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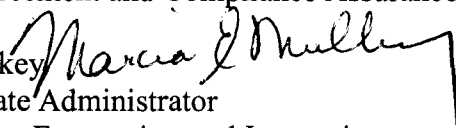


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 25 2009

**MEMORANDUM**

**SUBJECT:** Enforcement and Compliance Guidance on the Termination of the National Environmental Performance Track Program

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**TO:** Regional Administrators  
Deputy Regional Administrators  
Regional Counsel  
Enforcement Division Directors  
Enforcement Coordinators  
Performance Track Coordinators

This memorandum provides further guidance on the termination of the National Environmental Performance Track Program and the discontinued use of any regulatory incentives associated with participation in the program. It is a follow-up to three recent documents related to the termination of the program: (1) EPA Administrator Lisa Jackson's March 16, 2009, memorandum *Next Steps for the National Environmental Performance Track Program and the Future of Environmental Leadership Programs* that halted the program;<sup>1</sup> (2) Office of Policy, Economics, and Innovation (OPEI) March 25, 2009, memorandum that presented the planned close-out activities for the Performance Track Program over the next several months;<sup>2</sup> and (3) OPEI's May 14, 2009, Federal Register Notice that announced the date of the notice as the effective date of the termination of the Performance Track Program.<sup>3</sup>

<sup>1</sup> <http://www.epa.gov/performance-track/downloads/PerformanceTrackNextStepsMemoExternal-text.pdf>

<sup>2</sup> [http://www.epa.gov/performance-track/downloads/PTCclosure\\_MEMO\\_CKent.pdf](http://www.epa.gov/performance-track/downloads/PTCclosure_MEMO_CKent.pdf)

<sup>3</sup> 74 FR 22742; <http://edocket.access.gpo.gov/2009/E9-11272.htm>



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### Termination of the Low Priority for Routine Compliance Inspections Incentive

Facilities that were members in good standing of the Performance Track Program have been considered a low priority for routine compliance inspection by EPA. Since the program has been terminated, Performance Track membership is no longer a factor for consideration in determining facilities for routine inspections. However, consistent with EPA's January 19, 2001, memorandum, *Enforcement and Operating Principles for the National Environmental Performance Track Program*,<sup>4</sup> EPA maintains its commitment that no organization will be subject to greater scrutiny from an enforcement perspective, solely because of its former participation in Performance Track.

### Termination of the Maximum Achievable Control Technology (MACT) Incentive

Facilities that are subject to the National Emissions Standards for Hazardous Air Pollutants (NESHAPs) "Maximum Achievable Control Technology" (MACT) provisions of the Clean Air Act (CAA) must comply with a variety of record-keeping, monitoring, and reporting requirements. Performance Track provided certain member facilities the opportunity to reduce their MACT reporting frequency and the level of detail in some required reports.

A final rule, *National Environmental Performance Track Program*,<sup>5</sup> published in the Federal Register on April 22, 2004, allowed Performance Track member sources subject to the MACT provisions to submit reports less frequently than otherwise required. In some circumstances, the rule provided alternative reporting requirements for Performance Track member facilities which had reduced their emissions of hazardous air pollutants to certain levels.<sup>6</sup>

EPA understands that no Performance Track member took advantage of the MACT incentives. This guidance clarifies that these incentives are no longer available. EPA plans to take steps to rescind the final rule that enabled the MACT incentives.

### Termination of the Resource Conservation and Recovery Act (RCRA) Incentives

Under the federal RCRA hazardous waste regulations, Performance Track members could take advantage of two incentives: (1) large quantity generators of hazardous waste could accumulate hazardous waste at their facilities without a permit or interim status for 180 days, as opposed to the general requirement of 90 days;<sup>7</sup> and (2) owners and operators of hazardous waste treatment, storage, and disposal facilities could reduce the frequency of facility inspections to once a month, instead of the standard regulatory requirement to conduct facility inspections daily or weekly.<sup>8</sup> With the termination of the Performance Track program, all former members

<sup>4</sup> <http://www.epa.gov/perfrac/downloads/PTComplianceEnforcement.pdf>

<sup>5</sup> 69 FR 21737; <http://www.epa.gov/fedrgstr/EPA-WASTE/2004/April/Day-22/f9042.htm>

<sup>36</sup> Ibid

<sup>7</sup> 40 CFR 262.34

<sup>8</sup> 40 CFR 264.15; 40 CFR 265.15

will need to comply with the standard RCRA requirements for hazardous waste accumulation times and facility inspections pursuant to the appropriate provisions of the regulations. This guidance clarifies that the hazardous waste incentives are no longer available, since the effect of terminating the Performance Track Program is to withdraw or terminate program membership. EPA plans to take steps to rescind the final rules that enabled these incentives.

