

**Extending Grandfathering for Infrastructure Projects
and Providing Additional Flexibility for Excess Soil
Reuse**

Proposed Amendments to O. Reg. 406/19 and O. Reg. 153/04

Ontario Ministry of the Environment, Conservation and Parks

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Proposal to Extend Grandfathering for Infrastructure Projects and Provide Additional Flexibility for Excess Soil Reuse

As committed to in the Made-in-Ontario Environment Plan, we are making it safer and easier for industry to reuse more excess soil locally. This document describes proposed regulatory amendments to O. Reg. 406/19: On-Site and Excess Soil Management (Excess Soil Regulation) and O. Reg. 153/04: Records of Site Condition – Part XV.1 of the Act (Record of Site Condition Regulation), made under the *Environmental Protection Act* (EPA). The Ministry of the Environment, Conservation and Parks (MECP) is seeking comments on these proposals. Additional information is at the end of the document on how to provide your comments.

Background / Context

Excess soil is soil that has been dug up, typically during construction activities, and which must be moved off-site for reuse or disposal because it can't or won't be reused at the site at which it was generated. While most excess soil can be reused safely, some excess soil may contain contaminants and care must be taken when determining where it may be reused.

Proper management and tracking of excess soil help to prevent environmental impacts and illegal dumping of unwanted soil. There are also many benefits when excess soil is reused locally, including cost savings from avoided landfill disposal fees, reduced trucking distances, significantly reduced greenhouse gas emissions and reduced road damage in local communities. Recognizing excess soil as a resource instead of a waste also reduces pressures on limited landfill space.

In December 2019, Ontario made the new Excess Soil Regulation which is supported by a set of rules for soil management and excess soil quality standards that will make it safer and easier for industry to reuse more excess soil locally. The supporting document titled Rules for Soil Management and Excess Soil Quality Standards (Soil Management Rules) was adopted by reference and forms part of the new regulation.

In response to practical challenges that arose from the COVID-19 pandemic, the first phase of implementation of the Excess Soil Regulation was extended by six months from July 1, 2020 to January 1, 2021.

Through efforts to help municipalities, industries and others implement the new Excess Soil Regulation, MECP has identified opportunities to provide additional regulatory flexibility, clarity and refinement. Proposed amendments are intended to further increase local excess soil reuse and improve the efficiency of excess soil management, while being protective of human health and the environment. For projects with a low risk of environmental impact, the proposed regulatory changes would allow for additional soil management flexibility, and as a result, would increase the benefits of proper excess soil management and local beneficial soil reuse.

We have also learned of further operational challenges arising from the ongoing COVID-19 pandemic in relation to projects for which construction work is close to being contracted. We are proposing regulatory changes so that projects would not be delayed and technical assessments already completed would not have to be repeated.

The following pages describe the proposed amendments to the Excess Soil Regulation and to the Record of Site Condition Regulation to respond to these opportunities and challenges.

Proposed Regulatory Amendments

1) Extending Grandfathering

Proposed Change

Revise the current grandfathering provision in clause 8 (2) (b) of the Excess Soil Regulation, for contracts entered into for the management of excess soil as follows:

1. extend the date by which construction projects must be entered into by one year; from January 1, 2021 to January 1, 2022; and
2. expand the scope of this exemption to provide an exemption from the assessment of past uses, sampling and analysis plan and soil characterization report for projects which have already completed similar soil-related studies before January 1, 2022 (e.g., geotechnical studies with soil quality assessments).

Rationale

- The intent of the current grandfathering provision was to provide time for municipalities, developers and infrastructure projects to revise contracts to reflect the new requirements in the Excess Soil Regulation and to ensure work already completed does not need to be repeated.
- Extending the timelines by one year for contracts entered into related to excess soil management for construction projects recognizes the ongoing challenges COVID-19 has had on operations, including delayed processes related to the issuance of infrastructure construction contracts. This timing extension would ensure projects previously anticipated to be grandfathered but delayed by the pandemic would continue to be grandfathered.
- The second part of this proposed amendment would allow projects to move forward based on assessments that were recently completed, such as geotechnical studies involving soil sampling and analysis, avoiding the need to repeat these assessments.

