

## IC&I waste problem attracts regulator's attention

While there has been continued progress made in the diversion of residential wastes from landfill, no one seems to be talking about the dead elephant in the dumpster – the mammoth pile of industrial, commercial and institutional (IC&I) wastes being generated in Ontario. Of the 7.6 million tonnes of IC&I waste generated in 2004 (the last year for which reliable statistics are available), more than 81 per cent went to landfill.

Every year, the task of managing Ontario's IC&I waste gets more difficult. Municipal landfill capacity is devoted, primarily, to residential wastes. A number of promising waste diversion initiatives are stuck in the approvals pipeline. And no matter who wins the U.S. presidential nomination, both the Republicans and the Democrats appear more amenable than ever to shutting the U.S. border to Canadian waste.

In 2004, the province proposed a 60 per cent diversion target for municipal solid wastes, including IC&I waste, by the end of 2008. Although considerable progress has been made in diverting residential wastes through various green box, blue box and take-back/deposit programs, it's become obvious that the

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province's diversion target will remain unattainable – by the end of 2008 or any other year – without tackling the IC&I component. That's why, with little public notice, the Ontario Ministry of Environment has dusted off a couple of long-neglected IC&I waste regulations.

## IC&I Waste Regulations Revived

There was a flurry of interest in O. Reg. 102/94 (Waste Audits and Waste Reduction Work Plans) and O. Reg. 103/94 (Industrial, Commercial and Institutional Source Separation Programs) when the two were promulgated under Ontario's *Environmental Protection Act* back in 1994. Larger waste generators, as prescribed in the regulations, undertook waste audits, prepared work plans and began to source separate their wastes. In anticipation of a guaranteed supply of recyclables, a host of recycling operations opened their doors.

However, successive NDP and Conservative governments killed the impetus by gutting the Ministry's legal branch, cutting the number of branch inspectors, and directing enforcement attention elsewhere. During the Harris years, these kinds of 'command and control' regulations fell out of favour, while IC&I recycling markets fluctuated

## Numbers on IC&I waste

According to a report prepared for OWMA by RIS International Ltd., *The Private Sector IC&I Waste Management System in Ontario*, businesses in Ontario generated 7.6 million tonnes of waste in 2004, of which only 1.4 million tonnes were diverted while 6.2 million tonnes were landfilled. About two million tonnes of IC&I and construction/demolition (C&D) materials were sent to landfills in Michigan and New York State, while over three million tonnes were dumped in 11 large private sector landfills in Southwestern and Eastern Ontario. The remainder was sent to municipal landfills.

Coming up with good numbers on IC&I waste totals is problematic. Nobody has a good handle on how much IC&I waste is being generated and how much is being diverted, says Robert Cook, Executive Director of the Ontario Waste Management Association (OWMA). "It's all extrapolation and estimation." The most recent totals compiled by Statistics Canada for 2002 and 2004 are incomplete and don't account for a tremendous amount of IC&I waste that's being handled outside the traditional waste management infrastructure of MRFs, transfer sites and private sector recyclers.

Kelleher Environmental, in a recent report to OWMA, has tracked an additional 9.5 million tonnes of IC&I wastes and 6.3 million tonnes of C&D waste being diverted from disposal. This total includes 5 million tonnes of concrete and 1.3 million tonnes of asphalt pavement, 2.6 million tonnes of bark and sawdust, 3.4 million tonnes of ferrous and non-ferrous slag, 865,000 tonnes of coal fly ash and gypsum, and 353,000 tonnes of rendering wastes.

However, whether the official stats underestimate the diversion rates or not, there is still some six million tonnes of IC&I waste generated in Ontario that's being trucked to disposal sites every year.

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# SPECIAL REPORT: IC&I WASTE DIVERSION

## Who is covered by Ontario's IC&I regulations?

O. Reg. 102/94 and 103/94 don't cover everyone, but are aimed at larger facilities. For example, MOE estimates that 90 per cent of Ontario's manufacturing sector is exempt under the triggering threshold set forth in The Waste Audits and Waste Reduction Work Plans. For each regulated sector, there is a different threshold that triggers the auditing and waste diversion provisions of the regulations and different materials that must be separated at source.

