

## **ECO-PORNOGRAPHY: FALSE ENVIRONMENTAL ADVERTISING AND HOW TO CONTROL IT**

by David Hoch' and Robert Franz"

### INTRODUCTION

America is awash in a wave of environmentalism, and corporations are loudly proclaiming themselves green.<sup>1</sup> As Time recently observed, "companies are spending big sums to develop an earth-hugging image."<sup>2</sup> Products of every type and description are labeled "environmentally friendly," while consumers struggle to determine who and what really is. Minnesota Attorney General Hubert Humphrey III, head of a multi-state attorneys general task force on environmental advertising, recently told FTC Commissioners,

[0] Our task force has been grappling with the green revolution. The word revolution is a strong one-but it is not an overstatement. In all my years as both a consumer, and

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'Green' is the term increasingly used in our culture to describe ecological consciousness. This paper will discuss "green marketing," the advertising and promotion of products on the basis of environmental soundness. The ecological connotation of "green" is usually attributed to a Political party that began in Germany in the early eighties, declaring itself to be chiefly concerned with environmental issues, and calling itself, "Der Gruenen"-The Greens. Given the ecological crises that beset us, the trend in green marketing is not a passing fad. As Joan Treistman, Partner at Treistman & Stark Marketing said, marketers "would have to be brain-dead not to respond to the needs of the environment." Various recent surveys show a dramatically increased consumer concern with the environment, including a Walker Research study which showed that of adult respondents claim that concern for the environment has changed what they buy. \*\* L Loro, More *Testing of Less*, ADVERTISING AGE, July 6, 1961, at 24.

J- Cramer, *The Selling of Green*, TIME, Sept. 16, 1991, at 48.

a consumer advocate, I have never seen a marketing movement anything like this one.<sup>3</sup>

While many companies diligently attempt to produce, package, and market products in an environmentally sound fashion, others are merely riding the green wave to higher sales. "It is often difficult to distinguish between goods that offer a real environmental benefit from those that are simply making exaggerated claims."<sup>4</sup> Various names have been given to the relatively new marketing phenomenon of making unsubstantiated or false environmental claims in advertising. Common labels for such conduct range from greenwash and green-collar crime, to the pejorative, but some say more accurate, greensleeze and eco-pornography.

Eco-pornography is the advertising of a product as "environmentally friendly," when in fact, some unmentioned aspect of the product (or its production and distribution) has notably deleterious effects on the environment. Ecological impact is such a difficult thing to define in terms of the processes of production (as further discussed below), one is hesitant to single out specific corporations as eco-pornographers, lest they be unfairly vilified, but it might be informative to mention some egregious examples of false environmental advertising.

According to Bob Garfield, ad critic for Advertising Age Weekly, the most offensive environmental advertisement "is a General Motors corporate ad in which [the company is] congratulating America for 20 years of **environmental** progress. After spending three decades doing everything in [its] power to weaken, inhibit, and delay environmental legislation....,"<sup>5</sup> this ad is arguably misleading. General Motors is not the only auto manufacturer guilty of greenwash. Adweek chose a Toyota commercial in which a young woman lauds recycling and her Toyota in the same breath, as one of the worst advertisements of 1990. Said Adweek, "The only Earth-minded tie-in...is the woman's declaration that, until she can save the world, she'll buy a Tercel **and** save money."<sup>6</sup>

<sup>3</sup>Environmental Marketing: Hearings on Industry Guidelines Before the Federal Trade Commission, (July 17, 1991)(Statement of Hubert H. Humphrey III, Attorney General, Minnesota), at 3.

<sup>4</sup>Hubert Humphrey III, *Making Sure Green Claims Aren't Gray*, THE ENVIRONMENTAL FORUM, Nov./Dec. 1990, at 32.

<sup>5</sup>Jay Letto, *Madison Avenue Goes Green*, BUZZWORM: THE ENVIRONMENTAL JOURNAL, Sept./Oct. 1991, at 30. General Motors contends that it is environmentally concerned and is planning to provide information on its environmental progress in future ads. GM's Marina v.N- Whitman, VP-group executive, public affairs and marketing staffs, says "[o]nly recently have we realized how important it is to get the story out...[I]t's important...to get the facts out about our emissions (reduction) leadership, our leadership in electric cars, about all other work we're doing on alternative fuels." See R. Serafin, *Environment Next as Car Ad Theme*, ADVERTISING AGE- August 26, 1991, at 11. GM's critics remain skeptical.

<sup>6</sup>*Id.* at 31.

Heather Booth, director of the consumer group Citizen Action, singles out an ad sponsored by the Chemical Manufacturer's Association, a group numbering among its membership half of the worst chemical polluters in the country, which featured a drawing of the Earth and the caption, "Handle With Care."<sup>7</sup> Rep. Gerry Sikorski (D-Minn.), Congressional co-sponsor of a Bill to promote accuracy in environmental advertising, is particularly peeved by a "safe for the ozone" label on cans of Arrid deodorant, because the deodorant still contains organic compounds that contribute to urban smog. Bill McKibben, environmental author, says "If you read the new McDonald's ads, you would think they were a giant recycler that just happened to sell hamburgers and french fries."<sup>8</sup>

The list of eco-pornographers, or greenwashers, is long, but many corporations do live up to their advertisements. Proctor and Gamble was the first household product manufacturer to introduce less convenient but environmentally sound refill containers for detergents.<sup>9</sup> 3M is committed to its waste reduction program and claims to have saved \$500 million since the program began. 3M now conducts corporate education seminars to encourage other companies to follow its lead.

