



**Governor's Office Report to the Interim Committees of the  
2014 Legislative Assembly related to Environment and  
Natural Resources:**

**Proposed Approach in Response to SB 838 Directive for a Revised  
Regulatory Framework for Certain Types of Motorized Mining Activity**

**November 2014**

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## EXECUTIVE SUMMARY

Senate Bill 838, passed by the 2013 Oregon Legislative Assembly, set forth a number of provisions related to small scale motorized mining of precious metals in Oregon. This report is intended to satisfy Section 8 of the law, in which the Legislature directed the Governor's office, in consultation with various named state agencies and other affected interests, to study matters related to certain types of motorized mining specified in the bill and propose a revised state regulatory framework that includes elements specified that section.

In response to that directive, and with a project team consisting of the Governor's Natural Resource Policy Advisor, Department of State Lands, Department of Environmental Quality, Department of Fish & Wildlife and Oregon State Police, the Governor's office convened a 26-member study group that met 7 times between April and October, 2014. During this period, the project team also convened separate meetings with tribal representatives and federal land managers to better understand and seek input on matters of particular relevance to SB 838.

The SB 838 study group heard presentations on a number of topics addressed in SB 838, shared and discussed perspectives on these matters, and provided input on potential concepts for inclusion in the revised regulatory framework. The regulatory framework proposed in this report was informed by those interactions and by comments that study group members, the public, and cultural resources staff from various tribes submitted to the project team.

The proposed regulatory framework includes recommendations for a consolidated regulatory process; regulatory protections for natural resources, cultural resources and other social values; and improved enforcement tools, data collection and reporting. The recommended approach addresses both motorized suction dredge mining and motorized upland placer mining conducted in close proximity to Oregon waterbodies.

The new framework is intended to substitute for the moratorium that would otherwise go into effect in 2016 pursuant to Section 2 of SB 838. Legislative action would be required during the 2015 legislative session in order to achieve this outcome and advance the proposed framework. Core elements of the proposed approach include the following:

### **Consolidated Regulatory Process**

- Consolidate administration of the new regulatory framework in a single lead agency (DEQ). Clarify agency roles, responsibilities and authorities through Memoranda of Understanding (MOUs) as necessary.
- Develop a comprehensive permit application that would capture in one place all information necessary for issuing, conditioning or denying state authorizations for the mining activity (e.g., Clean Water Act, Oregon removal-fill law, cultural resources, water use / rights, etc.). A permit would not be issued by the lead agency until all reviews and determinations have been completed by entities with jurisdictional responsibilities.

## **Prohibitions and Permits**

Motorized suction dredge mining:

- Prohibit suction dredge mining or mining discharges into waters of the state in specified areas, including (see full report for complete list):
  - federal wilderness and wilderness study areas;
  - waterbodies that are 303d listed (i.e., not meeting water quality standards) for sediment, turbidity, toxics or heavy metals;
  - state scenic waterways and waters flowing through state parks;
  - Specified Biological Resource (SBR) waters (see definition section of report) flowing through non-federal land; and
  - no authorization of mining on tribal reservation and other tribal lands unless otherwise authorized by the tribe and subject to state regulatory jurisdiction.
- For SBR waters flowing through federal lands, allow mining under an individual permit unless the activity would otherwise be prohibited.
- For non-SBR waters on federal or non-federal lands, allow mining under a general permit unless the activity would otherwise be prohibited.

Motorized upland placer mining – (with the applicable scope of this proposed framework being operations of this type within 100 yards upland of the ordinary high water line of a given waterbody):

- Prohibit motorized upland placer mining in specified areas, including (see full report for complete list):
  - federal wilderness and wilderness study areas so long as consistent with federal direction;
  - within state parks and state scenic waterways;
  - on non-federal lands adjacent to SBR waters.
- For operations adjacent to SBR waters on federal lands not referenced as prohibited areas, authorize the activity through an individual permit.
- For operations adjacent to waters listed as water quality impaired / 303(d)-listed for sediment, turbidity, toxics, heavy metals or temperature, use an individual permit.
- For operations adjacent to waters in areas not listed above, authorize mining under a general permit.

The framework would direct the state to issue an individual permit for motorized suction dredge or upland placer mining otherwise prohibited as described above if the prohibition would constitute a regulatory takings.

