Promoting Self-Governance via Public Recognition: Lessons from EPA's Performance Track and OSHA's Voluntary Protection Programs

Cary Coglianese[*] and Jennifer Nash[**]

In seeking to protect public health, government officials have available to them a variety of policy instruments that can shape both individual and organizational behavior. In liberal societies, uses for *regulatory* instruments face certain widely-accepted normative constraints, such as an anti-paternalism norm that holds that regulation of individual behavior should occur only when it harms others. Under this principle, regulatory mandates are discouraged to ensure that individuals exercise regularly, limit their daily caloric intake, or stop smoking (except in public places). In these circumstances, where the motivation is largely paternalistic, governments may rely on non-coercive strategies, such as information disclosure, public education strategies, or forms of positive incentives.[1] Recognizing that these non-coercive (or at least, less coercive) techniques have been used to promote individual self-governance, it may seem hardly surprising that public officials would take an interest in using them in other contexts as well, including as means of promoting organizational self-governance or even as a substitute for traditional forms of regulation.

So-called voluntary approaches for promoting self-governance have emerged in recent years across a series of regulatory domains aimed at protecting public health, most particularly in the areas of environmental and workplace health and safety regulation. In these domains, although the protection of individual health is the primary goal, the means of achieving this goal typically takes the form of regulating *organizational* behavior, specifically the conduct of business activities that generate environmental, health, and safety risks. Regulation of organizations is readily justified because seldom is that regulation motivated primarily for the organizations' own benefit – something that the market itself is thought to do a better job of ordering – but rather for the benefit of individuals who work in, interact with, or are otherwise affected by the organization and its activities.

In part, the emergence of interest in alternative, voluntary strategies for promoting environmental and workplace safety self-governance has grown since the 1990s from a recognition of political limitations on further applications of public regulation. Most regulatory law in the United States aimed at environmental, health, and safety risks was adopted in the 1970s and 1980s, and many of these laws are thought to have achieved significant improvements in public health.[2] But since the early 1990s, the United States has also seen a virtual standstill in the passage of new environmental legislation and very few regulatory advances in workplace health and safety. Although the U.S. Environmental

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[*] Edward B. Shils Professor of Law and Political Science, and Director of the Penn Program on Regulation, University of Pennsylvania Law School.

[**] Director, Business and Environment Initiative, Harvard Business School.

[1] Richard Thaler and Cass Sunstein have grouped many of these less coercive strategies into a category they call "nudges." RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

[2] *See, e.g.*, J. CLARENCE DAVIES AND JAN MAZUREK, REGULATING POLLUTION: DOES THE U.S. SYSTEM WORK? (1997).

Protection Agency (EPA) has continued to adopt regulations under older statutes, important public health concerns remain either unaddressed or inadequately addressed by federal law, such as hazards from toxic chemicals and from so-called non-point sources of water pollution. In addition, in the realm of worker health and safety, many hazardous or potentially hazardous chemicals remain unregulated even though workers are exposed to them on a daily basis. For decades, the U.S. Occupational Safety and Health Administration (OSHA) has seemingly struggled to adopt new health and safety regulations in the face of high levels of scientific uncertainty combined with a conflict-ridden interest group environment and concerns over the likelihood of judicial scrutiny.[3]

In the absence of significant new legislative developments or regulatory advances, officials in environmental, health, and safety agencies at the federal and state levels have tried to innovate administratively, creating a series of alternative programs aimed at achieving positive public health protections through non-regulatory means. In addition to public education, administrators have experimented with a series of so-called voluntary programs.[4] By the mid-2000s, for example, EPA had created more than sixty different voluntary programs,[5] ranging from better-known efforts like 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.[6] OSHA has likewise since the 1980s operated a series of Voluntary Protection Programs to promote public health protection in the workplace. These and other voluntary programs vary in their details but they share a common approach that seeks to encourage individuals, businesses, and other organizations to take societally beneficial actions not otherwise required by law by promising to have government recognize participating businesses as leaders in environmental or safety protection.[7] These efforts seek, in other words, to promote self-governance via public recognition.

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[3] JOHN MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION (1988); THOMAS MCGARITY AND SIDNEY A. SHAPIRO, WORKERS AT RISK (1993); Thomas McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L. J. 1385 (1992).

[4] 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).

[5] 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.").

[6] 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. 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.

[7] 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-

Especially in the absence of new legislation, voluntary programs have been seen to offer a promising way to try to deliver improved public health outcomes without the investment of the government resources needed to engage in rulemaking and enforcement.[8] 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.[9] For these reasons, voluntary programs have garnered considerable support from a variety of scholars and public officials, some of whom have advocated their prominent role in the U.S. environmental protection system, even sometimes seeing them as possible substitutes for traditional regulation.[10]

Among the EPA's many voluntary programs, the agency long viewed its National Environmental Performance Track program to be its "flagship" initiative.[11] Established 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.[12] Through Performance Track, EPA sought to recognize and reward environmentally responsible businesses in various ways.[13] EPA

VHRF (noting voluntary programs are "designed to motivate people and organizations to take actions, not required by regulation, that benefit the environment").

[8] 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 __ .

[9] *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").

[10] *See, e.g.*, FIORINO, *supra* note __; Stewart, *supra* note __; 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).

[11] *See* EPA OFFICE OF POL 'Y, ECON., & INNOVATION, FY2006 NATIONAL PROGRAM GUIDANCE: NATIONAL ENVIRONMENTAL PERFORMANCE TRACK PROGRAM 1–2 [hereinafter FY2006 NATIONAL PROGRAM GUIDANCE] ("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).

[12] Indus. Econ., Inc., PTrack Member Data (Mar. 22, 2011) (obtained from Angela Helman, Industrial Economics, Inc.) .

[13] *See National Environmental Performance Track: History*, EPA.GOV, http://perma.law.harvard.edu/0MTfTeb3CBJ (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).

publicly lauded Performance Track members,[14] designated members as low priority for routine inspections and encouraged states to do the same,[15] and reduced certain regulatory and administrative requirements for Performance Track members.[16] In exchange for these benefits, members were supposed to stay in substantial compliance with regulatory requirements and make progress toward self-created environmental improvement goals that exceeded the requirements of existing regulation.[17]

Based on a model reflected in OSHA's Voluntary Protection Programs (VPP), EPA's Performance Track has been one of the latter agency's most prominent and comprehensive efforts at voluntary environmental protection.[18] 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.[19] 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."[20] In terms of

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[14] *See National Environmental Performance Track: Recognition*, EPA.GOV, http://perma.cc/QQ2SDLTH ("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 __.

[15] *National Environmental Performance Track: Low Priority for Routine Inspections*, EPA.GOV, http://perma.cc/5UEY-EGE9.

[16] *See* EPA, PERFORMANCE TRACK REGULATORY AND ADMINISTRATIVE BENEFITS FACT SHEET 1–2 (2009) (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").

[17] *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) (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"); *National 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[ting] to four quantitative goals . . . for improving their environmental performance").

[18] *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.

[19] *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, and Staff Office Dirs. (Jan. 26, 2007) ; FIORINO, *supra* note __, at 149.

[20] 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) . Former EPA Deputy Administrator

membership, the program ranked among the EPA's largest facility-based voluntary programs,[21] and observers viewed its entry criteria and programmatic requirements as ambitious.[22] According to claims made by the EPA, Performance Track members realized substantial environmental benefits in terms of energy and water conversation, habitat preservation, use of recycled materials, and reductions in greenhouse gas emissions and other pollutants.[23]

Although EPA eventually disbanded Performance Track under the Obama Administration, interest in voluntary programs like Performance Track and VPP continues unabated, making it important for regulators to understand better how these programs work and to try to glean lessons about how these voluntary programs seek to promote socially valuable self-governance. In policy circles, Performance Track and VPP have generated considerable attention — some laudatory, some critical — but thus far these programs have managed to escape significant attention from the research community. Earlier voluntary EPA initiatives, such as the 33/50 Program[24] and Project XL,[25] never matched Performance Track in terms of longevity,[26] yet they have received — and continue to receive — substantial attention in the legal and policy literature.[27] Strikingly, to date Performance

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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.

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

[22] *See, e.g.*, FIORINO, *supra* note __, 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.*

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

[24] 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 __and accompanying text.

[25] 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 __and accompanying text.

[26] 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 __, at 15, 38; Lisa C. Lund, *Project XL: Good for the Environment, Good for Business, Good for Communities*, ELR NEWS & ANALYSIS, 10,140 (2000) ; *Project XL*, EPA.GOV, http://perma.law.harvard.edu/0TUFVYM33xJ/.

[27] 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) ; 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*

Track and VPP have escaped all but the most passing mention in the literature and, as of yet, any independent, systematic academic study.[28]

Given the paucity of empirical literature on Performance Track and VPP, we provide in this paper an overview of how these programs operate: their goals, entry criteria, and membership requirements, including the information collected about participating businesses through applications, annual performance reports, and site visits. We also discuss the benefits government has offered to facilities that join these programs, chief among them the bestowing of public recognition on participating businesses as leaders in responsible environmental, health, and safety management. We then consider two main questions: (1) Do these programs promote exemplary environmental and safety leadership as they purport to do, or are they instead promoting more of a type of "public relations," on the part of either business, government, or both? (2) Can these programs scale up to a level that would make them a potentially significant alternative form of regulatory governance?

We address both of these questions first in the context of EPA's Performance Track. We report results from a series of triangulating empirical investigations, including case studies of five sets of matching pairs of Performance Track facilities and other facilities, and findings from a large-scale survey of Performance Track and other facilities.[29] We then turn to OSHA's VPP, offering the first in-depth examination of that program in the academic literature and reporting evidence about VPP that reinforces our findings about Performance Track.

With respect to whether Performance Track promotes exemplary environmental leaders, while we find no evidence to suggest that, in general, Performance Track facilities were anything but decent environmental actors, we also find no evidence to indicate that participating facilities systematically 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

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

[28] 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).

[29] The portions of this paper dealing with Performance Track draw on the authors' *Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program*, HARV. ENVTL. L. REV. (2014). An earlier report of the studies described here, all partly funded by EPA, is available as COGLIANESE & NASH, BEYOND COMPLIANCE, *supra* note __.

engaging with the broader community. This "extroverted" quality stands out more clearly as the distinguishing characteristic of participating facilities in public recognition programs than any performance-based indicia of social responsibility.[30] If those that advance to the "top" of a voluntary program exhibit extroverted qualities but not necessarily distinctive achievement, this fact in itself should lead us to question whether voluntary programs like Performance Track and VPP can induce major change in environmental practices throughout the entire economy, as such companies may be relatively few in number.

We turn, thus, to understanding the ability of programs like Performance Track and VPP to attract participants. We continue with our initial focus on Performance Track, showing that even if this program could credibly be said to have caused some environmental improvements in some facilities, an inherent tension in the program's design constrained the program from engaging a large proportion of the industrial facilities in the United States. The more that government agencies like EPA offer by way of 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. But even when government offers additional benefits, they do not correspondingly offset participation costs for most firms. As a result, programs like Performance Track are extremely unlikely to effectuate large-scale change in industry environmental performance. We present an account 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 to set low-cost entry and programmatic requirements. 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.[31]

Having reported our findings and conclusions from our research on Performance Track, we turn in the final part of this paper to OSHA's VPP, a program very similar to Performance Track but one with a longer history and about four times as many members. Those facts alone might suggest that Performance Track's limitations are not inherent to a program of its design. However, once VPP is more closely examined, as here, we can see that experience with it only confirms the major findings from our study of Performance Track. Voluntary partnership programs that seek to deliver meaningful public health benefits via public regulation appear, from both EPA's and OSHA's experiences, to be fraught with limitations. These programs may do well to attract some of the most extroverted businesses, but they seem to do less well in ensuring the selection of the best-performing businesses. Nor can they attract a sufficiently large number of participating

[30] As we explain further later, 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."

[31] 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. 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 __, at 173. Fiorino was the former director of EPA's Performance Track program.

businesses that would likely make them suitable as an alternative form of environmental or safety governance.

The National Environmental Performance Track

EPA created Performance Track as a means to identify and publicly recognize facilities that are environmental leaders.[32] The Performance Track program purported to single out individual facilities for environmental excellence.[33] It aimed to reach out to "superior" environmental performers.[34] 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."[35] As then-EPA Administrator Carol Browner put it, "Performance Track is targeted at the pace-setters, the environmental leaders in the corporate world."[36]

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.[37] Moreover, EPA relieved these facilities from certain limited regulatory requirements.[38]

In exchange for these incentives, EPA also expected Performance Track members to continue setting goals to improve their environmental performance.[39] Under such a system, EPA sought to advance its mission of environmental protection by better deploying its resources.[40] Agency officials believed Performance Track could help economize on traditional enforcement resources, allowing inspectors to focus less attention on facilities

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

[33] *See* SUMMARY OF FIRST PHASE PUBLIC MEETINGS, *supra* note__, at 4.

