**EPA COMMENTS ON PROPOSED REVISIONS TO GREEN GUIDES**
12/10/10

## General Comments

EPA supports the spirit and intent of the revisions to the Green Guides and looks forward to continuing dialogue with the FTC on issues related to the appropriate and credible use of environmental marketing claims. Because of the rapidly evolving use of environmental marketing terms and consumers' changing perceptions of those terms, EPA recommends more frequent updating of the Green Guides and will be glad to work with the FTC on timely updates to the Guides as circumstances indicate.

EPA supports the use of consumer perception data in determining whether marketing claims are unfair or deceptive. However, EPA emphasizes that these data represent a snapshot in time and consumer perceptions can change over time. It is important to explain that the version of the Green Guides that is current at any given time may not have taken into account more current understanding of consumers. The FTC should remind marketers that substantiating certain claims with more current evidence such as consumer perception surveys can be sufficient to overcome what the currently published Green Guides disfavor. Conversely, more current consumer perception data may also at times call into question practices previously regarded as non-deceptive.

EPA emphasizes the importance of consumer education in preventing deception and in promoting benefits to human health and the environment. The internet can be an effective tool for providing consumer education. EPA acknowledges that at this time it may not be reasonable to assume that advertising referencing a website is sufficient to make a claim understandable at the point of purchase. Nevertheless, EPA suggests that FTC note that the internet may be a reasonable source of information about environmental marketing claims if accessed prior to the point when a consumer is facing a product on the shelf. In general, ongoing consumer education is vital to combat "greenwashing" in the marketplace. By educating the public with regard to possible misuse and misappropriation of labels, slogans or brands, the FTC can reduce potential deception of and confusion among consumers. EPA is interested in continuing work with the FTC to determine effective means for addressing this ongoing issue.

FTC should caution against qualified claims that imply benefits without adverse impacts in other areas – for example, cautioning against assertions that "biodegradable" packaging provides a benefit compared to non-biodegradable packaging, ignoring the fact that landfill biodegradation produces methane, which is an environmental problem.

The FTC states that "the Commission does not create definitions or standards for environmental terms. Rather, it provides guidance to marketers on how consumers understand those terms." When generally accepted definitions exist, e.g. definition and methods for "ready biodegradability," incorporation of these definitions in the Green Guides will help to reduce ambiguity in the understanding of these terms. It appears that widely accepted definitions, standards, and practices could be incorporated into the proposed Guides to a greater extent than at present. EPA can assist the FTC with specific information and recommendations in this area.

**Certifications and Seals of Approval**

EPA agrees that the addition of the Certification and Seals of Approval section is appropriate at this time, and that the treatment of third party verification is appropriate. We agree that the FTC is not in a position to specify the specific process for or content of programs that award seals and certifications, and agree that dealing with it on a case by case basis is best. We note that some commenters recommended that "the FTC provide guidance to help avoid confusion about certifications that falsely appear to be bestowed by a government agency." We reiterate this idea, and wonder why it does not appear in the proposed rule.

The FTC considers that third-party certifications and seals constitute endorsements per the FTC Endorsement Guides. EPA believes that consumers may perceive certifications and seals as different types, only some of which would constitute endorsements in the lay sense. Some may indicate approval or recommendation, while others would only indicate verification against a particular standard or criteria. A consumer perception study on this point would clarify whether consumers believe that all seals and certifications are recommendations of the certifier or whether consumers distinguish among different types of seals and certifications.

EPA allows only a very limited number of seals for pesticide products, such as the Good Housekeeping Seal of Approval (because it functions as a limited warranty that provides for a refund or replacement to consumers if the product is defective) as well as the logo associated with the USDA National Organic Program (NOP). EPA has recently set up a pilot program that would allow pesticide products which pass the general Design-for-the-Environment (DfE) criteria and OPP's specific criteria to display a special OPP DfE logo and related statements. EPA does not consider use of this logo to indicate an endorsement by EPA but rather that the product has met certain standards.

The FTC concluded that seals and certifications are often perceived by consumers as general environmental benefit claims and therefore should be qualified. EPA wants to ensure that the revised Green Guides do not dissuade the use of multi-attribute standards and seals by marketers. There are a number of life cycle-oriented multi-attribute standards and eco-labeling programs widely viewed by product sustainability experts, stakeholders, and independent third-party organizations as credible. The new Guides should make it easier (or least not more difficult) for manufacturers, retailers and others to make claims that reference credible certification and labeling programs. EPA can assist the FTC in developing further guidance on how to qualify seals/certifications based on complex multi-attribute standards. EPA suggests the following additional example for this section of the guidance:

**Example 7**: A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text "EarthSteward." EarthSteward is an independent, third-party certifier that uses broad-based, lifecycle-oriented standards developed through a Voluntary Consensus Process. All available scientific evidence has been used in the standard development process to ensure the criteria in the standard address all major environmental issues if meaningful, testable distinctions among products can be made for those issues. Either seal likely conveys that the product has far-reaching environmental benefits, and that EarthSteward certified the product for

all of these benefits. Since independent, third-party verification can substantiate these claims, the use of the seal would not be deceptive. The marketer would not be required to include language limiting the general environmental benefit claim, provided that the advertisement's context does not imply other deceptive claims. If, however, the marketer wishes to include such language, the marketer could state next to the globe icon: "EarthSteward certifies that this product meets a meaningful, broad, lifecycle-based environmental standard."

