

**THE NEW ORGANIC: IT'S TIME FOR A
NATIONAL 'GREEN' CERTIFICATION PROGRAM**

by

Brandon Lupp

Submitted in partial fulfillment of the requirements of the
Kings Scholar Program
Michigan State University College of Law
under the direction of
Prof. Neal Fortin
Fall, 2008

TABLE OF CONTENTS

INTRODUCTION 1

I. Background on Green Labeling, Current Practices and the Six Sins of Greenwashing..... 2

 A. Green Labeling First Took Off in the 1980s..... 3

 B. The Current Situation: Advertising Pollution and Greenwashing Run Rampant 3

 C. Jurisdictional Overlap Creates Confusion and Uneven Enforcement..... 7

 i. FDA’s Authority Extends Over All Food Labeling, Including Environmental Claims 7

 ii. The FTC Currently Regulates Misleading Claims Through Its Green Guides 9

 iii. The EPA has Authority to Protect the Environment, Yet Ignores Green Claims 13

II. Existing Programs Offer Lessons for a Greenwashing Solution..... 13

 A. The National Organic Program & the Long Road to Organic Certification 14

 B. Today’s National Organic Program: A Success Story 15

 C. EPA’s WaterSense Program Shows Similarities to Organic Standards..... 19

III. EPA Should Be Charged with Creating a National Green Certification Program 21

 A. The FTC’s Green Guides Are Simply Ineffective 21

 B. The FDA Has Not Tackled Misleading Green Labeling on Food Products 23

 C. EPA Is Best Equipped to Handle Development of a Green Certification Program..... 24

 D. Existing Programs Should Serve as a Basis for EPA Regulation 26

 E. A National Green Certification Program Must Be Pursued for the EPA to Advance Environmental Protection 28

CONCLUSION..... 30

INTRODUCTION

Do you remember the days when anyone could slap a label on a product and call it organic? How about the days when anyone could slap a label on a product and call it “green?” Well, for memory of most misleading organic labels you’d probably dig back a decade or more. In the case of misleading green labels an afternoon trip to your local supermarket is probably sufficient.

Whether you call it greenwashing, advertising pollution, or just good information, it’s no secret that environmental marketing claims, or green claims as they’re commonly known, are on the rise. From a consumer information standpoint this should be good news. The problem is that most green labels can be misleading. In fact, a study by Terra Choice Environmental Marketing found that 99 percent of products reviewed were found to be guilty of committing one of the six

sins of greenwashing — the practice of inaccurately claiming green attributes.¹ Of course there's bound to be disagreement over using the six sins as the gold standard in environmental labeling guidelines, but the fact remains that marketers today are taking unfair advantage of a rise in consumer environmentalism, at the expense of consumer trust, environmental quality and the commercial viability of green products as a unique market niche. As a result, the EPA needs to get involved to curb misleading environmental claims and ensure consumer confidence remains high, because in doing so it will create a market-based system where enhanced confidence in environmental claims will lead to increased green purchases, improved green product offerings and ultimately enhanced environmental protection.

This paper will begin with an overview of the history of environmental claims, the current state of greenwashing and the jurisdictional overlap that exists between the Food and Drug Administration (FDA), the Federal Trade Commission (FTC) and the Environmental Protection Agency (EPA) with regard to environmental labeling claims. Next, the United States Department of Agriculture's National Organic Program and the EPA's WaterSense Program will be reviewed as a basis for creating a National Green Certification program. Finally, an argument will be set forth urging Congress to pass legislation charging the EPA with creation of a National Green Certification Program.

I. Background on Green Labeling, Current Practices and the Six Sins of Greenwashing

Green marketing, or the process of attributing environmental attributes to products or services, is not a new idea. However, the practice seems to be making a serious comeback as consumers are voicing their concern about global climate change and environmental degradation through their purchasing decisions. This section will briefly detail the history of green labeling, followed by a look at current practices and the "Six Sins of Greenwashing."

¹ See *infra* note 9.

A. Green Labeling First Took Off in the 1980s

Although its origins are debatable, the practice of green labeling is regarded to have begun slowly during the 1970s, but fully emerged during the 1980s.² Academics at the time spoke of a dramatic and inevitable shift towards greater consumption of green products,³ and survey evidence identified “heightened environmental awareness, a growing consumer interest in green products, and a pronounced willingness to pay for green features”⁴ as the drivers behind green product growth. In a rush to capitalize on this perceived green demand, marketers started blanketing products with terms like ‘essentially non-toxic,’ ‘earth-friendly,’ ‘eco-safe,’ ‘100 percent natural,’ ‘environmentally safer,’ ‘made with non-toxic ingredients,’ ‘earth smart’ and ‘ozone safe.’⁵ Between 1989 and 1990 the U.S. saw green product introductions double, totaling more than 11 percent of all new household products. At the same time, green print ads increased by 430 percent and green television ads increased by 367 percent.⁶

B. The Current Situation: Advertising Pollution and Greenwashing Run Rampant

In an effort to combat what its chief described as “advertising pollution,”⁷ the U.S. Federal Trade Commission released its Guides for the Use of Environmental Marketing Claims in 1992.⁸ Commonly known as the “Green Guides,” detailed below in Subsection C, these guides provide a roadmap for companies to consult when considering green claims in advertising

² Peattie & Crane, Green marketing: legend, myth, farce or prophesy?, *Qualitative Market Research International Journal*, 358 (2005) [hereinafter *Green Marketing*].

³ See Prothero, A., Green consumerism and the societal marketing concept: marketing strategies for the 1990s, *Journal of Marketing Management*, Vol. 6 No. 2, 87-103 (1990); Vandermerwe, S. and Oliff, M., Customers drive corporations green, *Long Range Planning*, Vol. 23 No. 6, 10-16 (1990).

⁴ *Green Marketing*, *supra* note 2 at 358, *citing* Roper Organization, *The Environment: Public Attitudes and Individual Behavior*, Roper Organization and SC Johnson & Son, New York, NY (1990); Mintel, *The Green Consumer Report* (1991); Worcester, R., *Public and Elite Attitudes to Environmental Issues*, MORI, London (1993).

⁵ Case, Scot, *Green Product Purchasers Beware*, *Interiors & Sources* (2004) 14 no7 12, 14, 16 S 2007 [hereinafter *Green Purchasers Beware*].

⁶ *Green Marketing*, *supra* note 2, at 358.

⁷ *Green Purchasers Beware*, *supra* note 5, at 1.

