 21.

⁴⁴⁵ *Id.* at 21.

EPA surveyed Performance Track members in 2004 and 2006 to gauge members' satisfaction with the program.⁴⁴⁶ In both cases, the survey received strong response rates: 73% and 76%, respectively.⁴⁴⁷ In the 2004 survey, members' most important reason for joining and staying in the program was to enjoy "a collaborative/amicable relationship with EPA and State agencies."⁴⁴⁸ While members wanted to see the program's regulatory incentives expanded, those incentives were not their primary reason for joining.⁴⁴⁹ Overall, members said that they wanted EPA to publicize their Performance Track memberships more robustly so that local communities were more aware of their status as environmental leaders.⁴⁵⁰

The 2006 survey found that most members were "generally satisfied" with Performance Track, believing that they "receive[d] as much or more business value than the costs of the program."⁴⁵¹ According to the respondents, the program's greatest value derived from "public awareness, opportunities to improve environmental performance, and an improved, more collaborative relationship" with EPA.⁴⁵² In 2006, as in 2004, survey respondents generally said that they did not join Performance Track on account of the incentives EPA offered.⁴⁵³ However, members indicated that they would have liked in the future to see membership benefits increase and the transaction costs associated with membership decrease.⁴⁵⁴

B. Why Performance Track Membership Was Destined to Remain Small

As noted, Performance Track's membership represented only a small fraction of eligible facilities.⁴⁵⁵ In this respect, Performance Track was little different from many of EPA's voluntary programs. However, participation levels across different programs have varied, with some garnering higher membership levels than Performance Track and some garnering lower levels. Although the total number of EPA voluntary programs is too small for econometric analysis, we can still take a closer look at the variation in membership across programs to see what might explain different membership levels. In this Section, we explore the relationships between the design of voluntary environmental programs and levels of participation, with the aim of developing an explanation for why EPA struggled to make Performance Track larger. We first consider how Performance Track membership compared with participation in the 33/50 Pro-

⁴⁴⁶ ABT ASSOC. INC., RESULTS OF 2004 PERFORMANCE TRACK CUSTOMER SATISFACTION SURVEY (2005) [hereinafter 2004 SURVEY] (on file with the Harvard Law School Library); 2006 SURVEY, *supra* note 209.

⁴⁴⁷ See 2004 SURVEY, *supra* note 446, at 1; 2006 SURVEY, *supra* note 209, at 5.

⁴⁴⁸ 2004 SURVEY, *supra* note 446, at 1.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ 2006 SURVEY, *supra* note 209, at 2.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ See *supra* notes 416–422 and accompanying text.

gram and Project XL, EPA's most-studied voluntary environmental programs. We then compare the design of twenty-nine additional voluntary partnership programs run by EPA with their corresponding rates of participation. Finally, we consider the relationship between program design and participation levels by reviewing state programs similar to Performance Track.

1. *The Participation Paradox: The Inverse Relationship Between Rewards and Participation*

Like Performance Track, all the programs we examine in this Section were voluntary partnership programs, a distinct type of voluntary environmental program. In a voluntary partnership program, the regulatory agency develops membership criteria and a process for firms to apply to be members.⁴⁵⁶ Members receive some benefit in exchange for committing to a certain course of action.⁴⁵⁷ Across all of the voluntary partnership programs of which we are aware, we find a clear, inverse relationship between participation and program rewards. That is, membership levels decline as program rewards increase. Why would this be so? After all, should not greater rewards induce still greater levels of participation?

The inverse relationship between rewards and participation may seem paradoxical at first glance. However, the explanation for this relationship is actually quite simple. As agencies move to increase rewards they also increase the stringency of entry criteria and membership requirements, effectively chilling facilities' interest in participating. The evidence we present in this Section suggests that businesses are much more sensitive to the costs of participation in voluntary environmental partnerships, and even modest increases in the transaction costs associated with becoming a member will more than offset any increased incentive that additional rewards might provide.

Moreover, the incentives facing government officials lead them to match any increase in rewards with increases in membership stringency and scrutiny. When government officials grant a facility a reward, especially when that reward amounts to a "seal of approval" from the government, the relationship between government and business becomes similar to that between any principal and its agent. Just as principals worry that agents will shirk or otherwise abuse the authority that principals have granted them, government officials also must worry that the businesses they reward will come to shirk or otherwise retreat from their commitment to act in an environmentally responsible manner. They must worry because government officials work in a political environment in which they face pressures both from Congress and from interest group representatives who stand ready, in turn, to pressure members of Congress.

In the context of environmental policy, the existence of a cadre of well-organized environmental groups in Washington, D.C. means that government

⁴⁵⁶ Cary Coglianese & Jennifer Nash, *The Paradox of Voluntary Environmental Partnerships: Information and Incentives for Participation*, in *BEYOND COMPLIANCE*, *supra* note 10, at 107.

⁴⁵⁷ *Id.*

officials who seek to “reward” the businesses they are charged with regulating can expect to be watched carefully. An example from Performance Track reveals the kind of interest group scrutiny government officials can and do expect in developing voluntary programs. In 2005, EPA published a notice in the *Federal Register* requesting public comment on its proposal to expand the benefits offered to Performance Track members.⁴⁵⁸ In comments to EPA, an attorney from the NRDC objected to proposed benefits that would reduce monitoring, recordkeeping, and reporting for Performance Track members and shrink the level of EPA and state environmental agency oversight.⁴⁵⁹ The Environmental Integrity Project (“EIP”), a non-profit organization dedicated to stronger enforcement of federal and state environmental laws, similarly called on EPA to step back from “ever more ambitious regulatory breaks” for Performance Track members.⁴⁶⁰ Both NRDC and EIP raised the concern that Performance Track entry criteria failed to ensure that members demonstrated sufficiently superior environmental performance to warrant regulatory benefits.⁴⁶¹ In short, EPA’s attempt to increase benefits was met by calls from environmental advocacy groups to tighten program entry criteria.

