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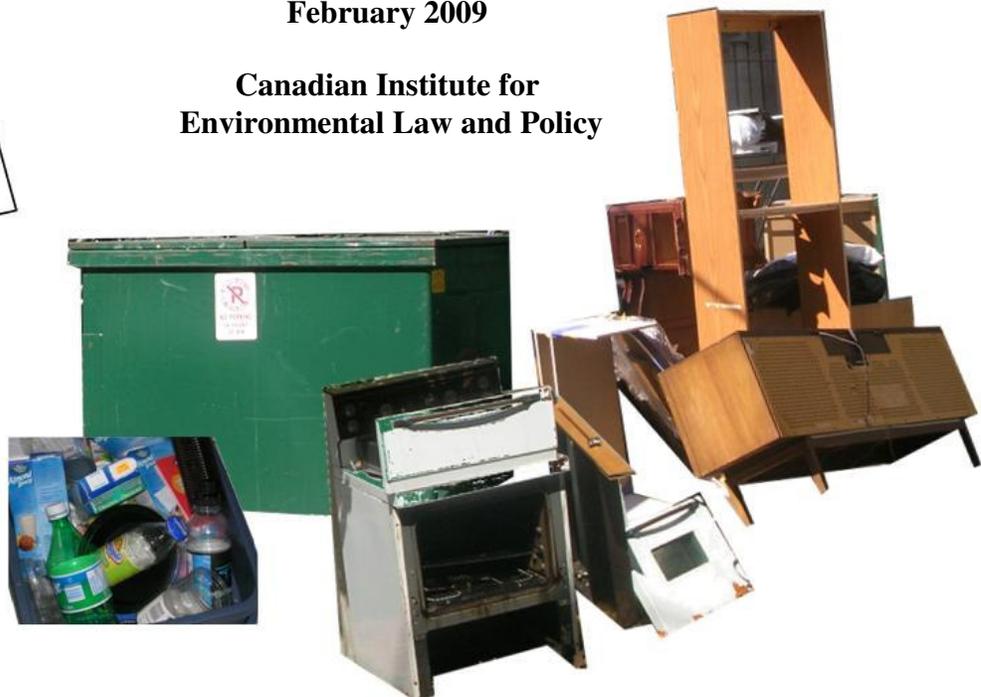
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An Options Paper on Ontario's Review of the *Waste Diversion Act*

February 2009

Canadian Institute for
Environmental Law and Policy



**An Options Paper on Ontario's Review of the
*Waste Diversion Act***

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**Canadian Institute for Environmental Law and Policy
February 2009**

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About CIELAP

Founded in 1970, as the Canadian Environmental Law Research Foundation (CELR), the Canadian Institute for Environmental Law and Policy (CIELAP) is an independent, not-for-profit professional research and educational institute committed to environmental law and policy analysis and reform. CIELAP is incorporated under the laws of the Province of Ontario and registered with Revenue Canada as a charitable organization. Our registration number is 11883 3417 RR0001.

CIELAP provides leadership in the research and development of environmental law and policy that promotes the public interest and sustainability.

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Introduction

In 2002, the Government of Ontario enacted the *Waste Diversion Act (WDA)*. The stated purpose of this legislation was to encourage the reduction, reuse and recycling of wastes, and facilitate the development, implementation and operation of waste diversion programs. The *WDA* established Waste Diversion Ontario (WDO) to assist in implementing the Act, giving it responsibility for developing, implementing, and operating waste diversion programs for waste materials designated by the Minister of the Environment, and for monitoring the effectiveness of these programs. The *WDA* included a requirement that the Minister conduct a review of the Act within five years of its coming into force.

In October 2008, Ontario's Ministry of the Environment (MOE) launched its review of the *WDA* with the release of a discussion paper titled *Toward A Zero Waste Future – Review of Ontario's Waste Diversion Act*. The purpose of this document is to solicit public input on the *WDA*, the program experience associated with the Act, and the Government's proposed new approach to waste diversion in Ontario. *Toward A Zero Waste Future* provides the foundation for a public consultation period that was originally set to end on January 15, 2009 but was later extended until April 1, 2009.

The Canadian Institute for Environmental Law and Policy (CIELAP) has undertaken a review of the goals and objectives of the *WDA* and the results achieved under the legislation thus far. As part of this review, CIELAP conducted 27 interviews with a broad range of stakeholders that included representatives from industry, municipalities, environmental non-governmental organizations (ENGOs), lawyers, academics, media and others. The interviews were conducted between April and October of 2008.

In addition to undertaking these interviews, CIELAP hosted a multi-stakeholder Roundtable on December 12, 2008. The Roundtable brought together a small group of well-informed stakeholders from different backgrounds to explore the possibilities for reforming the *WDA*. The discussion at the meeting was based on a draft of this options paper as well as MOE's discussion paper.

The discussion and options presented in this paper reflect the views and opinions of the respondents in CIELAP's interview process and the participants at CIELAP's Roundtable. The comments are summarized without attribution, and express a range of different perspectives. The comments do not necessarily reflect the views of CIELAP.

Following the Roundtable, CIELAP added to this options paper to more fully represent the different suggestions and opinions expressed by participants at that meeting. CIELAP has also prepared its own recommendations to MOE on how best to move forward with reviewing and reforming the *WDA*. As part of the review, CIELAP has also published a series of background papers to provide additional information on the *WDA*. They are available on our website at www.cielap.org.

General Effectiveness of the *Waste Diversion Act* to Date

Those interviewed gave a range of responses when they were asked about whether the *WDA* has been generally effective at increasing waste diversion in Ontario since its implementation. A number of respondents stated that the *WDA* has not yet been effective at increasing waste diversion in Ontario despite the large amount of money collected from stewards. Several respondents felt that the Province hasn't seen the diversion rates, targets, and overall improvements that it needs and that could have been achieved by such a piece of legislation. The situation in Ontario was contrasted with other jurisdictions that had seen improved diversion rates, such as British Columbia and the European Union. Some respondents expressed frustration at the slow pace at which materials had been designated and at which plans and programs had been developed, approved, and implemented. They also highlighted the failed development of the used oil program and the near failure of the tire program.