In addition, time, place and manner permit-based restrictions or conditions would exist where relevant to the protection of natural and cultural resources and other social values, including:

- total amount of disturbance and extraction allowed;
- minimum distance between motorized operations;
- proximity to cultural resources or high value natural resources;
- proximity to residences, campgrounds or other areas of high social conflict; and

- proximity to public drinking water intakes where mining activity could impair efficacy of treatment for drinking water purposes.

### Cultural Resources

Minimize potential impacts to cultural resources through an approach that includes the following (in addition to the above approach to prohibitions and permits as well as time, place and manner restrictions or conditions):

- Provide an opportunity for the State Historical Preservation Office and tribes to screen mining locations for potential cultural resource impacts prior to state permit issuance.
- Incorporate recommendations for avoiding impacts to cultural resources into the permit conditions to the extent possible.

### Compliance and Enforcement

Enhance achievement of compliance and enforcement objectives through measures including:

- Providing Oregon State Police with authority to issue citations for violations of the statutes, regulations, or permit provisions.
- Requiring miners to visibly display their permit number on suction dredge equipment and on or near upland-based mining equipment.
- Using web-based tools to make permitting data and information readily available to officers while on patrol.

## Background

During the 2013 legislative session, the Oregon State Legislature passed Senate Bill 838 (see Appendix A for the enrolled version of the bill). Oregon Governor John Kitzhaber signed this bill into law later that same year. In passing this legislation the Legislative Assembly found that small scale and recreational mining is part of Oregon's unique heritage and provides economic benefits to the state and its communities. It also found that the activity can pose significant risks to natural resource values and areas of cultural significance, and based on concerns related to this, stated that the regulatory system should be efficient and structured to best protect environmental values.

SB 838 imposes a moratorium on certain types of motorized mining of precious metals that would go into effect on January 2, 2016 and would remain until the same date in 2021, unless the Legislature adopts a different course prior to that date. The Legislature also imposed interim restrictions on the types of mining subject to SB 838, including restrictions on location, time-of-day, and total amount of state authorizations allowed. These restrictions went into effect on January 1, 2014 and, under current law, will remain in effect until January 2, 2016.

In Section 8(1) of SB 838 the Legislature directed the Governor's office, in consultation with various named state agencies and affected interests, to study matters related to certain types of motorized mining and further directed the Governor's office to propose a revised state regulatory framework that includes elements specified in that section. Section 8(2) of SB 838

directs the Governor's office to submit the proposed regulatory framework in a report to specified interim committees of the Legislative Assembly in 2014, as well as recommendations for any necessary legislation and funding. This report is intended to satisfy the direction given to the Governor's office by the 2013 Oregon Legislative Assembly through passage of SB 838.

In response to the directive in SB 838, the Governor's office convened a study group of the interests named in the bill in April of 2014, led by a project team consisting of the Governor's Natural Resource Policy Advisor, Department of State Lands (DSL), Department of Environmental Quality (DEQ), Department of Fish & Wildlife (ODFW) and Oregon State Police (OSP) as well as professional facilitation by Kearns & West. The roster of SB 838 Study Group and project team members is provided in Appendix B.

The study group met seven times and concluded its effort in October 2014. During its time together, and as represented in the agendas for SB 838 study group meetings (Appendix C), the group heard presentations on a number of topics addressed in SB 838, shared and discussed perspectives on these matters and attempted to find consensus on elements that could be included in the Governor's office recommendations for a proposed new regulatory framework. The project team also met separately several times with a cultural resources subgroup, as well as individual meetings with various tribes in recognition of state / tribal sovereign-to-sovereign relations and with federal land management agencies in order to better understand and seek input on various matters of interest and relevance.

The study group effort did not result in consensus on a set of recommendations for a revised regulatory approach. That said, the effort did result in an overarching objectives document that was jointly produced and edited by study group members, which describes agreed-upon high-level objectives for a new, revised regulatory framework. As for specific recommendations, study group members discussed and provided input on concepts for potential inclusion in the revised regulatory framework. After considering this input, which differed across study group members, the project team produced a proposed approach document for discussion at the final SB 838 study group meeting. While the study group did not reach consensus on this document or its collective elements, group members provided meaningful substantive feedback on these elements during and following that meeting.

The documents mentioned above -- including the high-level objectives document, concepts document, and proposed approach for SB 838 study group consideration -- are available under the "meeting dates and materials" section on the web-link provided below. The content of this Governor's office's report and proposed new regulatory framework is informed by the study group's input on and pursuant to these documents.

