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REGULATORY UPDATE – FTC SEEKS INPUT ON GREEN MARKETING GUIDES

by Tom Redick*

Growing public and regulatory attention to global warming, energy conservation and other sustainability issues is leading consumers and investors to demand more information about the environmental impacts of products and services. Consumers purchasing products, however, encounter myriad marketing claims promoting environmental aspects -- “carbon-neutral,” “sustainable,” “environmentally preferred,” “green,” or a range of specialized statements specific to certain sectors (“energy star” for electronics, “natural” or “organic” in food). In the US and the United Kingdom (UK) the “green marketing” regulators may invalidate advertising that goes too far – particularly claims that reach into the stratospheric ideal of “sustainability”. As claims are increasingly made for “indirect” as well as more consumer-friendly “direct” environmental effects, attorneys are predicting increased attention to both compliance from businesses and enforcement by agencies.¹ This article will survey the legal boundaries for such marketing representations, including eco-labeling standards, in the US and the UK.

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* *Global Environmental Ethics Counsel, Clayton, MO*

30th ANNUAL AGRICULTURAL LAW SYMPOSIUM IN WILLIAMSBURG, VA

by Robert P. Achenbach, AALA Executive Director

With a total attendance of 209 plus guests, the 30th Annual Agricultural Law Symposium was a fine success from all views. The program was packed with a variety of topics and speakers, from the traditional updates of major agricultural law areas to cutting issues such as animal rights and wind power.

Jesse Richardson of the Awards Committee announced presentation of the Distinguished Service Award to Tom Lawler of Parkersburg, IA, a former president and long-time supporter of the AALA. The Professional Scholarship Award was announced for Richard L. Cupp, Jr. for “Moving Beyond Animal Rights: A Legal/Contractualist Critique,” 46 *San Diego Law Review* 27 (2009). The Student Scholarship Award was announced for William Hett for “U.S. Corn and Soybean Subsidies: WTO Litigation and Sustainable Protections,” 17 *Transnational Law and Contemporary Problems* 775 (2008).

U.S.D.A. Secretary Tom Vilsack gave an extended talk and answered many questions on current policy and initiatives in the U.S.D.A. during the keynote luncheon on Friday.

Our appreciation for their service goes to Roger A. McEowen, past-present, and outgoing board members William Baarda and William Penn. Ted Feitshans assumed the presidency (cont. on page 8)

A. Who's Grinning (and Bragging) about their Greening?

Products declaring that they are sustainably produced are increasingly entering the marketplace, some with consensus-based industry standards backing up their assertion that they are “sustainable.”² As of August, 2009, the “Food Alliance” certifier of sustainable food, based in Oregon, claimed to have “320 Food Alliance certified farms and ranches in 23 U.S. states.”³ U.S. producers are being pressured by processors and consumer demands that farmers demonstrate the sustainability of their production systems. For example, Wal-Mart recently announced its Sustainability Index and the need for an industry standard. Wal-Mart senior vice president for sustainability told food industry leaders, at a Grocery Manufacturers’ Association (GMA) Executive Conference in early September, 2009, that there is no “silver bullet for sustainability; you need to do it collaboratively.”⁴ Wal-Mart and Whole Foods Market are hailed in the book “Green to Gold” by Esty and Winston, citing Wal-Mart CEO Lee Scott’s promise that sustainability efforts would help protect the company’s “license to grow.”⁵

Another book author on green marketing, Stan Cox, suggests that “the corporate takeover of organic food retailing has been the industrialization of organic agriculture”⁶ and cites critics who see corporations “exploiting organic agriculture’s feel-good image even when selling conventional products.” Cox cites one writer who suggested that the Whole Foods store in Manhattan was using folksy profiles of neighborly food-growers (like “a sandy-haired organic leek farmer named Dave”) to sell non-organic onions from Oregon and Mexico, and Cox suggests that “Wal-Mart has been caught in similar deception” without citing a reference.

Most companies do their homework before making any claims, including green claims about environmental attributes of their products or services, but there is always a risk that someone will find fault – a lack of adequate factual substantiation – in your data and conclusions, and call it “greenwashing”. For example, a November, 2007 report from the consulting firm “Terra Choice” reviewed 1,018 consumer products making 1,753 “green” claims—and found only one that completely avoided some

level of false or misleading information.⁷ The New York Times reported on \$54 million in 2007 spending for carbon credits to support tree planting, wind farms, solar power generation and other projects that offset the greenhouse gas (GHG) emissions of transportation choices. As Kyoto Protocol nations start engaging in mandatory global trading of carbon credits, key US industries – from high-flying airlines to low-lying agriculture – may find themselves faced with billion-dollar impacts to manage, with product labeling for voluntary greening and the liability risks that come with it. Major agricultural industries overseas, from palm oil to pork chops, may find their claims of sustainability rejected by regulators.

