

Summary Report on the Environmental Commissioner of Ontario's Roundtable on Extended Producer Responsibility

(November 28, 2012)

Extended producer responsibility (EPR) in Ontario has reached an impasse. Despite years of stakeholder consultations and discussions, relationships have been strained and progress hampered by conflicting views about roles, responsibilities, fees, and program structure and implementation.

In an effort to move the conversation forward, on November 22nd, 2012, the Environmental Commissioner of Ontario (ECO) convened 30 stakeholders to discuss EPR in Ontario. These stakeholders included representatives from producers (e.g., brand owners, importers, and manufacturers), municipalities, the processing industry, the retail industry, industry funding organizations, Waste Diversion Ontario (WDO) and other organizations. MPPs and their staff, as well as staff of the Ministry of the Environment (MOE), also attended the roundtable as observers.

Prior to the roundtable itself, the ECO sent invited participants a number of discussion statements related to EPR in Ontario (see Appendix 1) and asked participants to submit revisions and comments on these statements. After compiling the feedback and attempting to identify points of consensus, the ECO circulated a revised set of discussion statements (see Appendix 2), which became the basis of the roundtable discussion.

At the roundtable, the Commissioner presented each statement in turn to the convened group, soliciting comments, concerns, and caveats from the participants. Through the ensuing discussions, revisions were made to the statements to make them more agreeable to the group, while acknowledging qualifications and concerns. While unanimous agreement was not reached for every discussion point, the process allowed participants to provide views and concerns in a constructive way, resulting in a framework of basic principles that could be used as a foundation for future discussions on EPR in Ontario.

Below is the list of statements as revised at the roundtable, accompanied by a brief commentary describing the level of support and any outstanding concerns. Additional explanatory notes follow.

Annotated Discussion Statements as Revised at the Roundtable

1. The Role of EPR in Ontario's Waste Policy Framework

- a) **Ontario's waste policy framework should strive to ensure the environmentally responsible end-of-life management of products, materials, and packaging.**

There was qualified support for this statement; the group questioned whether Ontario's waste policy framework should focus on achieving the *most* environmentally responsible management of waste, the cost-effective management of waste, or something in between.

- b) **The environmental policy approach known as "Extended Producer Responsibility," which extends a producer's responsibility – physically and financially – for a product and its packaging to the post-consumer stage, is an effective means to help achieve the above goal.**

There was strong support for this statement.

- c) **Effective EPR should make producers fully responsible for achieving the environmental outcomes set by MOE.**

- This statement originally asserted that "effective EPR should make producers fully responsible for *the risks, liabilities, and costs associated with managing their products at end-of-life.*" However, several producers expressed concerns about the potentially broad scope of their liability if held fully responsible for all end-of-life management costs, including municipal waste management costs over which they have no control.
- Instead, producers expressed strong support for being held fully responsible for achieving environmental outcomes set by MOE (assuming reasonable outcomes).
- Some participants, however, expressed concern that this revised statement suggests that municipalities should continue to cover the costs of managing designated materials sent to landfill. Municipal participants asserted that producers – not municipalities – should be responsible for covering these costs.
- The Commissioner identified the need for further discussion on the unresolved issue of producer responsibility for the full costs of end-of-life management.

- d) **EPR has the potential to drive innovation in producer and recycling markets.**

There was very strong support for this statement.

2. **Elements of the current *Waste Diversion Act, 2002 (WDA)*, are inadequate in creating an EPR framework that encompasses the desired characteristics.**

There was very strong support for this statement.

3. **Key Desired Characteristics of a New Model for EPR in Ontario**

- a) **A new EPR model should be outcomes-based.**

There was very strong support for the statement (assuming that the outcomes are appropriately designed to meet the overarching goals).

- b) **Ontario's EPR framework, outcomes, and key performance indicators must be developed by MOE in consultation with stewards, municipalities and relevant stakeholders.**

- i) **While incurring the costs of handling any residential waste materials not captured by EPR programs, municipalities play a valid role representing the interests of residents in maintaining participation and diversion outcomes.**

- There was very strong support for MOE developing an EPR framework with clear outcomes and key performance indicators in consultation with relevant stakeholders; however, there was considerable debate about who the relevant stakeholders are.
- There was very strong consensus that during consultations both stewards and municipalities have a central role to the extent that they pay the costs of managing the relevant waste materials. While some asserted that other stakeholders must also be included because EPR policies can have widespread impacts, it was questioned whether haulers and processors – who profit from collecting and processing waste – should have a say in determining the outcomes, such as diversion targets.
- While the role of municipalities was generally acknowledged, many participants argued that including a separate statement about municipalities unduly elevates the role of municipalities above those of other stakeholders.