<http://www.oregon.gov/dsl/Pages/SB%20838%20Study%20Group.aspx>

## Current Regulatory Framework

Two state agencies (DSL and DEQ) have regulatory jurisdiction related to motorized suction dredge mining in Oregon and implement their legal responsibilities through separate authorization processes.

1. Pursuant to Oregon's removal-fill law, DSL currently allows motorized suction dredge mining under a General Authorization (GA) within the beds and banks of Oregon's Essential Salmonid Habitat (ESH) streams as long as the miner does not disturb more than 25 cubic yards of material and the dredge intake hose is 4 inches or less in diameter. The GA is effectively a pre-approval of suction dredge mining in ESH streams so long as the mining activity meets the conditions of the GA, which are designed to minimize the negative environmental effects of the mining. Miners submit a notification to the department between January 1 and February 28 of each year indicating their intent to mine during the upcoming summer in-water work period. They identify up to three locations (stream reaches) in which they intend to mine and agree to comply with the GA conditions. There is no fee for the GA. Current law as established by SB 838 limits DSL to issuing 850 GA's per year. Compliance monitoring and enforcement is performed by DSL and OSP. These activities are limited due to the lack of dedicated funds.

No permit or other approval is required for dredging within non-ESH streams so long as no more than 50 cubic yards is disturbed. An individual removal-fill permit is required for mining on non-ESH streams that disturb more than 50 cubic yards annually and for ESH streams where mining disturbs more than 25 cubic yards annually or where the suction dredge has an intake hose greater than 4 inches in diameter. The individual permit option has not been used in recent memory. State law prohibits suction dredge mining on State Scenic Waterways.

2. Under the Clean Water Act (CWA), all suction dredge miners discharging to waters of the U.S. are also required to obtain a National Pollutant Discharge Elimination System (NPDES) permit. This federal permit program is administered in Oregon by DEQ. DEQ has issued a general permit (700PM suction dredge general permit) that covers suction dredges with up to 30 horse power motors and 6 inch diameter intake hoses operating in non-ESH waters and 16 horse power motors and 4 inch diameter intake hoses operating in ESH waters. This permit applies statewide. Miners obtain coverage under DEQ's 700PM general permit by submitting a completed application to DEQ along with the statutorily-set fee (\$25 for one year; \$100 for five years). Miners who cannot meet the terms of the general permit may apply for an individual permit from DEQ (statutorily-set fee of \$300), but this option has not been utilized. 700PM permit fee revenues roughly cover the cost of processing permit applications. Permit fees do not cover the cost of technical assistance, complaint response or general permit development/reissuance that occurs every five years. DEQ does not have any dedicated resources for effectiveness monitoring, compliance monitoring or enforcement.



3. Discharges to ground water from upland placer mining (above the ordinary high water line) are regulated under state law through a DEQ Water Pollution Control Facilities (WPCF) permit. Both general permits and individual permits are available, and the vast majority of upland miners register under the WPCF 600 general permit (currently 1423 registered to the general permit and 8 individual permits). The WPCF 600 permit covers small-scale operations that process no more than 10,000 cubic yards / year and dispose of wastewater by evaporation and/or seepage. Operations must be located off-stream above the ordinary high water line and discharges to surface waters are prohibited. No fee exists for operations processing less than 1500 cubic yards or for permit renewals. There is a \$213 fee for operations processing between 1500 and 10,000 cubic yards. Fees for individual permits are substantially higher and tiered according to the size and nature of the operation. Very few individual permits have been sought for this activity.

\* **[Note:** If an upland mine involves the excavation of more than 5,000 cubic yards of material in a year or disturbs more than one acre in a year or more than five acres in total, it is also subject to regulation by the Oregon Department of Geology and Mineral Industries (DOGAMI) under the Mined Land Reclamation Act.]

## Proposed New Regulatory Framework

Advancement of the proposed regulatory framework set forth in this report would require: (a) crafting new legislative provisions and authorities; (b) advancing agency rulemaking where necessary to clarify existing or new relevant statutory provisions and ensure consistency with the framework; and (c) changing and coordinating agency practices, including potential use of Memoranda of Understanding (MOUs) to define roles between agencies. Attempts have been made throughout this report to identify where proposed approaches are either new or different from current approaches. In addition, this report attempts to indicate how proposed approaches address relevant SB 838 direction, where recommended modifications to SB 838 language exist, and where new statutory authority is likely needed.