[34] 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/0DDzWVRTrRQ/.

[35] PROGRAM GUIDE, *supra* note__, at 2.

[36] Browner Remarks, *supra* note __.

[37] For a description of Performance Track benefits, see OPERATIONS HANDBOOK, *supra* note __, 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 __, at 273–74. For a description of Project XL benefits, see generally MARCUS ET AL., *supra* note __.

[38] OPERATIONS HANDBOOK, *supra* note __, 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 rulemaking, which modified regulatory requirements for the facility. *See* MARCUS ET AL., *supra* note __, 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 __, at 4-3–4-5.

[39] PERFORMANCE TRACK PROGRAM GUIDE, *supra* note __, at 6.

[40] *Id.* at 2.

identified as top performers and more attention on truly laggard facilities.[41] By rewarding top performers and targeting laggards, EPA also sought to encourage more firms to strengthen their environmental practices.

EPA intended Performance Track to "deliver . . . measurable [environmental] results."[42] 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."[43] After identifying the "top" performers,[44] Performance Track would "spotlight . . . such companies as models of a higher level of environmental achievement."[45] 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."[46] If they desired to remain members, they would need to demonstrate continuous improvement in areas not governed by regulation.[47] 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."[48] The agency sought to use Performance Track to provide a blueprint for a "new generation of programs" that would encourage facilities to strive for environmental excellence instead of merely complying with government rules.[49]

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"[50] in order "to change business-as-usual approaches to environmental protection."[51] According to the agency, Performance Track would be "leading change" by promoting an incentive-based approach that operated alongside traditional environmental regulation.[52] In 2006, Dan Fiorino, the long-time Director of EPA's Performance

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[41] *See* OPERATIONS HANDBOOK, *supra* note __, at __.

[42] BEYOND COMPLIANCE, *supra* note __, at 2; *see also* TOP PERFORMERS, *supra* note __, 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] ; EPA OFFICE OF POL'Y, ECON., & INNOVATION, LEADING CHANGE: PERFORMANCE TRACK FOURTH ANNUAL PROGRESS REPORT 24 (2006) [hereinafter LEADING CHANGE] ; 2003–2008 STRATEGIC PLAN, *supra* note __, at 115 (announcing that Performance Track would "achieve measurably improved environmental performance").

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

[44] *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__, at 2; TOP PERFORMERS, *supra* note __; GROWTH & RENEWAL, *supra* note __, at 3; LEADING CHANGE, *supra* note __, at 24.

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

[46] GROWTH & RENEWAL, *supra* note__, at 4.

[47] BUILDING ON THE FOUNDATION, *supra* note 42, at 4; LEADING CHANGE, *supra* note __, at 15.

[48] TOP PERFORMERS, *supra* note __, at 15; BUILDING ON THE FOUNDATION, *supra* note__, at 17.

[49] *Id.* at 3.

[50] LEADING CHANGE, *supra* note __, at 5.

[51] *Id*.

[52] *Id.* at 23.

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."[53]

Despite the deep aspirations for Performance Track and its sustained support across both Democratic and Republican administrations, early in President Barack Obama's first term, then-EPA Administrator Lisa Jackson announced her decision to end the program. She offered the simple, even if unclear, explanation for doing so: "Performance Track was developed in a different era and may not speak to today's challenges."[54] 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."[55] Although the program's swift demise came as a shock to Performance Track's supporters, the agency's abrupt about-face 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."[56] On May 14, 2009, EPA published a *Federal Register* notice officially terminating Performance Track.[57]

Yet despite having ended Performance Track, 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."[58] The Center's main activity is an awards program that "recognizes and incentivizes exemplary corporate, organizational, and individual leadership in response to climate change."[59] Given the failure of Congress to enact climate change legislation, and the questionable outcomes in the courts of EPA climate change regulation, interest in voluntary programs has risen again recently. A report from the National Research Council, for example, has specifically directed EPA to "utilize partnerships"[60] 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.[61]

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[53] FIORINO, *supra* note __, at 147.
[54] Memorandum from Lisa P. Jackson, *supra* note __.
[55] *Id.*
[56] John Sullivan & John Shiffman, *Green Club an EPA Charade*, PHILA. INQUIRER (Dec. 9, 2008), http://perma.law.harvard.edu/0rcu3YPomYv. 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.
[57] 74 Fed. Reg. 22,741, 22,741–42 (May 14, 2009).
[58] Flyer from EPA, Ctr. for Corp. Climate Leadership .
[59] *Climate Leadership Awards*, EPA.GOV, http://perma.law.harvard.edu/0PPAtGw5x8J.
[60] NAT'L RESEARCH COUNCIL, SUSTAINABILITY AND THE U.S. EPA 107 (2011) (Finding 6.9).
[61] *Id.* at 104.

How Performance Track Worked

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.[62] 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."[63] To qualify for membership in Performance Track, a facility needed to be able to demonstrate to EPA that it met the following four criteria:[64]

- *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."[65] This typically means a focused, goal-driven "plan-do-check-act" process within a company, oriented toward finding ways to reduce environmental risks. In 2004, EPA added the requirement that facilities must have their EMSs independently audited; prior to that time, EPA allowed facilities to self-audit.[66] EPA also outlined qualifications for independent auditors and established a protocol for auditors to follow.[67]
- *Regulatory Compliance*. The facility was required to sustain a "record of compliance" with environmental standards.[68] For instance, a facility was not allowed to have had a conviction or guilty plea 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.[69]
- *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.[70] To show a record of past achievements, a prospective applicant was required to show improvements for at least two environmental indicators.[71] Managers could choose their own indicators using agency-selected categories and

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[62] TOP PERFORMERS, *supra* note __, at 3.

[63] Daniel J. Fiorino, Environmental Performance and Green Clubs: A New Tool for Governance? 4 (June 29, 2007) (unpublished manuscript) ; *see also* PRAKASH & POTOSKI, *supra* note __, 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").

[64] *National Environmental Performance Track: Criteria*, *supra* note __.

[65] EPA, PERFORMANCE TRACK APPLICATION INSTRUCTIONS 3-1 .

[66] GROWTH & RENEWAL, *supra* note __, at 6.

[67] *See Independent EMS Assessment,* EPA.GOV .

[68] PERFORMANCE TRACK PROGRAM GUIDE, *supra* note __, at 8.

[69] *Id.*

[70] *Id.* at 6.

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

measuring units.[72] Such categories included improving supply-chain environmental performance, as well as reducing energy use, air emissions, and noise levels, among others.[73] Facilities were also required to commit to future improvements based on at least four agency-selected indicator categories.[74]

- *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."[75]

To demonstrate that it met these four criteria, a facility needed to complete a twenty-nine-page application form.[76] The form called for the facility to provide basic information about its size, industry, and environmental management system.[77] In addition, the facility was required to quantify its proposed improvements, specifying measurable units of performance.[78] 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.[79] EPA encouraged each facility to "document and commit to a level of performance consistent with its own situation, capabilities, and goals."[80]

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[72] EPA, ENVIRONMENTAL PERFORMANCE TABLE 1 (2008) . 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.

[73] ENVIRONMENTAL PERFORMANCE TABLE, *supra* note __, 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 __, 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 __, at 5-1.

[74] 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 .

[75] EPA, PERFORMANCE TRACK SAMPLE FACILITY APPLICATION 20 [hereinafter SAMPLE FACILITY APPLICATION] ; *see also National Environmental Performance Track: Criteria*, *supra* note __.

[76] Applicants submitted their information online, but EPA's scan of a sample online submission spans twenty-nine pages. SAMPLE FACILITY APPLICATION, *supra* note __. The instructions for completing the application, on the other hand, were over fifty pages. P-TRACK APPLICATION INSTRUCTIONS, *supra* note 65. 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) .

[77] SAMPLE FACILITY APPLICATION, *supra* note __, at 1, 3–4.

[78] *Id.* at 8–10.

[79] PROGRAM GUIDE, *supra* note __, at 6.

[80] *Id.*

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.[81]

EPA did not conduct site visits during the application process.[82] 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.[83] 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.[84]

EPA required all Performance Track members to submit Annual Performance Reports ("APRs").[85] 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.[86] 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."[87] In addition to filing annual reports, members needed to re-apply every three years if they wished to stay in Performance Track.[88] The renewal process required that facilities again set a series of performance commitments, just as they did when they first joined the program.

What benefits did facilities receive by 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.[89] It sent letters to relevant elected officials

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[81] SAMPLE FACILITY APPLICATION, *supra* note __, at 19–24.

[82] PROGRAM GUIDE, *supra* note __, at 9.

[83] P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note __, at 15.

[84] 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 __, at 6; BUILDING ON THE FOUNDATION, *supra* note __, at 5; GROWTH & RENEWAL, *supra* note __, at 6; LEADING CHANGE, *supra* note __, at 14.

[85] EPA terminated the memberships of facilities that did not submit timely APRs. OPERATIONS HANDBOOK, *supra* note __, at 6-4.

[86] PROGRAM GUIDE, *supra* note __, at 10–11.

[87] *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 __, at 6-2.

[88] PROGRAM GUIDE, *supra* note __, at 7-3.

[89] *National Environmental Performance Track: Recognition*, EPA.GOV, http://perma.cc/3C8L-C2WT.

announcing a facility's acceptance to the program, submitted articles to trade journals, and regularly highlighted new coverage about members' environmental management on its website.[90] EPA allowed members to display a Performance Track flag at their worksites and to use the program's logo in promotional materials.[91] The agency created five awards that only Performance Track members could receive.[92] In addition, EPA eventually convinced some social investment advisory firms to use Performance Track membership as a factor in calculating company ratings.[93]

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.[94] 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.[95]

Finally, EPA offered members various types of regulatory and administrative benefits.[96] It deemed Performance Track facilities to be a low priority for routine EPA inspections[97] — those "majority of EPA inspections" that take place "when there is no specific reason to believe that a violation exists at a specific facility."[98] 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.[99] 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.[100]

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[90] *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.

[91] EPA, NATIONAL ENVIRONMENTAL PERFORMANCE TRACK BROCHURE 4 .

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

[93] *National Environmental Performance Track: Green Investment Firms Recognize Performance Track*, EPA.GOV, http://perma.cc/C2SY-B7NQ.

[94] *National Environmental Performance Track: Networking*, EPA.GOV, http://perma.cc/W425-UYGS.

[95] *Id.*; Nash & Coglianese, *supra* note __, at 18, 27.

[96] *See National Environmental Performance Track: Regulatory and Administrative Benefits*, EPA.GOV, http://perma.cc/Q5XG-JCEJ.

[97] *See* Memorandum from Steven A. Herman, *supra* note __; Memorandum from Sylvia K. Lowrance, Acting Assistant Adm'r, EPA Office of Enforcement and 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) ; Memorandum from John Peter Suarez, Assistant Adm'r, EPA Office of Enforcement and 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) .

[98] Memorandum from John Peter Suarez, *supra* note __.

[99] 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.

[100] *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) .

They could also apply for permission to inspect equipment and operations susceptible to spills less frequently than otherwise required.[101] In addition, Performance Track members could receive expedited processing of their National Pollutant Discharge Elimination System ("NPDES") permit renewals under the Clean Water Act.[102]

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.[103] 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.

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.[104] 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."[105] Its third annual report waxed glowingly about "the program's ability to attract and retain the nation's top environmental performers."[106] In its fourth annual report, EPA proclaimed, "Performance Track motivates facilities to go beyond legal requirements . . . [and] improves on the level of environmental protection achievable by regulations alone."[107] Then-EPA Administrator Stephen Johnson was quoted in a promotional flyer claiming that "Performance Track members are at the

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[101] 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.").

[102] *National Environmental Performance Track: Water Benefits*, EPA.GOV, http://perma.cc/LS6F-D3L8. EPA encouraged states to review Performance Track members' National Pollutant Discharge 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).

[103] *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 Bennear, *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.").

[104] *See* TOP PERFORMERS, *supra* note __, at 2.

[105] BUILDING ON THE FOUNDATION, *supra* note __, at 7.

[106] GROWTH & RENEWAL, *supra* note __, at 3.