When discussing third-party certifications, EPA suggests that FTC clarify who the various parties in the transaction would be. We assume the first and second parties would be the seller and the buyer and the third party would be an entity apart from them. But sometimes, certifications can involve additional parties beyond the certification body (e.g. testing labs) who may be involved in evaluating a product.

## General Environmental Benefit Claims

EPA considers general environmental claims on pesticide products to be "claims as to the safety of a product" [40 CFR 156.10(a)(5)(ix)] and are, therefore, false or misleading. This regulation, which applies to pesticide labels, includes examples of false or misleading claims such as "safe," "non-poisonous," "noninjurious," "harmless," "natural" and "nontoxic to humans and pets." EPA would consider that claims such as "environmentally friendly," "eco-friendly" and "green" fall in this same category. EPA believes that such claims can be false or misleading because they imply that these pesticide products are totally safe for humans and the environment.

Proper qualification appears to reduce but not eliminate consumer misperception about general benefit claims. When confronted with terms like "green," a significant minority of consumers impute additional environmental benefits to the product beyond those stated in the qualification. For claims based on one or a few attributes, stating the claim only in terms of the relevant attribute(s) without the use of terms that may imply broader environmental benefits should reduce consumer misperceptions about the claim. The qualification of benefit should avoid words like "better" and "worse". Instead, use words like "more" or "less", quantitatively where possible (e.g., 35% less water consumed, etc).

EPA wants to ensure that where a strong, multi-stakeholder, open, transparent, Voluntary Consensus Process is used to define broad claims/terms like "green," "environmentally sustainable," or "environmentally safe," (and define the evidence to back such claims), the revised Green Guides will not only allow marketers to make such claims but to encourage such claims over very narrow claims with hidden tradeoffs. EPA can assist the FTC in developing further guidance in this area.

## Degradable Claims for Solid Wastes

Like the FTC, EPA is unaware of a suitable test protocol providing assurance of complete degradation of solid waste in the time frame and conditions specified in the Green Guides. However, there are several published works which may be useful to marketers in developing

suitable (adaptable) test methods for making such claims. A limited bibliography of these works is included below.

(1) Ejlertsson J, A Karlsson, A Lagerkvist, T Hjertberg, BH Svensson. 2003. Effects of co-disposal of wastes containing organic pollutants with municipal solid waste–a landfill simulation reactor study. Adv. Environ. Res. 7:949-960
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(2) Bauer MJ, R Hermann. 1997. Estimation of the environmental contamination by phthalic acid esters leaching from household wastes. Sci. Tot. Environ. 208:49-57.

(3) Pohland FG, F Karadagli, JC Kim, FP Battaglia. 1998. Landfill codisposal of pentachlorophenol (PCP)-treated waste wood with municipal solid waste. Wat. Sci. Tech. 38:169-175

(4) Various published works from Mort Barlaz.

(5) ASTM D5525-94a Standard Practice for Exposing Plastics to a Simulated Active Landfill Environment. Withdrawn; no replacement; developed by subcommittee D20.96. No PDF file available from ASTM.

EPA has consistently considered claims of "degradable" or "biodegradable" on pesticide products to be false or misleading comparative, safety-related claims because of the implication that one product breaks down more rapidly and is therefore safer than another identical or similar product. In addition, EPA has not approved such claims because of the lack of standard test methods and criteria for determining the degree to which pesticides break down in various media (e.g., air, water, soil).

This section at times uses the words "degradable" and "biodegradable" interchangeably, when it appears that in all cases the proposed guidance means "biodegradable." Do consumers perceive these terms differently and/or are they likely to encounter both terms in the marketplace? A typical meaning of the term "degrade" includes impairment or degeneration of physical structure or function. For example, a paper box does degrade in a landfill in the sense that it tears, gets soggy and loses shape. However, the box does not biodegrade completely in a landfill in the sense of being broken down into innocuous products within the specified time frame. In the context of this section, it appears that "biodegradable" is the more appropriate term.

EPA supports the Commission's suggestion that a maximum of 1 year for complete decomposition is a reasonable expectation for degradable ("biodegradable") products, unless these products are bound for landfills, incinerators or subject to some other management approach which would not promote degradation. EPA further suggests that the FTC guidance state that the public generally understands that the meaning of "degradable" is that the material degrades into harmless (or even beneficial) products. Thus, if the material degrades into toxic products, the word "degradable" is misleading and should not be used. More detailed information in this area is available from standards and certification organizations (such as ASTM and the Biodegradable Products Institute) that address the time frame and other circumstances related to the complete biodegradation of products.

It may also be worth noting in both this section and in the section on Compostable claims that biodegradability and compostability are related, but not equivalent properties. These concepts can be confusing for consumers, so proper qualification of claims in these areas is important.