⁸ Part 260-Guides for the Use of Environmental Marketing Claims, *available at* <http://www.ftc.gov/bcp/grnrule/guides980427.htm> (last visited Sept. 25, 2008) [hereinafter *FTC Guides*].

and labeling. Although backed by law, these guides are just that: guides. Overall they appear loose and largely unenforceable, and most importantly ignore the majority of issues currently being raised by greenwashing critics.

TerraChoice, an environmental marketing firm, defines greenwashing as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”⁹ In an attempt to “describe, understand and quantify the growth of greenwashing,” and based on the premise that the practice of greenwashing is growing, the firm conducted a survey of six category leading big box stores, examining 1,018 consumer products bearing 1,753 environmental claims.¹⁰ These claims were tested against current best practices in environmental marketing, which the firm identified through the International Organization for Standardization, the U.S. Federal Trade Commission, the U.S. Environmental Protection Agency, Consumers Union and the Canadian Consumer Affairs Branch.¹¹ After reviewing all environmental claims against this developed standard, TerraChoice identified only one product of the 1,018 surveyed that was not “demonstrably false or that risks misleading intended audiences.”¹²

Based on this research, the firm identified six patterns from the greenwashing claims, which have been trademarked as the “Six Sins of Greenwashing.”¹³ These include:

1) Sin of the Hidden Trade-Off—This sin is committed when marketers base a green claim on one, often narrow, environmental issue.¹⁴ Although not usually false, hidden trade-off claims are misleading because by focusing purchasers on one green attribute, attention can be

⁹ The “Six Sins of Greenwashing”—A Study of Environmental Claims in North American Consumer Markets, TerraChoice Marketing, *available at* http://www.terrachoice.com/files/6_sins.pdf [hereinafter Six Sins].

¹⁰ *Id.* at 1.

¹¹ *Id.* at 2.

¹² *Id.* at 1.

¹³ *Id.*

¹⁴ *Id.* at 2.

drawn away from other detracting product features, thus “painting a ‘greener’ picture of the product than a more complete environmental analysis would support.”¹⁵ Examples of a hidden trade-off includes paper or forestry products that tout a high recycled content without making any effort to reduce environmental impact in other phases of production, such as air and water pollution that may be associated with the production process; or office technology products (printers, copiers, etc.) that promote energy efficiency but make no efforts to reduce hazardous material content or improve indoor air quality.¹⁶ The sin of the hidden tradeoff was the most frequently committed sin in TerraChoice’s survey, accounting for 57 percent of all greenwashing claims.¹⁷

2) Sin of No Proof—As the name suggests, products carrying environmental claims that cannot be substantiated by easily accessible information or by a certifying third party violate this sin.¹⁸ Product claims were deemed to fail the test of no proof if substantiating information was not available on the product itself, or on the company’s website.¹⁹ Frequently cited examples from the study include lights and lamps claiming energy efficiency, shampoos and other personal care products claiming to not test on animals, and paper towels claiming post-consumer recycled content.²⁰ These ‘no-proof’ claims were the second most-committed sin in TerraChoice’s survey, comprising 26 percent of all violations.²¹

3) Sin of Vagueness—Environmental attributes presented as broad or poorly defined so as to increase the likelihood of confusing the intended consumer violate the sin of vagueness.²²

Common themes identified include claims of being “chemical free” even though technically

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3.

nothing is free of chemicals; “non-toxic” claims, even though everything is arguably toxic in sufficient dosages; “all natural,” which could include such poisonous ‘natural’ products like uranium and mercury; and “green,” “environmentally friendly” and “eco conscious,” which are all sufficiently vague as to have no real meaning without further elaboration.²³ “Chemical free” garden insecticides and “natural” hair mousse are two examples of products with claims in this category.²⁴

4) Sin of Irrelevance—This sin is committed by making an environmental claim that, while technically true, is unhelpful as consumers seek to make more environmentally conscious choices.²⁵ Irrelevant environmental messages often distract consumers from finding greener options.²⁶ The most common claims guilty of irrelevance are those related to chlorofluorocarbons (CFCs).²⁷ Since CFCs have been banned for roughly 30 years, “CFC-free” is an irrelevant environmental claim and seeks to mislead consumers to think a product is environmentally friendly.

5) Sin of Lesser of Two Evils—Sometimes a green claim may be true within a product category, but that claim may risk distracting the consumer from the larger overall environmental impacts of such a product. For instance, green insecticides and herbicides may be a responsible choice for those who need to use them, like individuals involved in production agriculture. However, cosmetic application of insecticides and fertilizers may not always be necessary, yet these claims can encourage the use or overuse of such products through the confidence that may

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 4.

²⁶ *Id.*

²⁷ *Id.*

come with using a green product. Less than one percent of the offensive claims found in TerraChoice’s survey committed the sin of lesser of two evils.²⁸

6) Sin of Fibbing—Finally, and perhaps most disturbingly, some of the environmental claims investigated by TerraChoice committed the sin of fibbing by turning out to be completely false.²⁹ Examples include several shampoos that were “certified organic” with no available evidence of such certification, an “Energy Star” registered caulking product not listed as compliant on the Energy Star website, and dishwasher detergent claiming to be packaged in “100 percent recycled paper,” yet the container was plastic.³⁰

C. Jurisdictional Overlap Creates Confusion and Uneven Enforcement

Regulating environmental claims on food product labels poses an interesting challenge for governmental agencies, as authority for promulgating and enforcing standards seems to be divided. As the following subsection will explain, the Food and Drug Administration (FDA) is typically charged with regulating food labels, while the Federal Trade Commission (FTC) oversees environmental marketing claims no matter what products they’re on. Additionally, the Environmental Protection Agency (EPA), not the FDA or FTC, has jurisdiction over regulating environmental issues, yet currently does not regulate green label claims. Therefore, while not always in direct conflict with one another, the rise of green labeling is creating the potential for greater jurisdictional overlap and inconsistency.

i. FDA’s Authority Extends Over All Food Labeling, Including Environmental Claims

FDA’s authority over food labeling is derived in large part from the Food, Drug, and Cosmetic Act (FDCA),³¹ which regulates all food products moving in interstate commerce.³²

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 21 U.S.C. §§ 321(n), 331, 343(a) (1988 & Supp. V 1993).