[107] LEADING CHANGE, *supra* note __, at 5.

forefront of innovation and environmental stewardship."[108] In EPA's sixth annual report, the agency claimed that Performance Track "drives environmental excellence,"[109] with then-Administrator Johnson continuing to refer to members as "leading companies."[110]

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."[111] 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."[112]

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."[113] The mere fact that Performance Track members may have achieved environmental improvements does not necessarily mean that they 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."[114]

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.[115] 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.[116] EIP also issued a briefing paper that argued that "some of the manufacturers

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[108] EPA, REACHING FOR A BRIGHTER FUTURE 1 (2007) . This same flyer also said that the program led "the way toward a cleaner, safer environment." *Id*.

[109] EPA, PERFORMANCE TRACK SIXTH ANNUAL PROGRESS REPORT 1 (2008) .

[110] 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 __, at 148.

[111] PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note __, at 1.

[112] *Id.* at 1–3.

[113] Letter from John Walke, *supra* note __, at 6.

[114] *Id.*

[115] Letter from Eric Schaeffer, *supra* note __, at 1.

[116] *Id.*

reaping Performance Track rewards are releasing *more* toxic pollution to the environment than they were before signing up for the program."[117] EIP questioned the wisdom of relaxing inspections and reporting requirements for facilities that were increasing their pollution levels.[118]

At about the same time, the 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.[119] It also found that most members failed to achieve the commitments they made in their applications.[120] 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.[121] However, it called attention to its finding that some Performance Track members' performance was worse than average for their sectors.[122] 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."[123] 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."[124]

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.[125] 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 techniques[126] — 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.[127] 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

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[117] ENVTL. INTEGRITY PROJECT, WRONG TRACK? SOME PERFORMANCE TRACK FACILITIES REPORT INCREASED LEVELS OF TOXIC POLLUTION 1 (2006), *available at* http://perma.cc/J3T6-PBF6.

[118] *Id.* at 2.

[119] P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note __, at 11–15.

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

[121] *Id.*

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

[123] *Id.* at 25.

[124] *Id.* at 23 ("The presence of underperforming facilities [in this leadership program] reduces the integrity and value of the Performance Track brand.").

[125] Letter from Jay Benforado, Dir., Nat'l Ctr. for Envtl. Innovation, EPA, to Eric Schaeffer, President, Envtl. Integrity Project 3 (Mar. 3, 2006) .

[126] *Id.*

[127] *See* Memorandum from Brian F. Mannix, *supra* note __, 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.

could not reasonably be expected to be fully achieved.[128] 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."[129]

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."[130] 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?"[131] The report quoted Representative Edward Markey as stating that "undeserving companies are now being given a recognition which they did not earn."[132] In the words of NBC reporter Lisa Meyers, the controversy over Performance Track raised "questions about how carefully EPA screens members of the program."[133] In December 2008, the *Philadelphia Inquirer* ran a front-page story, under the headline "Green Club an EPA Charade," that raised similar questions about Performance Track's credibility.[134]

When faced with these kinds of criticisms, EPA was unable to demonstrate that Performance Track was working as the agency claimed. 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. Its screening was entirely based, in isolation, on each individual facility seeking to become a Performance Track member.

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.[135] One thing became apparent at the outset of our investigation: 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).[136] 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%).[137] Only 6% of applicants were turned away for problems with their environmental management systems, such as their failure to have an independent assessment.[138] Another 7% failed to develop or specify

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[128] *Id.* at 30.
[129] *Id.*
[130] *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 __, at 15, 55.
[131] *NBC Nightly News: Feds Giving Suspect Green Rewards* (NBC television broadcast Apr. 20, 2008), *available at* http://perma.cc/L6VR-AEJT.
[132] *Id.*
[133] *Id.*
[134] Sullivan & Shiffman, *supra* note __.
[135] *See generally* Yu & Coglianese, *supra* note __, at 84 (reviewing information gathered on application rounds for membership in Performance Track from April 2001 to February 2004).
[136] *See* PTrack Member Data, *supra* note __.
[137] *See* PTrack Member Data, *supra* note __.
[138] *See id.*

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.[139] 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.[140] 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.[141]

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.[142] 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;[143] 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.[144] 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 levels of toxic releases.[145] 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,[146] 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.[147] In two of the

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[139] *See id.*; *see also* Yu & Coglianese, *supra* note __, at 86.
[140] *See* PTrack Member Data, *supra* note __.
[141] *See id.*; *see also* Yu & Coglianese, *supra* note __, at 86.
[142] Fei Yu conducted the data collection and analysis reported in this paragraph and Table 1. *See* Yu & Coglianese, *supra* note __, at 94.
[143] *See* 42 U.S.C. § 11023(a) (2006).
[144] *Cf.* Lori S. Bennear & Cary Coglianese, *Measuring Progress: Program Evaluation of Environmental Policies*, 47 ENV'T 22, 33 (2005).
[145] Yu & Coglianese, *supra* note __, at 91 tbl.5.4.
[146] The regression analyses broke down the control variables into two classes: "Control Variables I" and "Control Variables II." *Id.*; *see also infra* notes __.
[147] *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.

Table 1. TRI Releases from Admitted Versus Not Admitted Applicants

	Model		
	1	**2**	**3**
Admitted Status[148]	-851,801	-3,043,971	-3,047,569
Control variables I[149]		Yes	
Control variables II[150]		Yes	Yes
R-squared	0.0247	0.1088	0.1071
Number of Observations[151]	3022	1574	1574

models, the average applicant admitted into Performance Track had three million pounds fewer TRI releases than the average applicant not admitted into the program.

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 facilities truly the leaders in their fields? Perhaps surprisingly, given all of 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."[152]

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.[153] 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-

[148] 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 applicants admitted to the program had lower TRI releases. All the coefficients were significant at the 5% level. *Id.* at 90–91.

[149] "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.

[150] "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.*

[151] 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.

[152] *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.").

[153] P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note __, at 24.

five facilities outperformed the average firm in terms of compliance.[154] EPA interpreted the IG's results to "confirm what [the agency] knew to be true – Performance Track members lead their peers in environmental performance."[155] 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.[156]

Leadership vs. 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.[157] 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, chemical products, transportation equipment, and wood products.[158] Together, the findings from these two studies offer important insights about Performance Track, business decision making, and beyond-compliance behavior.

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.[159] 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 EPA's TRI reporting requirements as well as facilities that were owned by Johnson & Johnson.[160] Of the remaining plants, we randomly selected five for study.

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[154] *Id.*

[155] Memorandum from Brian Mannix, *supra* note __.

[156] P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note__, at 24–25.

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

[158] 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).

[159] Howard-Grenville, Nash & Coglianese, *supra* note__, at 75–76.

[160] *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 &

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.[161] 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.[162] Of course, we could not control for every conceivable way the pairs of facilities might differ.[163] 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 Performance 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 1, below, shows how closely we were able to match the size and demographic characteristics of each of the studied facilities.[164]

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.[165] EPA and state environmental agencies had inspected each of the facilities.[166] 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.[167] Furthermore, the TRI data we collected on each pair for the period

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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.

[161] 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).

[162] Howard-Grenville, Nash & Coglianese, *supra* note__, at 87.

[163] 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.

[164] Howard-Grenville, Nash & Coglianese, *supra* note __, at 88 tbl.2.

[165] *See* Howard-Grenville, Nash & Coglianese, *supra* note __, at 86.

[166] *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.

[167] *Id.* at 88.

Table 1. Performance Track and Matched Facilities: Comparison of Size and Community Demographics[168]

Facility Pseudonym	**Number of Employees**	**Annual Sales ($ in millions)**	**% Community Designated "Urban"**[169]
Aero Inc. *Matched Facility*	500 *700*	75 *60*	48 *82*
Chem Co. *Matched Facility*	750 *620*	858 *200*	98 *100*
Glue Co. *Matched Facility*	63 *100*	33 *33*	99 *100*
Rubber Inc. *Matched Facility*	900 *700*	50 *50*	99 *72*
Tech Co. *Matched Facility*	6,000 *8,000*	1,000 *5,000*	99 *98*

1987 to 2003 suggested the pairs generally exhibited similar overall trends in the reduction of TRI releases.[170] 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.[171] Table 2, below, summarizes the environmental characteristics of the five matched pairs of facilities.

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[168] *Id.*

[169] 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).

[170] 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.

[171] 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 . 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).

Table 2. Performance Track and Matched Facilities: Comparison of Compliance, TRI Releases, and Permitting[172]

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

Having matched facilities as best we could, we next interviewed environmental managers at each of the ten plants.[173] 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.[174] 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.[175] 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.[176] 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

[172] Howard-Grenville, Nash & Coglianese, *supra* note __, at 89 tbl.3.
[173] 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.
[174] *Id.* at 91.
[175] *Id.*
[176] *Id.* at 91–92.

not to pay attention to [the regulations]."[177] Nevertheless, managers at both types of facilities also expressed frustration with what they perceived as irrational demands of regulation.[178]

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.[179] 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.[180] 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."[181] 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?"[182]

Not surprisingly, these differing perceptions of management support translated into different calculations about the costs and benefits of participating in 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.[183] 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.[184] 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.[185] She and other Performance Track interviewees sought out opportunities to engage with their communities in ways that communicated an environmental ethic.[186] Another Performance Track facility's manager sought to recover from a "tainted past" beset by environmental problems: "We just thought that this would

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[177] *Id.*
[178] *Id.*
[179] *Id.* at 92.
[180] 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.
[181] *Id.*
[182] *Id.* at 94.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 95.
[186] *Id.*

be another good way to promote ourselves as being environmentally aware and conscious."[187]

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.[188] Environmental management was, for their organization, just an important facet of sound business management practices.[189] 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.[190]

The third striking difference between the Performance Track and matched facilities lay in the Performance Track facilities' propensity to make outward displays of their behavior in ways that would be appealing to others — a characteristic called "self-monitoring of expressive behavior"[191] 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.[192]

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.[193] 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.[194] 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

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 95–96.
[191] Mark Snyder, *Self-Monitoring of Expressive Behavior*, 30 J. PERSONALITY & SOCIAL PSYCHOL. 526, 526 (1974). For a development of the self-monitoring concept in organizational settings, see Howard-Grenville, Nash & Coglianese, *supra* note __, at 83–84.
[192] *See* Howard-Grenville, Nash & Coglianese, *supra* note __, at 96.
[193] *See id.*
[194] *See id.*

offer a clear set of minimum standards for their environmental operations, not gestures of cooperation.[195]

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.[196] 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.

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.

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.[197] 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.[198] 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.[199] More Performance Track

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[195] *Id.* at 97.

[196] This conclusion is consistent with other research on firms' compliance and beyond-compliance behavior. *See, e.g.*, GUNNINGHAM ET AL., *supra* note__; Kagan, *supra* note __, at 31.

[197] *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 __, at 79.

[198] *See id*. at 55–60.

[199] *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

Table 3. Characteristics of Surveyed Facilities[200]

	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

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.

[200] *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.

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.[201] Performance Track applicants also tended to have more employees, but to have fewer environmental permits and legal obligations.[202] These characteristics are summarized in Table 3, above.

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 4, below). 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 5, 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.

Table 4. Internal Attitudes and Perceptions of Facilities[203]

	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

[201] Results reported here are differences in means that proved statistically significant using standard tests.
[202] *See* Borck, Coglianese & Nash, *supra* note __, at 60.
[203] *Id.* at __ tbl.3.1.

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 recognition as a top performer and employee morale as much more important than the non-Performance Track facilities (see Table 6, below). 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 7, 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.

Table 5. Importance of Various Influences on Environmental Management of Facilities[204]

	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 6. Importance of Potential Benefits of Participating in Voluntary Programs [205]

	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 envtl 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

[204] *Id.* at 62 tbl.3.3.
[205] *Id.* at 62 tbl.3.4.

Table 7. Importance of Potential Costs of Participating in Voluntary Programs[206]

	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 8. Participation in Other Voluntary Programs and Perceptions of Beyond-Compliance Behavior[207]

	PT Facilities		Non-PT Facilities		p-value of t-test
	n	**Value**	**Value**	**n**	
Percent active in 1 of 6 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 (max 9)	181	**4.7**	**3.4**	495	0.000
Envtl performance compared to others	181	**4.6**	**4.2**	495	0.000

Performance Track applicants rated their own environmental performance more highly than non-participants and reported engaging in more beyond-compliance behavior, as shown in Table 8, above. 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.

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.[208] We find support for these outside factors, but we also find considerable support for the proposition that internal factors and dispositions are also important variables.