- The proposed amendment to extend the grandfathering provision does not exempt projects from excess soil reuse provisions coming into effect January 1, 2021; it only applies to the provisions which come into effect January 1, 2022. Early adoption of regulatory requirements is a best practice and encouraged for all projects, where possible.

2) Environmental Compliance Approval (ECA) Relief for Low Risk Soil Management Sites

Proposed Change

Provide an exemption from the need to obtain an ECA for:

1. operation of a site temporarily storing excess soil generated from greenfield development sites (residential, parkland, institutional, agricultural uses) and other low-risk development sites to be reused at similar or lower risk development sites; and
2. operation of a site, such as a garden centre, that engages only in low-risk activities such as storing and blending (e.g., with compost) excess soil and is making that soil available for retail sale at or from that site as lawn or garden soil.

Rules would apply to the management of the sites that would be exempt from an ECA, including the following:

- Requirements on soil quality being stored, including that the soil must be dry soil and must be of equal or better quality than Table 2.1 Excess Soil Quality Standards for residential, parkland and institutional uses (restricted to soil coming from agricultural, residential, parkland and institutional uses).
- Requirements for storage and processing, including that the maximum amount of excess soil stored at a site at any one time shall not exceed 10,000 m³. General storage rules in Section C of the Soil Management Rules would also apply, including managing adverse effects such as impacts from leaching, prohibiting storage within 30 metres of a water body,

maximum stockpile size of 2,500 m³, keeping soil of different qualities segregated, soil storage limits of no longer than 2 years, types of permissible processing such as soil turning, size-based sorting, etc.

- Record keeping rules including maintain records of the sales receipt of all soil coming into the site - including the date, quantity and type of excess soil received and the name and contact information of the person who the purchase was made from (all records to be retained for 7 years to have consistency with Excess Soil Regulation).
- In relation to soil or soil mixes leaving these facilities - this must not cause an adverse effect when placed at the site that receives this soil. If soil or soil mixes are sold for the purpose of growing crops, garden produce and/or pasture, all requirements set out in Section D subsection 2 (2) of Part 1 of the Soil Management Rules must be met, including meeting Table 1 of the excess soil quality standards.
- In addition, when operating a site such as a garden centre where blending of compost is permitted, quality and mixing requirements as outlined in the Section D subsection 1 (1) of Part 1 of the Soil Management Rules apply including mixing with regular compost from a leaf and yard waste composting site regulated by O. Reg. 101/94 (Recycling and Composting of Municipal Waste) under the EPA, and compost produced from a composting facility operating under an ECA for composting that meets the requirements for Category AA compost in PART II of the “Ontario Compost Quality Standards”.

Rationale

- It is common practice to compile top soil from greenfield and other low risk development sites (e.g., from existing residential areas) and to redistribute it to development sites for landscaping or as fill.
- These are low risk activities that should take place without an ECA if basic rules are adhered to.

- This change would allow existing low risk operations such as garden centres and residential soil storage sites to continue to operate without the added burden of obtaining an ECA and would promote appropriate soil reuse.

3) Enabling Site-Specific ECA Soil Management Requirements

Proposed Change

Provide new authority to enable ECAs under the EPA and the *Ontario Water Resources Act* to specify alternative soil management requirements from those identified in the Soil Management Rules for the site or activity to which the ECA applies.

Rationale

- The Soil Management Rules may not always align with best practices for a particular project and in some cases site-specific modifications are required. It is proposed that flexibility be provided to enable an ECA to alter rules for a specific project.
- This is similar in nature to section 9 of Regulation 347 where an ECA can vary rules related to waste management and would allow project specific adjustments to various soil management activities (e.g., alternative storage requirements and alternative soil sampling approaches, where appropriate).
- Additional flexibility through an ECAs alternative requirements would provide more opportunities for excess soil reuse and efficient and proper soil management.
- This flexibility would provide alternative requirements, but would not completely eliminate requirements, such as the need for soil sampling, tracking, etc. related to excess soil management if otherwise required by the Excess Soil Regulation. It would also not affect other sites. For

example, an ECA for a project generating excess soil could not identify alternative rules that apply to other sites such as temporary sites or receiving sites.

