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Senate Bill 429 (Substitute S-3 as passed by the Senate)
Senate Bills 430 and 431 (as passed by the Senate)
Sponsor: Senator Jim Ananich
Committee: Transportation and Infrastructure

Date Completed: 9-1-22

RATIONALE

According to the Michigan Transportation Asset Management Council's 2020 annual report on the condition of roadways in the State, 22% of Michigan's roads were in good condition, 36% were in fair condition, and 42% were in poor condition.¹ As the State develops plans to improve road conditions, there is a focus on ensuring access to aggregates like sand and gravel because they are essential for road construction. However, there are also ecological and environmental concerns associated with the mining of aggregates. Striking a balance between the necessity of, and concerns associated with, aggregate mining has resulted in much debate in recent years, including debate regarding the most appropriate way to regulate sand and aggregate mining. Some people believe that a statewide regulatory approach to the mining of aggregates would be most appropriate. Accordingly, it has been suggested that authority be given to the Department of Environment, Great Lakes, and Energy (EGLE) for the regulation of aggregate mining in the State.

CONTENT

Senate Bill 429 (S-3) would add Part 639 (Sand and Gravel Mining) to the Natural Resources and Environmental Protection Act (NREPA) to do the following:

- **Specify that mining would be considered authorized under Part 639 if it had received a local permit for mining, zoning approval, or other governmental authorization, or was not required to have obtained an authorization because of nonregulation or because the mining was a legal nonconforming use.**
- **Specify that Part 639 would preempt an ordinance, regulation, resolution, policy, or practice of a governmental authority created by statute, municipality, or county that prohibited or regulated certain aspects of a mine.**
- **Prohibit, except for de minimis extraction or for certain exempt activities, a person from engaging in mining except as authorized by a mining permit, which would have to be obtained from EGLE.**
- **Require an application for a mining permit to include the name and address of the applicant, the location and legal description and survey of the proposed mining area, a \$5,000 application fee, an environmental impact assessment, a mining and reclamation plan, and financial assurance.**
- **Require a mining and reclamation plan to include a general description of materials, methods, and techniques that would be used for mining, among other information.**
- **Require all reclamation provisions to be carried to completion with reasonable diligence and be conducted concurrently with mining to the extent practicable.**
- **Require a mining permit application to be administratively complete effective 14 days after EGLE received it.**

¹ Michigan Transportation Asset Management Council, *Michigan's 2020 Roads and Bridges Annual Report*, p. 4, 2020.

- Require EGLE to publish public notice of the application in a newspaper of general circulation in the area of the proposed mine within 42 days after receiving an administratively complete application.
- Specify that a person would have to submit comments on the application in writing to EGLE within 30 days after the notice was published and, require EGLE to conduct a public hearing on the application under certain circumstances.
- Within 15 days after the extended public comment period expired, require EGLE to grant the application and issue the mining permit or deny the application.
- Specify that a mining permit issued by EGLE would be valid for the life of the mine and that the mining permit could be transferred or amended with EGLE's approval.
- Allow a local unit of government to submit a request to EGLE to amend a mining permit application or a mining permit.
- Require EGLE to assess against an operator a mining surveillance fee on the sand and gravel products sold for purposes of surveillance, monitoring, administration, and enforcement of Part 639, and require those fees to be forwarded to the State Treasurer for deposit in the "Sand and Gravel Surveillance Fund", which the bill would create.
- Require an operator to file with EGLE by the first June 1 immediately after a mining permit was issued a plan map of the mining area, and on or before June 1 of each year, a mining and reclamation report during the life of the mine.
- Require an operator to maintain financial assurance in the amount of \$3,000 per acre of area distributed and not yet reclaimed during mining until EGLE determined that all reclamation was completed.
- Allow a person aggrieved by an order, action, or inaction of EGLE under Part 639, by certain activity concerning a mining permit, or by the operation of a mine to file a petition with EGLE requesting a hearing.
- If EGLE determined that an operator had violated Part 639 or a mining permit, require EGLE to require the operator to correct the violation, and if a violation of Part 639 or a mining permit resulted in an imminent and substantial endangerment to the public health or safety, environment, or natural resources, require EGLE to take action necessary to abate or eliminate the endangerment.
- Specify that Part 639 would not limit EGLE's authority to take whatever response activities it determined necessary to protect the public health, safety, and welfare, the environment, or natural resources.
- Allow EGLE to request the Attorney General to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a violation of Part 639, a mining permit, or an order issued under Part 639.
- Prescribe penalties for violations of Part 639.
- Specify that an operator would be liable to a city, a village, or the county road commission for damage caused by the operator's trucks to streets or county roads that were haul routes between the mining operation and a primary road.
- Specify that a mine or mining would not be a public or private nuisance if a mining permit had been issued for the mine or mining and the mine or mining was not determined to be in violation of Part 639.

Senate Bill 430 would amend the Code of Criminal Procedure to include in the sentencing guidelines the felonies proposed by Senate Bill 429 (S-3).

Senate Bill 431 would amend the Michigan Zoning Enabling Act to prohibit a county or township from regulating or controlling aggregate mining and specify that the county or township would not have jurisdiction over the issuance of a permit, approval, or other authorization for the location, operation, abandonment, or reclamation of an aggregate mine unless certain conditions were met.

Part 91 Permit Requirements

Under NREPA, and subject to provisions described below, a person engaged in the logging industry,

the mining industry, or the plowing or tilling of land for the purpose of crop production or the harvesting of crops is not required to obtain a permit. However, all earth changes associated with these activities must conform to the same standards as if they required a permit under Part 91 (Soil Erosion and Sedimentation Control) and the exemption of obtaining a permit does not include access roads to and from the site where active mining or logging is taking place or ancillary activities associated with logging and mining.