### *I. DEFINITION OF TERMS and ACRONYMS*

As an initial matter, it is important to clarify the types of mining considered by the study group and subject to the proposed revised regulatory framework set forth in this report. SB 838 Section 8 expressly directed the study group to study mining that uses "any form of motorized equipment" to extract precious metals from placer deposits that are located in the bed or banks of Oregon's waters or upland placer deposits that may involve discharges to waters or removal or disturbance of streamside vegetation. This legislative direction covers what is commonly known as suction dredge mining and highbanking as well as the use of excavators or other motorized equipment on upland deposits above the high water line to the extent that the activity may involve the disturbance or removal of streamside vegetation. SB 838 and the proposed revised regulatory framework in this report specifically do not apply to (a) any mining

for which DOGAMI issues operating permits under ORS 517.702 to 517.989 or (b) mining of materials other than precious metals.

The following terms or acronyms appear in the report that follows. While not an exhaustive list of terms -- and while not intended as definitive technical or legal definitions -- the definitions below are intended as shorthand clarification of terms used in this report relevant to the proposed revised regulatory framework for the types of mining subject to SB 838.

### **Terms:**

- **Specified Biological Resource Waters (SBR):** waters where natural resources specifically referenced and designated in SB 838 exist or, based on best available science, are believed to exist, and where there is the highest potential for SB 838-related motorized mining activity to interfere with achievement of public values or legal objectives associated with those resource designations. SBR waters correspond to Essential Salmonid Habitat (ESH) streams as defined by DSL combined with ODFW's Pacific lamprey and bull trout distribution data.
- **Tribal trust lands:** lands to which the U.S. Secretary / Department of the Interior has acquired title and holds in trust for the benefit of a Native American tribe.
- **Motorized Suction Dredge Mining:** this activity takes place within the beds and banks of Oregon's waterways.
- **Motorized Upland Placer Mining:** takes place outside the bed and banks of Oregon waters (i.e., above the ordinary high water line). The proposed regulatory approach would apply to this type of mining to the extent any portion of an operation -- including camps and access routes (other than roads maintained by local, state or federal entities) -- falls within 100 yards upland of the ordinary high water line.
- **Individual permit:** state authorization that includes customized conditions, restrictions and BMPs based upon site-specific information.
- **General permit:** state authorization containing predetermined set of conditions, restrictions and Best Management Practices (BMPs).

### **Agencies**

- **BLM** = U.S. Bureau of Land Management
- **DEQ** = Oregon Department of Environmental Quality
- **DOGAMI** = Oregon Department of Geology and Mineral Industries
- **DSL** = Oregon Department of State Lands
- **ODFW** = Oregon Department of Fish & Wildlife
- **OSP** = Oregon State Police
- **OWRD** = Oregon Water Resources Department
- **USFS** = U.S. Forest Service

### **Laws:**

- **CWA** = Federal Clean Water Act
- **ESA** = Federal Endangered Species Act
- **NEPA** = National Environmental Policy Act

## II. CONSOLIDATED REGULATORY PROCESS

Section 8(1)(a) of SB 838 directs that the proposed new regulatory approach include:

**A consolidated regulatory process for mining described in this section, including a system that: “(A) Involves permits, licenses, authorizations or other forms of permission [that must be clearly displayed]; and (B) Considers a single permit or single point of contact approach to authorization.”**

In response to this legislative direction and the study group’s discussions, the Governor’s office recommends establishing a single lead agency for administering a revised regulatory framework that integrates the state’s authorities and interests into a consolidated permit document and establishes a more cohesive framework for determining compliance. Enforcement responsibilities would be distributed among multiple agencies based upon statutory authority. Elements of the proposed approach include:

- **A single-agency lead and point of entry for the permitting system**
  - The proposed approach recommends DEQ for this lead agency role.
  - The lead agency would be responsible for:
    - Administering the permit process, including issuance of a consolidated state decision document for authorizing motorized suction dredge and upland placer mining activities subject to SB 838;
    - Coordinating and integrating review, input, and underlying decisions from all relevant agencies into the decision document;
    - Coordinating public and tribal input on permit applications; and
    - Convening a state/federal interagency team at least once a year to:
      - evaluate the overall permitting process, including how state and federal processes are coordinating, and identify needed improvements;
      - address policy and procedural issues to ensure an efficient and effective regulatory system;
      - develop and implement an adaptive management plan; and
      - identify training needs and enforcement priorities, and develop plan for efficient use of combined agency resources to address those priorities.
  - Consider delegation and consolidation of state removal / fill legal authority in this limited context (i.e., for motorized suction dredging) within DEQ. Other state agency authorities (e.g., water use, cultural resources, etc.) would not be delegated or combined, but efficiency and effectiveness would be enhanced through the lead agency coordination approach described above.