## Degradable Claims for Liquid Wastes

EPA believes that ready biodegradability testing should be used to demonstrate the biodegradability of individual chemicals. Ready biodegradability tests don't measure complete ultimate degradation. However, international chemicals policy recognizes this testing as a reliable indicator of full biodegradation. This fact is reflected in the updated OECD guidance on degradation testing of chemical substances (see http://lysander.sourceoecd.org/vl=23617054/cl=21/nw=1/rpsv/ij/oecdjournals/1607310x/v1n3/s1/p1) as well as EPA's harmonized test guidelines (see 835.001 Principles and Strategies Related to Biodegradation Testing of Organic Chemicals under the Toxic Substances Control Act at http://www.epa.gov/ocspp/pubs/frs/publications/Test_Guidelines/series835.htm). EPA believes it would be acceptable to issue guidance such that a chemical that passes a Ready test can be regarded as ultimately degradable in a "reasonably short period of time", as this would be consistent with established understanding of these tests. The OECD and EPA guidance above should be considered when making degradability claims on a chemical based on Ready tests.

EPA does not believe that there is a suitable test method available to show biodegradability of a liquid product (mixture). While it is possible that testing each ingredient in a product might support a claim of biodegradability, negative synergies between chemicals might impact the rate of degradation. EPA is not aware of data demonstrating that existing methods could support a claim of biodegradation in a reasonably short period of time.

It's important to note that a substantiated biodegradability claim does not rule out possible adverse impacts to organisms exposed to that chemical. Chemicals that degrade quickly can still be toxic to aquatic, terrestrial, or mammalian species. Rapid degradation can reduce the potential for harm.

## Compostable Claims

*Proposed FTC Guide language*: "… all the materials in the item will break down into, or otherwise become a part of, usable compost...in a safe and timely manner..."
The phrase **"or otherwise become a part of"** is vague and could serve as a loophole for products that are partially degradable, but not compostable, to qualify as long as they degrade into small pieces within the timeline of a composting process. "Compostable" products should undergo a complete biological degradation to generate usable compost.

EPA appreciates the distinction made in the proposed guidance between home and municipal/industrial composting. The general public is often confused by this distinction, and clear information from marketers in this area is important.

## Ozone-Safe/Ozone-Friendly Claims

For pesticide products, EPA has regularly limited such claims to the use of a specific statement (i.e., "Contains no CFC's or other ozone-depleting substances. Federal regulations prohibit CFC propellants in aerosols."), and does not allow such claims as "ozone-safe" or "ozone-friendly." For products in general, EPA encourages the FTC to consider recommending against the use of the general claims of "ozone-safe" or "ozone-friendly" as these claims imply broad safety to the atmosphere and, ultimately, human health and the environment much like the unqualified general environmental benefit claims that the FTC recommends against. Specific claims that can be supported, such as "Contains no ozone-depleting substances," are appropriate.

EPA recommends retaining Examples 1, 2 and 3 as proposed.

## Recyclable Claims

EPA supports the FTC retaining the "substantial majority" threshold and quantifying it at 60% -- that is recycling facilities for the product/packaging in question must be available to 60% of the population in order to make an unqualified claim that the product/package is recyclable.

## Recycled Content Claims

The Guides provide that marketers may make a recycled content claim only for materials that have been diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer). FTC also articulated that spills and scraps that are normally reused by industry within the original manufacturing process do not constitute recycled content. The Guides do not advise marketers to distinguish between pre-consumer and post-consumer materials, but marketers may do so. Marketers must substantiate any express or implied claims about the specific amount of pre- or post-consumer content in their products.

The FTC has requested further comment and information that would help to better clarify the distinction between what materials are considered pre-consumer and which materials do not count toward recycled content. As a case in point, the FTC provides an example of a request by the textiles industry to claim pre-consumer recycled content for waste yarn used as fiber fill in toys, but which is now reprocessed for higher value uses. Clarification in this area may answer some of the industry-specific questions received on the Guides.

Previous Guides drew a distinction between "manufacturing processes" and "after consumer use." This bifurcated distinction may be unclear given the general use of the term "manufacturing process." In fact, in many instances, manufacturing processes produce a product which subsequently undergoes further processing or "converting" to prepare it for use in making a consumer item. During that "conversion" process (and when these materials are subsequently used in the production of a consumer item), scraps may be generated that are subsequently used in the manufacture of other products. These types of scraps may not have been defined adequately in the existing Guides as a recycled material.

For instance, in the papermaking process, pulped fiber goes through a series of steps that results in a finished roll of paper. Together, these steps are all part of a manufacturing process for that finished paper. Scraps or spills generated during the papermaking process are commonly known as "mill broke" and since they are generated from and commonly used within the original manufacturing process, these materials do not count toward recycled content. The rolls of finished paper that are produced from the manufacturing process are then modified or converted into consumer items (e.g., envelopes, newspapers, etc.). Along the way, these converting processes may generate scrap materials from trimming the paper or turning the paper into finished consumer products. This scrap material is not material that was generated from the original manufacturing process (i.e., papermaking) and would be considered a pre-consumer recovered material. Once the paper has been made into a consumer product and that consumer product has served its intended end use as a consumer item, any of these discarded products would be considered post-consumer materials. This example may help draw a clearer distinction between materials generated in an original manufacturing process (not considered recycled materials) and materials generated in subsequent processes to make a finished consumer item (considered pre-or post-consumer materials).

In general, EPA believes that numeric claims of recycled content based on weighted averages are not misleading, and may be the only way that some products can communicate the fact that recycled materials were used. As an example, manufacturers of corrugated containers buy paper feedstocks on the spot market and the mix of virgin and recycled feedstocks varies on a daily or weekly basis, with price.