- c) Each producer should be accountable for meeting the performance outcomes; however, producers should have the option to fulfill their obligations in conjunction with other producers through a collective.**

- There was very strong support for giving producers the choice to participate in a collective that administers/manages their obligations.
- There was also support for the principle that ultimate liability and accountability for meeting outcomes should remain with individual producers, even within a collective. While some argued that it is impractical to hold individual producers in a collective accountable, others argued that liability must rest with the individual producer to drive higher compliance in meeting environmental outcomes. In response to these concerns, it was asserted that the ultimate result will be the same, as failures to meet outcomes would be addressed through commercial contracts between producers and their collective.
- One important unresolved concern was to what extent and in which circumstances collectives would be sheltered from the *Competition Act*.

- d) Both individual producers and collectives should have the flexibility and autonomy to determine the best – most efficient and cost-effective – way to meet the outcomes.**

There was very strong support for this statement.

- 4. MOE should be responsible for designating (high-level) materials and products subject to EPR.**

There was very strong support for this statement.

5. Environmental Protection Standards for End-of Life Management

- a) MOE should continue to be responsible, through regulations and Environmental Compliance Approvals, for establishing the environmental protection standards for collecting, hauling, processing and disposing waste.**

There was very strong support for this statement.

- b) MOE must effectively enforce compliance with those environmental protection standards for collecting, hauling, processing and disposing waste.**

There was very strong support for this statement.

6. Measuring, Auditing and Reporting on Progress

- a) **Each producer should be obligated to report publicly on progress in meeting performance outcomes; however, producers should have the flexibility to meet their reporting requirements through a collective.**

- There was very strong support for this statement, with the caveat that confidential or proprietary business information must not be disclosed to the public or competitors.
- There was also a further recommendation that reporting should be annual (not quarterly).

- b) **Auditing is necessary to ensure accuracy of the reports. Producers should be required to have the data included in the report validated through independent third-party auditors.**

There was very strong support for this statement.

- c) **WDO should be responsible for aggregating and analyzing the data and recommendations from the producers' reports, and reporting to MOE annually on industry's overall progress in meeting the performance outcomes.**

There was very strong support for this statement, with the caveat that WDO should only aggregate, not audit, the information in the reports.

- d) **The above reporting and auditing requirements provide sufficient oversight mechanisms to assess individual and overall EPR performance.**

There was very strong support for this statement.

7. Compliance and Enforcement

- a) **Effective enforcement is critical to meeting the waste policy goals and performance outcomes, and to ensuring a level playing field.**

- There was very strong support for this statement.
- A concern was raised regarding the challenge of enforcing compliance by internet vendors that sell directly to consumers (e.g., Amazon.com), which affects the level playing field.

b) Provincial Officers should be responsible for:

- i) enforcing producer participation to address free-riders;**
- ii) enforcing producer compliance with performance outcomes; and**
- iii) undertaking inspection and investigation activities (consistent with a compliance policy) to help identify non-compliance with performance obligations.**

There seemed to be support for the concept of Provincial Officers that reside outside MOE (in WDO or some other independent organization similar to the Technical Standards and Safety Authority [TSSA] or Electrical Safety Authority [ESA]) enforcing producer participation and compliance with performance outcomes.

c) Compliance instruments (such as administrative orders and penalties) are needed to ensure compliance in meeting the performance outcomes.

- Some producers were opposed to the idea of penalties. These participants expressed concern about being held accountable for meeting outcomes (such as diversion targets) in an uncertain world with unknown variables. Other participants asserted that targets and penalties are necessary to ensure that performance outcomes are achieved.
- Further discussion and legal analysis are needed to assess: how compliance with achieving performance outcomes could be enforced; and how legal defences (such as due diligence) for failing to meet performance outcomes would apply.

8. The reasonable costs of oversight and enforcement should be recovered from producers, subject to appropriate external transparency and accountability mechanisms to ensure that costs are minimized.

There was strong support for this statement. Commenters noted that this model is used effectively by a number of regulatory authorities (e.g., the TSSA, the Law Society of Upper Canada, etc.) to finance enforcement in other areas.

9. **The *Competition Act* and commercial law, combined with a more flexible model of EPR, are sufficient to ensure a competitive marketplace. There is no need for further oversight roles to monitor the marketplace.**

There was general support for this statement, with the qualification that the Competition Bureau needs to be engaged and educated on the marketplace issues related to EPR. Others expressed reservations about relying solely on the *Competition Act*, noting that it is a reactive mechanism that can take years to resolve problems.

10. **Producers or collectives must be responsible for consumer liaison activities.**

- There was strong support for making producers responsible for liaising with consumers; participants asserted that a producer's liability for meeting performance outcomes should be aligned with responsibility for encouraging consumers to participate in their waste diversion program.
- However, several participants noted that this should not preclude others, such as MOE, WDO and municipalities, from educating the public (residents and businesses) on waste diversion.