- **A single permit application and consolidated state decision document**
  - Eliminate the DSL General Authorization and instead rely upon a single application form and consolidated decision document administered by the lead agency for motorized suction dredge and motorized upland placer mining.
  - The application form would capture in one place all information necessary for determining compliance with the various legal authorities relevant to the proposed use (e.g., Clean Water Act, removal-fill law, cultural resources, water use / rights, local land use, etc.).
  - A permit would not be issued by the lead agency until it has ensured all other reviews and determinations have been made with respect to other agencies or entities with jurisdictional responsibilities (e.g., OWRD / water rights and use, SHPO / cultural resources).
  
- **The use of technology to (a) enhance efficiencies, (b) customize conditions / approach per management zone, (c) better track activity location / volume, and (d) enhance monitoring, research, and enforcement abilities.** Such technology should be used to advance:
  - An online application and reporting system, including the ability to upload maps, plans or other documents in a one-stop-shop manner.
  - Interactive web-based mapping tools.
  - GPS-based data (e.g., location and extent) collected and reported by mining permittees or others that can be used for tracking mining activity, compliance, and adaptive management / research considerations.
  - An Information / Education portal in the online application system that links to content designed to enhance understanding of resource values, regulatory requirements, and best management practices (BMP's).
  - Synchronization and/or coordination with other relevant databases and technologies.
  
- **Enhanced coordination and communication with tribes and federal land management agencies.** In particular:
  - Recognize that federal / state processes and regulatory authorities are distinct (one does not supersede / render the other obsolete), and that tribal coordination is a distinct sovereign-to-sovereign responsibility.
  - Work to align BMP's / permit conditions where possible. This will help avoid confusion for the mining community and broader public by, to the extent possible, advancing consistency in what must be done whether under state or federal permit / approval documents.
  - Coordinate with relevant federal agencies to ensure state-based permit issuance is consistent with the Endangered Species Act.

Other elements of SB 838 Section 8(1) are addressed in other sections of this report. Permitting is covered in further detail in the “Natural Resources and Social Protections” section below. In

addition, Sec. 8(1)(a)'s direction regarding visible display of permits is covered in the "Monitoring, Compliance, and Enforcement" section of this report.

A single point of entry and consolidated permit application/ review process as set forth above would ensure more coordinated attainment of state legal obligations and interests (e.g., CWA, removal-fill, habitat protection, cultural resources, minimization of social conflicts, etc.). New statutory provisions may be needed or desirable to ensure the framework of the consolidated approach is clear, including agency roles, responsibilities and authorities. Agency rulemaking and MOU's could also clarify how various agencies with jurisdiction will meet the objectives of the consolidated process.

In addition, as part of advancing a consolidated regulatory process, ensure state agency rulemaking and related efforts are consistent with ORS 197.180 (state agency planning and coordination with local governments). Where a county or counties have established legal authorities and an enforceable program for regulating SB 838-related mining that meets or exceeds the protections in and is otherwise consistent with the state-adopted approach, the state regulatory system should provide a pathway for capturing efficiencies and incorporating information and resources from the county-level review, compliance, and enforcement program.

### *III. NATURAL RESOURCE AND SOCIAL PROTECTIONS*

Sections 8(1)(d) and (f) of SB 838 address the protection, conservation and recovery of specified natural resource values as well as conditions and restrictions designed to address specified social values through the following provisions:

**Prohibitions on mining in specific areas as per Section 8(1)(f):**

- **Waterbodies listed as water quality impaired (303d listed) under the Clean Water Act due to sediment, turbidity, toxics or heavy metals**
- **Waterbodies flowing through wilderness areas, national monuments and national botanical areas**
- **State scenic waterways and waterbodies flowing through state parks**
- **Habitat essential to the recovery and conservation of salmon, steelhead, lamprey, mollusks or other unique habitat values, unless protection is achieved through conditions, restrictions, or other approaches than prohibition of the activity.**

**Conditions and Restrictions on mining as per Section 8(1)(d) that are designed to:**

- **Protect and recover instream and riparian habitat important to meeting water quality standards and conserving and recovering anadromous salmonids and bull trout; and**
- **Address social values, including safety, noise, navigation, cultural resources and other uses of waterways (e.g., recreation).**

**Conditions and restrictions must be based on the "best available science" and "precautionary principles", and such measures and prohibitions are limited "to the extent allowed by law".**

SB 838 requires the prohibition of motorized mining activity in specific locations, to the extent allowed by law, including prohibitions in habitat essential to the recovery and conservation of the above-referenced species unless such habitat protection can be achieved through conditions, restrictions or other means short of a prohibition. The Governor's office recommendations below are based on SB 838 study group and project team discussions as well as SB 838 language related to application of best available science, the precautionary principle, and an understanding of the extent of the State's legal authority.