Corporations, anxious to both profit from the green wave and appear socially responsible, are responding to consumer willingness to buy green by "frantically relabeling, repackaging, and repositioning products..."<sup>10</sup> Marketing Intelligence Service, which tracks product launches, says 26% of all new household items last year boasted that they were "ozone-friendly, recyclable, biodegradable, compostable, or some other shade of green."<sup>11</sup> At the same time, Environmental Research Associates "found that nearly 47% of consumers dismiss environmental claims as 'mere gimmickry.'"<sup>12</sup>

at 32.

*Id.* at 30.

Proctor & Gamble Co. introduced Downy Refill (fabric softener) in October, 1990, and [P]roduct sales were impressive. P&G says Downy Refill now accounts for 40% of total Downy sales, and this news comforts not only P&G, but other marketers who wondered if consumers would really buy environmentally beneficial products that are slightly less convenient. See J. Lawrence, *Downy Refill Makes a Splash on Shelves*, ADVERTISING AGE, July 8, 1991, at 16. Encouraged by the response to Downy Refill, P&G released a new series of ads for their household cleaning products with environmental themes in July, 1991. Surprisingly, the new ads claim biodegradability, in spite of the difficulties Mobil and other marketers incurred using this term (see note 23). Lois Epstein, staff engineer with the Environmental Defense Fund, felt that "biodegradability claim raises concern, in that "[s]ome of those products contain chlorinated hydrocarbons that sometimes degrade into more toxic compounds or don't degrade at all." See J. Lawrence, *P&G Paints its Cleaners Green*, ADVERTISING AGE July 15, 1991, at 38. Jaclyn Fierman, *The Big Muddle in Green Marketing*, FORTUNE June 3, 1991, at 91.

*Id.*

*Id.*

Consumer skepticism stems in large part from false environmental advertising,<sup>13</sup> but it is also attributable to both the lack of uniformity in defining environmental terms such as "biodegradable" and "recyclable" and the inability to know when a commendable company is indeed selling an ecologically sound product. This inability to distinguish between environmental pronouncements is also frustrating to the producers who do not know what environmental claims they can legitimately make in regard to their products. A patchwork of embryonic or proposed state legislation, an absence of federal regulation, and conflicting technological research all serve to exacerbate the state of confusion surrounding green advertising. From this confusion, however, arises one point of almost unanimous agreement, namely, that uniformity in the regulation of environmental product labeling is necessary.

Toward that end, most producers, consumers, environmental groups, and state law enforcement officials are looking to the Federal Trade Commission (FTC) for guidelines or regulations.<sup>14</sup> Federal mandate, however, is not the only way to regulate green advertising. Other methods ranging from in-house product evaluation to independent rating codes have been suggested and explored. This paper will discuss the more serious proposals for regulating green advertising and explain why FTC involvement may be a necessary, but nonexclusive type of regulation.

#### NON-GOVERNMENTAL CONTROLS

How might green marketing best be regulated? Some companies have developed their own programs for rating the "greenness" of products on their shelves. The IGA foodchain in Illinois puts labels on the shelves, marking what they consider to be, after in-house investigation, environmentally superior products.<sup>15</sup> Wal-Mart, one of the nation's largest retailers, also uses special shelf markers to highlight new versions of products or their packaging

<sup>13</sup>With consumers and regulators concerned about false environmental advertising, Garey & Associates, a California-based advertising agency, will only accept clients whose products and manufacturing methods are environmentally sound. The firm took out an ad in the New York Times in November, 1989, espousing its environmental ethic and claiming, "we can help you change the world." Several firms signed on, including the Environmental Literacy Group of California. Garey believes his firm can be competitive and make small firms grow "with compelling advertising that informs the public of environmentally sound alternatives to tin\* honored products." See J.A. Cohen, *The Ad-Man with an Environmental Conscience* MANAGEMENT REVIEW, June, 1990, at 26.

<sup>14</sup>The Federal Trade Commission is responsible for the regulation of advertising and specifically empowered with the authority to regulate against unfair and deceptive trade practice<sup>8</sup> such as false advertising. Federal Trade Commission Act. 15 U.S.C. § 1336 (1988).

<sup>15</sup>See *Shelf Labels for Recyclables*, PROGRESSIVE GROCER March, 1990, at 91.

that are environmentally friendlier.<sup>16</sup> Several other companies are considering or developing similar programs.<sup>17</sup>

The effort is commendable and offers consumers some guidance, but the standards are subjectively derived in-house and do not offer uniformity between retailers. To obtain more uniform standards, trade associations are suggesting that we establish private intra- or inter-industrial codes. Again, some benefits would ensue, but uniformity in defining environmental terms, judging the ecological soundness of standards, and providing sanctions for greenwashers would be lacking. Furthermore, the danger exists of lax or minimal product standards fooling consumers into thinking they are shopping green, when in fact, they aren't.