11. **To support broader waste policy goals and EPR performance outcomes, MOE should employ additional regulatory measures or economic instruments.**

There was very strong support for this statement. Participants supported MOE using other policy tools to advance EPR performance outcomes and broader waste policy goals, particularly those that address the cost differential between disposal and recycling. However, it was recognized that further discussion and analysis is needed to determine the tools (e.g., landfill surcharge, disposal ban, etc.) that would best achieve this.

12. **Efforts should be made, where consistent with Statement 1(a), to harmonize Ontario's EPR program with the EPR programs in other Canadian jurisdictions.**

There was very strong support for this statement.

Explanatory Notes

- Throughout this document, the word “producers” (i.e., stewards) refers to brand owners, first importers, and manufacturers.
- Outcomes are the explicit timeline-specific results (e.g., collection, reuse, recycling targets) being sought.
- Key performance indicators (KPIs) are the metrics used to measure progress in meeting outcomes.

Appendix 1 – First Round of Discussion Statements Sent to Invitees

Please revise the following ten statements as you see fit (i.e., strike out, modify, etc. to create a statement that you can agree with). Feel free to provide additional explanatory comments as needed.

1. The goals/purposes of Extended Producer Responsibility (EPR) are to:
 - make producers/stewards (i.e., manufacturers, brand owners and first importers) fully responsible for the proper end-of-life management of their materials and products (including the liability and costs of collection, processing and disposal);
 - promote reduction, reuse, and recycling of waste (in that order); and
 - ensure the safe and environmentally responsible end-of-life management of products and materials.

2. Key characteristics of an effective EPR framework include:
 - clearly defined outcomes;
 - measurable objectives and targets, with timelines;
 - clear responsibility/accountability for meeting objectives and targets;
 - mechanisms to measure progress in meeting objectives and targets;
 - effective incentives/penalties to promote and prioritize waste reduction, reuse and recycling;
 - effective oversight, monitoring, auditing and enforcement;
 - well-articulated roles and responsibilities (with no gaps or conflicts) for all stakeholders (e.g., regulators, producers, oversight and administrative support organizations);
 - transparency (e.g., requirements for public reporting);
 - flexibility to meet outcomes cost-effectively; and
 - a framework that supports a fair and competitive marketplace.

3. The existing *Waste Diversion Act, 2002 (WDA)* is inadequate in meeting the policy goals and characteristics as identified above.

4. The Ministry of the Environment (MOE) should be responsible for:
 - Designating materials and products subject to EPR;
 - Establishing the rules and standards for the end-of-life management of products and materials subject to EPR, including:
 - accessibility requirements;
 - environmental performance (processing) standards;
 - reporting requirements;
 - overall performance targets; and
 - prioritization of reduction and reuse over recycling;
 - Establishing penalties (e.g., consequences for non-compliance with targets);
 - Enforcing producer participation and producer compliance with targets; and
 - Enforcing compliance with environmental performance processing standards.

5. Waste Diversion Ontario (WDO) should be responsible for the following:
 - Identifying and registering obligated producers;
 - Identifying producers that are non-compliant (e.g., free-riders);
 - Monitoring and reporting on progress in meeting EPR goals and targets;
 - Auditing performance to measure progress;
 - Inspecting and investigating implementation and non-compliance issues (e.g., failure to register as a producer, failure to meet recycling targets, failure to meet processing standards, etc.);
 - Communicating implementation issues with MOE;
 - Acting as consumer and industry liaison (e.g., building public awareness, conducting industry education, handling consumer complaints, etc.);
 - Monitoring marketplace issues to ensure that EPR programs do not interfere with a fair and competitive marketplace; and
 - Resolving disputes.
6. WDO and MOE's full oversight costs should be recovered from steward fees.
7. The goals of EPR would be achieved more effectively without mandated industry funding organizations (IFOs).
8. Producers should be held individually accountable for meeting EPR obligations and targets, even if they are part of a collective (such as an IFO).
9. Each producer should have the autonomy to decide how it will meet its EPR obligations and targets.
10. Producers should have full control over collection and processing of their end-of-life materials and products; however municipalities have a right to expect that EPR programs will meet certain service standards.

Thank you for your feedback. After compiling and analyzing responses, the ECO will circulate a summary that sets out the general areas of consensus, as well as those areas that require further discussion.

Appendix 2 – Second Round of Discussion Statements Sent to Invitees

The ECO has compiled and analyzed participants' responses to the initial discussion statements. Based on this analysis, the ECO has created the following revised list of statements, which will form the basis of discussion at the November 22 Roundtable.

