

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

Summary Minutes of Public Conference Call Meeting¹
November 4, 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: November 4 2004, 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 Panel's draft advisory. The Panelists will offer suggestions during the conference call to edit the draft advisory, which is intended to advise the 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 September 22, and August 5 & 6 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. Bill Davis & Mr. Rus Baier of the Texas Commission on Environmental Quality (TCEQ).

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 November 4, 2004 conference call.

Welcome and Introductions: Dr. K. Jack Kooyoomjian, Designated Federal Officer (DFO), convened the meeting at approximately 10:00 am 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 September 22, 2004 public conference call 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 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 contacts with the Agency or public during the Panel's 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 10:13 am welcoming the Panelists (Roster, Attachment A), briefly reviewed the meeting agenda (Attachment C), and opened the dialogue among the Panel with a discussion of the formal public comment letter dated November 3, 2004 from Mr. Robert H. Fuhrman of Seneca Economics and Environment, LLC on behalf of the American Chemistry Council and the Corporate Environmental Enforcement Council.²

² Mr. Fuhrman provided his public comment letter on November 3, 2004, but did not participate in the November 4, 2004 public conference call.

The Panel discussed matters raised in the 3-page public comment letter pertaining to such issues as probability of detection, which Mr. Fuhrman claimed would have a perverse effect of increasing penalties the most for violations where little or no harm occurs or where a company has no past history of violation, and in which he made a case that EPA's economic benefit analysis should always be ex post (see Attachment F). The Panelists agreed that the probability of detection and its associated deterrence should be maintained. They discussed language edits to the draft text (see Attachment D), arguing that the text edits are relevant, whether there are statutory provisions or not. They agreed that they do not need to raise the issue to the Agency whether the law needs to be changed, arguing that if the law needs to embrace deterrence, then EPA needs to think about it. The Panelists discussed the importance of providing for situations involving ex ante benefits, because it is information that the judge needs for deterrence and compliance. The Panelists argued that the judge would probably take away the ex post gains, but that decision is not the Panel's to make. Most often, the ex post measure is available, but sometimes the ex ante measure is preferable. In the ideal world, the judge may want both measures. It was observed that in an economic world, where efficiency is the outcome, then ex ante is preferred. However, it was acknowledged by the Panelists that in the real world, the ex post measure may give a perverse outcome.

It was acknowledged that the current draft advisory offers multiple possibilities, including restorative justice, as well as efficiency. In the discussion that followed, some Panelists concluded that there is a belief that there are multiple objectives in the law, and therefore the draft text needs to address the broader issues. One of the Panelists took issue with the ex ante measure being conceptually robust, and the Panelists concluded that the language needs to be edited and clarified. The Panelists acknowledged that when other criteria are introduced that go beyond the simple efficiency example, then there is departure which requires an explanation and some examples. Ex ante may be the correct measure to take account the different risk measures. It was acknowledged that the Panel could have the same sort of discussion for the concept of absolute deterrence and that there are not implausible examples where ex ante measures will be helpful for the judges; but that we always have ex post measures.

Section #6 - "Toward an Optimal Penalty Policy," and specifically in Section 6.1 "Economic Theory of Optimal Penalties," page 31, lines 19-24, Dr. Freeman suggested different language to reorganize that portion of text. The Panel had a follow-up discussion on such issues as the thrust of different statutes which rule out costs, but not optimal penalty behavior. One Panelist had a hard time accepting that the law implies absolute deterrence. The Panelists agreed that they need to better frame the economic efficiency issue discussion in the draft advisory and acknowledge that many of the statutes do not make economic efficiency a goal.

EPA Comments: At 10:45 am, Dr. Freeman asked the Agency staff (Mr. Libber) if he had any comments, particularly with regard to the clarity of the Panel's current response to the charge questions and whether statements were unclear, or whether there are any technical errors in the current Panel draft advisory. Mr. Libber expressed OECA's appreciation for this attention by the SAB ICA EB Advisory Panel. He remarked that the August 5 & 6, 2004 face-to-face meeting

was stimulating and interesting. He did admit some disappointment with the current (October 22, 2004) public draft (see Attachment D). He stressed that OECA employs non-economists, and that OECA needs something really practical to be used as guidance, especially as it references Charge Question #3 (*“Are there any suggestions for modifying the described analytical approach to calculate the economic benefits?”*). He doesn’t think that in its current form, that charge question #3 has been fully answered. He also remarked that the OECA Staff is encouraged with the current ex ante language, and that while there was very helpful dialogue in the August face-to-face meeting, the current advice in the October 22, 2004 draft is very generic.