Congress enacted the FDCA to ensure “that public health and safety might be advanced,”³³ prompting the promulgation of standards “whenever such action will promote honesty and fair dealing in the interest of consumers.”³⁴ Under this act FDA also has responsibility for regulating product labeling and misbranding,³⁵ which applies to all food products whose labels are “false or misleading in any particular.”³⁶ The term “any particular” encompasses any statement, word, design or device,³⁷ or failure to reveal a material fact in light of any representation.³⁸ As a result, the absence of information on a label may constitute it as misleading, and in certain circumstances an additional description may be necessary to alleviate unwarranted conclusions.³⁹

It is important to note that under the Federal Food, Drug, and Cosmetic Act, some advertising is also considered a form of labeling, and thus must adhere to the same guidelines as labels directly attached to a food product.⁴⁰ As the court stated in *Kordel v. U.S.*, “[e]very labeling is in a sense an advertisement. The advertising . . . performs the same function as it would if it were on the article or on the containers or wrappers. As we have said, physical attachment or contiguity is unnecessary . . .”⁴¹ In fact, the FDA recently relied on the *Kordel* opinion in stating that information presented on a website could constitute labeling.⁴² Thus, in the present context of environmental labeling, it is clear that the FDA has jurisdiction to regulate

³² See 21 U.S.C. 331.

³³ U.S. v. Walsh, 331 U.S. 432, 434 (1947); 21 U.S.C. § 331 (1988 & Supp. V 1993).

³⁴ 21 U.S.C. § 341. The FDA can determine a “reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container.” *Id.*

³⁵ 21 U.S.C. §§ 321(n), 331, 343(a) (1988 & Supp. V 1993).

³⁶ 21 U.S.C. § 343(a) (1988).

³⁷ See 21 U.S.C. 343(a); United States v. 95 Barrels of Vinegar, 265 U.S. 438, 442-43 (1924) (noting the statute “condemn[s] every statement, design and device which may mislead or deceive”).

³⁸ See 21 U.S.C. 321(n) (noting the failure to reveal facts material to the representation may violate the misbranding provision).

³⁹ See *Potato Chip Inst. v. General Mills, Inc.*, 333 F. Supp. 173, 181 (D. Neb. 1971), *aff’d per curiam*, 461 F.2d 1088 (8th Cir. 1972) (holding that potato chips produced from dehydrated potatoes needed an accompanying statement on the product’s label).

⁴⁰ 21 U.S.C. § 201(m)(2).

⁴¹ 335 U.S. 345, 351 (1948).

⁴² FDA Letter on Labeling Food Products Presented or Available on the Internet, U. S. Food and Drug Administration Center for Food Safety and Applied Nutrition, Nov. 1, 2001.

greenwashing claims on food products, but evidence does not exist to show that it has actually exercised that authority.

ii. The FTC Currently Regulates Misleading Claims Through Its Green Guides

While the Food, Drug and Cosmetic act gives FDA the authority to regulate food products, Section Five of the FTC Act charges the Federal Trade Commission with “preventing persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”⁴³ To bring an action under Section Five, the FTC need not show actual reliance or misrepresentation, but merely the likelihood of deception.⁴⁴ This deception can potentially occur in any situation where a consumer is misled while acting “reasonably under the circumstances,”⁴⁵ and the claim’s misrepresentation must be “material” in order to trigger FTC action.⁴⁶ Action may also be brought under Section Five to prevent unsubstantiated advertising claims, or those claims made without a “reasonable basis.”⁴⁷

Specifically related to environmental labeling claims, the FTC has used Section Five as the basis for its Green Guides.⁴⁸ These guidelines provide a roadmap for companies to follow when considering the use of environmental claims.⁴⁹ For starters, the Green Guides require that all environmental attribute claims, whether express or implied, be based upon competent and reliable evidence.⁵⁰ This standard often requires reliable scientific tests, analysis and research be

⁴³ 15 U.S.C. § 45(a)(2).

⁴⁴ Richards, Jeff, *Deceptive Advertising: Behavioral Study of a Legal Concept* 28 (1990).

⁴⁵ *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 164-65 (1984).

⁴⁶ *American Home Products Corp.*, 98 F.T.C. 136, 168 (1981), *aff'd*, 695 F.2d 681 (3d Cir.1982). Materiality was defined by the Tenth Circuit in 1943: “It is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do.” *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir.1943).

⁴⁷ Policy Statement Regarding Advertising Substantiation Program, 49 Fed.Reg. 30,999 (1984).

⁴⁸ FTC Guides, *supra* note 8.

⁴⁹ *Id.* at § 260.1.

⁵⁰ *Id.* at § 260.5.

undertaken and performed in an objective manner consistent with generally accepted practices.⁵¹ While the guides state that the party making a claim must “possess and rely upon a reasonable basis substantiating the claim,” it does not go on to define “possess.”⁵² Therefore, one could infer that physical possession of scientific studies is required before making an environmental claim, but it is not clear whether mental possession of a belief would also suffice.

To provide clarity for marketers, the Green Guides details a number of principles to guide marketers in their efforts. To set the stage, the FTC offers four general principles for environmental claims, beginning with the guideline that any qualifications or disclosures must be clearly and prominently displayed to avoid deception.⁵³ Second, the Guides require a distinction be drawn between a product, package or service, so that consumers know, for instance, that the term “recyclable” refers to the package, not the product contained therein.⁵⁴ Third, overstatement of environmental attributes is prohibited in hopes of avoiding negligible benefits, like a claim of “50 percent more recycled content” where the total recycled content only increased from 2 to 3 percent, or labeling trash bags “recyclable” when common practice dictates that trash bags are ordinarily filled with garbage and thrown in landfills, not emptied and sent to recycling facilities.⁵⁵ Finally, comparative claims must be stated in such a manner as to make the basis for comparison sufficiently clear to the consumer.⁵⁶

Moving to more substantive content, the FTC provides guidance for specific environmental marketing claims. The first is a prohibition on general environmental benefit claims, followed by qualifications for when and how the terms degradable, biodegradable, and

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at § 260.6(a).

⁵⁴ *Id.* at § 260.6(b).

⁵⁵ *Id.* at § 260.6(c).