Independent consumer product codes (seal programs) are another way to establish environmental marketing standards and inform consumers of how green a product is. Most were inspired by the government's Blue Angel program in Germany, which has been in effect since 1978.<sup>18</sup> There, the Federal Environmental Agency reviews the lifecycle of product categories and then sets standards. Categories are narrowly defined, however, so that unproved products are rewarded, but not those that have always been green.

For example, roll-on deodorants, which are more ecologically sound than aerosols, can't obtain the Blue Angel Seal, but aerosols without chlorofluorocarbons can. A combustion lawnmower received the Blue Angel Seal for reducing noise levels, while a hand-powered mower, which makes no noise and causes no pollution, was not eligible for the Seal because it's environmental soundness hadn't been "improved." Wolfgang Helm, environmental advisor to the German Green Party's parliamentary group, admits, "This 'eco-label' does not characterize a product as absolutely environmental friendly, it only indicates that it does less damage in one specific area than other products of its type."<sup>19</sup> Although Blue Angel has its shortcomings, it nevertheless sets the standard for programs in other countries. Canada and Japan recently began variations on the Blue Angel and the European Community is wondering how best to implement a

Fierman, *supra* note 10, at 91.

Put many ways corporations can move toward environmentally sound marketing, rather Lister Butler has developed an environmental design test called EDEX, which assesses the efficiency and efficacy of packaging material. The firm also determines whether substances affect that material. As over 300 legislative bills in the U.S. dealt with environmental aspects of product packaging in 1989, this is valuable environmental information for Lister Butler's clientele. It enables them to develop packaging in an environmentally sound fashion, and possibly influence impending legislation. See M.H. Peak, *My Supermarket*, MANAGEMENT REVIEW, June, 1990, at 20.

Environmental Green Police, Garbage the practical journal for the ENVIRONMENT, Sept/Oct., 1991, at 49. See Hein. In Germany, Green Products Are Colored Blue, THE ENVIRONMENTAL FORUM, Dec. 1990, at 31.

Community-wide program.<sup>20</sup> The two seal programs in America are Green Cross and Green Seal, although Good Housekeeping is developing its own program, to be called Good Earthkeeping.<sup>21</sup> Green Cross contends that its seal on a product (a green cross and a blue planet) "simply verifies a company's environmental claims."<sup>22</sup> If a company meets minimal standards Green Cross establishes for environmental endorsement, and is telling the truth in its claims, it receives the Cross. Green Cross is criticized for rewarding recycling and ignoring source reduction,<sup>23</sup> which is a recurring problem with seal programs.

Green Seal began with high aspirations. Said Denis Hayes, chief executive officer of Green Seal and chairman of Earth Day 1990, "We're trying to harness the most powerful forces we have available in the United States, the forces of the marketplace, to try to achieve environmental goals."<sup>24</sup> Norman L. Dean, Green Seal's executive director believes that "[a]n independent national labeling (seal) program can help keep the market honest."<sup>23</sup>

He argues that with governmental regulation, there would be enormous pressure to issue standards that large numbers of companies can attain rather than standards that reward the relatively few firms that are actually committed to producing superior products.<sup>26</sup>

They originally intended to conduct lifecycle analysis for each group of products Green Seal planned to evaluate. Lifecycle analysis is a difficult process of evaluating the environmental impact of a product from cradle to the grave, including "extraction and transportation of raw materials, manufacturing, distribution, use, and disposal."<sup>27</sup> The process is costly and

*Id.*

\*See J. Schwartz, K. Springen, & M. Hager., *It's Not Easy Being Green*, NEWSWEEK. N< 19,1990, at 52.

*Id.* at 47.

*Id.*

"C. Crocker, *Earth-Friendly Items Get Green Seal*, Associated Press Syndication, Fall, 1990 (quoting Denis Hayes).

"N.L. Dean, *An Educated Consumer is the Best Consumer*, THE ENVIRONMENTAL FORUM' Now./Dec., 1990, at 30.

*Id.*

*Id.* at 46. Lifecycle analysis (LCA) is the most comprehensive method for determining a product's environmental impact. The EPA is contemplating lifecycle analysis guidelines ^ industry is also focusing attention on LCAs. As stated in a recent article in Management Review "the emphasis today is on the entire product life cycle...Increasing concern about solid waste disposal has focused attention not only on products, but also on the packaging of products...[M]ore cycle studies will be to the 1990s what risk assessments were to the 1980s." K. Blumenfeld, *Managing the Product Life Cycle*, MANAGEMENT REVIEW, March, 1991, at 30.

cumbersome, and Green Seal has modified its plans to conduct a less complete product analysis called Environmental Impact Evaluation.<sup>28</sup> The difficulty in cradle to the grave evaluation extends beyond time and expense.