1. The Role of EPR in Ontario's Waste Policy Framework:

- a) Ontario's waste policy framework should strive to ensure the most environmentally responsible end-of-life management of products, materials and packaging.
- b) The environmental policy approach known as "Extended Producer Responsibility" ("EPR" or "Producer Responsibility"), which extends a producer's responsibility – physically and financially – for a product and its packaging to the post-consumer stage of its life cycle, is an effective means to help achieve the above goal.
- c) Effective EPR should make producers fully responsible for the risks, liabilities, and costs associated with managing their products at end-of-life.
- d) EPR has the potential to create incentives for producers to take into account environmental considerations when designing their products and packaging.

2. Elements of the current *Waste Diversion Act, 2002*, are inadequate in creating an EPR framework that encompasses the desired characteristics.

3. Key Desired Characteristics of a New Model for EPR in Ontario:

- a) A new EPR model should be outcomes-based: the focus should be on outcomes rather than process.
- b) For each designated product/material, the Ministry of the Environment (MOE) should establish clear, measurable and achievable performance outcomes (e.g., collection and end-of-life management outcomes, which might address accessibility, recovery rates, recycling rates, etc.) and timelines for meeting outcomes.
- c) The EPR framework and all important program components (e.g., material designations, performance outcomes, performance indicators, reporting requirements, etc.) must be developed in consultation with stewards and other key stakeholders.
- d) Municipalities have a legitimate role in participating in the development of performance outcomes: municipalities play a valid role representing the interests of residents in maintaining existing levels of participation and diversion; and municipalities incur the costs of handling any residential waste materials not captured by EPR programs.
- e) Each producer should be accountable for meeting the program requirements/performance outcomes; however, producers should have the option to discharge their obligations in conjunction with other producers through a collective (i.e., the collective would assume responsibility for meeting outcomes on behalf of all member producers).

- f) Both individual producers and collectives should have the flexibility and autonomy to determine the best (most efficient and cost-effective) way to meet the outcomes (e.g., how the program is established, designed, operated, etc.).

4. MOE should be responsible for designating materials and products subject to EPR.

5. Environmental Protection Standards for End-of Life Management

- a) MOE should continue to be responsible for establishing the environmental protection standards for the end-of-life management (including collection, hauling, processing and disposal) of products and materials subject to EPR. These standards should continue to be established through regulations under the *Environmental Protection Act (EPA)* and/or in Environmental Compliance Approvals (ECAs).
- b) MOE must ensure that there is effective enforcement of compliance with those environmental protection standards for collection, hauling, processing and waste disposal.

6. Measuring, Auditing and Reporting on Progress

- a) Each producer should be obliged to report publicly on progress in meeting performance outcomes; however, producers should have the flexibility to meet their reporting requirements through a collective.
- b) As a mechanism to measure progress on meeting the performance outcomes, [MOE or WDO] should establish “key performance indicators” (“KPIs”). Producers (individually or through the collective) should be responsible for reporting on the KPIs quarterly and in an annual report.
- c) Auditing is necessary to ensure accuracy of the reports. Producers should be required to have the data included in the report validated (through an independent third-party review or by WDO) to ensure data accuracy.
- d) WDO should be responsible for aggregating and analyzing the data from the producers’ reports, and reporting to MOE on annual overall progress of the entire industry in meeting the EPR performance outcomes.
- e) The above reporting and auditing requirements provide sufficient oversight mechanisms to assess individual and overall EPR performance.

7. Compliance and Enforcement

- a) Effective enforcement is critical to meeting the waste policy goals and performance outcomes, and to ensuring a level playing field for all players.
- b) Provincial Officers should be responsible for enforcing compliance with the EPR program requirements, namely:
 - i. enforcing producer participation (whether individually or through membership in a collective) to address free-riders; and

- ii. enforcing producer compliance with performance outcomes (such as collection or recycling targets).
 - c) Provincial Officers should be responsible for undertaking inspection and investigation activities to help identify non-compliance with performance obligations.
 - d) Compliance instruments (such as administrative orders and penalties) are needed to ensure compliance in meeting the performance outcomes.
8. The reasonable costs of oversight and enforcement should be recovered through annual administrative fees from producers, which are subject to appropriate external transparency and accountability mechanisms to ensure that costs are minimized.
9. The *Competition Act* and commercial law, combined with a more flexible model of EPR that introduces more choice into the market for both producers and service providers, are sufficient to ensure a competitive marketplace. There is no need for further oversight roles to monitor the marketplace.
10. Producers should act as the consumer liaison (e.g., building public awareness, education, handling consumer complaints, etc.).
11. To support broader waste policy goals and EPR performance outcomes, MOE should establish: a landfill ban on designated materials; and a prohibition on the exportation of those designated wastes.
12. Efforts should be made, where reasonable, to harmonize Ontario's EPR program with the EPR programs in other Canadian jurisdictions.