Sector	Triggering Threshold
Large Construction Projects	one or more buildings with a floor area $\geq 2,000 \text{ m}^2$
Large Demolition Projects	one or more buildings with a floor area $\geq 2,000 \text{ m}^2$
Restaurants	$\geq \$3$ million in gross sales for all restaurants operated by the owner in Ontario in the 2 preceding years
Hotels/Motels	> 75 units
Hospitals	classified as a Class A, B or F hospital in Reg. 964
Large Manufacturing Establishments	> 16,000 hours worked by persons employed at the site per month during the 2 preceding years
Retail Shopping Establishments	a floor area $\geq 10,000 \text{ m}^2$
Retail Shopping Complexes	stores with a combined floor area $\geq 10,000 \text{ m}^2$
Educational Institutions	> 350 students enrolled
Office Buildings	a floor area $\geq 10,000 \text{ m}^2$

five of the roughly 235 C&D companies inspected to date are in full compliance.

While the Branch has adopted a "soft compliance" approach for the time being, companies are being told that MOE is taking the regulations seriously. Where attention is needed, the IC&I inspectors are issuing letters requesting that a company takes appropriate action, and specifying a compliance timeframe. Businesses that do not comply with these requests will be issued a Provincial Officer's order. If a company shows a total disregard to their regulatory obligations, the Ministry is willing to take enforcement "to the next level, and refer the case to the Ministry's Investigations and Enforcement Branch," says Dominski.

"The primary focus is on diverting IC&I wastes from landfill, and less on tickets and fines," says Diminski, "but we will take those steps if necessary." With winter weather limiting construction site activity, the IC&I inspectors are moving into other sectors, beginning with retailers, and will continue to roll out the program over the coming year.

## Problems with Regulations

There are some problems with the regulations as they are currently worded, according to OWMA's Robert Cook. The waste management landscape has changed over the last 12 to 14 years," says Cook. He calls for a sector-by-sector review to look at the threshold triggers, update the source separation lists (to, at least, include organics), and incorporate a verification process. While a full manifest system would be overkill, there could be some form of annual written documentation to confirm where wastes are being trucked by contractors.

You also have to bridge the gap, says Rob Rivers, president of the Municipal Waste Integration Network (MWIN). "The province provides great direction for residential waste diversion and MOE regulations cover the larger IC&I companies," says Rivers, "but there is no framework in place for the small and medium-sized IC&I firms that generate the majority of that sector's waste."

and eventually floundered in the face of official disinterest in IC&I diversion.

Although out of favour with the province and ignored by many waste managers, O. Regs. 102/94 and 103/94 are still in force. The release of *Ontario's 60% Waste Diversion Goal: A Discussion Paper* on June 10, 2004, refocused official attention on IC&I wastes. The Ministry's Sector Compliance Branch (formerly called the Environmental SWAT Team) carried out a number of cursory surveys of compliance with the diversion regulations in 2005, followed by a province-wide inspection blitz of 260 businesses in all the regulated sectors in 2006.

The results were not encouraging. In some sectors, the inspectors couldn't find a single company in compliance. Some were unfamiliar with the two IC&I diversion regulations; others had chosen simply not to comply. About 40 per cent of the companies inspected were source separating many

or even all of the materials prescribed in the Source Separation Programs, but very few had completed the formal audits, work plans and other paperwork required under the Waste Audits and Waste Reduction Work Plans. Almost 93 per cent of the inspected businesses were out of compliance in some way or other.

In July 2007, MOE announced that it was hiring ten additional Provincial Officers "to focus on increasing waste diversion in business and industry across Ontario" and to ensure that generators are complying with the province's IC&I recycling requirements.

The promised new IC&I inspectors have been hired, trained and out in the field since late October, early November according to Andy Dominski, Director of the Sector Compliance Branch. To date they have been focusing heavily on the construction and demolition (C&D) sector. While a few firms are doing more than required, overall, compliance rates remain low, says Dominski. Only





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We want the province to put a legislative framework in place to address waste diversion by smaller generators, says Rivers. The waste management industry says it will provide the necessary infrastructure, but Ontario must make diversion a regulatory requisite first.

### Municipalities Becoming Active

Traditionally, municipalities have taken a ‘hands-off’ approach to IC&I wastes and let market forces rule. In effect, the low cost of landfilling in Michigan and New York, together with the transport costs of shipping wastes to the U.S., sets the free market price for waste management in Ontario.