Certain environmental analyses defy uniformity. Consider, for example, the environmental debate over cotton versus disposable diapers.<sup>29</sup> Cotton diapers require more energy output than disposables in that they must be washed, which requires both large amounts of water and electricity to run the washing machines.<sup>30</sup> Disposable diapers, on the other hand, take up more than their share of limited landfill space and contribute to other types of pollution. The most ecologically sound choice for clothing baby is difficult enough but the analysis is further complicated because each geographic region has unique environmental circumstances. "In parts of California, they have 100 years left on the landfill, but they're out of water."<sup>31</sup> In Louisiana, they have plenty of water but very little landfill space remaining.

It is quite difficult (if not impossible) to conduct a complete lifecycle analyses for the purpose of comparing different products' eco-worthiness. This is one of the major problems faced by seal programs. Another one is the cost of researching the products. Private independent seal programs such as Green Cross and Green Seal charge for product testing and Green Seal charges an additional licensing fee. Small companies, however green, may find the cost prohibitive and not be able to obtain a seal.

To establish meaningful standards for green marketing, regulators (be they private or governmental), producers, and consumers must understand and agree upon what is being claimed. Therefore, a common language must be found for terms most commonly used and confused in environmental advertising, such as degradable (or biodegradable and photodegradable), recycled, and recyclable.

The term "biodegradable" is a classic example of the confusion surrounding environmental advertising. Companies claiming to sell

<sup>28</sup>*Id.* Tim Mohin, lifecycle analyst for the Environmental Protection Agency, says his agency "would like to have a 'streamlined' process like Green Seal, but that when it comes to cradle to

grave evaluation, "We feel pretty strongly that we've got to figure out how to do a full-blown lifecycle analysis before we can simplify it." *Id.*

<sup>29</sup>The disposable versus cotton diaper debate recently became more visible with the release of Procter and Gamble Co. ad for its Pampers disposable diapers in August, 1991, that has a decidedly green focus. PAG spokeswoman Lynn Hailey said the ad was "in response to consumers' concern about the environment." Hailey cited the many news stories about the solid-waste impact of disposable diapers that (according to her) ignore the environmental impact of diapers. The ad doesn't discuss how cloth diapers affect the environment. *See* J. Lawrence, *Argues for Disposable Diapers' Merits*, ADVERTISING AGE Aug. 26, 1991, at 4. Furthermore, with many families that have opted to return to cotton diapers for environmental reasons, the diapers are done by a laundry service and the environmental costs of transporting and operating the vehicles which pick up and deliver the diapers to the consumer's residence must be factored into the equation.

<sup>30</sup>Hannah Holmes, *supra* note 17, at 47 (quoting Bob Hunt).

biodegradable trash bags have added cornstarch polymers to the bags to facilitate their breaking down into smaller parts, but the plastic remains plastic, which is not biodegradable.<sup>32</sup> Even in cases where the bags are biodegradable, the vast majority of them are buried in landfills where the sunlight necessary to catalyze the biodegradation process can't reach them, leaving the bags intact for as long as their nondegradable forerunners would remain whole.

Lest anyone wonder what difficulties might ensue from such fine distinctions, they need only ask the Mobil Corporation, which was sued by the Attorneys General of seven states<sup>33</sup> for claiming its Hefty trash bags were biodegradable.

After the suits were filed, Mobil dropped its biodegradability claim from Hefty advertising, but said the investigation leading to the suits had nothing to do with the change in advertising.<sup>34</sup> The suits were eventually **resolved** in a settlement<sup>35</sup> where Mobil agreed to pay the states \$150,000 (to fund environmental education programs), but admitted no wrongdoing.<sup>36</sup> In fact, Mobil not only denied the allegations that the Hefty packaging was **misleading** but affirmatively alleged "that the Hefty bags do have a **significant** environmental benefit."<sup>37</sup>

This exemplifies the problem. No one knows precisely **what** "biodegradable" means. An eleven member Attorneys General Task Force on Environmental Marketing (discussed below) issued a series of recommendations for responsible environmental advertising, in which they contend that "[p]roducts that are currently disposed of primarily in **landfills** or by incineration-whether plastic or paper-should not be promoted as 'degradable,' 'biodegradable,' or 'photodegradable.'"<sup>M</sup>

American Enviro Products ran into the same problem with its **original** advertising claims for Bunnies disposable diapers. The Task Force also **sued** them and settled, with American Enviro agreeing to pay \$50,000 to cover the

'biodegradable technically means something is capable of being broken down by microorganisms into fundamental organic compounds, and harmoniously recycled into the organ\* processes of nature. Plastic is synthetic and not fundamentally organic.

"Mobil was sued by attorneys general from California, Massachusetts, Minnesota, New York Washington, and Wisconsin. The suits were filed in June, 1990 and a settlement was reached in June, 1991. *See infra* note 36.

\*G LASZEWSKI MOBIL CHEMICAL DROPPING ITS BIODEGRADABILITY CLAIMS ON HEFTY PLASTIC GARBAGE BAGS, Pioneer Press, March 30th, 1990.

"Texas was originally involved in the suit but reached a prior separate settlement with Mobil

\*J. Lawrence Si C Fisher, *Mobil, States Settle Degradability Suit*, ADVERTISING AGE, July 1, 1991, at 4.

"State of Minnesota v. Mobil Chemical Company, No. C5-90-6843 (2d Dist. Ct. Minn. 1990) at 2).

