



CANADIAN INSTITUTE FOR
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April 1, 2009

Alena Grunwald
Project Manager
Ministry of the Environment
Integrated Environmental Planning Division
Waste Management Policy Branch
135 St Clair Avenue West, Floor 7
Toronto Ontario M4V 1P5

Dear Ms. Grunwald:

Re: Review of Ontario's *Waste Diversion Act, 2002*: Discussion Paper for Public Consultation, EBR Registry Number: 010-4676

I am writing on behalf of the Canadian Institute for Environmental Law and Policy (CIELAP) to provide comments on the Ministry of the Environment's review of Ontario's *Waste Diversion Act, 2002* (WDA). CIELAP was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. CIELAP produces balanced, evidence-based research, and works to bring together a diverse range of stakeholders for constructive dialogue on environmental issues.

CIELAP has significant research expertise in both solid and hazardous waste management, dating back to the 1980s. Our recent reports include *Waste Bytes! Diverting Waste Electrical and Electronic Equipment in Ontario* (January 2008), *Hazardous Waste in Ontario: Progress and Challenges* (September 2007), and *Ontario's Waste Management Challenge – Is Incineration an Option?* (March 2007). Over the past few months CIELAP has conducted interviews and performed its own assessment of the *Waste Diversion Act*. We have recently published *An Options Paper on Ontario's Review of the Waste Diversion Act* (February 2009) to reflect what we heard from stakeholders that we interviewed, along with a series of background papers relating to the WDA. A copy of the Options Paper is attached to these comments, and all of our reports are available at www.cielap.org.

Since Ontario's *Waste Diversion Act* was enacted in 2002, many feel that the Act has achieved limited measurable diversion results. There has been frustration at the slow pace at which materials have been designated, and at which plans and programs have been developed, approved, and implemented. Within the past year, however, the Ministry of the Environment has shown much interest in making progress on waste management in Ontario. The Ministry has changed the structure of the Waste Diversion Ontario (WDO) board to make it more independent, mandated full steward responsibility for Ontario's Blue Box Program, launched the 5-year review of the WDA, and produced an excellent discussion paper – *Toward a Zero Waste Future: Review of Ontario's Waste Diversion Act, 2002* – proposing that Ontario adopt a zero waste vision. CIELAP commends the Ministry for the direction that has been shown, and encourages the Minister to move forward with strengthening the Act to ensure that strong measures for waste diversion continue to be developed in Ontario. We are pleased to provide the following comments and recommendations, based on our research and discussions with stakeholders.

Extended Producer Responsibility

Legal Framework for EPR

Amendments should be made to the WDA to allow it to be enabling legislation for a framework of full Extended Producer Responsibility (EPR) for waste. The Act should include a clear definition of EPR that recognizes responsibility for the impacts of both waste and non-waste factors. The Ministry should determine the objectives to be achieved in introducing EPR and set these out clearly in the WDA. These may include any or all of: shifting the financial burden for waste management and recycling operations from municipalities to producers; internalizing the costs among producers for the end-of-life of their products; increasing reuse, remanufacturing, and recycling; encouraging or requiring changes in product design; and achieving other environmental benefits including greenhouse gas reductions or reductions in the use of toxic substances. EPR should be a central feature of the WDA and the primary funding model. In most situations industry should be required to provide 100% of funding for waste diversion programs.

Recommendation

The WDA should provide a legal framework for implementing full EPR in Ontario and include a clear definition of EPR. The Ministry should determine the objectives to be achieved in introducing EPR and set these out clearly in the WDA.

Individual Producer Responsibility

The WDA currently provides a framework that requires one collective monopoly IFO to be created and designated so that stewards work with their competitors to develop diversion programs for designated materials. Rather than retaining the collective monopoly as the default structure, the WDA should be amended so that producers are made individually responsible for their obligations but given greater flexibility in how they choose to meet them, including the creation of multiple IFOs.