[206] *Id*. at 63 tbl.3.5.
[207] *Id.*
[208] *Id*. at 53; GUNNINGHAM ET AL., *supra* note __, at 20–22.

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.[209] 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 connected more 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.[210]

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 also to be "models of a higher level of environmental achievement" as professed by EPA.[211] 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.

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. We now turn to consider another aspect of the Performance Track model. In contrast with our focus earlier on understanding which businesses decided to join Performance Track and why, we now focus 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.[212] Both EPA and states that have developed similar Performance Track programs have maintained that these programs contribute

[209] BEYOND COMPLIANCE, *supra* note __, at 5–6.
[210] *Id.*
[211] Fiorino, *supra* note __, at 9 (quoting former EPA Administrator Carol Browner).
[212] *See supra* notes __ and accompanying text.

uniquely and significantly to environmental protection — e.g., by "stretching the boundaries of innovation and performance"[213] at EPA, creating "a healthier, cleaner environment,"[214] "transform[ing] the way that government and industry address environmental issues and solve problems,"[215] and "delivering measureable results."[216] 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.[217] 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.[218] Continuous, rapid growth was always an objective of Performance Track's managers, who set a goal of increasing the ratio of program applicants to program members by 25% each year — all while increasing overall membership.[219] 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."[220] 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."[221] Voluntary initiatives with few members are viewed as "suspect" and "likely [to] have no more than a marginal impact on basic environmental problems."[222]

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.[223] 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.[224] Only half of Performance Track's members were subject to environmental permitting

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[213] Browner Remarks, *supra* note __.
[214] *Id.*
[215] TODAY'S COMMITMENTS, *supra* note __, at 31.
[216] BUILDING ON THE FOUNDATION, *supra* note __, at 3.
[217] *See* EPA, 2005 RECRUITMENT STRATEGY: NATIONAL ENVIRONMENTAL PERFORMANCE TRACK 1 (Feb. 9, 2005 Draft) (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").
[218] *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.").
[219] RAND CORP. ASSESSMENT, *supra* note __, at 20.
[220] TODAY'S COMMITMENTS, *supra* note __, at 31.
[221] Case, *supra* note __, at 198.
[222] Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1286 (1995).
[223] PTrack Member Data, *supra* note__; *see also supra* note __.
[224] *Cf.* Wyeth, *supra* note __, at 63 ("Although the number of participants in such programs continues to grow, the programs still enroll only a tiny percentage of regulated organizations.").

requirements,[225] 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.[226] 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.[227] Performance Track membership amounted to less than 10% of that group, notwithstanding the fact that Performance Track's membership requirements overlapped substantially with the ISO 14001's standards.[228]

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.

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.[229] Subsequently, however, membership grew by less than forty facilities annually through 2009,[230] 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.[231] 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.[232] 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.[233]

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[225] *See supra* note __ and accompanying text.

[226] *See Enforcement & Compliance History Online (ECHO)*, EPA.GOV, http://perma.law.harvard.edu/0g6AUdPUjs5.

[227] INT'L ORG. OF STANDARDIZATION, THE ISO SURVEY – 2007 25 (2008), *available at* http://perma.cc/D994-LBKW.

[228] *See* PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note __, 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).

[229] PTrack Member Data, *supra* note __.

[230] *See* PERFORMANCE TRACK FINAL PROGRESS REPORT, *supra* note__, at 3 (charting Performance Track's membership statistics from 2000–2008).

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

[232] EPA, RECRUITER'S HANDBOOK 12 (2001) .

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

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.[234] Officials routinely contacted facilities that met ISO 14001 standards for environmental management systems.[235] Before each application round, EPA staff sent each such facility a postcard announcing the open enrollment period and followed up with a telephone call.[236]

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.[237] 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.[238] They distributed information about Performance Track at these meetings and subsequently followed up with contacts they met.[239]

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.[240] Similar technical assistance resources were made available on an industry-sector basis.[241] 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.[242] 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.[243] 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.[244] Table 9 and Figure 1, below, shows movement in and out of the program during the years of its existence.

The largest membership loss occurred in 2004, when membership terms expired for the facilities that had joined Performance Track in the initial Charter Round.[245] Of the over 200 charter members, approximately 25% chose not to reapply.[246] While 2004 was the year when the greatest membership loss occurred, the program suffered significant

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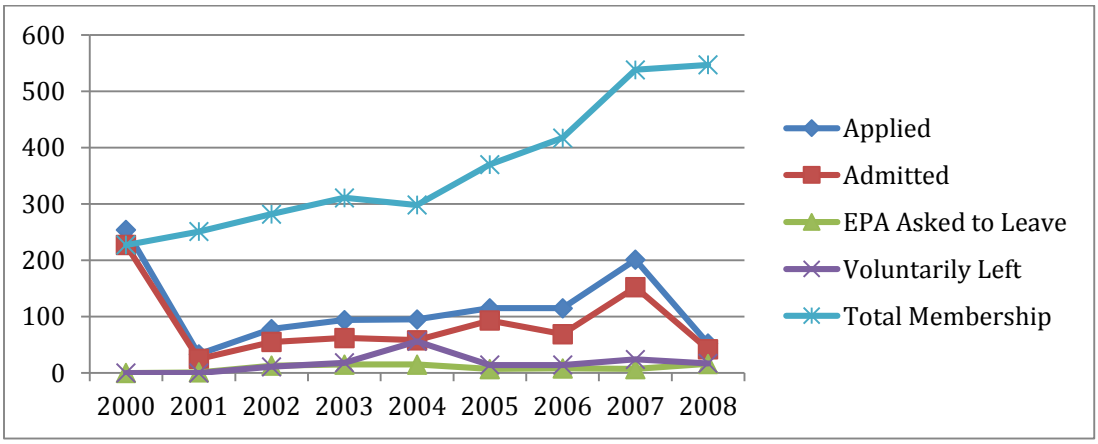
[234] Interview with John Foster, *supra* note __.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Technical Assistance*, EPA.GOV, http://perma.cc/U6KU-WV29.
[241] *Environmental Management Systems*, EPA.GOV, http://perma.cc/3FTL-5RKZ.
[242] Borck, Coglianese & Nash, *supra* note __, at 785, 798.
[243] PERFORMANCE TRACK PROGRAM GUIDE, *supra* note __, at 9.
[244] PTrack Member Data, *supra* note __.
[245] Nash & Coglianese, *supra* note __, at 19.
[246] *Id.*

Table 9. Performance Track Membership Trends[247]

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	11%
2002	78	55	13	11	282	12%
2003	94	62	15	18	311	10%
2004	95	58	15	56	298	-4%
2005	115	93	7	14	370	24%
2006	115	69	8	14	417	13%
2007	201	152	7	24	538	29%
2008	52	42	16	17	547	2%
Totals	*1044*	*783*	*82*	*154*	*547*	

Figure 1: Facilities Applying, Admitted, and Leaving



attrition in every year after 2001.[248] 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.[249] 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.[250] EPA asked forty-nine facilities either to leave or not re-enroll in Performance

[247] *Id.* Note that no application date was given for seven applications.
[248] *Id.*
[249] Nash & Coglianese, *supra* note __, at 19.
[250] *Id.* at 19–20.

Track.[251] 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.[252] EPA also asked facilities to leave because they were found in non-compliance with environmental regulations or had problems with their commitments.[253]

EPA surveyed Performance Track members in 2004 and 2006 to gauge members' satisfaction with the program.[254] In both cases, the survey received strong response rates: 73% and 76%, respectively.[255] 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."[256] While members wanted to see the program's regulatory incentives expanded, those incentives were not their primary reason for joining.[257] 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.[258]

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."[259] 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.[260] In 2006, as in 2004, survey respondents generally said that they did not join Performance Track on account of the incentives EPA offered.[261] However, members indicated that they would have liked in the future to see membership benefits increase and the transaction costs associated with membership decrease.[262]

Why Performance Track Membership Was Destined to Remain Small: The Participation Paradox. As noted, Performance Track's membership represented only a small fraction of eligible facilities.[263] In this respect, Performance Track was little different from many of EPA's voluntary programs. However, some voluntary programs have attracted larger membership levels than Performance Track. What explains differences in the size of these programs? While the number of such programs is relatively small, we nevertheless can draw insights from a systematic inquiry into their differences. The design of voluntary environmental programs appears to affect membership levels, and that design

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[251] *Id.* at 19.
[252] *See* OSHA, *supra* note __.
[253] Nash & Coglianese, *supra* note __, at 19, 21.
[254] ABT ASSOC. INC., RESULTS OF 2004 PERFORMANCE TRACK CUSTOMER SATISFACTION SURVEY (2005) [hereinafter 2004 SURVEY] ; 2006 SURVEY, *supra* note __.
[255] *See* 2004 SURVEY, *supra* note __, at 1; 2006 SURVEY, *supra* note __, at 5.
[256] 2004 SURVEY, *supra* note __, at 1.
[257] *Id.*
[258] *Id.*
[259] 2006 SURVEY, *supra* note __, at 2.
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *See supra* notes __and accompanying text.

appears related to the rewards offered. Ironically, there appears to be a participation paradox: as rewards increase, membership declines.

Like Performance Track, 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.[264] Members receive some benefit in exchange for committing to a certain course of action.[265] Across all of the voluntary partnership programs of which we are aware, we find a clear, inverse relationship between participation and program rewards.

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 they do not see marked differences in the benefits of participation (notwithstanding the increase in the rewards), such that even modest increases in the transaction costs associated with becoming a member will more than offset any (slightly) 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 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.[266] 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 would shrink the level of EPA and state environmental agency oversight.[267] The Environmental Integrity Project

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

[265] *Id.*

[266] 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).

[267] Letter from John Walke, *supra* note __, at 3, 12.

("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.[268] 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.[269] 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.[270] This benefit was relatively meager, however, compared to those EPA originally outlined in its August 2005 request for comments.

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,[271] while only about fifty facilities joined Project XL.[272] 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.[273] 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).[274] 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.[275] Upon receipt of such a letter, EPA sent the company a certificate of appreciation signed by the Administrator.[276]

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

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[268] 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).

[269] Letter from John Walke, *supra* note __, at 8–9; Letter from Eric Schaeffer, *supra* note __, at 1–2.

[270] 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).

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

[272] 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).

[273] 33/50 PROGRAM: THE FINAL RECORD, *supra* note __, at 3.

[274] *Id.* at 1.

[275] EPA, THE 33/50 PROGRAM: FORGING AN ALLIANCE FOR POLLUTION PREVENTION 1 (1992), *available at* http://perma.cc/C6J-BKS4.

[276] *Id.* at 4.

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.[277] 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.[278]

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.[279] 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.[280] 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.[281] If EPA deemed that a proposal met these criteria, then the applicant, regulators, and participating community groups would negotiate a Final Project Agreement ("FPA"). EPA reserved the right to reject any agreement, even after all the parties had agreed to the terms.[282]

Negotiation of final agreements often required thousands of hours.[283] 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*.[284] EPA stopped receiving applications for XL projects in 2003. By that time, only about fifty regulated entities were fully participating in Project XL,[285] 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,[286] 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

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[277] EPA, 33/50 PROGRAM: THE FINAL RECORD, *supra* note __, at 7.
[278] *Id.* at 4.
[279] EPA, PROJECT XL 1999 COMPREHENSIVE REPORT 1 (1999).
[280] *See* EPA, PROJECT XL: FROM PILOT TO PRACTICE, A JOURNEY TO SYSTEM CHANGE 2–3, 10 (1999), *available at* http://perma.cc/R6P5-35G9.
[281] Coglianese & Nash, *supra* note __, at 105.
[282] *Id.*
[283] *Id.*
[284] *See* Caballero, *supra* note __, at 404–05.
[285] Coglianese & Nash, *supra* note __, at 105; MARCUS ET AL., *supra* note __, at 195.
[286] *See supra* notes __ and accompanying text (describing EPA's sample application).

companies in 33/50 to about 550 facilities in Performance Track to only about fifty companies in Project XL.

To investigate whether this pattern holds more generally, we twenty-nine of EPA's 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 10, below. Notwithstanding the actual names EPA gave to these programs, each is a partnership program in the sense we mean. Even the two programs in Table 10 labeled as "awards" programs were also partnership programs as the "awards" were available to any qualified applicant and not limited or competitive.[287]

We gathered official program documentation for each of the programs listed in Table 10. 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.[288]

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.

[287] Coglianese & Nash, *supra* note __, at 251.
[288] *Id.* at 251, 253.

