



# ALAMEDA COUNTY COMMUNITY DEVELOPMENT AGENCY

## PLANNING DEPARTMENT

Agenda Item #6 July 9, 2019

Chris Bazar  
Agency Director

June 28, 2019

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Honorable Board of Supervisors  
Administration Building  
1221 Oak Street, Fifth Floor  
Oakland, California 94612

Dear Board Members:

**SUBJECT: SOIL IMPORT ORDINANCE** – Development of regulations for the importing of soil onto properties in the unincorporated areas of Alameda County.

### RECOMMENDATION

**Planning Commission:** At their May 06, 2019 public hearing, the Planning Commission voted 4 to 2 with one excused to recommend that the Board of Supervisors approve the Soil Import Ordinance as recommended by staff, without the changes as recommended by the State regulatory agencies: the San Francisco Bay Regional Water Quality Control Board (Water Board) and the State Department of Fish and Wildlife (CDFW).

**Board of Supervisors:** At the

At your May 21, 2019 hearing, the Board continued this item to give staff time to respond to the comments of State regulatory agencies that had provided input. Specifically, the Board requested that staff:

- 1) reduce the amount of soil to be imported before a discretionary permit, such as an Administrative Conditional Use Permit or a Conditional Use Permit, was required;
- 2) include additional screening methods to address potential impacts to biology and hydrology;
- 3) require phasing of the agricultural operation before additional soil is imported;
- 4) add “tipping” fees for all soil to be imported;
- 5) increase fines or require bonding for imported soil;
- 6) require registration with the County for all soil importing activity above a certain threshold, but below the discretionary permitting levels; and
- 7) establish a finite maximum amount of soil allowed to be imported per property.

Staff is updating the ordinance based on the comments from the State regulatory agencies, and the input from your Board. We anticipate that the ordinance will be ready to present for a decision to the Board of Supervisors at the July 23, 2019 Board of Supervisors Regular Meeting.

**Staff Recommendation:** Staff recommends that the Board of Supervisors continue this item until the Board of Supervisors’ Regular Meeting of July 23, 2019.

### DISCUSSION

#### Most Recent Input from Regulatory Agencies

Staff continues to work with the State regulatory agencies on the proposed language for the ordinance. Key input has just been received and it will take some additional coordination with County Counsel to incorporate these comments into the County General Ordinance Code. Staff

intends to complete this work in time to have the item heard at your Board's July 23 Regular meeting; below is a summary of comments received.

Per the Regional Water Quality Control Board, inadequately screened and/or carelessly placed soil can put humans and special status species at risk. Human health can be placed at risk if imported soil contains constituents at levels that are associated with unacceptable risks of cancer or other noncancer based health effects. The most significant risk to special status species from imported soil results from physical modification of essential habitat features for those species.

The Water Board has developed Tier 1 Environmental Screening Levels (ESLs) (*Users Guide: Derivation and Application of Environmental Screening Levels (ESLs), Interim Final* (Water Board, 2019)) that represent constituent levels in soil that serve as an aid in assessing the overall threat (pathways and threat level) at a typical soil/groundwater cleanup site. These screening levels allow for understanding whether threats to human health or the environment are adequately controlled. The Tier 1 Soil ESLs consider risks from direct exposure to both humans and terrestrial species, soil contamination leaching to groundwater, and nuisance odors. The Tier 1 Soil ESL human exposure scenario includes children living and playing on the soil and construction workers working (including excavating) at sites containing the screened soils.

The generic site assumptions used to develop the Tier 1 Soil ESLs do not consider special status species (terrestrial or aquatic). Such special status species may be more sensitive to some constituents than the surrogate species used to develop the terrestrial soil ESLs used as Tier 1 Soil ESLs. However, at this time there is not a list of screening levels appropriate to all special status species that may be present in agricultural lands in Alameda County. Also, identifying special status screening levels on a site-by-site basis would be burdensome to the regulated community. Therefore, risks to special status species from imported soil will be assessed with respect to impacts on habitat features that are essential for the life cycles of special status species.

Placing fill dirt on areas that have special status species, such as seasonal or perennial waterways, stock ponds, riparian corridors, rock outcroppings in chaparral habitat, grasslands within 1.3 miles of breeding ponds, or burrows, can remove essential habitat features for these species and entomb any species present when fill is placed over these areas. Prior to placement of soil on these areas, they should be assessed for the potential presence of special status species. A habitat assessment should be prepared by a qualified biologist who has the education, training and experience and possesses the expertise to identify habitat of special status species.