The proposed approach prohibits the types of mining subject to SB 838 in certain areas, and allows it when authorized under an individual or general permit in other areas. The attached maps (Appendix D) have been created in order to assist in depicting and understanding the proposed regulatory framework, including its approach to prohibitions and permitting.

Of particular note with respect to the proposed approach to prohibitions and permitting for **motorized upland placer mining** is the geographic scope embedded in SB 838 Sections 2 and 5. The prescriptions in Section 2 (moratorium) and Section 5 (interim restrictions) apply "... 100 yards upland perpendicular to the line of ordinary high water...". Although SB 838 Section 8 is silent as to an area of applicability, the proposed approach recommends incorporating this scope into the revised framework for motorized upland placer mining in the following manner:

- The proposed regulatory framework applies to motorized upland placer mining to the extent any portion of an operation -- including camps and access routes (other than roads maintained by local, state or federal agencies) -- falls within 100 yards upland of the ordinary high water line.
- Motorized upland placer operations taking place entirely outside of the 100 yard zone would be regulated as appropriate under existing DEQ and DOGAMI authorities.

Because the overall proposed revised regulatory framework recommended below differs in places from current language in SB 838 Section 8(1) and is intended to replace interim requirements in SB 838 Section 5 and the 2016 moratorium that would otherwise go into effect pursuant to Section 2, legislative action would be required during the 2015 legislative session to achieve this outcome and advance this proposed approach.

#### A. Prohibitions:

The proposed approach recommends clarifying or creating statutory provisions that prohibit authorization of the types of mining activity subject to SB 838 or discharges from such activity within the specific areas set forth as prohibitions in Sec. 8(1)(f), with the following exceptions, understandings and adjustments:

- Modify SB 838 Sec. 8(1)(f) to clarify that current prohibition language related to waterbodies listed as impaired for sediment, turbidity, toxics or heavy metals would apply to motorized suction dredge mining only, with motorized upland placer mining adjacent to these waterbodies being addressed through individual permits with protective restrictions or conditions.
- Modify current Sec. 8(1)(f)(B) prohibition language as follows (new language is underlined):
  - “Bodies of water within federally designated wilderness areas and wilderness study areas; national monuments ~~and national botanical areas~~; designated botanical areas on National Forests; Areas of Critical Environmental Concern on Bureau of Land Management lands; and areas withdrawn from mineral entry (including for administrative purposes) under federal law or management plans, except those that have been withdrawn for the purpose of recreational mining.”
- For “Specified Biological Resource” (SBR) waters, prohibit discharges from motorized suction dredge mining on waters flowing through **non-federal lands**. For SBR waters flowing **through / within areas of federal lands**, an individual permit would be required.
- Prohibit motorized mining activity subject to SB 838 directly in the banks of any waterbody. Require an individual permit for motorized mining occurring between the wetted perimeter and the bank and on gravel bars in areas or situations not otherwise prohibited above.
- The State would not authorize motorized mining subject to SB 838 within waters flowing through or bounded by tribal reservation lands, tribal trust lands, and lands owned in fee by a Native American tribe in Oregon unless authorized by the tribe and allowed by law.
- Allow the state to issue an individual permit for mining or discharges from mining otherwise prohibited as described above if the applicant demonstrates that the prohibition would constitute a regulatory takings.

## B. Permitting:

Short of prohibitions, SB 838’s direction for the protection, conservation, and/or recovery of natural resource and social values would be achieved through a permitting approach that includes conditions, restrictions, BMP’s and/or management zones as referenced in SB 838 Sections 8(1)(d) and (e). It is assumed that statutory language would be needed to implement the permitting structure described below, including elements to be considered during permit application review and criteria for permit issuance or revocation. Details of the permitting approach would be addressed through agency rulemaking or agency advancement of the permitting process itself, as opposed to in statute.