Increasing individual responsibility will hopefully provide producers with more incentive to show innovation in meeting their diversion requirements. Such innovative changes in design should be encouraged and rewarded by government through financial incentives or subsidies.

The WDA should require that individual producers meet pre-determined targets, parameters, and compliance mechanisms set out in the backdrop regulations and Program Request Letters (PRLs). Producers could then be encouraged to form or join collective schemes as they choose to meet the targets in the most efficient way in cooperation with others. The development of IFOs would also promote competition between collective schemes and ensure that no single player can exert control over the market. This design has been used in jurisdictions in the European Union.

For example, Belgium's 1997 Interregional Cooperation Agreement on the Prevention and Management of Packaging Waste imposes three obligations on those responsible for packaging: a prevention obligation (parties submit a prevention plan every three years to the Interregional Packaging Commission); a take-back obligation (to prove that their packaging has been recycled or recovered and that they have met targets); and an information obligation (requiring them to report on how they have complied with regulations). Fines are issued for non-compliance. The Agreement applies to both residential and IC&I waste.

The Agreement also specifies that parties may entrust their obligations to an accredited body or arrange for a third party to take care of its obligations. Accredited bodies are required to meet collective targets rather than individual targets, which are often easier to achieve. In such cases the accredited body or third party reports to the Interregional Packaging Commission. One such organization is VAL-I-PAC, an accredited body established in 1997 by fifty business owners and trade federations. VAL-I-PAC charges a joining fee as well as a tonnage charge. It supports its members by: collecting supporting documentation; ensuring that member companies are complying with regulations; providing a centralized system to track its members' packaging; and helping businesses achieve their targets. VAL-I-PAC works with waste management industries to secure information about its members' waste recycling rates. VAL-I-PAC also provides financial incentives to small-to-medium sized companies.

Recommendation

Producers should be made individually responsible for their obligations but given greater flexibility in how they choose to meet them, such as through the development of multiple IFOs to promote competition between collective schemes. Innovative changes in design should be encouraged and rewarded by government through financial incentives or subsidies. The WDA should require that individual producers meet pre-determined targets, parameters, and compliance mechanisms.

Differentiation of Steward Fees

If the current structure is maintained in which one collective IFO is designated and stewards must pay steward fees to it, the Act should be modified to provide the IFO with greater flexibility to differentiate fees in order to reward individual producer responsibility. Section 30 of the WDA currently places restrictions on how fees can be differentiated. These restrictions should be

revised or removed to give the IFOs the flexibility to set differentiated steward fees to reward better environmental performance and encourage innovation.

Recommendation

If the current structure is maintained in which one collective IFO is designated and stewards must pay steward fees to it, the Act should be modified to provide the IFO with greater flexibility to differentiate fees to reward individual producer responsibility.

Fee Visibility

CIELAP supports MOE's position in *Toward a Zero Waste Future* that producers and retailers not be permitted to show consumers their costs for waste diversion through a visible fee above the point-of-sale price. Producers should have to internalize these costs as they do other production costs to encourage reduction of these costs and of waste. A symbol or comment could be placed on the pricetag or product packaging to educate consumers about the end-of-life management of that product as well as to recognize the efforts of stewards.

Recommendation

Producers and retailers should not be permitted to impose a visible fee for waste diversion costs above the point-of-sale price.

Design for Environment

A key component of EPR should be the promotion of Design for Environment principles, which incorporate versatility, recyclability and disassembly into innovative design for products and packaging. The WDA should recognize the principle of Design for Environment and include both requirements and incentives to ensure that manufacturers improve durability and extend products' useful lives.

Recommendation

The WDA should recognize the principle of Design for Environment and include both requirements and incentives to ensure that manufacturers improve durability and extend products' useful lives.