The environmental groups largely succeeded in dissuading EPA from increasing Performance Track’s benefits. Before the program’s termination in 2009, EPA had finalized only modest changes in the benefits for Performance Track members. Its most notable such effort occurred in April 2006, when the agency published a rule allowing Performance Track facilities with secondary containment facilities to apply for permission to self-inspect their hazardous waste tanks only once a month, compared with mandatory daily or weekly inspections for non-Performance Track facilities.⁴⁶² This benefit was relatively meager, however, compared to those EPA originally outlined in its August 2005 request for comments.

2. *Design and Participation in 33/50 and Project XL*

To see how the participation paradox plays out, it is instructive to compare Performance Track’s membership with the levels of participation in the agency’s two widely studied voluntary initiatives: the 33/50 Program and Project XL. Nearly 1,300 firms participated in 33/50 in the 1990s,⁴⁶³ while only about fifty

⁴⁵⁸ Description of Collaboration with the Environmental Council of the States Regarding National Environmental Performance Track and State Performance-Based Environmental Leadership Programs, 70 Fed. Reg. 44,921 (Aug. 4, 2005).

⁴⁵⁹ Letter from John Walke, *supra* note 27, at 3, 12.

⁴⁶⁰ Patricia Ware, *Enforcement: Benefits of ‘Performance Track’ Program in Question, Environmental Group Says*, 37 Env’t Rep. (BNA) No. 6, at 309 (Feb. 10, 2006).

⁴⁶¹ Letter from John Walke, *supra* note 27, at 8–9; Letter from Eric Schaeffer, *supra* note 27, at 1–2.

⁴⁶² Resource Conservation and Recovery Act Burden Reduction Initiative, 71 Fed. Reg. 16,862, 16,881 (Apr. 4, 2006) (codified at 40 C.F.R. pts. 260, 261, 264, 265, 266, 268, 270, and 271).

⁴⁶³ EPA, 33/50 PROGRAM: THE FINAL RECORD 4 (1999) [hereinafter 33/50 PROGRAM: THE FINAL RECORD], available at <http://perma.cc/8E6V-V4ZH>.

facilities joined Project XL.⁴⁶⁴ Performance Track's membership size falls between these two numbers. What might explain these different levels of participation? All three programs exhibited striking differences in their design that had important implications for levels of participation.

EPA launched the 33/50 Program in early 1991.⁴⁶⁵ The program challenged industry to achieve a 33% reduction in overall releases of seventeen toxic chemicals by the end of 1992 and a 50% reduction by 1995 (compared to 1988 levels).⁴⁶⁶ To participate in the program, companies simply had to write EPA a letter committing to reduce any amount of one or all of the seventeen targeted chemicals against companies' 1988 level of releases.⁴⁶⁷ Upon receipt of such a letter, EPA sent the company a certificate of appreciation signed by the Administrator.⁴⁶⁸

Commitments were in no way legally binding, and EPA encouraged companies to set their own goals and timeframes. Indeed, a notable proportion of companies — up to 40% according to a 1995 evaluation commissioned by EPA — received certificates even though EPA could not quantify *any* specific level of reductions stated in their commitment letters.⁴⁶⁹ Furthermore, EPA made no effort to ascertain whether individual companies followed through on the commitments they made. EPA actively invited companies to join the program, and nearly 1,300 companies “participated” by sending in a commitment letter.⁴⁷⁰

In 1995, the Clinton Administration's EPA launched a “reinventing regulation” initiative that went beyond the 33/50 program to create other voluntary initiatives, such as Project XL, which sought to encourage “eXcellence and Leadership” in environmental management.⁴⁷¹ Through Project XL, EPA would consider waiving virtually any regulatory requirement if a company could demonstrate that doing so would enable it to achieve superior environmental performance.⁴⁷² A team from EPA's regional offices and headquarters was set up to review proposals for such waivers. Successful proposals were required to demonstrate improvements in environmental performance, reduce paperwork and cost, involve outside constituencies, prevent pollution in multiple media, establish measurable objectives, and broadly disseminate information.⁴⁷³ If EPA deemed that a proposal met these criteria, then the applicant, regulators, and participating community groups would negotiate a Final Project Agreement

⁴⁶⁴ EPA, PROJECT XL 2000 COMPREHENSIVE REPORT VOL. 2: DIRECTORY OF PROJECT EXPERIMENTS AND RESULTS 2 (2000), available at <http://perma.cc/VVQ6-SDYS> (noting that by the year 2000, a total of fifty-three projects were at various stages of development).

⁴⁶⁵ 33/50 PROGRAM: THE FINAL RECORD, *supra* note 463, at 3.

⁴⁶⁶ *Id.* at 1.

⁴⁶⁷ EPA, THE 33/50 PROGRAM: FORGING AN ALLIANCE FOR POLLUTION PREVENTION 1 (1992), available at <http://perma.cc/C6J-BKS4>.

⁴⁶⁸ *Id.* at 4.

⁴⁶⁹ EPA, 33/50 PROGRAM: THE FINAL RECORD, *supra* note 463, at 7.

⁴⁷⁰ *Id.* at 4.

⁴⁷¹ EPA, PROJECT XL 1999 COMPREHENSIVE REPORT 1 (1999).

⁴⁷² See EPA, PROJECT XL: FROM PILOT TO PRACTICE, A JOURNEY TO SYSTEM CHANGE 2–3, 10 (1999), available at <http://perma.cc/R6P5-35G9>.

⁴⁷³ Coglianesi & Nash, *supra* note 456, at 105.