There may be other ways that manufacturers can calculate recycled content, other than weighted averages for recycled content in products coming from a specific manufacturing facility. However, we believe that other approaches should be limited to calculating recycled content across a specified product line/SKU – not across multiple product lines in a single business or across an industry. Other acceptable calculation approaches could include allocating recycled content across a specific product line/SKU (made in different facilities) where there is on average a specific recycled content in that product line as a whole (considering all the facilities where it is made). However, in such cases, the manufacturer should substantiate by mass balance calculations how much secondary material was received by each plant making the specific product in question. Also, the manufacturer should say what the overall average recycled content is for that product line and explain that any given specific product in this line may have more or less recycled content (or even none) than this average. This way the consumer is not confused that the specific product purchased has a definite recycled content. Important factors in allowing other calculation methodologies include being able to demonstrate chain of custody of secondary materials, and mass-balance calculations that demonstrate that recovered content is indeed being used, how much and where (e.g., what facility).

The proposed guidance notes that products that are made of 100-percent recycled materials appear to be recyclable. This is not necessarily the case, especially when using the criterion of access by a substantial majority of the population to recycling opportunities. As an example, many textiles are now available that are made from 100% recycled PET bottles, but the textiles

are not widely recyclable. As another example, a product can be made by combining 100% recycled paper, and 100% recycled plastic, and the resulting product may not be recyclable. We recommend that the guidance point out that companies should be careful to avoid creating confusion in this area.

## Free-of Claims

EPA recommends placing the guidance on "free-of" claims in a separate section, apart from the guidance on "non-toxic" claims. These are different types of claims and we want consumers to view them as such. A "free-of" claim does not necessarily imply anything about the toxicity of the product.

In the specific case of pesticide products, EPA has not permitted a de minimis level for claims such as "dye-free" and "fragrance-free" when allowing their use on antimicrobial pesticide labeling. EPA has recently set up a pilot program that would allow antimicrobial pesticide products that contain no dye and/or no fragrance to make this assertion on the pesticide labeling so long as the confidential statement of formula supports the claim. EPA believes that the presence of dye or fragrance, in any amounts, would render the claim false or misleading under 40 CFR 156.10(a)(5).

## Non-toxic Claims

EPA believes that marketers will rarely, if ever, be able to adequately qualify and substantiate a claim of "non-toxic" in a manner that will be clearly understood by consumers. This same comment applies to the use of synonymous terms, such as "non-hazardous." Many consumers are likely to interpret a claim of "non-toxic" as an intrinsic property of the material, and not as simply a statement regarding the safety of the material as it is used in a particular product. For example, a consumer may assume that a "non-toxic" furniture coating is non-toxic not just in its final form on the furniture, but also is non-toxic to the workers who manufactured and applied the coating, and to environmental species exposed to the coating from releases that occur during manufacture, processing, or disposal.

EPA is aware of a specific instance where a manufacturer advertised its product as non-hazardous, and yet a user was harmed. A user of this chemical did not use it according to the manufacturer's instructions; the user then "**reported unusual fatigue and headaches and developed arthralgias, visual disturbances (difficulty focusing), paresthesias, and muscular twitching" and was referred to an emergency department by his physician (Centers for Disease Control and Prevention, 2008**; see http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5748a2.htm**).** We are concerned that the use of an unqualified term such as "non-hazardous" may lull the user into a false sense of security that does not encourage appropriate health and safety precautions.

As noted in the proposed guidance, a "non-toxic" claim conveys that a product is non-toxic for both humans and for the environment generally. Demonstrating a lack of toxicity in a generic

sense involves testing for a broad array of endpoints (e.g. acute toxicity, carcinogenicity and other chronic effects, developmental and reproductive toxicity, neurotoxicity, sensitization, etc.) across a variety of species. It is highly unlikely that the typical consumer product will have been subjected to this degree of testing with a resulting finding of "no adverse effect" for each of the endpoints evaluated.

EPA considers "non-toxic" claims on pesticide products to be "claims as to the safety of a product" [40 CFR 156.10(a)(5)(ix)] that are false or misleading. Further, EPA urges revising Example 3 in the proposed 260.9 so it doesn't apply to a pesticide product. The example implies that it may be acceptable to use claims such as "essentially non-toxic" or "practically non-toxic" on a pesticide in some cases. Such claims would likely not be acceptable for pesticide products under current EPA regulations.

**Renewable Materials Claims**

The Commission requested comment on whether a ''made with renewable materials'' claim should be qualified with specific information about which material is used, how it sources the material, and why it is renewable. EPA can imagine few instances where sufficient space is available to include that much information on a product. Furthermore, the question still remains whether a renewable material provides an environmental benefit over another, non-renewable material. The manufacturer or marketer should qualify the claim with why the renewable material is environmentally beneficial in the particular application in question.

EPA understands that the FTC's research shows that 45% of consumers mistakenly believe that the term "renewable" means "made with recycled materials." This is a clear misunderstanding. The FTC guidance should point out the proper meaning of the term. The FTC and EPA should also consider additional approaches to correct this misunderstanding.

Generally speaking, in layperson's terms, a renewable resource is anything that grows (and thus can renew itself.) Wood fiber and fish stocks are renewable, iron and copper are not. Where things are a little more confusing is where the natural resource base (e.g., the forest or the stock of fish) has been so severely exploited or damaged that it can't renew itself. In these cases, companies should not only avoid using the word "renewable," but they should also avoid harvesting from that natural resource base to begin with. Renewable natural resources are resources from renewable natural stocks that, after exploitation, can return to their previous stock levels by natural processes of growth or replenishment.