With the Obama administration and a Democratic majority in Congress taking over enforcement of green marketing laws, advertising experts predict that Congress will “broadly expand the Federal Trade Commission (FTC) and Federal Communications Commission and their enforcement of food and drug marketing, so if we can’t convince regulators that we are regulating well, they will do it for us.”⁸

Across the water, the Prime Minister of the UK, Gordon Brown, has publicly promoted sustainability in various sectors of Britain. Mr. Brown might have some tales to tell President Obama, since Mr. Brown has been accused of “greenwashing” in his efforts to promote “eco-towns” and electric cars.⁹ Mr. Brown is in good company – as this article was going to press, the UK Advertising Standards Authority (UK-ASA) was going after palm oil from Malaysia and other “sustainability” claims made in products sold there.

B. British Advertising Authority Rejects “Sustainability” Claims

In the European Union (EU), the United Kingdom’s Advertising Standards Authority (“UK-ASA”) has gained notoriety in the past by ruling against companies including Shell and Lexus over green claims in their advertising. UK-ASA rules on disputes related to allegedly deceptive advertising.

1. Sustainable Palm Oil Skids to Shuddering Halt in UK

On September 10, 2009, UK-ASA ordered Malaysian Palm Oil Council (MPOC) to

withdraw their press campaign making environmental claims about palm oil from Malaysia. Among other claims, MPOC asserted its palm oil was “sustainable” – which was deemed “misleading” by the UK-ASA. The environmental group Friends of the Earth International and two members of the public challenged the Malaysian Palm Oil Council (MPOC) claims calling its product the “green answer” as the “only product able to sustainably and efficiently meet a larger portion of the world’s increasing demand for oil crop-based consumer goods, foodstuffs and biofuels”. US soybean producers (the other ASA, the American Soybean Association) would vigorously dispute this assertion – and UK-ASA found it lacking in the substantiation required. In particular, UK-ASA ruled that the palm oil company “sustainability” certification by the third-party Roundtable on Sustainable Palm Oil (RSPO), and the certification of biofuels in general, was “still the subject of debate” around the world.

In defense of the RSPO, the Worldwide Fund for Nature (WWF - www.panda.org) can point to measurable environmental and social progress as palm producers take the “Ten steps towards increased sustainability of palm oil production” including environmental and social impact assessments, zero discharge for some operations, and other environmental measures including Regional-scale HCVM (high conservation value forest) surveys to be completed for the whole of Borneo and making 75% of new plantings on land already deforested. Such efforts would surely improve the ecological “footprint” of palm oil, reducing environmental degradation.¹⁰

With the UK-ASA striking down the RSPO, can similar actions toward the WWF’s soybean standard (Roundtable on Responsible Soy or RTRS) be far behind? This standard is out for comment, and is drawing fire from US biotech grower associations, who suggest that provisions penalizing use of biotech soybeans do not belong in a standard WWF is promoting as “technology neutral”. The same standard has irritated the anti-biotech crowd (GMWatch EU), which finds WWF and its corporate

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sponsors (Monsanto et al.) to be strange bedfellows.¹¹ The one point both of these critics agree upon is that “no-till is synonymous with GM soy production”, but despite the known benefits of no-till for soil conservation and biodiversity protection (which WWF and other NGOs recognize), the anti-biotech “GMWatch EU” sees all use of “sustainable” in conjunction with biotech crops or “GM” as “greenwashing” *per se*.¹² Unfortunately for soybean producers around the world, the UK-ASA appears to endorse this view of biotech crops in the cotton case discussed next.

2. UK-ASA and “Sustainable” Biotech Cotton from the US

This RSPO decision follows in the wake of a similar 2008 decision challenging US sources of “sustainable” cotton that question whether “sustainability” can be defined at all these days – and noting that the UK-ASA is still not ready to accept biotech crops as sustainable. In March 2008, UK-ASA ruled that the claim “SOFT, SENSUAL AND SUSTAINABLE” in the US Cotton Council advertising had “misleadingly implied the sustainability of CCI’s cotton was universally agreed” upon – which ASA found untrue. Under the UK’s “Green Claims Code”, which sets the legal boundary for green marketing in the UK, green claims should not be vague or ambiguous, for instance by simply trying to give a good impression about general concern for the environment. Claims should always *avoid the vague use of terms such as ‘sustainable’, ‘green’, non-polluting’ and so on...*” (Emphasis added).