("FPA"). EPA reserved the right to reject any agreement, even after all the parties had agreed to the terms.⁴⁷⁴

Negotiation of final agreements often required thousands of hours.⁴⁷⁵ Developing Intel's XL agreement, for example, required 100 meetings each lasting four to six hours. EPA insisted that an essential component of any XL agreement was active engagement of community and environmental advocacy groups, but involving these groups often raised new issues that required more time to resolve. Only after EPA obtained approval of the agreement from a long list of community and environmental groups would it begin the formal process of waiving requirements: that is, issuing a site-specific rulemaking following normal notice-and-comment procedures, including publication in the *Federal Register*.⁴⁷⁶ EPA stopped receiving applications for XL projects in 2003. By that time, only about fifty regulated entities were fully participating in Project XL,⁴⁷⁷ considerably fewer than anticipated when the program was announced eight years earlier.

Comparing the stringency of the requirements for entry into 33/50 and Project XL with those for Performance Track suggests how the level of participation responds to the costs of entry. The entry requirements for all three programs varied considerably. They ranged from the minimal letter of general commitment for 33/50, to the twenty-nine page application for Performance Track,⁴⁷⁸ to an application process followed by an intensive multi-party negotiation followed by a site-specific rulemaking for Project XL. As the entry costs increased across these programs, participation levels declined from over 1,300 companies in 33/50 to about 550 facilities in Performance Track to only about fifty companies in Project XL.

3. Evidence from Other EPA Voluntary Partnership Programs

Although they are among the most prominent of EPA's voluntary programs, the 33/50 Program, Project XL, and Performance Track are only three such programs. EPA has run over sixty voluntary programs, ranging from educational programs, grants, competitive awards, product certifications, and voluntary partnerships.⁴⁷⁹ To investigate further the relationship between program design and participation, we focused on EPA's twenty-nine voluntary partnership programs. As described earlier, a partnership program involves some element of exchange or agreement between the applicant and the government. When the applying member meets specified standards, the agency will provide something in return. A full list of EPA's voluntary partnership programs we examined is provided in Table 12, below. Notwithstanding the actual names EPA gave to these programs, each is a partnership program in the sense we

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ See Caballero, *supra* note 44, at 404–05.

⁴⁷⁷ Coglianese & Nash, *supra* note 456, at 105; MARCUS ET AL., *supra* note 44, at 195.

⁴⁷⁸ See *supra* notes 171–172 and accompanying text (describing EPA's sample application).

⁴⁷⁹ See *supra* notes 2–8 and accompanying text; see also Coglianese & Nash, *supra* note 3, at 251.

mean. Even the two programs in Table 12 labeled as “awards” programs were also partnership programs as the “awards” were available to any qualified applicant and not limited or competitive.⁴⁸⁰

In late 2005, at the midpoint of Performance Track’s history, we gathered official program documentation for each of the programs listed in Table 12. Using these materials, we coded each program in terms of three characteristics: stringency, benefits, and number of members. For the first two characteristics, we separately coded every program and had a research assistant do the same. On those occasions where we had differences in coding, we resolved them by gathering more information and, in some cases, by contacting an EPA staff person responsible for running that program.

The programs were coded on a three-point scale according to their entry stringency. A rating of “1” (low stringency) only required submitting a brief application and committing generally to voluntary action. A rating of “2” (medium stringency) required more of the applicant, such as submitting a description of a project or otherwise demonstrating a commitment. Programs rated “3” (high stringency) also required such commitments and demonstrations, but also involved EPA or a third party in screening and sometimes training applicants. An example of a level “3” program is Performance Track.⁴⁸¹

TABLE 12. NATIONAL EPA VOLUNTARY PARTNERSHIP PROGRAMS⁴⁸²

Best Workplaces for Commuters Climate Leaders Coal Combustion Products Partnership Combined Heat and Power Partnership ENERGY STAR Business Improvement Green Power Partnership GreenScapes High Production Volume Challenge Indoor Air Quality Tools for Schools - Great Start Awards Program Indoor Air Quality Tools for Schools - Leadership Awards Program Labs 21 Landfill Methane Outreach Program Methane to Markets Partnership Mobile Air Conditioning Climate Protection Partnership National Environmental Performance Track National Partnership for Environmental Priorities Natural Gas STAR Program Partnership for Safe Water Pesticide Environmental Stewardship Program PFC Emission Reduction Partnerships Plug-In to eCycling SF-6 Emission Reduction Partnership for Electric Power Systems SF-6 Emission Reduction Partnership for Magnesium Industry SmartWay Transport Partnership Sunwise School Program Sustainable Futures Voluntary Aluminum Industrial Partnership Voluntary Children’s Chemical Evaluation Program WasteWise

⁴⁸⁰ Coglianesse & Nash, *supra* note 3, at 251.

⁴⁸¹ *Id.* at 251, 253.

⁴⁸² *Id.* at 252; Coglianesse & Nash, *supra* note 456, at 109; *see also List of Partnership Programs*, EPA.gov, <http://perma.law.harvard.edu/0Ns1sBATeuU> (including links for the Combined Health

In addition to coding the programs based on their membership stringency, we also coded them based on their benefits, again using the “1” (low), “2” (medium), or “3” (high) rating system. Most voluntary programs have as their primary benefit some type of public recognition. EPA lists members’ names on its website, provides them with a plaque, logo, or certificate, grants them access to technical assistance or educational materials, or offers a point of contact with EPA. Since public recognition is the most common form of benefit, programs that offered only public recognition were coded at the level of “2” or “medium.” Only one program offered no public recognition — the SunWise program, which does not even list participants on EPA’s website — so we rated it a “1” or “low” for its level of benefits. A handful of programs (including Performance Track and Sustainable Futures) offered benefits exceeding the basic package, in particular offering some form of regulatory relief. These programs we rated a “3” (high) for the level of benefits.

Finally, we collected information on how many members participated in each of these partnership programs. EPA’s website provided a list of participating members for most programs as of the end of October 2005.⁴⁸³ For those programs that distinguished members based on their organization or sector type, we aggregated members from across all categories and used the total membership numbers.