4) Flexibility in Excess Soil Storage for Reuse

Proposed Change

Provide flexibility, if certain conditions are met, for excess soil to be stored at a location within 10 metres of a property line boundary. This requirement is set out in Section C subsection 1 (1) subparagraph 4 ii of Part 1 of the Soil Management Rules. This flexibility would be provided if any of the following conditions apply:

- small volumes are being stored (less than 500 metres³ of excess soil);
- storage is very short term (less than 1 week);
- the storage location has a physical barrier (e.g., concrete wall); or
- the storage is taking place in a public road right-of-way.

Alternative set back rules would also be permitted to be specified in an ECA or another local site-specific instrument issued by a public body.

Rationale

- The intent of the requirement for setbacks from property lines is to help ensure that excess soil is not stored in a manner that may impact neighbouring properties as a result of dust, run-off, contaminants leaching to groundwater or visual impacts.
- It is however recognized that in some cases this setback requirement is not always practical or possible and some soil may need to be stored in close proximity to a neighbouring property. For example, narrow project sites such as work in a road right-of-way may not have 10 metres of space within which to temporarily store soil as it is being excavated and before it is moved

to another site for reuse. This storage is low risk provided the volumes are either limited or the storage time is short.

- Providing increased flexibility on property set-backs, with limitations would allow practical challenges to be overcome and reuse to occur more easily, while ensuring appropriate rules are in place to protect neighbouring properties.

5) Reuse of Salt-Impacted Soil

Proposed Changes

It is proposed that the current requirement found in Part 1, Section D subsection 1 (3) clause 1 ii (c) of the Soil Management Rules that prohibits the reuse of salt-impacted soil within 2 metres of a water table be removed.

Rationale

- The excess soil quality standards for salt-related parameters (e.g., sodium adsorption ratio and electrical conductivity) were developed to be protective of the surrounding environment, including local groundwater sources.
- MECP has heard that this restriction makes the reuse of salt-impacted soil unfeasible in large parts of Ontario where ground level is less than 2 metres above the water table, particularly in central and northern Ontario.
- This change would provide increased flexibility for the beneficial and appropriate reuse of excess soil in these regions of Ontario, reducing the need for hauling of soil long distances and disposal of reusable soil.

6) Reuse of Rock Mechanically Broken Down

Proposed Changes

Add a provision to the Excess Soil Regulation clarifying that the regulation applies to rock that is mechanically broken down into soil-like particles in the same way that the regulation applies to soil.

Rationale

- The intent of the Excess Soil Regulation is to specify the appropriate conditions in which excess soil can be reused. This includes consideration of quality, grain size and other regulatory rules for reuse.
- The definition of soil in the Excess Soil Regulation includes particles of rock that are less than 2 millimetres in size as a result of the natural breakdown of rock.
- Stakeholders have stated that the definitions in the new Excess Soil Regulation are not clear whether materials that look like soil, such as rock that is mechanically broken down to the same particle size as “soil” (< 2mm), are within the scope of the definition of soil and excess soil.
- Clarity is needed as to whether particles resulting from mechanical processes such as tunneling, drilling or crushing which break down rock into smaller pieces similar in size to soil as defined in the regulation, would be considered soil or excess soil if moved off the project area, and managed according to the Excess Soil Regulation.
- The proposed amendment would clarify that material resulting from mechanical breakdown of rock would be treated as soil - the same as materials naturally broken down under the Excess Soil Regulation, and when it leaves a project area, should be subject to the same rules and exemptions as other excess soils, including consideration of the excess soil quality standards for reuse.

- This clarification would allow a greater amount of materials that become excess soil to be reused, increase local beneficial reuse which in turn would provide opportunities for a number of economic, environmental and social benefits.
- Considerations related to sampling and characterization of rock materials may need to take into account practical challenges with in situ sampling. In some cases, stockpile sampling or sampling upon prompt arrival at a temporary site may be more appropriate.

7) Updates to Leachate Testing and Related Requirements

Proposed Changes

With regard to leachate, the following are proposed:

1. For the purpose of analyzing leachate under the Excess Soil Regulation, replace the Toxicity Characteristic Leaching Procedure (TCLP) and the Synthetic Precipitation Leachate Procedure (SPLP) with MECP's new modified Synthetic Precipitate Leachate Procedure (mSPLP). This would be effective January 1, 2022 to allow laboratories to transition to this procedure. The new mSPLP (E9003) has been released by the Director and is currently available and encouraged for use, a copy can be obtained by contacting MECP's laboratory services at LaboratoryServicesBranch@ontario.ca. The authority to utilize another method approved by the Director would be maintained.
2. Clarify leachate requirements in the Soil Management Rules Part 1, Section B, subsection 2 (5) that leachate analysis is not required for background quality soils (i.e., soil with soil analysis results that meet background concentration). The Rationale Document for Development of Excess Soil Quality Standards would also be amended to include this clarification.
3. Provide flexibility for qualified person discretion on the approach for the selection of samples with maximum concentration of contaminants for leachate analysis.

