

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

Summary Minutes of Public Conference Call Meeting¹
January 19, 2005

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: January 19, 2005, 10:00 am to 12:00 noon 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 the SAB's ICA EB Advisory Panel's draft advisory dated December 15, 2004. The Panelists will offer suggestions during the conference call to edit the draft advisory, which is intended to advise the Agency's Office of Enforcement and Compliance Assurance (OECA) pertaining to the charge questions. The public conference call will also provide an opportunity to receive additional public comments on this advisory activity as a follow-up to the Panel's August 5 & 6, September 22, and November 4, 2004 advisory meetings. (See Meeting Agenda - Attachment C.)

Attendees: All Panel members were present and include the following: Drs. A. Myrick Freeman, Dallas Burtraw, Mark Cohen, Jane V. Hall, Michael Hanemann, Catherine L. Kling, Arik Levinson, Clifford Russell, Michael A. Salinger and, David Sunding (See Attachment A); Dr. K. Jack Kooyoomjian (Designated Federal Officer - SAB Staff) SAB Staff Office; Mr. Jonathan Libber, Senior Attorney and BEN/ ABEL Coordinator of OECA, was present. Members of the interested public that were present included Mr. Jonathan S. Shefftz, Industrial Economics, Inc. (IEc), Mr. Jazbinder Singh, President of Policy Planning & Evaluation, Inc. of Herndon, VA. Mr. Robert H. Fuhrman, Principal and CEO of Seneca Economics and Environment, Inc. was not present, but provided a public comment letter for consideration by the Panel (See Attachment F).

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.

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 - Attachment H). There were written comments and verbal public comments submitted to the Panel. Mr. Robert H. Fuhrman submitted public comments (see Attachment F), however, he did not attend the January 19, 2005 conference call.

Welcome and Introductions: Dr. K. Jack Kooyoomjian, Designated Federal Officer (DFO), convened the meeting at approximately 10:00 am with introductory remarks and identified the participants logging into the call. 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, September 22, 2004 and November 4, 2004 public conference call meetings, 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 briefly 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.

Dr. Kooyoomjian again reminded the Panelists that 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 10:10 am welcoming the Panelists (Roster, Attachment A), briefly reviewed the meeting agenda (Attachment C), and opened the dialogue among the Panel with a discussion in Section #6 - "Toward an Optimal Penalty Policy," starting with edits to Section 6.4, "Implications for Current EPA Policy," in the most recent draft text (see Attachment D). A Panelist brought up the issue of the probability of detection, the ethical aspects of 2 different scenarios, and what the current guidelines might suggest for penalties. The Panelist surmised that while the penalties calculated under the current guidance would be different, that both companies are culpable and equally negligent. Since the probability of detection has been made known ex ante, therefore the probability of detection is not an issue. It was observed that ex post situations can also have a number of complicating factors. The Panel discussed a number of other scenarios, such as a very large oil spill from a tanker on the ocean, which would be easily

detected. There was some discussion of the Federal Trade Commission (FTC) methodology for time to detection that could be applied to ongoing permit violations and appropriate detection methodologies. The basic thrust of these discussions suggests that the Agency should think about this in its own work, and perhaps assign generic levels or classes of detection, such as very low, low, medium and high. The Panel thought that the probability of detection does have implications for environmental penalties, and since most of the Panel is satisfied with the current approach in the draft text, it was recommended that the existing language should be edited and clarified.

The Panel discussed Section 5 “Additional Issues,” focusing first on Section 5.3 entitled “Ex Ante vs. Ex Post Assessments.” It was thought that the current text could use examples to be helpful to illustrate points being made by the Panel. A discussion followed on some of the examples that might be helpful. The Panel concluded that it was its responsibility to be raising “flags” on issues, but it was not necessarily the Panel’s charge to have complete answers on those issues raised. Rather, the Panel should be able to convey issues in the big picture sense. There was some discussion on how economic gain from increased sales (of an illegal activity) should be linked to economic gain from avoiding the activity. The Panel agreed that some of this discussion that includes concepts that are well rooted in economics should be in the draft text, even if they seem off-base to persons from other disciplines. The Panel thought that this discussion could also be continued in a broader context in the form of peer-reviewed journal articles. After this discussion, it was thought that the current version of Section 5.3 might be adequate to leave as it currently is.