The Water Board recommends that County staff and the regulated community refer to the *Eastern Alameda County Conservation Strategy (EACCS, 2010)* for a documented baseline inventory of biological resources and conservation priorities to be utilized during project-level planning and environmental permitting. It was designed to convey project-level information for use in permitting and environmental compliance with the federal and state endangered species acts (FESA and CESA), the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), and other applicable laws for projects within the study area with impacts on biological resources. The *EACCS* is intended to support and streamline the permitting process. *EACCS* does not create new regulations or change the process by which a project applicant obtains permits for authorization to impact biological resources, but it has been accepted as a guidance document by several agencies including USFWS and CDFW. *EACCS* does not authorize or provide legal coverage for take of special status species. The landowner should consult with the U.S. Fish and Wildlife Service (USFWS) and staff at the California Department of Fish and Wildlife (CDFW) if the import or export areas occur in areas defined in the *EACCS* and/or by the qualified biologist as providing habitat for special status species. Habitat maps are available on the East Alameda County Conservation Strategy website ([http://eastalcoconservation.org/documents/eaccs\\_ch3\\_oct2010.pdf](http://eastalcoconservation.org/documents/eaccs_ch3_oct2010.pdf)).

CDFW has discretionary authority over activities that could result in the “take” of any species listed as candidate, threatened, endangered pursuant to California Endangered Species Act (CESA) (Fish and Game Code, § 2050 et seq.) or rare species under the Native Plant Protection Act (NPPA). (Fish and Game Code, § 1900 et seq.). A CESA permit must be obtained if the project has the potential to result in “take” of plants or animals listed under CESA, either during construction or over the life of the project.

Summary of other Federal and State Laws that Project Jurisdictional Waters

The State regulatory agencies have also reminded the regulated community and County staff that, regardless of the draft County soil importing ordinance, there are additional Federal and State laws that protect local waterways, including perennial and seasonal wetlands; ephemeral, intermittent, seasonal, and perennial creeks; seasonal ponds; perennial ponds; and lakes. Regulated ponds usually include stock ponds in the area covered by the Ordinance.

- Federal Clean Water Act prohibits the placement of fill in waters of the U.S. without first obtaining permits from the U.S. Army Corps of Engineers (Corps).
- The California Porter-Cologne Water Quality Act prohibits the discharge of fill to waters of the State without first obtaining Waste Discharge Requirement’s from the appropriate Regional Water Quality Control Board.
- CDFW requires a Lake and Streambed Alteration (LSA) Notification, pursuant to Fish and Game Code section 1600 et. seq., for project activities affecting stock ponds, lakes, or streams and associated riparian habitat.

Areas that may be regulated as waters of the U.S. and/or waters of the State include the following:

- Areas of soggy ground that remain soggy for at least two weeks during the rainy season.
- Any creek channel with a defined bed and bank (e.g., a topographic change from the adjacent land), no matter how small or how often water flows through the channel in a typical year.
- The bottom of any canyon is likely to contain a regulated creek channel.
- Any pond or impoundment of water, including stock ponds.

CONCLUSION

Based on the input by the State regulatory agencies summarized above, Staff is drafting an ordinance that includes screening investigation protocols to protect land and water species before the soil is placed on the receiving property. Staff anticipates that the last remaining step in this process -- to format the ordinance for adoption to the County General Ordinance Code -- will be completed in time to agendize for your Board’s July 23 Regular meeting.

Very truly yours,

DocuSigned by:  
  
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Chris Bazar, Director  
Community Development Agency

# TABLE 1: State Agency Concerns and Possible Ordinance Revisions

NOTE: Issues 1 – 10 are from San Francisco Bay Region, State Water Quality Control Board, letter of April 8, 2019. Issues 11 – 17 are from California Department of Fish and Wildlife, letter of February 7, 2019.

CONCERN	DESCRIPTION OF ISSUE	POSSIBLE SOLUTION
<p><b>1. Lead Agency Staffing Inadequate</b></p>	<p>As lead agency for this Zoning Ordinance modification, general staffing and subject matter expertise at CDA is minimal. Additional staff or consulting services for CDA will become necessary on a permanent basis unless other County Agencies can provide staff with appropriate expertise and time to manage the technical and field requirements for the tasks implied by the ordinance language.</p>	<p>Additional subject matter expertise could be explored and developed.</p>
<p><b>2. Limited Intent of Ordinance</b></p>	<p>The Ordinance does not include the following additional reasons for its adoption:</p> <ul style="list-style-type: none"> <li>(a) to ensure that potential human and ecological risks are not transferred between properties due to the import of polluted fill materials;</li> <li>(b) to ensure that hazardous wastes are not imported to properties accepting fill.</li> </ul> <p>These reasons are easily stated, but both imply a highly technical and complex set of requirements that cannot be easily expressed for general use in a land use ordinance. The proposed ordinance itself is missing some of the technical aspects of these reasons, as explained below.</p>	<p>Amend Paragraph 17.66.010, Purpose, to include:</p> <p><i>“...to ensure that potential human and ecological risks are not transferred between properties due to the import of polluted fill materials, and to ensure that hazardous wastes are not imported to properties accepting fill.”</i></p> <p>And</p> <p>Include various amendments as generally described below to strengthen ordinance language to address technical requirements.</p>