We found, not surprisingly, a rough correlation between program stringency and benefits. A program like SunWise, for example, only required prospective members to complete a form indicating a desire to learn more about protection from the sun’s ultraviolet rays. That completed form in turn entitled the member to the most minimal of benefits: a packet of information from EPA.⁴⁸⁴ By contrast, a program such as Sustainable Futures required days of training and a significant commitment from product engineers to deviate from familiar methods of product development. In return, it provided members with expedited regulatory relief from testing protocols called for under the Toxic Substances Control Act (“TSCA”).⁴⁸⁵ As Figure 5 shows, below, a few programs that appeared only to require a statement of commitment (low entry stringency) offered medium benefits, but none offered a high level of benefits. Similarly, the programs with high stringency also provided high levels of benefits.

and Power Partnership program; ENERGY STAR Business Improvement program; Green Power Partnership program; Indoor Air Quality Tools for Schools programs; Labs 21 program; Landfill Methane Outreach Program; Mobile Air Conditioning Climate Protection Partnership program; Natural Gas STAR program; SmartWay Transport Partnership program; Sunwise School Program; and the Voluntary Aluminum Industrial Partnership program).

⁴⁸³ Coglianese & Nash, *supra* note 3, at 254.

⁴⁸⁴ See *Join Sunwise*, EPA.gov, <http://perma.law.harvard.edu/0URE4GVKtnN>.

⁴⁸⁵ Sustainable Futures: Voluntary Pilot Project Under the TSCA New Chemicals Program, 67 Fed. Reg. 76,284–90 (Dec. 11, 2002). Of course, as Figure 5 shows, the variation between entry-requirement stringency and program benefits was not great. More than half of the programs provided the “standard” package of program benefits and also provided a typical level of entry stringency (requiring both a commitment and some action on the part of members).

FIGURE 5. MATCHING ENTRY STRINGENCY TO PROGRAM BENEFITS⁴⁸⁶

		Program Benefits		
		Low	Med	High
Entry Stringency	Low	1	5	0
	Med	0	18	1
	High	0	0	3

In addition to the correspondence between entry stringency and program benefits, we found that the degree of entry stringency appeared to be inversely related to the number of members (see Figure 6, below).⁴⁸⁷ This finding was not surprising given that one would expect fewer facilities to join a program that imposed substantial requirements upon members. Even taking into account the fact that some programs were older than others, we found a slightly downward trend in the number of members in programs with greater entry stringency (see Figure 6).⁴⁸⁸

Programs with high levels of benefits had few members, illustrating the participation paradox described in Part III.B.1. SunWise, which offered virtually no benefits to members, boasted about 13,000 members.⁴⁸⁹ At the other extreme, the Sustainable Futures program offered the potential for substantial regulatory relief to qualifying firms, yet only eight firms had joined at the time of our study.⁴⁹⁰

Between these extremes, the bulk of the programs were mostly middle of the road in terms of both entry stringency and benefits. Program membership also appeared to be mediocre. The median program had only about thirty-four members per year (mean = 157, standard deviation = 495). Putting programs with the largest and smallest memberships aside, the average program attracted seventy-two members per year (standard deviation = 96).⁴⁹¹

Admittedly, our measures of entry stringency and program benefits are not very precise and, given the small sample size, we cannot control for other fac-

⁴⁸⁶ Coglianese & Nash, *supra* note 456, at 109.

⁴⁸⁷ Coglianese & Nash, *supra* note 3, at 254–55.

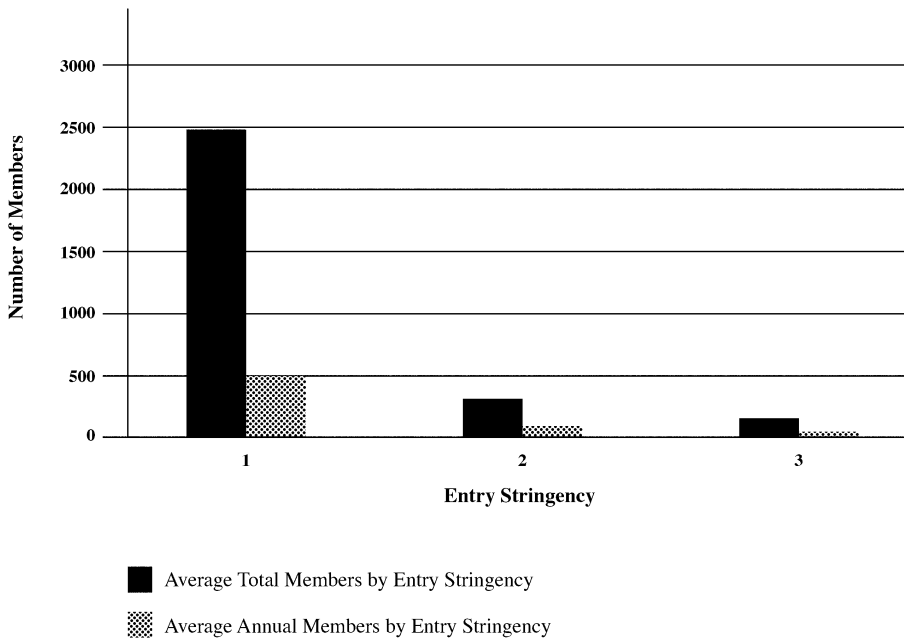
⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 255.

⁴⁹⁰ *Benefits to Sustainable Futures Graduates*, EPA.gov, <http://perma.law.harvard.edu/OPMesxpT3MD>. EPA considers two additional firms as graduates based on their participation in Project XL. See also Coglianese & Nash, *supra* note 456, at 109–10 (describing the status of program participation at the three-year mark).

⁴⁹¹ Coglianese & Nash, *supra* note 3, at 255; see also Coglianese & Nash, *supra* note 456, at 110.

