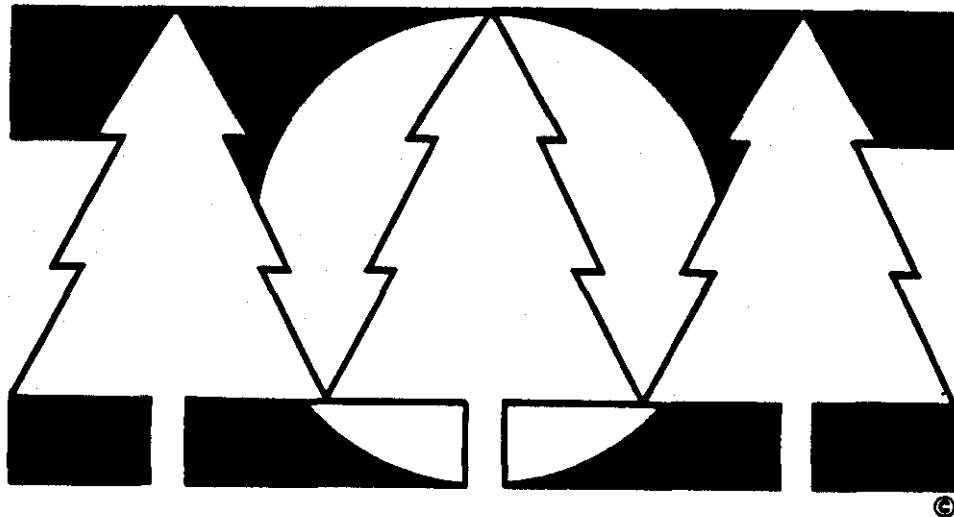


THE GREEN REPORT:

FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING



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THE GREEN REPORT:

Findings and Preliminary Recommendations For Responsible Environmental Advertising

EXECUTIVE SUMMARY

"Green marketing" has become the marketing craze of the 1990's. The American public is increasingly concerned about environmental issues, and people are looking for ways to do their part to protect and restore our nation's resources. As consumers have become more aware of the environmental impacts of the products they purchase, environmental awareness has begun to influence purchasing decisions.

The increasing interest in the environmental consequences of purchasing decisions has not been lost on the business community. A quick trip down the aisle at the grocery store makes this clear. Many companies have begun claiming that their products provide some benefit to the environment or are less harmful to the environment than other competing products. This marketing strategy, which has become known as "green marketing," can be informative to conscientious consumers when it is used honestly. Unfortunately, attempts to take advantage of consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.

This is particularly troublesome because the environmental problems facing the world today are largely the result of the way we do business. In order to reverse the pattern of widespread environmental degradation, substantial changes must be made

in the way products are formulated, manufactured, used and disposed. Considering the magnitude of the problems facing the United States and the desire of consumers to support positive environmental improvements, it is disturbing to see a growing number of confusing and misleading claims that take advantage of consumers and, in many cases, violate existing laws.

"Green marketing" has been the focus of parallel investigations by a ten-state task force of Attorneys General (the "Task Force") and by the Federal Trade Commission (the "FTC"). The United States Environmental Protection Agency (the "EPA") has also expressed concern about the growing number of products making confusing and misleading environmental claims. As part of their activities in this area, the Attorneys General on the Task Force, in conjunction with the FTC and the EPA, held a national public forum in March of 1990 (the "Public Forum" or "Forum") to focus the spotlight on this marketing trend. The Public Forum brought together leaders of government, business and environmental groups who were struggling with the issue of how best to provide consumers with the truthful and accurate information they need to make purchasing decisions that contribute positively to environmental quality.

The Public Forum revealed a wide degree of consensus among business and environmental groups on many important issues. Significantly, almost every organization testifying at the Public Forum urged the development of national standards, guidelines or definitions to guide business in making environmental claims and to help consumers understand the claims made. The Public Forum also exposed disagreements on several issues, the most notable being the role of degradable plastics in solving our nation's serious solid waste problems.

This Report is issued by the Attorneys General on the Task Force and is divided into three major sections. Section I explains how and why the state and federal officials participating in the Public Forum became concerned about the growing number of

environmental marketing claims. Section II provides an overview of the testimony presented at the Public Forum and identifies the major areas of agreement and controversy.¹ Finally, Section III sets forth recommendations of the Attorneys General on the Task Force. First, it recommends that the FTC and the EPA work jointly with the states to develop uniform national standards for environmental marketing claims. Specifically, the Report urges that the federal government enact a comprehensive regulatory scheme for environmental marketing claims that establishes definitions for terms used in environmental advertising and standards governing the use of those definitions. Second, Section III sets forth the following preliminary recommendations of the Task Force for responsible environmental marketing in order to provide interim guidance to the business community and to provide a framework upon which more concrete definitions and standards can be developed:

- Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.
- Environmental claims relating to disposability (e.g., "degradable" or "recyclable") should not be made unless the advertised disposal option is currently available to consumers in the area in which the product is sold and the product complies with the requirements of the relevant waste disposal programs.
- Environmental claims should be substantive.
- Environmental claims should, of course, be supported by competent and reliable scientific evidence.

The Attorneys General on the Task Force have developed these preliminary recommendations, which are explained in greater detail in Section III. B. below, based on the testimony and written comments presented at the Public Forum and their ongoing investigation of environmental marketing claims. To further the open dialogue

¹ The full transcript of the two-day proceedings, including selected written comments submitted by participants and other organizations, is available at cost. An order form is attached as Appendix A

on environmental marketing issues that began at the Public Forum, the Task Force will hold open hearings on these preliminary recommendations in San Diego, California on December 10 and 11, 1990. Following the hearings, the Task Force will determine whether any revisions to the preliminary recommendations are appropriate and issue their final recommendations. Adherence to the recommendations until a national regulatory scheme for environmental marketing claims is developed can minimize the confusion and abuse currently surrounding environmental claims and dramatically reduce the necessity for litigation.

SECTION I

THE PROBLEM: SUDDEN RISE IN ENVIRONMENTAL CLAIMS

As the American public has come to better understand the significance and scope of environmental problems throughout the country and the world, the public has expressed an increasing concern about environmental issues. People are beginning to realize, as never before, that they may contribute unknowingly or unintentionally to environmental problems that are national or global in scope, such as destruction of the ozone layer, acid rain, global warming, ocean pollution and the mounting accumulation of waste. As a result, there is a growing desire on the part of the public to do its part to help protect the environment. In particular, consumers have become increasingly willing to change their purchasing habits in ways that will reduce environmental problems: consumers have begun to seek out products they believe are better for the environment and to avoid products they believe contribute to environmental problems. Several polls and surveys document this trend. For example, in a September 1989 poll conducted by the Gallup Organization, more than 87 percent of all consumers

surveyed said they would pay more for "environmentally safe" products or packaging. "Consumers Go Green," Advertising Age, September 25, 1989, at 3.²

Business has been quick to respond to this growing consumer interest in "environmentally safe" products. In the past year, American businesses have advertised hundreds of products as "degradable," "recyclable," "recycled," "ozone friendly" or otherwise good for the environment, and even more new "environmentally friendly" products are on corporate drawing boards. A survey by Marketing Intelligence Service, Ltd., a marketing research firm, indicated that some 5,700 new "green" packaged goods would be introduced in 1989 alone. "Luring Green Consumers: Companies Pursue the Ecology Minded Shopper," The New York Times, August 8, 1989, at § 3, p.12.³

Concerned that some environmental attributes being promoted were not in fact "benefits" at all, the Attorneys General of California, Massachusetts, Minnesota, Missouri, New York, Texas, Washington and Wisconsin formed an ad hoc task force in November of 1989 to review environmental advertising claims.⁴ The Task Force had good reason for concern. Many of the Task Force states have also been involved in

² More recent polls and surveys report similar findings. A nationwide survey conducted by Gerstman + Meyers, Inc., a New York design and marketing firm, found that 78% of all respondents would pay up to 5% more for "environmentally sound" containers and 47% would pay up to 15% more. Gerstman + Meyers, Inc., Consumer Solid Waste: Awareness Attitude and Behavior Study II, July 1990. In a July 1990 poll conducted by the Roper Organization, consumers reported that they would pay an average of 6.6% more for environmentally sound products. Env't Rep. (BNA) at 691 (Aug. 3, 1990).

³ Again, more recent polls and surveys document the sharp rise in the number of products making environmental claims. According to Marketing Intelligence Service, Ltd., "green" products constituted 4.5% of all new product introductions in 1989 and 9.2% in the first half of 1990. In 1985, "green" products made up only .5% of all new products. "1990 Green Introductions Soar," Green Marketing Alert, October 1990, at 8-9. A 300 page report titled "The Green Consumer" published by FIND/SVP, a marketing research firm, predicts that by 1995, \$8.8 billion in sales will be "displaced" into "green products," up from \$1.8 billion by the end of 1990. "Green Concerns Grow," Advertising Age, September 4, 1990, at 27.

⁴ In July of 1990, the Florida Attorney General and the Utah Attorney General joined the original eight Attorneys General on the Task Force. Although Florida and Utah did not participate in the Public Forum, they have participated in the drafting of the recommendations and join the original members of the Task Force in issuing this Report.

reviewing deceptive nutritional claims for food products, and the Task Force saw troublesome parallels. In each area, there has been a rapid increase in consumer interest in a specific type of benefit -- nutritional or environmental -- at a time when many existing products were not distinguishable on these grounds. Consumer interest in both nutrition and the environment has become so significant that product manufacturers have rushed to promote their products on the basis of these new areas of interest. In responding to these consumer trends, marketers have in each area used advertising buzz words that have no standard or clearly understood meaning: "lite," "natural" and "low-cholesterol" in the food area, and "environmentally friendly," "ozone friendly" and "degradable" in the environmental area. Finally, because of the complex technical, health and scientific issues underlying both nutritional and environmental claims, the ability of the average consumer to assess the validity of such claims is limited.

Based on the states' experience with nutritional claims advertising, the Task Force identified several potential problems that could result from the growing confusion surrounding environmental advertising. First, the Task Force feared that if consumers began to feel that their genuine interest in the environment was being exploited, consumers would no longer seek out or demand products that are less damaging to the environment. If this were to occur, the environmental improvements that could be achieved by consumers purchasing more environmentally benign products would be lost. Equally troublesome was the possibility that some environmental claims might lead the public to believe that either the problem does not exist or that it has been solved. This, in turn, could actually impede finding real solutions to our nation's serious and complex environmental problems. Finally, the Task Force was troubled by generalized environmental claims suggesting that products are "good" for the environment. Products can be manufactured in ways that creates fewer environmental

problems and can be formulated so that product use and disposal have fewer negative environmental impacts, but the production and consumption of goods and services necessarily have adverse environmental consequences.

To address these concerns, the Attorneys General on the Task Force developed a two-fold response to the rising tide of environmental claims. First, acting in their traditional role as enforcers of state laws prohibiting deceptive advertising, the Attorneys General initiated a number of investigations into the environmental claims made by specific product manufacturers. The Task Force has asked manufacturers of some products making environmental claims to provide scientific substantiation for their claims and has met with several of the manufacturers in an attempt to resolve the Task Force's concerns.

In October 1990, the Task Force reached its first settlement in its year-long investigation of environmental claims. The ten Attorneys General on the Task Force entered into an Assurance of Discontinuance with American Enviro Products, Inc., the manufacturer of "Bunnies," the most widely advertised brand of "biodegradable" disposable diapers. Under the settlement, American Enviro Products is prohibited from claiming that its diapers are "degradable" or "biodegradable."

Where companies have been unwilling to enter into legally binding agreements to modify environmental claims that members of the Task Force have determined violate their individual state laws, some members of the Task Force have taken legal action. On June 12, 1990, seven Attorneys General on the Task Force filed suit against Mobil Chemical Company, Inc., after settlement discussions failed to result in a pre-filing settlement. The Attorneys General allege that Mobil Chemical Company, Inc., falsely represented to consumers that its "Hefty degradable" trash bags provide an environmental benefit when disposed of under normal disposal conditions such as

landfills.⁵ The Texas Attorney General reached an out of court settlement with Mobil on June 26, 1990. The other six cases are now on different court schedules throughout the country. More lawsuits against other companies may be forthcoming as the Task Force's investigations proceed.

The Task Force was also cognizant, however, of the great potential of the "green revolution." Many of today's environmental problems are the result of business activity that is presumably in compliance with existing laws protecting environmental quality.⁶ Public interest in a better, cleaner environment expressed through consumer purchasing decisions, together with business' responsiveness to that interest, offers the possibility of moving the nation beyond the requirements of state and federal laws governing product manufacture and use to a higher level of environmental quality. For this to occur, however, environmental information provided to consumers must be helpful, accurate and complete.