Over the last three or four years, there has been huge pressure on diverting more waste, no matter who generates, says MWIN’s Rob Rivers. Municipal politicians are receiving calls from small and medium-sized companies asking for service. “They say ‘You already have the infrastructure, can we use it?’,” says Rivers. Unfortunately, the municipal diversion infrastructure – collection vehicles, MRFs, composting facilities, etc. – cannot handle the extra burden of IC&I waste from thousands of generators.

In response to increased pressure by local businesses for better 3Rs services, a number of municipalities have started to address IC&I waste diversion. Owen Sound, for example, has passed a by-law that mirrors the IC&I waste audits and source separation regulations. However, it is left to the recycling sector to handle the expected increased demand. Halton Region, at the other end of the spectrum, is considering whether to take a much more active role in providing collection and diversionary services for IC&I wastes. Other municipalities – Mississauga, Ottawa, Kingston, Toronto, and others – are looking at their options.

### Promoting ‘Flow Control’

Denied access to cheap landfills elsewhere, IC&I generators could provide enough volume to create economies of scale to make expensive diversion activities more economically

justifiable. Banning certain materials from landfill or raising tipping fees to encourage recycling is only effective if municipalities are able to prohibit or regulate IC&I waste transfers out of the region. A number of municipalities are considering so-called “flow control” mechanisms that would prohibit generators from trucking wastes outside municipal or regional boundaries. While critics claim flow control is a blatant attempt to monopolize tipping fee revenues, the practice does provide an incentive for recycling and other waste reduction alternatives. A recent decision of the Nova Scotia Court of Appeal endorsed flow control.

In June 2002, Halifax Regional Municipality (HRM) amended its *Solid Waste Resource Collection and Disposal By-Law (S-600)* to require that waste generated and collected in the municipality – including IC&I solid waste, but not recyclables – be trucked to a public-private facility at Otter Lake, while C&D waste must go to a privately operated facility in HRM. However, Ed DeWolfe Trucking Limited, a solid waste hauler, challenged the by-law on the basis that HRM had created a waste disposal monopoly. In 2006, the Supreme Court of Nova Scotia agreed and quashed the by-law.

The municipality appealed and the Nova Scotia Court of Appeal upheld the by-law, stating that the by-law “... sought to assure that the Municipality had management of all the waste for which it is responsible, to provide a predictable flow of revenue to help fund the waste resource management system and, particularly in the case of IC&I Waste, to support municipal efforts to maximize source separation and diversion of waste.”

The Court of Appeal stated that statutory municipal powers should be interpreted broadly, based on their purpose, and upheld the HRM flow control by-law.

It seems reasonable that Ontario courts could take a similar approach to such ‘flow control’ by-laws in Ontario in light of the authority and responsibilities given to municipalities the Ontario *Municipal Act, 2001*. Section 8(1) of the Act declares that the powers of a municipality “shall be interpreted

### N.S. Court assesses merits of ‘flow control’

“For haulers of solid waste ... flow controls limit their ability to operate in the marketplace. The controls prevent the haulers from seeking out and taking advantage of cheaper disposal (“tipping”) fees at provincially approved facilities operated outside HRM [Halifax Regional Municipality]. This does not, it is suggested, interfere with the attainment of environmental goals. All waste disposal facilities, whether inside or outside HRM, must operate in accordance with provincial standards. From the perspective of the marketplace, flow control provisions are not about protecting the environment, but about ensuring that HRM can keep all the tipping fee revenue for HRM waste and exclude competition from waste disposal sites elsewhere.

From another perspective, flow controls are about management of solid waste. Effective waste management requires control over how and where the waste is dealt with, and indeed of what remains as waste and what remains as a resource. Tipping fee revenue, which is stabilized and made predictable by flow controls, is an important feature, but must be viewed in the context of the whole integrated waste management system. Fees not only produce revenue to help fund the system, but also provide incentives to the private sector to source separate waste. The fees, therefore, are an important management tool, both to help sustain the system and to encourage compliance.”

From *Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.* [2007] N.S.J. No. 333

broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues.”

“Municipalities only have so many tools in the tool box to encourage diversion,” says MWIN’s Rob Rivers. “It looks punitive if we raise tipping fees or ban certain materials from landfill.” Municipalities would like to see the province step in and implement a overall flow control policy or plan to support local diversion efforts.