The Act specifies that Part 91 does not apply to a metallic mineral mining activity that is regulated under a mining and reclamation plan under Part 631 (Ferrous Mineral Mining) or 634 (Small Native Copper Mines) or a mining, reclamation and environmental protection plan under Part 632 (Nonferrous Metallic Mineral Mining) if the plan contains soil erosion and sedimentation control provisions and is approved by the Department. Under the bill, Part 91 also would not apply to a metallic mineral or sand and gravel mining activity that was regulated under a mining and reclamation plan under Part 631, a mining, reclamation and environmental protection plan under Part 632, a mining and reclamation plan under Part 364, or a mining and reclamation plan under Part 639, if the plan contained soil erosion and sedimentation control provisions and was approved by the Department under Parts 631, 632, 634, or 639, respectively.

As used above, "mining" does not include the removal of clay, gravel, sand, peat, or topsoil. The bill specifies that "mining" would not include the removal of clay, gravel, sand, peat, or topsoil unless authorized by a permit under Part 639.

(The bill would add Part 639, which is described in more detail below.)

Part 639 Definitions

Under the bill, "mine" would mean a sand and gravel mine. "Mining" would mean sand and gravel mining and processing, including associated loading of trucks and transporting sand and gravel by truck. "Sand and gravel" would mean sand or gravel, or both, that is excavated from natural deposits on or in the earth for commercial, industrial, or construction purposes. However, sand and gravel would not include clay, limestone or limestone product, sand mined for commercial or industrial purposes from sand dune areas regulated under Part 637 (Sand Dune Mining), or earth materials associated with extraction of coal regulated under Part 635 (Surface and Underground Coal), nonferrous metallic minerals regulated under Part 632, or ferrous minerals regulated under Part 631.

"Mining permit" would mean a sand and gravel permit issued under the bill. "Operator" would mean a person engaged in or preparing to engage in mining or reclamation.

"Mining area" would mean an area comprising all the following, whether below the water table:

- Land from which material is removed in connection with the production or extraction, other than de minimis extraction, of sand and gravel by surface or open pit mining methods.
- Land where material from that mining is stored on the surface.
- Land on which water reservoirs used in mining are located.
- Auxiliary land used in conjunction with mining.

"De minimis extraction" would mean extraction of sand and gravel that is conducted by or for a property owner for end use by that property owner on the same property and is not for resale or inclusion in any other commercial product or does not exceed 5,000 cubic yards of sand and gravel during the life of the mine.

"Life of the mine" would mean the period of time from issuance of a mining permit through the completion of reclamation of the mine as required by Part 639.

"Sand and gravel products" would mean those products produced from the processing of sand and gravel and other materials, including recycled materials and other materials obtained from off-site.

"Administratively complete" would describe an application for a mining permit that contains all the documents required under Part 639.

"Contested case hearing" would mean a hearing under Chapter 4 of the Administrative Procedures Act. (Chapter 4 of the Administrative Procedures Act specifies that parties in a contested case must be given an opportunity for a hearing without undue delay.)

"Fencing" would mean a four-foot-high woven wire farm fence or its equivalent.

"In-existence" or "existing" would describe active or previously active mining areas that have not yet been fully reclaimed.

"Primary road" would mean a county primary road as described in Section 5 of Public Act 51 of 1951, the Michigan Transportation Fund law, or a State trunk line highway as described under Section 1 of the law. (Section 5 of the law specifies that all roads, streets and highways included in the county primary road system of any county are known as county primary roads. Section 1 specifies that the State trunk line highway system consists of all roads, streets, and highways, either located within or outside the limits of incorporated cities and villages, now or hereafter constituted State trunk line highways under the laws of the State.)

"Property line" would mean the exterior property line of all contiguous parcels owned or controlled by the operator, including easements, leasehold interests, options to lease, options to purchase, and rights of first offer or refusal.

"Sequence of mining" would mean the order in which the property will be mined and reclaimed.

"Stockpile" would mean material, including surface overburden, that in the process of mining has been removed from the earth and stored on the surface.

"Supervisor of reclamation" would mean the State Geologist.

Applicability of Part 639

Under the bill, subject to provisions described below and notwithstanding preemptions described below, Part 639 would not apply to either of the following unless the owner or operator elected to be subject to Part 639 by submitting an application to EGLE:

- A mine or mining operation in existence and authorized for mining before the bill's effective date.
- A mine with a total sand and gravel deposit of 1.0 million tons or less.

The bill specifies that Part 639 would apply to an expansion of mining into an area not authorized for mining on the bill's effective date.

Mining would be considered authorized if either of the following applied:

- It had received a local permit for mining, zoning approval, or other governmental authorization.
- It was not required to have obtained an authorization because of nonregulation or because the mining was a legal nonconforming use.

Preemption

The bill specifies that Part 639 would preempt an ordinance, regulation, resolution, policy, or practice of a governmental authority created by statute, municipality, or county that prohibited or regulated the location, development, or operation, including processing activities, of a mine, or trucking activities of or relating to a mine, or that would duplicate, modify, extend, revise, contradict, or conflict with Part 639. A governmental authority created by statute, municipality, or

county could not adopt, maintain, or enforce an ordinance, regulation, resolution, policy, or practice in relation to mining that duplicated, was different from, extended, revised, contradicted, was more strict than, or conflicted in any manner with Part 639.

Part 639 Permit Requirements

Under the bill, except for de minimis extraction or for activities exempt as described above, a person could not engage in mining except as authorized by a mining permit. To obtain a permit, a person would have to submit an application to EGLE. The application would have to contain the name and address of the applicant and the location, including a legal description and survey, of the proposed mining area. An application would have to be submitted on a form and in a medium provided or approved by EGLE.

The bill would require a mining permit application to be accompanied, at a minimum, by all the following:

- An application fee of \$5,000, which EGLE would have to forward to the State Treasurer for deposit into the Sand and Gravel Surveillance Fund.
- An environmental impact assessment for the proposed mining that described the natural and human-made features, including flora, fauna, hydrology, geology, and baseline conditions in the proposed mining area, and the potential impacts on those features from the proposed mining.
- A mining and reclamation plan for the proposed operation that complied with the bill.
- Financial assurance as prescribed by the bill.