Informal discussions with business representatives and environmental groups suggested an interest in government involvement to provide guidance to businesses and consumers in making and understanding environmental advertising claims. Encouraged by this interest, the Task Force decided to hold a national public forum to

⁵ Shortly before Mobil's first meeting with representatives of the Task Force, Mobil announced that it would discontinue promoting "Hefty" trash bags as "degradable." Packages of "Hefty degradable" trash bags are still available in stores throughout the country, however, and, according to Mobil officials, will be available through the end of 1990.

⁶ The Clean Air Act was passed in 1970 and was followed by a succession of federal mandates that required business and government entities to comply with a multitude of regulations designed to protect the environment by reducing the by-products of manufacturing. The history of implementing these mandates on the federal and state levels is a long and complicated one. Industry can be in compliance with these laws and still legally discharge many of these by-products into the environment. For example, 4.57 billion pounds of toxic chemicals were released into the nation's air, water and land in 1988, according to reports submitted by 19,732 industrial plants to the EPA. (Reporting of this type is required for facilities which produce 50,000 pounds or more of toxic substances per year.) This figure does not include nonhazardous waste, which is much more voluminous. It also does not include toxic chemicals released during product use. For example, in 1988 the use of consumer products resulted in the release into the environment of an estimated 54 million pounds of a single problematic chemical compound, 1,1,1 - trichloroethane.

determine whether government regulation of environmental marketing was warranted and, if so, what type of regulation could best reduce the current confusion and abuse. Recognizing that environmental marketing is a national phenomenon and that any action taken by the states would have nationwide implications, the Task Force invited the staff of the FTC's Bureau of Consumer Protection (the "FTC staff") and the staff of the EPA's Office of Pollution Prevention (the "EPA staff") to join the Attorneys General on the Task Force in sponsoring the Public Forum.

Both federal agencies had already expressed concerns over the increasing number of environmental claims on products. The FTC's Consumer Protection Bureau is the federal agency charged with the enforcement of federal laws prohibiting deceptive advertising. In a speech to the 1989 Winter Meeting of the National Association of Attorneys General, FTC Chairman Janet Steiger had expressed her agency's concern over the potential for deception in environmental marketing claims. During that speech, Chairman Steiger publicly announced that the FTC was investigating products making environmental claims. The Task Force saw FTC staff participation in the Public Forum as a means of implementing an important stated goal of Chairman Steiger: to work cooperatively with the states in areas in which the states and the federal government have concurrent interests and jurisdiction, such as the regulation of deceptive advertising practices.

The EPA also had several divisions looking into issues relating to environmental advertising. In February 1990, the EPA submitted a comprehensive report to Congress entitled "Methods to Manage and Control Plastic Wastes." The report included a review of issues relating to the development of degradable plastics. The EPA had also commissioned a report on the feasibility of implementing a nationwide environmental "seal of approval" product labeling program in the United States, similar to programs already in place in Germany, Canada and Japan. Eager to draw on the EPA's

environmental experience and expertise, the Task Force invited the EPA staff to participate with the Attorneys General and the FTC staff in hosting the Public Forum.

In announcing the Public Forum, information was distributed to over 300 environmental organizations, consumer groups, businesses and government agencies that had expressed an interest in environmental marketing. In addition, the Forum was announced in several newspapers and trade publications of national circulation, including The New York Times, The Wall Street Journal, and Advertising Age. The announcement asked participants to focus their remarks on several aspects of environmental marketing such as current trends, the greatest areas of potential abuse and methods for promoting honesty and full disclosure.⁷

More than 40 organizations testified at the Public Forum and representatives from more than 60 other organizations attended.⁸ Over the course of the two day Forum, the Presiding Panel⁹ heard testimony from environmental groups and consumer organizations on the national and local level -- Environmental Action Foundation, Environmental Defense Fund, Green Seal, the Minnesota Project, GreenPeace and Clean Water Action Project. The Presiding Panel also heard from businesses, both large and small, such as Procter & Gamble, Mobil Chemical Company, Weyerhaeuser

7 The letter announcing the Public Forum is attached as Appendix B.

8 The agenda of the Public Forum is attached as Appendix C.

9 The panel presiding at the Public Forum included Minnesota Attorney General Hubert Humphrey III; Missouri Attorney General William Webster; Wisconsin Attorney General Don Hanaway; Barry Cutler, Director of the Bureau of Consumer Protection of the Federal Trade Commission; Sharon Stahl, Chief of the Policy Analysis Branch of the Office of Pollution Prevention of the Environmental Protection Agency; Assistant Attorneys General from Massachusetts, Minnesota, Missouri, New York, Texas, Washington and Wisconsin; and staff attorneys from the Federal Trade Commission. North Dakota Attorney General Nicholas Spaeth joined the Presiding Panel for a portion of the proceedings. Although active on the Task Force, the California Attorney General's Office was unable to attend the Forum because of budgetary constraints. The Attorneys General of Florida and Utah were not members of the Task Force at the time of the Forum.

When used hereafter, the "Presiding Panel" refers to the Attorneys General on the ten-state Task Force and the FTC staff and EPA staff participating in the Public Forum. A complete list of the names and addresses of the members of the Task Force is attached as Appendix D. A complete list of the names and addresses of the participating FTC staff and EPA staff is attached as Appendix E.

Paper Company, Sears Roebuck & Co., Archer Daniels Midland, First Brands, James River Corporation, Webster Industries, RMED International, 7th Generation, and North American Plastics Corporation. Representatives of trade organizations, such as the American Association of Advertising Agencies, the American Paper Institute, the Minnesota Retailers Association and the Minnesota Grocers Association, also testified. Finally, the Presiding Panel heard from governmental and private organizations involved in state and local recycling efforts, such as the Minnesota Office of Waste Management, the Houston County (Minnesota) Recycling Council and the St. Paul (Minnesota) Neighborhood Energy Consortium.¹⁰

SECTION II

FORUM ISSUES: POINTS OF AGREEMENT AND CONTROVERSY

The testimony provided by speakers and submitted in writing to the Presiding Panel by other interested parties breaks roughly into areas where there was broad agreement among diverse groups and areas where there was a good deal of controversy among participants.

A. Points of Agreement

The most surprising, and encouraging, aspect of the Public Forum was the broad based agreement on many key issues. After reviewing the testimony presented at the Public Forum and the written comments and information submitted to the Task Force, the Task Force has identified eight issues on which there was virtually unanimous agreement at the Public Forum.

¹⁰ A complete list of the names and addresses of the organizations attending the Public Forum is attached as Appendix F.

1. Increasing Consumer Demand

Consumer interest in purchasing products that are less harmful to the environment has increased dramatically over the past year and has become perhaps the most important marketing trend of the decade. Several companies provided concrete examples of this trend. One company that operates a mail order business selling what it calls "environmentally sensitive" products testified that it had experienced a large growth in sales in the last quarter of 1989 and predicted that its sales would increase by over 500 percent in 1990. Consumer demand for products that are less problematic for the environment was also demonstrated by the marked increase in the number of calls companies reported receiving from consumers requesting more information about the environmental effects of products. Indeed, the sheer number of products introduced in the past year that are promoted on the basis of their alleged environmental attributes is a testament to the perceived increased consumer interest.

2. Intense Competitive Pressures

Virtually all of the companies testifying at the Forum commented on the intense pressure they feel to start making environmental claims in response to the increasing consumer interest in the environment and in response to the actions of their competitors. Competitive pressure also arises when different materials compete for the same use. For example, the tension between the plastics industry and the paper industry over which material is better for the environment was readily apparent at the Forum.

Many companies testified that competitive pressure is the chief reason they began making environmental claims. Some stated that this competitive pressure had taken precedence over their concerns about whether the information contained in the

environmental claim was useful and valuable to the consumer. Several other companies stated that they have not yet started making environmental claims because they are concerned about further adding to the confusion. These companies also acknowledged, however, that pressure to make environmental claims is becoming increasingly difficult to resist and that they may soon be obliged to make environmental claims in order to remain competitive.

3. Mounting Consumer Confusion

Both environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive advertising practices. Three reasons were consistently given for the growing confusion. First, the words commonly used in environmental marketing, such as "environmentally friendly," "degradable," "recyclable," and "ozone friendly," have no clear, uniform meaning. Different manufacturers use the same terms to promote different environmental benefits. Second, the science involved in understanding the environmental issues underlying these claims is complicated and the related technologies associated with environmental management are undergoing rapid change. Finally, the manner in which we dispose of our waste is changing. Although most people still put all garbage in a trash can destined for a landfill, people are now more aware that their garbage is part of the overall solid waste problem. People are therefore increasingly seeking ways to reduce the amount of waste they produce and to treat different kinds of waste differently. In fact, because many state and local governments are beginning to rely on alternative waste disposal methods (other than landfill burial), many people are now required by state and local laws to separate their trash.

4. Derailing Environmental Efforts

The testimony at the Public Forum confirmed the concerns that the Task Force had identified when it first began reviewing environmental claims. Both environmental groups and businesses expressed concern that if consumers begin to feel that companies are taking advantage of consumers' genuine concern about environmental issues, consumers may become disillusioned and stop taking environmental considerations into account when making purchasing decisions. Businesses also warned that there would be no incentive for business to make substantial investments in more environmentally sound manufacturing processes and new products if companies that do not make such investments or efforts are allowed to make trivial or exaggerated environmental claims. Any improvements in environmental quality that would accrue through the manufacture and use of more environmentally benign products would therefore be lost. Finally, environmental groups warned that the proliferation of trivial or misleading environmental claims could interfere with real solutions to environmental problems.

5. Recognition of Corporate Environmental Responsibility

Business representatives candidly acknowledged that each business has an inherent duty of environmental responsibility and that this duty includes a responsibility to minimize the adverse environmental impacts of its products. There appears to be widespread recognition that meeting this responsibility requires a careful review of all of the environmental effects at each stage of every product's lifecycle. Such a review must take into account the natural resources and energy consumed and the waste produced in the manufacture, packaging, distribution, use and disposal of the product.

6. Need for Standards

Almost every organization testifying at the Public Forum, both business representatives and environmental groups alike, urged the development of uniform national standards, guidelines or definitions to guide business in making environmental claims and to assist consumers in understanding them. Two main reasons were cited to support the need for increased standardization. First, business representatives testified that standardization of environmental claims is necessary to provide a level playing field upon which businesses can compete on an equal footing. Second, both businesses and environmental groups stated that standards would reduce for both consumers and business the mounting confusion about the meaning of environmental claims.

7. Fostering Competition

Business and environmental groups alike expressed the common concern that, although government regulation in the area of environmental marketing claims is needed, such regulation could have the undesirable effect of curtailing the development of environmentally preferable products. Only if new, less environmentally damaging products are available and are discernible from other products can consumers choose products that are less harmful to the environment. Organizations cautioned that standards or guidelines designed to protect consumers from misleading environmental advertising must avoid stifling the forces of competition necessary to encourage the development and promotion of more environmentally benign products.

8. Standard Setting Process

The testimony revealed two chief concerns with the procedure for the standardization of environmental claims. First, business representatives, in particular,

cautioned that, because much of the advertising for consumer products is now carried out on a national level, any guidelines, standards or definitions must be adopted on a national level. Second, participants emphasized that the standardization of environmental marketing claims must be accomplished through an ongoing dialogue among all parties concerned -- public officials, environmental and consumer groups and business representatives.

B. Points of Controversy

The Task Force also identified three issues that were hotly disputed at the Public Forum.

1. Degradability Claims

The makers of "degradable" plastics argued that their products do indeed degrade in a variety of environments and, in their opinion, make a significant contribution to protecting the environment. Although acknowledging that "degradable" plastics will not solve the nation's solid waste crisis, these manufacturers argued that "degradable" plastic products are better than conventional plastic products and will become increasingly important if municipalities move away from landfill disposal and incineration to more biologically active solid waste disposal systems such as composting.

Other manufacturers, as well as environmental groups, testified that "degradable" plastic products offer no environmental benefits when disposed of in the usual and customary manner of solid waste disposal in the United States, namely, landfills, because modern landfills are designed to isolate waste from the environment, which inhibits degradation. Environmental organizations testified that promoting plastic products as "degradable" is deceptive and lulls consumers into believing that they are

contributing to environmental protection when they actually are not. They argue that such degradability claims may steer people away from real solutions to solid waste problems, such as source reduction. Environmental groups also asserted that, although there eventually may be some acceptable uses for "degradable" plastics, not enough is currently known about what happens to "degradable" plastics once they begin to break down and whether the by-products of "degradable" plastics are harmful to people or the environment.