4. Update leachate screening levels (LSL) in the Soil Management Rules for Arsenic and Molybdenum to reflect background groundwater concentrations. The Beneficial Reuse Assessment Tool (BRAT) would also be amended to align with these new LSLs and to correct some administrative errors (e.g., typos).
5. Update the Protocol for Analytical Methods Used in the Assessment of Properties under Part XV.1 of the EPA (Analytical Procedure) to align with the Excess Soil Regulation and other minor amendments to bring it up to date (see the Appendix for a more detailed listing of proposed amendments to the Analytical Protocol).

Rationale

- The mSPLP for leachate analysis has been designed for the new Excess Soil Regulation. Amending the Excess Soil Regulation to require the mSPLP method would provide consistency in approach which is being requested by laboratories.
- Removing the option to use less optimal methods of TCLP and SPLP on January 1, 2022 allows a transition period for labs. Any analyses done before this date using the older methods would continue to be recognized.
- Clarifying requirements on leachate analysis for background quality soil would prevent the need for leachate analysis when it was not intended to be triggered.
- Providing qualified persons with discretion on the approach for the selection of samples with maximum concentration would provide flexibility to help avoid delays in laboratory processing of excess soil samples to inform the selection of leachate samples.
- Amendments to current standards and procedures outlined in the Analytical Procedure would keep the Excess Soil Regulation and its supporting guidance and procedures current, which would benefit private laboratories by providing the most up to date references to sampling, handling and storage requirements, analytical methods and method specific quality control and assurance procedures.

8) Clarifications on Application to Aggregate Operations

Proposed Changes

The following are proposed clarifications related to aggregate operations:

1. Clarify the “Non-Application of Regulation” provision, in subsection 2 (2) of the Excess Soil Regulation, to specify that the exemption for aggregate operations is in relation to material leaving the operation; it does not apply to excess soil imported to rehabilitate the site or to be used for other beneficial reuse purposes.
2. Delete the duplicative exemption from the excess soil reuse planning requirements for projects under the *Aggregate Resources Act* (ARA) by moving up terminology in section 5.2 of Schedule 2 to the Excess Soil Regulation, to replace the non-application clause found in section 2 paragraph 2.

Rationale

- Aggregate products leaving an aggregate pit or quarry is not intended to be captured as excess soil, but excess soil entering the site of a pit or quarry for rehabilitation or another beneficial reuse purpose is subject to the Excess Soil Regulation to ensure the excess soil being reused is of appropriate quality for rehabilitation and that other regulatory rules are followed.
- During outreach on regulatory implementation, some stakeholders felt this could be made more explicit in the Excess Soil Regulation for clarity purposes, which is what this proposed change would do.

9) Registry Delivery

Proposed Change

1. Amend the registry identified in sections 8 to 10, and 19 of the Excess Soil Regulation for the purposes of filing notices for large and high-risk excess soil-generating projects and large reuse sites to be a registry operated by the Resource Productivity and Recovery Authority (RPRA), instead of MECP's existing Environmental Site Registry.
2. Section 7 related to the purposes of the registry would be removed as the Registry would now be under the Resource Recovery and Circular Economy Act (RRCEA); however, the purposes will be maintained through that Act and mechanisms under that Act, such as a letter of Direction from the Minister to RPRA. The purposes would be expanded to include integration with other third-party platforms (e.g., tracking and/or soil matching systems and other non-regulatory programs), considering cost, security and other relevant matters.

Rationale

- The online excess soil registry operated by RPRA would be publicly accessible, provides a source of information for regulatory agencies and others, and must be available for the filing of notices including key regulatory information.
- RPRA is a not-for-profit entity that was created in November 2016 by the Government of Ontario to support transition to a circular economy and waste-free Ontario, governed under the *Resource Recovery and Circular Economy Act, 2016* and the *Waste Diversion Transition Act, 2016*.
- RPRA oversees waste diversion programs, enforces individual producer responsibility requirements, and operates current and future registries for MECP programs (e.g., producer responsibility, tires, hazardous waste) while providing a general role in helping to manage data and to spur innovation.