Table 10. National EPA Voluntary Partnership Programs[289]

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

[289] *Id.* at 252; Coglianese & Nash, *supra* note __, at 109; *see also List of Partnership Programs*, EPA.GOV, http://perma.law.harvard.edu/0Ns1sBATeuU (including links for the Combined Health 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).

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.[290] 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.[291] 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").[292] As Figure 2 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.

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 3, below).[293] 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 3).[294]

Programs with high levels of benefits had few members, illustrating the participation paradox. SunWise, which offered virtually no benefits to members, boasted about 13,000 members.[295] 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.[296]

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[290] Coglianese & Nash, *supra* note __, at 254.

[291] *See Join Sunwise*, EPA.GOV, http://perma.law.harvard.edu/0URE4GVKtnN.

[292] Sustainable Futures: Voluntary Pilot Project Under the TSCA New Chemicals Program, 67 Fed. Reg. 76,284–90 (Dec. 11, 2002). Of course, as Figure 3 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).

[293] Coglianese & Nash, *supra* note __, at 254–55.

[294] *Id.*

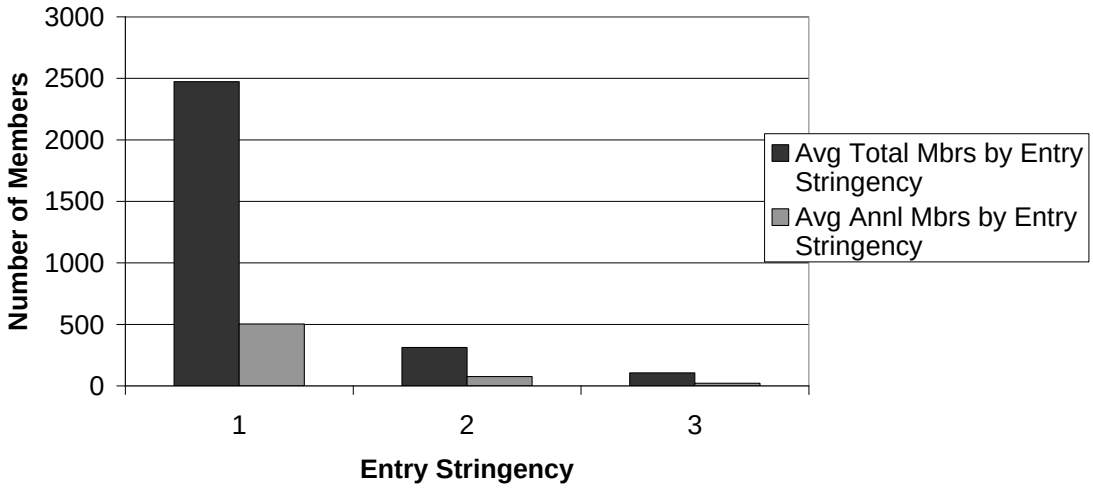
[295] *Id.* at 255.

[296] *Benefits to Sustainable Futures Graduates*, EPA.GOV, http://perma.law.harvard.edu/0PMesxpT3MD. EPA considers two additional firms as graduates based on their participation in Project XL. *See also* Coglianese & Nash, *supra* note __, at 109–10 (describing the status of program participation at the three-year mark).

Figure 2. Matching Entry Stringency to Program Benefits[297]

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

Figure 3: Average Membership by Entry Stringency Group



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).[298]

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

[297] Coglianese & Nash, *supra* note __, at 109.
[298] Coglianese & Nash, *supra* note __, at 255; *see also* Coglianese & Nash, *supra* note __, at 110.

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.[299] 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.[300]

Summary. This investigation indicates a relationship between the design of programs like Performance Track and 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.[301] 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 agencies face the prospect of criticism and controversy if businesses they are rewarding turn out to be undeserving of those rewards.

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. 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 would seem from our evidence to lie in store for other voluntary programs. If "[p]oorly subscribed voluntary programs are suspect," as Professor Eric Orts has noted,[302] 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 worthy — hence, officials can be expected to screen entry into their programs even more stringently when rewards are greater, thereby further discouraging participation.

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[299] Coglianese & Nash, *supra* note __, at 256.

[300] *See supra* notes __ and accompanying text.

[301] 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.

[302] Orts, *supra* note __, at 1286.

OSHA's Voluntary Protection Program

Eighteen years before the U.S. Environmental Protection Agency launched Performance Track, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) began exploring the role that voluntary approaches might play in protecting workers' safety and health. In many respects, OSHA's Voluntary Protection Programs (VPP) served as a blueprint for EPA's Performance Track. Both programs have similar goals, seeking to encourage what their respective agencies have called "the best" facilities to achieve performance beyond what regulations require. Both have recognized facilities that adopted formal management systems—safety and health management systems in the case of VPP, and environmental management systems in the case of Performance Track. Both have exempted participating plants from routine compliance inspections and have extoled what agencies have called the "exemplary" performance of participating facilities. Both have drawn members from the same industries, and in some cases the very same firms. The programs have so much in common that in 2002 EPA and OSHA signed a Memorandum of Agreement recognizing the common purposes of VPP and Performance Track and pledging to "communicate regularly to share program policies, procedures, and lessons learned."[303]

VPP is now more than thirty years old and claims some 2,220 sites as members.[304] Unlike EPA's Performance Track, this program is still very much alive. VPP's longevity, and its achievement of a larger membership than Performance Track ever attracted, might at first glance seem to draw into question any general conclusions that might be drawn from Performance Track. If VPP is still running and if it has attracted more members, perhaps the limitations observed in Performance Track derive less from the model of inducing self-governance via public recognition and more from failures in implementation. Maybe, in other words, we should conclude that EPA just failed to carry out the model as well as OSHA did, rather than that public recognition as a model of governance suffers from inherent weaknesses. We consider that possibility in this section, which examines the VPP program and its development from 1982 to the present. What we find, rather than contradicting our conclusions from Performance Track, actually only serves to confirm them. VPP has proven to be afflicted with the very same limitations that led to Performance Track's demise: both the failure to ensure that participants meet agency-established standards of excellence on a consistent basis, and a failure to attract a significant enough number of members to demonstrate viability as a more broadly applicable method of governance.

Early History. On January 19, 1982, OSHA announced plans to institute six new voluntary programs to "seek out and recognize exemplary safety and health programs as a means of expanding worker protection."[305] The new programs—known collectively as the Voluntary Protection Programs, or VPP—represented a new strategy to enlist the help of

[303] Occupational Safety and Health Administration. 2002a. U.S. Department of Labor Memorandum of Agreement between The Occupational Safety and Health Administration and The U.S. Environmental Protection Agency. April 24, 2002 (on file with the authors).
[304] Occupational Safety and Health Administration. 2015a. Current Federal and State-Plan Sites. Available at: https://www.osha.gov/dcsp/vpp/sitebystate.html. Accessed December 22, 2015.
[305] Occupational Safety and Health Administration. 1982b. Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions. 47 Fed. Reg. 29025 (1982), Friday, July 2, 1982, pages 29025-29032, at 29025.

those *outside* government in achieving the goals of the Occupational Safety and Health Act. OSHA recognized that the range of hazards potentially encountered in American workplaces was simply too broad for any government agency to anticipate and manage. With VPP, the Reagan Administration's Labor Department hoped to tap the expertise of people working in facilities—people who are often more knowledgeable than regulators about the most significant sources of risk and how best to reduce them:

> Employers and employees, because of their day-to-day experience in the workplace, acquire a thorough knowledge of the processes, materials, and hazards involved with the job. This knowledge . . . can be used by employers to improve workplace safety and health in ways simply not available to OSHA.[306]

OSHA expressed the belief that VPP would also help to supplement its limited inspection and enforcement resources. OSHA is responsible for overseeing safety and health practices in all of the United States' 8 million workplaces. With about 2,200 inspectors on staff, it is able to inspect only a tiny fraction of these workplaces annually.[307] The primary incentive OSHA offers worksites for participating in VPP was exemption from its "general schedule inspection list."[308] By flagging some workplaces as good performers and removing them from OSHA's inspection responsibility, OSHA sought "to focus its limited enforcement resources on establishments where the most serious hazards exist."[309]

More importantly, by drawing on the safety and health expertise of those with the most knowledge about worksite hazards, and freeing highly performing worksites with from the specter of a government inspector showing up unannounced at their doors, OSHA believed VPP could create more open, collaborative relationships between government and the private sector. With VPP, the Administration maintained, "participants [would] enter into a new relationship with OSHA in which safety and health problems [could] be approached cooperatively, when and if they [should] arise."[310] As an additional incentive to participate, OSHA would recognize participating worksites for their first-rate safety and health programs, holding them up as "a model and means to those employers" seeking to improve working protections.[311]

VPP's early days were much like those of EPA's voluntary programs, as policymakers in their respective agencies experimented with different program designs to determine which approach would best achieve their goals. In its January, 1982, announcement, OSHA asked for comments on six proposed programs.[312] Three of the new programs emphasized employee participation in health and safety activities: (1) "STAR",

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[306] Occupational Safety and Health Administration. 1982a. Voluntary Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Request for Comment and Information. 47 Fed. Reg. 2796 (1982), Tuesday, January 19, 1982, pages 2767 – 2801, at 2796.

[307] Occupational Safety and Health Administration. 2015b. Commonly used statistics. Available at: https://www.osha.gov/oshstats/commonstats.html. Accessed December 23, 2015.

[308] OSHA, *supra* note [1982b], at 29029.

[309] OSHA, *supra* note [1982a], at 2796.

[310] Occupational Safety and Health Administration. 1985. Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Notice of Changes. 50 Fed. Reg. 43804, Tuesday, October 29, 1985, page 43804, at 43811.

[311] *Id*. at 43804.

[312] OSHA, *supra* note [1982a].

intended to recognize and encourage businesses with established labor-management committees, fully developed health and safety programs, and good health and safety performance records; (2) "Project Build" for similar firms in the construction industry; and (3) "Operation Try" for firms seeking to experiment with new forms of employee participation.[313] Three additional programs attempted to foster management-initiated health and safety programs: (1) PRIME, for firms with established management programs and good health and safety records (but without labor-management committees); (2) PRAISE, for firms in low-hazard industries seeking to improve their health and safety performance; and (3) a special initiative for small businesses.[314]

OSHA finalized its plan for its Voluntary Protection Programs in a *Federal Register* notice six months later.[315] Like EPA's Performance Track program, it would be a facility-based program. Instead of the original six programs that OSHA had proposed, though, OSHA would offer just three: "STAR," "Praise," and "Try." "STAR" started out as an acronym that stood for "Sharing the Accountability for Regulation" [316] – although subsequently OSHA has referred to the program without all capital letters. OSHA considered Star to be its "core" voluntary program, with the highest standards for entry and ongoing participation. [317] It expected Star facilities to have in place "the most comprehensive safety and/or health programs used by American industry." [318] These facility-adopted programs would address not just those aspects of performance covered by OSHA safety and health standards, but "all aspects of health or safety relevant to the worksite."[319] OSHA envisioned that Star requirements would be so demanding that only a small number of sites would qualify.[320] It intended that the "Try" program would be available for employers who could not yet meet the high standards of Star. "In order to keep the flexibility desired in the program," the Administration explained, "OSHA has set very minimal and general requirements for 'Try.'"[321] "Praise" was open to facilities in low-hazard industries with "better records than average for their industries."[322]

In its July, 1982, final notice, OSHA offered VPP participants an additional incentive: the opportunity to be considered for variances from health and safety standards. [323] It removed that benefit in 1985, citing "misconceptions" about its appropriateness.[324] With this one exception, the primary benefit for participation in Star has remained unchanged from the agency's original proposal: removal from OSHA's list of facilities subject to general schedule inspections.[325] (OSHA did, though, retain authority to inspect any VPP site in response to a complaint, serious injury, or fatality.)

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[313] *Id*. at 2796.
[314] *Id*. at 2797.
[315] OSHA, *supra* note [1982b].
[316] *Id*. at 29026.
[317] *Id*.
[318] *Id*.
[319] *Id*.
[320] *Id*.
[321] *Id*.
[322] *Id*.
[323] *Id*. at 29029.
[324] OSHA, supra note [1985], at 43810.
[325] OSHA, *supra* note [1982b], at 29029.