⁵⁶ *Id.* at § 260.6(d).

photodegradable can be used.⁵⁷ Misrepresenting that a package is compostable or recyclable is also prohibited, and such affirmative claims must be backed by competent and reliable scientific evidence.⁵⁸ Recycled content, both pre and post-consumer, is also addressed, with pre-consumer content requiring substantiation that the material would have entered the solid waste stream if not for the recycling effort of the party making the claim.⁵⁹

Source reduction claims must be qualified and substantiated,⁶⁰ and refillable claims must be accompanied by a program to collect and refill the package, or by a qualifying statement directing the consumer to refill the package themselves.⁶¹ Finally, “ozone-safe” and “ozone-friendly” claims must not be used if any part of the product has the potential to harm the atmosphere.⁶² For example, even though an air freshener product might not contain chlorofluorocarbons (CFCs), it still might contain volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. In this instance a label of “ozone-safe” would be deceptive.⁶³

Although useful in providing some general guidance to marketers, the FTC has not aggressively pursued Section Five violations. Misleading environmental claims have been prosecuted on a case-by-case basis since the 1970s, with fact-specific inquiries creating little in the way of predictability for future green claims. Examples include a 1973 order by the Commission that Ex-Cell-O Corporation cease and desist from claiming that its plastic-lined Pure-Pak milk cartons were biodegradable.⁶⁴ In 1974, the FTC pursued misleading claims made

⁵⁷ *Id.* at § 260.7(a)-(b).

⁵⁸ *Id.* at § 260.7(c)-(d).

⁵⁹ *Id.* at § 260.7(e).

⁶⁰ *Id.* at § 260.7(f).

⁶¹ *Id.* at § 260.7(g).

⁶² *Id.* at § 260.7(h).

⁶³ *Id.*

⁶⁴ Ex-Cell-O Corp., 82 F.T.C. 36 (1973). Ex-Cell-O had included the following statements in its advertising: “Pure-Pak cartons are completely biodegradable. We made sure of that. If they're incinerated, for instance, they go up as

by Standard Oil where the emission reduction capacity of its gasoline was overstated.⁶⁵ The 1980s saw cases brought against air and water filtration companies for overstating their products' purification properties,⁶⁶ and in the early 1990s Zipatone, Inc. was ordered to cease and desist from claiming that its spray cement product contained "ecologically-safe" propellants.⁶⁷

According to some, the FTC's case-by-case approach has created a substantial problem by failing to "demarcate clear boundaries between deceptive and permissible practices."⁶⁸ This case-by-case adjudication has been described as selective, incremental and highly contextual, and resolutions are of limited future value because final orders only cover a limited number of acts, and consent agreements provide little, if any, interpretive guidance for future cases.⁶⁹ As current research on the proliferation of environmental labeling claims shows, these sporadic efforts at regulation have provided little in the way of deterrence for current or would-be environmental marketers.

harmless carbon dioxide and water vapor. Or if they're used as land fill, they disintegrate. Even the plastic film breaks down." *Id.* at 38. In reference to these representations, the company concluded: "That's our story. We think it's a nice story, too. Because it . . . has a happy ending." *Id.*

⁶⁵ Standard Oil Co. of Ca., 84 F.T.C. 1401 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978).

⁶⁶ New Medical Techniques, Inc., 110 F.T.C. 125 (1978) (consent order); Sunbeam Corp., 107 F.T.C. 226 (1986) (consent order); Associated Mills, Inc., 106 F.T.C. 5 (1985) (consent order); Young & Rubicam/Zemp, Inc., 105 F.T.C. 317 (1985) (consent order).

⁶⁷ Zipatone, Inc., F.T.C. No. C-3336, 1991 FTC Lexis 326, (July 9, 1991) (consent order).

⁶⁸ Grodsky, Jamie, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 155 (1993).

⁶⁹ *Id.*, *citing* Hearings on Environmental Labeling: Hearings on S.615 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 1st Sess. 14 (1991) (testimony of Deborah Becker, Vice President, Environmental Policy, Kraft General Foods, Inc.). The pertinent testimony reads as follows: "[T]he case-by-case approach does not always result in guidance that can be readily understood. The vast bulk of the Commission's administrative workload takes the form of consent agreements. In all such cases, there is no Commission opinion that can be relied upon to provide a thorough explanation of the underlying evidence, the legal theories that were pursued successfully or unsuccessfully, the remedies that were considered and accepted or rejected, and so on. Instead, there is a brief, sometimes cryptic, complaint, and a consent agreement. The analysis to aid public comment frequently does little more than recite the terms of the complaint and consent, and certainly will not disclose any of the nonpublic evidentiary information that may be critical to an understanding of the Commission's decision to proceed with the case and its interpretation of the law. Unless there is a dissenting or concurring opinion from a Commissioner, these consent agreements provide very little, if any, interpretive guidance to industry." *Id.* at 14-15.

iii. The EPA has Authority to Protect the Environment, Yet Ignores Green Claims

In addition to the jurisdictional grants given to the FDA and the FTC, according to Title 40 of the Code of Federal Regulations, the EPA is charged with assuring the protection of the environment, including action to “reinforce efforts among other Federal agencies with respect to the impact of their operations on the environment.”⁷⁰ Based on this jurisdiction the EPA has established numerous programs intended to benefit the environment, but one program in particular actually ventures into the area of green labeling. This program, named WaterSense, is detailed in the following section.

Aside from its recent foray into the arena of environmental labeling through the WaterSense program, the EPA has largely ignored the possibility of promoting environmental policy through stringent regulation of environmental labeling claims. Whether this inaction is due to contentment with the FTC’s current Green Guides solution, lack of a specific Congressional mandate or simply due to insufficient resources, the EPA is currently missing a powerful opportunity to promote improved environmental policies through a market-based approach.

II. Existing Programs Offer Lessons for a Greenwashing Solution

The problems currently plaguing green labeling, including a lack of clear administrative jurisdiction, varying standards and consumer mistrust, is not without precedent. The controversy surrounding green labeling today seems quite similar to that faced by the organic industry two decades ago. The following section offers a closer look at the history, regulation and results of the National Organic Program (NOP), offering it as a model for the future of environmental marketing claims.

⁷⁰ 40 CFR § 1.3.

A. The National Organic Program & the Long Road to Organic Certification

In response both to consumers' concerns about the environment and desire for certain food characteristics, Congress passed the Organic Foods Production Act (OFPA) in 1990, requiring the U.S. Department of Agriculture to develop national standards for organically produced agricultural products.⁷¹ Three main purposes for the Act were set forth, including 1) to establish national standards governing the marketing of certain agricultural products as organically produced products; 2) to assure consumers that organically produced products meet a consistent standard; and 3) to facilitate interstate commerce in fresh and processed food that is organically produced.⁷²

Despite the fact that the OFPA was passed in 1990, the National Organic Program took well over a decade to flourish. To get the program off the ground, in 1993 the USDA named its first National Organic Standards Board.⁷³ The 15-member Board is comprised of representatives from the following categories: farmer/grower; handler/processor; retailer; consumer/public interest; environmentalist; scientist and certifying agent.⁷⁴ All members are appointed by the Secretary of Agriculture and are charged with developing recommendations for the NOP.⁷⁵ In addition to Board recommendations, the USDA reviewed State, private and foreign organic certification programs to guide its regulation formation.⁷⁶

The National Organic Standards Board published its first set of recommendations in 1997, which should have been a welcome addition to an industry plagued with inconsistent standards.