Mining and Reclamation Plan Requirements

Under the bill, a mining and reclamation plan would have to include all the following:

- A general description of materials, methods, and techniques that would be used for mining.
- Plans for reclamation of the mining area following cessation of mining.
- A general description of the sand and gravel deposit.
- The proposed sequence of mining, including proposed phasing, if applicable.
- Surface overburden removal plans.
- The proposed depth from grade level from which the sand and gravel would be removed.
- Provisions for grading, revegetation, and stabilization that would minimize, to the extent practicable, soil erosion, sedimentation, noise, airborne dust, and public safety concerns and that met additional requirements specified in the bill.
- A site plan showing the proposed location of buildings, equipment, stockpiles, roads, berms, or other features necessary for mining and including provisions for their removal and reclamation of the area following cessation of mining; the site plan would have to comply with additional requirements prescribed in the bill.
- The interim usage of reclaimed areas before the cessation of all mining.
- If required by EGLE when the mining area would present a dangerous condition if left open, a proposal delineating fencing or other techniques to minimize trespass or unauthorized access to the mining area.
- If threatened or endangered species were identified within the mining area, an indication of how they would be protected or, if not protected, what mitigation measures would be performed, in compliance with Part 365 (Endangered Species Protection), the Endangered Species Act, and rules promulgated under those statutes.
- A description of measures to be implemented to ensure that all mined materials disposed of within the mining area and all areas to be reclaimed under the mining permit would not result in an unauthorized release of pollutants to the surface drainage system and that an authorized release of pollutants to groundwater would not occur from any material mined, handled, or disposed of within the mining area.
- A description of measures to be implemented to ensure that the mining did not create dust, noise, or ground vibration in excess of the standards specified in the bill.

- A description of measures to be implemented to ensure that blasting activity did not create at a residential building ground vibration in excess of that set forth in United States Bureau of Mines Reports, RI 8507, Figure B-1 "Safe levels of blasting vibrations for houses using a combination of velocity and displacement", air blast in excess of 133 decibels, and unreasonable dust or noise.
- A description of all explosives that would be intended to be used, stored, or handled on-site, all of which would have to be used, stored, and handled only in accordance with Part 55 "Explosives and Blasting Agents" of the Department of Licensing and Regulatory Affairs' "General Industry Safety and Health Standards".
- A description of customer truck loading hours, which would be permitted from at least 6 AM to 7 PM local time, Monday through Friday and from at least 6 AM to 5 PM, local time on Saturday, except to the extent additional hours were approved specifically by EGLE or required by State or county contract, and except that these limitations would apply only to the loading of trucks or trailers for over-the-road transportation and would not apply to the loading or unloading of railroad cars or ships.
- A description of proposed lighting at the mining area.
- A description of the proposed primary haul routes to and from the mining area and a primary road, and the anticipated impact, if any, of the operator's use of the haul routes on vehicle and pedestrian safety and on the condition of the haul routes; if the mining operator required the use of a road other than a class A road, EGLE could request that the operator collaborate with the county road commission to determine a route from the mining area to a class A road, and the route would have to be reasonably direct to accommodate customary mining operations, including trucking operations.
- A description of the processing activities proposed to be conducted on-site, such as washing, screening, crushing, and blending of sand, gavel, and other materials, including recycled materials obtained from off-site, to create sand and gravel products.
- A description of measures to be implemented to ensure that blasting activity did not create at any residential dwelling unreasonable dust or noise and air blast in excess of 133 decibels.
- A description of comprehensive general liability insurance covering third party personal injury and property damage, for which the operator would have to maintain such insurance throughout the life of the mine in amounts at least \$1.0 million per occurrence.

Reclamation Requirements

Under the bill, all reclamation provisions would have to be carried to completion with reasonable diligence and could be conducted concurrently with mining to the extent practicable, taking into consideration the mining and reclamation plan, safety, economics, availability of equipment and material, and other site-specific conditions relevant and unique to the affected land and post-mining land use. Once initiated, final reclamation measures would have to be performed in compliance with the mining and reclamation plan, unless the owner or operator resumed exploration or mining.

The owner or operator would have to initiate reclamation within the shorter of the period required by Federal law or one year after cessation of mining operations or a longer period if approved by EGLE.

Application Process

Under the bill, subject to the provisions below and effective 14 days after EGLE received a mining permit application, the application would be administratively complete and EGLE would have to notify the applicant in writing. If, before the 14-day period expired, EGLE notified the applicant that the application was not administratively complete and specified the information needed to make the application administratively complete, or notified the applicant that the application fee had not been paid, specifying the amount due, the 14-day period would be tolled until the applicant submitted to EGLE the specified information or fee amount due. The notice would have to be given in writing. A determination that an application was administratively complete would not preclude

EGLE from requiring additional information from the applicant. The time periods described below would be tolled until the applicant submitted the requested information.

The Department would have to do all the following within 42 days after receiving an administratively complete application:

- Publish public notice of the application in a newspaper of general circulation in the area of the proposed mine.
- Transmit a copy of the public notice to the applicant and to the supervisor or manager of the township or chief administrative officer of the city or village where the mine was proposed to be located.
- Post the notice on its website and make the notice available at EGLE's office in Lansing and its district office for the district that included the proposed mining area until the application was granted or denied.

The Department would have to transmit the notice to a person upon written request. The notice would have to contain all the following information:

- The date it was published.
- The address and telephone number of the Department office in Lansing and the Department district office of the district that includes the location of the proposed mining area.
- The name and address of the applicant.
- A concise description of the applicant's proposed use.
- The location of the proposed mining area identified in the application.
- A concise description of EGLE's procedures to arrive at a decision to grant or deny the mining permit application and information on the public comment period or other means by which interested persons could comment on the application.
- The address and telephone number of the Department office where more information about or a copy of the application could be obtained and where any other applicable related documents could be inspected or copied.