OSHA substantially amended VPP in 1985, phasing out "Praise" on the grounds that it had "failed to capture the attention of such industries as finance or retail sales where [it]… would have been more logical."[326] Star would now cover all industry sectors, even low-hazard industries.[327] In 1988, OSHA changed the name of the Try program to Merit. Merit facilities are those that do not meet the qualifications for Star, but nevertheless "have demonstrated the commitment and potential to achieve Star Requirements within an agreed period of time that may not exceed 3 years."[328]

VPP Today. Today, VPP is administered by the Office of Partnerships and Recognition (OPR) within OSHA's Directorate of Cooperative and State Programs. According to OSHA, OPR "develop[s], implement[s] and evaluate[s] cooperative programs focused on encouraging and recognizing reductions in fatalities and injuries and illnesses in the workplace."[329] OPR runs two other voluntary programs in addition to VPP: OSHA Challenge, which helps employers and workers improve safety and health through mentoring and performance tracking; and the OSHA Strategic Partnership Program (OSPP), which helps employers in high-hazard industries take steps to address specific risks. Seven staff members are assigned to OPR at OSHA's headquarters in Washington, DC, including a director, a supervisor, two program analysts, and two industrial hygienists. In addition, about 48 FTEs support VPP at the regional level.[330] The Directorate of Cooperative and State Programs runs an additional voluntary program called the Safety and Health Achievement Recognition Program (SHARP) that is similar to VPP but intended for small, high-hazard worksites. In fiscal year 2003, OSHA spent about 28% of its overall budget on its voluntary programs.[331]

VPP today retains three distinct membership levels — Star, Merit, and Demonstration— each with its own requirements. Almost all VPP members fall within the Star level, however. For example, as of December, 2015, a total of 2,123 facilities participated in the Star site-based program, 27 facilities participated in Merit, and only two participated in the Demonstration track.[332]

In order to be accepted into any of VPP's three levels, a worksite must meet two minimal requirements: it must have achieved a specified level of safety and health performance, and it must have in place a safety and health management system that meets OSHA-defined criteria.[333]

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[326] OSHA, supra note [1985], at 43810.

[327] *Id*. at 43808).

[328] BRIAN T. BENNETT & NORMAN R. DEITCH, PREPARING FOR OSHA'S VOLUNTARY PROTECTION PROGRAMS: A GUIDE TO SUCCESS 6 (2010).

[329] Occupational Safety and Health Administration. 2015c. Directorate of Cooperative and State Programs (DCSP). Available at: https://www.osha.gov/dcsp/. Accessed January 18, 2016.

[330] Smith, Nancy, Christi Griffin, John Newquist, Kris Hoffman, Mark Briggs, and Diane Price. 2011. OSHA's Voluntary Protection Programs (VPP) Review: Findings and Recommendations. A Report Submitted to Dr. David Michaels, Assistant Secretary for OSHA. Washington, DC: Occupational Safety and Health Administration.

[331] Government Accountability Office. 2004. OSHA's Voluntary Compliance Strategies Show Promising Results, but Should Be Fully Evaluated before They Are Expanded. GAO-04-378. Washington, DC: US Government Accountability Office, at 3.

[332] Occupational Safety and Health Administration. 2015a. Current Federal and State-Plan Sites. Available at: https://www.osha.gov/dcsp/vpp/sitebystate.html. Accessed December 22, 2015.

[333] Iannuzzi, Al Jr. 2002. Industry Self-Regulation and Voluntary Environmental Compliance. Boca Raton: Lewis Publishers

VPP Safety and Health Performance Requirements. To be admitted to VPP at the Star level, a site's safety and health performance must be better than the national average for its sector with respect to two measures.[334]

- Total Case Incidence Rate (TCIR), that is, the incidence rate for all work-related injury and illness cases.
- Incidence rate for recordable nonfatal injuries and illnesses involving what is known as the "Days Away from work, Restricted activity, or job Transfer injury and illness" rate – or DART rate, for short. This is the incidence rate for the more serious injury and illness cases that result in time away from the job or changes in job routines.

In the VPP application instructions, OSHA offers guidance to employers about how to calculate these rates. Both are derived from information included in OSHA 300 logs, where employers are required to record all work-related incidents that result in medical treatment beyond first aid.[335]

OSHA determines which workplaces are eligible for VPP based on work-related incidents, injuries, and illnesses for the previous three years. For acceptance into VPP's Star level, an applicant's three-year TCIR and DART rates must be lower than at least one of the three previous year's national averages, as reported by U.S. Department of Labor's Bureau of Labor Statistics (BLS), for the applicant's 6-digit NAICS code. In cases where BLS does not publish statistics for an applicant's specific six-digit NAICS, OSHA instructs applicants to compare their performance against the next most specific industry classification.[336]

In addition to having acceptable TCIR and DART rates, a Star-eligible worksite must have a good compliance record. If OSHA has inspected it within the past three years, "the inspection and abatement history must indicate good faith efforts to improve safety and health," with no ongoing enforcement actions or willful violations within the past three years.[337]

This performance requirement for entry into Star is different from the one OSHA originally established. In the early years of VPP, OSHA required successful applicants to have TCIR and DART rates below the national rate for their industry *in the most recent year*. Agency officials eventually came to realize, however, that national rates can fluctuate significantly year-to-year. In the petroleum industry, for example, total recordable incidence rates fluctuated from 2.50 in 1999 to 3.70 in 2000 to 1.40 in 2001 – an increase of 32 percent from 1999 to 2000, and a decrease of 62 percent from 2000 to 2001.[338] OSHA changed its performance requirement in 2003 to create greater flexibility in the membership requirement, allowing applicants to compare their performance to any

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[334] Occupational Safety and Health Administration. 2008. OSHA Instruction. Voluntary Protection Programs Policies and Procedures Manual, CSP 03-01-003. Available at: https://www.osha.gov/OshDoc/Directive_pdf/CSP_03-01-003.pdf, at 21.

[335] *Id*., at Appendix A.

[336] Occupational Safety and Health Administration. 2003b. Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions. 68 Fed. Reg. (2003) December 8, 2003, pages 68475-68479, at 68475.

[337] OSHA, *supra* note [1982b], at 29027.

[338] Occupational Safety and Health Administration. 2003a. Voluntary Protection Programs To Provide Safe and Healthful Working Conditions; Draft Revisions, Notice. 68 Fed. Reg. (2003) Friday, July 25, 2003, pages 44182-44183, at 44182.

of the most recent three years.[339] Now, as long as an applicant's three-year average is below the highest rate for its sector in any of the three most recent years, it meets VPP's performance criterion.

Employers who do not meet the Star entry standard may still be eligible for joining VPP at the Merit level. Such employers must explain in their applications how they plan to reduce their rates to below the industry average.[340] Only applicants who demonstrate that it is feasible, mathematically and practically, to meet Star criteria within two years are eligible for the Merit designation. If, for example, a work site's TCIR and DART rates were more than three times the BLS average for its industry sector, OSHA would treat that facility as highly unlikely to achieve required rates within two years. In addition, a history of labor-management disputes at the site, or occupational hazards that are difficult and expensive to control, would also make a site ineligible for admission into Merit.[341]

Small businesses receive even greater flexibility when it comes to meeting either Star or Merit's performance requirements. These smaller firms – which OSHA defines as employers with fewer than 250 employees at a worksite and fewer than 500 at the corporate level – are eligible for an alternative method of calculating safety performance. The small business method allows the site to base its safety and health performance on its best three out of the most recent four years of injury and illness records, eliminating the year with the greatest number of problems from its calculation.[342]

VPP Management Requirements. In addition to meeting safety and health performance levels specified by OSHA, Star sites must have established, for at least one year, a operational safety and health management program that uses "a systems approach to preventing and controlling workplace hazards."[343] The employer's program must have four components:[344]

1. *Management leadership and employee involvement*: Managers from the highest levels must be committed to carrying out documented safety and health programs in which employees take an active role.
2. *Worksite analysis*: Employers must be aware of all workplace hazards and be able to control them.
3. *Hazard Prevention and Controls*: The health and safety program must consist of clear, established methods to prevent and control hazards.
4. *Safety and health training*: Employers must train employees to share management's commitment to protecting safety and health and understand the most effective ways to avoid hazards.

Once admitted, VPP sites must report to OSHA each year on their TCIR and DART rates and the status of their safety and health management systems. They must include their annual safety and health self-evaluation and goals, as well as a description of any "success

[339] OSHA, *supra* note [2003b].
[340] OSHA, *supra* note [2008], at 37.
[341] BENNETT & DEITCH, *supra* note __.
[342] *Id*. at 63.
[343] GAO, *supra* note [2004] at 5.
[344] OSHA, *supra* note [2009], at 936-38.

stories."[345] OSHA's expectation is for "continuous improvement" in both the "operations and impact" of employers' safety and health management systems.[346]

Application process. Participation in VPP requires high levels of information disclosure on the part of worksite managers and workers. Managers must describe in detail their worksite safety and health hazards, as well as their plans and capacity for addressing them. The amount of time required to complete an application can be substantial; OSHA estimates about 200 hours per employer.[347] Perhaps even more significant than the time, VPP demands a willingness on the part applicants to open their operations to direct scrutiny by government.

OSHA instructs managers to send VPP applications to their OSHA office for their region. Upon receipt, the appropriate OSHA regional official reviews the applicant's description of its safety and health management system and its TCIR and DART rates. The regional official determines whether the applicant is eligible for VPP, and if so, whether it meets the requirements for Star or Merit. If the regional official determines that the applicant is not appropriate for either program, OSHA will offer the applicant the opportunity to withdraw. For those applicants that appear to meet VPP requirements, OSHA's regional official will begin the process for on-site review, to be conducted within six months of receipt of the application.[348]

According to OSHA, the on-site review generally requires four days.[349] Through an initiative known as the Special Government Employee Program that OSHA began in 1994, employees from worksites already participating in VPP often take part in these reviews, defraying OSHA resources.[350] The review team must include, at a minimum, a leader (usually the OSHA regional VPP manager), an industrial hygienist, and a safety engineer or safety specialist. OSHA compliance officers may or may not be involved.[351] If an OSHA compliance officer participates, OSHA policy prohibits that inspector from basing any agency enforcement action against the facility on findings from the review, for at least two years after the review.[352] The team considers each element of the applicant's safety and health management system as well as injury and illness rates in the plant. The team walks through the facility, observes operating practices and management protocols, and interviews workers to ensure that the safety and health management system is in place and working. If the team identifies areas of deficiency, on-site managers must correct them within 90 days and provide documentation of the corrective action taken. Based on this review, the team leader prepares an evaluation report recommending whether the site should be admitted to VPP at the Star, Merit, or Demonstration level, and then the recommendation goes to the regional OSHA administrator. The regional administrator reviews the information and decides whether to recommend VPP designation to OSHA's

[345] Occupational Safety and Health Administration. 2015d. VPP Application Instructions for the Site-Based Way to Participate. Available at: https://www.osha.gov/dcsp/vpp/application_sitebased.html. Accessed December 23, 2015.
[346] OSHA, *supra* [2008], at 10.
[347] BENNETT & DEITCH, *supra* note __, at 50.
[348] OSHA, *supra* [2008].
[349] *Id*.
[350] BENNETT & DEITCH, *supra* note __, at 17.
[351] OSHA, *supra* [2008].
[352] *Id*.

national office, which must make the final determination about the site's VPP participation.[353]

Program Benefits. As noted, a primary benefit that OSHA offers VPP participants is removal from the agency's "general schedule inspection list." But a second important benefit OSHA offers to those businesses included in VPP is public recognition. OSHA lists the names of VPP participants on its website and lauds their safety and health attributes. VPP participants may fly a VPP flag and use a VPP logo on letterhead, employee uniforms, and other facility materials. In addition, managers of VPP facilities may participate in training programs to become designated as a Special Government Employee with responsibility for evaluating the safety and health programs of worksites seeking to join the program. Those who work at VPP sites also report feeling "comfortable" in their interactions with OSHA inspectors, who they view as "partners, not adversaries."[354]

The Voluntary Protection Programs Participants' Association (VPPPA), an independent organization of VPP members, offers education and advocacy support on behalf of the program.[355] As of 2014, 1,089 VPP participants were members of the Association, along with 334 worksites that were seeking to join VPP. With annual revenues exceeding $2.5 million, VPPPA has the capacity to augment the recognition and other benefits that OSHA can provide. It runs an annual conference with approximately 2,500 attendees, offering safety and health workshops, exhibits, and networking. It also publishes a magazine that features safety and health best practices, and it offers various webinars and other educational opportunities for members.[356]

Concerns about the Performance of VPP Members

OSHA's intention with VPP has been "to seek out and recognize companies with *exemplary* safety and health programs."[357] OSHA consistently speaks of VPP members in the most glowing terms. For example, the VPP Policies and Procedures Manual states that the Star Program "recognizes *the very best* workplaces that are in compliance with OSHA regulations and that operate *outstanding* safety and health management systems for employee protection."[358] More recently, 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."[359] But in what sense are VPP facilities "best"? Neither VPP's performance

[353] Government Accountability Office. 2009. OSHA's Voluntary Protection Programs: Improved Oversight and Controls Would Better Ensure Program Quality. GAO-09-395. Washington, DC: US Government Accountability Office.
[354] Lobel, Orly. 2005. Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety. Administrative Law Review 57, 1071-1152; *see also* GAO, *supra* note [2004].
[355] http://www.vpppa.org/about-vpppa
[356] Voluntary Protection Program Participants' Association (VPPPA). 2014. Voluntary Protection Program Participants' Association (VPPPA) Annual Report FY2014. Falls Church, VA: VPPPA
[357] OSHA, *supra* note [1985], at 43804 (emphasis added).
[358] OSHA, *supra* note [2008], at 21 (emphasis added).
[359] Barab, Jordan. 2012. Statement of Jordan Barab, Deputy Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Before the Subcommittee on Workforce Protections Committee on Education and the Workforce, U.S. House of Representatives. Available at: https://perma.cc/0RmytqeHQhh. Accessed January 6, 2016.

standard nor its management system requirements are necessarily reliable tools for identifying the truly "outstanding" worksites.