Many respondents made specific reference to the Blue Box program when commenting on the effectiveness of the *WDA*. They noted that, despite the *WDA*'s lack of strong results with regard to diversion so far, the Government's aim of offsetting municipal costs for the Blue Box through the *WDA* has been successful. One person stated that the increased municipal funding has supported the establishment and development of programs in rural areas and allowed big cities to develop more sophisticated plans, education, and promotional materials.

A number of those interviewed commented that the Province has seen some increased diversion of Blue Box materials since the Blue Box program was approved. Others, however, questioned whether the diversion numbers are accurate due to a number of factors: differences in how data has been collected at different points over the years; ambiguous and changing definitions, such as what constitutes residential waste; the self-reporting nature of some of the data; the fact that the amount collected is measured as opposed to the amount actually recycled or diverted; and the fact that population increases have not been adequately taken into account. Many respondents also suggested that collection and diversion rates might have increased anyway, regardless of the *WDA* and its programs.

A number of municipal stakeholders expressed that the funding formula, and the stewards' insistence on reducing fees, has meant that municipalities consistently receive as little as 33 percent funding rather than the 50 percent they had been promised. One person noted that the bulk of the Blue Box program continues to be financed by taxpayers. [It is important to be aware that, in October 2008, the Minister of the Environment requested that WDO conduct a review of the Blue Box Program and instructed it to incorporate principles of extended producer responsibility into the program, and consider full industry funding of the program.]

A number of respondents suggested that, while it isn't clear that waste diversion has increased in Ontario, the *WDA* has been successful in that it has laid much groundwork for future progress. In particular, the *WDA* has: focused stewards' attention; stimulated discussion on how to increase the efficiency of the system; compelled stakeholders to come to the table to address waste diversion and take action; and forced discussions about product stewardship.

Since the *WDA* was enacted, WDO and the Industry Funding Organizations (IFOs) have put rules, procedures and processes into place. The Blue Box program has resulted in systematized municipal processes, such as harmonizing material pick-up requirements and providing incentives. The *WDA* has

also led to the collection of useful information through WDO's annual Municipal Datacall, which provides a series of program, tonnage and financial reports, and the completion of municipal waste audits that have benefitted municipalities by generating baseline information. One stakeholder commented that the Act required the development of detailed plans, as opposed to the executive summaries produced by other jurisdictions such as BC.

A few respondents suggested that, since the introduction of the *WDA*, stakeholders have been involved in a significant learning process and that progress is imminent. Some respondents argued that more time is needed before the Act's effectiveness may be appropriately evaluated.

Achieving the Purposes of the *Waste Diversion Act* – Successes and Challenges

The purpose of the *WDA*, as stated in the Act, is to encourage the reduction, reuse and recycling of wastes, and facilitate the development, implementation and operation of waste diversion programs. In CIELAP's interviews, stakeholders consistently pointed out that action under the *WDA* had primarily focused on recycling but not on reduction or reuse of waste, and that this limited scope needed to be addressed.

WDA's focus on Blue Box funding rather than waste diversion

Many respondents pointed out that one of the Government's primary, if unstated, intentions for enacting the *WDA* was to establish a funding program for the Blue Box program. They suggested that one consequence of this has been that stewards have been allowed to primarily focus on the finances of that program and on minimizing costs to businesses, rather than on achieving increased waste diversion.

Offering examples of how the *WDA* regime has failed to promote waste diversion, various respondents referred to: the absence of incentives for manufacturers to produce more recyclable materials and the lack of penalties for using difficult-to-recycle materials; the absence of incentives to motivate changes in consumer or producer behaviour; the fact that little has been done to make products more recyclable or for stewards to reduce packaging; the lack of progress in developing markets for plastics and other difficult materials; the fact that municipalities have focused on program administration rather than developing processes for increased waste diversion; and the fact that many steward demands have reduced costs at the expense of effective diversion.

A few respondents suggested that the payment scheme has been approached in the wrong way, in that stewards pay for blue box materials, many of which are recycled, rather than for materials that go to landfill. One person pointed out that Government promises not to enact any new taxes have led the Government to focus on recycling rather than other instruments, such as a landfill fee.

Respondents suggested several possibilities for reform:

- The *WDA* should have a much stronger focus on diversion activities, other than recycling, that are further up in the hierarchy, including reduction and reuse, and Extended Producer Responsibility (EPR)
- The Blue Box program should have greater breadth and depth and should include industrial, commercial and institutional (IC&I) wastes
- Waste going to landfill should be targeted and penalized, using an economic instrument such as a landfill fee or surcharge.

Lack of clarity about the intention and purposes of the *Waste Diversion Act*

Many respondents expressed that there is a lack of clarity about the Act's intentions, vision, purposes and objectives. Those interviewed consistently asked whether the Act's purpose is to: fund a recycling

program; ensure that fewer materials end up in landfill; or provide a basis for EPR. Participants in CIELAP's Roundtable also emphasized the importance of being clear about what the Act is intended to accomplish. One participant suggested that the central goal of the Act should be: how can we divert more waste?

Participants at the Roundtable generally agreed that it might be appropriate to change the title of the *Waste Diversion Act* to accurately reflect the purpose of the legislation. Ideas included the following: the *Waste Reduction Act*; the *Waste Management Act*; the *Waste Responsibility Act* or the *Producer Responsibility Act*.

Respondents suggested that:

- The *WDA*'s intention, purposes and principles need to be determined and clarified for all stakeholders
- The purposes should be consistent with the Government of Ontario's overall vision of a sustainable society
- These clarified definitions would help WDO and the IFOs have a clearer understanding of their mandates, the principles guiding them, and what they should be aiming for in developing and monitoring programs
- Environmental indicators could be developed to support the goals of the *WDA* or EPR and to establish priorities. For example, if Ontario's priority is waste diversion, indicators could include the volume of waste produced by waste stream
- Indicators to measure the success of the Act could be based on the principles that already exist in MOE's Statement of Environmental Values created pursuant to the *Environmental Bill of Rights*.

Moving beyond recycling to reduction and reuse

A number of respondents commented that the focus of WDO has been limited to recycling; however one respondent pointed out that WDO should not be faulted for this because its mandate has primarily been to recycle. It was noted at CIELAP's Roundtable that full implementation of EPR in Ontario may help to shift the waste diversion focus to reduction and reuse. Participants observed that recent Program Request Letters (PRLs) have placed more emphasis on reuse requirements, but that this has been at the discretion of the Minister and is not formalized in the Act.