"National Association of Attorneys General Task Force on Environmental Marketing (hereafter referred to as Task Force), *The Green Report II: Recommendations for Responsible Advertising*, May, 1991, at 21.

cost of investigation and drop the term "biodegradable" from labeling and advertising,<sup>39</sup> but the problem will continue until some consensus can be reached on what claims like biodegradable mean. The Task Force recommendations also propound qualifications for the term "recyclable," but no formal adoption of its suggestions or any others has yet taken place. Ecological terms must be defined so that all market players will understand their meaning.

#### STATE REGULATION AND THE TASK FORCE

The Attorneys General Task Force on Environmental Marketing was formed in November, 1989,<sup>40</sup> by Minnesota Attorney General, Hubert Humphrey III, vice president and environmental committee chairman of the National Association of Attorneys General. The Task Force was created "to attack the problem of well-intentioned consumers being hoodwinked by environmental claims that were unsubstantiated, misleading or outright lies."<sup>41</sup>

The Task Force initially included the Attorneys General of nine states,<sup>42</sup> but was later joined by two more.<sup>43</sup> It held a public forum on environmental marketing in the spring of 1990, and in November of 1990, issued a comprehensive study entitled The Green Report.<sup>44</sup> At its spring, 1990 meeting, the National Association of Attorneys General, under advisement from the Task Force, adopted a resolution<sup>45</sup> calling on the federal government to work with the states to develop "uniform but flexible national guidelines to help ensure the honesty of environmental claims in advertising."<sup>46</sup>

In December, 1990, the Task Force held further hearings "offering industry, environmental groups, and consumers an opportunity to respond"<sup>47</sup> to The Green Report. The response was generally favorable but some specific recommendations were severely criticized, so the Task Force reviewed 'Q' testimony and written recommendations from the December, 1990

Lawrence, *Diaper Drops Claim*, ADVERTISING AGE, Oct. 22, 1990, at 57.

<sup>39</sup>Task Force, *supra* note 37, at v.

C- Koenenn, *Advocates Fear 'Green Hype' Backlash: Green Guides Help Identify*

*Environmentally Sound Products*, Star Tribune, April 10, 1991, at 2E.

<sup>42</sup>California, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington, and Wisconsin.

<sup>43</sup>Florida and Tennessee.

<sup>44</sup>Task Force, *The Green Report*, Nov., 1990.

National Association of Attorneys General, *Resolution Supporting Development of Uniform*

*itional Guidelines for Environmental Marketing Claims*, March 18-20, 1990.

<sup>47</sup>Task Force, *supra* note 37, at vi.

hearings, and issued a revised report, The Green Report: II,<sup>4\*</sup> in May of 1991.

The Green Report: II advocates a "national regulatory scheme for environmental advertising."<sup>49</sup> The Task Force is working with the FTC, the EPA, and the U.S. Office of Consumer Affairs toward that end. Until federal standards are realized, however, The Green Report: II offers "guidance to industry so that companies can avoid making environmental advertising claims that violate the deceptive advertising laws of various states."<sup>50</sup>

While the Green Reports were intended to provide non-binding guidelines for marketers, Humphrey made very clear at the March, 1990 meeting that advertisers would be closely monitored by the Task Force: "Wrapping your product in green is not enough. Window dressing and lip service are not enough. We need integrity and honesty."<sup>51</sup> If anyone doubted Humphrey's message, the Mobil suit (discussed above) brought swift notice that the Task Force meant business.

Other settlements were reached with American Enviro Products Inc. (discussed above), and Alberto-Culver, the first cosmetics company targeted for aerosol claims by the Task Force. Alberto-Culver had claimed its hair sprays were "environmentally safe," and "will not harm the ozone." The company agreed to pay \$50,000 to the Attorneys General,<sup>52</sup> who are also investigating Revlon for using the phrase "environmentally safe formula" on cans of hair spray, and Gillette for claiming its products are "ozone friendly."<sup>53</sup> The Task Force uses pre-litigation enforcement powers to obtain "assurances of continuance,"<sup>54</sup> which are not admissions of wrongdoing by the defendants, but nonetheless binding upon them.

<sup>4</sup>Task Force, *supra* note 37.

<sup>49</sup>Task Force, *supra* note 37, at viii.

<sup>50</sup>Task Force, *supra* note 37, at viii. To briefly summarize *The Green Report: II*, the Task Force recommends that:

1. Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.
2. Environmental claims relating to the disposability or potential for recovery of a particular product (e.g., "compostable" or "recyclable") should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold.
3. Environmental claims should be substantive.
4. Environmental claims should, of course, be supported by competent and reliable scientific evidence. *Id.* at vii.

<sup>51</sup>C. Laszewski, *The Jury's Still Out on Degradable Plastics*, Pioneer Press, March 15, 1990, at 6A. Humphrey feels strongly that green marketing, if done honestly, brings a new dimension to consumerism: "A new dynamic is at work—the ability of the consumer to choose not just on the basis of price or color or size or whatever, but also for ecological attributes." *FTC May Put a Lid on Environmental Boasts in Ads*, Star Tribune, July 15, 1991, at 7A.