CONCERN	DESCRIPTION OF ISSUE	POSSIBLE SOLUTION
<p><b>3. Soil Fill in Jurisdictional Waters not addressed</b></p>	<p>The Ordinance does not caution the regulated community against the placement of imported soil in jurisdictional waters of the State and waters of the U.S., such as creeks and wetlands. It has been assumed that these regulations are left to the Army Corps of Engineers, CDFW, and the Water Board, who have jurisdiction over ephemeral and intermittent creek channels, and the County Public Works Agency, which has jurisdiction over some watersheds.</p> <p>To prevent members of the regulated community from inadvertently placing fill in such waters, the Ordinance’s text could be expanded to clarify that the placement of soil in any channels with defined bed and banks, any ponds, and any wetland areas is likely to require state and/or federal authorization, and that failure to obtain appropriate authorization prior to placing fill in those waters may result in state and/or federal enforcement action. To prevent inadvertent violations of state and federal law, the Ordinance should require that property owners have a jurisdictional delineation of waters of the state and of the U.S. performed at sites at which the placement of imported fill is proposed.</p>	<p>The Draft Ordinance already contains Section 17.66.040, Compliance with Existing Laws and Regulations, which specifies compliance with the requirements of these numerous other agencies. That language does not explicitly specify jurisdictional delineation of waters of the state and the U.S. Technically, this is already a legal requirement in order to avoid violations of state and federal law; however, such a directive could be added to ensure that the delineation is done:</p> <p><i>“Owners of property receiving imported soil shall have a jurisdictional delineation of waters of the state and of the U.S. performed at sites at which the placement of imported fill is proposed.”</i></p>
<p><b>4. Tier 1 Soil environmental Screening Levels (ESLs) alone are not protective of aquatic habitats and special status species.</b></p>	<p>The Tier 1 ESLs are intended for evaluating polluted properties, and the concentration levels represent thresholds in soil and groundwater that present insignificant risk or concerns (e.g., odors) to humans, upland terrestrial receptors, and aquatic water column receptors. The ESLs do not address the potential erosion of soil/fill material, dissolved transport in stormwater, or the potential pollution of wetland/stream sediment.</p> <p>The Ordinance could be revised to include a definition of acceptable fill. The ESLs may be used to determine “acceptable” fill for placement in upland areas provided</p>	<p>Language to address this concern in detail would add a level of complexity to the Ordinance that could be difficult to comprehend by Staff or the Public. However, some general language could be added to provide direction to qualified professionals on how to proceed.</p> <p>Soil has already been defined to include only “earthen material lying above the bedrock,” and to exclude “trash, debris, piping of any material, wooden boards, logs, branches or chips, broken concrete or asphalt, metal pieces of any kind,</p>

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	<p>that: (a) no material classifiable as a hazardous waste is imported; (b) any materials placed at the surface are compliant with the polychlorinated biphenyls (PCBs) Total Maximum Daily Load (TMDL) (Water Board 2017); and (c) the fill material is not placed in or adjacent to any sensitive environments (e.g., wetlands; riparian corridors of any ephemeral, intermittent or perennial streams, or the stream channels; or endangered species habitats).</p> <p>In rural and agricultural areas, contaminants in fill soil may pose a significant risk to animals, including listed species. Some agricultural lands in Alameda County include designated critical habitat for species listed under the Federal Endangered Species Act. Levels of contaminants in soil that pose negligible risk to humans may be toxic to CTS and/or CRLF or inhibit the successful breeding of these species.</p> <p>The Ordinance currently does not include provisions to protect biology and habitat from adverse effects of soil fill import. Ideally, at any site at which imported fill may be washed by precipitation into creeks, ponds, or wetlands, the cleanliness of imported soil should be additionally screened using ecological screening levels that are protective of aquatic species, including special status species. This would add a level of complexity to the Ordinance that could be difficult to comprehend by Staff or the Public.</p>	<p>plastic, glass, or other human-made materials”; or “human-made or artificial chemicals, substances or contaminants at measured levels greater than those determined through required testing processes to be safe for human contact, adequate for protection of watercourses or ponds and the water contained therein, groundwater located or flowing beneath the surface, and protection of biological habitat and native species found on or known to use the parcel site and surrounding parcels. Soil specifically does not include Organic Mulch.”</p> <p>In order to satisfy this concern, language would need to be added that would protect wetlands, stream channels, bodies of water and endangered species habitats. An example of this could read as follows:</p> <p><i>“Testing of Soil for Ecological Screening.</i></p> <p>A. <i>For all soil import subject to an ACUP or CUP as described in 17.66.050 and 17.66.060, all soils shall be tested for Ecological Risk Factors and compatibility with onsite water quality, watercourse and streambed preservation and habitat / special status and aquatic species protection according to protocols and standards recognized by the State of California Water Resources Control Board San Francisco Bay Region and the State of California Department of Fish and Wildlife.</i></p>