In the cotton case, UK-ASA concluded that there was no universally agreed upon definition of the term “sustainable”. Moreover, it found a “significant division of informed opinion as to whether cotton production in the US could be described as ‘sustainable’ or not under the various available definitions.” The ads were not allowed to appear again in their current form.¹³

In its defense, Cotton Council International (CCI) argued that US cotton production, both conventional (over 99% of US production) and organic (under 1%), met or exceeded “generally accepted” definitions of “sustainability”.¹⁴ CCI noted, however that conservation tillage was difficult if not impossible to use in organic

cotton production, while conventional US cotton production – using biotech seed – had used no-till to good effect. Increased planting of biotech cotton in the US, led to less pesticide usage, with pesticides that were more targeted, less toxic, and less persistent in the environment than previous ones. Increases in beneficial insects were being reported- due to better management for those populations in cotton (via integrated pest management). Cotton growers saved over 500 million metric tonnes of soil per year and over a billion litres of fuel, reducing greenhouse gas (GHG) emissions. With higher yields, this cotton required less land, water and labor inputs to be produced than organic cotton, and also used nitrogen fertilizer rather than the large amounts of animal manure used in organic cotton production.¹⁵ Lacking no-till methods, such use of manure could lead to nutrient run-off (without careful containment) that could pollute surface waters of the US. In sum, CCI concluded that “organic” cotton could not claim sole title to being “sustainable”, despite the benefits attributable to its use of less pesticides and choice of inorganic fertilizers. At a very low acreage, organic cotton alone could not sustain and supply the global demand for cotton, being too land- and labor-intensive.

CCI denied the allegation that cotton was an “insecticide intensive” or “water intensive” crop, citing its relative drought tolerance compared to other crops and offering evidence that around 65% of the US crop used no irrigation water. Any US cotton that was irrigated generally used water-efficient drip-irrigation methods like “low energy precision irrigation.

UK-ASA, in the course of finding US cotton unable to call itself “sustainable”, acknowledged that “environmental management played a significant part” in US cotton production with undisputable drops in pesticide use. Citing “reputable scientific opinion that was concerned about the longer term impact of GM crops on biodiversity and the environment” and the need to “consider ten years to be sufficient time to assess the long-term impact of such crops,” UK-ASA refused to equate the undisputed environmental benefits of biotech cotton production in the US with

the *undefined* term “sustainable”.

Citing the Ogallala aquifer (aka High Plains aquifer) and a US Geological Survey report from 2000, UK-ASA questioned the CCI assertion that US cotton was not water-intensive, when viewed through the screen of future generations that might need the Ogallala aquifer. UK-ASA pointed to a 6% decrease in the volume of water stored in the aquifer over the past 50 years, with Texas and Kansas reporting steeper water storage declines (27% and 16% respectively). Without changes in agricultural practices, UK-ASA expected a “significant impact on the agricultural economy of the region” in the future. In light of all this, UK-ASA concluded that for water conservation, CCI did not establish that US cotton production on the High Plains region of the US was “sustainable”.

UK-ASA also noted the division of opinion on the global impact of US cotton subsidies (e.g., unfairly competing with cotton farmers in the developing world). CCI denied that US cotton subsidies were responsible for African and other cotton farmers’ losses of markets. UK-ASA cited a World Trade Organization (WTO) ruling against US cotton subsidies in ruling that that “CCI’s view that the US cotton industry had no negative impact on local economies elsewhere therefore did not command universal acceptance.”

In light of this decision, the ability of any claim of “sustainable” to pass muster, given the lack of an accepted definition, places proposals to put “sustainable” on food labels in doubt, at least in the UK.

C. US Regulatory Report – FTC’s Update of the Green Guides

To assist marketing departments everywhere in avoiding charges of being “deceptive or misleading” (i.e., “greenwashing”), the Federal Trade Commission (FTC) has had its “Guides for the Use of Environmental Marketing Claims” 16 CFR Part 260 (“Green Guides”) available since 1992. These were last updated in 1998 and are set for further revision in 2009. See, Federal Trade Commission (FTC), Green Guides Rulemaking, available at <http://www.ftc.gov/bcp/grnrule/guides980427.htm>. The Green Guides provide marketers with

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important guidance on how to make legally valid environmental claims in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names and the like.

1. FTC Workshops Explore Various Issues and Industry Sectors

At the request of various stakeholder groups, FTC held workshops to hear comments on the FTC's Green Guides (known as "Green Guides").¹⁶ In the US, the FTC saw a troubling rise in "green" marketing in the last few years. Press reports suggest that consumers will double their spending on green products and services in 2008 from 2007 spending, to over \$500 billion.