The RCRA regulatory incentives provide a schedule for facilities to return to compliance with the standard RCRA hazardous waste requirements if a facility's membership is withdrawn or terminated. With respect to hazardous waste accumulation times, the regulations provide that a facility must return to compliance with the standard RCRA requirements as soon as possible but no later than six months after the date of withdrawal or termination<sup>9</sup> (in this case May 14, 2009, as designated in the Federal Register Notice). For purposes of compliance monitoring and enforcement, OECA interprets this provision to mean that all hazardous waste generated after the date of program termination (May 14, 2009) may be accumulated without a permit or interim status for up to 180 days (or 270 days, if the generator is transporting the waste more than 200 miles from the generating facility). Therefore, Performance Track facilities must come into compliance with their original RCRA hazardous waste storage requirements as soon as possible, but no later than November 21, 2009 (February 21, 2010, for facilities transporting waste more than 200 miles).

For facilities that took advantage of less frequent inspections, the regulations provide that the facility must immediately notify the state that it is no longer a member of the Performance Track Program, place a dated copy of that notice in its operating record, and return to the standard RCRA inspection frequencies within seven calendar days from the date of termination. Therefore, the facilities should now be in compliance.

The Performance Track regulations promulgated under the RCRA hazardous waste program were effective only in those states that had: (1) adopted the Performance Track regulations as state law; and (2) received state program authorization from EPA for those particular state laws and regulations to operate in lieu of the federal program.<sup>10</sup> As of the date of program termination, EPA had authorized 15 states for the Performance Track RCRA hazardous waste storage regulation, and ten states adopted the regulation but did not receive authorization (see attachment 1). For the RCRA reduced frequency of self inspections regulation, EPA authorized two states, and nine states adopted the regulation but did not receive authorization (see attachment 2). Performance Track facilities in all ten EPA Regions have reported taking advantage of one or both of the RCRA regulatory incentives (see attachment 3). The Regional offices should review the attached list of Performance Track members in

<sup>9</sup> 69 FR 21737; <http://www.epa.gov/fedrgstr/EPA-WASTE/2004/April/Day-22/f9042.htm>

<sup>10</sup> Under section 3006 of RCRA, EPA may authorize a qualified state to administer and enforce the hazardous waste program, in lieu of the federal program. For regulations that EPA promulgates under provisions of RCRA that were enacted prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA) (such as the Performance Track regulations), the regulations do not become effective in an authorized state until the state adopts the requirements as state law and EPA approves the revision to the state program. Once a state has adopted the new regulations and EPA has authorized the revisions, then EPA, as well as the state, may monitor compliance and enforce the new requirements. The Performance Track regulations were promulgated under RCRA provisions that pre-date HSWA, which means they were only effective in those states that had adopted them and received EPA authorization for those revisions.

their respective regions, along with the state regulations implementing the Performance Track regulations in those states to understand the authorized state regulations and to ensure that all facilities return to compliance with the base RCRA program within the specified timeframe.

#### Termination of Performance Track “Flags” within ECHO and OTIS Databases

Performance Track members were identified within OECA’s Enforcement & Compliance History Online (ECHO) and Online Tracking Information System (OTIS) data systems using a “flag” obtained from EPA’s Facility Registry Systems (FRS). EPA is removing this flag as a public data element from FRS and EnviroFacts Data Warehouse.<sup>11</sup> EPA will take the following steps summarized below to make the ECHO and OTIS databases consistent with the FRS and Envirofacts databases:

##### In ECHO:

- The Performance Track flag will be removed from ECHO data searches.
- A “Frequently Asked Question” will be added to the ECHO Web-site entitled "Does ECHO allow searching for Performance Track facilities?" with the following answer: "ECHO disabled the Performance Track search function when the program was terminated on May 14, 2009. For historical purposes, users can review the list of Performance Track facilities at *Performance Track Facilities* (a Web link to another internal Web page within ECHO with a list of Performance Track Facilities will be provided). If users need to search for this information, the ID numbers can be cut and pasted from this list into the ECHO "multiple ID search box." A Web link to another internal Web page within ECHO with the FAQ/Response and a list of Performance Track Facilities will be provided to users.
- The Performance Track reference will be removed from the Detailed Facility Report. The user will know if a facility was in Performance Track by using the list of facilities provided.

##### In OTIS:

- The Performance Track flag will remain active for an extended period which will allow EPA Regional offices and states time to review facilities in light of their inspection commitments.
- A pop-up window which activates when a user selects the Performance Track checkbox will be added. The text within the pop-up window will state "The Performance Track Program was terminated on May 14, 2009, but OECA is leaving this selection in place for a limited time so that EPA Regional offices and states can review their compliance monitoring plans in relation to previous Performance Track facilities."
- A link to the list of Performance Track facilities will also be provided as described for ECHO.

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<sup>11</sup> <http://www.epa.gov/enviro/>

We thank you for your work in closing out the Performance Track Program, and for implementing this guidance as expeditiously as possible. Please do not hesitate to contact Caroline Ahearn (202-564-1716) for enforcement-related questions; Andrew Teplitzky (202-566-2947) in OPEI for program questions; and John Dombrowski (202-566-0742) for questions related to Performance Track Flags in ECHO and OTIS.

Attachments (3)