FIGURE 6. AVERAGE MEMBERSHIP BY ENTRY STRINGENCY GROUP



tors that seem likely to affect variation in membership levels across partnership programs. These factors include the size of the population of facilities that could potentially meet membership criteria, potential members' perceptions of how federal or state regulatory actions might make participation more or less advantageous, the degree to which other drivers such as liability might encourage (or discourage) the activities required by the program, the costs and benefits of the actions required to join the program, and the degree to which EPA has promoted the program and recruited members.⁴⁹² However, the evidence collected appears consistent with the survey responses discussed in the previous Part, which indicate that businesses are sensitive to the costs of entry in voluntary programs — perhaps because they do not see the benefits of these programs as being significant.⁴⁹³

4. State “Performance Track” Programs

We also looked to state environmental partnership programs for additional evidence about the connection between program design features and membership. Over the past two decades, approximately twenty states have developed

⁴⁹² Coglianese & Nash, *supra* note 3, at 256.

⁴⁹³ See *supra* notes 449–453 and accompanying text.

programs with features very similar to Performance Track.⁴⁹⁴ We considered what the patterns of membership across these programs could tell us about the underlying prospects for making a program like Performance Track attractive to many facilities nationwide.

Even though EPA terminated Performance Track, at least fifteen state programs remain currently active.⁴⁹⁵ These state programs offer a variety of benefits to facilities that meet explicit entry requirements, such as public recognition, limited regulatory flexibility, or less frequent inspections.⁴⁹⁶ In order to qualify for these benefits, facilities typically must demonstrate compliance with environmental regulations, implement some form of an EMS, set environmental performance goals that go beyond compliance, and agree to report progress toward those goals to agencies.⁴⁹⁷ In some cases, facilities must also share performance information with surrounding communities.⁴⁹⁸

In eight states, these partnership programs consist of multiple “tiers” or levels of participation, each with its own separate requirements and rewards.⁴⁹⁹ These state programs exhibit a membership pattern similar to what we have observed across EPA’s voluntary programs. Program tiers that are the easiest to join and offer minimal levels of benefits generally have the most members, while program tiers that require the most action by facilities and offer the greatest rewards have the fewest members. For example, North Carolina’s Environmental Stewardship Initiative has three program tiers: Environmental Partner, Rising Environmental Steward, and Environmental Steward.⁵⁰⁰

To join the Environmental Partner tier, a facility must establish environmental goals and commit to implementing an EMS. It must also agree to report its progress in achieving its environmental goals to North Carolina’s Department of Environment and Natural Resources (“NCDENR”). In return, North Carolina offers its Environmental Partners various kinds of recognition, networking opportunities, help developing their EMSs, a single point of contact within NCDENR, and the opportunity to be paired with an Environmental Steward facility as a mentor.⁵⁰¹

Requirements for joining the Rising Environmental Steward tier are more demanding. These facilities must establish environmental performance targets, make annual improvements in their environmental performance, and have an

⁴⁹⁴ See CARY COGLIANESE, JENNIFER NASH & JONATHAN BORCK, STATE AND FEDERAL PERFORMANCE-BASED ENVIRONMENTAL PROGRAMS: ASSESSING GOALS, ACTIVITIES, COMMUNICATION, AND DATA COLLECTION 1 (2008).

⁴⁹⁵ See *supra* note 34.

⁴⁹⁶ COGLIANESE, NASH & BORCK, *supra* note 494, at 11.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ States with active tiered programs are: Colorado, New Mexico, North Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin. See *id.* at 73, 76, 78. Several of these tiered programs pre-date EPA’s Performance Track — e.g., Colorado, New Mexico, Texas, and Vermont initiated their programs in 1998. For sources of further information about these programs, see *supra* note 34.

⁵⁰⁰ NORTH CAROLINA ENVIRONMENTAL STEWARDSHIP INITIATIVE, ENVIRONMENTAL STEWARDSHIP ANNUAL REPORT 16–17 (2012), available at <http://perma.cc/S3AV-94EP>.

⁵⁰¹ *Id.* at 17.

EMS already in place that has been certified by a third party or member of the NCDENR staff. In addition to all of the benefits of Environmental Partners, NCDENR provides Rising Environmental Stewards with further recognition.

The third program tier is the most challenging and most rewarding. Environmental Stewards must put in place a mature EMS that “is integrated into core business functions,” sets “aggressive environmental performance goals,” and communicates “with the local community” about “progress toward performance goals.”⁵⁰² North Carolina rewards Environmental Stewards with recognition from the Secretary of the NCDENR and offers the opportunity to participate in two high-level groups: a stewardship forum chaired by the Secretary and an Environmental Stewardship Initiative advisory board.⁵⁰³ But these greater rewards do not necessarily lead to greater levels of participation. In 2011, ninety-seven facilities participated in the Environmental Partner tier, while only a little more than a dozen facilities participated in each of the Rising Environmental Steward and the Environmental Steward tiers.⁵⁰⁴

This paradox of participation — where fewer facilities tend to join tiers that offer greater benefits — is found in almost every tiered state program. For example, in fiscal year 2012, Virginia’s least demanding (and least rewarding) tier had 150 members (including two facilities with multiple offices),⁵⁰⁵ while its most demanding (and most rewarding) tier had thirty-eight.⁵⁰⁶ Similarly, Wisconsin’s least demanding (and least rewarding) tier had eighty-two members while its most demanding (and most rewarding) tier had six.⁵⁰⁷ The general pattern observed with EPA’s voluntary partnership programs is consistent with the general pattern across state voluntary partnership programs.

5. Summary

This review of EPA and state voluntary partnership programs confirms how the design of a voluntary program like Performance Track can affect businesses’ willingness to join. As agencies offer more significant rewards for participation in their voluntary programs, they also raise the stringency of the programs’ entry requirements.⁵⁰⁸ Of course, agencies’ propensity to link heightened program benefits to heightened entry requirements may well be entirely appropriate, both normatively and politically. As we have seen, government

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 3.

⁵⁰⁵ *Environmental Enterprise (E2) Members*, VA. DEP’T OF ENVTL. QUALITY, <http://perma.law.harvard.edu/0Bo9dQbLrrC>.