To revise the Green Guides, FTC held three public workshops in Washington, DC in 2008, including, one, a workshop on carbon offsets and renewable energy certificates (RECs), which allow an operation to reduce greenhouse gas emissions and sell credits that "offset" emissions elsewhere.¹⁷ Second, a "green packaging" workshop (claims such as recyclable, biodegradable, compostable, and sustainable) raised the question of an industry that has achieved high rates of recycling – does it lose the right to say this is "Green" when consumers think all steel is recycled?¹⁸ And third, a July 15, 2008 workshop for textiles, building products, and buildings that generated 58 comments from a range of stakeholders, including agricultural interests. One such stakeholder took a claim for transition-to-organic cotton clothing to task since it called itself "baby organic" and asserted it was "healthier" with no scientific basis.¹⁹

On the subject of "sustainable" agriculture, food company Unilever suggested that FTC follow the Keystone Group (a facilitator in Colorado) "Field to Market" standard.²⁰ His group of corn-soy-cotton-potato-wheat producers and other stakeholders is taking a deliberate and data-robust approach to metrics, which should provide growers with guidance on reaching sustainability. Labeling is not currently planned as an end-point, but growers were urged to join this initiative by Wal-Mart, which is making moves toward sustainability as a supply chain requirement.

The FTC comment period for the Green Guides ended on June 11, 2009 for its "study" of consumer attitudes.²¹

The stakes are high for both the advertising industry and the customers they serve.

The FTC can penalize greenwashing if a factually unfounded statement is found to be "unfair or deceptive acts or practices in or affecting commerce" and if the FTC finds that an unfounded claim is likely to mislead a reasonable consumer.

According to a copy of a joint filing at the FTC by advertising trade associations the American Association of Advertising Agencies (AAAA), the American Advertising Federation (AAF), and the Association of National Advertisers (ANA), US industry interests suggest that the FTC should wait on the GMG revision, because: 1) existing guidelines on truth and accuracy in environmental claims are already effective; 2) self-regulation already "ensures that environmental claims are not deceptive and must be substantiated; and 3) confusing changes could chill "valuable advertising messages." <http://www.broadcastingcable.com/article/CA6531406.html>.

It is also worth noting that state-level unfair trade practices statutes are already providing a level of oversight that is more tailored to a state's unique interests. In the ever-greener state of California, the courts are being asked to enforce Business & Professions Code §17200 to penalize "greenwashing" by companies, including issues such as use of child labor.²²

Green Guides are guidance, not formal regulations, but courts tend to give this guidance deference in litigation relating to environmental claims, when the standard for due diligence in substantiating marketing claims is challenged.

2. Enforcement Actions at State and Federal Level: The Obama Factor

FTC has enforced the Act based on allegedly false or unsubstantiated environmental claims. Because the Guides are administrative interpretations of the law, they do not have the force and effect of law and they are not independently enforceable. However, if a marketer makes claims that are inconsistent with the Guides, the FTC can take action under Section 5 of the FTC Act, which prohibits unfair or deceptive practices.

In the 1990's, under the Clinton and the

first Bush administrations, the FTC brought 37 enforcement actions against green marketers making invalid claims. In the present decade (2000 to present), however, George W. Bush's FTC had no reported enforcement actions involving such claims. Did the industry get smarter, or was there a regulatory holiday? Some experts in this area see the Obama FTC as looking for a "poster child" of improper green marketing, and if this proves true, then companies launching new products with a green statement need to be sure of both product quality and statement quality – companies need to do the same due diligence of suppliers' representations regarding as companies they do for quality control.

Carbon-offsets and broad terms like "sustainable" could provide fertile ground for FTC enforcement, since justification for the claims is exceedingly complex and sometimes based on subjective, debatable value judgments. Some commentators suggest that the Green Guides were written for packaging claims "based largely on objective data from testing or manufacturing" while carbon offsets and Renewable Energy Credits (RECs) from remote photovoltaic projects may be suffering from gaps in "processes and/or protocols used to document how these credits are certified, registered, allocated, traded and, ultimately, used and retired along the supply chain." Potential creators of credits in renewable energy have to address complex issues like "additionality" for acts taken to avoid emitting carbon (i.e., did the operator take this step in consideration for the credit to come, or would that change have been made without the credit's "carrot").

Another controversial question arises in "terrestrial" carbon. Land-based ("terrestrial") ecosystems store large amounts of carbon, which is emitted by deforestation and certain agricultural practices (tilling the soil). Credits for acts that sequester carbon include avoidance of deforestation for development and agriculture, and "no till" agricultural practices. Unfortunately, some buyers of credits do not recognize carbon-sequestration in agriculture and forestry as a viable credit. The EU does not give credits to growers of biofuels, while the US sees them as offering significant carbon offsets via sequestering (through plants taking carbon dioxide from the air) in growing corn,

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soybeans and other biofuels feedstocks.²³

D. Proposed American National Standards on Ecolabeling and EU Parallels

In 2007, Scientific Certification Systems Inc. (SCS) published a Draft Standard for Sustainable Agriculture (SCS-001) with the American National Standards Institute (ANSI). The Leonardo Academy in Madison, WI (Leonardo), an ANSI-accredited standards development organization (SDO) specializing in sustainability, began to facilitate a national dialogue on the future of sustainable agriculture in the U.S. Toward that end, Leonardo chose fifty-eight voting members of the Standards Committee, representing nearly every major material interest in US agriculture, who have, over the past year, invested significant time and resources to set the foundation for this standard. By 2012, the Committee hopes to deliver practical tools, through ANSI's consensus-building process, that US producers can use to follow the three pillars of sustainability – environmental protection, social justice, and economic viability.