Another controversial issue was whether "degradable" plastic products interfere with plastic recycling efforts because of the additives they contain. Some participants argued that "degradable" plastic products, particularly "biodegradable" plastics, do interfere with specific plastic recycling technologies and that several recycling companies had stopped recycling polyethylene plastic bags because of increasing contamination by starch-based "biodegradable" bags. Furthermore, several participants stated that recycled plastic made of "degradable" plastic is of little value in the marketplace because of marketplace concerns about the integrity of the end product. Manufacturers of "degradable" plastics argued, however, that both "biodegradable" and "photodegradable" plastics have been recycled successfully.

2. Recyclability Claims

There was also a lack of agreement about whether it is appropriate to promote a product as "recyclable" when there is no readily available method of recycling the material in the area in which the product is sold. Several paper and plastic manufacturers felt that it is appropriate to label a product "recyclable" -- without regard to actual recycling rates or the existence of recycling opportunities or markets for the material -- because such labels increase public awareness that the product is technically capable of being recycled. Other manufacturers and environmental groups

asserted that the use of the term "recyclable" without regard to the actual ability of consumers to recycle that particular item in their community only contributes to consumer confusion. Several problems were attributed to the promotion of a product as "recyclable" without regard to the actual recycling rate for that product. First, if consumers place labeled items in the recycling stream that are not actually recycled in their communities, recyclers (often government entities) then incur additional costs in identifying those items and removing them from the recycling stream. Second, overuse of the term "recyclable" may destroy consumer confidence in the recycling system as consumers become frustrated by their inability to identify which products on store shelves that are labeled "recyclable" are actually recycled in their communities. Finally, allowing companies to promote products as "recyclable" without regard to actual recycling rates removes business' incentive to participate in the development of collection programs and markets for recycled materials.

3. Recycled Content Claims

Finally, there was a dispute as to the appropriate meaning of "recycled." Several manufacturers who are using pre-consumer waste, either industrial waste generated and commonly used within their own facilities or industrial waste that is diverted from the solid waste stream, testified that it is appropriate to label their products as "recycled" because recycling pre-consumer waste reduces the amount of material that must ultimately be disposed. Other manufacturers and environmental groups testified that consumers understand the word "recycled" to refer only to post-consumer waste. Therefore, they argue, it is confusing and possibly misleading to label as "recycled"

products manufactured from recycled pre-consumer waste. Some organizations suggested that in order to encourage the reprocessing of pre-consumer and post-consumer waste, products labeled "recycled" should describe the source of the recycled material.

SECTION III

RECOMMENDATIONS

The Task Force was encouraged by the widespread agreement at the Public Forum on so many important issues. As stated above, there was a common understanding of the causes of the current confusion surrounding environmental claims -- the lack of commonly understood meanings for terms used in environmental marketing, the complexity and fluidity of the technology underlying products and waste management methods and the fierce competition to meet the rising consumer interest in the environment. There was also a basic agreement on the very serious problems caused by the confusion, including growing consumer cynicism with environmental claims and the possible abandonment by consumers and businesses of efforts to move toward products, packaging and manufacturing methods that ease the burden on the environment. By far the most important area of consensus, however, was the virtually unanimous call for the development of uniform national guidelines or standards for environmental marketing claims. After careful examination, the Task Force offers the following recommendations with the goal of reducing the current confusion and potential for consumer exploitation.

A. Recommendations for Federal Action

1. Definitions

The Task Force recommends that the federal government adopt a national regulatory scheme establishing definitions for environmental marketing claims to be used in the labeling, packaging and promotion of products on the basis of environmental attributes. This regulatory scheme should be developed with input from and after consultation with the states and should be enforceable by both state and federal officials. In addition, the proposed regulatory scheme should be concurrent with existing state and federal laws governing false advertising and deceptive trade practices.¹¹

Although the opportunity for confusion and abuse lies in several factors, one -- the lack of common meanings for terms used to make claims -- can be addressed by government action. Indeed, the other causes of the confusion, such as the ever changing and complex nature of the relevant technology and business responsiveness to consumer interest in the environment, are the very factors that make the "green revolution" possible. By developing uniform definitions for terms such as "recycled," "recyclable" and "compostable," businesses will know what they must do to change their products in order to make specific environmental claims and consumers will be armed with the information they need to make purchasing decisions based on environmental considerations. Market forces will drive the "green revolution" forward.

¹¹ By recommending a national regulatory scheme for environmental claims, the Task Force is not recommending that states be preempted from regulating the area. Indeed, the states would vigorously oppose any federal statute or regulation that would preempt states' rights in the area.

2. Testing Protocols

In addition to definitions, the Task Force recommends that the federal regulatory scheme include testing procedures and standards for determining whether a product meets a particular definition. For example, a term such as "degradable" might be defined to require that a product achieve a certain physical property within a specified period of time under particular solid waste disposal conditions. Without standard testing procedures to determine if a particular product meets that definition, however, the product might be able to technically meet the definition if it is exposed to environments or testing procedures that do not approximate the customary use or disposal method of the product. Promoting that product as "degradable" could therefore be misleading.¹²

National testing protocols would be particularly useful for the environmental analysis referred to as "cradle-to-grave product assessment" or "product life assessment." A product life assessment involves consideration of the environmental effects at every stage of a product's lifecycle, including the natural resources and energy consumed and the waste created in the manufacture, distribution and disposal of a product and its packaging. Companies are beginning to promote the use of their products over other competing products on the basis of product life assessments. For example, one manufacturer of disposable diapers has recently begun to promote the benefits of disposable diapers over cloth diapers on a product lifecycle basis. A trade organization of plastic manufacturers has sponsored a lifecycle study comparing the environmental impacts of polystyrene foam versus bleached paper board food service

¹² FTC regulations currently specify standardized testing procedures for various types of advertising claims. See, e.g., Guides Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. pt. 259 (1990); Labeling and Advertising of Home Insulation, 16 C.F.R. pt. 460 (1990).

containers and polyethylene versus unbleached paper grocery bags. The results of this study have been used to promote the use of plastic products over paper products.

Manufacturer sponsored product life assessment studies could, however, prove to be problematic because there are no standards for conducting such comparisons. As a result, studies of the same product that are conducted by different companies could yield different results depending on the assumptions and judgments underlying the studies. Such assessments will only provide useful comparative information about how to reduce environmental problems associated with products if they are conducted using uniform and consistent assumptions.

The EPA has already begun work on a methodology for conducting product life assessments. The Consumer Product Comparative Risk Project is a joint effort of three offices within the EPA: the Office of Air Quality Planning and Standards, the Office of Solid Waste and the Office of Research and Development. The Project is designed to develop a methodology for evaluating the environmental and public health consequences of consumer products throughout their lifecycles and to develop a mechanism for providing this information to consumers.¹³ The EPA's work in this area will provide a useful foundation for product life assessment standards that could be incorporated into the national regulatory scheme for environmental marketing claims proposed by the Task Force. Environmental groups have also been working in conjunction with experts in industry and academia to determine the usefulness of, and appropriate methods for, conducting product life assessments.

The Task Force recognizes that the development of a standardized and comprehensive method for conducting product life assessments based on well-

¹³ The work plan for the EPA's Project includes five main topics: (1) selection of a peer review group; (2) developing a method for applying lifecycle impacts; (3) selecting products for initial evaluation using the method; (4) conducting the analysis and refining the method; and (5) developing a communications strategy. The project began in July 1990 and is funded through October 1992.

founded assumptions and accurate data may take years to develop. Because of the potential this analytical method has to provide consumers, businesses and regulators with valuable environmental information, and for developing and directing national environmental policy, the Task Force urges that standardized methods for conducting such assessments be formulated as swiftly as possible. Until uniform protocols are developed, however, the Task Force questions whether product life assessments should be used in the advertising and promotion of products.

3. Need for Government Regulation

Although the call at the Public Forum for national standards for environmental claims was virtually unanimous, the Task Force acknowledges that several organizations testifying at the Forum advocated industry sponsored guidelines for environmental claims rather than government regulation. It was suggested that these be promulgated through an organization such as the Better Business Bureau or the American Association of Advertising Agencies. The Task Force has concluded that a government regulatory response is preferable to industry self-regulation for several reasons. First, environmental advertising affects an unprecedented and broad range of participants. Businesses from virtually every sector of the economy have expressed an interest in providing consumers with more information about the environmental effects of their products. Trade organizations ranging from the Society of Plastics Industries to the National Grocers Association have expressed interest in participating in the standard setting process. There is currently no existing business or trade organization that could quickly bring together all the affected organizations.

Second, the majority of organizations testifying at the Public Forum expressed a preference for a government response to environmental advertising. A key reason given for this preference was the concern that the wide range of business interests

implicated in environmental marketing might result in competing and conflicting industry sponsored standards.

Finally, unlike other advertising areas, environmental advertising can affect environmental quality. As the federal government struggles with mandatory controls to reduce the sources of pollution that cause problems such as acid rain, global warming, depletion of the ozone layer and smog, trends that result in the use of one product over another may counteract specific regulatory goals or initiatives. In order to ensure that environmental advertising fosters, rather than impedes, sound environmental practices, the federal government must be a key participant in the standard setting process.

By calling for a government response, however, the Task Force by no means intends that the private sector be excluded from the development of definitions and standards. The testimony at the Public Forum emphasized that the standard setting process must be accomplished through an ongoing dialogue among all parties concerned -- public officials, environmental and consumer groups and business representatives. The Task Force agrees that input from a broad range of interests is essential to the development of a comprehensive regulatory scheme that takes advantage of businesses' ability to innovate, government's primary responsibility for the direction of our state and federal environmental policy and public interest groups' heightened awareness of environmental and consumer issues. The open hearings to be held on the preliminary recommendations set forth in Section III. B. are a testament to the Task Force's recognition of the importance of an open dialogue to the development of a successful regulatory scheme.

4. Seal of Approval Programs

In recommending a regulatory scheme based on definitions for terms commonly used in environmental advertising, the Task Force notes that in the past year there has

been a great deal of discussion of so-called environmental "seal of approval" programs. Several countries, notably Germany, Canada, Japan and Norway, already have government sponsored environmental seal of approval programs in place. Although the operation of the seal of approval programs in these countries varies, all involve endorsement of products by a governmental or quasi-governmental agency based on environmental considerations. Only products that apply for the awards are eligible. West Germany's "Blue Angel" Program has been in operation since 1978. As of August 1989 over 3100 products in 57 categories had received the "Blue Angel" award. Canada's Environmental Choice Program began in 1988. The Environmental Choice Program has issued guidelines for 14 categories to date, ranging from low pollution solvent-based paint to reusable cloth diapers. Several other countries, as well as the European Economic Community, are also preparing plans for labeling programs.

Two private initiatives for seal of approval programs are under way in the United States. Green Cross Certification Company, a nonprofit subsidiary of Scientific Certification Systems, Inc., has developed standards for products based on recycled content and, with respect to cleaning products only, biodegradability. Green Cross awards its seal to products that Green Cross certifies meets its specifications. Another nonprofit organization, Green Seal, has announced plans to issue its seal of approval to products that, based on an entire lifecycle analysis, cause significantly less harm to the environment than competing products. Like the seal of approval programs of other countries, Green Cross and Green Seal both award their seals only to companies that apply for endorsement. A number of retail chains such as Wal-Mart Stores, Inc., a United States discount store chain, and Loblaw Companies, Ltd., a Canadian supermarket chain, have adopted their own in-house environmental seal of approval programs.

The EPA has also expressed interest in seal of approval programs. The EPA's Office of Pollution Prevention recently commissioned a draft report assessing the feasibility of a nationwide seal of approval program in the United States. The draft report reviews the experience of countries such as Germany and Canada with government sponsored seal of approval programs and suggests goals, functions and structures for a quasi-governmental environmental labeling program in the United States.¹⁴

The ultimate goal of seal of approval programs and the regulatory scheme recommended by the Task Force is the same: to provide consumers with more information about the environmental consequences of their purchasing decisions and to encourage producers to reformulate their products to meet increased consumer demand for more environmentally benign products. The regulatory scheme proposed by the Task Force differs from the seal of approval programs that have been discussed, however, in several respects. First, all of the seal of approval programs involve a third party endorsement of qualifying products, either from a private organization or from a government agency. Second, the regulatory scheme recommended by the Task Force provides minimum requirements that products must meet in order to use the defined terms. In contrast, seal of approval programs generally contemplate setting higher standards that perhaps only a few products in a particular product category are able to meet. In that respect, the regulatory scheme proposed by the Task Force and the proposed seal of approval programs are not at cross purposes and could work side by side.