Within 30 days after the notice was published, a person could submit comments on the application in writing to EGLE. The Department could extend the time for public comment for up to 30 days if it determined that an extension was necessary to facilitate additional public comment. Comments submitted to EGLE would have to be retained and considered by EGLE in making a final determination on the application.

If EGLE determined that one or more of the public comments constituted sufficient cause or that there was sufficient public interest in an application, EGLE would have to conduct a public meeting on the application in the county in which the mining area was proposed to be located. The Department would have to give notice of the public hearing not fewer than five or more than 28 days before the date of the public hearing. The notice would have to specify the time and place of the public hearing, which would have to be held in the county where the mining area was proposed to be located, and would have to include information on how to review a copy of the application. The notice also would have to be given to the city, village, or township and the county where the mining area was proposed to be located. The Department would have to accept written public comment on the application for 15 days after the public hearing.

After the applicable public comment periods expired, EGLE would have to issue a report summarizing all comments received and providing EGLE's responses to the comments. The Department would have to post the report on its website and make the report available at its office in Lansing and its district office or for the district that included the proposed mining area.

After the applicable comment periods expired, and not more than 120 days after the date EGLE determined that the mining permit application was administratively complete, EGLE would have to grant the application (if it met the requirements specified below) and issue the mining permit or deny the application and notify the applicant in writing as to why it was denied.

The Department would have to grant the application if it determined that it met the requirements of Part 639, that the conditions under which mining would occur as provided in the application would minimize reasonably actual or potential adverse impacts on air, water, or other natural resources, and that the reclamation set forth in the mining and reclamation plan was consistent with the master plan of the township, city, or village in which the mine was proposed to be located.

The Department would have to deny the application if it determined, based on sound scientific evidence, that the application did not meet the requirements of Part 639. In addition, EGLE could deny the application if it determined that the operator or proposed operator was in violation of Part 639, an order issued by EGLE under Part 639, or a mining permit. However, EGLE could not deny the application because of a violation if the person had corrected the violation or had agreed in writing to correct the violation under an administrative consent agreement containing an EGLE-approved compliance schedule.

Terms and conditions that were set forth in the mining permit application and the mining and reclamation plan and that were approved by EGLE would be incorporated in the mining permit. The issuing of a mining permit would not amend the underlying zoning or the master plan, to the extent that the underlying zoning or master plan complied with the preemption provisions described above.

Permit Timeline, Transfer, & Amendment

Under the bill, a mining permit issued by EGLE would be valid for the life of the mine; however, EGLE could revoke a mining permit if the operator did not commence construction of plant facilities or mining covered by the mining permit within 10 years after the date the mining permit was issued.

A mining permit could be transferred with approval of EGLE, subject to provisions described below. The person seeking to acquire the mining permit through a transfer would have to submit a request for transfer of the mining permit to EGLE on a form and in a medium provided or approved by EGLE. The person acquiring the mining permit would have to accept the conditions of the mining permit and adhere to the requirements of the approved mining and reclamation plan.

The Department could deny a request to transfer a mining permit if it determined that the proposed transferee was in violation of Part 639, an order issued by EGLE under Part 639, or a mining permit. However, EGLE could not deny the request because of a violation if the person had corrected the violation or had agreed in writing to correct the violation under an administrative consent agreement containing a compliance schedule approved by EGLE. If the operator had been notified by EGLE of a violation of Part 639 or the mining permit at the mining area involved in the transfer, the mining permit could not be transferred until the operator had corrected the violation or the person acquiring the mining permit had entered into a written agreement with EGLE to correct the violation.

The operator could submit to EGLE a written request to amend a mining permit and, after receiving it, EGLE would have to determine if the requested amendment was a significant change in the conditions of the mining permit. If so, EGLE would have to submit the request for amendment to the same review process as described above. If EGLE determined that the requested amendment did not constitute a significant change, it would have to approve the request and notify the operator in writing. If EGLE denied the request, EGLE would have to notify the operator in writing of the reasons for the denial.

The local unit of government could submit to EGLE a written request to amend a mining permit application during the application process or to amend the mining permit after the permit was granted. After receiving the request, EGLE would have to determine if the requested amendment were a significant change in the conditions of the application or mining permit. If EGLE determined that the amendment was a significant change, EGLE could submit the request for amendment to the same review process as provided above or if the amendment were made during the application

process. If EGLE determined that the requested amendment was not a significant change, EGLE would have to grant or deny the request. If EGLE denied the request, it would have to notify the local unit of government in writing of the reasons for the denial. If EGLE granted the request, it would have to modify the mining permit application or issue an amended mining permit.

Mining Surveillance Fee

Under the bill, for purposes of surveillance, monitoring, administration, and enforcement of Part 639, EGLE would have to assess against an operator a mining surveillance fee on the sand and gravel products sold during the calendar year. Funds collected by the fees could not exceed the actual costs to EGLE of implementing Part 639. Mining surveillance fees would have to be forwarded to the State Treasurer for deposit in the Sand and Gravel Surveillance Fund (described below).

The bill specifies that the total amount of revenue to be raised with mining surveillance fees during a fiscal year would have to be determined by subtracting the amount of unspent money in the Fund that was carried over to that fiscal year from the amount appropriated for the fiscal year for surveillance, monitoring, administration, and enforcement. The Department would have to divide the total amount of revenue to be raised with the mining surveillance fees by the number of tons of sand and gravel sold in the State for the preceding calendar year as reported by all operators. The fee amount per ton would have to be the lesser of this quotient and five cents per ton.

An operator would have to file a report of sand and gravel sales by February 15 of each year. The report would have to contain the number of tons of sand and gravel products sold from each of the operator's sand and gravel mines from January 1 through December 31 of the immediately preceding year. The Department could order an operator to suspend mining if the operator did not submit an annual report, and an operator would have to preserve for two years the record on which the annual report of sales was based. The records would be subject to audit by EGLE.

The amount of mining surveillance fee owed by an operator would be the product of the amount per ton and the total number of tons required to be reported by that operator. Payment of the mining surveillance fee would be due not more than 30 days after EGLE sent written notice to the operator of the amount due.

