

January 15, 2018

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RE: Draft Blue Box Program Plan Agreement between Stewardship Ontario (SO) and the Resource Recovery and Productivity Authority (RPRA)

The proposed amended Blue Box Program Plan (a-BBPP) and the related Program Agreement as presented have the potential for significant impacts on many fronts - the environmental management of designated materials, the role of municipalities and the public, the vibrancy of the waste management industry, and the future of Producer Responsibility in Ontario.

The Association of Municipalities of Ontario, the Municipal Waste Association, the Ontario Waste Management Association, the Recycling Council of Ontario, the Regional Public Works Commissioners of Ontario, and the City of Toronto are submitting the following comments jointly. It is our intention to outline areas where changes to the Program Agreement, in the context of associated changes to the a-BBPP, could be made to strengthen the effectiveness and oversight of the Blue Box Program.

We note that the Minister's Direction letter reiterated the desire of the government to ensure a fair and competitive marketplace, and that this is considered to be the first phase in the transition to Individual Producer Responsibility (IPR) under the *Resource Recovery and Circular Economy Act* (RRCEA). Many of our comments are meant to ensure fairness and transparency in the short-term, but also ensure that the conditions for all parties set the foundation for the next phase of transition.

The Parties have reviewed the draft a-BBPP and the draft Program Agreement. We have also examined both in the context of the *Waste Diversion Transition Act* (WDTA) and the Minister's Direction letter. The comments below are specific to the draft Program Agreement. Comments on the a-BBPP have already been submitted.

We recognize that all parties are operating under tight timelines and that the request for transition of the Blue Box Program comes early in RPRA's mandate without stakeholders having had the opportunity to become familiar with the nuances of the WDTA and RPRA's role. For this reason, it is critical that the Program Agreement clearly define the respective roles and responsibilities of RPRA and SO. In addition, the Program Agreement must provide opportunity and processes for stakeholder collaboration on key aspects of the a-BBPP developments and implementation, in order to ensure its effectiveness and fairness.

We have collected our concerns under three themes – Governance and Decision Making, Dispute Resolution, and Transition, each of which is outlined below and are offered in no particular order.

Governance and Decision Making

While we recognize the need for both SO and RPRA to make operational decisions within their mandates, it is critical that the Program Agreement identify those decisions that may have a material effect on the objectives of the Minister’s letter and in those cases provide mechanisms for comprehensive stakeholder consultations before those key decisions are made. While both the draft a-BBPP and Program Agreement reference consultation in a number of places, there is little clarity regarding what aspects of the Plan development or implementation will require consultation or processes describing them. Stakeholders need to know how and when they will be consulted, and how their input will be utilized in decision making. This applies equally to decisions being taken by RPRA and those being considered by SO.

We have serious concerns with the elements of the draft Program Agreement that outline the areas of dialogue between RPRA and SO in the context of how RPRA comments are to be considered by SO. In many areas it is unclear whether SO is obligated to incorporate comments provided. It is also unclear how RPRA will:

- a) solicit the input of stakeholders, particularly those potentially directly affected by the proposals, and
- b) evaluate and address any concerns associated with how SO incorporates comments

Until the current municipally-operated Blue Box system can be successfully transitioned to Individual Producer Responsibility, more balanced and transparent controls are needed for the protection of all stakeholders. This resulting decision-making structure is unacceptable and should be revised to ensure a decision structure that includes a strong role for RPRA in the transition framework.

Decisions that could have material implications on the current and future system should require a robust process that protects the interests of all stakeholders. This includes, but is not limited to, the following decision areas:

- Catchment design and sequencing,
- Master Services Agreement outlining terms and conditions applicable to collection and post-collection,
- Statements of Work for collection and post-collection,
- Collection and post-collection Procurement changes that impact the competitive marketplace,
- Management of incentives including rate changes,
- Obligated Materials and standardized collection list,
- Definitions and metrics
- Target setting, performance measurement methodologies and reporting
- Operating budgets
- Steward agreements, and
- Pay-In / Pay-out methodologies for non-transitioned municipalities

Additionally, language in the Agreement should reflect ‘best efforts’ rather than ‘reasonable efforts’, which provides for a more progressive standard.