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Coincidentally, the Halifax ruling followed on the heels of a U.S. Supreme Court upholding 'flow control' ordinances. In April 2007, the U.S. Supreme Court upheld flow control ordinances of two New York counties preventing the export of solid waste. In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 US (2007), the majority of the Court found that the ordinances represented a legitimate exercise of the state's police powers to address waste problems and to protect the health, safety, and welfare of its citizens, and thus did not discriminate against interstate commerce. The Court concluded that while flow control could impose some economic burden on residents, it "does not exceed the public benefits of the ordinances."

### CofA Process Being Upgraded

Some generators are having trouble meeting their waste diversion obligations because there currently isn't sufficient recycling capacity in place across the province. The private waste management sector has said repeatedly that it is more than willing to build and operate the necessary facilities, but it must have some confidence that MOE will enforce the IC&I regulations. It also needs an efficient approvals process in place for turning around applications in an expeditious manner.

The province processes approximately six thousand new or amended certificates of approval (CofAs) every year. Of these, some 1,200 have been stuck in the pipeline for at least 12 months. "The approvals system is just way out of step with the province's waste diversion policy," says OWMA's Cook.

To address the backlog and expedite the approval of needed waste management facilities, MOE is looking at a two-track approach: short term, hire more staff; long term, reassess how the approvals process accommodates risk. This might mean that a permit-by-rule approach is adopted for low risk facilities or that minor amendments are fast tracked

### Will the border close?

If the U.S. was closed to Ontario's solid wastes, the currently available domestic landfill capacity would be unable to absorb the estimated 3.5 million tonnes of mostly IC&I and some residential waste that's being shipped to Michigan and another 500,000 tonnes going into New York each year.

This issue is very much alive on the political agenda, with both Republicans and Democrats seeing it as an issue that could curry favour in key border states. Legislation to amend the *Solid Waste Disposal Act* has passed the House of Representative and is sitting in the U.S. Senate that would give states greater ability to control or ban international waste shipments

Michigan says waste shipments from Ontario were down in 2007 – the first time in 15 years – that's probably because more waste is now going to New York. But despite the slight decrease in shipments, in the event of a border closing, the entire IC&I waste collection, transfer and transportation system would be completely clogged with 48 hours.

through the system. The Ministry may also consider moving away from the highly detailed, prescriptive certificates it currently favours; these CofAs require continual amendment every time a company makes minor process adjustments. However, large projects with significant environmental impacts would still be subject to a full review.

The province has been moving forward in expediting the approval of some 3Rs facilities, says MWIN's Rob Rivers. Together with last year's EA reforms, the Ministry should be able to fast track composting plants, MRFs, 3Rs drop-off centres and other needed infrastructure. It appears they understand the need, says Rivers, "now, it's time to see a couple of examples come through [the approval] pipeline."

### Financial Assurances Under Scrutiny

On one hand, the Sector Compliance Branch is investigating whether businesses were meeting the province's

IC&I diversion requirements to increase diversion to recycling. On the other, provincial auditors have been scrutinizing the status of the financial assurances required to obtain facility CofAs to provide capacity. MOE's financial assurance policies, if followed to the letter, can be extremely daunting. Companies can be forced to post cash, letters of credit, surety bonds or some other acceptable collateral to cover every worse case scenario imaginable. Some firms are able to comply. Others lobby for relief or simply cannot post the required assurances.

The Office of the Provincial Auditor General has been very critical of how financial assurance is being applied in the hazwaste field. In his *2007 Annual Report*, the Auditor General noted that the requirements for financial assurance by haulers and treatment facilities is often at MOE's discretion. In a sample of certificates reviewed, only 60 per cent had to supply some form of financial assurance. Even when such assurance was required, it was not always collected or was collected late. Nor was there a process in place to ensure the amount needed was reassessed on a regular basis. As a result, sufficient funds may not be available to cover clean-up in the event of a release.

"The lack of a consistent approach is the number one problem," says OWMA's Robert Cook. Some facilities have financial assurances set far lower than other equivalent operations. Some don't have any. At issue is the very complicated formula for calculating the assurance imposed by the Ministry. If some relief is not forthcoming, Cook says the OWMA is looking at establishing and managing an industry pool fund.

Since the release of the Auditor General's report, the Ministry has said it will release a new guidance document containing current cost information to determine the appropriate amount of financial assurance to be collected prior to issuing a CofA. The Ministry will also include a standard clause for the annual evaluation of financial assurance amounts in all new or amended CofAs.

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