

**U.S. Environmental Protection Agency
Science Advisory Board
Illegal Competitive Advantage (ICA) Economic Benefit (EB) Advisory Panel**

Summary Minutes of Public Conference Call Meeting¹
September 22, 2004

Committee/Panel: Illegal Competitive Advantage (ICA) Economic Benefit (EB) Advisory Panel of the U.S. Environmental Protection Agency's Science Advisory Board (SAB). (See Roster - Attachment A.)

Date and Time: September 22, 2004, 2:00 pm to 3:30 pm Eastern Time (See Federal Register Notice - Attachment B).

Location: Via conference call from Washington, DC

Purpose: The purpose of this public conference call meeting is to conduct edits to a working draft of the Panel's Advisory. The Panelists will offer suggestions to edit the draft advisory, which is intended to advise the Office of Enforcement and Compliance Assurance (OECA) pertaining to the charge questions, as well as to provide an opportunity to receive additional public comments on this advisory activity as a follow-up to the Panel's August 5 & 6 advisory meeting. (See Meeting Agenda - Attachment C.)

Attendees: Panel members who were present include the following: Drs. A. Myrick Freeman, Dallas Burtraw, Mark Cohen, Jane V. Hall, Michael Hanemann, Catherine L. Kling, Arik Levinson, Clifford Russell, and Michael A. Salinger. Dr. David Sunding was unable to participate in this conference call (See Attachment A); Dr. K. Jack Kooyoomjian (Designated Federal Officer - SAB Staff) and Dr. Vanessa Vu, SAB Staff Office Director; Mr. Jonathan Libber, Senior Attorney and BEN/ ABEL Coordinator of OECA, was present. Members of the interested public present included Mr. Jonathan S. Shefftz, Industrial Economics, Inc. (IEc).

Meeting Summary:

The meeting followed the issues and general timing as presented in the meeting Agenda, except where otherwise noted (see Meeting Agenda - Attachment C and marked-up Agenda -

¹ NOTE AND DISCLAIMER: The minutes of this public meeting reflect diverse ideas and suggestions offered by the SAB Panelists during the course of deliberations within the meeting. Such ideas, suggestions and deliberations do not necessarily reflect definitive consensus advice from the Panelists. The reader is cautioned to not rely on the minutes to represent final, approved, consensus advice and recommendations offered to the Agency. Such advice and recommendations may be found in the final advisories, commentaries, letters or reports prepared and transmitted to the EPA Administrator following the public meetings.

Attachment H). There were no written comments or verbal public comments submitted to the Panel.

Welcome and Introductions: Dr. K. Jack Kooyoomjian, Designated Federal Officer (DFO), convened the meeting at approximately 2:00 pm with identification of the participants logging into the call and with opening remarks. He introduced himself as the DFO for the ICA EB Advisory Panel, explained the purpose of the call, indicating that this Panel operates under the requirements of the Federal Advisory Committee Act (FACA) and is chartered to conduct business under the SAB Charter. He explained that, consistent with FACA and with EPA policy, the deliberations of the ICA EB Advisory Panel are conducted in public meetings, for which advance notice is given. He explained that this conference call is a follow-up to the Panel's August 5 & 6, 2004 face-to-face meeting, and that he is present to ensure that the requirements of FACA are met, including the requirements for open meetings, for maintaining records of deliberations of the ICA EB Advisory Panel, and making available the public summaries of meetings, as well as providing opportunities for public comment. Dr. Kooyoomjian also commented on the status of this advisory panel's compliance with Federal ethics and conflict-of-interest laws and following the Panel Formation Process, as well as determinations made by the SAB staff and others pertaining to confidential financial information protected under the Privacy Act. He noted that each panelist has complied with all these provisions, that there are no conflict-of-interest or appearance issues for any Panel members, nor was any individual needing the granting of waivers or any recusals. He also advised that the biosketches of each Panelist are posted on the SAB Web site, and that hard copies of the biosketches were provided at the August 5 & 6, 2004 meeting in Washington, DC.