The SCS-001 Standards Committee started from general principles after setting aside a controversial initial draft at its initial meeting in September, 2008. After reaching out to other standards processes, like the Keystone Field-to-Market Initiative, the Standards Committee voted in May 2009 to focus on crop production, leaving livestock operations for later. By agreeing to the use of “any technology” that serves sustainability in agriculture, they neutralized the strong objections lodged by USDA in its appeal challenging Leonardo's accreditation. (See Thomas Redick and Shawna Bligh “A Twisting Path Toward a National Standard on Sustainable Agriculture” AALA Update (March 2009) at D.)

As of September, 2009, the Standards Committee had formed six subcommittees to engage in the process of drafting a standard worthy of becoming the national standard for sustainability in US agriculture. (A list of the subcommittees and their subgroups is attached.) The “Funding and Communication” subcommittee, chaired by Dr. A. J. Bussan at University of Wisconsin and Douglas Johnson of Environmental Intelligence, is reaching out to the US agricultural community for broader participation, including voting seats on the Standards

Committee. Any interested stakeholder can participate in the subcommittee process, simply by notifying the Leonardo Academy (observer link). The 58 member Standards Committee will also be seeking to fill open seats in the next few months, and it invites active observers to apply for membership on the Standards Committee. See: Leonardo Academy Sustainable Agriculture Standard web pages: <http://www.leonardoacademy.org/programs/standards/agstandard.html>.

The Standards Committee is working to develop a national standard for sustainable agriculture in order to encourage widespread adoption of ecologically responsible, equitable, economically viable, and science-based agricultural production and handling practices that guide crop producers through stages of continuous, incremental improvement. The standard would suggest a common set of metrics – a benchmark to gauge private sustainability efforts, whether certified or voluntary measures used to improve an ecological and social footprint.

Subcommittees are now writing text for the standard on key issues relating to soil, water, energy, fair labor practices and other elements of sustainability. (Project Wiki: <http://sites.google.com/site/sustainableagstandards/>). In the year since work began in earnest, they have compiled an impressive list of references on sustainable agriculture, which is open to public use. Sustainable Agriculture Standard Reference Library: <http://sites.google.com/site/sustainableagresourcelibrary/>. The Library includes standards, metrics, guidance documents, research/analysis, web sites and other documents that are relevant to sustainable agriculture.

It is worth noting that another draft standard being promoted by SCS – the SCS-002 Life Cycle Analysis (LCA) Eco-Labeling standard–would specify how to justify labeling claims made regarding the life-cycle impact assessment framework.²⁴ This proposed standard includes calculation algorithms, and standardized declaration formats for assessing, quantifying, and reporting the environmental performance of materials, products, services, and systems. Life-cycle assessment includes determination of appropriate scope and boundary conditions, a complete life-cycle inventory, and a complete life-cycle impact assessment, conducted in accordance with ISO-14044.

Several trade groups (the American Soybean Association (ASA), Institute of Shortening and Edible Oils (ISEO), and National Potato Council (NPC)) wrote to ANSI in November 2008 objecting to the use of the ANSI standard-setting process to advance the “precautionary approach” endorsed by Scientific Certification Systems (SCS), a company offering certification services for the SCS-001 draft standard for sustainable agriculture and SCS-002 LCA standard. There is concern among certain members of the SCS-001 Standards Committee about the potential for aspects of SCS-002 to become incorporated into SCS-001 over time.

E. Preventive Steps for Businesses in Avoiding Liability for Greenwashing

For businesses, the FTC has issued a brochure, “Complying With the Environmental Marketing Guides.” This publication provides an overview of environmental marketing claims and the Green Guides. It also includes the complete text of the Guides. Documenting each step in the life cycle is complex analysis raising issues concerning ownership, reliance on third-parties, and credits that are defined differently under various state laws (at least half of US states have renewable energy credits standards, potentially allowing RECs, while half the states do not allow those credits to be traded).