⁷¹ 7 U.S.C.A. § 6501.

⁷² *Id.*

⁷³ Value Through Verification: USDA National Organic Program, 4, *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3049688&acct=noppub> (last visited Nov. 4, 2008) [hereinafter Value Through Verification].

⁷⁴ *Id.*

⁷⁵ National Organic Program-Background Information, *available at* www.ams.usda.gov/nop (last visited Dec. 3, 2008) [hereinafter NOP Background].

⁷⁶ *Id.*

At the time of the release, the New York Times reported that about half of the states were regulating organic food, but any producer could “slap a label on a product and call it organic.”⁷⁷ Available standards were reported to vary widely, with 33 different private certification agencies and 11 state agencies all trying to regulate an industry that had been growing at more than a 20 percent annual clip since 1990.⁷⁸

However, the first set of USDA standards was met with much criticism.⁷⁹ Among the most contentious issues were the inclusion of genetically engineered seeds and other genetically engineered substances (GMOs), biosolids (untreated sewage sludge used as fertilizers), and ionizing radiation in organic agriculture.⁸⁰ As a result of strong pushback from organic consumers and producers, the USDA published a second proposal in March of 2000, and published its final regulation in December of 2000, which was free of the aforementioned issues of GMOs, biosolids and ionizing radiation.⁸¹ Accreditation and certification began in April of 2002, and the program was deemed fully implemented in October of 2002, a full 12 years after initial action was taken by Congress.⁸²

B. Today’s National Organic Program: A Success Story

A far cry from the chaos described in the 1990s as agencies fought to establish certification standards, today’s National Organic Program is a model of cooperation between federal agencies, state governments, producers and consumers. As a coordinated national effort

⁷⁷ Burros, Marian, U.S. to Subject Organic Foods, Long Ignored, to Federal Rules, New York Times, Dec. 15, 1997, available at <http://query.nytimes.com/gst/fullpage.html?res=980DE1DA173FF936A25751C1A961958260> (last visited Nov. 4, 2008).

⁷⁸ *Id.*

⁷⁹ Value Through Verification, *supra* note 73.

⁸⁰ PCC Natural Markets, Issues & Education—Organics, A Regulatory History of USDA National Organic Standards, available at http://www.pccnaturalmarkets.com/issues/organic/history_usda_nos.html (last visited Nov. 4, 2008).

⁸¹ Value Through Verification, *supra* note 73.

⁸² *Id.*

headed by the USDA, current NOP standards focus on two main areas: production and handling standards and labeling standards.

Organic crops are produced without using most conventional synthetic pesticides or fertilizers based on petroleum or sewage sludge.⁸³ Organically raised animals must be fed organic feed and provided with access to the outdoors.⁸⁴ Antibiotics and growth hormones are not used in organic animal operations.⁸⁵ As a general rule, the NOP regulations allow the use of all natural substances in organic production, and maintain a National List of Allowed Synthetic and Prohibited Non-Synthetic Substances within the regulations to provide specific exceptions to the rule.⁸⁶

The OFPA and the National Organic Program regulations require that agricultural products labeled as organic originate from farms or handling operations certified by a state or private entity that has been accredited by USDA.⁸⁷ Currently there are 95 accredited certifying agents; 55 domestic and 40 foreign.⁸⁸ These certifying agents review the organic system plans of all applicants, which describes (among other things): practices and substances used in production, record-keeping procedures and practices to prevent comingling of organic and non-organic products.⁸⁹ Organic producers are also subject to on-site inspections to ensure compliance with their organic system plan.⁹⁰ Operations selling less than \$5,000 of organic products per year are exempt from certification, but may still market their products as organic, although they may not

⁸³ NOP Background, *supra* note 75.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ NOP Background, *supra* note 75.

⁸⁸ United States Department of Agriculture-National Organic Program, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPACAs&description=USDA%20Accredited%20Certifying%20Agents&acct=nopgeninfo>.

⁸⁹ NOP Background, *supra* note 75.

⁹⁰ *Id.*

use the USDA Organic seal.⁹¹ These requirements apply to organic production only, and not to retail operations like restaurants and food retailers.⁹²

Just as important, and interrelated to production and handling standards, are the organic labeling standards set forth by the NOP. Listing the content of agricultural products produced and verified according to the standards above, organic labeling standards provide strict rules through three different labeling schemes, all of which are intended to establish consumer trust in organic products.

First, products labeled as “100 percent organic” must contain only organically produced ingredients and processing aids (excluding water and salt).⁹³ Second, products labeled only as “organic” must contain at least 95 percent organic ingredients (excluding water and salt).⁹⁴ The remaining five percent of product ingredients must consist of nonagricultural substances approved on the National List including specific non-organically produced agricultural products that are not commercially available in organic form.⁹⁵ If these standards are met, the terms “100 percent organic” and “organic” may appear on product labels, along with the percentage of organic content.⁹⁶ Furthermore, these products are authorized to use the USDA organic seal and/or the seal or mark of the relevant certifying agent.⁹⁷

A third category provides for products “made with organic ingredients.” To use this phrase and list up to three of the organic ingredients or food groups on the principal display

⁹¹ *Id.*

⁹² *Id.*

⁹³ United States Department of Agriculture-Agricultural Marketing Service: National Organic Program, Organic Labeling and Marketing Information, 1, *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004446&acct=nopgeninfo> (last visited Nov. 4, 2008) [hereinafter Organic Labeling].