¹⁴ A copy of the draft report entitled "Environmental Labeling in the United States: Background Research, Issues and Recommendations" may be obtained by calling the EPA's Office of Pollution Prevention at (202) 245-4164.

The Task Force cautions, however, that environmental seal of approval programs can in themselves be confusing and even misleading. Because such programs generally involve an overall stamp of approval rather than a description of the specific environmental attributes of a product, they are necessarily based on complicated value judgments about what is best for the environment. Judgments and tradeoffs among environmental impacts must necessarily be made. For these reasons, the Task Force recommends that environmental seal of approval programs strive to meet the same general recommendations set out in Section III. B. for private businesses, which are designed to reduce and limit consumer confusion and the potential for deceptive advertising.

Another potential problem with seal of approval programs is that they may discriminate against products that do not apply for the seal because of economic considerations or for other reasons but which are no more harmful to the environment than the product on which the seal appears. Finally, there is a danger that competing seals of approval using different standards to assess environmental impacts will only further confuse consumers. Despite these potential problems, the Task Force feels that a single, carefully structured seal of approval program recognized by consumers throughout the United States has the potential to be a powerful mechanism for increasing consumer awareness of the environmental effects of purchasing decisions and for encouraging manufacturers to reduce the environmental impacts associated with their products.

5. Steps Toward Definitions and Standards

The Task Force has already begun to take concrete steps to aid the development of a national regulatory scheme for environmental advertising. The week following the Public Forum, the National Association of Attorneys General, at the urging of the

Attorneys General on the Task Force, unanimously endorsed the following resolution at its annual Spring Meeting:

[T]he National Association of Attorneys General requests the Federal Trade Commission and the United States Environmental Protection Agency to work jointly with the states to develop uniform national guidelines for environmental marketing claims, with input from environmental and consumer groups, members of business and industry, trade associations and other interested parties.¹⁵

In June of this year, the Attorneys General of California, Massachusetts, Minnesota, New York, Texas and Wisconsin¹⁶ offered extensive comments to Senator Frank R. Lautenberg of New Jersey on his legislative proposal for the regulation of environmental marketing claims. Senator Lautenberg's proposed legislation, the "Environmental Marketing Claims Act of 1990," would give the EPA authority to promulgate regulations defining environmental marketing terms. In their letter, the participating Attorneys General expressed support for Senator Lautenberg's proposed legislation and offered suggested modifications to further enhance the important public policies reflected in the Environmental Marketing Claims Act of 1990.¹⁷ The Task Force renewed its support in a letter to Senator Lautenberg dated October 11, 1990, but emphasized that the Task Force would not support federal legislation at the expense of the states' ability to both pursue deceptive advertising under existing state laws and to enact more stringent or comprehensive requirements for environmental claims.¹⁸

¹⁵ The full text of the NAAG resolution appears in Appendix G. The National Association of Consumer Agency Administrators passed a similar resolution in June 1990.

¹⁶ The Attorneys General of Washington and Missouri did not join the other states on the Task Force in commenting on Senator Lautenberg's proposed legislation because of timing considerations.

¹⁷ The June 29, 1990, letter submitted by the six Attorneys General is attached as Appendix H.

¹⁸ The Task Force's October 11, 1990, letter is attached as Appendix I. Senator Lautenberg introduced the Environmental Marketing Claims Act of 1990 on October 18, 1990. Environmental Marketing Claims Act of 1990, S. 3218, 101st Cong., 2d Sess. (1990).

In addition, the Attorneys General of New York and Massachusetts submitted comments in June 1990 on draft model regulations proposed by the Northeastern Recycling Council and the Source Reduction Council of the Coalition of Northeastern Governors that would define and regulate the use of terms such as "source reduction," "reusable," "recyclable" and "recycled content." Although generally supporting the draft regulations, the Attorneys General noted their preference for nationwide standards.¹⁹

Finally, the Task Force is continuing to work cooperatively with the FTC and the EPA on enforcement efforts as well as a determination of the most effective method for developing a national regulatory scheme for environmental claims. FTC staff and EPA staff have agreed to join the Task Force at the open hearings on the preliminary recommendations scheduled for December 10 and 11, 1990, in San Diego, California.²⁰ The Task Force looks forward to their participation at the December hearings and to the continuing coordination of state and federal efforts.

B. Preliminary Recommendations for the Business Community

The Task Force recognizes that the enactment of a comprehensive regulatory scheme for environmental marketing claims will be a complex and time consuming process for some of the same reasons that environmental claims are currently so confusing: the inherent complexity of environmental issues; the rapid technological changes currently taking place in product manufacturing and development; and, conflicting and changing approaches in methods of waste management. For

¹⁹ The letter submitted by the Attorneys General of New York and Massachusetts is attached as Appendix J.

²⁰ A letter from Barry Cutler, Director of the FTC's Bureau of Consumer Protection, is attached as Appendix K. A letter from Don R. Clay, Assistant Administrator of the EPA's Office of Solid Waste and Emergency Response, is attached as Appendix L.

definitions and standards to be truly effective in fostering truthful environmental advertising, they must be based on a thorough understanding of the scientific and technical issues underlying existing and emerging products as well as the changes taking place in waste management. It may prove to be very difficult to develop a comprehensive framework for the standardization of environmental marketing claims that is flexible enough to respond to desirable innovations in products and waste management methods.

Simply because it is difficult to develop such a comprehensive framework does not, however, mean that businesses are free to make any claims they desire. Environmental advertising is and will continue to be subject to regulation by existing state and federal laws prohibiting false advertising and unfair and deceptive trade practices. In general, these statutes prohibit advertisements which are untrue, misleading, deceptive, or fraudulent, including claims that, although literally true, mislead by omitting or obscuring information necessary to understand the claims made. The Task Force intends to continue to review and investigate environmental claims in light of these laws and to bring legal action when environmental claims violate them.

The Task Force is mindful, however, that the business community has requested some immediate guidance on how environmental claims can be made in a manner that is consistent with state and federal laws. As stated earlier in this Report, the unrestrained use of environmental claims threatens to derail the real and substantial contributions consumers and business can make to environmental protection by moving toward products that have less harmful impacts on the environment. In light of the vital environmental interests at stake and the risks inherent in delay, the Task Force has determined that it is appropriate to provide business with some interim guidance. Accordingly, the Task Force offers the following preliminary recommendations to guide

businesses that wish to make environmental claims while the process of developing more concrete and specific definitions and standards continues. Equally important, the Task Force believes that the following preliminary recommendations offer a framework upon which more concrete definitions and standards can be developed.²¹

1. CLAIMS SHOULD BE SPECIFIC.

Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.

Commentary: *Not only are terms such as "environmentally friendly" or "safe for the environment" too vague to be meaningful but, because of the inherent complexity of environmental issues, simplified statements have a tendency to be inaccurate. Moreover, vague and incomplete claims do not permit consumers to make meaningful comparisons between products. Providing more specific information allows consumers to evaluate environmental attributes for themselves and makes an important*

²¹ Legislation recently adopted in California regulates the use of several terms currently used in environmental advertising, such as "ozone friendly," "recycled," "biodegradable," and "recyclable." 1990 Cal. Stats. Ch. 1443 (effective January 1, 1991). New York has also issued regulations for the use of the state recycling emblem and the terms "recyclable," "recycled" and "reusable." N.Y. Comp. Codes R. & Regs. tit. 6, pt. 368 (1990). The regulations of each of these states are generally consistent with the preliminary recommendations set forth in Section III. B.

Of course, to the extent that any federal law expressly conflicts with these preliminary recommendations, such federal law would take precedence. In addition, any expressly conflicting state law would control in such state.

The Task Force notes that the legislatures of a few states have enacted legislation requiring certain plastic products to be "biodegradable" or "degradable." See, e.g., Fla. Stat. Ann. § 403.708(4)(a) (West Supp. 1990); Minn. Stat. Ann. § 325E.045 (West Supp. 1990). Florida's definition of "degradable" applies only to specified materials and products and reflects only a litter control perspective. These statutes were enacted in an initial flurry of enthusiasm over "degradability," before legislatures had solid information as to the benefits of degradable products in current waste disposal systems. The Task Force suggests that legislatures revisit these statutes now that the science underlying "degradable" products in the context of current waste disposal systems is more thoroughly understood. In 1990, the Minnesota legislature did just that by repealing, before the provision even went into effect, that portion of Minn. Stat. § 325E.045 that prohibited state agencies from buying or using non-"degradable" polyethylene disposal bags. In repealing this provision, the Minnesota legislature relied on a report, prepared by a government appointed committee, that cited the uncertain benefits of "degradable" plastics in current waste disposal systems; concerns over the safety of the end products; and the effect of the promotion and sale of "degradable" plastics on efforts in recycling, consumer education and litter reduction.

contribution to consumer education. Specific claims also prevent the misunderstanding that is probable when a more generalized term or phrase is used because such term or phrase may be subject to more than one reasonable interpretation. Finally, specific information minimizes the risk that consumers will attach a broader significance to the product's actual environmental attributes than is warranted.

Examples:

1.1 Use of Terms "Environmentally Friendly" and "Safe for the Environment."

Generalized claims of environmental benefit such as "environmentally friendly" or "safe for the environment" necessarily incorporate value judgments. What is "environmentally friendly" to one consumer may not be "environmentally friendly" to another. In the absence of standards for comparing the environmental impacts of products throughout a product's lifecycle, it is very difficult, if not impossible, to substantiate claims of generalized environmental benefit. Moreover, generalized environmental claims may create an unwarranted impression that a product is good for the environment in all respects. As stated earlier in this Report, the production and use of products necessarily has adverse environmental consequences. For these reasons, such claims should be avoided altogether or, if used at all, should specify in close proximity and comparable

prominence to the generalized claim the basis for the claim.²²

1.2 Pre-existing Environmental Attributes.

In promoting a previously existing but unidentified environmental attribute of a product, it should be made clear that the product has not been modified or improved. For example, because the federal government first banned the use of chlorofluorocarbons ("CFCs") in most aerosol spray products in 1978, the fact that an aerosol spray product is made without CFCs should be promoted carefully to avoid the impression that CFCs have recently been removed and to avoid the problems discussed in Example 1.3 below.

Other examples of products that have not been modified but which now make environmental claims include paper and plastic bags labeled "recyclable" or "degradable." Although these claims may be inappropriate for other reasons as well (see Recommendation 2 below), they illustrate how eager companies are to characterize any existing attributes of their products as "environmental benefits" in order to create a positive environmental image.

²² In Canada, the government's environmental labeling program was originally called the "Environmentally Friendly Products Campaign," but was changed to "Environmental Choice." The phrase "environmentally friendly" was considered inaccurate because a product can be environmentally benign without actually improving the environment. In Germany, the environmental labeling logo originally read, "Environment-Friendly because" The German logo is now being changed for the same reason.

1.3 Removal of Harmful Ingredient.

In promoting the removal of a single harmful ingredient or a few harmful ingredients from a product or package, care should be taken to avoid the impression that the product is good for the environment in all respects. For example, some aerosol spray products made without CFCs that are advertised as "safe for the environment" or "ozone friendly" may contain other ingredients that contribute to destruction of the stratospheric ozone layer, specifically 1,1,1 - trichloroethane.²³ Certain of these products identify the chemical additives on the label; others do not. Promoting such a product as "ozone friendly" is clearly misleading. Describing such a product as "contains no CFCs" is also likely to be misleading because the phrase "no CFCs" has come to mean "safe for the ozone" to most consumers.

Labeling an aerosol spray product that does not contain any ozone depleting chemicals as "safe for the environment" may also be misleading because many of these products contain volatile organic compounds that are linked to the creation of smog. A more appropriate, less confusing claim for such a

²³ In June 1990, parties to the Montreal Protocol, the international agreement for the protection of the stratospheric ozone layer, adopted a goal of the complete phase-out of 1,1,1 - trichloroethane by the year 2005. Both the House and Senate versions of the Clean Air Act Amendments include provisions that would phase out all use of the chemical.

product would be one which states "does not contribute to ozone depletion" and also lists the substitute and all other ingredients actually used in the product to allow consumers to avoid other potentially harmful propellants or ingredients if they choose.