Dispute Resolution

As the draft a-BBPP proposes to significantly alter the management of the existing marketplace for waste management and recycling services, there is a significant possibility of material impacts on all participants – municipalities and service providers, the public, and stewards. The draft a-BBPP proposes, for example, that a dispute resolution mechanism associated with key elements of service contracts would be embedded in the contracts themselves. While this may be acceptable from a business relationship perspective, there is a broader concern related to other decisions in areas such as catchments, contamination, or recycling standards, that might be taken by either SO or RPRA that will potentially affect stakeholder interests.

In those situations, the interests of third parties, including commercial interests, ***cannot*** be interpreted and represented by either RPRA or SO. It is therefore critical that there be appropriate and clearly laid out notification, consultation, and dispute resolution mechanisms associated with the program. Some of those might be imbedded in the Plan itself, managed by SO and overseen by RPRA, while others must be in place and managed directly by RPRA. There should also be clearly defined scenarios, or situations, to which an independent and binding dispute resolution mechanism applies. It is important to all stakeholders that the mechanism and related process, including appeal provisions, are clearly detailed prior to the approval of either the a-a-BBPP or Program Agreement. Comments on a proposed dispute resolution process have been submitted during the consultations and in response to the draft Plan submission.

Transition

A critical component of the Minister’s Direction letter remains the notion that this Plan, developed under the WDTA, is considered to be a “first phase” of transition to IPR under the RRCEA. The Ministry in its Strategy suggested a timeframe of five (5) years for that transition (2023). If transition is to be facilitated a number of key elements must exist:

- a defined time limit associated with the a-BBPP,
- a review process and mechanism for RPRA to evaluate the plan’s progress,
- mechanisms to ensure a robust marketplace for services continues to exist,
- mechanisms to ensure stewards will have real choice in meeting their obligations at the point of transition to IPR, and
- protection against SO owning any Intellectual Property acquired as a result of investments of steward’s funding into research.

It is important for all stakeholders that decisions are not made in the guise of “program management” that ultimately entrench SO as the only option for stewards. Equally important is the need to ensure that a robust marketplace for services continues to exist, and that program decisions do not have the effect of driving service providers out of the market.

In our view, the Program Agreement does not include a mandate or commitment by either party to the timely transition to IPR. In our view, however, the Agreement can play an important role in supporting the Minister’s Direction letter in critical areas. A structured review process, under the direction of RPRA and clearly written into the Program Agreement between SO and RPRA, with a requirement to ensure

that the necessary steps are being taken to facilitate the timely transition to IPR. Such a process, which would include a review based on the Minister's Direction letter, should be considered in advance of the five-year mark.

The Program Agreement also presents an opportunity to ensure that there are appropriate checks and balances on market intervention that will undoubtedly occur through investment. For example, the a-BBPP indicates that SO is committing to investing steward dollars into the system. However, a concern exists that those investments in research that generate Intellectual Property, funded by stewards and others' money, do not provide a future market advantage to SO, particularly in the transition to IPR.

The Program Agreement represents an opportunity for clarity around how issues related to Intellectual Property will be managed. The challenge remains to ensure the willingness of service and technology providers, who have long been at the centre of system innovation, advancement and market development, and bring considerable expertise to the system, continue to be willing to make those investments in the future.

A final concern is the (possibly unintended) recognition in the Program Agreement of Canadian Stewardship Services Alliance (CSSA) as an agent of SO, since notice under the Agreement to SO is directed to CSSA. RPRA has no clearly defined oversight role related to CSSA and there is no clarity on the relationship of SO and CSSA as per sec 24(2) **Subsidiary Corporation** and 24(3) **Commercial Activity** of the WDTA.

We remain committed to working with all parties to support the principle of driving innovation through cooperative and competitive efforts, and support an a-BBPP which we can feel assured will not create barriers to competition for service providers and/or stewards when the program transitions to IPR. Mechanisms for meaningful collaboration and impartial dispute resolution as well as assurances of a timely move to an IPR system and SO wind-up are critical to our support.

We look forward to continuing a dialogue that will allow us to resolve and eliminate concerns with the proposed a-BBPP.

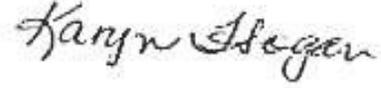
Sincerely,



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