<sup>52</sup>*Id.* <sup>53</sup>Lawrence, *AGs Target Revlon, Gillette*, ADVERTISING AGE, Aug. 12, 1991, at 2.

<sup>54</sup>1212 *Environmental Reporter*, (BNA) (Oct. 26, 1990).

In the Mobil case, where pre-suit resolution was not achieved, settlement terms with the State of Minnesota<sup>53</sup> included a provision that Mobil would comply with a consent order it simultaneously entered into with the FTC. The terms of the consent decree were typical, requiring Mobil to cease and desist<sup>36</sup> from using the term "degradable" in advertising trash bags and to pay \$25,000 to fund consumer protection activities.<sup>37</sup>

In February of 1991, the National Food Processors Association (NFPA), pursuant to Code of Federal Regulations procedures,<sup>58</sup> petitioned the FTC to issue industry guidelines for environmental claims, with specific recommendations that differed substantially from those called for by the Task Force.<sup>59</sup> The Green Report: II "offers specific guidance on the use of environmental terms, (while) the industry plan... appears to allow more interpretation in using green claims."<sup>40</sup> "The industry plan calls for a self-regulating review process to ensure adherence to the guidelines..."<sup>61</sup> In short, the industry plan allows the marketer more discretion than the Task Force recommendations call for, which is not surprising when comparing regulatory proposals offered by private industry and Attorneys General.<sup>62</sup>

The FTC has now received four other sets of guidelines to consider. Mobil; First Brands Corporation, maker of Glad trash bags; the Cosmetic, Toiletry, and Fragrance Association and the Non-prescription Drug Manufacturers Association; and the Association of National Advertisers and Grocery Manufacturers Association, have all submitted proposals.<sup>63</sup> While the particulars may differ, one feature remains constant: Everyone wants uniformity provided by the FTC.

Patchwork regulation is the marketer's nightmare. As companies succumb "greenmania" and wax environmentally eloquent about their products, state regulators, like the Task Force, are entering the fray with increasing regularity, filing lawsuits and advocating legislation. If labeling requirements

<sup>53</sup> State of Minnesota v. Mobil Chemical Company, No. C5-90-6843 (2d Dist. Ct. Minn. 1990, FTC power to

issue cease and desist orders derives from the Federal Trade Commission Act, 15 U.S.C. § 53 (1988),

<sup>36</sup>Federal Trade Commission Guidelines, 16 C.F.R. sec. 1.6 (1990).

<sup>37</sup>In Re National Food Processors Association, Petition for Industry Guides for Environmental Under Section 5 of the Federal Trade Commission Act (Feb. 14, 1991).

<sup>58</sup>Lawrence, *Slat» Guido Define Green Terms*, ADVERTISING AGE May 27, 1991, at 3.

<sup>59</sup>J. Lawrence, *Marketers Offer Green Standards*, ADVERTISING AGE. Dec. 17, 1990, at 36. As National Food Processors Association director of program management, Glenn Gamber fit "\*\*\*\* foot many of our points of disagreement with the green report is a

"dimensionally different view of the way in which the marketplace works in dealing with such as environmental communications." J. Lawrence, *Marketers Offer Green Standards*, ADVERTISING AGE. Dec. 17, 1990, at 36.

<sup>62</sup>S.W. Coiford, *FTC Poised to Study Green Rules*, ADVERTISING AGE July 15, 1991, at

vary from state to state, marketers will have great difficulty implementing national environmental advertising campaigns.

A dilemma now faced by Proctor and Gamble exemplifies this problem. P&G may discontinue "recyclable" claims on products sold in Rhode Island because new legislation in that state could render their advertising illegal.<sup>64</sup> As Hal Shoup, executive vice president of the American Association of Advertising Agencies, told the FTC, "[r]ight now, environmental claims are the third rail of advertising—touch it and you die. Marketers can't live with...a crazy quilt of regulation. We need guidance."<sup>65</sup>

The Mobil proposals echo the logistical fears of green marketers, stating that

Because of the emergence of varying, and often conflicting, definitions of environmental terms, there is a critical need for the commission to take the lead in developing industrywide guides to assure accurate and consistent environmental messages.<sup>66</sup>

Although their goals may differ, most everyone concerned with green marketing agrees on the need for uniform guidelines, and that the FTC should provide them. Twenty-nine marketers, trade associations, and government and environmental groups asked to appear at FTC hearings on environmental advertising held in July of 1991, and almost all of them favored uniform guidelines or regulations.<sup>67</sup> Said a representative of the Grocery Manufacturer's Association,

uniform national guidelines for environmental claims are essential to the efficient marketing of nationally distributed consumer goods (and the absence of guidelines) will deny the American consumer valuable information about the environmental benefits of products.<sup>68</sup>

Even the EPA, which is working on its own green-labeling project modeled after the Blue Angel system,<sup>69</sup> endorses FTC guidelines. EPA

<sup>64</sup>See S.W. Colford, *FTC Confronts Green Muddle*, ADVERTISING AGE, July 22 1991, at 2.

<sup>65</sup>*Id.* at 2,40.

<sup>66</sup>S.W. Colford, *supra* note 61, at 4.