Sand and Gravel Surveillance Fund

The bill would create the Sand and Gravel Surveillance Fund within the State Treasury and require the State Treasurer to deposit fees paid under Part 639 into the Fund. The State Treasurer could receive money or other assets from any other source for deposit into the Fund. The State Treasurer would have to direct the investment of the Fund and credit to it interest and earnings from Fund investments.

The bill specifies that unspent money in the Fund at the close of the fiscal year would remain in the Fund and be carried over to the succeeding fiscal year. The Department of Environment, Great Lakes, and Energy would be the administrator of the Fund for auditing purposes and it would have to spend money from the Fund, upon appropriation, only for the actual cost of surveillance, monitoring, administration, and enforcement of Part 639.

Enforcement & Variance

The bill would require EGLE to administer and enforce Part 639 and, after giving reasonable notice to the operator or landowner, EGLE could enter a mining area for an investigation and inspection without incurring liability to the operator or landowner.

If requested by an operator, EGLE could modify or grant a variance from the provisions of Part 639 if EGLE determined that the modification or variance was not contrary to the public interest. If EGLE determined that the modification or variance had significant potential to affect the

environment or public safety, EGLE would have to provide for public notice and comments and a public meeting in the same manner as described above for a mining permit application.

Plan Map & Report

Under the bill, by the first June 1 immediately after a mining permit was issued, an operator would have to file with EGLE a plan map of the mining area. The map would have to be drawn to a scale of one inch equals 200 feet and be in the form specified by EGLE. Annually thereafter, by June 1, the operator would have to file a plan map in the same scale and form showing any changes made during the preceding calendar year and the portion of the mining area that the operator anticipated would be subjected to active mining during the current calendar year.

An operator also would have to file with EGLE a mining and reclamation report on or before June 1 of each year, during the life of the mine. The mining and reclamation report would have to contain all the following:

- A description of the status of mining and reclamation, including revised drawings or photographs depicting the progress of mining and reclamation, as applicable, for the preceding year.
- A list of the incident reports required for the preceding calendar year.
- A description of the annual financial assurance update.

The bill would require an operator to report promptly to EGLE any incident or act of nature at a mining area or violation of a mining permit that had created, or could create, a threat to the environment, natural resources, or public health and safety. An operator would have to preserve for two years records on which the reports described above were based and would have to make the records available to EGLE upon request.

Financial Assurance Requirements

The bill would require an operator to maintain financial assurance during mining until EGLE determined that all reclamation had been completed, except that financial assurance would have to be released immediately upon termination of a mining permit. The financial assurance would have to consist of, at the sole option of the operator, a performance bond, surety, escrow, cash, certificate of deposit, irrevocable letter of credit, or other equivalent security, or any combination of those. The Department could waive the requirement for financial assurance if the operator annually submitted a statement of financial responsibility demonstrating to EGLE's satisfaction that the applicant had sufficient financial resources, apart from the proposed mining activity, to satisfy the reclamation requirements under Part 639.

The financial assurance would have to be in the amount of \$3,000 per acre of area distributed and not yet reclaimed, excluding roadways, plant sites, and open water areas that would remain open water after completion of reclamation. The State Treasurer would have to adjust the \$3,000 figure by an amount determined by the State Treasurer at the end of each calendar year, beginning the first full calendar year after the bill took effect, to reflect inflation since the end of the calendar year in which the bill took effect. The Department of Treasury would have to publish the adjusted figure on its website, and an adjusted figure would apply only to mining permits for which an application was submitted on or after the date of publication of the adjusted figure and before the date of the publication of the next adjusted figure.

The operator would have to annually update the amount of financial assurance or statement of financial responsibility maintained or submitted by the operator to account for any change in the number of acres.

Reclamation Requirements

Under the bill, an operator would have to conduct reclamation activities at a mining area in

compliance with the approved mining and reclamation plan. If mining were suspended for a continuous period exceeding one year, the operator would have to maintain, monitor, and secure the mining area.

An operator would have to begin final reclamation of a mining area within one year after mining ceased and would have to complete reclamation within the time set forth in the approved mining and reclamation plan. Upon written request of an operator, EGLE could approve an extension of time to begin or complete final reclamation.

Aggrievements

The bill would allow a person aggrieved by an order, action, or inaction of EGLE under Part 639, by the issuance, denial, termination, revocation, or amendment of a mining permit, or by the operation of a mine to file a petition with EGLE requesting a contested case hearing. Subject to provisions described below, the filing of the petition would be the aggrieved person's sole recourse. The Department could reject as untimely a petition filed more than 90 days after an order, action, or inaction of EGLE by which the petitioner was aggrieved. The Department would have to provide notice by mail of a contested case hearing to the person requesting the hearing, the operator or mining permit applicant, and other affected parties.

Violations

Under the bill, if EGLE determined that an operator had violated Part 639 or a mining permit, it would have to require the operator to correct the violation. If EGLE determined that a violation of Part 639 or a mining permit were resulting in an imminent and substantial endangerment to the public health or safety, environment, or natural resources, it would have to take action necessary to abate or eliminate the endangerment. The action could include revoking the mining permit and issuing an order to the operator to undertake other actions as necessary to abate or eliminate the endangerment.

The action also could include issuing an order to the operator to suspend mining immediately, and for purposes of enforcement for this action, imminent and substantial endangerment would include the failure to submit an annual report or maintain financial assurance. An order suspending mining activities would remain in effect until the endangerment to the public health or safety, environment, or natural resources was eliminated, but not more than 10 days. If the endangerment continued, the supervisor of reclamation could extend the suspension beyond 10 days after providing an opportunity for a hearing. The total duration of the suspension of mining activities could not be more than 30 days.

Before taking action to suspend mining or revoke a permit, or to otherwise prevent the continuation of mining, EGLE would have to notify the operator, by certified mail, of the alleged violation and a reasonable period of time to correct it. The Department would have to provide the operator an opportunity for a hearing.