1.4 Benefits of Product versus Packaging.

A clear distinction should be made between the environmental attributes of a product and the environmental advantages of its packaging. The testimony of a county recycling official at the Public Forum illustrates the problems that can arise when such distinction is not clearly made. A manufacturer of disposable diapers placed a sticker on the plastic wrapper containing its diapers which states "RECYCLABLE" in large capital letters. Below the word recyclable, in smaller print, are the words "This softpac is recyclable where plastic bag recycling facilities exist." The county recycling official reported that shortly after the sticker appeared on the wrapper, a consumer dropped off a pile of the plastic wrappers and a garbage bag full of dirty diapers. Evidently, the consumer thought the diapers, as well as the plastic wrapper, were recyclable. In fact, the recycling facility accepts only milk and soft drink bottles -- not plastic bags and certainly not disposable diapers.

1.5 Use of Term "Recycled."

The word "recycled" alone does not provide a consumer with sufficient information to make meaningful comparisons between products. Therefore, the percentage of the recycled material used in the product should be disclosed on any product labeled "recycled."

In addition, a distinction should be made between pre-consumer recycled material and post-consumer recycled material. This distinction is important because consumers generally understand the term "recycled" to mean materials made from products previously used by consumers and diverted from the solid waste stream. In fact, many products currently labeled "recycled" are made from industrial waste, either industrial waste generated and commonly reused in a company's own manufacturing process or industrial waste sold in the recycling market. The use of industrial waste in the recycling process is clearly an important step in the reduction of overall waste, the first priority in our nation's solid waste hierarchy. Designating the source of materials in products labeled "recycled," however, provides consumers with more information and can be expected to contribute to

the expansion of markets for post-consumer waste.²⁴ As an example, the text of this Report is printed on 100% recycled paper, 5% of which is post-consumer waste and 95% of which is pre-consumer waste.

1.6 Comparative Claims.

Any specific claim that includes a comparative statement such as "better for the environment" should only be used if a complete and full comparison is made and the basis for the comparison is stated. Such a comparison might be: "This product is better than [our former product] [our competitor's product] because"

²⁴ Most existing definitions for the term "recycled" set minimum requirements for post-consumer waste content in order to encourage or ensure that some amount is included in materials designed as "recycled." For example, effective January 1, 1991, products advertised as "recycled" in California must contain "at least ten percent by weight of post-consumer material." 1990 Cal. Stats. Ch. 1443. Post-consumer material "does not include manufacturing wastes." *Id.* Regulations in New York have also defined the term "recycled" for different materials. These regulations specify a minimum mix of pre- and post-consumer waste for various materials and require that the total amount of recycled waste appear on the product. N.Y. Comp. Codes R. & Regs. tit. 6, pt. 368 (1990). The definition of "recycled" proposed by the Northeastern Recycling Council and The Source Reduction Council of the Northeastern Governors as well as Green Cross' recycled content certification standards set minimum requirements for post-consumer waste content. Senator Lautenberg's proposed legislation also limits the use of the term "recycled" to products containing some percentage of post-consumer waste. Environmental Marketing Claims Act of 1990, S. 3218, 101st Cong., 2d Sess. § 6(b)(7)(A) (1990).

2. CLAIMS SHOULD REFLECT CURRENT DISPOSAL OPTIONS.

Environmental claims relating to disposability (e.g., "degradable" or "recyclable") should not be made unless the advertised disposal option is currently available to consumers in the area in which the product is sold and the product complies with the requirements of the relevant waste disposal programs.

Commentary: Time and again during the Public Forum, when the Presiding Panel asked what supposed environmental benefit a "degradable" product provides when disposed of in a landfill, the answer from business was, "Well, maybe not in a landfill, but what about composting?" The simple truth is that, although some communities may be moving toward composting as a means of mixed solid waste disposal, composting is not an available disposal option at the current time for most consumers in the United States. The advertising today of an environmental benefit that cannot be realized until some uncertain time in the future is confusing and misleading to the public. To avoid potential deception, claims such as "degradable" that relate directly to disposal should be made in the context of disposal options that are currently available to consumers in the area in which the advertisement is made.

In addition, a manufacturer promoting a product as suitable for a particular disposal option should also ensure that the product complies with the requirements of the relevant programs in the area in which the product is sold. Waste management practices currently vary among states and within states. For example, there are multiple technologies for recycling waste and, consequently, a waste product that is recyclable using one manufacturing process may not be able to be recycled in another.²⁵ Similarly, there are multiple methods and markets for compost, and a material labeled as suitable for composting by the manufacturer may not be suitable for

²⁵ For example, some communities recycle only specific resin types whereas some recycle mixed plastics through a relatively new technology.

composting according to local solid waste regulations or requirements. Finally, some local waste districts are seeking, or may be required, to control specific aspects of environmental quality, such as air quality if waste is incinerated, by controlling components of the waste stream. It is misleading to promote a product as suitable for a particular disposal option if it does not comply with the local requirements of the relevant programs in the area in which the product is sold.

The Task Force recognizes that this recommendation is likely to draw criticism from the business community. By tying environmental claims to disposal options available to consumers in a particular area, companies desiring to make disposability claims may be required to vary their advertising according to location. Because the primary responsibility for solid waste disposal currently rests with state and local governments, the Task Force has made a preliminary determination that disposability claims must reflect existing local environmental and waste disposal conditions in order to provide consumers with accurate and relevant information.²⁶ Recognizing the complexity of this issue, however, the Task Force requests that participants at the open hearings pay particular attention to this recommendation.

Examples:

2.1 Use of Terms "Degradable," "Biodegradable," and "Photodegradable."

Products that are currently disposed of primarily in landfills or through incineration -- whether paper or plastic -- should not

²⁶ Many companies already limit the sale of particular products to certain markets for various reasons. Several manufacturers have informed the Task Force that they currently target the sale of some products to certain locations based on local waste disposal needs or requirements. In addition, the Task Force notes that many companies, in an attempt to come out with environmental claims as quickly as possible, have used stickers to "update" their packaging. Stickers may also be a useful method of targeting environmental claims to specific areas based on available disposal options.

be promoted as "degradable," "biodegradable," or "photodegradable." Virtually all organizations testifying at the Public Forum stated that even products specifically modified to degrade more rapidly than conventional products do not degrade at any appreciable rate in landfills. Moreover, in a report submitted to Congress in February 1990 entitled "Methods to Manage and Control Plastic Wastes," the EPA stated that degradable plastics will not help solve the landfill capacity problems facing many communities in the United States. The Task Force is concerned that consumers do not sufficiently understand that degradability offers little or no environmental benefit for products that will be disposed of in landfills or incinerators and that, consequently, such claims are misleading.

2.2 Use of Term "Compostable."

A product should be not promoted as "compostable" or "compostable where composting facilities exist" unless the particular item is currently composted in a significant amount in the area in which the product is sold. There are currently very few locations in the United States that compost mixed municipal solid waste. Without the ability to have an item composted in the consumer's area, promoting a product as "compostable" is utterly meaningless and thus deceptive.

Although there are a growing number of food waste and yard waste composting facilities, the methods and facilities vary greatly from community to community. Many of these facilities operate with different time frames for "curing" the compost into a usable end product and different criteria for evaluating the finished compost, which often include minimum contaminant levels for heavy metals or other toxics. If yard waste composting is available in a particular community, a company desiring to promote bags as suitable for yard waste composting should first ascertain that the bags comply with the requirements of local composting facilities.

In addition, because of the widespread misunderstanding among consumers about the benefits of "degradability" for products disposed of in landfills, the label of any product promoted as "degradable" or "compostable" in a composting setting should clearly and prominently disclose that the product is not designed to degrade in landfills.

2.3 Use of Term "Recyclable."

Similarly, for the reasons discussed in Section II. B. 2., products should not be promoted as "recyclable" or "recyclable where facilities exist" unless the particular item is currently recycled in a significant amount in the state in which

the advertisement is made.²⁷ If only the technical recycling potential of the primary material is assessed, these gratuitous "recyclable" claims could be made for virtually all materials, including plastics, metals, glass and paper. Again, a product should not be promoted as "recyclable" if it contains additives or other materials that make the product unsuitable for recycling programs in the area in which it is sold.

2.4 Incineration Claims.

The EPA and waste managers consider the control of the components of the waste stream which enter incinerators to be a method for reducing specific air emissions of particular incineration facilities. As a consequence, a waste district may prohibit the incineration of a specific product, packaging material or the like, even though, in the manufacturer's opinion, it does not present a problem. A manufacturer should not promote a product as "safe for incineration" if the product contains materials or additives sought to be controlled by the waste district of the area in which the product is sold.

²⁷ This localized approach is consistent with California's newly enacted legislation which provides that a product labeled "recyclable" must be able to be "conveniently recycled . . . in every county in California with a population of over 300,000 persons." 1990 Cal. Stats. Ch. 1443. Similarly, regulations in New York limit use of the term "recyclable" to 1) materials for which at least 75% of the population has access to recycling facilities accepting those materials; 2) materials with a state-wide recycling rate of 50% or more; 3) materials with a manufacturer or distributor recycling rate of 50% or more; or 4) materials that are recycled within a particular municipality, but in such case, advertisements for this attribute can only be made on store shelves and displays for the material in those particular municipalities. N.Y. Comp. Codes R. & Regs. tit. 6, pt. 368 (1990).

3. CLAIMS SHOULD BE SUBSTANTIVE.

Environmental claims should be substantive.

Commentary: *Nonsubstantive claims are widespread in "green marketing" today. These trivial and irrelevant environmental claims create a false impression of a product's overall environmental soundness. They also contribute to consumer confusion. Although this may, in the short run, aid the sale of a given product, it reflects an irresponsible attitude toward the environment and may be misleading.*

Examples:

3.1 Trivial and Irrelevant Claims.

The broad variety of trivial and irrelevant environmental claims being made today almost defies description. Examples include products promoted as "degradable" that will be disposed of in landfills or incinerators, and trash bags, which are highly unlikely to be used again for any purpose, advertised as "recyclable." Still another example of a technically accurate but irrelevant claim is a polystyrene foam cup that claims to "preserve our trees and forests." It is simply irrelevant, and perhaps deceptive, to suggest that a product made of petroleum products, a scarce nonrenewable natural resource, provides an environmental benefit because it does not use trees, the natural resource that would have been used if the cup had been made of paper instead of polystyrene.

3.2 Single Use Products.

Many products that are designed to be thrown away after a single use, such as disposable diapers, paper plates or shopping bags, sport lists of alleged environmental disposal benefits such as "safe for the environment," "landfill safe" or "degradable." Such claims convey an implicit message that disposal of a single use item -- perhaps the most environmentally distressing aspect of the product -- does not contribute to the overall solid waste disposal problem. These claims therefore run the risk of leading consumers to ignore or reject more durable alternatives to single use products, such as cloth diapers, reusable plates or canvas shopping bags. Single use disposable products promoted on the basis of environmental attributes should therefore be promoted carefully to avoid the implication that they do not impose a burden on the environment.

4. CLAIMS SHOULD BE SUPPORTED.

Environmental claims should be supported by competent and reliable scientific evidence.

Commentary: *Of course, this recommendation does not set forth a new legal requirement. Instead it restates what has always been required under state and federal law -- that advertising claims must be supported by tests, analysis, research or studies conducted or evaluated in an objective manner by persons qualified to do so using*

procedures generally accepted by others in the profession to yield accurate and reliable results.

The Task Force notes that in the course of its investigation of environmental claims, some companies have attempted to minimize their responsibility for claims that appear on their products by pointing to information provided by suppliers of the constituent materials. Companies that fail to independently confirm substantiation provided to them by suppliers do so at their peril. Aside from potential legal liability, a company that does not independently confirm the accuracy and completeness of claims made by suppliers abdicates its duties to its consumers and the environment.

In addition to ensuring that environmental claims are adequately supported, business can make a significant contribution toward the public debate about environmental problems by making the substantiation for environmental claims available to the public, regulators and experts. Although the Task Force recognizes that companies will often feel it necessary to keep certain information confidential, the Task Force urges companies to make information about the composition and the environmental effects of their products and the substantiation for their environmental claims available to the public to the greatest extent possible.

The Task Force's ultimate goal is to promote the development of specific and concrete definitions for terms commonly used in environmental advertising and standards for applying those definitions. Based on the testimony and written comments presented at the Public Forum and the Task Force's ongoing investigation of environmental claims, the Task Force has developed the above preliminary recommendations to provide guidance to businesses desiring to make environmental claims until such definitions and standards are enacted. Equally important, these

preliminary recommendations express principles that the Task Force believes should underlie the national regulatory scheme proposed in Section III. A.