The Panelists think that the White Paper should be re-written to clarify the Panel’s suggested focus on profit as a measure. The Panelists also think that the BEN Model, as a calculator, should focus on profit. The Panelists asked where the NCEE (Al McGartland’s staff) is in all of this? The Panelists felt that the NCEE Staff should be integrally embedded in all of this activity, providing support to OECA. In response, Mr. Libber recalled that the NCEE Staff was helpful in 1999, but they haven’t been active players in this recently.

The Panelists discussed that there are some models in other program offices within EPA where support was provided by a the staff office. For instance, they observed that the Children’s Health area brings a variety of Agency resources to bear on providing useful information to program office staff. Mr. Libber further clarified that they would be looking for advice from the Panel on what comments might be helpful to recommend specific modifications to the Agency White Paper, including the methodological approaches and whether they are off-base.

Mr. Libber also thought that additional clarification to Charge Q # 4 is needed (*“The Agency’s proposed approach strives to avoid double-counting of the benefit by laying out all relevant cash flows stemming from the violations, as opposed to simply adding on the additional calculations to a BEN run. What additional measures (if any) should the Agency put in place to avoid such potential double-counting?”*). He gave an example of a wetlands issue, and the illegal sales of pesticides as another example to illustrate his points where the Panel’s current draft might be more helpful. He felt that the current SAB Panel’s draft advisory suggests that the Agency staff should only look at that situation where the BEN model overstates the estimates. The Panel acknowledged that both under & over-estimates ought to be mentioned, and Mr. Libber acknowledged that would be helpful.

Mr. Libber suggested that the text in Section 1.4 (*“Toward an Optimal Penalty Policy,”*) currently does not provide advice to quantify the harm. The Panelists agreed that some monetizing language would be helpful in the re-draft. Mr. Libber also discussed Section 6 (*“Toward an Optimal Penalty Policy,”*) and identified some problems in addressing this issue regarding the probability of detection. The Panel thought that in some areas in the text, Mr. Libber was taking the advice too literally.

Mr. Libber encouraged the Panel to think about the practical and implementation aspects of their advice for the Agency and other affected parties. He suggested that a simple rating system that was being recommended by the Panel in the current draft may fit into a practical

framework. He also observed that in Section 6.4 (“*Implications for Current EPA Policy,*”) harm factors are cited, but none of them were intended to address detection. He remarked that the Agency does not need statutory authority to look at probability of detection. The Panel acknowledged that Section 6.4 needs some wording changes, and that it should focus on practical advice to the OECA Program Office Staff.

Public Comments:

At approximately 11:14 am, Dr. Freeman invited public comments and Mr. Jasbinder Singh spoke. Mr. Singh observed that with the current draft of the ICA EB Advisory Panel, this is the first time that all the broad issues have been addressed. He agreed that there has been no NCEE Staff economists involved in providing support for OECA Staff for some time in any rigorous manner. He expressed hope that the NCEE Staff Office could be involved in some way in this process. He referred to an enforcement seminar about 6 years ago where NCEE Staff had engaged on the topic. He also brought up an example of a pulp and paper manufacturing plant where one could conclude that the production was illegal. He would like to see some thoughts and guidance on this specific issue addressed in the Advisory.

Mr. Singh brought up another example in the Superfund area, where the benefits calculation attempted to include natural resource damages under the natural resource laws, rather than under environmental damages. He thought that everyone would appreciate examples which are practical threshold examples. The last point he made was the probability of detection application which was limited to harm, but not to the overall penalty itself. He thanked the Panel for the opportunity to comment, and for the engaging dialogue.

At 11:19 am, Dr. Freeman asked if anyone else wished to provide public comments, Mr. Jonathan Shefftz of IEc, the contractor to OECA offered his view on Mr. Fuhrman’s written comments, finding them to be off the mark. Mr. Libber commented that he supported Mr. Shefftz’s remarks.

One Panelist commented that the Panel should seriously entertain a recommendation to have a staff economist to get involved in enforcement, and that it is a matter of priorities and resources. The Panelists commented that while contractors can be used, there is a need for an in-house capability on the analysis issues. It was agreed that this point should be made in the revised text, as well as being highlighted in the cover letter to the Administrator.

The public comment period ended at 11:22 am.