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<p><b>5. Environmental Review for many smaller projects would not adequately assess impacts on biology</b></p>	<p>Ideally and legally, prior to receiving permission to import soil to an agricultural property, the property owner would be directed to have a biological assessment performed to identify the presence of any sensitive biological receptors, such as riparian habitats, ponds, wetlands, or special status species, including the presence of critical habitat for a special status species. If special status species are present... appropriate soil constituent screening levels should be selected to protect the listed species from constituents that may be transported in sediment or leached from sediment into habitat for those species. In addition to identifying appropriate screening levels, the biological assessment should examine the ways in which habitat may be</p>	<p><i>B. Acceptable protocols may include, but not be limited to, thorough testing and screening of potential soil for import for all potential applicable contaminants, substances or naturally-occurring hazardous elements and compounds under the supervision of a professional(s) with experience in toxicology, analytical chemistry and statistics; sampling and screening of onsite soils of the receiving parcel(s) for compatibility with soil to be imported; characterization of the receiving parcel(s) for biological habitat, watercourse protection and special status / aquatic species; and when necessary, a Habitat Conservation Plan or other mitigation for adverse effects on watercourses, habitat or biology approved by the State of California Department of Fish and Wildlife."</i></p> <p>As described above, new language would be required to explicitly address the concerns of the presence of special status species or special habitats on any of the soil import receiving sites. As currently written in the draft Ordinance, the Tiering system would remove many smaller projects on agricultural lands from any such oversight and evaluation.</p> <p>This concern is difficult to address without either:</p> <p><b>(1) Eliminating the Tiering system proposed in draft Ordinance, which allows smaller</b></p>

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	<p>compromised by the import of fill. Where habitat used by special status species may be negatively impacted, the property owner should be directed to consult with CDFW and the U.S. Fish and Wildlife Service.</p> <p>Currently, no such specific requirement is included in the draft Ordinance. For all soil fill import action on properties where no Conditional Use Permit is required – up to 15,000 cubic yards per year in many cases – no environmental review would be required. This may mean that no vehicle for soil characterization prior to receipt would be available to the lead agency. The potential for receipt of uncharacterized contaminated soil or placement of soil that would pose a risk to biology and ecology could be substantial.</p>	<p>projects to proceed without proactive oversight by the County; or</p> <p><b>(2)</b> Revising the text to apply biological and toxicological evaluation requirements as shown above to all tiered projects or a much larger subset of them, with evaluation of both the receiving lands and the imported soils, including smaller ones.</p>
<p><b>6. Ordinance does not include detailed protocol to develop a sampling plan capable of establishing that imported soil is sufficiently clean (“acceptable”) for placement in agricultural lands.</b></p>	<p>The Ordinance does not explicitly provide guidance for assessing the cleanliness of soil proposed for importation to agricultural lands. In assessing contaminant levels in soils, it is standard practice to specify the minimum sampling density necessary to establish that the soils have been sufficiently characterized [...]The Ordinance leaves out details [to assess cleanliness of soils], which include the following standard procedures in the evaluation of soils:</p> <ul style="list-style-type: none"> <li>• Required minimum sampling density;</li> <li>• A protocol for determining that sufficient samples have been collected</li> <li>• List of analytes that must be tested for in the soil;</li> <li>• Analytical methods considered acceptable to assessing concentrations of contaminants in soils;</li> <li>• Required reporting levels for analytical methods;</li> <li>• Protocols for assessing data when method reporting limits are higher than appropriate screening levels;</li> </ul>	<p>Amend the draft Ordinance to include language as follows, to either augment or replace existing language as appropriate:</p> <p><b>“Screening Requirements (Appropriate List of Analytes for Testing / Screening).</b></p> <p>Soil shall be screened in accordance with Sections 17.66.050 and 17.66.060 above and the following requirements:</p> <ol style="list-style-type: none"> <li>1. Tier 1 ESL</li> <li>2. Other Screening Levels as described in this Section,</li> <li>3. The soil shall be tested in accordance with the standards established by the San Francisco Bay Regional Water Quality Control Board in its “Beneficial Use of Dredged</li> </ol>