As noted throughout this Report, the Task Force strongly feels that an open dialogue among public officials, environmental and consumer groups and the business community is essential to the development of a comprehensive and effective regulatory scheme for environmental claims. The Task Force has therefore decided to hold open hearings on the preliminary recommendations in San Diego, California, on December 10 and 11, 1990. Representatives of the FTC and the EPA will be joining the Task Force at the hearings. The Task Force invites environmental groups, businesses, consumer groups, government agencies and other interested parties to attend the open hearings and offer oral and written comments on the Task Force's preliminary recommendations. Following the hearings, the Task Force will, as necessary, make appropriate revisions to the preliminary recommendations and issue its final recommendations as soon thereafter as possible.

SECTION IV

Conclusion

The sensitivity of business to consumer interest in products that are less harmful to the environment than existing products is on the rise. This trend has the potential to move businesses beyond the requirements of state and federal environmental regulatory programs of the last two decades. This same consumer interest also has the potential to move businesses more swiftly than required toward recently legislated or negotiated environmental goals, such as phasing out the manufacture of CFCs.

Already, however, that potential is at risk. In response to intense competition, companies are increasingly making environmental claims that are confusing or trivial, and in some cases, misleading or unsubstantiated. Unfortunately, if consumers'

genuine willingness to shift their purchasing practices towards products that are less harmful to the environment falls prey to businesses' attempt to make short-term profits, the promise of the corporate "green revolution" will be wasted.

This opportunity must not be lost. Businesses must be held accountable for the environmental claims they make. Further, they must provide adequate substantiation of claims when they do develop products that are truly better for the environment than existing products. There must be standards and definitions that apply across the board to all businesses so that information provided to consumers enables them to make informed choices between products on environmental grounds. The Task Force has resolved to vigorously pursue the promotion of a national regulatory scheme that provides such definitions and standards. Until such system is in place, however, recommendations along the lines proposed above can serve as guides to business in advertising the environmental benefits of their products so that such advertisements do not mislead or deceive consumers and truly benefit the environment.

Already, there are signs that some companies are showing restraint in making environmental claims. In the first quarter of 1990, Dow Chemical Company announced that it would remove its "photodegradable" and "recyclable" claims from its "Handi-Wrap" product. First Brands and Mobil Chemical Company, Inc. have also announced plans to discontinue promoting their "Glad" and "Hefty" trash bags as "degradable." In a settlement with the Task Force, American Enviro Products, Inc., has agreed to stop advertising its "Bunnies" brand disposable diapers as "biodegradable." The Task Force has been contacted by several other companies indicating that they intend to withdraw or modify environmental advertising claims in light of the Task Force's concerns. The Task Force is encouraged by the actions of these companies and urges other companies to modify their environmental marketing claims in light of the above recommendations. Adherence to these recommendations represents an important

step toward ensuring that environmental claims are not deceptive and a significant commitment by business to meeting its responsibility toward the environmentally conscientious consumer and the environment.

TRANSCRIPT ORDER FORM

**PUBLIC FORUM ON ENVIRONMENTAL MARKETING
MARCH 14 AND 15, 1990**

Please send me _____ cop(ies) of the Transcript from the Public Forum on Environmental Marketing. Enclosed is \$100 (check or money order) for each copy ordered.

Please send the above items to:

Name

Organization

Address

Telephone No.

Please return this form to:

Minnesota's Bookstore
117 University Avenue
St. Paul, MN 55155

APPENDIX A



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

February 16, 1990

102 STATE CAPITOL
ST. PAUL, MN 55155
TELEPHONE (612) 296-6196
FACSIMILE (612) 297-4191

TO: Environmental Groups, Businesses and Consumer Groups

Re: Public Forum on Environmental Marketing

The Attorneys General of California, Massachusetts, Minnesota, Missouri, New York, Texas, Washington and Wisconsin have formed a task force to review the claims made in connection with the sale of "environmentally friendly" products and to promote the development of standards to guide companies in advertising the environmental benefits of products. In response to consumers' increasing concern with environmental issues, many companies have recently come out with products claiming to be better for the environment, and many new "environmentally friendly" products are on the drawing board. The task force is concerned about the confusion and potential for abuse in the advertising and sale of such products.

To assist us in becoming familiar with recent trends in environmental marketing, potential problem areas and possible solutions, the states will hold a public forum on environmental marketing March 14 and 15 in St. Paul, Minnesota at the Radisson St. Paul, 11 East Kellogg Boulevard.

On behalf of my office and those of the other sponsoring Attorneys General, I would like to invite your organization to attend the forum and to offer its thoughts and suggestions on ways of approaching this important area. We would welcome your comments on the following issues:

1. What are the most significant current trends in environmental marketing?
2. What level of substantiation and supporting evidence should be required before a marketer makes an environmental claim for a product?
3. What are some possible definitions for commonly used, but currently undefined, terms such as "degradable," "recyclable," "recycled," and "environmentally friendly"?
4. Where are the greatest areas of potential abuse in environmental marketing?

APPENDIX B

5. How can we best promote honesty and full disclosure in environmental marketing?

We ask that you limit your comments to ten minutes so that we may hear from as many participants as possible. In addition to your oral comments, we would welcome receiving written comments and any other relevant studies, reports or information that would assist us in addressing the above issues.

If you are interested in attending the forum, please mail or telecopy the enclosed response before Wednesday, February 28, 1990, to:

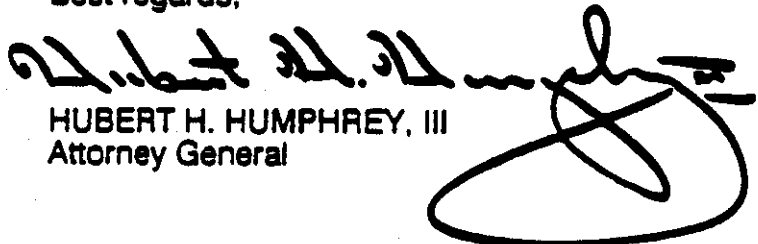
Don Donahugh
Minnesota Attorney General's Office
200 Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 297-4719
FAX: (612) 297-4348

Time slots will be assigned on a first-come first-served basis. We will notify you by mail or telecopy on or before Monday, March 5, 1990, of the date and approximate time of your presentation. We understand the forum has been scheduled on short notice. In light of the recent interest in the area, however, we have determined the forum should be held as soon as possible.

For your convenience, we enclose a list of St. Paul hotels. The Radisson St. Paul Hotel, the site of the forum, has offered a rate of \$55 per night for conference participants. For reservations, call 1-800-228-9822.

We look forward to a productive dialogue and hope you will be able to attend.

Best regards,


HUBERT H. HUMPHREY, III
Attorney General

Enclosure

AGENDA

PUBLIC FORUM ON ENVIRONMENTAL MARKETING MARCH 14 AND 15, 1990

Wednesday
March 14, 1990

OPENING REMARKS:

Hubert H. Humphrey, III
Minnesota Attorney General

Barry Cutler
Director of Bureau of Consumer Protection
Federal Trade Commission

Sharon Stahl
Chief of Policy Analysis Branch
Office of Pollution Prevention
Environmental Protection Agency

Steve Gardner
Assistant Attorney General
Texas Attorney General's Office

SPEAKERS:

Bob Viney and Dr. Debra Anderson
Procter & Gamble

Jeanne Wirka
Environmental Action Foundation

Dr. Richard Denison
Environmental Defense Fund
(Remarks read by Jeanne Wirka)

Robert J. Barrett
Mobil Chemical Company

BREAK

REMARKS:

Don Hanaway
Wisconsin Attorney General

APPENDIX C

SPEAKERS:

Ramani Narayan
ASTM

Timothy E. Shiveley
Archer Daniels Midland

Patrick J. O'Brien
First Brands

Beth Topor and John Burke
James River Corporation

LUNCH BREAK**REMARKS:**

William Webster
Missouri Attorney General

SPEAKERS:

Barry E. Williams
American Enviro Products, Inc.

Jeffrey Hollender
Seventh Generation, Inc.

Ellen Schaplowsky
Ruder Finn

Kenneth Smaha
Webster Industries, Div. c Chelsea Industries

Karl Kamena
Dow Chemical Co.

Suzanne Shelton-Foley
RMED International

BREAK**SPEAKERS:**

Anthony Redpath
Enviromer Enterprises

Michael Robertson
Minnesota Office of Waste Management

John Kamp
American Association of Advertising Agencies

Joel Holland
Minnesota Grocers Association

Gary S. Kerlagon, Sr.
North American Plastics Corp.

Ronald L. Walling
Advanced Materials Center

Thursday
March 15, 1990

WELCOME:

Andrea Levine
Assistant Attorney General
New York Attorney General's Office

SPEAKERS:

Denis Hayes
Green Seal

Robert McKernan
American Paper Institute

Richard L. Erickson
Weyerhaeuser Paper Company

Michael W. Fitzgerald
Nice-Pak Products, Inc.

Dave Locey
Minnesota Soft Drink Association

BREAK

SPEAKERS:

Susan Schmidt
Minnesota Project

Brian Spielmann
Environmental Consultant/Engineer

C. T. Stockton and Ed Waldman
Keyes Fibre Co.

David Rapaport
GreenPeace U.S.A.

Kevin Kelleher
Houston County Recycling

LUNCH BREAK

SPEAKERS:

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Minnesota Retail Merchants Association

Debbie Meister
District 14 Community Council St. Paul

James Elgin
ChemRex, Inc.

Diane Jensen
Clean Water Action Project

Fred Hunt
Ringer Corporation

Timothy Draeger
National Corn Growers Association

BREAK

SPEAKERS:

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Mary Tkach
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**PUBLIC FORUM ON ENVIRONMENTAL MARKETING
MARCH 14 AND 15, 1990**

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

**Spring Meeting
March 18-20, 1990
Washington, D.C.**

RESOLUTION

**SUPPORTING DEVELOPMENT OF UNIFORM NATIONAL
GUIDELINES FOR ENVIRONMENTAL MARKETING CLAIMS**

WHEREAS, American consumers are increasingly concerned about a wide array of threats to the environment and are increasingly interested in changing their daily lives to contribute personally to the preservation of that environment; and

WHEREAS, consumers are translating these attitudes into purchasing decisions, and are beginning to seek out products they believe will help the environment; and

WHEREAS, many businesses have begun to advertise and label products in a fashion designed to promote them as "degradable," "recyclable," "recycled" or otherwise "environmentally friendly," but these terms have no fixed or widely understood meanings, and are sometimes used in ways that are confusing and potentially misleading; and

WHEREAS, a Public Forum on Environmental Marketing was conducted in St. Paul, Minnesota, on March 14 and 15, 1990, by Attorneys General Humphrey, Hanaway, Webster, and Spaeth, and representatives of Generals Abrams, Shannon, Eikenberry and Mattox, as well as representatives of the Federal Trade Commission and Environmental Protection Agency, to hear testimony on the issues, problems and potential abuses in the field of environmental marketing; and

WHEREAS, witnesses at the Forum, including representatives of manufacturers, retailers, environmental groups, trade associations and consumer groups, were virtually unanimous in urging the development of uniform but flexible national guidelines to help ensure the honesty of environmental claims in marketing;

NOW THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

- 1) Requests the Federal Trade Commission and the United States Environmental Protection Agency to work jointly with the states to develop uniform national guidelines for environmental marketing

claims, with input from environmental and consumer groups, members of business and industry, trade associations and other interested parties.

- 2) Authorizes its Executive Director to make these views known to the Federal Trade Commission, Environmental Protection Agency and other interested parties.

BE IT FURTHER RESOLVED that the Executive Director is authorized to contact the Federal Trade Commission and Environmental Protection Agency to convey these views.



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

June 29, 1990

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

200 UNIVERSITY AVE.
ST. PAUL, MN 55101
TELEPHONE: 621-2400
FACSIMILE: 621-2400

The Honorable Frank R. Lautenberg
United States Senate
717 Hart Senate Office Building
Washington, DC 20510-3002

Re: Comments on Draft Legislation Regulating
Environmental Marketing Claims

Dear Senator Lautenberg:

The undersigned Attorneys General appreciate the opportunity to comment on your legislative proposal for the regulation of environmental marketing claims, provisionally entitled the Environmental Marketing Claims Act of 1990 (Environmental Claims Act or Act). We commend you for your anticipated sponsorship of this important legislation that would greatly curtail the exploitation of consumers and the environment resulting from the alarming increase in confusing and deceptive environmental marketing claims.

As you know, the undersigned Attorneys General are part of a national task force of Attorneys General (the Task Force) investigating the rising number of environmental marketing claims. Staff from both environmental protection and consumer protection backgrounds are involved in this effort. As of this date, the Task Force has several ongoing investigations of environmental claims, and lawsuits have been filed in seven states against a leading manufacturer of so-called "degradable" plastic trash bags.