Dr. Kooyoomjian reminded panelists that contacts with the Agency or public during the Panel deliberative phase (i.e., prior to production of a consensus draft report) should involve the DFO, and while the Panel members may communicate with one-another, it is advisable to provide copies of all communications to the DFO to keep him in the loop, for communication with the other Panelists and for record-keeping purposes.

Dr. A. Myrick Freeman, Panel Chair, provided brief introductory remarks at approximately 2:06 pm welcoming the Panelists (Roster, Attachment A), briefly reviewed the meeting agenda (Attachment C), and opened the dialogue to the Panel.

The Panel discussed edits to the Panel's September 1, 2004 working draft (Attachment D-3). Topics discussed included all the items needing editing in the working draft. The Panelists began the discussion with benefit recapture issues, such as recapture of a violator's savings from violating the law, and whether the size of the violator is relevant to the degree of punishment (size is mentioned in the law).

A discussion took place on the present limitations of the BEN model to capture revenues with respect to the ICA issue. The Panelists discussed what questions might be addressed to allow BEN to be used in some ICA cases. The Panel agreed to provide revised language to address those issues raised, such as limitations in the current BEN model to recapture revenues.

A discussion followed on the current Section 3.3 (“The Four Categories of Illegal Competitive Advantage”) on edits needed in the current draft pertaining to the four categories of ICA (1) violator gains additional market share; (2) - violator sells products or services prohibited by law; (3) - violator initiates construction or operation prior to government approval; and (4) - violator operates at higher capacity than it should have.

For the current Section #4 (“The Panel’s Responses”), it was thought that inserting some discussion on monopolistic competition would make the text more general. A discussion took place on benefits from non-compliance for competition versus monopoly conditions, and it was thought that the current illustrative Figure #1 might be expanded to encompass both situations, and that the draft text needs to also reflect this.

Further discussion took place on answers to charge question #4 on avoidance of double-counting of the benefits, and the Panel agreed to draft some language on this.

In Section 5 (“Additional Issues”), some edits were recommended for this draft text, and the Panel agreed to re-write this for clarity, as well as to cite Mr. Jasbinder Singh’s earlier public comments (those comments were offered in the August 5 & 6, 2004 meeting) pertaining to “Dynamic effects” (the current Section 5.2). The Panel agreed that the text needed to be condensed, and to recognize, perhaps with a footnote, Mr. Singh’s public comment relevant to this issue. A discussion followed on the economic logic of harm-based penalties.

A discussion followed on ex ante versus ex post assessments, and how these bear on the interpretation of “fairness.” It was agreed to make edits to this section. A discussion followed on the conceptual basis for ex ante versus ex post measurement (Section 5.3.1). Ex ante examples were discussed, such as situations involving pesticides, the purchase of crop insurance, and how to obtain actuarially fair estimates of insurance necessary to protect for fair value. Discussion included situations where an affected party is risk neutral versus if the affected party is risk-averse, and situations were discussed where use of an illegal pesticide might become a proxy for actuarially fair insurance. The Panel recognized a need to posture a scenario without a yield situation, and if there is an illegal pesticide that could be used in lieu of crop insurance, as well as where the price of insurance becomes the appropriate measure. Other ex ante versus ex post examples were discussed, such as the use of wetlands. The Panelists agreed to re-draft and clarify the various examples.

For the current Section 6 (“Toward An Optimal Penalty Policy”), it was agreed that some text edits, along with references are needed to what might be “socially optimal” and what might be in the “public interest.” It was agreed that language is needed that keeps the suggestion of an optimal penalty policy on the table as a matter of principle. Some text edits were suggested, such as changing the text statement referring to “policy,” instead of to a “formula,” to stress that compliance with the law ought to be an objective, and that the Panel needs to discuss the concept of harm-based penalties. Other points relevant to an optimal penalty policy were discussed, and it was agreed that the Panel is offering economic methodology advice to the Agency, and that the Panel is not in a position to tell them what to do.