Additional Measures

There are a number of other measures that the Ontario Government may take, in conjunction with modifying the WDA, to foster EPR. For example, EPR programs would likely benefit from landfill bans and export bans in relation to specific materials. The Ontario Government should put in place procurement policies relating to its own purchasing. The Ontario Government should also consider establishing a brand to identify greener products from a waste diversion perspective, such as those that are more recyclable or reusable, to reward responsible producers. This could be similar to the Energy Star and Forest Stewardship Council brands.

Recommendation

The Ministry should consider the development of landfill bans and export bans for specific materials to support EPR in Ontario. The Ontario Government should put in place procurement policies relating to its own purchasing, and also consider establishing a brand to identify greener products from a waste diversion perspective to reward responsible producers.

Increasing Waste Reduction through the 3Rs Hierarchy

Comprehensive Waste Management Planning

The WDA should provide for the development of a broad, comprehensive waste management plan for Ontario. This would involve the development of a master plan or framework, such as the state of Massachusetts' Solid Waste Master Plan and the Strategic Plan of Nova Scotia's RRFB, to give direction on upcoming waste management initiatives and waste diversion programs. The plan would provide information to the public and guidance to industry, and could include: a vision; priorities; targets; timelines; and a framework for monitoring, evaluation and enforcement. The plan could also provide strategic direction for achieving other benefits, for instance increasing jobs or reducing greenhouse gas emissions.

Recommendation

The WDA should provide for the development of a broad, comprehensive waste management plan for Ontario.

Include the Waste Hierarchy in the Act

The primary focus of the WDA so far has been on recycling rather than on reduction or reuse. It is important that this focus be shifted so that minimizing the generation of waste is addressed at the earliest stage possible, rather than simply taking a "recycle at the end-of-life" approach. A waste hierarchy should be incorporated into the WDA that clearly prioritizes reduction and reuse activities over recycling, and ensures that these priorities will be reflected in the programs developed under the Act.

The Ministry should not include recovery of energy from waste in a waste hierarchy under the WDA. Section 25 of the current WDA specifies that waste diversion programs under the Act shall not promote the burning of waste. CIELAP believes that this prohibition is appropriate given the Act's focus on the reduction, reuse and recycling of waste. Recovery of energy from landfilling or incinerating waste should not be considered a form of waste diversion. The Ontario government should proceed with caution if it intends to expand the use of incineration, and should only consider its use in Ontario for truly residual waste after a strong and effective waste diversion program has been established in the province, and relevant technologies have been clearly shown to be safe. For more information on CIELAP's perspective on this issue, please see our 2007 report, *Ontario's Waste Management Challenge – Is Incineration an Option?*, available at www.cielap.org.

Recommendation

A waste hierarchy should be incorporated into the WDA that clearly prioritizes reduction and reuse activities over recycling, and ensures that these priorities will be reflected in the programs developed under the Act. The hierarchy should not include energy recovery as a form of waste diversion.

Targets and Market Creation

The Minister should be responsible for providing strong, mandatory diversion targets for reduction, reuse and recycling under the WDA. These targets could be provided in each PRL for designated materials, as appropriate and based on market research. Over time, targets should be reviewed and strengthened to encourage continual improvement. The WDO should be given the mandate to ensure that reduction and reuse targets are met in addition to those for recycling, as well a greater authority and resources to achieve this mandate.

With regard to achieving recycling targets, programs should continue to foster the creation of viable after-markets for recyclables. The programs that are developed should also encourage the creation of markets for reuse of materials as well as markets for recycling. There is a need to support local infrastructure to manage our waste domestically, which could also support the creation of jobs in Ontario.

Recommendation

The Minister should be responsible for providing strong, mandatory diversion targets for reduction, reuse and recycling under the WDA. Programs should encourage the creation of markets for both reuse and recycling.

Consumer Role

As proposed in *Toward a Zero Waste Future*, the WDA should include incorporate tools that facilitate consumers in making purchasing choices that drive the decisions of producers and retailers concerning product and packaging design. Such tools could include consumer education, deposit return systems, take-back services, product certification and labelling for environmental impacts.