- Delivery of the excess soil registry would build upon and leverage RPRA's existing platforms and would further centralize MECP services for stakeholders.
- It is anticipated that fees for registration using a RPRA-operated registry would be lower than other options explored given their existing registries and IT infrastructure to leverage.
- Integration of the registry with third-party platforms will facilitate exchange of information with other programs and systems, to provide a user friendly system and to ensure users do not have to re-enter information on their soil management activities, into multiple platforms.

10) Minor Clerical Updates

Proposed Change

Some minor changes are proposed to address clerical matters, including the following:

1. Remove "or supervisee" in section 13 of Schedule 1 to the Excess Soil Regulation to ensure the qualified person takes responsibility for analyses undertaken to confirm appropriate excess soil quality standards.
2. Clarify that if sampling undertaken as part of requirements in the Soil Management Rules is older than 18 months the project leader must obtain a statement from the qualified person confirming that the sampling results remain current and accurate.
3. Clarify the "soil processing site" definition such that soil processing includes but is not limited to processing to reduce contaminants, to clarify any misinterpretation of other forms of processing that are not exempt from the need for an ECA.
4. Clarify that once Class 2 Soil Management Sites and Local Waste Transfer Facilities have completed their temporary storage and/or processing of excess soils, that they be returned to the same condition or an improved condition from their condition prior to use for soil management activities and that MECP's local district office is notified of the closure.
5. Clarify intent that every parameter on the minimum parameter list in Part 2 of the Soil Management Rules, in addition to those identified during the assessment of

past uses, must be analyzed for each sample.

6. In section 19 of the Excess Soil Regulation, clarify that the need for registration of a reuse site receiving 10,000 m³ or more of excess soil is determined considering only excess soil brought to reuse sites for final placement in respect of an undertaking after January 1, 2022.
7. Add “Local Waste Transfer Facilities” into the introduction in subsection 9 (2) of the Excess Soil Regulation for consistency with other requirements for the online registry.
8. Part (b) of the Class 2 Soil Management definition is repetitive to part (a) and is proposed to be deleted.
9. Correct other minor clerical errors that have been identified e.g., foot notes, punctuation, etc.

Rationale

- The proposed updates would help to clarify the intent of the Excess Soil Regulation and would correct any inaccuracies.
- Revisions would also provide clarity and do not result in any change in costs or benefits.

11) Minor Amendments to the Record of Site Condition Regulation (O. Reg. 153/04)

Proposed Change

The following amendments are proposed to O. Reg. 153/04 (Record of Site Condition Regulation):

1. As a consequential amendment related to recent changes under the Emergency Management and Civil Protection Act (EMCPA), amend the Record of Site Condition Regulation to continue to exempt temporary health and residential facilities from the need for a record of site condition if it is in response to the COVID-19 pandemic and its effects.

2. Additional minor changes are also proposed to provide clarity and fix errors:

- In subsection 35(1) paragraph 1 and subsection 35(2) of the Record of Site Condition Regulation, amend the reference from section 36 to be section 37.
- More explicitly reference the sampling and analysis plan and soil characterization report from the Excess Soil Regulation in Schedule E, subsection 31 (2) of the Record of Site Condition Regulation.

Rationale

- The current emergency exemption provision references declared emergencies under the EMCPA. This is no longer being used to address COVID-19. The proposed amendment would allow the RSC exemption for temporary health and residential facilities to continue to apply in response to COVID-19 and its effects even though the declared emergency has ended.
- The proposed changes would also ensure the Record of Site Condition Regulation reflects current terminology used in law.

We Want to Hear from You

You are invited to submit comments on this proposal online through the Environmental Registry website: <https://ero.ontario.ca/>. Search by registry number 019-2462. You can also send your comments by email to: MECP.LandPolicy@ontario.ca. We will review and consider all the comments that we receive in response to this proposal through the Environmental Registry and the Ontario Regulatory Registry, via email and through meetings and calls with stakeholders and Indigenous communities.