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	<ul style="list-style-type: none"> <li>• Acceptable calculations for establishing the likely range of contaminant concentrations in soils;</li> <li>• Acceptable quality assurance/quality control procedures to ensure that data are of sufficient quality to be used in screening prospective soil fill.</li> <li>• Specification of the level of certainty required for concluding that soil has met the appropriate screening guidelines (e.g., whether an 80 percent upper confidence interval or a 90 percent upper confidence level would be an acceptable metric for comparison with appropriate screening levels).</li> </ul> <p>Water Board staff have suggested two protocols that may be of use in the Ordinance: (a) the Alameda County Department of Environmental Health – Local Oversight Program’s August 1, 2018, Fill Material Characterization Guidance (the underlying documents for which are referenced in the Ordinance text); and (b) the Hawai’i Department of Health’s October 2017 Guidance for Soil Stockpile Characterization and Evaluation of Imported and Exported Fill Material.</p>	<p><i>Materials: Sediment Screening and Testing Guidelines, Draft staff report” (2000), as amended, or other source recommended by the State of California Water Resources Control Board San Francisco Bay Region.</i></p> <p><b>Testing of Soil for Human Safety According to Established Protocols.</b></p> <p><i>For all soil import subject to an ACUP or CUP as described in 17.66.050 and 17.66.060, all soils shall be tested for compliance with Tier 1 ESL according to protocols and standards recognized by the State of California Water Resources Control Board San Francisco Bay Region, and the Alameda County Department of Environmental Health.</i></p> <p><i>Acceptable protocol may include those set forth in the County Department of Environmental Health document, “Fill Material Characterization Guidance” (August 1, 2018 or later versions), or similar protocol as approved by the State of California Water Resources Control Board San Francisco Bay Region. ”</i></p>

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<p>7. The Ordinance does not yet include a protocol for selecting the constituents that must be analyzed for in soil to ensure that imported soil is sufficiently clean for placement in agricultural lands.</p>	<p>The Ordinance does not describe how to determine which elements and chemicals must be included in the list of analytes to be measured in soil proposed for import to agricultural lands. The text does describe required analytes in soil imported from agricultural lands or imported from areas adjacent to roadways, but the rationale used in each of those discussions is incomplete.</p> <p>The Ordinance requires that soils derived from a source that has been in agricultural production in the last 50 years must be analyzed for agricultural chemicals (fertilizers, herbicides, and pesticides). Residential areas with lawns and commercial properties with landscaping are also likely to have residues of fertilizers, herbicides, and pesticides in soils. Water Board staff have observed that the upper two to three feet of soils used in agricultural production usually have pesticide levels that are not compatible with placement in or adjacent to aquatic habitat.</p> <p>The Ordinance requires that soils adjacent to a freeway, state route, or major arterial roadway be analyzed for asbestos and lead contamination. This list could be expanded to include copper, which is present in many brake shoe formulations and is highly toxic to aquatic life. Soils adjacent to roadways should also be tested for petroleum hydrocarbons and combustion byproducts (e.g., PAHs). Also, since electric power lines often parallel roadways, soils adjacent to roadways should be tested for PCBs, which were a constituent of transformer fluids for many years. Finally, since maintenance crews often use herbicides to control road side vegetation, these soils should be analyzed for herbicides.</p>	<p>Amend the draft Ordinance to include language as follows, to either augment or replace existing language as appropriate:</p> <p><b>“Screening Requirements (Appropriate List of Analytes for Testing / Screening).</b></p> <p>Soil shall be screened in accordance with Sections 17.66.050 and 17.66.060 above and the following requirements:</p> <ol style="list-style-type: none"> <li>1. Tier 1 ESL</li> <li>2. Other Screening Levels as described in this Section,</li> <li>3. The soil shall be tested in accordance with the standards established by the (San Francisco Bay Regional Water Quality Control Board in its “Beneficial Use of Dredged Materials: Sediment Screening and Testing Guidelines, Draft staff report” (2000), as amended, or other source recommended by the State of California Water Resources Control Board San Francisco Bay Region.</li> </ol> <p>Amend Paragraph 17.66.060(E)(2) to include recommended testing for copper, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), and common roadside herbicides.</p> <p>In all cases, a qualified professional (defined in the Ordinance as a licensed geologist or other professional who, by education, training and</p>