At 10:51 am, Dr. Kling excused herself in order to prepare for her class.

The Panel moved to Section 4.5 “Revising the White Paper,” pages 27 & 28. They decided that the title should be changed to “Revising the BEN Model,” and to add a logic flow diagram. They also discussed edits to Section 4.3 “The Four Categories of Illegal Competitive Advantage,” pages 23-25. It was agreed that Section 4.3 needed some edits pertaining to when a violator gains additional market share.

EPA Comments: At 11:04 am, Dr. Freeman asked the Agency staff (Mr. Libber) if he had any comments. Mr. Libber indicated that the Agency OECA staff was much more pleased with this current draft than the earlier draft. He had a number of minor technical accuracy comment edits to convey, and agreed to pass these on to the DFO for the Panel (Dr. Kooyoomjian). He touched on the Panel’s recommendation in the December 15, 2004 draft of involving the EPA’s National Center of Environmental Economics (NCEE), commenting that their prime focus is on the economics that surrounds regulatory impact statements (RIA’s), and not regulatory, enforcement or penalty assessment issues. He indicated that he would chat with the NCEE staff on this issue. The Panel discussed some aspects of enforcement and compliance and how this might be taken into account by the Agency. It was thought that it might be necessary to change the last paragraph on page 28 of Section 4.5 pertaining to the NCEE, and Dr. Freeman volunteered to do the edits, such as entertaining the possibility of a full-time staff economist in OECA.

Public Comments:

At approximately 11:20 am, Dr. Freeman invited public comments and Mr. Jasbinder Singh spoke. He decided that he would raise a couple of issues, such as in the ex ante versus ex post area. He raised one issue, asking “Did a violator experience a profit, or did a violator expect to (emphasis added) experience a profit?” Mr. Singh observed that every polluter is expected to comply with the law. However, if the polluter is avoiding all the risks and investments involved in compliance, the Agency should be looking at the risks avoided by the violator and the risks taken by those who comply. EPA should focus on the risks not taken (emphasis added) by the violator. The second issue is ... how to calculate Illegal Competitive Advantage (ICA). He gave an example of a company that has to obtain an NPDES Permit by a certain date to comply with the law. If the plant has a violation, we don’t know if the full value of the plant’s violation would be accepted in court.

The Panel acknowledged that perhaps we need to further examine the “gravity” component, and ask the OECA staff if there is a systematic manner to set the penalty or the gravity component in practice (Section 3.2 “The Objectives of Penalties,” page 16, line 12 in the current draft text). Mr. Libber discussed the gravity component and remarked that it (gravity) is specifically designed to address non-economic issues, such as the 8th time a company violated the law, etc. to provide guidelines to the gravity component in isolation from the economic issues (emphasis added). The Panel observed that, while the gravity component is systematic, it is not quantified. Mr. Libber’s specific edits would be looked at by the Panel.

Mr. Singh observed that the Agency has developed 20 or 30 matrices in time pertaining to various statutes. He observed that, as a practice, the “gravity” component always stays “in the pocket,” but is used in Administrative proceedings, and they are also used by the States.