<sup>67</sup>*Id.* The FTC, however, is not sold on the need to regulate in a manner other than the traditional case-by-case approach employed by the agency in deceptive advertising.

<sup>68</sup>*Id.*

<sup>69</sup>APRIL 11 INVOLVED WITH lifecycle analysis. See 1212 *Environment Reporter*, (BNA) (Oct. 26, 1990).

Deputy Director, F. Henry Habicht II feels only a small percentage of consumers believe current environmental claims. Habicht said "it's too early to freeze out the states (by pre-emption)...But we need consistency."<sup>70</sup>

If the FTC overcomes its reluctance (discussed below) to create special guidelines for environmental advertising, the question remains what type of regulation would be best. Should the agency promulgate formal rules, a lengthy process that provides for sanctions, or merely issue guidelines, as most marketers favor? Perhaps a two-phased program would serve best, where industry guidelines are followed by formal regulations. These matters and related problems will eventually be dealt with by the FTC, because everyone, including the White House, is looking to them for guidance.<sup>71</sup>

#### FEDERAL REGULATION AND THE FTC

The FTC is not anxious to issue guidelines pertaining to environmental marketing.<sup>72</sup> The agency prefers to handle such issues on a case-by-case basis and wonders "[w]hy shouldn't environmental marketing claims be regulated like all others-if they're deceptive, prosecute under current provisions of the FTC Act?"<sup>73</sup> Attorney General Humphrey listed several reasons in remarks before the FIC, most importantly that "we have never seen any other marketing issue of this magnitude,"<sup>74</sup> and "a case-by-case approach will be too slow and too cumbersome in developing the boundaries for legitimate environmental claims."<sup>75</sup>

Another agency concern is whether it's best to set guidelines in an area changing as rapidly as environmental marketing,<sup>76</sup> and two commissioners have publicly questioned the wisdom of FIC guidelines.<sup>77</sup> The agency is well

<sup>70</sup>S.W. Colford, *supra* note 62, at 40. Presumably, given Habicht's statement against preemption, the EPA favors FTC guidelines, rather than formally promulgated regulations.

<sup>71</sup>In July, 1991, Clayton Fong Jr., deputy director of the White House's Office of Consumer Affairs, recommended that the FTC create guidelines for environmental advertising. See S.W. Colford, *supra* note 62, at 40.

<sup>72</sup>Should the FTC choose to do so, however, the agency may issue either non-binding industry guidelines or formal rules or regulations accompanied by agency sanctioning power against violators, under its powers derived from the Federal Trade Commission Act, 15 U.S.C 8 41 *et seq.* (1988).

<sup>73</sup>S.W. Colford, *supra* note 62, at 40. The FTC may regulate deceptive advertising under provisions of the Federal Trade Commission Act. 15 U.S.C § 1336 (1988).

<sup>74</sup>H. Humphrey III, *supra* note 3, at 12.

<sup>75</sup>H. Humphrey III, *supra* note 3, at 15.

<sup>76</sup>See S.W. Colford, *supra* note 61, at 4.

<sup>77</sup>*Id.* Commissioners Deborah Owens and Mary Azcuenaga are opposed to special regulation in this area, but willing to hear industry arguments.

aware of the interest in guidelines<sup>78</sup> and held hearings in July, 1991, "to consider whether federal regulations and uniform national standards are needed for environmental advertising claims."<sup>79</sup> The commissioners heard various proposals at the hearings but given their preference for case-by-case regulation, if the agency does issue guidelines, it is likely to adopt a general approach that "doesn't specifically define what constitutes a non-deceptive environmental claim."<sup>80</sup> That fact was evidenced in a statement by Barry Cutler, director of the FTC's Bureau of Consumer Protection, who said

If there were to be guides, (the) industry proposal asking for a traditional FTC approach probably has a better chance to work once it's in place than more rigid definitions.<sup>81</sup>

The FTC is aware that case-by-case handling of green marketing disputes will leave the states without guidance and increase the probability of conflicting legislation being passed. With pressure growing for the agency to provide guidance, it is likely that guidelines will be issued in the near future.

Critics argue, however, that guidelines, being neither pre-emptive of state regulatory powers nor binding upon marketers, will prove insufficient and ultimately result in the patchwork legislation they were intended to prevent. Others are more optimistic. L. Ross Love, vice-president of advertising at Proctor and Gamble, said at the FTC hearings, "[w]e favor pre-emption as a last resort. We hope guidelines will lead to uniformity,"<sup>42</sup> hoping that state regulators and legislators will follow the FTC's lead. Attorney General Humphrey shares Love's confidence. His office believes that

<sup>78</sup>The FTC, while not initially disposed to issue guidelines for environmental advertising, has been pressured by industrial, governmental, and consumer groups seeking such assistance, and may eventually regulate the field. The agency is continually barraged by requests for guidelines from people such as Melinda Sweet, director of environmental affairs at Lever Brothers, who said (speaking on behalf of industry), "[w]e really believe the Federal Trade Commission is the only appropriate agency to look at marketing claims, because they're in the business of making sure the consumer is not deceived." J. Dagnoli, *Green Plans Require Foes to Cooperate*, ADVERTISING AGE, Feb. 4, 1991, at 12.