We will continue to work closely with stakeholders and Indigenous communities as we move forward with implementation of the various phases of the Excess Soil Regulation. For more supporting information, resources and tools please visit

<https://www.ontario.ca/page/handling-excess-soil>.

Appendix - Updates to the Analytical Protocol

Brief Overview - Analytical Protocol

The MECP is in the process of updating the document “Protocol for Analytical Methods Used in the Assessment of Properties under Part XV.1 of the Environmental Protection Act” (2011 version), here referenced as the ‘Analytical Protocol’.

The Analytical Protocol is incorporated in the Records of Site Condition Regulation and is referred to in the Soil Management Rules incorporated by reference in the Excess Soil Regulation. It provides specific requirements for laboratory sample submission, analysis and data reporting. The Analytical Protocol supports private laboratories in Ontario as mandatory guidance to the regulated community.

The Analytical Protocol sets out the sampling, handling and storage requirements, analytical methods and method specific quality control and assurance procedures for laboratories, as established by recognized organizations.

Proposed Changes

The Analytical Protocol is proposed to be updated to include the most current information on:

- method references;
- sample container requirements;
- sample preservatives;
- sample hold times;
- sample preparation and analytical procedures;
- Ministry references;
- format updates; and
- correction for two referenced Chemical Abstracts Services (CAS) numbers.

More specifically, these updates would include the following:

1. Update of sampling and laboratory testing requirements for use in both the Record of Site Condition Regulation and the Excess Soil Regulation including:
 - Updated the protocol title to “Protocol for Analytical Methods Used in the Assessment of Properties and Excess Soil Quality under Part XV.1 of the Environmental Protection Act” to better reflect inclusion of O. Reg. 406/19;
 - Update leachate procedures and associated analysis, required reporting limits for leachates in soil standards under the Excess Soil Regulation to include the new mSPLP;
 - updated tables to include reference to the reporting limit requirements in the Excess Soil Regulation;
 - updated glossary language to reflect both regulations; and
 - updated table footnotes for better clarification of content.

2. Incorporation of leachate procedure (MECP E9003, modified Synthetic Precipitation Leaching Procedure - mSPLP):
 - reference to only one mSPLP leachate method (prescriptive) or alternative methodology (as approved by Director) allowed under the Excess Soil Regulation.
 - pertinent and critical summary of procedural steps for the MECP’s prescribed leachate method, MECP E9003, such as general descriptions of procedural steps and laboratory requirements.

3. Inclusion of a reference on how to obtain an electronic copy of the MECP’s methods (including MECP- E9003).

4. Inclusion of references to new analytical equipment (e.g., ICP-MS/MS) to expand the scope of application.

5. Update of references to include the most recent versions of all reference methods

(e.g., methods from the United States Environmental Protection Agency - U.S. EPA, American Society for Testing and Materials - ASTM, United States Geological Survey - USGS, Ministry of the Environment Conservation and Parks - MECP, and other standard methods).

6. Removal of the provision to allow for a second sample to be filtered for benzo(a)pyrene exceedances.
7. Updates to sample container requirements, as detailed in Table A and Table B of “Protocol for Analytical Methods Used in the Assessment of Properties under Part XV.1 of the Environmental Protection Act” (2011 version). (O. Reg. 153/04).
8. Updates and clarifications of procedures to align with current lab practices and method principles for various test groups, including:
 - Polychlorinated biphenyls (PCB)
 - Electrical Conductivity (EC)
 - Sodium Adsorption Ratio (SAR)
 - Fraction of Carbon (FOC)
9. Corrections for two CAS numbers, and one parameter name clarification.
 - Correction: CAS number 39638-32-9 will be changed to CAS number 108-60-1 and Bis (2-chloroisopropyl) ether will be changed to Bis (2-chloroisopropyl) ether and a reference will be included that the two are used interchangeable.
 - Correction: CAS number 195-59-6 will be changed to CAS number 959-98-8 associated with Endosulfan.
10. Removal of a previous reference to the 2004 Analytical Protocol (in Table 4.1.2).
11. Updates on the acceptable approaches in the determination of method detection limits to include a combined evaluation of blank and low-level spikes.

Rationale

- The update would ensure that the Analytical Protocol provides private laboratories the most up to date procedures and industry practices and regulatory requirements.
- The document also serves Ontario's 'Open for Business' initiative and supports various MECP programs related to protection of land and water.