The permit process would distinguish between motorized suction dredge and motorized upland placer mining, which involve different techniques, locations, and impacts. The individual permit process would include a review that assesses site-specific issues and potential impacts, while the general permit would take a uniform approach that addresses generally applicable directives and standards. Criteria for permit issuance or revocation would be based on the applicant's achievement of the natural resource and social value protections and provisions specified below and advanced through permit conditions, restrictions, or BMPs.

In addition to the exceptions, understandings, and adjustments to SB 838 Sec. 8(1)(f) described above in the "Prohibitions" section, mining would be permitted or prohibited as follows:

### **Motorized Suction Dredge Mining – prohibitions and permit requirements, conditions:**

#### **Motorized suction dredge mining or discharges from suction dredge mining:**

- **would be prohibited** or unauthorized in the following waterways or streams flowing through the following areas, except as required under federal law or where the prohibition would constitute a regulatory takings:
  - SBR waters flowing through non-federal lands, unless specifically allowed as part of a state-authorized management zone.
  - Federal wilderness areas and wilderness study areas, national monuments, USFS botanical areas, and BLM Areas of Critical Ecological Concern.
  - State scenic waterways and waters flowing through state parks.
  - Waters that are 303d listed for sediment, turbidity, toxics or heavy metals.
  - Areas withdrawn from mineral entry (including for administrative purposes), except those that have been withdrawn for the purpose of recreational mining.
  - Tribal reservation lands, tribal trust lands, and lands owned by a Native American tribe in fee unless authorized by the affected tribe(s).
  - Directly in the banks of any waterway.
  
- would require an **individual permit** in the following areas:
  - SBR waters on federal lands.
  - Tribal reservation lands, tribal trust lands, and lands owned by a tribe in fee IF authorized by the affected tribe(s).
  - Between the wetted perimeter and the bank and on gravel bars in areas or situations not otherwise prohibited above.
  - Any situation that would otherwise disqualify an applicant from use of a general permit (e.g., cultural resources are known to be present in the vicinity of where mining would occur).
  
- would require a **general permit** in the following areas:
  - Non-SBR waters on federal lands where mining is not otherwise prohibited based upon prohibition areas listed above.



- Non-SBR waters on non-federal lands where mining is not otherwise prohibited based upon prohibition areas listed above.
- An applicant for a general permit may be required to apply for an individual permit under certain circumstances, such as:
  - o Operator cannot meet terms of general permit;
  - o Cultural resources are known to be present in the vicinity of the mining activity; or
  - o Threshold triggers (e.g., # of permits already existing in a given watershed).

**Permits would include the following time, place, and manner restrictions or conditions that address the following:**

- Limits on the total amount of disturbance and extraction allowed.
- Distance restrictions and spacing between equipment based on the level of activity in an area, management zone considerations, or cumulative impact concerns.
- Avoidance of areas upstream of drinking water intakes where the activity could affect the efficacy of treatment for drinking water purposes based on an increase in turbidity or re-suspension of pollutants.
- Protection for areas of known presence of high value natural resources (e.g. mussel beds, lamprey ammocoetes).
- Avoidance of areas of known presence of cultural resources in the vicinity of mining activity.
- Limits on activity in order to minimize conflict in proximity to residences, campgrounds or other locations where user conflict is likely to occur (see Section E below).
- BMPs aimed at protecting sensitive species and their habitat, including bull trout, lamprey and freshwater mussels.
- BMPs and other conditions would be revised to address relevant science-based or legal developments, such as:
  - o BMP's associated with the ongoing USFWS-sponsored process for lamprey, mollusks, etc., which would supplement state permit conditions related to salmon-oriented BMP's in existing DEQ permits.
  - o Terms and conditions or recommendations tied to the avoidance of ESA "take" liability in federal biological opinions relevant to SB 838-related mining activity and the area of proposed activity.

**Motorized Upland Placer Mining – prohibitions and permit requirements, conditions:**

**Motorized upland placer mining:**

- **would be prohibited** in the following areas, except as required under federal law or where the prohibition would constitute a regulatory takings:
  - Federal wilderness areas and wilderness study areas, national monuments, USFS botanical areas, BLM Areas of Critical Ecological Concern unless authorized by the

federal land management agency, in which case an individual permit would be required.