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	<p>The Ordinance's language regarding asbestos could be updated...Information regarding the regulation of airborne asbestos is available from the Air Resources Board. Information regarding managing asbestos hazardous waste is available from the Department of Toxic Substances Control.</p> <p>Beyond listing potential agricultural- and transportation-related contaminants, the Ordinance does not yet provide guidance on the appropriate list of analytes to be selected for screening soils. Unless specific documentation exists for a given source of soil that rules out some classes of contaminants, Water Board staff suggests that soils should be screened for a full suite of metals, volatile organic compounds, semi-volatile organic compounds, polycyclic aromatic hydrocarbons, PCBs, pesticides, herbicides, and fertilizers. The full list of analytes presented in the Beneficial Reuse of Dredged Materials: Sediment Screening and Testing Guidelines. Draft staff report (Regional Water Quality Control Board, 2000) should be used in testing soils, unless sufficient documentation is available to exclude the likely presence of a class of contaminants in a soil source. Such documentation may include Phase 1 and Phase 2 Environmental Site Assessments of the proposed source site.</p>	<p>experience possesses the expertise in testing and analyzing Soils necessary to accurately evaluate the chemical properties of the Soil, including but not limited to, the ability to determine appropriate screening levels for toxicity for various applications and land uses) would need to be in charge of soil screening and analysis for these issues.</p>
<p><b>8. Ordinance does not include protocol for screening imported soil for materials other than elements and chemicals that may negatively impact habitat quality at the receiving site.</b></p>	<p>In addition to screening soils for harmful levels of elements and chemicals, the Ordinance should set requirements for trash and invasive plant species seedstocks. To prevent imported soil from functioning as a landfill, the Ordinance should specify screening protocols to ensure that the imported soil does not contain significant trash or debris. Also, invasive plant species are dominant in many developed areas of the County. Depositing fill soil in agricultural areas may introduce new seed stocks from</p>	<p>The draft Ordinance already includes language that explicitly excludes any trash or debris as fitting the definition of soil. Any soil not pre-screened for this material is not permitted to be imported.</p> <p>Staff has not yet been able to determine whether an adequate method of screening large masses of soil for nonnative and weedy seeds, or whether this problem can be surmounted. It may be possible to</p>

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<p>9. Ordinance exempts soils from analysis if obtained within the same zoning designation of Agriculture or PD or if imported from a Licensed and Permitted Retailer or Wholesaler.</p>	<p>invasive species into habitat at the fill site and compromise populations of native plant species. The Ordinance should include protocols that minimize and avoid the spread of invasive plant seed stock.</p> <p>The Ordinance does not require soil to be tested if it is imported from the same zoning designation or if soil is imported from a Licensed and Permitted Retailer or Wholesaler. Technical bases for these exemptions are not provided.</p> <p>Because of the combination of alluvial and tectonic processes in the shaping of landforms in the Bay Area, the chemical compositions of soils can vary significantly over relatively small distances. In addition, some Bay Area soils have elevated levels of metals that are toxic to wildlife at relatively low concentrations, including arsenic, cadmium, mercury, nickel, selenium, and thallium. In subregions in which elevated levels of these metals occur in soils, the local flora and fauna have often adapted to these metals over many generations. Moving soils from such a source area to an area that does not contain elevated levels of some of these metals is likely to have a negative impact on flora and fauna at the fill location. This is not addressed in the Ordinance.</p>	<p>achieve this task after seed germination at the receiving site using a method called soil solarization, but this requires intensive work and a large amount of land across which to spread the soil, and may be impractical for all but very small volumes of soil. Moreover, most land in Alameda County is already adversely affected by invasive nonnative species which have become common.</p> <p>For soils to be moved within the same zoning designation, from one agricultural parcel to another, language similar to that described above would provide adequate testing of the soils, but Paragraph 17.56.060(E) would need to be amended to eliminate the exemption allowed under the language: <i>“exemption for imports from a source parcel within the Agricultural (A) district in the unincorporated areas of the County of Alameda or equivalent districts in other jurisdictions shall be exempt from the tiered requirements above...”</i></p> <p>Licensed and permitted retailers or wholesalers include surface mining operations and home and garden supply businesses who sell landscaping materials, either in bulk or in small quantities. Water Board staff assert that these businesses do not always screen soils for potential toxicity to special status species, and also assert that unless retailers and wholesalers have data available that demonstrates that constituents in the soils do not exceed acceptable concentrations for safe exposure of special status species, soil from these sources should be tested to verify that it is safe to use in potential listed species habitat. CDA staff acknowledges that this may be the case, but this</p>

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<p><b>10. The Ordinance has not been reviewed under the California Environmental Quality Act (CEQA).</b></p>	<p>The County proposes to satisfy the requirements for review under CEQA by referencing the Categorical Exemptions from review under Sections 15307 and 15308 of the CEQA Guidelines.</p> <p><b>15307. Actions by Regulatory Agencies for Protection of Natural Resources</b> Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.</p> <p><b>15308. Actions by Regulatory Agencies for Protection of the Environment</b> Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.</p> <p>Water Board Staff have expressed concern that the regulation proposed are not sufficiently protective of wildlife, including special status wildlife and associated</p>	<p>would go far beyond any kind of regulation ever envisioned by the County, would affect materials that have not been involved in the problems this Ordinance is designed to correct, and would go beyond the intention of the Ordinance.</p> <p>CDA Staff has prepared this regulation on the premise that the activity in question – soil import and placement for any agricultural reason and at any level – is already unregulated under existing County ordinance, and that any stricter regulation on that activity, such as the draft Ordinance, satisfies the concept that natural resources and the environment will receive greater protection than previously as a result.</p> <p>It is acknowledged that conducting a CEQA review on this proposal would provide maximum transparency of potential impacts of the soil import activity being regulated, and the most solid legal foundation for approval of this Ordinance.</p>