An authoritative definition of "renewable" and "non-renewable" is in a 2008 document from the Organization for Economic Cooperation and Development (OECD), *Measuring Material Flows and Resource Productivity, Volume 1, the OECD Guide*, page 150 (http://www.oecd.org/dataoecd/46/48/40485853.pdf):

> **Natural resources**
> The term "natural resources" designates renewable and non-renewable resource stocks that are found in nature (mineral resources, energy resources, soil resources, water

resources and biological resources). Natural resources are commonly divided into renewable and non-renewable resources:

- **Renewable natural resources**

Renewable natural resources are resources from renewable natural stocks that, after exploitation, can return to their previous stock levels by natural processes of growth or replenishment. *Conditionally* renewable resources are those whose exploitation eventually reaches a level beyond which regeneration will become impossible. Such is the case with the clear-cutting of tropical forests. Examples of renewable resources include timber from forest resources, freshwater resources, land resources, wildlife resources such as fish, agricultural resources.
*Source: OECD, and UNSD, Environment Glossary*

- **Non-renewable natural resources**

Non-renewable natural resources are exhaustible natural resources whose natural stocks cannot be
regenerated after exploitation or that can only be regenerated or replenished by natural cycles that are relatively slow at human scale. Examples include metals and other minerals such as industrial and construction minerals, and fossil energy carriers, such as oil.
*Source: OECD, and UNSD, Environment Glossary*

**Renewable Energy Claims**

1. **The Commission discussion about renewable energy claims does not clearly reflect understanding of the fact that renewable energy certificates (RECs) are integral to any environmental claims relating to renewable energy.**

   The Commission discussion presents a dichotomy between purchasing renewable power from a utility, and purchasing RECs (p. 152, 154 "whether utilities must disclose that the renewable energy they sell is based on RECs," and 156). Even if a consumer purchases electricity from a utility (or competitive electric service provider) that was generated by a facility using renewable energy, if the sale does not include RECs (or the retirement of RECs on behalf of the customer), no environmental claim should be allowed. The Commission appears to understand this, but the language used is poorly chosen, and could lead to confusion. Instead, the products should be differentiated between purchasing electricity bundled with RECs, or purchasing unbundled RECs, but we do not believe that this difference needs to be disclosed (see next point).

2. **The Commission discussion makes a false distinction between purchasing renewable energy through contracts, and purchasing RECs.**

   Beginning on p. 153, the Commission refers to "the contract method" of purchasing renewable energy as though contracts relate only to electricity purchased from a local utility. This distinction does not reflect the current way the market works.[1] For utility green pricing

[1] When the Guides were last updated, one of the issues was whether claims should be verified using "the contract method of tracking" (i.e., tracking ownership of the renewable energy and its attributes via contracts) or by tracking

programs, for example, if customers do not purchase renewable energy under contract; they can opt out of the program at any time. Further, the sale of unbundled RECs is often accompanied by short duration contracts. This distinction is again emphasized at the bottom of p. 163 and continuing on the next page. "The Commission also considered whether specific disclosures are necessary for renewable energy claims based on the purchase of RECs, rather than the purchase through contracts." Without disclosure that RECs are being purchased, some commenters argued that "consumers would otherwise assume that the marketer either generated the renewable energy itself or purchased it through contracts."

This distinction is unnecessarily confusing because unbundled RECs are often purchased through contracts. The issue being raised is not how the renewable energy is purchased (through contracts or otherwise), nor is it whether the generator is owned by the seller of the energy. Rather, the issue is whether the sale was of renewable electricity bundled with RECs, or of unbundled RECs, and whether the latter should be disclosed. In fact, the Commission appears to understand this in its closing statement on this topic, "Accordingly, the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs."

As noted in our first comment, <u>all</u> renewable energy claims are based on RECs, and we think the distinction between bundled and unbundled RECs is one that need not be disclosed in marketing materials. In this, we support the Commission's conclusion.

**3. The use of RECs, and their geographic origin, need not be disclosed.**

As mentioned in previous points, RECs are the basis of environmental claims, whether purchased as renewable electricity bundled with RECs, or purchased as unbundled RECs. One way of purchasing renewable energy is not inherently better or worse than the other, so disclosing that RECs are used serves no real purpose. If commenters believe that unbundled RECs are in some way inferior to buying renewable electricity bundled with RECs, they should make the case for that inferiority, and the Commission should address that weakness directly.

One commenter cited in the discussion believes the weakness of unbundled RECs is that they may have been purchased from a distant location. Disclosing that unbundled RECs are being sold does not really address this issue, however, because unbundled RECs could have been generated locally as well as from afar. If consumers assume that all renewable energy purchases (electricity bundled with RECs or unbundled RECs) come from local generators, then disclosure of location may be appropriate, but both unbundled RECs and electricity bundled with RECs could be generated in a distant location and imported. We note that on p. 164, the Commission realizes that the energy could be generated in a distant geographic region regardless of whether the marketer sells electricity bundled with RECs or unbundled

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unbundled RECs. At the time, RECs were new and certificate tracking systems were not yet in operation—it was only a concept. Perhaps this is what the Commission means by "the contract method." However, although the contract method of tracking may still be used occasionally for renewable energy generators that do not participate in a tracking system, such tracking systems are now in operation across all regions of the country, and in most regions are almost exclusively relied upon.