If the operator or a surety failed or neglected to correct a violation of Part 639 or a mining permit or failed to take corrective actions as specified under a EGLE order, the Department, beginning 24 hours after notifying the operator and surety, could enter the mining area and any private or public property necessary to reach the mining area, correct the violation, and remediate any damage to the public health, environment, or natural resources resulting from the violation. The operator or surety would be jointly and severally liable for expenses incurred by EGLE and would have to pay them within 30 days after being notified of the amount. If the expenses were not paid within that time, EGLE could bring an action against the operator or surety, jointly or severally, for the recovery of the expenses.

The revocation of a mining permit or suspension of mining as described above would not relieve an operator of the responsibility to complete reclamation, maintain financial assurance, and

undertake appropriate measures to protect the environment, natural resources, and public health and safety.

If EGLE received a complaint alleging a violation of Part 639 or a mining permit, it would have to make a record of the complaint and the allegations included in the complaint. If the complainant provided written evidence sufficient to support the allegations included in the complaint, as determined by EGLE, the Department would have to notify the operator immediately and provide the operator with a copy of the complaint, the record, and all written evidence. The Department would have to give the operator an opportunity to rebut the complaint and any supporting evidence. The Department would have to take steps that it considered necessary to confirm the evidence provided by the operator in rebuttal and if EGLE determined that the complaint had been rebutted, it would have to dismiss the complaint and notify the complainant and operator of the dismissal.

If EGLE did not dismiss the complaint, it would have to conduct an inspection of the mining operation to investigate the allegations within five business days after receiving the complaint and, within 15 business days after completing an investigation, submit a written report of the complaint and the investigation's results to the operator and the complainant. The bill specifies that if the complaint or allegations were of a highly serious nature, as determined by EGLE, the Department would have to inspect the mining operation as quickly as possible. The report also would have to state whether the investigation identified a violation of Part 639 or a mining permit.

If EGLE dismissed a complaint and it previously dismissed a complaint by the same complainant with respect to the same operator and mining operation, the complainant would be liable to EGLE for the full costs incurred by it to investigate the subsequent complaint.

The bill also specifies that Part 639 would not limit EGLE's authority to take whatever response activities it determined necessary to protect the public health, safety, and welfare, the environment, or natural resources.

Civil Action & Penalties

Under the bill, EGLE could request the Attorney General to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a violation of Part 639, a mining permit, or an order issued under Part 639. Before requesting the Attorney General to commence a civil action at the Attorney General's own initiative, EGLE would have to provide the operator an opportunity for a hearing. The court would have jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted by the bill, the court could impose a maximum civil fine of \$1,000 per day of violation.

Upon finding by the court that an operator violated Part 639, a mining permit, or an order issued under Part 639 and, subject to provisions described below, that the violation posed a substantial endangerment to the public health, safety, or welfare, the court could impose, in addition to the sanctions described above, a civil fine of at least \$50,000 and not more than \$1.0 million. The Attorney General could file a civil action to recover, in addition to a fine, the full value of the damages to the natural resources of the State and the costs the State incurred for surveillance and enforcement as a result of the violation.

The bill specifies that a person who intentionally made a false statement, representation, or certification in an application for a mining permit, a form pertaining to a mining permit, or a notice or report required by a mining permit, knowing it to be false, would be guilty of a felony punishable by imprisonment for up to two years or a fine of at least \$2,500 and not more than \$25,000, or both, for each violation. If the conviction were for a subsequent violation, the court would have to impose a fine of at least \$25,000 per day and not more than \$50,000 per day of violation. Knowledge possessed by a person other than the defendant could not be attributed to the defendant unless the defendant took substantial affirmative steps to shield himself or herself from the relevant information.

Subject to the provision described below, upon a finding by the court that a violation of the provision above posed or did pose a substantial endangerment to the public health, safety, or welfare, the court could impose, in addition to the penalties set forth as described above, a sentence of imprisonment for up to one year or a maximum fine of \$500,000, or both.

The bill specifies that, to find a defendant civilly or criminally liable for substantial endangerment as described above, the court would have to determine that the defendant acted knowingly in such a manner as to cause a danger of death or serious bodily injury and that the defendant had an actual awareness, belief, or understanding that his or her conduct would cause a substantial danger of death or serious bodily injury.

A civil fine or other civil recovery would be payable to the State and would have to be credited to the General Fund. The fine or other civil recovery would constitute a lien on any property of any kind owned by the defendant. A lien would be effective and have priority over all other liens and encumbrances, except those filed or recorded before the date of judgment, but only if notice of the lien were filed or recorded as required by State or Federal law. A lien would have to be terminated under the procedures required by State or Federal law within 14 days after the fine or other recovery ordered to be paid was paid.

The bill also specifies that an operator would be liable to a city, a village, or the county road commission for damage caused by the operator's trucks to a city street, village street, or county road, respectively, that was a haul route between the mining operation and a primary road.

Public or Private Nuisance

Under the bill, a mine or mining would not be a public or private nuisance if a mining permit had been issued for the mine or mining as provided by the bill and the mine or mining was not determined in an action to be in violation of Part 639. This provision would apply notwithstanding any of the following:

- A change in the ownership of the mine, the size of the mine, or the size of the community where the mine was located.
- Temporary cessation or interruption of mining.
- Enrollment in governmental programs.
- Adoption of new technology.
- A change in the type of sand and gravel product being produced.
- A change in the land use or occupancy of land within one mile of the boundaries of the mine if, before that change in land use or occupancy, the mine or mining would not have been a nuisance with respect to the use and occupancy of the land.

The bill specifies that in an action in which a mine or mining was alleged to be a nuisance, if the defendant mine owner or operator prevailed, the mine owner or operator could recover from the plaintiff the actual amount of costs and expenses determined by the court to have been incurred reasonable by the mine owner or operator in connection with the defense of the action, together with reasonable and actual attorney fees.