**TABLE 1: State Agency Concerns and Possible Ordinance Revisions**

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CONCERN	DESCRIPTION OF ISSUE	POSSIBLE SOLUTION
<p><b>11. California Endangered Species Act and Native Plant Protection Act</b></p>	<p>critical habitat, to satisfy the requirements of these exemptions and justify use of the proposed categorical exemptions.</p> <p>CDFW has discretionary authority over activities that could result in the "take" of any species listed as candidate, threatened, endangered pursuant to California Endangered Species Act (CESA) (Fish and Game Code, § 2050 et seq.) or rare species under the Native Plant Protection Act (NPPA). (Fish and Game Code, §1900 et seq.). A CESA permit must be obtained if the project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the project. Issuance of a CESA permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the project and mitigation measures may be required in order to obtain a CESA Permit.</p>	<p>The Draft Ordinance already contains Section 17.66.040, Compliance with Existing Laws and Regulations, which specifies compliance with the requirements of these numerous other agencies, including CDFW. That language does not explicitly specify Jurisdictional authority over the "take" of any species listed as candidate, threatened, or endangered pursuant to CESA or rare plant species under the Native Plant Protection Act (NPPA), or that a CESA permit must be obtained.</p> <p>Technically, this is already a legal requirement in order to avoid violations of state and federal law, and for those proposals that require CEQA analysis, these obligations would be fulfilled. However, there is the risk of missed obligations for consultation with the relevant State agencies for projects that fall under Tiers in which no County permit would be required and no CEQA analysis would be performed.</p> <p>There are multiple ways to address this issue. The following directive could be added to ensure that the obligation is known and fulfilled for all properties receiving imported soil:</p> <p><i>"Owners of property receiving imported soil shall consult with CDFW and if required, obtain a CESA permit if the project has the potential to result in</i></p>

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		<p><i>"take" of plants or animals listed under CESA, either during construction or over the life of the soil import project. Issuance of a CESA permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the project and mitigation measures may be required in order to obtain a CESA Permit."</i></p> <p>Or, as in No. 5 above, this level of consultation could be explicitly required for all or most Tiers of soil import; or finally, the Tiering system could be discarded in favor of full permitting, environmental analysis and soil screening for all import projects large and small.</p> <p>In all of these scenarios, however, the obligation of lead agency status for any CEQA analysis required to fulfill this obligation would fall to the County.</p>
<p><b>12. Lake and Streambed Alteration</b></p>	<p>CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et. seq., for project activities affecting lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA</p>	<p>As in No. 11, The Draft Ordinance already contains Section 17.66.040, Compliance with Existing Laws and Regulations, which specifies compliance with the requirements of numerous other agencies, including CDFW.</p> <p>Also, as for No. 11, a directive could be added to ensure that the obligation is known and fulfilled for all properties receiving imported soil:</p> <p><i>"Owners of property receiving imported soil shall consult with CDFW and if necessary, prepare an LSA</i></p>

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CONCERN	DESCRIPTION OF ISSUE	POSSIBLE SOLUTION
<p><b>13. Ordinance will result in significant biological impacts; substantial CEQA analysis should be required.</b></p>	<p>Agreement (or Incidental Take Permit) until it has complied with CEQA as a Responsible Agency.</p>	<p><i>Notification, pursuant to Fish and Game Code section 1600 et. seq., for project activities affecting lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. Issuance of a LSA Agreement is subject to consideration of a CEQA document for the Project.</i></p> <p>Or, as in Nos. 5 and 11 above, this level of consultation could be explicitly required for all or most Tiers of soil import; or finally, the Tiering system could be discarded in favor of full permitting, environmental analysis and soil screening for all import projects large and small.</p> <p>In all of these scenarios, however, the obligation of lead agency status for any CEQA analysis required to fulfill this obligation would fall to the County.</p>
<p><b>13. Ordinance will result in significant biological impacts; substantial CEQA analysis should be required.</b></p>	<p>CDFW anticipates that significant impacts to the environment will result from the proposed Ordinance since the areas covered under the Ordinance are known to provide habitat for state and federally listed species and other special-status species. Suitable habitat is present within unincorporated Alameda County for numerous federally and state threatened species.</p>	<p>CDA Staff has prepared this regulation on the premise that the activity in question – soil import and placement for any agricultural reason and at any level – is already permitted and unregulated under existing County ordinance, and that any stricter regulation on that activity, such as the draft Ordinance, satisfies the CEQA Guidelines concept that natural resources and the environment will receive greater protection than previously as a</p>