RECs. The Commission does not propose to advise guidance on the geographic location of renewable energy generation, and we support this conclusion.

**4. The Commission should be unambiguous that nuclear energy is not a renewable fuel.**

We agree that it is not necessary for the Commission to define renewable energy sources (p. 161) because states and independent programs each have their own definitions for their purposes. Nevertheless, we have a concern because the Commission in its discussion concluded, "There appears to be a consensus…that renewable energy excludes fossil fuels" (p. 160). The discussion also says, "the Commission proposes advising marketers not to make an unqualified 'made with renewable energy' claim if an item was manufactured with energy produced using fossil fuels" (p. 160).

We venture into this definitional territory because the Commission is unclear about the use of nuclear fuel. Both of the above quoted sentences should also mention that nuclear is not renewable energy (i.e., renewable energy excludes fossil and nuclear fuels).

Whether nuclear energy is renewable is a scientific question. That is not to say that someone might not market nuclear as environmentally preferable (see example below), but not all environmentally preferable choices are renewable. Renewable energy is usually defined as energy resources that are naturally replenished at a rate equal to or faster than they are used.

- The Energy Information Administration (EIA) groups uranium and fossil fuels as "non-renewable energy sources" (http://tonto.eia.doe.gov/kids/energy.cfm?page=2); and the Department of Energy's Office of Energy and Renewable Energy does not include any nuclear programs, which are supported by the separate Office of Nuclear Energy. Factually, according to the EIA, "Uranium is nonrenewable, though it is a common metal found in rocks all over the world. Nuclear plants use a certain kind of uranium, referred to as U-235. This kind of uranium is used as fuel because its atoms are easily split apart. Though uranium is quite common, about 100 times more common than silver, U-235 is relatively rare." We believe that U-235 is non-renewable because it exists in a fixed amount, and is consumed much faster than nature can recreate it.

- No public comments summarized on pp. 154-155 states that nuclear is renewable, and the Commission's market research as summarized on p. 158 provides no evidence to include nuclear in renewable energy.

- We are not aware of any explicit evidence regarding consumer perceptions of nuclear fuel as renewable or non-renewable, although there is a plethora of market research registering consumer attitudes towards nuclear and renewable sources in which stark differences are usually reported. This seems to be a settled question, because most of this work is more than five years old. For examples:
    - K. Winneg, M. Herrmann, A. Levy and B. Roe, Summary Report; Baseline Survey: Consumer Knowledge, Practices, and Attitudes. Electric Utility Deregulation and Consumer Choice. National Council on Competition and the

Electric Industry. January 1998. According to this national survey of 1,307 consumers, consumers distinguish sharply between nuclear and solar, wind and hydro in terms of their preference and their view of environmental impacts.

- B. Farhar, Willingness to Pay for Electricity from Renewable Resources: A Review of Utility Market Research. NREL/TP.550.26148. Golden, Colorado: National Renewable Energy Laboratory July 1999. http://apps3.eere.energy.gov/greenpower/resources/pdfs/farhar_26148.pdf This report compiles and analyzes market research from 14 different surveys conducted in 12 utility service territories in five Western/Southwestern states. The following information is from p. 8. "Utility market surveys asking about attitudes toward renewables found the same strong preferences for renewable energy to produce electricity when compared with other energy sources, as has been documented in national poll data (Farhar 1993, 1996)." Residential consumers prefer new renewables (89%) and hydropower (85%) over nuclear (39%) and coal (14%). "More evidence for this pattern of preferring renewable sources came from a question asking customers about their preferences for purchasing electricity from coal, nuclear, natural gas, or wind and solar. Findings show that 41% say they would choose electricity from wind and solar, 35% from natural gas, 9% from nuclear energy, and 5% from coal; 10% don't know."
- "Americans Want Energy Efficiency," November 16, 2005. http://healthandenergy.com/energy_efficiency.htm "For the third year in a row, a majority (56 percent) of all voters, and nearly two-thirds (66 percent) of those expressing a preference, would give the highest priority to funding the U.S. Department of Energy's renewable energy and energy efficiency research and development programs. On the other hand, nearly a third (31 percent) of respondents selected nuclear power as the first R&D program that should be subject to budget cuts, followed by fossil fuels (21 percent)." Further evidence of this point may be found at Farhar, B.C. Energy and the Environment: The Public View. Renewable Energy Policy Projects Issue Brief No. 3. October 1996. (see Table 2) http://www.repp.org/repp_pubs/articles/issuebr3/index_ib3.html

Public opinion may change, but this market research strongly suggests that consumers make and understand the distinction between renewable and nuclear energy.

- To our knowledge, there are no products including nuclear energy that are or have been advertised as renewable. We follow this market closely, and there is only one product we are aware of that is remotely close. Exelon Energy offers two products, a Renewable Energy Certificate that is described under Exelon Energy's Renewable Energy Offerings; and an Emission-Free Energy Certificate that is described on a separate web page. The latter is based on nuclear energy, but is nowhere described as renewable. http://www.exelonenergy.com/products/epp/Pages/default.aspx

5. **Disclosing the source of the renewable energy does not serve a useful purpose in avoiding deceptive claims.**

The discussion of consumer interpretation of renewable energy claims (p. 161) states, "Although the Commission did not test any specific qualifiers, it proposes that marketers disclose the type or source of the renewable energy (e.g., solar or wind)." Section 260.14 paragraph (b) of the proposed guideline also states, "Research suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable energy claims by specifying the source of the renewable energy (e.g., wind or solar energy)."