Mr. Libber noted that the 1984 policy is contained in a 3-inch thick binder with 33 policies, and the binder essentially says to look at the benefit policy. However, the 1984 policy was not very descriptive particularly in regard to the gravity side of the penalty, but that these details have been filled in by the 33 policies that have been developed in response to that 1984 policy. He further added that harm will also include regulatory harm, and not necessarily environmental harm, and is part of the guidance in the gravity component of the penalty. While it may be systematic, there is very little actual monetizing of harm. One Panelist suggested that the Panel could include a sentence in the draft text that there is a large communication of practice that is far too complicated to summarize in this report and that it does not address the monetizing issue. If you make the assumption that the probability of detection is 1, then it argues for the ex post assessment, whereas, if the probability of detection is less than 1, then it argues for ex ante assessments. The Panel discussed the merits of the current ex ante and ex post discussion, preferring to leave ex ante and ex post language in edits to the current draft. While ex post is easier to measure, there may be times where ex ante could be examined. The Panel felt that if they did not mention the issue in the text, then it may down play the value of the ex

ante measurement. Mr. Singh remarked that if the ex ante and ex post issues affect the discount rate, then it is very important in the overall discussion.

The Panel acknowledged that this is a thorny issue that goes back 25 years or more, and the choice between ex ante vs ex post will differ among and between economists, there being no straight-forward resolution, and that they are not mutually exclusive.

The public comment period ended at 11:50 am.

Open Discussion:

The Panel reflected on the issues raised during the public comments. It was thought that it may be premature to worry about any specific case more than what we already have raised and discussed. For some of the text, the Panel decided to leave it as is.

Panel Discussion on Schedule, Action Items and Next Steps:

The Panel then discussed specific assignments to each Panel member, and these are briefly summarized below in the actions items.

Action items:

All edits due to Dr. Freeman by **Close-of-Business, Friday, January 28th**, unless other arrangements are made with Dr. Freeman and/or the DFO, Dr. Kooyoomjian, who should be cc'd on all edits.

1. **Freeman:**
 - a) Revise last paragraph of p. 28 in Section 4.5 on need for an economist;
 - b) Clarify the end-of-pipe argument in Sections 1.3.2 and 5.4; and
 - c) Incorporate edits already received from Drs. Levinson, Russell, Salinger, as well as any further edits received from Mr. Libber of the OECA Program Office, others (see list below)
2. **Hall:**
 - a) Propose language for the end of Section 6.4
3. **Hanemann:**
 - a) Propose language for end of Section 6.4; and
 - b) Prepare a flow chart for Section 4.5
4. **Libber & OECA Staff:**
 - a) Submit proposed edits and corrections
5. **Salinger:**
 - a) Propose a sentence for the bottom of p. 27 (Section 4.5)

6. **Sunding:**
a) Propose language on different views for Section 5.3 (ex ante vs ex post)

There being no further business, Dr. Freeman adjourned the meeting at 12:00 noon.

Respectfully Submitted:

Certified as True:

_____/Signed /_____
K. Jack Kooyoomjian, Ph.D.
Designated Federal Official
ICA EB Advisory Panel

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

List of Attachments

- A Roster of ICA EB Advisory Panel
- B Federal Register Notice (Vol 70, No. 4, pages 1244-1245, January 6, 2005)
- C January 19, 2005 Public Conference Call Proposed Meeting Agenda (dated December 15, 2004)

- D ICA EB Advisory Panel Review Materials Pertaining to January 19, 2005 Conference Call:
The working draft advisory entitled “Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs: An SAB Draft Advisory,” dated December 15, 2004 (PDF file)

- E ICA EB Advisory Panel Chronological Correspondence on Draft Advisory, December 3, 2004 thru February 18, 2004 Pertaining to January 19, 2005 Conference Call

- F Public Comments Pertaining to January 19, 2005 Conference Call:
Entitled “Comments on the December 15, 2004 Draft Advisory of the ICA EB Advisory Panel,” January 18, 2005 from Robert H. Furhman, Principal and CEO, Seneca Economics and Environment, LLC, on behalf of the American Chemistry Council, Corporate Environmental Enforcement Council (3 pages)

- G General Chronological Correspondence with Public, December 15, 2004 to February 11, 2005 Pertaining to January 19, 2005 Conference Call

- H Marked up Agenda for January 19, 2005 Conference Call
- I DFO Notes from January 19, 2005 Conference Call

End of Record