Open Discussion:

The Panel reflected on the issues raised during the public comments. For instance, the Panel engaged in a follow-up discussion to address the case of the wetlands and the nature of the penalty, and whether an option should be to build other wetlands elsewhere after the violation occurred. If there is no other land available to build elsewhere, then, the basis of the evaluation would be different.

Dr. Freeman asked the Panel about other substantive points raised in the discussions. Some of the Panelists suggested that the SAB draft advisory should specifically address the 4 cases in the White Paper, as well as two other cases that were brought up in the discussions. They discussed their response on the market share case, and felt that while this response was clear, it does not address issues on a case-by-case basis. Dr. Freeman agreed to draft something on this and send it around to the Panel for edits.

A discussion followed where the individual Panelists agreed to draft language and edit specific areas in the current draft advisory. The following action items captures the highlights of those major items agreed to by the Panel.

Panel Discussion on Schedule, Action Items and Next Steps:

Action items:

<u>Who</u>	<u>What</u>	<u>When</u>
Freeman	Incorporate changes recommended during 11/4 Conference Call, including Letter to the Administrator	11/8/04
Public	Written comments due to DFO for Panel Distribution following conf call	11/9
Kooyoomjian	Forward action items list to Dr. Freeman for review	11/9
Kooyoomjian	Forward action items list to Panel	11/10
Libber	Provide written comments on 1 st Public (10/22/04) Draft to DFO for Panel	11/12
Kooyoomjian	Arrange November editing (non-public) conference calls for anyone on the Panel who desires to engage on their assignments	11/16 to 11/24
Kooyoomjian	Poll Panel for a Jan 11 - 28 time frame for a public conference call to reach closure on the 2 nd Public Draft	11/10 to 11/24
All Panelists	To provide any recommended editorials to Dr. Freeman	12/3
Cohen	Do rewrite of Section 6.4 on practical advice for considering harm and probability of detection	12/3

Salinger, Burtraw, Kling, & Russell	Revise Ex Post-Ex Ante Section (5.3)		12/3
Hanemann	Write recommendations for how the White Paper can be revised, including the recommendation for collaboration with NCEE economist		12/3
Hall & Salinger	Write brief comments on each of the four categories of cases of ICA that are listed in the White paper		12/3
Freeman	Incorporate all comments and produce 2 nd Public Draft	COB	12/10
Kooyoomjian	Prepare, Format and Distribute 2 nd Draft, and Submit for Posting onto SAB Website & Distribution to Panel & Public		12/17
Kooyoomjian	Prepare <u>Federal Register</u> Notice for Jan Public Conference Call		12/17
Kooyoomjian	Prepare & Post Agenda, Public Draft, etc. Approx. 10 working days , and no later than 1 week prior to public conference call		1/18/05

There being no additional items to discuss, Dr. Freeman adjourned the Panel at 11:47 am.

The Panel will plan to reconvene in a public conference call in the Jan 11-28 time frame (Note: the date selected was January 19, 2005 from 10:00 am to 12:00 noon EST) 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. 198, pages 60996-60997, October 14, 2004)
- C November 4, 2004 Public Conference Call Proposed Meeting Agenda (dated October 25, 2004)

- D ICA EB Advisory Panel Review Materials Pertaining to November 4, 2004 Conference Call:
The working draft advisory entitled “Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs: An SAB Advisory,” dated October 22, 2004 (PDF file)

- E ICA EB Advisory Panel Chronological Correspondence on Draft Advisory, October 7 thru December 3, 2004 Pertaining to November 4, 2004 Conference Call

- F Public Comments for November 4, 2004 Conference Call:
- F-1 Entitled “Comments on the Draft Advisory of the ICA EB Advisory Panel,” November 3, 2004 from Robert H. Furhman, Seneca Economics and Environment, LLC, on behalf of the American Chemistry Council, Corporate Environmental Enforcement Council (4 cover pages of correspondence plus 3 additional pages of transmittal & acknowledgment correspondence)
- F-2 Follow-up Comments from Mr. Jasbinder Singh entitled “An Additional Comment from J. Singh,” November 9, 2004
- F-3 Follow-up Comments from Mr. Jonathan Libber, entitled “ORE Comments on the Draft Panel Advisory,” November 11, 2004

- G General Chronological Correspondence with Public, November 1 - 12, 2004 Pertaining to November 4, 2004 Conference Call

- H Marked up Agenda for November 4, 2004 Conference Call
- I DFO Notes from November 4, 2004 Conference Call

End of Record