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	<p>Take of special-status species in the form of mortality (i.e., "kill") may occur as a result of soil importation activities from heavy equipment/vehicle strikes; burrow collapse associated with earthwork, removal of vegetation or burial of vegetation, earthwork activities at the Project site resulting in crushing or suffocation, entrapment and desiccation of underground individuals; crushing by heavy equipment and materials, or under the weight of vehicles driving through habitat; entombment of individuals from deposition of stockpiled soil over occupied burrows, and during vegetation, top soil, or soil compaction, and development of access roads.</p> <p>Indirect impacts of the importation of soil could also include adverse effects to the special-status species related to temporal losses, increased habitat fragmentation and edge effects, and the Project's incremental contribution to cumulative impacts. Therefore, CDFW advises a Negative Declaration is not appropriate for this Project.</p>	<p>result.</p> <p>It is acknowledged that conducting a CEQA review on this proposal would provide maximum transparency of potential impacts of the soil import activity being regulated, and the most solid legal foundation for approval of this Ordinance.</p>
<p><b>14. Fully Protected Species and Birds</b></p>	<p>CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. "Take" of any Fully protected species is generally prohibited and CDFW cannot authorize "take" except in limited circumstances; for example, under the authority of the Natural Community Conservation Planning Act. (Fish and Game Code, § 2800 et seq.)</p> <p>CDFW has jurisdiction over actions that may result in the disturbance or destruction of nests or the unauthorized "take" of birds. Fish and Game Code sections 3503, 3503.5, and 3513 prohibit the following: unlawful "take," possession or needless destruction of the nest or eggs of</p>	<p>The Draft Ordinance already contains Section 17.66.040, Compliance with Existing Laws and Regulations, which specifies compliance with the requirements of numerous other agencies, including CDFW.</p> <p>As in Nos. 5, 11 and 12 above, a directive could be added to encourage initial communication between all project proponents and CDFW, or CEQA review could be required for all Tiers of projects to ensure that these concerns are addressed.</p>

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CONCERN	DESCRIPTION OF ISSUE	POSSIBLE SOLUTION
15. Water Pollution	<p>any bird; unlawful "take," possession, or destruction of any birds-of-prey or their nests or eggs; and unlawful "take" of any migratory nongame bird.</p> <p>It is unlawful to deposit in, permit to pass into, or place where it can pass into the "Waters of the State" any (1) petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or residuary product of petroleum, or carbonaceous material or substance, (2) refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill, or factory of any kind, (3) sawdust, shavings, slabs, or edgings, (4) any factory refuse, lime, or slag, (5) Cocculus indicus, (6) substance or material deleterious to fish, plant life, mammals, or bird life. (Fish and Game Code, § 5650).... "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.</p>	<p>Please refer to Nos. 2 – 9 above. In these, Staff has attempted to develop possible methods to address concerns about effects to Waters of the State. The current draft ordinance does not currently include language to this effect for all Tiers of soil import.</p>

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<p><b>16. Scope and content of Environmental Review</b></p>	<p>The commenting agency, CDFW, provides an extensive template for analyzing and assessing the level of environmental impacts that could arise from adoption of the Ordinance and the types of soil import / agricultural projects that could be allowed or permitted under it. The comment focuses exclusively on the preferred CEQA process, an EIR, that the agency encourages, whether for the Ordinance in a cumulative way or for individual projects that may result.</p>	<p>CDA Staff has prepared this regulation on the premise that the activity in question – soil import and placement for any agricultural reason and at any level – is already permitted and unregulated under existing County ordinance, and that any stricter regulation on that activity, such as the draft Ordinance, satisfies the CEQA Guidelines concept that natural resources and the environment will receive greater protection than previously as a result.</p> <p>It is acknowledged that conducting a CEQA review on this proposal would provide maximum transparency of potential impacts of the soil import activity being regulated, and the most solid legal foundation for approval of this Ordinance.</p> <p>If the process for this Ordinance should shift toward a CEQA analysis, staff recommends consideration of the environmental review template provided by CDFW. This recommendation also applies to individual projects pursuant to the Ordinance so far as permitting authority by County will allow.</p>
<p><b>17. Filing Fees</b></p>	<p>CDFW anticipates that the Ordinance will have an impact to fish and/or wildlife habitat, and assessment of filing fees is necessary. (Pub. Resources Code, § 21 089; Fish and Game Code, § 711.4). Fees are payable upon filing of the Notice of Determination.</p>	<p>If the process for adoption of this Ordinance should shift toward a CEQA analysis, the County would pay the appropriate filing fee as required by law. However, each implementation project under this Ordinance that requires a CEQA analysis will likewise be required to pay the filing fee.</p>

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