Research conducted by the Commission found that consumers could not distinguish between renewable energy and recycled materials. Providing information about the type of energy resource may be educational, but it does not necessarily clarify consumer confusion about the difference between renewable energy and recycled materials.
Providing information about the type of energy resource would help consumers understand what is "renewable," but it does not address what it means to be "recycled." We do not think that requiring disclosure of the source of the renewable energy (solar, wind, etc.) is necessary because consumer confusion identified by the Commission is less about what is renewable than about the distinction between renewable and recycled. The Commission concluded (p. 160) that a "significant minority" (5%) of consumers have a general understanding of renewable energy, and that there is a consensus that renewable energy is not derived from fossil fuels. There is no evidence presented that consumers are confused about the specific type of renewable energy. We conclude that the remedy proposed does not really address the source of confusion, and that in this instance, consumers would be better served by more general education rather than by burdening companies making claims with the strong advice to state the type of energy resource.

Although it is possible to identify the sources of energy from each certificate after the fact, it may be difficult to state ex-ante precisely what those sources are. For example, REC marketer might specify to a supplier that it must have Green-e certified RECs, but the source of these RECs may vary during the year. Similarly, a marketer might propose to sell a product that is 60% wind and 40% hydro, but because the wind doesn't blow as expected, or the rainwater or snowmelt doesn't accumulate as predicted, the mix may vary. If the Commission proceeds with its proposed disclosure of sources, its guidance should allow flexibility for changes to the mix.

6. **"Hosting" a renewable energy facility is a lesser statement than "powered by renewable energy" and should not be considered deceptive if it is further explained.**

The Commission proposes that it would be deceptive for a company with solar panels on its roof, and that sells the RECs, to state that it "hosts a renewable power facility." This is based on a consumer survey undertaken by the Commission that found that 62% of respondents interpreted the "hosting" statement to mean that the company used solar power.

We agree that the company should not advertise that it is "solar-powered" because it does not own the RECs. We have thought that "hosting a solar system" implies something lesser than "solar-powered," and have advised companies that follow this model to use the "host" language. Under the Commission's proposal, if a company must own the RECs to be able to claim that it is hosting a solar system, then there is no distinction between a claim of "solar-powered" and the claim of "hosting a solar system."

It is unlikely that a company would mention that it is hosting a renewable generator in its advertising for a specific product, but our focus, and the common use of the expression "hosting," is in relation to describing and promoting corporate sustainability action generally.

It is important that the Commission provide guidance on this point because such situations are becoming common, and companies need appropriate descriptive language, either language in lieu of using the word "hosting," or further explanatory language to accompany a description of hosting a facility.

If the hosting claim does arise, we urge the Commission to be very careful in how it guides such claims. Rather than totally discouraging such claims, we have suggested in Commission's Example 2 (see § 260.14 , paragraph d) below some more precise language to describe what should be disclosed.

> **Example 2**: A company places solar panels on its store roof to generate electricity and advertises that its store is "100% solar-powered." The company, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the company uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The company's claim is therefore deceptive. It may also be deceptive for this company to advertise that it "hosts a renewable power facility" <u>without further explanation</u> because reasonable consumers could misinterpret this claim to mean that the company uses renewable energy. <u>To avoid misleading consumers, the claim should include information on who actually owns the renewable energy project, who gets the renewable energy represented by the RECs, and the fact that the "host" does not use the renewable energy, such as "Company X hosts the renewable energy project, but it is owned by company Y, which gets the renewable energy."</u>

**7. In some instances, the Commission should use terminology with a more general meaning.**

The discussion in the document and the proposed guidelines often use the term "marketer" to refer to the company making a claim, whereas in the energy business "marketer" most often means the company selling the energy. It would help readers avoid confusion if the Commission used the term with broader application, such as "company" or "organization," as not all companies to which these guidelines apply are actually marketing a specific product as made with renewable energy.

**Responses to Specific Questions Posed by FTC (pp. 186-191) That Are Relevant to § 260.14 Renewable Energy Claims**

**16.** How, and under what circumstances, should marketers qualify "made with renewable energy" claims to avoid deception?

a. Does disclosing the source of the renewable energy adequately qualify the claim and prevent deceptive implications that the advertised product is made with renewable or recycled materials? Why or why not? Are there other disclosures that would adequately qualify a "made with renewable energy" claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.

b. Should the Commission advise marketers to qualify a "made with renewable energy" claim if the advertised product is not made entirely with renewable energy? If so, should marketers qualify such claims if all or virtually all significant processes used in making a product are powered by renewable energy? Why or why not? Please provide any relevant consumer perception evidence.