Does OSHA's Screening Process Ensure "Best of the Best" Participation? With respect to safety and health performance, VPP criteria merely require that worksites perform better than the national average in one of the previous three years. This is a standard that many worksites in any sector could meet. If safety performance is normally distributed within a sector, then fully 49.99% of the facilities in the sector will have better-than-average performance, which is far from saying that all of these facilities are "outstanding" or the "best of the best." Firms would need to have performance levels that are a full two standard deviations better than average to be in the top 5% of all facilities in the sector. Furthermore, there still are some industrial sectors with relatively poor overall track records of workplace safety; in such sectors, even being two standard deviations above average might not properly be considered a strong level of excellence.

VPP's requirement that participating facilities have established a safety and health management system is also not a strong signal of a truly exemplary worksite. These systems are now so commonplace throughout industry that the adoption of such a system cannot be said, on its own, to distinguish a workplace as "best." Most worksites in the chemicals industry, for example, are subject to OSHA's Process Safety Management regulation, which since 1992 has required managers of facilities that use highly toxic and flammable materials to adopt management systems that in many respects mirror VPP requirements. Furthermore, what OSHA demands of VPP applicants in terms of the design and operation of their management systems is far from demanding. It is not the case that the management systems deployed by VPP members are necessarily more rigorous or exacting than those used by other businesses. In fact, OSHA explicitly states in its VPP application instructions that there is no "single correct way to meet VPP requirements."[360] The agency encourages applicants simply to describe "a system that works for you."[361]

Whatever can be said for a voluntary approach like that reflected in the VPP approach, in practice it is hard to see how this program selects the best facilities within a sector when OSHA appears to accept nearly every worksite that goes through the process of completing the VPP application. Data on acceptance rates for the program overall are hard to come by, but at least four of OSHA's ten regional offices have tracked the number of facilities that apply to VPP and the number approved as members since the program's inception in 1982. Those regions report approval rates of 83% to 99%—a very high rate by any standard.[362]

Does OSHA Monitor Participants to Ensure Ongoing High Performance? Once admitted to VPP, worksites must self-evaluate their safety and health programs and submit results to OSHA. OSHA requires VPP participants to be reapproved every three to five years. If, in the process of re-approval, OSHA discovers that a worksite's three-year TCIR or DART rate is higher than the BLS average for its sector, it requires the site to submit a

[360] OSHA, *supra* note [2015d].
[361] *Id*.
[362] Occupational Safety and Health Administration. 2013a. Number of VPP Applications Received/Accepted by OSHA Regions - CY 1982 - CY 2013 (as of 2/28/13) (on file with the authors).

two-year rate reduction plan. If rates have not declined sufficiently in two years, OSHA will ask the participant to leave the program voluntarily or face termination.[363]

OSHA's Office of Inspector General (OIG) has questioned the appropriateness of allowing worksites with higher-than-average rates to continue in the program for such a seemingly long time.[364] OIG points out that worksites have been allowed to remain in the program for up to five or six years with accident and injury rates above BLS standards—three or four years before the site is reevaluated (depending on its size), and two more years under a rate reduction plan.[365] The Inspector General found that "157 participants (9 percent) had injury and illness rates above industry averages."[366]

The U.S. Government Accountability Office (GAO) has also raised concerns about OSHA's practice of allowing facilities that experience safety and health problems to remain members of VPP.[367] In a 2009 review, 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."[368] OSHA's policy requires regional offices to follow up with any VPP site where a fatality or senior injury has occurred. Its VPP Manual "requires regions to review sites' safety and health systems after such incidents to determine whether systemic changes are needed to prevent similar incidents from occurring in the future and whether the site should remain in the program."[369] GAO found, however, that OSHA had no policy requiring regional offices to document their decisions and actions after an incident at a VPP site. Thirty-two fatalities occurred at VPP sites during the period 2003-2008. When GAO interviewed regional VPP staff, it found that OSHA allowed 17 of these worksites to remain in the program, despite the fatalities. "One of these sites had 3 separate fatalities over the 5-year period. Another site received 10 violations related to a fatality, including 7 serious violations and 1 violation related to discrepancies in the site's injury and illness logs," yet it retained its VPP status.[370]

In response to GAO's 2009 report, OSHA convened a team of OSHA headquarters and regional personnel to review VPP and recommend changes.[371] The review team acknowledged the merit of many of GAO's concerns and proposed 34 improvements, including actions OSHA should take when fatalities and other serious problems occur at VPP sites. One recommendation was to flag such problem sites as "Inactive Pending Fatality/Catastrophe Inspection." As of December 2015, eight VPP participants listed on the program's website bore that designation, indicating that serious safety and health concerns remain a problem.[372]

In a series of articles, the Center for Public Integrity, a nonpartisan investigative news organization, has documented workers who had been seriously injured while working

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[363] Occupational Safety and Health Administration, Office of Inspector General—Office of Audit. 2013b. Voluntary Protection Program: Controls Are Not Sufficient to Ensure Only Worksites with Exemplary Safety and Health Systems Remain in the Program. 02-14-201-10-105.
[364] *Id*.
[365] *Id*. at 3.
[366] *Id*. at 5.
[367] GAO, *supra* note [2009] (Highlights).
[368] *Id*. at 14.
[369] *Id*. at 12.
[370] *Id*. at 13.
[371] Smith et al, *supra* note __.
[372] OSHA, supra note [2015a].

at VPP sites. The Center found that eighty workers have 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.[373] A PBS television documentary similarly stated that "once a worksite achieves VPP designation, OSHA seldom takes it away, even after extremely serious accidents have occurred."[374]

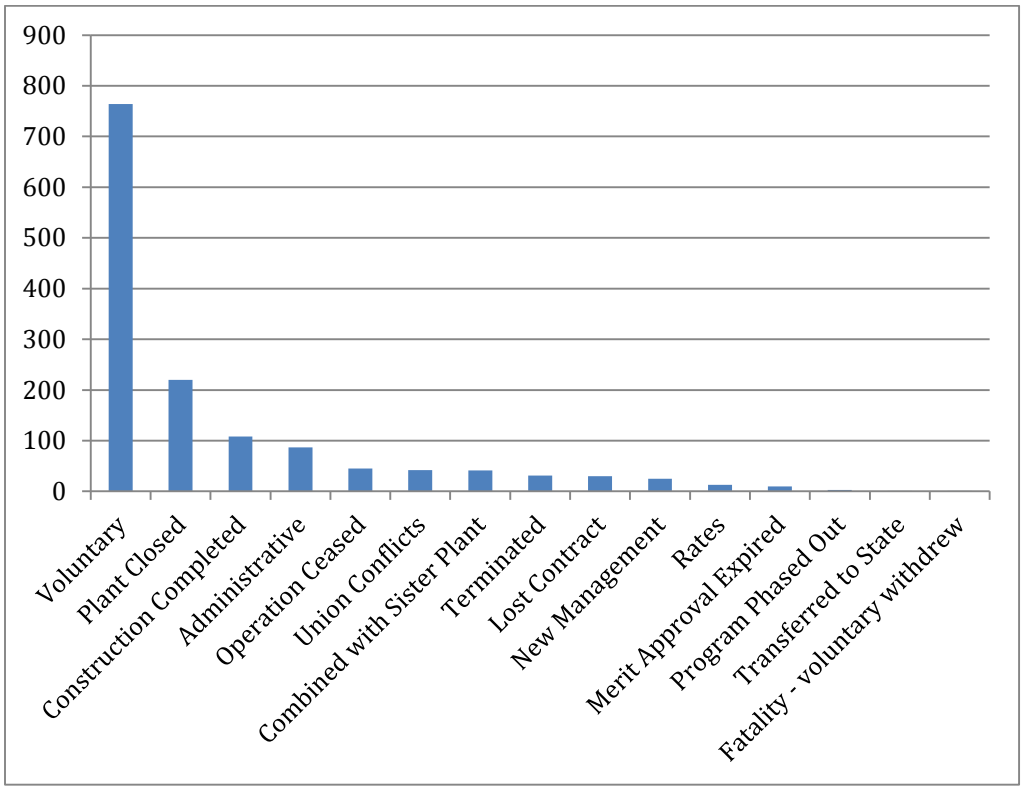
As of August, 2015, some 1,421 worksites had left VPP since its inception. Most left "voluntarily," or because the site closed, construction was completed, or due to undefined administrative reasons.[375] Nearly 93% of those that left the program did so apparently on their own accord. Over VPP's 33-year history, OSHA has "terminated" just 31 worksites and asked an additional 13 sites to leave due to higher-than-allowed injury and illness rates.[376] OSHA's policy is to request termination only as a last result, "when all efforts for assistance have been exhausted," such as "when OSHA has identified one or more serious problems and recommended technologically feasible solutions, but the participant has refused."[377] Figure 1, below, provides additional detail about the reasons worksites have left VPP.

It cannot be discerned merely from the high number of facilities that left voluntarily how many did so because they lost interest in VPP or because OSHA encouraged them to leave. As the next section discusses, though, OSHA officials have faced internal pressures to grow the program. That fact, when combined with the number of facilities remaining in the program following the occurrence of workplace fatalities or with subpar safety records, would appear to suggest that most facilities voluntarily leaving were not likely to have done so at the behest of OSHA.

The ultimate test for the program's impact on performance would be, of course, whether it caused improvements in on member facilities' workplace safety performance as well as potentially on the similar performance of non-members.[378] In response to a recommendation from the U.S. Government Accountability Office (GAO), OSHA did retain the Gallup Organization in 2003 in a purported effort to assess the extent to which VPP actually brought about reductions in participants' injury and illness rates.[379] But the Gallup study relied only on data on a limited number member companies, with no comp-

[373] Hamby, Chris. 2011. "Model Workplaces" Not Always So Safe. Washington, DC: Center for Public Integrity. Available at: http://perma.law.harvard.edu/0v2P2gUQL7B. Accessed January 7, 2016.
[374] Iskander, Mona. 2011. "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). Accessed January 7, 2016.
[375] Occupational Safety and Health Administration. 2015e. VPP withdrawal list all of sites (federal and state) as of July, 2015. Data provided by OSHA's Directorate of Cooperative and State Programs. On file with the authors.
[376] *Id*.
[377] Occupational Safety and Health Administration. 2013c. Further Improvements to the Voluntary Protection Programs (VPP) Termination. Policy Memorandum #7. Available at: https://www.osha.gov/dcsp/vpp/policy_memo7.html. Accessed January 10, 2016.
[378] Borck, Coglianese, Nash, *supra* note __.
[379] [Gallup 2005].

Figure 4. Reasons for Leaving VPP, 1982-2015. N=1421 (OSHA 2015e)



parison to non-participating companies, so no causal inferences could possibly be drawn. (Even if they had compared VPP facilities with non-member facilities, the voluntary nature of the program introduces the threat of selection bias.) The GAO subsequently declared the Gallup study to be "not reliable or valid."[380]

Limits to VPP Growth

In the first several years of the program, membership growth was modest. In the program's first year, for example, OSHA approved 17 sites for participation.[381] By October, 1985, OSHA had approved 54 sites, but 13 had left "due to completion of construction work, voluntary withdrawals or plant closings."[382] Of the 41 sites still in VPP at that time, 30 had joined at the Star level, seven had joined Try, and one was a Demonstration Program. Only three had joined Praise, all of them being facilities of Johnson & Johnson.[383]

[380] GAO, *supra* note [2009].
[381] OSHA, *supra* note [1985], at 43804.
[382] *Id*. at 43805).
[383] OSHA, *supra* note [1985], at 43805; BENNETT & DEITCH, *supra* note __, at 5.