How can all this value be reaped while also letting the public know your product is “Greener” than the competition? First, be specific where possible - the Green Guides recommend against broad statements lacking specificity about the practices making you green. Second, rather than saying that a product or service is “environmentally friendly” or “green” without backup explanation, list attributes: does it conserve energy, resources, or is it biodegradable, or is something specific about the process used to create it green? More information about the Green Guides can be found on the Energy and the Environment website, www.ftc.gov/energy. In conclusion, there is no conclusive reference for “Sustainable Agriculture,” which will make any such representations risky in some parts of the world.

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ANSI SCS-001 SUSTAINABLE AG STANDARD SUBCOMMITTEES-SUBGROUPS

Open to Public Observers – see this link: <http://www.leonardoacademy.org/programs/standards/agstandard/development.html>

Subcommittee & Co-Chairs Structure & Process	Sub-group
Jim Pierce - Food Trade Sustainability Leadership Association Kenneth McCauley - National Corn Growers Association	Writing "Template/Outline" and "Guidance"
<u>Economic Criteria</u>	
Russell Williams - American Farm Bureau Federation	Inputs
Tracy Miedema - Stahlbush Island Farms	Output
	Long Term Farm Viability (?)
<u>Social Criteria</u>	
Molly Anderson - Wallace Center at Winrock International Bama Athreya - International Labor Rights Forum	1) Labor rights 2) Farmers' rights 3) Community rights 4) Consumer rights 5) Health rights 6) Scale and diversity of farming systems
<u>Environmental Criteria</u>	
John Thorne - CropLife America	Water, Soil and Air Pollution
Grace Gershuny - Independent dba GAIA Services	Agricultural Ecosystem Soil Health, Fertility and Productivity Renewable/Non-Renewable Inputs Environmental Footprint Biodiversity Reduce, Reuse, Recycle Crop & Livestock Integration Local Production Consumer Health Climate Change
<u>Funding and Communication</u>	
Doug Johnson A.J. Bussan	Funding Communication
<u>Reference</u>	
Betsy Peterson, California Seed Association and Bill Wolf, Wolf, DiMatteo Associates	Inputs Data library Side by Side comparison

ENDNOTES

¹ Perry Robinson, Darin Lowder, Green Energy Advertising: How FTC "Green Guide" Revisions Might Affect Your Business Marketing, Ballard Spahr Firm Newsletter (January 29, 2008) available at <http://www.ballardspahr.com/press/article.asp?ID=1984>.

² NSF International, a standard-setting and testing organization based in Ann Arbor, MI, has a "Center for Sustainable Product Standards" used to develop U. S. national standards, which has two final standards now in use, for carpet and furniture. NSF, Sustainability (Green) Program, available at <http://www.nsf.org/business/sustainability/index.asp?program=Sustainability>. NSF was also the first standard-setter to publish notice of a draft standard for sustainable food, feed, fuel and fiber, the SCS-001 Draft Standard on Sustainable Agriculture, in April 2007 (ANSI Standards Action, April 2007, on file with author).

³ N.Y. fruit processor certified as sustainable,

Sustainable Food News (August 17, 2009) available at <http://www.foodalliance.org/newsroom/articles/2009/RedJacket-SFN-17Aug.pdf> (" Food Alliance certification for sustainable agriculture verifies that Red Jacket's farm operations - over 600 acres of tree fruit production - meets high standards for soil and water conservation, safe and fair working conditions, responsible pest and nutrient management, and protection of wildlife habitat.")

⁴ David Orgel, Wal-Mart Talks Sustainability With Kroger (Sep 2, 2009) available at http://supermarketnews.com/Sustainability_Green/walmart_kroger_0902/.

⁵ Daniel Esty and Andrew Winston, *Green To Gold: How Smart Companies Use Environmental Strategy To Inovate, Create Value, And Build Competitive Advantage* (2006).

⁶ Sick Planet: Corporate Food and Medicine (Pluto, 2008) at 65-73 critiques "industrial" agriculture and recounts how these two

Fortune 500 companies (Wal-Mart at No. 1, Whole Foods at No. 411) were each attempting to expand the market for natural and organic food.

⁷ Terra Choice, *The Six Sins of Greenwashing* (November, 2007).

⁸ Karl Greenberg, ANA Hears Of Potential For More Regulation (March 10, 2009) (quoting Dan Jaffe, EVP, government relations at the Association of National Advertisers (ANA)), available at http://www.mediapost.com/publications/index.cfm?fa=Articles.showEdition&art_send_date=2009-3-11&art_type=16.

⁹ Jonathan Leake, Gordon Brown's eco-towns policy just 'greenwash', warns report London Times, (June 22, 2008) (citing "official report warning that many of the schemes are little more than ordinary housing estates with a green label attached") available at <http://www.timesonline.co.uk/tol/news/politics/article4187614.ece>; <http://www.libdems.org.uk>

(cont. on page 7)

org.uk/news_detail.aspx?title=Brown's_support_for_electric_cars_yet_more_greenwash_-_Baker&pPK=3c67fccf-eb0-412c-89f8-db523ba543bd (Electric cars_

¹⁰ Hereward Corley, Ten steps towards increased sustainability of palm oil production, (June 2006) available at <http://www.rspo.org/PDF/Main%20page/Ten%20steps%20towards%20increased%20sustainability.pdf>.