**Claims that a product is "made with renewable energy" should be specific to the type of energy replaced and should only be allowed if 100% of the energy used is from renewable sources, unless the claim is qualified.**

Question 16 invites comment on how marketers should qualify "made with renewable energy" claims to avoid deception. This issue seems to focus on specific products made with renewable energy rather than general company-wide claims about using renewable energy, but in either case, the claim should be specific. For example, 100% of the electricity used to make a product (or supply a company) may come from renewable energy sources, but natural gas may be used for heating, and petroleum fuels may be used for transportation. If heating is accomplished using solar energy, or if electric vehicles powered by renewable sources (including RECs) provide transportation, then that might also be the basis for an environmental claim. Companies in this situation might be advised to claim, for examples, "Made with solar heat," or "Made with renewable transportation fuels." Therefore, the Commission should advise that the claims should be specific to the type of energy being displaced by cleaner energy sources. For such claims, the Commission should advise marketers to qualify "made with renewable energy" claims if the product (or the company in the case of a general company-wide claim) is not made (or supplied) entirely with renewable energy, by stating the percentage that is supplied by renewable energy.

**Carbon Offset Claims**

**Proposed FTC guidance: Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.**

**COMMENT:** The Commission proposes adding to the Guides several guidelines that help to ensure offsets quality, including the use of sophisticated accounting protocols and rigorous tracking methods, and screening for regulatory additionality.

In addition to these points, the Commission should add general guidance stating that it is deceptive to claim that a carbon offset represents an emission reduction if the reduction is not additional, i.e., credits should not be claimed for activities that would have happened anyway. As FTC noted in the preamble, while industry members rely on different tests and standards for additionality, most agree that sellers have a duty to demonstrate that projects are additional. FTC should add general guidance stating that offsets should come from projects that have passed additionality screening.

As the Commission noted, rigorous tracking methods are essential for quality offsets. The Guides could be more specific and state that rigorous tracking methods should include the use of a registry.

**Proposed FTC guidance: It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.**

**COMMENT:** There are several issues to consider regarding timing of emissions reductions and claims that marketers can make. If the consumer is purchasing offsets credits, the emissions reductions or sequestration should have already occurred and been verified. This should include offsets from offsets registries, and any other group claiming to sell offsets. If the consumer is purchasing a product for which a company is claiming it will offset emissions, more flexibility may be warranted. If the company inventories its emissions annually, it would likely purchase offsets after it has completed its accounting, which will be over a year after the emissions of GHG occurring in the first part of the inventory year. In this case, the two year timeframe proposed would make sense. Some companies that claim to offset emissions use funds from consumers to make investments in practices or technologies that will reduce emissions in the future. This scenario is riskier to the consumer than the two noted above; however, it can provide a valuable source of upfront financing for offset projects, so it should not necessarily be discouraged.

**Proposed FTC guidance: It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.**

**COMMENT:** The Commission wisely sidesteps the issue of defining which additionality tests must be met for carbon offsets, but proposes to issue guidance regarding regulatory additionality. We support this conclusion. If a law mandates a particular emissions reduction activity, the sale of offsets from that activity, and claiming emission reductions from the purchase of those offsets, would be deceptive. The Commission should be aware that there may be instances where regulatory additionality is unclear. For example, a regulated entity may have several options to meet a regulatory requirement, some of which would reduce greenhouse gases and some of which would not. The selection of an emissions-reducing option over more common options

which do not reduce greenhouse gases may be considered an eligible offset activity by some programs, even though the activity was completed for compliance reasons.

## Sustainable Claims

While acknowledging the FTC's conclusion regarding the difficulty in providing specific regulatory guidance at present, EPA has a strong interest in fostering a more common understanding and application of the term "sustainable" in the marketplace. Claims of sustainability and standards for sustainability assessment are proliferating rapidly in the marketplace. In the absence of authoritative guidance in the area, the current inconsistencies and confusion about the use of the term can only be expected to worsen. We agree with several commenters who expressed the notion that context is important when using the term sustainable, since activities associated with the life cycle of products can affect how a natural system operates. Thus, if marketers or companies choose to use the term, EPA would suggest that at the very least the word should be accompanied by an explanation of what it means in the context. Because EPA believes that this term connotes broad environmental benefits (which may well include safety to human health and the environment), the Agency would likely consider this term to be misleading on pesticide product labels.

Generally speaking, sustainability is a characteristic of systems, whether natural or human-made – the quality of being able to continue in their present state and mode of operation indefinitely. Often the word "sustainable" is used in describing how natural resources, such as forests and fisheries, are harvested. Resources can be used sustainably. Claims of sustainable resource use should be explained. Where the term is used in the sense of "sustainable products," it is important to understand that there really isn't such a thing as a "sustainable product" in the first place. Some products will have greater effects than others on the sustainability of natural systems, which is similar to saying that some are "greener" than others. *In general, the guidance should be that companies do best to avoid claiming that their products are "sustainable."*

It may be that the Green Guides are not the best venue at present for addressing this issue in detail, but EPA and the FTC could explore less formal mechanisms for increasing understanding and promoting more consistent practices in this area.

## Life Cycle Analysis (LCA)

EPA agrees that, at this time, the FTC should not propose guidance about LCA either in marketing or substantiation. However, EPA suggests that our Agencies work together to establish a process and the appropriate criteria which will distinguish between the requirements needed for environmental labels (ISO Type I, multi-attribute label awarded by a third party), claims (ISO Type II, single-attribute label developed by the producer) and declarations (ISO Type III, eco-label based on a full life-cycle assessment), all of which have different types of requirements under the ISO 14020 series of standards.