Respondents suggested a number of approaches to revising the *WDA*:

- There should be a shift in the Act to an emphasis on other approaches to waste management, such as EPR, design for environment (DfE), reduction of waste and reuse of materials
- EPR principles should be set out clearly in the *WDA* so they are not left to be determined in specific PRLs
- The Government should institute a waste hierarchy and put programs in place to support this hierarchy; it was noted that the Municipal Hazardous or Special Waste PRL prioritized a waste hierarchy, which ensured that reuse and reduction were included in the program

- A waste hierarchy should be the product of consensus and reflect a science-based analysis of the environmental sustainability of waste diversion
- The Act should include clear definitions of what constitutes reduction, reuse and recycling
- One respondent suggested that the Act could instruct WDO to develop definitions of reduction, reuse and recycling on a material-by-material basis
- A respondent suggested that the definition of recycling should not include incineration
- The *WDA* should adopt a full lifecycle approach to waste management
- The Act should attempt to address issues of consumerism and the relationships between consumption and production
- WDO should be provided with greater authority and resources so that it has the potential to effectively achieve a mandate to meet reuse and reduction targets as well as recycling
- The Government should support the creation of markets for reuse in addition to markets for recycling
- The *WDA* should provide for policy mechanisms such as strong mandatory targets, flexibility to allow municipalities to develop innovative strategies (such as introducing local reuse/reduction centres) and incentives or subsidies.

Governance and *Waste Diversion Act* Process Issues

Concerns about governance and the program planning process under the *WDA* regime were much discussed in the interviews conducted by CIELAP. Respondents' detailed feedback about what has been problematic and what is needed to address these issues has been summarized in this section.

Conflicts of interest within WDO's governance structure

The majority of respondents identified that WDO's governance structure, and the potential for conflict of interest of many of its board members, has been one of the major impediments to the success of the *WDA*.

At CIELAP's Roundtable, participants discussed the question of whether WDO is necessary and if so, what should be the role of the organization. While some criticized the notion that the Government is contracting out policy to a quasi-agency with few regulatory powers, others argued that WDO will become increasingly important and must remain for a number of reasons: it provides stability when ministers and governments change; it supports program development by ensuring that the requirements of the PRLs are met and IFOs report on consultations; and it functions as a referee in the program development process.

Until recent changes were made, the WDO board was governed primarily by industry members – the designated stewards – meaning that those who financed the programs were responsible for and had control over them. These stewards have a vested interest in minimizing their fees. Some respondents suggested that this interest has taken precedence over increasing waste diversion. Municipalities, who have been primarily interested in maximizing their funding, made up the majority of the remaining board seats. Some argue that the board thus had little interest in maximizing waste diversion and achieving environmental benefits and the purposes of the Act. In fact, the current Act has been seen by some to be a mere funding mechanism rather than a tool to promote diversion or environmental responsibility.

One respondent commented that WDO board members have had strong sectoral allegiances and have not necessarily acted independently in the best interests of the organization, as is required of a board of directors. From the commencement of the *WDA*, most industry members of the WDO board only had an interest in the Blue Box program. These members have had little incentive to ensure that subsequent programs would be effective and to explore good stewardship models. It was suggested that these allegiances and limited interests have meant that decisions and programs have not been developed or scrutinized as effectively as they should have been.

Respondents noted a number of interests that have not been represented on the WDO board or reflected in the programs at all. A number of neglected stakeholders were mentioned: the materials associations and recycling industries, many of whom pay into the programs and are responsible for and knowledgeable about end markets; consumers and taxpayers, who ultimately bear many of the program costs; and ENGOs and concerned members of the public.

In April 2008, an agreement was made to modify the WDO board's governance structure to address these concerns. The new structure, which is currently being implemented, has 16 seats: five industry representatives, four municipal representatives, one ENGO representative, one senior staff person from

MOE, and five directors who are to be appointed by the Minister of the Environment and cannot be industry representatives affected by WDO programs, municipal representatives or Ontario Government employees. Stakeholders are cautiously optimistic about the potential for the new structure to improve the governance role of WDO given that it provides balance between municipal, industry and other voices, and ensures that a larger number of independent representatives are present. Participants at CIELAP's Roundtable stated that the changes to the WDO board composition have resulted in a fairer and more diverse range of interests and ideas.

It is important to note that WDO, originally a steward-dominated board, has become a multi-stakeholder board while the boards of the IFOs continue to be made up of stewards. This situation should be revisited in order to ensure greater transparency and allow for input from other stakeholders.

Many respondents agreed with MOE's decision to modify the composition of the board to help ensure its governance by knowledgeable, independent and balanced directors in accordance with its mandate. In addition, several respondents noted that:

- There is a need to improve the transparency of the WDO board – initial steps to achieving this include making detailed minutes of its meetings public, and making WDO subject to Ontario's *Freedom of Information and Protection of Privacy Act*.

WDO's lack of authority and enforcement capacity

When respondents were asked whether WDO had the necessary authority to achieve the purposes in the *WDA*, their responses were mixed. While several respondents stated that WDO did not have enough authority, some believed that WDO did have adequate authority and others expressed mixed feelings. Various respondents also raised the point that WDO is severely lacking in the financial resources necessary to exercise its authority and fulfil its mandate. Participants at CIELAP's Roundtable expressed concern about WDO's lack of authority.

Many respondents expressed concern that the Minister has not given WDO enough power to push for greater waste diversion or to enforce programs put in place under the Act. WDO has few tools available to hold IFOs accountable for meeting the Minister's program requests, to push for strong diversion programs, or to meet program commitments and targets. Currently, if WDO or other stakeholders ask MOE for clarification or request changes to a Program Request Letter to better achieve the Letter's intentions, the process can become highly political and take a substantial amount of time before being resolved. The WDO's lack of power has been compounded by its lack of resources and the need for it to maintain good relationships with the IFOs and industry players across the table.