Recommendation

The WDA should incorporate tools that facilitate the capacity of consumers to make purchasing choices that drive the decisions of producers and retailers concerning product and packaging design.

Increasing Diversion of Industrial, Commercial, and Institutional (IC&I) Waste

Approaches to IC&I Waste Diversion

Toward a Zero Waste Future raises the question of whether Ontario should continue to promote approaches to waste diversion that focus on facilitating diversion by waste generators. CIELAP believes it is important that the Ministry make it a priority to increase levels of IC&I waste diversion in Ontario by using a range of different approaches to achieve its aims.

Recommendation:

The Ministry should make it a priority to increase levels of IC&I waste diversion in Ontario by using a range of different approaches to achieve its aims.

Including IC&I in WDA Programs

CIELAP strongly urges MOE to include the IC&I sectors as appropriate in existing and future programs under the WDA. For example, there could be major benefits in expanding the existing Blue Box program to encompass diversion by IC&I waste generators. Statistics Canada estimated that Ontario's non-residential (including IC&I and Construction and Demolition) sectors diverted a mere 18% of their wastes from landfill in 2004. These sectors make up a large percentage Ontario's non-hazardous waste stream (61% in 2004) and must be targeted in any provincial waste diversion programs. A key move in this direction would be to extend the Blue Box program and stewards' responsibility for packaging waste to include the IC&I sectors.

It will be important to examine and better understand the material distribution among the sectors so that waste diversion programs can be developed effectively. It may be most appropriate that programs not be overly prescriptive but instead allow IC&I waste generators to meet government-set targets in whatever ways work best for their specific businesses. However, it may be necessary that programs be standardized across municipalities or regions to ensure consistent programs and education.

Recommendation:

MOE should include the IC&I sectors as appropriate in existing and future programs under the WDA, including the Blue Box program.

Diverse sectors

The IC&I sectors are very diverse and a number of different approaches may be needed. MOE should make use of a range of tools that could include: providing incentives; banning materials from landfill; instituting landfill taxes and fees; issuing penalties; and enforcing compliance. The Ministry should consider forming a multi-stakeholder advisory group to provide advice on the best mix of approaches for IC&I waste diversion for Ontario.

Recommendation:

MOE should make use of a range of tools that could include: providing incentives; banning materials from landfill; instituting landfill taxes and fees; issuing penalties; and enforcing compliance.

Environmental Protection Act and Existing 3Rs Regulations

As noted in *Toward a Zero Waste Future*, the 3Rs Regulations under the *Environmental Protection Act* (EPA) could be amended to promote increased IC&I diversion rates. CIELAP agrees that the 3Rs Regulations should be amended to increase the scope of their coverage and include more definitive requirements, such as data reporting requirements and stronger enforcement measures.

Waste diversion should also be promoted in the IC&I sectors through the inclusion of specific conditions in environmental approvals or permits issued to companies under the EPA. Such conditions could include requirements for source separation of waste generated at a business or institution.

Recommendation:

The 3Rs Regulations should be amended to increase the scope of their coverage and include more definitive requirements. Waste diversion should also be promoted in the IC&I sectors through the inclusion of specific conditions in environmental approvals or permits issued to companies under the EPA.

Target Key Materials and Sectors

When approaching waste diversion in the diverse IC&I sectors, it makes sense to target specific materials and related sectors. For example, it would be very effective to target diversion of organics in sectors that are engaged in food services, including restaurants, hotels, hospitals, educational institutions and shopping centres.

Another key material is construction and demolition (C&D) waste, which is generated in large volumes and therefore important to target. MOE should consider a number of elements from California's model C&D diversion ordinance. These would include: tying the approval of building or demolition permits to the submission of a Waste Management Plan (WMP) setting out how targets predetermined by the province will be met; requiring applicants to submit a cash deposit that is only returned when the applicant proves that diversion of the target waste has taken place; and requiring builders and demolishers to provide proof that they have complied with their WMPs before receiving a certificate of occupancy or final project approval.