¹¹ GM-Watch EU, Comment on latest weasel words from WWF (“The principles and criteria of the RTRS, [use] the word “sustainable.” And although this word was rightly avoided in naming the RTRS, the effect of the certification programs being developed to certify to the RTRS principles and criteria will be to label GM soy as “sustainable.” If this is not greenwashing, what is? .

There are at least two certification programs under development aimed at using the RTRS principles and criteria as the basis for certifying GM soy as “sustainable.” One is owned by Aapresid, the Argentinean No-Till Farmers Association (no-till is synonymous with GM soy production in Argentina).

¹² *Id.*

¹³ ASA Adjudications, Cotton Council International t/a Cotton USA (March 12, 2008) available at www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44113.htm (UK-ASA Cotton)

¹⁴ *Id.* CCI quoted definitions from the United Nations Brundtland Commission, the US Environmental Protection Agency and the 1990 US Farm Bill (Food, Agriculture, Conservation and Trade Act of 1990), P.L. 101-624 (1990) noting the basic “three pillars” principles remained constant: 1) economic viability, 2) environmental protection and 3) social responsibility.

¹⁵ *Id.* CCI claimed that, since 1930 the amount of land devoted to cotton farming in the US had dropped by 30 million acres, while yields of cotton had risen by 6 - 8 million bales, due to sustainable development practices which had freed up land for conservation and other uses. UK-ASA Cotton, *supra*.

¹⁶ See 72 FR 66094, Carbon Offsets and Renewable Energy Certificates (held

on January 8, 2008); 73 FR 11371, Green Packaging Claims (held on April 30, 2008); and 73 FR 32662, Green Building and Textiles (held on July 8, 2008).

¹⁷ Renewable power generators sell their electricity (RECs) as conventional electricity, but sell the eco-value of their power separately through the REC document. FTC Workshop transcript/webcast at: <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>.

¹⁸ Since “Steel is the most recycled material in the United States, and is recycled more than all the other materials combined” at what point does this become simply sensible business practice, such that it should stop qualifying to be “green” in marketing claims? See Comments of William Heenan, Steel Recycling Institute, to Green Packaging Workshop, Comment No. 534743-00018 (May 15, 2008) <http://www.ftc.gov/os/comments/greenpkgworkshop/534743-00018.htm> and FTC Workshop transcript/webcast, available at <http://www.ftc.gov/bcp/workshops/packaging/index.shtml>. The FTC has posted 32 comments from various stakeholders at # 240; 16 CFR Part 260; Project No. P084200: Guides for the Use of Environmental Marketing Claims; The Green Guides and Packaging: Public Workshop, (April 30, 2008) available at <http://www.ftc.gov/os/comments/greenpkgworkshop/index.shtml>.

¹⁹ Bill Norman, National Cotton Council of America, Comment 536013 (August 15, 2008) available at <http://www.ftc.gov/os/comments/buildingandtextilesworkshop/536013>. See also, FTC Workshop transcript/webcast at, <http://www.ftc.gov/os/2008/06/P084203ggfrn.pdf>.

²⁰ Comment of Nancy L. Schnell, Esq. Unilever to Green Packaging Workshop (May 19, 2008) Comment No. 534743-00030 available at <http://www.ftc.gov/os/comments/greenpkgworkshop/534743-00030.pdf>.

²¹ Federal Trade Commission, Agency Information Collection Activities; Submission for OMB Review, 74 Fed Reg. 22395-22399 (May 12, 2009)(Seeking comments on (“Green Marketing Consumer Perception Study, Project No. P954501”) available at <http://www.ftc.gov/os/>

[fedreg/2009/may/090512greenmarketing.pdf](http://www.ftc.gov/os/publiccomments.shtml). Comments are posted at <http://www.ftc.gov/os/publiccomments.shtml>.

²² In *Kasky v. Nike*, 119 Cal. Rptr. 2d 296, 27 Cal. 4th 939 (2002) activists sued Nike under California’s consumer fraud law, alleging that defendant corporation, deflected public criticism and induced consumer purchases via false statements about its labor practices (Nike allegedly manufactured sneakers using sweatshops overseas). The California Supreme Court found “that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages” and reversed for further proceedings (opinion available at <http://www.law.com/regionals/ca/opinions/may/s087859.shtml>); See also, Wendy Tannenbaum, Nike brings commercial speech to Supreme Court Available at <http://www.rcfp.org/news/mag/27-2/lib-nikebrin.html> (site visited December 27, 2008).