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

panel, the food product must contain at least 70 percent organic ingredients.⁹⁸ Although “made with organic ingredients” and the food types may be listed, the USDA organic seal may not be used anywhere on the package.⁹⁹

Finally, any product containing less than 70 percent organic ingredients cannot use the term “organic” anywhere on the principal display panel, but may identify specific organic ingredients on the ingredients statement on the information panel.¹⁰⁰ Similarly, any product listed as organic must identify each organically produced ingredient, and the name and address of the certifying agent must be displayed.¹⁰¹ These provisions are enforceable with civil penalties of up to \$11,000 for any person who “knowingly sells or labels as organic a product that is not produced and handled in accordance with the National Organic Program’s regulations.”¹⁰²

Growth in the organics industry has been explosive in recent years. Between 2001 and 2003, certified organic crop acreage increased 11 percent, and between 1997 and 2003 the number of organically raised livestock increased fivefold. According to a 2007 Organic Trade Association Manufacturer Survey, U.S. organic food and beverage sales have grown from \$1 billion in 1990 to an estimated \$20 billion in 2007, and are projected to approach \$23 billion in 2008.¹⁰³ After that, organic food sales are anticipated to increase an average of 18 percent each year from 2007 to 2010.¹⁰⁴ According to a survey conducted in 2002, the main market drivers for organic purchases were the preference to have fewer chemicals in food (63%), the belief that organics are “better for me and my family (51%), and that organics are better for the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Organic Trade Association-Industry Statistics and Projected Growth, *available at* <http://www.ota.com/organic/mt/business.html> (last visited Nov. 4, 2008).

¹⁰⁴ *Id.*

environment (37%).¹⁰⁵ These preferences are clearly driving consumer purchase decisions in the grocery store, but the correlation between the establishment of national organic standards, increased consumer confidence in organic products, and the resulting increase in production and sales cannot be ignored.

C. EPA's WaterSense Program Shows Similarities to Organic Standards

WaterSense is a national, voluntary market-based program created and administered by the EPA for promoting water efficient products.¹⁰⁶ Beginning with stakeholder meetings to discuss the idea in 2004,¹⁰⁷ the WaterSense program was initially a label attached to professional certification programs for landscape irrigation professionals.¹⁰⁸ However, it has recently been expanded to help consumers identify water efficient products.¹⁰⁹

Based on research (and common sense) showing that the use of water efficient products and practices can save natural resources and reduce personal water consumption and costs, EPA acknowledged that the biggest limiting factor delaying consumer adoption of this common sense approach was the lack of easily identifiable water-efficient products.¹¹⁰ Under the WaterSense program, participating companies meeting product-specific criteria will be allowed to use the WaterSense label, which includes the phrase "Meets EPA Criteria."¹¹¹ EPA estimates that products bearing the WaterSense label will be about 20 percent more water efficient and will perform as well or better than their conventional counterparts.¹¹²

¹⁰⁵ Value Through Verification, *supra* note 73, at 3.

¹⁰⁶ EPA WaterSense-Major Milestones, *available at* <http://www.epa.gov/watersense/basic/milestones.htm> (last visited Nov. 5, 2008).

¹⁰⁷ *Id.*

¹⁰⁸ EPA, The WaterSense Label, Sept. 2007, *available at* http://www.epa.gov/watersense/docs/ws_label508.pdf (last visited Nov. 5, 2008).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² EPA WaterSense-Product Certification and Labeling, http://www.epa.gov/watersense/basic/cert_label.htm (last visited Nov. 5, 2008) [hereinafter WaterSense Labeling].

During its identification of product categories for the WaterSense program, the EPA considered both technical and market factors, including the potential for significant water savings on a national level, equal or superior performance to existing models, the state of technology development (excluding products relying on a single, proprietary technology), the ability to measure and verify performance and water savings, and cost effectiveness.¹¹³ For manufacturers wishing to obtain WaterSense certification, the first step is to enter into a partnership agreement with the EPA.¹¹⁴ Following this agreement, manufacturers have 12 months to obtain certification that their proposed product meets relevant WaterSense specifications.¹¹⁵

Specifications are developed by the EPA following an eight step process: 1) technical analysis and market research is conducted to evaluate the potential for water savings and anticipated environmental and economic impacts; 2) the intention to develop specifications is announced to allow for stakeholder input throughout the process; 3) test methods are determined; 4) draft specifications are published and stakeholder and public comment is sought; 5) comments are posted online and specifications are revised as necessary; 6) final product specifications are announced; 7) existing specifications are periodically reviewed to determine the need for updates; and 8) market monitoring is ongoing to determine the need for specifications in new product areas.¹¹⁶

Based on the results of this process licensed certifying bodies, a number of which have already been approved by the EPA, review product applications.¹¹⁷ This review usually includes

¹¹³ EPA WaterSense-Specification Development Process, <http://www.epa.gov/watersense/specs/develop.htm> (last visited Nov. 5, 2008).

¹¹⁴ WaterSense Labeling, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

an initial production inspection, product testing and evaluation.¹¹⁸ Successful applications are granted the right to use the WaterSense label on the complying product, and infringing uses of the label are subject to “appropriate action” taken by the EPA.¹¹⁹

III. EPA Should Be Charged with Creating a National Green Certification Program

As the preceding sections outline, with the exception of WaterSense, green labeling is becoming increasingly confusing for consumers and regulators alike. Therefore, as the following analysis will show, Congress should mandate that the EPA create a National Green Certification program, replacing the FTC’s Green Guides and regulating all environmental product claims.

A. The FTC’s Green Guides Are Simply Ineffective

At present it appears as though the FTC has taken the lead in regulating environmental claims, basing its jurisdiction on Section Five of the FTC Act to prevent unfair and deceptive practices,¹²⁰ which it attempts to accomplish through its Green Guides. However, reports like the survey from TerraChoice suggesting that 99 percent of products identified were guilty of at least one greenwashing sin imply that the FTC guides do not really have things under control after all.¹²¹ Since the Federal Trade Commission does not have jurisdiction for setting environmental policy, it is ill-equipped to seriously deal with the issue of environmental marketing claims. Although it has been stated that the FTC hopes the promotion of truthful advertising will “make it possible for consumers to make informed choices in the marketplace that will in turn encourage companies to develop more environmentally-sound products and

¹¹⁸ WaterSense Certification Scheme-Draft, May 24, 2007, 4-5, *available at* http://www.epa.gov/watersense/docs/cert_scheme_draft508.pdf (last visited Nov. 5, 2008).

¹¹⁹ *Id.* at 7.

¹²⁰ *See supra* note 43.

¹²¹ *See supra* note 12.

packages,” actual results fall far short of what could be done to promote environmentally friendly alternatives.¹²²

On December 4, 1996, FTC Commissioner Roscoe Starek delivered a speech entitled “The Federal Trade Commission’s Green Guides: A Success Story.”¹²³ This speech touted the benefits of the new Green Guides, proclaiming they “help ensure that environmental claims are not deceptive and are adequately supported.”¹²⁴ He stated that during development of the Guides there was “nearly universal agreement among consumers, industry and government regulators that environmental marketing was an area where more, not less, information was desirable.”

