ATTACHMENT E

July 28, 2022

To the Honorable Senate and House of Representatives,

Pursuant to Article LVI, as amended by Article XC, Section 3 of the Amendments to the Constitution of the Commonwealth of Massachusetts, I am returning to you for amendment Sections 13 and 175 of House Bill No. 5050, “An Act Making Appropriations for the Fiscal Year 2023 for the Maintenance of the Departments, Boards, Commissions, Institutions and Certain Activities of the Commonwealth, for Interest, Sinking Fund and Serial Bond Requirements and for Certain Permanent Improvements.”

Section 13 establishes a new requirement for quarry operators producing concrete aggregate for use in foundations, structural elements or infrastructure to obtain each year a license from the commissioner of environmental protection, in consultation with the state geologist. Section 175 provides an effective date for this new requirement. The use of concrete aggregate containing pyrite and pyrrhotite in foundations and other structures is a serious problem, as it can compromise the strength and lifespan of buildings and infrastructure and result in substantial financial harm to innocent homeowners, municipalities, and the state.

I agree that the Commonwealth must address the problem of unsuitable concrete aggregates. However, the approach suggested in these sections as drafted is unnecessarily cumbersome and the problem can be addressed without creation of a new licensing program. Moreover, while the Department of Environmental Protection regulates certain aspects of mine activities, such as impacts on wetlands, the Department does not regulate any mine products, does not have staff trained to conduct the assessments called for in the bill, and does not have any institutional experience in conducting an effective licensing program based on geological analysis. Accordingly, the Department of Environmental Protection is ill-suited to the assessment of concrete aggregate, and the annual licensure requirement would create a burden on the department, requiring the department to hire new staff with appropriate expertise and to manage a new regulatory program.

We can more effectively protect consumers and other users of concrete aggregates by building on the strong foundation of consumer protection law. This approach has two elements. First, it provides that a quarry selling concrete aggregate for use in structures is engaged in a deceptive trade practice unless it conducts and makes publicly available the required geological analysis. Second, it gives purchasers – and, crucially, the owners of structures built with concrete aggregate – a 20-year cause of action against quarries that fail to meet their obligations.

Together, these elements provide a strong financial incentive for quarries to police themselves by conducting the geological analyses, and they provide innocent homeowners an opportunity to recover when they discover that their homes were built with inappropriate materials – even if that fact is not readily detectable until years after initial construction.

Finally, unlike a licensing requirement that would apply only to Massachusetts quarry operators, updating our consumer protection laws would apply to any quarry operator seeking to sell concrete aggregate into the Commonwealth. Many Massachusetts homeowners are suffering because of concrete aggregate containing pyrite or pyrrhotite that originated in an out-of-state quarry.

I agree with the Legislature that quarries will require time to ensure that they obtain the required analyses and can post them appropriately. To provide this time, these provisions, like the proposed licensing regime, should not take effect until January 1, 2023.

For these reasons, I recommend that the bill be amended by striking Section 13 and inserting in place thereof the following 2 sections:-

SECTION 13. Chapter 93A of the General Laws is hereby amended by adding the following section:-

Section 12. (a) For purposes of this chapter, it shall be deemed to be an unfair and deceptive act or practice in the conduct of trade and commerce to mine, expand, excavate or otherwise operate a quarry for the purpose of producing concrete aggregate for sale or use in the commonwealth in foundations, structural elements or infrastructure such as roadways and bridges without: (1) preparing and publishing online a geological source report that shall include, but not be limited to: (i) a description of the characteristics of the aggregate to be excavated at the subject quarry; (ii) a description of the products to be produced by such quarry; (iii) a copy of the results of an inspection of face material and geologic log analysis conducted by a certified geologist not more than 60 days from the date of the report; and (iv) petrographic analyses by a certified geologist of grab or core samples representative of the material being mined; and (2) conducting aggregate testing to identify the presence of pyrite or pyrrhotite including, but not be limited to, a total sulfur test to measure total sulfur content in a representative sample and posting the results of such testing online. Aggregate testing shall be performed by an accredited laboratory in accordance with applicable standards and shall be conducted at least every 4 years.

(b) For the purposes of this section, the following words shall have the following meanings unless the context clearly requires otherwise:

“Aggregate”, granular materials such as gravel, sand and crushed rock that are combined for a particular purpose.

“Certified geologist”, a professional geologist certified by the American Institute of Professional Geologists.

“Concrete aggregate”, natural sand, natural gravel or crushed aggregate products produced from ledge rock.

(c) Any person who purchases or uses concrete aggregate from a quarry subject to subsection (a), or who is an owner of real property or improvements incorporating a foundation, structural element, or infrastructure built using concrete aggregate from a quarry subject to subsection (a), shall have a cause of action against the quarry for a violation of this section.

SECTION 13A. Section 1 of chapter 260 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:- Sixth, Actions under section 12 of chapter 93A.

And further recommend that the bill be amended by striking out Section 175 and inserting in place thereof the following section:-

SECTION 175. Sections 13 and 13A shall take effect on January 1, 2023.

Respectfully submitted,

Charles D. Baker

Governor