Jurisdiction

Under the bill, the circuit court for Ingham County would have exclusive jurisdiction over all the following:

- An appeal from the final decision or order made in a proceeding instituted by an aggrieved person under the bill.
- An action under proposed Sections 63916(5), 63917(1) to 63917(3), or 63919.
- Any other claim relating to the issuance of, or operation under, a mining permit applied for or issued under Part 639.

-- Proceedings under Section 63917(4), except for arraignment or the issuance of a criminal complaint or warrant.

(Proposed Section 63916(5) would allow EGLE to enter a mining area and any property necessary to reach the mining area to correct a violation and remediate any damage if the operator or surety failed or neglected to correct a violation of Part 639 or a mining permit. Section 63919 would allow a defendant, in an action in which a mine or mining was alleged to be a nuisance, to recover from the plaintiff the actual amount of costs and expenses reasonably incurred in defense of the action if the defendant prevailed.

Section 63917(1) would allow EGLE to request the Attorney General to commence a civil action for appropriate relief for a violation of Part 639, a mining permit, or an order issued under Part 639. Section 63917(3) would allow the Attorney General to file a civil action to recover the full value of damages to the natural resources of the State, among other costs, as a result of a violation. Section 63917(4) would prescribe a felony penalty for a person who intentionally made a false statement, representation, or certification in the process of applying for or maintaining a mining permit.)

Senate Bill 430

Sentencing Guidelines

The bill would add the felonies of "false mining permit application" and "false permit application causing endangerment", each proposed in Senate Bill 429 (S-3), to the sentencing guidelines in the Code of Criminal Procedure.

False mining permit application would be a Class H felony against the public trust with a statutory maximum sentence of two years' imprisonment. False permit application causing endangerment would be a Class G felony against the public trust with a statutory maximum of three years' imprisonment.

Senate Bill 431

The Michigan Zoning Enabling Act prohibits an ordinance from preventing the extraction by mining of valuable natural resources from any property unless very serious consequences would result from that extraction. Under the bill, this prohibition would be subject to the provision described below.

The bill would prohibit a county or township from regulating or controlling aggregate mining and specifies that the county or township would not have jurisdiction over the issuance of a permit, approval, or other authorization for the location, operation, abandonment, or reclamation of an aggregate mine unless both of the following applied:

- Less than 1.0 million tons of aggregate would be mined over the life of the mine.
- The mining operator chose to apply for the permit, approval, or other authorization.

MCL 324.9115 et al. (S.B. 429)

777.13f (S.B. 430)

125.3205 (S.B. 431)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Sand and gravel aggregates are essential to road repair and construction, which has been a focus of policy and appropriations in the State in recent years. According to the Michigan Department of

Transportation's (MDOT) 2016 Michigan Aggregates Market Study, produced under contract with MDOT by FMI, a consulting firm, certain regions of the State have a shortfall of sand and gravel aggregates. The study estimates that sand and gravel reserves in the southeast Michigan region have decreased significantly, with approximately 12.7 years of reserves or fewer remaining. Reserves are ample in other regions of the State, such as in the Upper Peninsula, and they can supplement the shortfall of aggregates in regions with fewer reserves; however, sand and gravel aggregates are a low-value commodity with high transportation costs, which can reduce overall funding for road repair and construction significantly if the State or local governments must transport aggregates long distances.

The study considered the likelihood of permitting new reserves in a region when determining the adequacy of that region's current reserves. This assumption is based on experiences from industry stakeholders, some of whom suggest that acquiring a permit for new aggregate mines has become difficult as population has increased in certain regions with shortfalls in reserves. The study's conclusions and the economics of transporting sand and gravel aggregates make clear that permitting new reserves in regions of the State with shortfalls can reduce the cost of road repair and construction, but the study's assumption also makes clear that industry stakeholders have had significant difficulty with acquiring permits from local governments. According to testimony before the Senate Committee on Transportation and Infrastructure, several local governments have placed undue requirements on the permitting process, considered by some as an attempt to minimize the number of new aggregate mining permits in the local governments' jurisdictions.

A majority of Michigan's roads are in fair or poor condition, and they will continue to deteriorate without cost-effective, timely repair and reconstruction. Ensuring access to sand and gravel aggregates in all regions of the State is essential to that repair and reconstruction, but the current permitting process for these aggregate mines does not allow for adequate access. A statewide permitting process overseen by EGLE would maintain certain standards of mining while granting appropriate access to aggregate mines for the improvement of Michigan roads.

Response: In October 2019, the Office of the Auditor General (OAG) issued an investigate audit report concerning MDOT's Michigan Aggregates Market Study. The OAG reviewed for its audit contract documentation, email communications, and meeting minutes, among other records. The OAG concluded that MDOT allowed industry stakeholders considerable influence in the commission and scoping of the study, which the OAG believed "may have undermined the Study's credibility and usefulness to MDOT and policymakers because of the industry stakeholders' previously disclosed position in favor of expanding permitted mining for aggregates in local communities".² The audit challenges the study's veracity, and further investigation should be completed to determine the current volume of sand and gravel aggregates in the State.

Supporting Argument

Urban sprawl has reduced access to sand and gravel aggregates in certain, highly populated areas of the State. Given the economic difficulties of transporting sand and gravel aggregates long distances, as they are low-value commodities with high transportation costs, the decrease in access directly reduces the funding available to fix more of the State's deteriorated roads. A decrease in the amount of road repairs and construction in Michigan would result in fewer jobs for professional trades people in the State's aggregate industry and in the State's road construction workforce, and according to testimony before the Senate Committee on Transportation and Infrastructure, there already is a shortage of professional trades people in the State.

The current, locally controlled process to acquire a permit for a sand and gravel mine prevents access to the aggregates. Some local governments have placed undue burdens on the permitting process, resulting in a cycle of appeals and denials. Without expanded access to aggregate mining in certain regions of the State, there will not be enough employment opportunity to sustain the current number of professional tradespeople. This could be detrimental to the State's economy, as the Department of Labor and Economic Opportunity estimates that there will be significant need

² Ringler, Doug A., *Investigative Audit Report: Michigan Department of Transportation's Procurement of the Michigan Aggregates Market Study*, p. 6, 2019.

for professional trades people in the foreseeable future.³ The bill would create a statewide permitting process that would allow for appropriate access to aggregate mining while maintaining a sector of Michigan's workforce.