The Task Force recognizes, however, that legal action against products already on the market is only part of the solution to the problem of confusing and misleading environmental claims. In March of this year, the Task Force, the Federal Trade Commission (FTC) and the Environmental Protection Agency (EPA) sponsored a national public forum focusing on the promotion of products as "environmentally friendly." Representatives of over 40 environmental groups, consumer groups, businesses and governmental organizations testified on how to address the growing number of confusing and misleading environmental claims.

APPENDIX H

Surprisingly, almost every organization testifying at the forum called for the development of standards, guidelines or definitions to guide business in making environmental claims and to assist consumers in understanding them.

Encouraged by the widespread call for uniform national standards, the Task Force urged the National Association of Attorneys General to go on record in support of national standards. Accordingly, in March of this year the National Association of Attorneys General overwhelmingly endorsed a resolution calling on the FTC and the EPA to work jointly with the states to develop uniform national guidelines for environmental marketing claims, with input from environmental groups, consumer groups and members of the business community.

Your proposed legislation, Senator Lautenberg, provides a framework for this national regulation and standardization of environmental marketing claims, and we support your proposed legislation. The following comments and suggested modifications are offered by the undersigned Attorneys General to advance the important public policies reflected in the Environmental Claims Act of providing consumers with truthful information with which they can more accurately assess the environmental consequences of their purchasing decisions.

1. Findings and Purposes.

Currently, advertising claims, including environmental claims, are subject to state and federal laws prohibiting false advertising and unfair and deceptive trade practices. In general, these statutes prohibit advertisements which are untrue, misleading, deceptive or fraudulent, including claims that, although literally true, mislead by omitting or obscuring material facts necessary to understand the claims made. The Task Force and the FTC are each currently vigorously enforcing these laws against deceptive environmental advertising. We therefore suggest that subsection 2(a)(5) of the Act be modified to clarify that environmental claims are "largely" unregulated and to avoid the impression that such claims are completely unregulated at the present time.

We also suggested that subsection 2(a)(5) be expanded to explain more fully the very real and substantial harm caused by false environmental advertising: First, that consumers may stop taking environmental concerns into consideration in making purchasing decisions if they feel their genuine interest in the environment is being exploited and, second, that some environmental claims may in fact be impeding real solutions to environmental problems.

2. Definitions.

Subsection 3(1) of the Act defines the term "product" to include the "packaging" of the product. In other sections of the Act, however, such as subsection 6(a)(3), product and packaging are referred to separately. We are concerned that the reference to "product" as including packaging in some cases but as separate from packaging in other cases might cause unintended confusion in the interpretation of the Act. We therefore suggest that these terms be used consistently throughout.

3. Independent Advisory Board.

The idea of an independent advisory board comprised of a cross-section of industry, environmental, consumer and government representatives to advise the Administrator of the EPA (the Administrator) in setting standards for environmental claims is an excellent one. We have several suggestions to enhance the representative nature and operation of the board.

a. Composition. First, we recommend that the number of consumer advocates be increased from two to three to correspond with the number of representatives from the business community. Second, we suggest that the reference to representatives of "industry and manufacturing" in subsection 5(b)(1)(B) be expanded to include representatives of the retailing industry. The retailing community is an important link between manufacturers and consumers. Moreover, retailers have recently taken an active role in relaying information to consumers about the environmental effects of the products they sell. Authorizing the Administrator to include a representative of the retailing community on the board would greatly enhance the diversity of interests and experience represented on the board.

Third, we urge that the description of the type of government representatives that should be included on the board set forth in subsections 5(b)(1)(D) and (E) be expanded to require the inclusion of at least one expert in consumer protection or the regulation of marketing claims. The Task Force is currently comprised of representatives from both environmental and consumer backgrounds, and we have found that the expertise of both groups is essential for the effective regulation of environmental claims. Representatives of state and local consumer protection agencies have worked with the concept of deception for many years and will provide the board with important insight into how consumers interpret environmental claims.

Finally, we strongly urge that government representatives on the board be accorded the same voting rights as other members,

rather than serving merely in an ex officio capacity. According all members on the board full voting rights is essential to ensuring that board policy reflects the view of the entire board and that government representatives on the board play an active role in the development of board policy.

b. Administrative Matters. Subsection 5(c) of the Act wisely opens the operations and recommendations of the independent advisory board to public scrutiny by providing, among other things, that "public comments" shall be published in the Federal Register. We assume that this means that notice of hearings and the issues on which public comment is requested will also be published in the Federal Register, and not just that the public comments themselves will be published.

4. Standardization of Terms.

a. List Not Exclusive. The heart of the Environmental Claims Act is, of course, its delegation of authority to the Administrator in subsection 6(b) of the Act to promulgate regulations governing the use of environmental marketing claims. The list set forth in that subsection is an excellent starting point for the terms that are currently most subject to confusion and abuse. If under federal law, the term "including" is not specifically interpreted to mean "including but not limited to," we recommend that this subsection be revised to make it clear that the list is not exclusive, but rather a starting point.

b. Additional Terms. In the course of the Task Force's review of environmental marketing claims, we have come across the following additional terms that are currently causing widespread confusion:

- i. Landfill safe/inert in landfills/non-leaching in landfills.
- ii. Non-toxic when incinerated.
- iii. Water-based inks.
- iv. No CFCs/ozone friendly.
- v. Non-toxic.
- vi. Better for landfills.
- vii. Better for incineration.

We recommend that these terms also be included in the list in subsection 6(b).

c. Minimizing Avoidance. Although we understand your concern regarding the blanket prohibition of certain terms, we are concerned about the ability of "creative" advertisers to avoid operation of the Act by using terms in advertising that are not explicitly defined by regulations promulgated under the Act. We have several recommendations to limit the ability of businesses to circumvent the Act by using such undefined terms.

First, we suggest that the Act or the regulations provide that the defined terms include "any variation or synonym of any of those words." Further, we recommend that only the term designated by the Act or regulations may be used to convey the meaning sought. As an illustration of these suggestions, any advertiser desiring to make a claim regarding the ozone safety of its product, whether it be "ozone neutral," "no CFCs" or "ozone friendly," would be required to demonstrate that its product meets the requirements set forth under the regulations for a claim of that type and would be required to use the term designated by the Act, for example, "ozone neutral," to make that claim.

Finally, we strongly urge that the Act obligate the Administrator to promulgate definitions on an ongoing basis for previously undefined terms that become the subject of confusion or abuse. Incorporating a procedure whereby citizens, manufacturers, environmental groups and consumer groups can request the Administrator to promulgate definitions for new terms used in advertising might be an effective means of bringing such terms to the attention of the Administrator.

5. Considerations in the Promulgation of Definitions.

As you know, the Task Force has been particularly concerned with the current use of the terms "degradable," "biodegradable," and "photodegradable." In light of the manner in which we currently dispose of a majority of our solid waste (landfills or incinerators), we feel that, at the present time, promoting a product as "degradable" is inherently misleading. One way to minimize the deceptive use of claims regarding "degradability" without banning use of such claims altogether would be to require in subsection 6(b)(3), which lists factors the Administrator must consider in promulgating regulations, that degradability claims be permitted only for those products that are then being disposed of at a certain specified percentage in a solid waste disposal system in which degradability is a desirable and meaningful characteristic, such as composting. In the alternative,

subsection 6(b)(3) could require that any claim regarding degradability be accompanied by a clear and conspicuous disclosure of the solid waste disposal systems in which degradability is a desirable feature.

6. Review of Regulations.

Subsection 6(d) requires the Administrator to review regulations under the Act every five years. Given the rapid state of technological change in both products and solid waste management practices, we recommend that the five-year review period be specified as a maximum and that the Administrator be required to review and revise the regulations as often as is necessary and reasonably practicable to keep up with technological advances. Again, including a procedure whereby concerned citizens, environmental groups, consumer groups and businesses can request the Administrator to review and update regulations would be an effective means of assisting the Administrator in keeping apprised of technological changes affecting the meaning of terms defined under the Act.

7. Time period.

Currently, the Act requires the Administrator to appoint the independent advisory board within six months of enactment and requires the board to make recommendations to the Administrator within six months after the board's first meeting. In addition, the Administrator is independently obligated to issue the first set of final regulations no later than two years after enactment.

The development of regulations for such complex concepts as "degradable" and "ozone friendly" is admittedly a complicated and difficult process. Environmental claims, however, are already the subject of widespread confusion and abuse and the proliferation of products making environmental claims shows no sign of slowing down any time soon. We therefore recommend that the timeframe for the final promulgation of the first regulations be reduced if at all possible to one year or 18 months. We also recommend that until such time as the final regulations are adopted, the use of the terms listed in subsection 6(b) of the Act be prohibited based on a finding that because the terms used to make environmental claims have no clearly defined meanings, such claims are inherently confusing and misleading.

8. Prohibited Practices.

Section 7 of the Act makes it unlawful for any person to fail to comply with a regulation or order issued under subsection 6(b) of the Act. Since the Administrator is also authorized to

promulgate regulations under subsections 6(c) and 6(d), section 7 should be revised to incorporate these subsections. A similar change should be made to subsection 9(f), dealing with statutory construction in citizen suits.

9. Enforcement Authority.

a. FTC Enforcement Authority. We strongly urge that the FTC be given joint authority with the EPA to enforce violations of the Act. As stated above, the regulation of environmental claims represents a unique overlap of environmental and advertising issues. The FTC has a long history of working with the business community to ensure truthful advertising and of identifying and defining deception. Indeed, courts have expressly recognized that the FTC's many years of experience in regulating advertising gives the FTC the ability to identify what practices have the tendency and capacity to deceive consumers. Providing the FTC with joint enforcement authority would augment the limited enforcement resources at both the FTC and the EPA and bring the FTC's considerable experience in the protection of consumers from deceptive advertising practices to bear on the regulation of environmental claims.

b. State Enforcement Authority. In order to improve enforcement, we also strongly urge the inclusion of a provision granting enforcement authority to appropriate state and local law enforcement officials, including state Attorneys General.^{1/} Again, such a provision would greatly enhance the limited enforcement resources at both the federal and state level by directing the combined resources of the EPA, the FTC and the state Attorneys General towards the regulation of deceptive environmental claims. Such a dual enforcement procedure would recognize the historic pattern of joint federal-state enforcement of laws aimed at preventing deception and would also be consistent with the growing trend towards greater federal-state agency cooperative enforcement efforts in the consumer and environmental protection areas.

c. Penalties. Subsection 8(a)(4) of the Act requires the United States Attorney General to bring an action against a person who fails to pay a civil penalty imposed under the Act before such penalty is enforceable even though the Administrator has issued an order imposing the penalty, the violator has had an

^{1/} The Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11046(a)(2), gives states direct enforcement authority, including the right to request the imposition of civil penalties.

opportunity to request a hearing on the order and the violator has had an opportunity to have the order reviewed by a federal court pursuant to subsection 8(a)(3) of the Act. We are unclear why, in light of these procedures, the final order is not enforceable against the violator without the action of the Attorney General particularly when the "validity, amount and appropriateness of such penalty shall not be subject to review," in such an action and there would thus seem to be no issue before the court. Such a cumbersome procedure makes it unlikely that any civil penalties will ever actually be collected, and thus greatly undermines the deterrent value of the civil penalties provision of the Act. We would appreciate further explanation of the rationale behind such procedure.

We are also confused about the interplay between the civil penalty provision of subsection 8(a) and the criminal penalty provision of subsection 8(b). Subsection 8(b) provides that criminal penalties are "in addition to or in lieu of" civil penalties. We are unclear why criminal penalties, which necessarily involve a higher standard of proof, would ever be imposed in lieu of civil penalties. We therefore recommend that criminal penalties be authorized in addition to, and not in lieu of, civil penalties.

10. Citizen Suits.

a. Compliance by Administrator. We urge that a provision be added to section 9 of the Act to permit citizens to file suit against the Administrator for failure to perform the Administrator's ministerial duties under the Act. Such a provision is standard in federal environmental statutes. See, e.g., 33 U.S.C. § 1365(a)(2) (Clean Water Act); 42 U.S.C. § 6972(a)(2) (RCRA).

b. Prerequisites to Citizen Suits. Even if states are not given specific enforcement authority under the Act as we strongly urge above, the states would, of course, be authorized to bring citizen suits under section 9 of the Act. In such event, we strongly urge that the limitations on the rights of citizens to bring such suits, set forth in subsection 9(b) of the Act, not apply to states bringing actions for violations of the Act.