A few respondents suggested that WDO may have enough authority but that its authority has not been exercised due to the potential for conflicts of interest inherent to the board's structure and membership. Concerns were expressed that these conflicts of interest have meant that members have not necessarily been interested in effectively scrutinizing programs. This has made it challenging for WDO to effectively monitor and enforce programs. This issue will hopefully be resolved with the board's new composition.

One respondent commented that municipalities, in order to receive funding, have made improvements, incorporated best practices and reduced program costs. In contrast, however, that respondent suggested

that WDO's lack of enforcement capacity has meant that stewards have not been required to improve their own practices. Respondents expressed some concern that WDO's lack of capacity to enforce programs has led to a situation where industry stewards are essentially regulating themselves and are unlikely to penalize themselves or push themselves for more ambitious outcomes. Another respondent indicated that WDO should also have some authority over municipal representatives in order to compel them to actively participate in programs.

Respondents made a number of suggestions on how to improve WDO's authority and enforcement capacity:

- It may be necessary to redefine the role of WDO as set out in the Act
- WDO should be given the authority to require that IFOs make specified changes to the program plan during program development so that it meets the requirements of the Act and PRL
- WDO should be given the regulatory authority to penalize the IFOs and industry stewards using financial and other mechanisms
- WDO should be given the authority to provide incentives to ensure that ambitious programs are developed according to the Minister's requests and that plans meet their objectives
- WDO should be given the authority to dismiss an IFO from its responsibilities if it does not meet its requirements
- MOE should be responsible for enforcement while WDO is responsible for monitoring, evaluation and reporting to MOE
- Program Request Letters should specify consequences that will apply if programs are not developed according to the Minister's specifications or if program commitments are not met
- WDO should be given the authority to approve programs that meet the Minister's requirements rather than requiring the Minister's approval.

WDO's dual role of program developer and evaluator

A number of respondents were critical of WDO's dual mandate to both develop and evaluate programs. One respondent suggested that WDO is in fact unable to implement and operate programs given its significant lack of resources, and that at present it effectively passes the PRL to the IFO, which then proceeds with program development and implementation. When programs are presented to MOE, the details may not have been effectively scrutinized by WDO, and the Minister must make a decision on a flawed program.

The dual role creates significant challenges for effective monitoring and enforcement. One respondent suggested that WDO's lack of independence makes it ineffective at monitoring and evaluating programs. Another noted that WDO does little monitoring and instead focuses on the development of waste diversion plans.

At CIELAP's Roundtable, one participant clarified WDO's role. WDO currently does not actually develop programs, which is the responsibility of the IFO. Instead, WDO makes sure the program being

developed complies with the PRL, referees rules, provides information, and ensures that stakeholder comments are considered.

Respondents referred to a number of additional challenges that prevent WDO from effectively monitoring and evaluating programs: it is difficult to evaluate effectively when the purposes of the *WDA* are not clear; there is a lack of guiding documents to provide a clear framework for program development and evaluation; there are no agreed-upon metrics by which to evaluate success; and there is a lack of good data, particularly in relation to IC&I waste, and potential for numbers to be manipulated.

The respondents provided a range of suggestions for addressing concerns about the dual mandate of WDO, and for improving its capacity to conduct monitoring and evaluation:

- The WDO's role in developing and evaluating programs should be clarified. If there is concern about the WDO's dual mandate a third party could monitor programs for effectiveness or WDO could maintain its oversight role and stewards could be allowed to develop the programs independently.
- The Act should state clearly that the WDO is responsible for ensuring that programs are developed, implemented and operated rather than being responsible for developing, implementing, and operating programs.
- The *WDA* should set out broad objectives for monitoring that could be made more specific for each program. The Act could define: which metrics are required to measure progress (including whether the reduction of persistent pollutants, mitigation of greenhouse gases and other effects not directly associated with diversion should be measured); appropriate indicators of success (such as how much waste is still going to landfill); and broad targets related to how programs will influence the market and minimize environmental consequences; a change in WDO's mandate may be required to reflect these monitoring responsibilities
- The *WDA* should clearly define who is responsible for various elements of monitoring and evaluation
- A system for steward reporting is needed to help WDO fulfil its responsibility to ensure that stewards report
- WDO should increase its monitoring function with the intention of increasing recycling rates
- In monitoring and evaluation, WDO should focus broadly on what stewards and municipalities should be doing and how their efforts could be improved, and on what opportunities exist for market development and other overarching considerations.

Lack of government leadership and accountability

Many respondents pointed to a lack of Provincial Government leadership and involvement in the waste diversion regime as an impediment to the success of the *WDA*. Respondents suggested that the Province has been too distant from the process, with one person noting that: "it has been a car with no driver since it was conceived." Respondents felt that the Government has not played enough of an

active leadership role in the process. One person noted that political leaders have generally backed away from waste management issues, and that the *WDA*'s lack of success is simply part of a larger picture. Participants agreed that it is important that the Act be implemented and enforced in an ongoing manner regardless of which political party is in power.

Several respondents suggested that the Government has not been interested enough in the waste diversion program planning process because of *WDO*'s position as an arm's length organization and the belief that this allowed the Government to be removed from accountability and responsibility. A few respondents expressed serious concerns that the *WDA* regime has effectively contracted a government policy implementation function out to an independent organization, and ultimately to industry stewards who are primarily accountable to their shareholders. Some respondents did note that the Government had recently begun to put resources towards better implementing the Act.

Many respondents expressed confusion over *WDO*'s role as an arm's length organization. Although the Government developed *WDO* as a third party organization, the Government also maintained control over final decision-making by giving itself the authority to approve or reject *WDO*'s decisions and final program plans. It is therefore sometimes the case that external stakeholders bypass *WDO* to lobby the Government directly. A number of respondents expressed frustration over the extensive lobbying that has taken place at all stages of program development, from the wording of PRLs and the prioritization of program materials to the approval of the final program plans. As a result, the Government has been called upon to play a larger role than was originally contemplated by the Act, and any intended benefits of involving an arm's length organization have been greatly reduced.

A number of respondents highlighted ambiguities in relation to the roles, responsibilities and relationships of and between the Minister, *WDO* and *IFOs*, and suggested that these need to be clarified.