Supporting Argument

The reduction of access to sand and gravel aggregates in certain regions of the State affects more than the costs of road repair and construction. The reduction of access also can have environmental impacts. According to a 2018 report on Aggregate Sustainability in California, produced by the California Geological Survey (CGS), California consumed 180 million tons of aggregate on average each year from 1987 to 2016. The CGS estimates that the consumption required 7.2 million round-trip truck hauls of 50 miles annually, which amounts to 570,000 tons of carbon dioxide (CO₂) emissions produced annually. The CGS estimates that doubling the haul distance, as access to sand and gravel aggregates also has reduced in certain regions of California, produces over 1.0 million tons of CO₂ emissions annually.⁴ While the magnitude of aggregates consumed in Michigan differs from that of California (the United States Geological Survey (USGS) reports that Michigan produced 42.9 million tons of sand and gravel aggregate for construction in 2017), the CGS report suggests that the distance needed to transport aggregates can have a significant effect on the sand and gravel aggregate mining industry's contribution to CO₂ emissions.⁵ Establishing a statewide permitting process for sand and gravel aggregates would prevent the unnecessary limitation of sand and gravel aggregate mines in certain regions of the State that need access for development, which could reduce the industry's CO₂ emissions.

Opposing Argument

Sand and gravel aggregate mining creates many concerns for communities, such as noise pollution, air pollution, and traffic congestion. The proposed legislation would address these concerns by prescribing certain standards for dust control, acceptable decibel levels, and hours of operation; however, it would use a standardized approach that would remove local input and control. Noise pollution, air pollution, and hours of operation are local issues that affect the quality of life in a community, and they should be regulated on the local level. In addition, when problems with mining arise in a community, such as loose gravel on roadways or complaints concerning hours of operation, local governments can respond quickly and work with mining operators to resolve these problems. If EGLE assumed authority of sand and gravel aggregate mine permitting, local governments would not have the power to resolve these issues in a timely manner. The current permitting process should remain as it is, allowing local governments to regulate sand and gravel mining effectively and with attention to the community directly affected by aspects of a mine.

Opposing Argument

Before extracting sand and gravel from mining sites, operators must remove the surface layer of trees, vegetation, and soil above the sand and aggregate deposits. This layer is commonly referred to as overburden. Aggregate mining operators use overburden to form berms surrounding the mine, and they often save overburden for mining reclamation efforts. According to testimony before the Senate Committee on Transportation and Infrastructure, aggregate mining causes significant damage to overburden. The soil in overburden degrades while amassed in berms for years or decades, depending on the duration of the mine's operation. This degraded soil, which operators use for reclamation, can result in unstable environments without the return of native organisms.

Testimony also indicates that best practices for aggregate mining reclamation include simultaneous reclamation efforts, which avoid the drastic degradation of soil over time. The purpose of reclamation is to protect mining sites from permanent environmental degradation, but the reclamation requirements of the proposed legislation, which would require reclamation after cessation of mining operations, would not be strong enough to prevent significant degradation of

³ "Skilled Workers Needed in Trade Careers Throughout Michigan", www.wzzm13.com. Retrieved on 8-29-2022.

⁴ Clinkenbeard, John P., *et al.*, *Aggregate Sustainability in California*, p. 1, 2018.

⁵ "The Mineral Industry of Michigan", www.usgs.gov. Retrieved 1-11-2022.

overburden. Reclamation requirements should be strengthened for further environmental protections.

Legislative Analyst: Tyler VanHuysse

FISCAL IMPACT

Senate Bill 429 (S-3)

The bill would have an indeterminate fiscal impact on EGLE. It would require EGLE to administer the new permitting process. This would include meeting all public notice, public comment, and public meeting requirements. The Department would have to evaluate the permits for administrative compliance. If an application were identified as noncompliant or incomplete, the Department would be responsible for communicating the reasons and monitoring whether the applicant had addressed the problems before determining whether to issue a permit.

The bill would require EGLE to track and maintain a record of all permits issued and to manage all requests for transferring or amending existing permits. The Department also would have to manage the reclamation plans of each permit and to monitor the annual reports for each mine. Additionally, the Department would be responsible for surveillance, monitoring, administration, and enforcement. The bill would allow the Department to assess a surveillance fee that would be calculated using a prescribed formula and the amount paid by each mine would be based on tons of sand and gravel sold from mines in the previous year. Surveillance fees would be deposited into the Sand and Gravel Surveillance Fund, while civil fines and recovery awarded through enforcement actions taken on behalf of the Department by the Attorney General would be deposited into the General Fund.

The Department would receive increased revenue through the \$5,000 fee permit for each application and the surveillance fee, the amounts of which are unknown at this time. The Department would have an increase in administrative costs associated with processing, surveillance, monitoring, administration, and enforcement of each permit. To the extent that the new revenue from fees was equal to the marginal cost of managing each permit, the bill would have no fiscal impact on EGLE; if costs exceeded the fee revenue, the opposite would be true, but fees collected in the Fund could be used only to cover the actual costs associated with the Department's surveillance and enforcement activities.

The bill's criminal penalties could have a negative fiscal impact on the State and local government. Violations of the bill's provisions would be punishable as felonies of varying severity. More felony arrests and convictions could increase resource demands on law enforcement, court systems, and correctional facilities. The average cost to State government for felony probation supervision is approximately \$3,400 per probationer per year. For any increase in prison intakes, in the short term, the marginal cost to State government would be approximately \$5,400 per prisoner per year. Any associated increase in fine revenue would increase funding to public libraries.

Senate Bill 430

The bill would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions.

Senate Bill 431

The bill would have no fiscal impact on State or local units of government.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.