<sup>79</sup>TC *May Put a Lid on Environmental Boasts in Ads*, Star Tribune, July 15, 1991, at 7A. Although the agency held hearings, it has not yet agreed to regulate environmental marketing. The question of regulation is complicated by events such as the Council of Better Business Bureaus recent announcement that it endorses the idea of FTC environmental guidelines but asks the agency to pursue "only the most egregious violators," leaving the resolution of most cases to the Council's National Advertising Division. The Council met in July, 1991 to develop rules for self-regulation of green marketing. See S.W. Colford, *supra* note 62, at 40.

<sup>80</sup>J. Lawrence, *supra* note 59, at 36.

<sup>81</sup>*Id.*

<sup>42</sup>S.W. Colford, *supra* note 62, at 2.

[i] f the Commission adopts meaningful national guidelines, it is unlikely that state legislators would continue to push for state laws... (but warned) in the absence of Commission guidelines, we can expect to see more and more states attempting to seek legislative solutions to the green marketing frenzy.<sup>83</sup>

Green marketers favor interpretive guidelines to formal regulation because it would allow advertisers greater discretion when applying the guidelines and not subject them to administrative sanctions should their exercise of that discretion prove inadequate. Regulators like Humphrey, on the other hand, "are calling for interpretive guidelines-as opposed to a formal trade regulation rule-primarily because guidelines are less cumbersome and time-consuming to develop."<sup>84</sup>

Current FTC reluctance to enter the field and a predilection toward minimal involvement, coupled with industry and Task Force preferences for guidelines, makes it unlikely that formal rules will soon be forthcoming. Guidelines would mitigate the extent of confusion in green marketing but might prove inadequate as a corrective.

Perhaps preliminary guidelines followed by promulgation of formal regulations would be most effective. A July, 1991, editorial in the (Minneapolis) Star Tribune suggested as much when it reminded readers that non-binding guidelines "would leave states free to write their own laws on green marketing (and)...leave manufacturers vulnerable to a mind-boggling patchwork of labeling requirements...[F]orgoing regulation altogether would be a mistake. Soft guidelines are an essential first step, but consumers will ultimately need the protection of hard rules."<sup>85</sup>

The legitimacy of these claims may eventually necessitate formal FTC controls. In anticipation of such regulation, several questions arise: Should the FTC consider lifecycle analysis in advertising curbs, or merely the effects of the product itself? Should formal standards for buzzwords such as "biodegradable" and "recyclable" be determined and products required to meet efficacy tests? Should proven violators be sanctioned traditionally, or more stringently through stiffer fines and possible incarceration for responsible executives in the more flagrant cases of green-collar crime? These questions must be answered before formal rules can be written.

"Memo from J. Jacobson to Minnesota Attorney General, H. Humphrey III (July 9, 1991)(discussing upcoming hearings before the FTC).Humphrey also said, in July, 1991 hearings before the FTC, "I remain confident that if meaningful federal guidelines are developed, the abuses in the marketplace will be corrected and the need for state legislative action will subside. H. Humphrey III, *supra* note 3, at 18.

"H. Humphrey III, *supra* note 3, at 19.

"7b *Tell the Green Truth*, Star Tribune, July 25, 1991, at 22A.

#### SUGGESTIONS AND CONCLUSION

The FTC should issue preliminary guidelines reflecting the consensus view of interested parties, thereby providing the national uniformity so badly needed by green marketers and those who regulate their conduct. It should be understood, however, that such guidelines, whose timeliness is necessary to reduce the current chaos in environmental advertising, will be superseded (in approximately three years) by formally promulgated regulations.

The new regulations should define, with a high degree of specificity, what is meant by ecological buzzwords such as "biodegradable" and "recyclable," and products should be required to meet efficacy standards or subject marketers to sanctions for false environmental claims. Sanctions should include stiffer fines than those usually levied in cases of false advertising, so that marketers do not violate standards casually, considering the fines a cost of doing business.

The FTC should also consider advocating companion legislation that would subject responsible executives to personal financial liability and/or incarceration in the most flagrant cases of eco-pornographic advertising. Finally, corrective advertising with more stringent requirements for confession of wrongdoing should be employed. Above all, the agency must be willing to regulate aggressively so that consumers and honest competitors are protected from the deception of greenwash.

The measures recommended above may seem extreme, but the ecological crises we face are dire and time is of the essence in our quest to save the planet. With so many corporations and individuals genuinely committed to sound environmental practices, marketers who feign ecological concern must be held accountable. As consumers become increasingly sensitive to the cost of their consumption, they will demand more ecologically sound products and packaging. To consume "greenly," they must receive accurate information. It is imperative that improved regulation of green marketing be implemented on every level from intra-corporate programs like those at IGA and Wal-Mart to the promulgation and enforcement of formal regulations by the FTC. As Attorney General Humphrey said,

to carry out the green revolution, consumers must be armed with accurate and meaningful information about the products they buy. Ensuring that product labels carry accurate and reliable environmental information will allow consumers to do their part in helping to alleviate our true environmental problems.\*<sup>6</sup>

\*H. Humphrey III, *supra* note 3, at 13.