Respondents contributed a number of suggestions on how to improve Government leadership and accountability under the *WDA*:

- The Government should provide direction by setting out its waste diversion principles and providing for broad waste policy objectives in the *WDA*
- The Government should show active leadership in the waste diversion program process and structure its relationship with *WDO* to clarify and capitalize on the benefits of an arm's length organization
- The Government should play a more active role in the development of other policy mechanisms to complement *WDO*'s efforts, such as putting in place more inspectors, enacting bans on the landfilling of specific materials,¹ nurturing markets and directly funding activities to promote diversion
- The Minister should oversee the process governed by the Act, and set targets that are required to be met

¹ A participant at *CIELAP*'s Roundtable suggested that landfill bans could negatively affect the potential for municipalities to receive greenhouse gas credits; concerns such as this should be researched and considered in program design.

- The roles, responsibilities, and relationships of and between the Minister, WDO and the IFOs should be clarified
- The Government should take responsibility for evaluating the economic and environmental outcomes of programs
- The Ministry should enforce consequences if a program plan is submitted that is not in compliance with the *WDA* and the *PRL*.

Conflicts in the relationship between WDO and IFOs

When respondents were asked whether the relationship between WDO and IFOs had been effective at achieving the purposes of the *WDA*, many referred to this relationship as a “fox guarding the henhouse” due to concerns about potential conflicts of interest of WDO’s board members and the funding relationship between those bodies. The IFOs, through the collection of stewards’ fees, fund WDO. Some respondents suggested that the industry stewards therefore hold the balance of power over WDO and its staff. One respondent suggested that this has made it challenging for WDO to promote programs that are not in the industry’s interest even if such a program might provide benefits for diversion (the example of a deposit-return system was given). Some respondents also suggested that WDO’s lack of capacity to reprimand the IFOs has allowed stewards to develop program plans contrary to the mandate they were given.

Several respondents emphasized that WDO’s funding structure reveals an inherent conflict of interest and poses challenges for WDO’s cash flow. WDO incurs significant costs to develop a program. However, because it receives all of its funding from stewards’ fees, its costs can only be recovered when a program is approved and the IFO begins collecting fees. The funding situation generally creates significant cash flow problems for WDO, especially when programs are delayed. Participants at CIELAP’s Roundtable discussed the funding issue, including major concern that the funding only comes to WDO when programs have been approved and through the IFOs. Greater independence could be achieved with full Government funding. Respondents also suggested that program development funding could be provided by the Government but recovered from the IFOs once the program is approved, and that the Government could also consider providing funding to support the involvement of other stakeholders.

A number of respondents felt that the relationship between WDO and IFOs is too close; the industry stewards developing the programs have also been the ones who approve them, as representatives on WDO’s board. These stewards have been vested in protecting their own interests and one respondent suggested that they have deliberately kept WDO toothless to ensure that it would not critique program designs. Respondents hope that the new WDO board structure will help to correct this problem.

Despite these criticisms, other respondents suggested that the relationship between the IFO Stewardship Ontario and WDO has been largely productive and strong, particularly at the staff level. One respondent noted that WDO’s board and the IFOs have typically had healthy debates and WDO has been able to push the IFOs on targets and other issues. One respondent commented that WDO has not been very effective in its role of watchdog, but has been more effective in working with the IFOs to develop programs.

Several respondents expressed concern that a select group of stewards have dominated the IFOs and their program plans. A respondent suggested that many brand owners have been supportive of greater diversion, but that the dominant stewards have wanted to maintain the current system. A number of respondents were also concerned that the IFOs were becoming monopolies with too much power, and had the capacity to dictate which market players would get business.

Respondents suggested the following approaches to address the problems identified:

- The Government should structure WDO funding so that it is not dependent on stewards fees
- MOE should fund part of or the full costs of WDO to establish programs
- Alternatively, MOE should provide a pool of funding for program development that would need to be paid back when a project was established
- If the IFOs continue to fund the WDO, measures should be taken to guarantee that WDO is independent and free from manipulation
- WDO should be an administrative, not political, body and should have impartial, knowledgeable staff – WDO should not be a policy-making body
- There should be multiple IFOs competing within the context of each diversion program.

Challenges related to designation of materials and the Program Request Letter

Respondents expressed frustration about the extensive lobbying that influences what materials are designated, what phases of program development these materials are included in, and how the PRLs are written. They suggested that the lobbying that takes place has politicized the process and promoted individual interests over broader waste diversion goals. It has also compromised the benefits of an arms-length organization, and has sometimes been unfair to other interests. At CIELAP's Roundtable, the question was raised as to why all wastes are not designated under the Act.

Some respondents stated that Ministers have tended to designate materials and prescribe them to specific phases without a thorough needs assessment or stated rationale. One respondent argued that lobbying currently seems to be the only obvious determinant for materials designation. The Government does not appear to conduct any needs assessment to establish at the outset whether a need exists for diversion of the specific material or whether another policy mechanism would be preferable to the development of a diversion program.

A number of respondents criticized the ambiguous language that has been used in PRLs, stating that the language frequently gives little guidance or clarity. They commented that this ambiguity has been particularly frustrating when the Government has been unable to clarify the language when requested. One respondent also criticized how materials are defined, claiming that poorly developed definitions have allowed some materials to be missed.

Respondents generally felt that PRLs were overly prescriptive as to how to develop diversion programs but lacked strong direction, targets and end goals. The level of detail in the PRLs concerning how programs were to be developed left little room for creativity and innovative thinking.

WDO and IFOs have had long waits in the past when they have asked the Minister to change the PRLs and other parameters in the interest of achieving a stronger program. These long delays have deterred WDO and the IFOs from requesting many changes that could have potentially improved program development. However, a participant at CIELAP's Roundtable suggested that it is not true that changes to draft programs are rarely made, and pointed to the WEEE program development process as an example.