However, the goal of adequately supporting claims and providing more information to consumers is hardly achieved by the Guides. True, the Guides require claim substantiation, but they do not require that substantiation be made available to consumers or environmental groups. They offer no solid guidelines for what can actually constitute a valid scientific deduction, but since the studies purportedly conducted and relied upon by companies to make claims are not necessarily made public, consumers have no avenue for independent verification. No wonder the “sin of no proof” was the second-most committed sin in TerraChoice’s survey.¹²⁵

The Green Guides are a set of reactionary guidelines that were developed to address common problems with environmental marketing claims. Attention was given to the most commonly abused claims, like recycled content and general benefit claims. Issues like the hidden tradeoff, described by TerraChoice as most commonly committed greenwashing sin, are not addressed in the Guides. Therefore, by regulating marketing claims as such, without raising

¹²² Federal Trade Commission, “The Federal Trade Commission’s Green Guides: A Success Story” *available at* <http://www.ftc.gov/speeches/starek/egstarek.shtm> (last visited Nov. 2, 2008).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See supra* Section I-B.

the bar for claim standards, neither consumer confidence nor environmental quality benefits are attained.

B. The FDA Has Not Tackled Misleading Green Labeling on Food Products

While the FTC is charged with regulating unfair and deceptive practices,¹²⁶ the FDA is charged with ensuring that food product labels are not “false or misleading in any particular.”¹²⁷ Additionally, some advertising can also be considered a form of labeling, thus also requiring it to avoid false and misleading claims.¹²⁸ Therefore, the FDA should take a stand when it comes to greenwashing claims on food products. However, this has not yet been the case. Most likely due to a lack of resources, perhaps deferring to the FTC’s Green Guides, the FDA has not yet established firm policy against the practice of greenwashing on food products. This is unfortunate because the agency has historically been successful in drafting regulations to help consumers avoid confusion.

For instance, consider the FDA’s Policy on Health Claim Labeling. According to the FDA, “[h]ealth claims describe a relationship between a nutrient or food and a disease or health-related condition.”¹²⁹ The FDA has authorized the use of 10 health claims that show a link between consumption of a substance and a related outcome.¹³⁰ These claims range from links between reduced cancer rates and low fat diets to decreased dental caries from reduced sugar consumption.¹³¹ Through its Health Claim labeling policies the FDA was able to help

¹²⁶ See *supra* note 43.

¹²⁷ See *supra* note 36.

¹²⁸ See *supra* note 39.

¹²⁹ See Food and Drug Administration, *The New Food Label: Better Information for Special Diets*, FDA CONSUMER (January-February 1995, Revised January 1998).

¹³⁰ *Id.*

¹³¹ *Id.* The other eight claims are 1) calcium and a lower risk of osteoporosis, 2) saturated fat and cholesterol and a greater risk of coronary heart disease, 3) fiber-containing grain products, fruits and vegetables and a reduced risk of cancer, 4) fruits, vegetables and grain products that contain fiber and a reduced risk of coronary heart disease, 5) sodium and a greater risk of high blood pressure, 6) fruits and vegetables and a reduced risk of cancer, 7) folic acid

consumers see truthful correlations between a claim and an outcome. The same cause and effect labeling requirements could have been established for environmental claims, but likely due to jurisdictional overlap, progress such as this has never come to fruition.

C. EPA Is Best Equipped to Handle Development of a Green Certification Program

Just as the USDA's experience with production agriculture, its ability to comprehend the changes envisioned by organic production systems and its ties to constituent groups made it the appropriate agency to handle the National Organic Program, the same subject matter and constituency familiarity make the EPA the appropriate agency to handle the establishment of National Green Standards. First, the EPA (at least theoretically) has much more experience dealing with environmental issues than other governmental agencies like the FDA or the FTC. At present, the Green Guides deal more with the prevention of misleading claims than they do with true environmental protection. While this policy step was appropriate at the time, since its enactment most marketers have only worked to comply with the Guides, not to make meaningful progress towards positive environmental goals. If regulation is led by the EPA it can be infused with a more science-based approach, allowing for meaningful environmental goals to be furthered through more stringent restrictions on green labeling.

Second, the EPA has already demonstrated experience and success in this area through its WaterSense program. Just as the USDA used the involvement of producers and consumers in establishing the National Organic Program, the EPA has shown not only willingness, but a strong aptitude for seeking public input when setting WaterSense standards. This step will be critical if it is to establish and administer a National Green Certification program. Furthermore, the EPA has shown that a science-based approach can be successfully applied to environmental claims.

and a decreased risk of neural tube defect-affected pregnancy, 8) soluble fiber from whole oats, as part of a diet low in saturated fat and cholesterol, and a reduced risk of coronary heart disease. *Id.*

True, some claims are easier to manage than others, and water efficiency may be easier to test and measure than areas like post-consumer recycled content, but this does not change the fact that it can be done.

Third, a National Green Certification program would require the use of independent certification agencies to help process all green product claims, in the same way that the National Organic Program relies on third party certification for producers. In this area the EPA also has experience, as the same system is currently being employed through the WaterSense program. At a very high level, a National Green Certification program would differ very little from EPA's current WaterSense program, except of course the scope would be much more comprehensive.

Fourth, consolidating the oversight of all green labeling claims with the EPA would create enhanced predictability for companies and improved confidence among consumers. By producing one set of regulations for producers to follow, investment can occur to develop and test new methods, based on the confidence that the end product isn't trying to hit an ambiguous target (as is currently the case under the Green Guides). Consumers will also benefit as environmental claims become more standardized and products begin to offer true environmental benefits, not just tout those that are largely meaningless.

Finally, based on the preceding analysis it must be clear that a National Green Certification program would replace, not supplement, the FTC's Green Guides. Although coexistence may be technically possible, this situation would create the very confusion that such a system would be designed to avoid. Therefore, all environmental claims, such as "100 percent recycled" or "biodegradable," would be subject to certification through the EPA program. Likewise, even though there have not yet been serious issues of jurisdictional overlap between

the FTC and the FDA, any new green regulations promulgated by the EPA would also apply to food products to the exclusion of the FDA.

D. Existing Programs Should Serve as a Basis for EPA Regulation

Initiated through the Organic Foods Production Act (OFPA) of 1990,¹³² the National Organic Program has already experienced nearly two decades of growing pains and, due to the similarities described above, could serve as a model for a new National Green Certification program. The underlying market factors preceding both programs are the same: inconsistent and lax regulation, consumer confusion and mistrust, and abuse by producers and marketers. Furthermore, the approach to developing standards is also similar: utilize a mixture of science, market-based analysis and stakeholder input.