²³ (Center for Clean Air Policy, Guidebook, (Jan. 17, 2007) available at [guidebook_beta/downloads/CCAPTransportationGuidebook\(2\).pdf](http://www.guidebook_beta/downloads/CCAPTransportationGuidebook(2).pdf)). See also, Press Release, Pew Center on Global Climate Change <http://www.pewclimate.org/press-release/OQI/7-28-08>(The Offset Quality Initiative suggests that biological sequestration, particularly avoided deforestation, is a vital category of mitigation opportunity).

²⁴ SCS-002: 2008 Draft Standard for Comment, Type III Life-Cycle Impact Profile Declarations for materials, products, services, and the manufacturing or operational systems integrated into them. SCS-002: 2008 Draft Standard for Comment (2008). Scientific Certification Systems. Available at www.scscertified.com/PDFS/SCS_002_0808_FR.pdf.

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(cont. from p. 1)
“A judge is a law student who marks his own examination papers.”
H. L. Mencken

presidency and Maureen Kelly Moseman continues on the board as past-present. New board members for 2010-2012 are David Waggoner and Allen Olson. Pat Jensen is the president-elect for 2010 and already hard at work designing the 2010 conference, October 8-9, 2010 at the Hilton Hotel in downtown Omaha, NE. Pat welcomes all ideas and offers to create panel discussions. Contact her at wcolemanpjensen@aol.com.

Due to the excellent attendance and the contributions of many sponsors, the conference was also a great financial success.

We owe a debt of gratitude to our sponsors:

- The AALA appreciates the generous support of the Farm Foundation. As it has in many years, the Farm Foundation's grant to the AALA for the annual conference has allowed the AALA to offer student attendees a greatly reduced registration fee which is instrumental in giving the students the chance to participate in broadening their educational experiences.

- Funds to reimburse student travel expenses have been provided by The Farm Credit Council on behalf of the Farm Credit System.

- Jesse Richardson and the staff of the Urban Affairs & Planning department at Virginia Tech for assistance in getting the word out to Virginia practitioners.

- Linda Malone for hosting the Thursday evening Welcome Reception at her home.

- Virginia Department of Agriculture and Consumer Services and Virginia Farm Bureau (Cosponsors) for sponsoring the Thursday evening Welcome Reception;

- Baird Holm Law Firm, Omaha, NE - for sponsoring the Friday morning breakfast;

- McLeod, Watkinson and Miller, Washington, DC - for sponsoring the Friday morning break;

- Faegre & Benson LLP, Des Moines, IA - for sponsoring the Friday luncheon food

- Beving, Swanson & Forrest, P.C., Des Moines, IA - for sponsoring the Friday afternoon break;

- Ice Miller, LLP, Indianapolis, IN – for co-sponsoring Friday evening reception;

- Jesse J. Richardson, Jr. - for sponsoring the Saturday morning break;

- L. Leon Geyer, Don and Evelyn Mitchell Agricultural and Environmental Law Endowment, Virginia Tech and Bill Bridgforth, Ramsay, Bridgforth, Pine Bluff, AR – for sponsoring the Saturday afternoon break.

Please extend your thanks whenever you speak with or meet any of these people.

If you or your firm would like to sponsor an event, participate in the student travel subsidy, or provide other assistance, please let me or Pat Jensen know.

You can still order a copy of the conference handbook in either printed (\$90) or CD (\$45) version. The CD will also contain archives of recent AALA Updates and has an active Table of Contents which will allow you to click on a paper title to take you directly to that paper on the CD. You can order the handbook online using the conference registration form, www.aglaw-assn.org or send me an e-mail and I can send the book or CD with an invoice, RobertA@aglaw-assn.org.

2010 Membership Renewals

2010 membership renewals can be paid at any time using the membership form online. I will be mailing renewals in late November.

Please send in your renewals as soon as possible to avoid interruption of member benefits, including the agricultural law listserv (send e-mail to RobertA@aglaw-assn.org if you are not currently receiving posts) and the Agricultural Law and Food Policy Blog, www.agandfoodlaw.com.

After a huge increase of 174 new members for 2009, it is essential to build on this success with high retention of membership into 2010.

Maureen Kelly Moseman's Challenge

During her president's speech at the Saturday conference luncheon, Maureen challenged herself and all members to write at least one article for the AALA Update in the next year.

Linda McCormick, the communications committee, and I join her in making that challenge to all AALA members, academics, students and practitioners alike. Whatever you are working on, write it up in a short or long article for submission. We prefer articles in MS Word with endnotes manually listed (i.e. do not use the automatic endnote numbering application). A major reason given for membership is the networking with the other members. Your article lets others know what is going on and who is working on the current issues.