Respondents suggested a number of approaches to improve the process for material designation and PRL development:

- The Government should have the public policy role of determining which wastes should be designated, and how
- The process for deciding what materials should be designated and how the PRL is written should be formalized, transparent and not influenced by lobbying, and perhaps the PRL should include a number of possible options
- The Act should be amended to ensure that the *WDA* will be properly implemented even when the Government has other priorities that compete with environmental protection and waste diversion
- Program Request Letters should be drafted within the context of a broader Provincial waste management plan
- Prior to designating materials, MOE should perform a needs assessment to examine whether WDO should address a material or what policy mechanisms should be used to address that material, such as a landfill ban or the use of financial incentives
- It may make more sense to designate by application rather than by material, because materials such as plastics may change frequently. For example BC is working with detergent manufacturers on detergent containers, regardless of what plastic they are constructed from
- The Act should require that WDO determine and provide the rationale for designating specific wastes
- Any analysis of materials to be designated should involve a jurisdictional review that includes environmental and economic sector analysis
- A needs assessment should also determine the feasibility of a diversion program and whether diversion can take place within the parameters of the Act
- Before a PRL is written, MOE should initiate a consultation process to test and refine its language and content; the consultation process should indicate the intentions of the program and allow stakeholders to provide suggestions and definitions to refine the PRL and its parameters
- PRLs should specify program principles, policies and targets, but should not include detailed requirements that are overly prescriptive as to how the program is to be developed and the means to achieve targets

- There should be a common set of tools available to assess the various options produced by the IFOs in response to a PRL, and there could also be a form of third party certification as to which options will best meet the principles and standards set for the programs
- The IFOs should be required to present a variety of plausible options for discussion as part of the PRL development process.

Tight timelines for program development

A number of respondents noted the tight timelines that are often set by MOE for program development. These ambitious deadlines have made it difficult for WDO and the IFOs to effectively consult with stakeholders and have the program properly vetted before the Government becomes involved in deciding whether or not to approve it. After WDO has met timelines that are sometimes extremely tight while developing the plan, the plan may rest in the Minister's office for an indefinite period of time while the Minister decides to approve or reject it. Following approval, the Government may then set tight deadlines for program implementation.

Respondents made suggestions on how to improve the program development process:

- The program development process should be modified and, where appropriate, lengthened so that timelines are reasonable and achievable and allow time for adequate consultation
- The Government should be subject to timelines when deciding whether to approve, reject or ask for modifications to a program.

Collective responsibility and fee structures

Various respondents criticized the process by which stakeholders organize themselves to develop program plans. Some questioned the *WDA*'s mechanism of establishing one collective IFO to be responsible for the development and implementation of a program plan.

Respondents commented that this default arrangement, which is set out in the Act, leaves little opportunity or demand for stewards to practice individual extended producer responsibility. They noted that it gives industry leaders little flexibility to opt out and develop their own innovative diversion programs. Finally, respondents suggested that it creates a monopoly IFO that may stifle competition and has substantial capacity to influence the market, benefitting some and disadvantaging others. One respondent questioned the current process that asks industry to take responsibility for waste diversion, even though it is in no way related to their primary business or their shareholders' interests. Other respondents added that the process of giving responsibility to steward collectives has not been beneficial from environmental, sustainability or economic perspectives.

Respondents were also critical about the way in which steward fees are determined and indicated that they do not adequately reward individual performance, but instead stifle innovation. One respondent expressed concern that waste diversion efforts made by industry leaders prior to a program plan coming into effect are not recognized in the steward fees that they are required to pay. Another respondent noted that subsection 30(3) of the *WDA* states that in setting the fees to be paid by stewards, the total amount should not exceed the costs of developing, implementing and operating the program and the

costs to WDO and MOE. That respondent suggested that this provision is too restrictive, and does not allow IFOs to differentiate fees and reward stewards who have improved their product design to incorporate environmental principles.

Another respondent criticized the assumption that municipalities would be involved along with industry in the program plans.

Respondents suggested the following approaches to address concerns about collective responsibility and fee structures:

- The *WDA* should require industry stewards to be individually responsible for their legal waste diversion requirements
- Steward fees should be set in a manner that rewards individual steward performance, and encourages innovation
- The Act should be revised to enable the IFOs to differentiate fees
- There should not be any assumption that municipalities must participate in industry program plans, but they should be given the option of becoming involved on an individual basis
- Materials with lower diversion rates and capacities should carry a higher cost, and costs should be allocated to non-recycled materials; landfill costs could be applied to materials that are not being diverted to recycling.

Inadequate stakeholder consultation and incorporation of stakeholder perspectives

A number of respondents expressed concerns that the IFOs and industry stewards were developing programs with their own interests in mind, without taking other perspectives and alternatives into account. They also expressed mixed opinions about the public consultations that have been conducted in the past by WDO and the IFOs.

Several respondents suggested that consultations have occurred because stewards are required to do so, but that they have not been meaningful or had impacts on the results. These respondents felt that the stewards have already decided on their program designs, with a priority on minimizing costs and complexity, and have not been interested in seeking and incorporating other opinions or looking for alternatives. One respondent stated that stakeholder engagement has not always been required strongly enough in the language of the PRL.

Other respondents believed that stakeholder consultations have been professional and accessible, and have genuinely attempted to engage the stewards. Some respondents pointed out that stewards and other stakeholders have not always been interested in participating, perhaps due to a perception that WDO has not been successful, the lack of funding for smaller stakeholders, or the lack of excitement that stakeholders have felt over the programs, which have been seen as funding mechanisms rather than diversion programs.

Respondents highlighted concerns about a lack of transparency and public involvement, stating that the majority of decisions had taken place behind closed doors, and that many individuals and groups may

not have had the capacity to comment on program plans or proposals. Several respondents criticized the short notice of many consultation sessions, further noting that meeting minutes were not distributed until the last minute and that key stakeholders were left off distribution lists. Others agreed, but also pointed to the extremely tight deadlines that led to the rushed consultation processes and the lack of capacity to integrate comments into the plans in a meaningful way. One respondent felt that the process has been a learning experience and that the consultations have steadily improved.

Respondents suggested several possibilities for improving stakeholder consultation:

- Community groups should be provided with more support to engage in the issues under discussion in program planning
- The principle that stakeholder and public consultation must take place should be enshrined in the *WDA*. Programs should be developed through a formalized process, perhaps codified in the Act, and designed through transparency and consultation with the various stakeholders involved
- The early stages of program development should include a thorough exploration and analysis of alternative options for achieving the aims of the PRL. This analysis should be conducted by an independent body, and include an examination of how the product is handled in other jurisdictions and what options are possible. A participant at CIELAP's Roundtable suggested that the *Environmental Assessment Act* could be used as a precedent for program assessment and consultation – particularly the requirements for assessing the need for a project, other options for designing a project and the consultation process.

