



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
POLICY, ECONOMICS AND INNOVATION

January 19, 2001

MEMORANDUM

SUBJECT: Enforcement and Compliance Operating Principles for the National Environmental Performance Track Program

FROM: Steven A. Herman /s/
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TO: Administrator
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Deputy Assistant Administrators
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Regional Administrators
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On June 26, 2000, EPA launched the National Environmental Performance Track program. This national program is the cornerstone of the Agency's innovation activities and is designed to motivate and reward public and private facilities whose environmental performance exceeds existing regulatory requirements. The program builds directly on EPA's experience with the Environmental Leadership Program, Star Track, Project XL, the Common Sense Initiative, as well as many State leadership programs. In developing the program, EPA consulted extensively with the public and our state partners. On December 13, 2000, EPA selected 228 facilities for Charter Membership in Performance Track.

The purpose of this memorandum is to explain the overall operating principles for handling enforcement and compliance issues that may arise in the Performance Track program. These general operating principles respond to the questions raised during early implementation of the program, and will help foster the spirit of cooperation that underlies the Performance Track program.

The basic design of Performance Track is straightforward. Participants must satisfy

specific performance criteria designed to ensure that they exceed regulatory requirements. In turn, the Agency will publicly recognize the achievements of these facilities, and offer them a specific set of incentives. Enforcement incentives include lower inspection priority for performance track facilities and audit policy penalty mitigation. The detailed program elements may be found at <http://www.epa.gov/performancetrack>.

During implementation of this program, enforcement and compliance assurance issues may arise in four basic contexts: 1) as part of the Agency's deliberations regarding whether an applicant meets the Performance Track criteria; 2) in evaluating the effectiveness of the Performance Track program; 3) in providing reduced inspection priority for participants; and 4) in determining an appropriate response to violations by facilities involved in Performance Track that are identified during the course of the program. This memorandum sets forth an enforcement response framework that we believe is practical, fair, and recognizes EPA's intention to work collaboratively with facilities who routinely do more than is required by law.

I. APPROVAL OF PROGRAM APPLICANTS

In reviewing applicants for the Performance Track program, the Agency should consider the facility's compliance history and whether it is under investigation or involved in an enforcement action with the Agency, the State, local government, or citizens. Compliance screening criteria, which address both current compliance status as well as a facility's compliance history, have been developed specifically for this program, using the Agency's general guidance on "Compliance Screening for EPA Partnership Programs," and are available in the Performance Track Program Description on the National Performance Track Web site at <http://www.epa.gov/performancetrack>. Under the compliance screening guidance, the Office of Policy, Economics and Innovation, as the national Performance Track program manager, will make decisions about participation based on information about the facility's record of compliance and current status. The concurrence of the Office of Enforcement and Compliance Assurance is required for exceptions to the criteria developed for Performance Track.

There may be an instance where neither EPA nor a state has any record in its compliance data systems on an applicant, or where neither EPA nor state staff have knowledge about the facility. In this event, EPA will discuss with the states the need for a pre-site selection program visit. If a region or state plans a performance track site visit, staff should notify the EPA-wide Performance Track implementation staff workgroup prior to the visit. This on-site visit generally would include a meeting of EPA and senior facility management, discussion of the facility's operations and practices, and when EPA believes it is necessary, a review of documents that directly support participation in Performance Track, and a non-inspection walk through of the facility. In the event a violation is found during the visit, the violation will be handled according to the procedures outlined below in Section IV.

II. PROGRAM EVALUATION AND TECHNICAL ASSISTANCE

To evaluate the effectiveness of the Performance Track program EPA also plans to conduct evaluative program site visits at up to twenty percent of participating facilities in a given year. During the program site visit, a facility will make available materials that directly support its participation in Performance Track, including the EMS, progress on performance commitments, and information on community outreach. EPA also expects that participating facilities may occasionally voluntarily invite EPA or state agencies to visit on site for technical assistance or other matters. In the event that a violation is discovered incidental to any of these visits, the violation will be handled according to the procedures outlined below in Section IV.

III. IMPLEMENTING REDUCED INSPECTION PRIORITY

Once facilities are admitted to the program, they will be considered a low priority for routine inspections. In order for relevant EPA and state agency management and staff to take this designation into account in carrying out their inspection activities, EPA must ensure that relevant federal and state agency personnel at all levels are informed of these designations as expeditiously as possible. Senior enforcement officials in each Region (the Deputy Regional Administrator or Division Director as appropriate) are responsible for ensuring that this policy is implemented and appropriately incorporated into internal planning and accountability processes as well as planning processes with states and localities. As a resource to EPA regions, Headquarters offices, and to states, OPEI will list participating facilities by region and state on the Performance Track web page <http://www.epa.gov/performance-track>

IV. COMPLIANCE ISSUES AT PERFORMANCE TRACK FACILITIES

Compliance issues may arise from time to time at facilities participating in performance track. EPA has committed that facilities participating in performance track will not be subject to greater enforcement scrutiny solely because of participation in the program. This section details how compliance issues should be handled.

EPA's enforcement response approach under Performance Track should reflect a line of demarcation between those circumstances in which information comes to our attention solely by virtue of a company's participation in Performance Track (i.e., but for participation in Performance Track, we would not have discovered the violation) and circumstances in which information is generated as a result of compliance monitoring activities separate and apart from Performance Track. With this general framework in mind, the following guidelines shall apply:

1. No organization will be singled out for enforcement, or be subject to greater scrutiny from an enforcement perspective, solely because of their participation in Performance Track.

2. The Agency must be free to respond to circumstances which may present an imminent and substantial endangerment or other threat to human health or the environment, or are criminal in nature, even when discovery of such circumstances is through Performance Track.

3. The routine monitoring done by Performance Track facilities may uncover violations. EPA expects voluntarily self-discovered and self-disclosed violations, as defined under EPA's self-disclosure policy ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," commonly known as the "Audit Policy"), to be handled pursuant to the Audit Policy. This means that penalty mitigation is available consistent with the audit policy for participants that self-identify, promptly disclose and correct violations.

4. As stated in Sections I and II above, a Performance Track program visit (such as pre-site selection, program evaluation or technical assistance) might result in discovery of a violation. EPA expects such violations to be addressed under EPA's self-disclosure policy, which normally results in no or substantially reduced penalties. Should the facility fail to meet audit policy conditions, such violations would be handled as violations under subsection 5 below.

5. In the unlikely event that a violation is discovered by EPA during a compliance inspection or investigation, or is not disclosed to EPA under the terms of the audit policy, EPA maintains its discretion to take an enforcement response. If EPA determines an enforcement response is warranted, EPA will consider a facility's good faith participation in the Performance Track program as an indicator of good faith under applicable penalty policies.

In conclusion, successful implementation of the Performance Track program requires consistent application of policy and practice across EPA regions. To resolve any issues that may arise in application of these operating principles, the Deputy Assistant Administrators for the Office of Policy, Economics and Innovation and the Office of Enforcement and Compliance Assurance will consult to resolve issues that require senior management attention. Regional staff should raise issues requiring headquarters attention expeditiously. Mary Kay Lynch, Director of the Office of Planning and Policy Analysis, also may be contacted at (202) 564-2574 to assist in the resolution of enforcement and compliance issues.

cc: OECA Office Directors and Division Directors
Regional Enforcement Coordinators
Regional Performance Track Coordinators