⁵⁰⁶ *Extraordinary Environmental Enterprise (E4) Members*, VA. DEP’T OF ENVTL. QUALITY, <http://perma.law.harvard.edu/03iXk74aGZG?type=image>.

⁵⁰⁷ *Green Tier Charters, Tiers, and Applicants*, WIS. DEP’T OF NATURAL RES., <http://perma.law.harvard.edu/032FaY7BATA?type=image>.

⁵⁰⁸ See *supra* Part III.B.1 (detailing the inverse relationship between the rewards from and participation in agency programs). Of course, it is also possible that agencies first decide to impose stringent entry requirements and then seek to offer greater rewards to compensate. These additional rewards, though, do not appear to be sufficient to induce high levels of participation.

agencies face the prospect of criticism and controversy if businesses they are rewarding turn out to be undeserving of those rewards.⁵⁰⁹

The problem is that businesses do not find the additional rewards sufficient to offset the additional entry requirements that accompany these rewards. In practice, this linkage has created a paradox of participation.⁵¹⁰ Because the level of business participation varies inversely with the stringency of entry requirements, at the same time that an agency increases rewards in order to boost participation in a program, it paradoxically decreases participation by increasing the costs of business participation. Fewer firms are willing to assume the increased costs associated with gaining entry to programs with higher stringency, even when they promise greater rewards.

Rather than increasing benefits, as Performance Track's managers repeatedly tried to do, the most effective way to have increased participation in Performance Track would have been to reduce program stringency. But a program with weak requirements will demand weak environmental performance improvements from its members. Despite lofty aspirations at the outset, Performance Track eventually found itself confronting an inescapable impediment to becoming a major driver of environmental improvement in the United States. Even when the program offered rewards that included relief from the kind of regulatory requirements that many businesses often complain about, businesses were simply not interested in jumping through the agency's hoops to receive the promised relief.

Such a trap lies in store for other voluntary programs. If "[p]oorly subscribed voluntary programs are suspect," as Professor Eric Orts has noted,⁵¹¹ then programs like Performance Track appear destined to be suspect. When they demand more of each member, they can expect to see fewer members. Promising greater rewards simply does not help. Governments that reward private companies become vulnerable to criticism if those companies turn out not to be worthy⁵¹² — hence, officials can be expected to screen entry into their programs even more stringently when rewards are greater, thereby further discouraging participation.⁵¹³

⁵⁰⁹ See *supra* Part II.A.

⁵¹⁰ See *supra* Part III.B.1.

⁵¹¹ Orts, *supra* note 412, at 1286.

⁵¹² See *supra* Part III.B.1.

⁵¹³ OSHA's experience with VPP does not diminish our conclusions. Although EPA modeled Performance Track on VPP and the two programs bore many similarities, we do not take the fact that OSHA currently has more members in VPP than EPA had in Performance Track to undercut in any way the core constraints we have explained. Despite their similarities, OSHA's VPP and EPA's Performance Track did have some differences in entry requirements and rewards that make direct comparison challenging. The most striking difference between the two programs lies in their age: VPP is over thirty years old, while Performance Track came to an end after nine years. When OSHA's VPP was nine years old, it had only seventy-one worksites in the federal VPP — vastly fewer members than Performance Track when it ended. *Growth of VPP – Federal Only – As of 01/31/04*, OSHA.GOV, <http://perma.law.harvard.edu/0L1dhrj4eey>. Even ignoring differences in program longevity, the ratio of program members to the total population of potential members is incredibly small in both the EPA and OSHA programs. See *supra* notes 416–418 and accompanying text. Moreover, when rough estimates of the combined membership in the federal Performance Track and state-based environmental leadership programs (2,389) are compared with the total

IV. LESSONS LEARNED

Our study of Performance Track has been based on a variety of research methods: a review of publicly available information about Performance Track and other voluntary programs, semi-structured interviews with managers of participating and non-participating facilities, and a large-scale survey of facility managers in several industry sectors. By using such a multifaceted research approach, we have been able to test our analyses against one another, comparing findings from interviews with findings from survey research. Moreover, in contrast with other research on voluntary environmental programs more generally, we approached our inquiry not only by collecting data on the joiners but also by considering the views of non-participants. Our three major findings, summarized here, not only speak to Performance Track and what it achieved, but they also contribute to an improved understanding of voluntary programs more generally.

A. Claims About Recognizing “Top Performers” Should Be Verifiable

EPA called Performance Track members the best of the best.⁵¹⁴ Yet EPA’s entry criteria for Performance Track never addressed performance directly, and it never compared facilities that applied with facilities that did not apply. Although the Performance Track application asked for a large amount of information about a facility’s characteristics — its EMS, past achievements, future commitments, and public outreach initiatives⁵¹⁵ — EPA never gathered information about other facilities’ environmental practices. Thus, it had no way of knowing where applicants fell along the performance spectrum.

Those who have examined the environmental performance of Performance Track members have concluded that at least some members failed to perform better than their peers.⁵¹⁶ A 2007 study by EPA’s Office of Inspector General found that some Performance Track facilities emitted more toxic pollutants than the average for their sectors and that some had non-trivial compliance

number of worksites in both the federal VPP and similar state-based programs (2,339), the differences between the two types of programs seem to disappear altogether. Borck et al., *supra* note 25, at 817–18 (reporting Performance Track and state environmental leadership program data as of July 2007, although this may include some unknown double-counting of facilities in both federal and state programs); *Current Federal and State-Plan Sites As of 10/31/2013*, OSHA.gov, <http://perma.law.harvard.edu/09gYZhUA6uJ>. It is also worth noting that EPA has had more than sixty voluntary programs in operation compared with OSHA’s five programs; to some degree, EPA’s other programs may have diverted interest away from Performance Track. See Coglianese & Nash, *supra* note 456, at 107 (noting more than sixty voluntary programs listed on EPA’s website in 2005); *OSHA’s Cooperative Programs*, OSHA.gov, <http://perma.law.harvard.edu/0Smka58qvBP> (describing OSHA’s five “cooperative programs”).