Lack of public awareness, education and engagement

Respondents generally agreed that WDO and the IFOs have done little to raise public awareness and participation in waste diversion programs once the programs have been established. One respondent noted that members of the public had little interest in learning about the diversion programs until they were affected directly by them.

One respondent commented that no benchmarks have been provided for education and awareness. Another observed that, while WDO has had the potential to help foster a waste diversion culture across the Province, it has had little money to perform this function. One respondent noted that, in a system of diversion programs where the stewards pay by the amounts recycled, there is an incentive to do as little public education as possible. Another respondent stated that this is inaccurate as the Blue Box Program's fee structure requires stewards to pay for designated blue box materials whether or not these materials are recycled and that stewards in fact pay less fees for material categories that are more frequently recycled. Respondents also stated that there has been a lack of harmonization across regions with respect to public awareness raising and education. This has caused some public confusion and created challenges for municipalities.

A number of respondents observed that WDO has little public profile and brand awareness, including among industry stewards. The common public perception is that WDO and Stewardship Ontario are government bodies. Industry also gets little credit for its efforts because few members of the public are aware of industry's funding role. One respondent believed, however, that the public likely would not benefit from knowing about WDO and its initiatives.

A few respondents noted that there has been little fatigue on the part of the general public to support diversion activities, stating that where recycling ads have been shown recycling rates have gone up proportionally. One respondent raised the issue that even municipalities are not necessarily well educated about diversion programs, and that there is little brand awareness among municipalities about who WDO is, where the money is coming from, and why the municipalities are receiving it.

Respondents suggested the following approaches to increasing public awareness:

- Public education should include information about the programs and how members of the public can participate, as well as information about what happens to the waste and about contamination issues
- Education should inform citizens about what is possible, why waste diversion is important and how they can contribute
- IFO's could be required to contribute a specified percentage of their public awareness and education budget to WDO, allowing WDO to engage in its own public awareness and education program.

Achieving Extended Producer Responsibility (EPR)

Enhancing Extended Producer Responsibility

The need for the *WDA* to mandate the principles of EPR emerged strongly in many of the interviews and at CIELAP's December 12 Roundtable. A number of respondents noted that the *WDA* in its current form was enacted to establish funding programs and that it had never been designed to address EPR or Design for Environment (DfE). The Act does not contain principles for EPR or even employ that term.

Participants at CIELAP's Roundtable explored the notion of EPR within the context of the *WDA* in great detail. There was discussion about what EPR is, and what a true EPR program would look like. An amended *WDA* would need to include a legal framework for the implementation of EPR in the Ontario context. Because there is currently no precedent available, we need to develop a consensus on a good EPR model for Ontario. However, it was noted that the Province of British Columbia is already a leader on EPR in Canada, and Québec is now showing some interest.

The Roundtable discussed how incentives could be provided to facilitate EPR. Incentives could include certification programs similar to the Energy Star, Eco-logo and US EPEAT programs, as well as Government procurement policies. It was noted at the Roundtable that EPR programs may not be appropriate for certain materials, if existing diversion programs are already in place and successful. Also, diversion of organics may not fit well into an EPR model and may require a different approach.

Respondents offered a range of suggestions as to how the *WDA* could be amended to better achieve EPR:

- The *WDA* and its programs should go beyond recycling and it should become an enabling Act that provides a legal framework and direction on EPR in the Province
- A definition of EPR should be developed through multi-stakeholder consultation, and clearly stated in the Act
- The *WDA* should promote DfE by requiring that manufacturers improve durability and extend products' useful lives
- The *WDA* should address products or materials from a full lifecycle approach
- All of Ontario's waste legislation should be modified to encompass EPR principles
- Industry should be required to provide 100% funding for diversion programs, rather than 50%
- Industry should also be required to fund the landfill costs of non-recycled designated materials
- Industry should be given responsibility for EPR and be left to design and carry out programs, within set targets and parameters and the compliance mechanisms established in backdrop regulations. The market should drive EPR; the Government should set targets, reporting standards, audit requirements, and other parameters and allow stewards to meet them as they see fit

- The costs for participation in an EPR program, or steward fees, should reward positive environmental behaviour, and favour the use or non-use of particular materials and the introduction of recycled materials into the market
- The *WDA* should take programs out of the hands of municipalities; municipalities should not be involved in product stewardship unless they are hired as contractors
- The *WDA* should create price signals and incentives for brand owners and manufacturers to improve diversion programs
- The *WDA* should make those who are designing and manufacturing products responsible for their own wastes
- An EPR program should recognize the existing infrastructure for the management of particular products under the current Act
- An EPR program should influence the behaviour of both consumers and manufacturers
- To measure the success of an EPR program, proper monitoring must be established and a baseline level determined. Reuse and recycling targets should also be established
- The *WDA* should foster the creation of viable after-markets for recyclables, possibly by mandating a percentage of recycled content in specific products. Because much of the recycling is done outside of Canada for materials that are collected here, there is a need to create facilities here for recycling, which would also create jobs

Individual EPR

Many respondents commented on the need to move towards a system that gives stewards direct incentives to improve the design of their products and to link costs to poor environmental performance, rather than having a collective that buffers these signals, benefits and penalties. This concept is often referred to as individual EPR. Such a system would better reward those companies whose products incorporate more effective design.

Some respondents criticized Ontario's collective IFO system for having a lack of price signals to link cost to performance; in the collective IFO, the costs are diffused among all of the stewards. Currently, if a steward wishes to opt out of the collective program and meet the Government's requirements individually, it can only do so after the collective program has been developed. That process is a barrier to individual EPR since stewards are unlikely to develop their own stewardship program after they have been required to work with their competitors to develop a collective one.

Some of the participants at CIELAP's Roundtable described the basic principle of EPR as follows: if you make individual producers responsible for end-of-life management, they will determine the most efficient way to manage it.