Public Comments:

At approximately 3:20 pm Dr. Freeman asked for public comments. None were offered by any of the participants.

Panel Discussion on Schedule and Next Steps:

At 3:20 pm, the Panel discussed the schedule and logistics for the next round of Panel writing assignments. It was agreed that all Panelists would get their edits to Dr. Freeman in the next two weeks (by October 6th). Dr. Freeman advised that he would not be available from October 12-19, 2004, so he would attempt to prepare the next draft, less the draft Executive Summary and the draft Letter to the Administrator by October 12th for distribution to the Panel. The Panel targeted October 25, 2004 for the next draft.

Dr. Kooyoomjian reminded the Panel that the Letter to the Administrator should be in “Layman’s Terms,” and that no more than 3 or 4 major points to stress to the Administrator ought to be the targeted goal. He thanked everyone for their productive dialogue and appreciation for agreeing to conduct the edits with the quick turn-around to Dr. Freeman.

The next public conference call was agreed to be Thursday, November 4, 2004 from 10:00 am to 12:00 noon EST, and this will be announced in the *Federal Register*.

The writing assignments that were originally agreed by the Panelists are summarized as follows:

Action items:

1. Charge Question #1:

Are there categories of cases that would be useful for the Agency to consider in calculating the ICA economic benefit, other than those that are identified in the White Paper? Should any of these be combined?

Assigned to: Cathy Kling (lead), Dallas Burtraw

2. Category of Cases #1 - Violator Gains Additional Market Share:

Consider Charge Questions 2, 3, and 4 in the context of this category

Assigned to: Michael Hanemann

3. Category of Cases # 2 - Violator Sells Products or Services Prohibited by Law:

Consider Charge Questions 2, 3, and 4 in the context of this category

Assigned to: Michael Salinger

4. Category of Cases #3 - Violator Initiates Construction or Operation Prior to Government Approval:

Consider Charge Questions 2, 3, and 4 in the context of this category
Assigned to: Cathy Kling

5. Category of Cases #4 - Violator Operates at Higher Capacity Than It Should Have:

Consider Charge Questions 2, 3, and 4 in the context of this category
Assigned to: Jane Hall (lead), Mark Cohen

6. Implications of Market Structure for Estimating Economic Gains:

Assigned to: David Sunding (lead), Michael Salinger, Arik Levinson

7. Consideration of Probability of Detection in Setting Deterrent Penalties:

Assigned to: Cliff Russell (lead), Michael Hanemann

There being no additional items to discuss, Dr. Freeman adjourned the Panel at 3:30 pm.

The Panel will reconvene as planned on Thursday, November 4, 2004 for its next public conference call meeting.

Respectfully Submitted:

Certified as True:

_____/Signed /_____
K. Jack Kooyoomjian, Ph.D.
Designated Federal Official

_____/Signed /_____
A. Myrick Freeman, Chair
ICA EB Advisory Panel

List of Attachments

- A Roster of ICA EB Advisory Panel
- B Federal Register Notice (Vol 69, No. 122, pages 35599-35600, June 25, 2004)
- C September 22, 2004 Public Conference Call Proposed Meeting Agenda (dated September 16, 2004 and contains proposed charge)

- D ICA EB Advisory Panel Review Materials: September 3, 2004 Memo from Dr. A. Myrick Freeman entitled Draft Report.”which contains the attached working draft advisory dated September 1, 2004:
 - D-1 Cover memo to each Panelist from Dr. A. Myrick Freeman, dated September 3, 2004
 - D-2 Memo from A. Myrick Freeman to Michael Hanemann entitled “Draft Report” and outlining editing glitches, dated September 3, 2004
 - D-3 The working draft advisory entitled “Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs: An SAB Advisory,” dated September 1, 2004

- E ICA EB Advisory Panel Correspondence, September 3, 2004 thru September 24, 2004

- F Marked up Agenda for September 22, 2004 Conference Call
- G DFO Notes from September 22, 2004 Conference Call