Finally, the NOP demonstrates the value in being regulated by an agency with subject matter familiarity. For instance, the issues of genetically modified organisms, biosolids as fertilizer and ionizing radiation encountered by the USDA were not only politically charged issues, but were also ones that required a thorough understanding of science and agriculture to truly appreciate and correctly analyze. Even though opposition to GMOs are based on public perception of what is natural, governing regulators must still understand the technical nature of how crops are modified and how that alteration plays into a commercial farming operation. In the end, the USDA's organic standards were successful not only because they brought harmony to an otherwise defunct, fragmented system, but because they were developed with an understanding of the issues valued by producers, manufacturers and consumers.

¹³² See *supra* note 71.

Another source of guidance for the EPA can be found in current environmental labeling certification programs, such as EcoLogo. This program is defined as a Type I eco-label,¹³³ meaning it compares products and services with others in the same category, developing rigorous and scientifically relevant criteria which must be met before an EcoLogo is awarded.¹³⁴ The EcoLogo program is one of only a few such programs in the world that have been successfully audited by the Global EcoLabelling Network to ensure compliance with ISO 14024 principles.¹³⁵ Currently EcoLogo manages 122 Certification Criteria Documents addressing over 250 product types.¹³⁶ Although EcoLogo is managed by a private entity (TerraChoice Environmental Marketing, the firm that created the six sins of greenwashing), it could still serve as a valuable partner for the EPA in developing its own Green Certification program. Just like the organic industry did with competing organic labeling programs,¹³⁷ the EPA should ensure that its certification supersedes that of any private firm, such as EcoLogo, only allowing such private green labels to appear on products that also meet EPA's environmental criteria.

Finally, the USDA's approach to labeling organic products, through a flexible, three-tiered system, should provide the most valuable guidance. In setting green labeling guidelines, the EPA should focus on developing a tiered system, allowing the most latitude, and the most prestigious claims, to those products that truly make a positive difference to the environment. Of course standards must be set on a category-by-category basis to ensure meaningful results, but the WaterSense program shows that progress can be made quickly, and if companies have truly been in compliance with the FTC's Green Guides all along they will have their claim verification

¹³³ A Type I eco-label is defined by the International Organization for Standardization in its standard- "Environmental Labeling" (ISO 14024).

¹³⁴ EcoLogo Program-See Our Criteria, <http://www.ecologo.org/en/seeourcriteria/> (last visited Nov. 5, 2008).

¹³⁵ *Id.*

¹³⁶ EcoLogo-EcoLogo Program, <http://www.ecologo.org/en/> (last visited Nov. 5, 2008).

¹³⁷ *See supra* note 102.

studies ready and waiting for approval. But the true differentiator here will be the refusal to grant Green Certification to products that do not meet the EPA's established thresholds. This is one aspect of the Green Certification program that must not be compromised, or else the risk of consumer confusion will remain.

E. A National Green Certification Program Must Be Pursued for the EPA to Advance Environmental Protection

One alternative to the establishment of a National Green Certification program is to merely leave things the way they are, and in effect let the market decide which green label claims will survive. This solution, if it indeed can be called a solution, could be the fastest and cheapest way of addressing the current greenwashing problem. Simply put, consumers are intelligent individuals who care about the purchasing decisions they make. They are fully capable of conducting their own independent research to verify green product claims, guided of course by the Green Guides, and in the event that they feel a claim is invalid or lacking in some particular, they will voice their concern by purchasing another product. Along these same lines, consumers may be aided by independent watchdog organizations that could monitor green claims. If demand is high enough, these organizations could even provide a fee-based research service.

However, this alternative is deficient for several reasons. First, consumers would need perfect information about a product's history and composition to make rational decisions – this is a classic case of imperfect market information. Purchases have to be made on trust attributes, like brand name and certification seals. Second, if consumers were actually informed (or had the ability and desire to be informed), the current FTC Green Guides would be unnecessary as well. Indeed, all forms of advertising regulation could be viewed as cumbersome and overly restrictive in this sense, since as this argument goes, consumers should be able to fend for themselves.

Third, and most importantly, this solution risks detriment to the environment. The hallmark of an EPA-administered Green Certification Program is the creation and/or enhancement of a market for products and services with environmental attributes. Today consumer confidence in environmental claims is at risk as an ever increasing number of companies push the envelope with vague, deceptive or false claims. When companies are free to greenwash, either under a regime of no regulation or the current “light” guidelines, consumers may ultimately become disillusioned by environmental claims altogether. This will likely manifest itself through reduced green product purchases, sending the dangerous message to firms that consumers are no longer interested in products that protect the environment. Since product purchase data is a poor and offers an incomplete method of communication, it is likely that companies will miss the real reason for a decline in green purchases and slow or cease the production of environmentally friendly products.

Current regulation is designed to supposedly stop these violations, but as the preceding analysis argues, this has not been the case. Furthermore, current regulation is centered around the prevention of misleading information, not on environmental protection. By working closely with all stakeholders, including manufacturers, consumers, non-governmental organizations and others, the EPA can develop science-based labeling regulations that are not only accurate, but that actually have a positive impact on the environment. By adhering to strict standards and communicating these new policies to consumers, confidence in green claims will be enhanced, leading to increased purchases of environmentally sound products and services.¹³⁸ This increase in purchases will lead to improved environmental attributes offered by producers, thus leading to enhanced environmental protection. By creating and administering a National Green

¹³⁸ As evidence to support this line of reasoning, consider the growth experienced by the U.S. organic industry following the promulgation of standards, described above in Section II-B.

Certification Program the EPA will further its mission of environmental protection by curbing misleading environmental claims and letting consumers drive corporate behavior through confident purchasing decisions.

CONCLUSION

With 99 percent of environmental claims today accused of greenwashing, it is apparent that too many marketers are simply slapping labels on products and calling them green. The FTC's Green Guides may have been a logical first step in addressing the problem, but of late have been of limited use in controlling the problem. Therefore, the time is right for Congress to enact a law similar to the Organic Foods Production Act, mandating that the EPA establish a National Green Certification program to establish national standards governing the marketing of environmental claims to assure consumers that green products meet consistent and rigorous standards. Perhaps only then will the term greenwashing leave our vernacular almost as quickly as it entered.