We are unclear about the purpose of subsection 9(b)(2) of the Act, especially the reference in such subsection to subsection 3(b) (we do not find a subsection 3(b) in the Act). Assuming the reference in subsection 9(b)(3) is intended to refer to subsection 6(b), and not subsection 3(b), we are concerned that subsections 9(b)(1) and 9(b)(2) are redundant and inconsistent and may cause unnecessary confusion and lead to needless

litigation to determine what the section means. If subsection 9(a) of the Act is revised to permit citizen suits to compel performance by the Administrator of ministerial duties under the Act, subsection 9(b)(2) could be revised to provide that no civil action may be commenced against the Administrator for failure to perform any ministerial duty prior to 60 days after the potential plaintiff has given notice of such intended action to the Administrator.

c. Consolidation. We are very concerned that the consolidation provisions of subsection 9(g) of the Act will unfairly burden plaintiffs filing citizen suits. First, the provision only gives the defendant, and not plaintiffs, the right to request consolidation of actions involving the same defendant. Given the possibility that a plaintiff may, without knowing of an existing action against a defendant in one district court, file an action in another district court against the same defendant, plaintiffs should also be permitted to request consolidation to the same extent as defendants.

Second, subsection 9(g)(1)(A) gives the defendant the right to select the district in which the case will be tried without regard to the desire and convenience of the plaintiffs. The unfair burden of this provision on plaintiffs, who in many cases may be individuals lacking the resources of corporate defendants, is obvious. We therefore strongly urge that this provision be deleted. In addition, we recommend that subsection 9(g)(1)(C) be revised to reflect that the court should take into consideration fairness to all parties in selecting the appropriate forum for consolidation.

In reviewing the provisions of various other federal environmental statutes authorizing citizen suits, we did not find any comparable consolidation provisions. We respectfully suggest that the standard procedures of the Multi-District Litigation Panel regarding consolidation of multi-district litigation are sufficient to cover consolidation of cases that may be brought under the Act.

11. Preemption.

To avoid any ambiguity regarding the affect of the Environmental Claims Act on state law, we strongly urge that the Act contain an explicit provision to clarify that the Act does not affect the right of any person or state to pursue an action under any other statute or under common law against an advertiser

making misleading environmental claims.^{2/} As you know, the Task Force is currently investigating several manufacturers for potentially deceptive marketing claims under state and federal laws prohibiting false advertising and deceptive trade practices. In fact, seven states on the Task Force have filed suit in their respective state courts against one manufacturer of so-called "degradable" plastic bags. As the investigations of the Task Force continue, other lawsuits under state and federal law may follow. The Act should not prevent states from continuing to enforce their laws prohibiting false advertising and deceptive trade practices against advertisers making misleading or deceptive environmental claims.

In addition, we strongly urge that the Act contain a provision that expressly permits states to enact more stringent requirements for the use of terms defined under the Act as well as regulations defining terms not covered under the Act. We recognize that ensuring uniform and consistent standards for environmental claims is an important goal of the Act. A state should not be precluded, however, from passing more stringent or comprehensive requirements for environmental claims where the state makes a determination that such laws are necessary to protect its citizens from deceptive advertising and to further enhance environmental protection.

Thank you once again, Senator Lautenberg, for the opportunity to submit these comments for your consideration in preparing this important legislation for submission to the Senate. We fully support the development of uniform national standards for

2/ Subsection 9(f) of the Act addresses statutory construction in the context of citizen suits. This subsection provides that the Act does not restrict the right of any person to bring an action under any other statute or common law to seek enforcement of any regulation promulgated under the Act. Subsection 9(f) does not address claims arising under other statutes or under common law that do not relate to regulations promulgated under the Act.

The Honorable Frank R. Lautenberg
June 29, 1990
Page 11

environmental marketing claims and look forward to working with you, the EPA and the FTC in ensuring that consumers are provided with the information they need to make environmentally sound purchasing decisions.

Best regards,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

JOHN K. VAN DE KAMP
Attorney General
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JAMES M. SHANNON
Attorney General
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By:


JULIE A. VERGERONT
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200 Ford Building
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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

October 11, 1990

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HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

The Honorable Frank R. Lautenberg
United States Senate
717 Hart Senate Office Building
Washington, DC 20510-3002

Re: The Environmental Marketing Claims Act of 1990

Dear Senator Lautenberg:

On June 29, 1990, I was joined by the Attorneys General of California, Massachusetts, New York, Texas and Wisconsin in writing to express our support for your legislative proposal provisionally entitled The Environmental Claims Act of 1990 (the "Act"), and suggest modifications to further enhance the consumer protection provisions of the Act. In particular, we urged that the Act include an explicit provision clarifying that the Act does not preempt states from pursuing deceptive environmental advertising claims under existing state law or from enacting more stringent and comprehensive requirements for terms used in environmental advertising.

We have since been provided with a revised draft of the Act which includes, in Section 11, language expressly preserving the ability of states to act in the area of environmental advertising. On behalf of the Attorneys General on the ten-state Task Force investigating deceptive environmental claims (California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington and Wisconsin), I am writing to express our strong support for that position. We would vigorously object to any provision in the Act that would preempt state consumer protection laws or prohibit states from enacting more stringent or comprehensive requirements for environmental claims.

Preempting state action in the area of environmental advertising is particularly inappropriate because of the traditional state and local interest in and control over environmental policy decisions. The federal government, of course, establishes the basic goals and priorities of our nation's environmental policy. With these as a backdrop, state

APPENDIX I

and local governments enact additional legislative requirements based on the particular geographic and demographic characteristics of the state or locality. Environmental advertising can, and indeed is or should be intended to, affect environmental quality. Trends that result in the use of one product over another product could counteract specific state or local environmental goals or initiatives. In order to ensure that environmental advertising coincides with rather than impedes sound environmental practices, state and local governments must be permitted to make decisions about environmental advertising in light of the environmental policies they pursue.

The Attorneys General on the Task Force strongly support a federal regulatory scheme for environmental marketing claims. In March of this year, the National Association of Attorneys General unanimously endorsed a resolution calling for national standards for environmental marketing claims. Currently, we are in the process of drafting a report providing an overview of the Environmental Marketing Forum convened by the Attorneys General on the Task Force in March of this year. In this report, we urge that the federal government enact a comprehensive regulatory scheme for environmental claims that establishes definitions for terms used in environmental advertising and standards governing the use of those definitions. Your proposed legislation, Senator Lautenberg, provides a possible framework for this national regulation.

We would not support a federal regulatory scheme for environmental claims, however, at the expense of the states' ability to pursue deceptive environmental advertising under existing state laws or at the expense of states' ability to enact more stringent or comprehensive requirements for environmental marketing claims. States must retain the right to determine what laws are necessary to protect their citizens from deceptive advertising and to further environmental quality. We therefore strongly urge you to retain in your proposed legislation the current Section 11 which preserves the states' ability to regulate environmental advertising.

Thank you once again, Senator Lautenberg, for the opportunity to comment on your proposed legislation. We anticipate that the report from the Environmental Marketing Forum will be available within the month and we will provide you with a copy as soon as

it is available. We look forward to working with you in ensuring that environmental advertising makes a positive contribution to environmental quality.

Best regards,


HUBERT H. HUMPHREY, III
Attorney General

cc: John K. Van de Kamp,
California Attorney General

Robert A. Butterworth,
Florida Attorney General

James M. Shannon,
Massachusetts Attorney General

William L. Webster,
Missouri Attorney General

Robert Abrams,
New York Attorney General

Jim Mattox,
Texas Attorney General

Paul Van Dam,
Utah Attorney General

Ken Eikenberry,
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VAL E. WASHINGTON
Deputy Bureau Chief
Environmental Protection Bureau

June 25, 1990

Victor Bell
Chair, Northeast Recycling Council
Council of State Governments,
Eastern Regional Conference
Suite 513
270 Broadway
New York, New York 10007

William Ferretti
Chair, Labeling Subcommittee
of Packaging Standards Committee, and
Vice Chair, Northeast Recycling Council

Re: Model State Recycling Emblem Regulations

Dear Sirs:

The comments below are submitted on behalf of the Attorneys General of the States of Massachusetts and New York. These comments have been drafted by representatives of the Attorneys General of these states serving on a national task force of State Attorneys General investigating false and misleading environmental marketing claims. (The other states on the Task Force - California, Florida, Minnesota, Missouri, Texas, Washington and Wisconsin - are outside the Northeastern region). As of this date, the Task Force has multiple investigations of environmental claims underway, and law suits have been filed in seven states against the Mobil Chemical Corporation for false and misleading advertising related to their Hefty "degradable" trash bags.

The Model State Recycling Emblem Regulations are generally excellent and obviously the product of a great deal of thought. Our comments deal only with one point.

It is our opinion that prevention of misleading advertising claims related to environmental benefits should be an important objective for regulatory labeling programs. The establishment of standard definitions for the terms, "source reduction", "reusability", "recyclability" or "recycled content", combined with the requirement of conformance with the definitions when the terms are used on packages and/or products provides a much-needed regulatory structure for "green marketing" related to disposal alternatives. The regulations can be expected to prevent misleading advertising claims related to environmental benefits associated with these terms.

For the term "recycled", or "recycled content", however, we suggest, in addition to the emblem and the term, that the percentage of recycled content be listed, i.e., "50% recycled content", along with the statement: "the minimum recycled content necessary to qualify for the state emblem is 50%".

The percentage figure used with the seal or term "recycled content" lets the consumer know that a range of values fall within the qualification for using the seal. Use of the term or emblem alone, on the other hand, would likely mislead the average consumer to think the emblem signifies that 100% of the package or product is recycled material. More information must be provided to allow concerned consumers to choose products that go beyond the minimum requirements, or to choose between packages or products containing different recycled content. Adding this information would foster competition among manufacturers to surpass minimum requirements, competition that would not occur if the percentage amount does not appear in conjunction with the emblem.

This additional information does something more: it makes the actual meaning of the recycling emblem immediately accessible to the consumer who comes in contact with it. We believe it is important to provide the basis for use of the emblem whenever possible to guard against possible misunderstanding as to its meaning. This is becoming more important because of the proliferating number of emblems or seals designed gain consumer confidence or approval.

The Task Force and the National Association of Attorneys General ("NAAG") support national standards for the terms such as those your model legislation defines. NAAG has passed a resolution to this effect which urges the U.S. Environmental Protection Agency and the Federal Trade Commission to work expeditiously to set standards for the terms being used in environmental marketing claims. Therefore, we commend your

initiative and believe action at the state and regional level may well provide both the impetus and substantive foundation for national standards.

We hope these comments are helpful. Please feel free to contact us at any time if we can be of assistance on these or other matters.

Sincerely,

A handwritten signature in cursive script, reading "Sarah L. Johnston". The signature is written in dark ink and is positioned above the typed name and title.

Sarah L. Johnston
Environmental Policy Assistant
(518) 486-5469



Office of the Director
Bureau of Consumer Protection

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 24, 1990

Hubert H. Humphrey, III
Attorney General, State of Minnesota
200 Ford Building
117 University Ave.
St. Paul, MN 55155

Dear General Humphrey: *Skip*

My staff and I have recently received the completed report of the March environmental hearings which provides an excellent overview of the conference and presents a helpful summary of environmental marketing issues. Although the Commission has not taken a position on the merits of the report's specific recommendations, I believe that by continuing to work cooperatively we can ultimately determine the best way to address problems raised by deceptive environmental claims. The report will help to focus the national debate on the difficult regulatory issues raised by environmental marketing claims.

I understand that the Commission staff will be invited to participate in hearings that are planned for December. We look forward to the opportunity to participate in the hearings and appreciate your inclusion of the Commission staff once again. I look forward to the continuing coordination of our efforts.

Sincerely,

[Signature]
Barry J. Cutler
Director



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

OCT 26 1990

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

Hubert H. Humphrey, III
Attorney General, State of Minnesota
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Dear General Humphrey:

We recently received the draft final report of the March hearings on environmental marketing and labeling. You and your staff are to be commended for an excellent summary of the proceedings. While EPA has not taken a position on the recommendations, I believe that the report has taken an important step forward in providing a basis for the discussion of national policy in this area. As you may know, EPA's Administrator, William K. Reilly, recently announced that EPA will be approaching the Federal Trade Commission and the U.S. Office of Consumer Affairs suggesting the development of national guidelines for certain terms used in making environmental claims. I hope that the National Association of Attorneys General will be an active participant in any dialogue that ensues on this issue.

I understand that EPA will be invited to participate in public hearings on the NAAG report. EPA looks forward to the opportunity to participate and to our continued coordination on this important issue.

Sincerely,

for Glavin Stanley
Don R. Clay
Assistant Administrator