Discussion at the Roundtable suggested that producers require an incentive to design products and packaging for the environment. One way to do this is by facilitating the development of EPR programs that follow the principles of individual producer responsibility. Stakeholders generally felt that the *WDA* needs to be drafted so that the "collective" or "monopoly" regime is not the default. Instead,

producers should be given the option of creating collective schemes as they see fit. This would possibly foster competition among IFOs or other producer responsibility organizations. Multiple IFOs might be created, possibly for different markets. A system could be created, similar to one in the UK, where producers and importers buy credits from accredited recyclers to meet their legal requirements.

At the Roundtable, a participant highlighted the example of EPR for WEEE found in the European Recycling Platform, a pan European compliance scheme established by several companies in response to the EU WEEE regulations, which coordinates recycling markets across jurisdictions.

One respondent noted that most options for individual responsibility would require brand sorting, which could be extraordinarily complex and costly, as has been the case in some European jurisdictions.

Another respondent commented that WDO has been exploring the use of differentiated fees at the point of sale, and that the WEEE program has the capacity to implement a system of differentiated fees, and will do so if data exists to substantiate this differentiation.

Respondents provided a range of suggestions on implementing individual EPR:

- Individual stewards should have more flexibility to choose how they meet their responsibilities
- Individual stewards should be given direct responsibility for stewardship under the WDA and allowed to create collectives to deal with their responsibilities if they so choose, as is the case in many jurisdictions in the EU
- If the Act maintains the present system of collective responsibility it should be revised to allow the IFO to better differentiate steward fees depending on environmental performance, such as greater recyclability, to allow the collective system to require greater individual responsibility
- The initial design of a waste diversion program should not preclude a producer working outside the collective, and fee formulas should allow producers to opt out of the collective where alternate diversion is already established
- Any individual producer that is going beyond the efforts of a collective to divert waste (as with HP/Dell and their takeback programs) should be recognized and this should be reflected in product pricing and/or other benefits
- EPR costs, including end-of-life costs, should be built into product prices. This would relieve the concern about how to treat all stewards fairly.
- Branding should be used to indicate environmentally friendly products, provide education and enhance consumer choice; a DfE symbol could be introduced similar to those used by Energy Star or the Forest Stewardship Council
- The Government should consider implementing deposit and take-back systems rather than simply taking the “recycle at the end-of-life” approach.

Challenges for EPR and improved product design

Some respondents were sceptical about the *WDA*'s potential for increasing EPR and improving product design, arguing that while Europe has been able to force design changes, the Ontario market is likely too small to do so. At CIELAP's Roundtable, stakeholders noted some obstacles to implementing EPR programs for designated products and packaging; for example, a large number of producers operate in many countries or provinces, and so the extra costs of an EPR program in Ontario will not serve as sufficient incentive to change product design, if that is the goal of an EPR program. The EPR principle of passing on the end-of-life costs of waste management from municipalities to industry would be much more achievable.

Some respondents, however, expressed optimism about the potential for change if the Ontario Government shows leadership on EPR and DfE. Respondents highlighted a number of examples in which small jurisdictions had impacted product design, such as in Germany or with California's automobile program. They also pointed out that Provincial leadership on these issues could lead to necessary actions at the Federal Government level. A respondent suggested that another mechanism to drive better product design could be Government purchasing policies.

Respondents suggested that:

- The Ontario Government should show leadership by revising the *WDA* to require increased EPR and improved product design
- Fees on packaging materials would need to be great enough to force manufacturers to use different materials in their packaging.

A need to examine other environmental consequences using a full lifecycle approach

Several respondents highlighted the potential for the *WDA* to extend beyond governing waste diversion to regulate other environmental consequences of product design, in accordance with a full lifecycle approach, such as: energy use and the related greenhouse gas emissions; emissions that result from the breakdown of waste in landfills; water use; pollutants; and other consequences. They noted that the name of the Act could be changed to remove the term "waste" if it were to regulate more than simply end-of-life product management.

Respondents suggested the following possibility for expanding the scope of the *WDA*:

- The *WDA* should go beyond diversion to examine other environmental consequences of product design in the context of a full lifecycle approach.

Need for a waste management framework for Ontario

Respondents felt strongly that that Ontario Government should look beyond the review of the *WDA* to consider other laws and policies that also could be modified to establish an effective waste management framework for Ontario. In the discussion at CIELAP's Roundtable, participants urged the Provincial Government to create a framework plan to indicate to stakeholders how waste will be approached in Ontario. This plan should include attention to environmental, economic and social outcomes. Thus, EPR would be part of a larger waste management and diversion strategy.

Respondents offered a wide range of different suggestions for strengthening Ontario's waste management framework:

- In addition to the *WDA*, the Government should evaluate and improve its other waste-related legislation and policy instruments; the Government should consider replacing all of Ontario's current waste legislation with a new waste management law
- A broad master plan or framework, similar to that developed for Nova Scotia and other jurisdictions, is needed for Ontario to provide direction on waste management and to let the public and industry know what's coming – such a plan would include: a vision; priorities; targets; timelines; and a framework for monitoring
- The Act should mandate the Ministry to develop an integrated waste management strategy that contemplate environmental, economic and social outcomes, to be revised every few years
- The Government should be more open and transparent, and work with stakeholders to develop appropriate legislation needed for waste management
- The Province should provide consistent guidance to municipalities and create the means for them to act uniformly to promote and achieve greater diversion
- MOE should improve its enforcement, programs and sustained funding for diversion activities
- The Government should ensure that waste management, EPR and DfE concepts are taught in universities and colleges, as there is currently a lack of adequate education and training and not enough experts
- The Government should ensure that it is more onerous to dispose of waste, and less onerous to recycle it
- The Government should better enforce the 3Rs regulations, and target IC&I waste as well as residential waste
- The roles and responsibilities of consumers should be considered.

Moving Forward

Overall, respondents have suggested a broad range of recommendations on how to move forward with reviewing and improving the *WDA* and on how to achieve greater waste diversion in Ontario. A central theme in these responses was the importance of having the Government take a stronger leadership role and assume greater responsibility for waste diversion and waste management in the Province.

In summary, the responses provided in the interviews conducted by CIELAP included options and suggestions to:

- clarify, expand and achieve the purposes of the *WDA* with a strong focus on improving the reduction and reuse of waste;
- address issues related to governance and the program planning process that have been identified as problems; and
- implement effective Extended Producer Responsibility.