⁵¹⁴ See GROWTH & RENEWAL, *supra* note 142, at 3; see also *supra* Part II.A.

⁵¹⁵ EPA, EPA DOC. NO. 240B01006, PERFORMANCE TRACK APPLICATION INSTRUCTIONS 2 (2002) (on file with the Harvard Law School Library).

⁵¹⁶ See P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 24, 26; PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 17–18.

problems.⁵¹⁷ An analysis undertaken by consulting firm Booz Allen Hamilton at our request found that Performance Track facilities presented slightly higher-than-average risk to public health compared to all facilities subject to EPA toxic reporting requirements.⁵¹⁸

In addition to calling Performance Track members “top performers,” EPA frequently spoke of the program as “delivering results.”⁵¹⁹ EPA required members to track progress toward their goals and report improvements to EPA on an annual basis.⁵²⁰ But at least some of the facilities that joined Performance Track undertook those activities and made those improvements without any regard to the program. Managers we interviewed did not speak of Performance Track as a vehicle for inducing them to improve their environmental performance; they largely saw it as “easy” to join because they were already doing many of the things that the program required.⁵²¹ Recall that EMS implementation was a prerequisite to program admission. It would not be appropriate, therefore, for EPA to claim credit for the environmental benefits that were pursued as part of the EMSs that managers put into place before they joined. Nevertheless, EPA routinely claimed such improvements as Performance Track “results.”

B. *Voluntary Programs Attract “Extroverts” — Not Necessarily “Leaders”*

What made Performance Track facilities stand out was the value they placed on external engagement as opposed to any measurable tendency toward environmental excellence.⁵²² Performance Track facility managers cultivated an image of environmental responsibility and environmental leadership.⁵²³ They valued recognition and actively sought to engage regulators and communities, and their corporate and facility bosses voiced strong support for such efforts.⁵²⁴ A large number of facility managers working at Performance Track facilities also reported that they more frequently sought out the opinions of community members and environmental advocacy organizations.⁵²⁵

The managers we spoke with at facilities that did not participate in Performance Track, in contrast, preferred to keep a low profile and achieve environmental results without fanfare.⁵²⁶ Our research indicated that facilities differed markedly in their degree of organizational extroversion. Some sought to call attention to their accomplishments, while others preferred to stay out of the spotlight. This extroversion, rather than superior environmental performance, was the chief characteristic distinguishing joiners from others.⁵²⁷

⁵¹⁷ See P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note 29, at 24–25.

⁵¹⁸ See PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note 282, at 17–18.

⁵¹⁹ See, e.g., FY2006 NATIONAL PROGRAM GUIDANCE, *supra* note 9, at 1.

⁵²⁰ See, e.g., TOP PERFORMERS, *supra* note 124, at 4, 6.

⁵²¹ See *supra* note 371 and accompanying text.

⁵²² Howard-Grenville, Nash & Coglianese, *supra* note 345, at 96.

⁵²³ *Id.* at 95.

⁵²⁴ *Id.* at 96–97.

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 95.

⁵²⁷ *Id.* at 100.

C. Voluntary Partnership Programs Face Limits to Growth

When Performance Track ended in 2009, it had 547 members. While that number was significantly more than the number that participated in Project XL and StarTrack, it still represented only a tiny fraction of regulated facilities. From the perspective of facility managers, the cost of applying for and maintaining their Performance Track membership was significant, while the benefits EPA provided were modest. EPA initially promised regulatory relief to firms participating in Performance Track, but it took several years before the agency was even able to offer a short extension of the time period for on-site hazardous waste storage. From EPA's perspective, however, the benefits it offered were still quite significant — they were, after all, exemptions from *law*. Relinquishing even a very small degree of regulatory authority was a major concession and political risk for EPA.

The different ways that EPA and facility managers value the costs and benefits of voluntary programs necessarily limits the potential of voluntary partnership programs to impose meaningful incentives on a large number of businesses. Programs that are easy to join and offer small benefits can attract relatively large numbers of members, but ambitious programs that set stringent entrance requirements and offer more significant rewards attract relatively few members. Ironically, fewer firms want to join the programs that offer the greater benefits. This paradox of participation generally holds true across EPA partnership programs as well as those offered by states. For most facilities, joining a relatively inconsequential voluntary program may be attractive, but joining a voluntary program that sets high goals and standards is simply not worth the cost.

CONCLUSION

Although Performance Track, EPA's "flagship" voluntary program, has now been disbanded, government agencies, including EPA, continue to operate a significant number of voluntary programs like it. With little prospect for ending gridlock in Congress, voluntary programs like Performance Track are likely to become increasingly attractive avenues for seeking environmental improvement in the absence of new legislative authority. Yet public officials should take heed of the lessons from EPA's experience with Performance Track.

Public leaders should keep the contributions of voluntary programs in perspective. These efforts will likely always be modest additions to core regulatory activities. For those who seek to encourage businesses to undertake greater pollution prevention and control efforts, voluntary programs may well be the only available option in the face of the "logjam" that has impeded environmental lawmaking in recent decades — but they are also likely to prove very unsatisfying alternatives. These programs tend to be gap-fillers, not inducers of a paradigm shift or an "alternative path" toward new environmental regulation.

We recognize, of course, that traditional regulation is hardly perfect. Substantial rates of non-compliance with traditional regulation have persisted even after decades of regulatory control.⁵²⁸ Yet even rules that experience some of the lowest-known compliance rates still encompass and affect many more facilities than Performance Track ever reached.⁵²⁹

In crafting voluntary programs, government officials should refrain from calling program participants “top performers” — especially if the agency collects no data with which to compare member facilities to non-member facilities. Our research suggests that those who shun the spotlight of recognition by a federal or state regulatory agency do not always have something to hide. Instead, the organizational introversion that characterizes these facilities leads their managers to emphasize getting work done without fanfare.