A few companies were responsible for a large percentage of members —for example, in 1987 Mobil Chemical (now ExxonMobil) had 24 facilities in the program at the Star level, about one-third of VPP's total membership at that time.[384]

OSHA commissioned a study in 1983 to explore perceptions about VPP among plant managers.[385] Investigators found that many employers thought that VPP offered insufficient incentives for participation and the application process was "burdensome." In addition, employers feared "that VPP participation might lead to OSHA interference or enforcement actions."[386] In 1992, ten years after the Labor Department launched the program, VPP still counted only about 100 worksites as members.[387] It announced its 500th member in February, 2000, nearly 18 years after the program began.[388]

While OSHA originally envisioned Star as a small program, with requirements set high enough to exclude all but the very best plants,[389] over time membership growth became an agency program priority. In a speech commemorating VPP's 20th anniversary in September 2002, OSHA administrator John Henshaw announced his goal to increase VPP membership ten-fold, to 8,000 workplaces. As Henshaw pointed out, at that time only one in 10,000 worksites participated in the program.[390] To boost membership, OSHA's national office began setting targets for the number of new worksites it expected regions to approve. Although OSHA headquarters did not mandate that regions meet those targets, the number of new participants began to increase markedly.[391]

Henshaw also sought to increase participation by encouraging federal facilities to join VPP. OSHA first made federal facilities eligible to join VPP in 1997.[392] By 2003, the number of federal sites began to grow markedly, until by 2008 federal sites represented about 10 percent of total members:

> At the end of 2008, almost 200 VPP sites were federal agencies or Postal Service sites. The majority of these sites—157—were post offices, processing and distribution centers, and other postal facilities, while most of the remaining sites were Department of Defense facilities, such as naval shipyards, Army depots, and Air Force facilities. In addition, from 2005 to 2008, 7 OSHA area offices in 1 region were approved as new VPP sites as a result of OSHA's efforts to have all of its offices participate.[393]

Outside of government, today the top eight industrial sectors participating in OSHA's VPP are chemicals (13%), utilities (8%), wood and paper (7%), professional services (5%), warehousing and storage (5%), transportation equipment (5%), warehousing and storage (4%), specialty contractors (4%), and waste management (4%), which together make up

[384] BENNETT & DEITCH, *supra* note __, at 12, 13.
[385] OSHA , *supra* note [1985], at 43806.
[386] *Id*.
[387] BENNETT & DEITCH, *supra* note __, at 13.
[388] *Id*.
[389] OSHA, *supra* note [1982b], at 29026.
[390] (Henshaw 2002).
[391] GAO, *supra* note [2009], at 10-11.
[392] BENNETT & DEITCH, *supra* note __, at 7.
[393] GAO, *supra* note [2009], at 9.

48% of VPP worksites.[394] Several of these sectors were also well-represented in the Performance Track program, namely chemicals, wood and paper, and transportation equipment.

Despite recruitment efforts, VPP membership has remained quite modest as a relative matter. As of December 2015, some 2,200 worksites participate in VPP at all three levels. According to OSHA, the number of worksites in the United States stands at about 8 million, so VPP participants represent just 0.03% of potential participants.[395] But even though this is such a tiny fraction, even it may overstate VPP's market penetration, as the total number of VPP sites that OSHA reports as active may be misleading. The spreadsheet of active sites we obtained from OSHA included more than 390 where no contact person was listed, leading us to question how active the program could be at these locations[396]. OSHA's Inspector General raised the same concern in 2013, finding that "OSHA could not identify the universe of participants or applicants."[397] Each of OSHA's ten regional offices tracks basic identifying information about the VPP sites within its jurisdiction, and OSHA's national office compiles the data for all regions into a single list. But the national office lacks the resources to address inconsistencies and omissions in VPP site information. When OSHA's Inspector General reviewed site information in 2013, it found that the number of VPP worksites ranged "between 1,743 to 1,859 for participants, and 19 to 274 for applicants."[398]

Lessons Learned from Performance Track and VPP

Three decades ago, OSHA created VPP to tap private sector expertise about workplace safety and health, relieve some of the burden on its limited inspection and enforcement resources, and establish more collaborative relationships between government and business. VPP identifies and rewards worksites with formal safety and health management systems and whose performance is in principal supposed to be better than average during at least one of the three most recent years. Rewards include inspection amnesty and recognition by OSHA. But the worksites that participate in VPP are not necessarily exemplary along the dimensions OSHA touts.

It is true that VPP, unlike EPA's Performance Track program, does explicitly require some comparison between a prospective member and other facilities in the same sector. But the comparison only requires that a member achieve a level that is above average performance. As we have seen, some nontrivial number of members actually end up with safety and health performance worse than average, and a small percentage even have suffered fatalities at their worksites. Overall, the worksites in VPP, like the facilities in EPA's Performance Track, seem to be distinguished most by their willingness to open themselves to OSHA—to welcome OSHA onsite to review the internal workings of their safety and health programs.

In other respects, OSHA's VPP appears to have suffered challenges similar to those that plagued EPA's Performance Track. VPP has been met with substantial outside criticism, especially when a number of these facilities that OSHA has deemed "the best of

[394] OSHA [2015j].
[395] OSHA, *supra* note [2015b].
[396] OSHA, , *supra* note [2015f]
[397] OSHA, *supra* note [2013b], at 5.
[398] *Id*.

the best" have been the site of fatalities and other major incidents. Moreover, the program involves only the tiniest fraction of regulated workplaces. Despite OSHA's efforts at recruitment, membership has never exceeded such a tiny portion of United States workplaces, perhaps simply because there are not many facilities for whom the costs of participation in terms of paperwork and regulatory scrutiny would actually exceed the program's modest public recognition and inspection-relief benefits. Although a few companies – and a number of government agencies – appear to find value in VPP, the program's inability to attract more than a tiny fraction of the workplaces in the United States makes it unlikely ever to provide more than a very tiny contribution to the policy goals of promoting worker safety and health.

Admittedly, VPP does currently have about four times the number of members than Performance Track had when it was disbanded, which might on the surface make VPP seem a counterexample to Performance Track. But it bears noting that VPP is now over thirty years old, while Performance Track came to an end after less than a decade. When OSHA's VPP was the same age as Performance Track was when it was ended, OSHA had only seventy-one worksites in its equivalent program — vastly fewer members than Performance Track had when it ended. If anything, Performance Track succeeded in establishing a stronger growth track than VPP. Indeed, when rough estimates of the combined membership in the federal Performance Track and similar state-based environmental leadership programs (about 2,390) are compared with the total number of worksites in both the federal VPP and similar state-based programs (about 2,340), the differences between the two types of programs largely disappear altogether, despite their differences in age. However one calculates membership levels, the bottom-line comparison between Performance Track and VPP yields a substantively similar result: the ratio of program members to the total population of potential members has proven to be incredibly small for both programs.

Overall, then, not only does OSHA's experience with VPP not draw into question our conclusions about programs like EPA's Performance Track, it actually tends to confirm them. Voluntary recognition programs seem to attract those businesses seeking outward validation rather than necessarily the "best of the best." Moreover, the constraints inherent in the rewards government agencies can offer, as well as the costs they impose on those who apply for those rewards, make these programs of highly limited scope.

Our findings about both Performance Track and VPP have drawn on a wide variety of research methods: a review of publicly available information about these 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 have included in our inquiry not only data on the joiners but also information about non-participants. Our three major findings, summarized here, not only speak to Performance Track and VPP, but we believe they also contribute to an improved understanding of voluntary programs more generally.

Claims About Recognizing "Top Performers" Should Be Verifiable. EPA and OSHA have called Performance Track and VPP members, respectively, the best of the

best.[399] Yet for EPA, the entry criteria for Performance Track never addressed performance directly, and it never compared facilities that applied with facilities that did not apply. OSHA did include a comparison against the average facility in a facility's sector, but it imposed no requirement about how far above average facilities accepted into the program needed to be. Neither program provided any basis for claiming that their members were "the best of the best."

Those who have examined the environmental performance of Performance Track members and the fatality records of VPP members have concluded that at least some members failed to perform better than their peers.[400] 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 problems.[401] 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.[402]

In addition to calling program participants "top performers," both agencies have frequently claimed that the two programs have delivered meaningful results in terms of environmental, health, and safety goals.[403] Admittedly, EPA and OSHA did require members to track progress toward their goals and report improvements regularly.[404] But at least some of the facilities that joined the voluntary programs already would have undertaken those activities and made those improvements even in the absence of the program. Managers we interviewed for our Performance Track case studies did not report that the EPA served as the vehicle that induced 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.[405] 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."

Voluntary Programs Attract "Extroverts" – Not Necessarily "Leaders." What made Performance Track and VPP facilities stand out seemed to be the value they placed on external engagement as opposed to any measurable tendency toward environmental excellence.[406] Performance Track facility managers in particular could be seen to be deliberately cultivating an image of environmental responsibility and environmental leadership.[407] They valued recognition and actively sought to engage regulators and communities, and their corporate and facility bosses voiced strong support for such efforts.[408] A large number of facility managers working at Performance Track facilities

[399] *See* GROWTH & RENEWAL, *supra* note __, at 3.
[400] *See* P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note __, at 24, 26; PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note __, at 17–18.
[401] *See* P-TRACK TO IMPROVE DESIGN & MANAGEMENT, *supra* note __, at 24–25.
[402] *See* PERFORMANCE TRACK DATABASE OVERVIEW, *supra* note __, at 17–18.
[403] *See, e.g.*, FY2006 NATIONAL PROGRAM GUIDANCE, *supra* note __, at 1.
[404] *See, e.g.*, TOP PERFORMERS, *supra* note __, at 4, 6.
[405] *See supra* note __ and accompanying text.
[406] Howard-Grenville, Nash & Coglianese, *supra* note __, at 96.
[407] *Id.* at 95.
[408] *Id.* at 96–97.

also reported that they more frequently sought out the opinions of community members and environmental advocacy organizations.[409]

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.[410] 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.[411]

Voluntary Recognition Programs Face Limits to Growth. When Performance Track ended in 2009, it had 547 members. While that number was significantly greater than the number that participated in Project XL, 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. The same is true for VPP. From EPA's and OSHA's perspective, however, the benefits they are offering are still at least politically significant — they were, after all, exemptions from regulatory oversight. Relinquishing even a very small degree of regulatory authority amounts to a major concession and political risk for a government agency.

The different ways that regulators 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 and OSHA, continue to operate a significant number of voluntary programs like it. With little prospect for ending gridlock in Congress, voluntary programs like these are likely to remain attractive avenues for seeking public health protections in the absence of new legislative authority. Yet both public officials and scholars should take heed of the lessons to be learned from EPA's and OSHA's experiences.

Voluntary programs appear likely to offer, at best, modest additions to core regulatory activities. For those who seek to encourage businesses to undertake greater environmental, health, and safety efforts, voluntary programs may well seem at times to be the "only" realistic option in a period of gridlock — but they are likely to prove very

[409] *Id.*
[410] *Id.* at 95.
[411] *Id.* at 100.

unsatisfying alternatives. These programs tend to be at best gap-fillers, not inducers of a paradigm shift or "alternative path" toward new style of 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.[412] Yet even rules that experience some of the lowest-known compliance rates still encompass and affect many more facilities than Performance Track and VPP ever reached.[413]

Moreover, neither officials nor scholars should 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 performance, now or in the future.

Promoting self-governance via public recognition may seem attractive to both government and business, offering a possible vehicle for achieving public health, safety, and environmental objectives at a relatively low cost to both the public and private sectors. Yet whatever difference these programs might be able to make in inducing businesses to go beyond compliance, they are prone to challenges in terms of credibility and incentives. These challenges limit the ability to conclude that they are motivating genuine corporate leadership, as well the ability of these programs to reach beyond the tiniest fraction of the business population. At least from the experience of these two flagship federal voluntary programs, it is difficult to see how these kinds of recognition programs can ever constitute a very meaningful form of general governance of the overall social impacts of the firm.

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[412] *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).

[413] 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 __, 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 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 mere awareness of Performance Track, it is hard to imagine that the program exerted any substantial indirect effects on their businesses' environmental performance.