Recommendation:

MOE should target specific materials and related IC&I sectors for waste diversion programs, such as organics and C&D waste.

Streamlining Governance and Administration

Purposes of the WDA

There is currently a lack of clarity in the WDA about the Act's purposes, principles, and broad policy objectives, which has resulted in some confusion among stakeholders. These purposes, principles and policy objectives should be clarified and set out in the Act to give WDO, IFOs, other stakeholders and the public a better understanding of: their roles and mandates, the principles guiding this mandate: and what they should be aiming for in developing and monitoring programs. The Act should also clarify and specify the roles and responsibilities of the Minister of the Environment, WDO, and the producers, or industry stewards, to ensure a common understanding. This should include clarification as to who is responsible for monitoring, evaluation, and enforcement.

Recommendation

The purposes of the WDA should be clarified and set out in the Act to give WDO, IFOs, other stakeholders and the public a better understanding of: their roles and mandates, the principles guiding this mandate: and what they should be aiming for in developing and monitoring programs. The Act should also clarify and specify the roles and responsibilities of the Minister of the Environment, WDO, and the producers, or industry stewards, to ensure a common understanding.

Roles and Responsibilities of the Minister

The Minister should be responsible for designating wastes and setting ambitious program targets. These designations and targets should be based on scientific assessment and consultation. An independent body made up of individuals from various sectors should be established to determine appropriate targets and parameters for the PRL. Such a panel was created for the WEEE program and could be replicated for future programs.

Currently, under the WDA, the Minister has the authority either to approve or not approve a proposed waste diversion program that has been submitted by WDO. The Minister also should have the authority to require that WDO make specific amendments to a proposed program plan to ensure that it meets the requirement of the Act and the PRL. This will ensure that program plans that are for the most part acceptable do not need to be rejected after a great deal of work and consultation.

The Ministry should establish environmental, social, and economic criteria and objectives against which the waste diversion program may be evaluated. These criteria and objectives could include examination of other environmental consequences, such as the generation of greenhouse gases or toxins.

Under the current WDA, it is a general offence to contravene the Act, regulations or rules, and enforcement provisions are included in the Act. The WDA should give the Minister specific authorities: to enforce timelines related to program development and implementation; and to penalize industry stewards if they do not adequately fulfil the requirements of the Act.

The Minister also should play an active role in the development of other policy mechanisms to support and complement the efforts of WDO, such as enacting landfill or export bans on specific materials, nurturing markets, and directly funding activities to promote diversion.

Recommendations:

The Minister should be responsible for designating wastes and for setting strong program targets, based on scientific assessment and advice from an independent body.

The Minister also should have the authority to require that WDO make specific amendments to a proposed program plan to ensure that it meets the requirement of the Act and the PRL.

The Ministry should establish environmental, social, and economic criteria and objectives against which waste diversion program may be evaluated.

The WDA should give the Minister specific authorities: to enforce timelines related to program development and implementation; and to penalize and possibly dismiss IFOs and industry stewards if they do not adequately fulfil their responsibilities under the Act.

The Minister should also play an active role in the development of other policy mechanisms to complement WDO's efforts.

Roles and Responsibilities of Waste Diversion Ontario

Under the current WDA, WDO plays a number of important roles, such as: providing stability when there are changes in government or Minister; supporting program development by ensuring that requirements of PRLs are met; ensuring reporting on consultations related to program development and review; and performing other administrative roles to support the development and implementation of successful waste diversion programs. Recent changes to the composition of WDO's board of directors are likely to increase its effectiveness and accountability.

The role of WDO should be strengthened and it should maintain its role as a third party administrative body. All efforts should be made to allow WDO to be independent and removed from political pressure. WDO's main role should be to ensure the successful development and implementation of waste diversion programs and its board should be composed of a knowledgeable and independent group of individuals. Efforts should be made to improve WDO's transparency, such as requiring that detailed minutes of its meetings be made public and making WDO subject to Ontario's *Freedom of Information and Protection of Privacy Act*.