As a result, environmental officials should not equate the participation in a voluntary program, even one that requires adoption of a management system and the setting of improvement goals, as the achievement of a superior level of performance. After all, goals may be ambitious or modest. They may address problems that are important or trivial. They may reflect plans made earlier or may be implemented for reasons having nothing to do with the voluntary program, and once managers set environmental performance goals, they may strive to meet them with varying degrees of determination. Simply having goals or having a management system in place says relatively little about a facility’s environmental impacts, now or in the future.

We have seen that facilities that participate in voluntary programs are indeed different from their non-participating peers. The crux of that difference

⁵²⁸ See, e.g., Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 304–05 (1999) (describing significant noncompliance rates even twenty years after the passage of the Clean Water Act); Mary E. Deily & Wayne B. Gray, *Agency Structure and Firm Culture: OSHA, EPA, and the Steel Industry*, 23 J.L. ECON. & ORG. 685, 705–06 (2007).

⁵²⁹ For a similar conclusion about EPA’s Strategic Goals Program (“SGP”), which was part of the agency’s Common Sense Initiative in the 1990s, see Cary Coglianese & Laurie Allen, *Building Sector-Based Consensus: A Review of the US EPA’s Common Sense Initiative*, in INDUSTRIAL TRANSFORMATION 65, 84 (Theo de Bruijn & Vicki Norberg-Bohm eds., 2005) (“If the limited voluntary efforts associated with SGP are compared with the likely impact of a new environmental regulation that would have covered all 3,000 firms, instead of just the small fraction who participated in SGP, the environmental impacts of SGP can hardly seem all that significant.”). Of course, we do recognize the theoretical possibility that voluntary programs like Performance Track might have “spillover” effects, potentially inducing some changes in the management of facilities that do not participate in the program, either by enticing these non-members to improve their performance so as to position themselves to join the voluntary program in the future or by somehow engendering the diffusion of best environmental practices. Borck & Coglianese, *supra* note 45, at 317. Neither our research nor anything EPA reported has identified any significant spillover effects from Performance Track. We surmise that if there were any such effects, they would probably not be large. Our survey of facilities described in Part II.C.2 included a question designed to gauge managers’ awareness of Performance Track. After taking out those who responded as members of Performance Track, 52% of the respondents indicated that they had never even heard of Performance Track, while another 26% only knew a little about it. If the environmental managers of so many non-member facilities had so little awareness of Performance Track, it is hard to imagine that the program exerted any substantial indirect effects on their businesses’ environmental performance.

lies in their organizational extroversion — the value their managers place on engaging with external constituencies and seeking government recognition. We have explained that these characteristics are not the same as top environmental performance, but we should conclude by duly noting that such characteristics could be valuable, at least to some degree, to EPA when acting in its role as a traditional regulator.

In other words, there might actually be a meaningful contribution that can be reasonably expected from a program like Performance Track because facilities that engage with EPA and state environmental officials might prove to be useful sources of information for regulatory decision-making.⁵³⁰ Facilities that participate in these programs make themselves open to regulators to learn about their industrial operations and how they can be made cleaner and safer. Members give access to regulators, offering windows into what goes on inside industrial facilities that presumably can only help inform future regulatory decision-making. When the time is ripe for statutory change or new regulations, what EPA learns from its engagement with extroverted facilities could prove useful.

In this way, Performance Track might help by acting as a magnet, drawing out managers from more extroverted facilities to engage with EPA. To at least some degree, Performance Track apparently did help EPA officials better understand the role of environmental management systems in environmental protection. After visiting Performance Track facilities and observing how EMSs worked in practice, EPA learned that EMSs that were not externally certified tended to diminish in quality. Hence, the agency added a requirement for facilities participating in Performance Track to have their EMSs certified by a third party.⁵³¹ Performance Track also provided an opportunity for EPA to learn about performance reporting. As the agency gathered information from members about their progress toward achieving their goals, it learned much more about the challenges of performance measurement, normalization, and communication. The models for community engagement that EPA officials thought would help to ensure that facilities met their goals were also tested through experience — although in light of the sharp criticisms of the program from environmental organizations, these can probably be said to have fallen short.

Ultimately, agency officials learned — or should have learned — that the “alternative path” articulated in its visionary *Aiming for Excellence* report was much more difficult to achieve than many environmental policy innovators had anticipated at that time. Indeed, the biggest lesson for government officials to take away from Performance Track is almost certainly not the one that the program’s founders had in mind when they emphasized that they were seeking “measurable results.”⁵³² We have indicated that EPA never implemented Per-

⁵³⁰ Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 310 (2004).

⁵³¹ See *supra* Part I.C.

⁵³² See TOP PERFORMERS, *supra* note 124, at 3 (“Through these early initiatives, EPA learned the importance of keeping program design simple, keeping transaction costs low, and delivering measurable results.”). See also Jonathan C. Borck, Cary Coglianese & Jennifer Nash, *Evaluating the*

formance Track in a way that enabled the agency to generate any meaningful measurements of the program's results. On the contrary, the data we have marshaled through a series of studies reveal significant design weaknesses in voluntary environmental programs like Performance Track. To achieve the true learning potential from these programs, government officials must be prepared to accept that innovations can sometimes fail — or at least not live up to the grand expectations that their founders may proclaim. That is what our research shows, and true policy learning requires going where the evidence leads.⁵³³

Social Effects of Environmental Leadership Programs, 38 ENVTL. L. REP. 10697, 10697 (2008); Borck, Coglianesi & Nash, *supra* note 25, at 775–76.

⁵³³ Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in *NEW PERSPECTIVES ON REGULATION* 111–12 (David Moss & John Cisternino eds., 2009); Coglianesi & Snyder Benneer, *supra* note 244, at 246–73.