Currently under the WDA, WDO is required to develop waste diversion programs in co-operation with Industry Funding Organizations. This responsibility would need to be adjusted if the Ontario government amends the WDA to introduce an individual EPR system, but WDO could continue to provide assistance in the development of waste diversion programs.

WDO should be responsible for monitoring, evaluation and reporting on all aspects of progress in achieving waste diversion under the WDA. WDO should assess waste diversion programs against the environmental, social, and economic criteria and objectives established by MOE. WDO also should assess what stewards and municipalities should be doing, how their efforts could be improved, and what opportunities exist for market development and other overarching considerations.

The Ministry should restructure the funding mechanism for WDO so that it is not completely dependent on fees from industry stewards. The creation of a reserve fund would ensure that WDO has adequate funding during the program development phase, and the fund could be replenished once a program has been developed.

Recommendations:

WDO should be strengthened and it should maintain its role as a third party administrative body that is independent and removed from politics.

WDO's main role should be to ensure the successful development and implementation of waste diversion programs and its board should be composed of a knowledgeable and independent group of individuals. Recent changes to the composition of WDO's board of directors should be codified in the WDA.

Efforts should be made to improve WDO's transparency.

WDO could continue to provide assistance in the development of waste diversion programs, and should be responsible for monitoring, evaluation and reporting on all aspects of progress in achieving waste diversion under the WDA.

The government should also structure WDO funding so that it is not as dependent on steward fees during the program development phase.

The Ministry should restructure the funding mechanism for WDO so that it is not completely dependent on fees from industry stewards, and has adequate funding during the program development phase.

Roles and Responsibilities of the Industry Stewards

As stated above in relation to EPR, industry stewards should be made individually responsible for meeting legal waste diversion requirements and targets. Stewards should be given the flexibility to meet these requirements on their own or by forming collective structures.

Recommendation

Industry stewards should be made individually responsible for meeting legal waste diversion requirements and targets.

Process for Program Development

CIELAP has developed a number of recommendations specific to the current process for program development under the WDA. While these processes may be changed as a result of amendments to the Act, the principles reflected in these recommendations would remain relevant.

Recommendations:

Transparency and appropriate consultation should be the foundation for how programs are developed, including the stage prior to a Program Request Letter being developed. The process for deciding what materials should be designated, as well as what requirements and targets should be included in the PRL, should be transparent and involve comprehensive and effective public consultation.

MOE should perform an assessment of need to designate a specific waste and the feasibility of a diversion program. This assessment should involve a jurisdictional review that includes environmental, economic, and social analysis.

MOE should establish guidance documents to provide a clear understanding of general expectations for program development and evaluation.

PRLs should specify program principles and policy targets, and should refrain from including detailed requirements that are overly prescriptive as to how the program is to be developed.

PRLs should be consistent with the Province of Ontario's provincial waste management plan, once developed.

The program development process should be subject to timelines that allow adequate time for consultation, consideration of options, and appropriate planning.

The government should also be subject to a timeframe for deciding whether to approve, reject or ask for modifications to a program.

Public consultation and education should be emphasized as an important component of developing waste diversion programs.

Other Recommendations

Specific references to the Blue Box Program should be removed from the WDA and put into a regulation to ensure that the focus of the Act is broad and encompasses all waste diversion programs.

The revised WDA should include the need for another 5-year review to provide an opportunity to evaluate and further strengthen the Act.

Thank you for the opportunity to comment on the review of the WDA. Please contact me or Maureen Carter-Whitney, CIELAP's Research Director, if you wish to discuss any of these comments further.

Yours sincerely,

A handwritten signature in black ink that reads "Anne Mitchell". The signature is written in a cursive, flowing style.

Anne Mitchell
Executive Director

Cc: Hon. John Gerretsen, Minister of the Environment
Gord Miller, Environmental Commissioner of Ontario