- State scenic waterways or state parks.
  - Non-federal lands within 100 yards of SBR waters, unless specifically allowed as part of a state-authorized management zone.
  - Areas withdrawn from mineral entry (including for administrative purposes), except those that have been withdrawn for the purpose of recreational mining.
  - Tribal reservation lands, tribal trust lands, or lands owned in fee by a tribe unless authorized by the affected tribe(s).
- would require an **individual permit** in the following areas:
    - Federal lands within 100 yards of SBR waters where not otherwise prohibited.
    - Federal and non-federal lands within 100 yards of waters that are water quality impaired / 303(d)-listed for sediment, turbidity, toxics, heavy metals, or temperature.
    - Tribal reservation lands, tribal trust lands, and lands owned by a tribe in fee simple IF authorized by the affected tribe(s).
  - would require a **general permit** in the following areas:
    - All federal and non-federal lands not described above and that are not otherwise prohibited/restricted.

**Permits would include the following time, place, and manner restrictions or conditions** that address the following:

- Limits on the total amount of disturbance and extraction allowed.
- Avoidance of areas of known presence of cultural resources in the vicinity of mining activity.
- Limits on activity in order to minimize conflict in proximity to residences, campgrounds or other locations where user conflict is likely to occur (see Section E below).
- Ensure no unpermitted discharges of pollutants to state waters from the mining activity itself, ponds, or camps used in association with the mining, or disposal of over-burden.
- Ensure the protection of riparian areas -- which are of high importance to many resource values -- through generally applicable or site-specific setbacks and, as appropriate, other vegetation protection requirements that ensure removal or disturbance of streamside vegetation would not reasonably be expected to result in:
  - increased water pollution, including increased solar heating of the waterway. Restrictions or conditions would be especially stringent where the adjacent water body is water quality impaired / 303(d) listed for temperature;
  - damage to rare or endemic plant sites; or
  - inhibition of important habitat functions associated with the protection and recovery of fish and wildlife species mentioned in SB 838.

- BMPs and other conditions would be revised to address relevant science-based or legal developments, such as:
  - o BMP's associated with the ongoing USFWS-sponsored process for lamprey, mollusks, etc., which would supplement state permit conditions related to salmon-oriented BMP's in existing DEQ permits.
  - o Terms and conditions or recommendations tied to the avoidance of ESA "take" liability in federal biological opinions relevant to SB 838-related mining activity and the area of proposed activity.

**Other considerations:**

- Expedited pathway: If an applicant presents documentation indicating the proposed mining activity has already received a BLM or USFS decision that has gone through NEPA review and state CWA Sec. 401 approval, the state permitting process would be streamlined and would not require additional review of issues already addressed in the plan of operations and federal decision.

**C. Management Zones**

SB 838 Section 8(1)(e) directs the revised regulatory framework to establish:

**A system of management zones that:**

- **Limits the amount of motorized mining activity at specific times and cumulatively;**
- **Sets conditions and restrictions specific to the respective management zone; and**
- **Ties to the payment of fees as part of the fee structure discussed in Sec. 8(1)(c)**

The proposed new framework reflects a management zone approach based on the distinctions between prohibition areas, individual permit and general permit areas. Best available science has been used in developing a primary management zone comprised of SBR waters, and a secondary zone of non-SBR waters. Permit availability, conditions and restrictions would vary based on whether the proposed mining activity is within prohibition areas, SBR waters, non-SBR waters, or subject to an individual versus a general permit.

While it is understood that motorized suction dredge mining and motorized upland placer mining can have cumulative impacts to streams, riparian habitat, and ecological functions, there is currently a limited amount of research specific to this subject. Given this, the proposed revised regulatory framework advances prohibition, restriction, and permitting approaches based on precautionary principles and allows for an adaptive management strategy to be implemented. For example, the "SBR waters" designation is precautionary in design, and both the individual and general permit approaches provide for adjustments to numbers of permits, conditions, and restrictions based on future research and monitoring.

Further refinement of the management zone concept could include:

- The authorization of caps on total permitted use—applied at a regional or watershed-based management zone level—in order to address cumulative impact concerns. Currently, SB 838 Section 5(4) caps the number of DSL General Authorizations (GA) for SB 838-related mining to 850 statewide during any relevant time period mentioned in the bill. Given that the proposed approach proposes elimination of the GA and suggests a regional or watershed-based approach to caps and cumulative impacts, this statutory language in SB 838 would need to be revisited.
- The development of caps and other management zone restrictions would be based on an iterative approach tied to adaptive management. If the proposed approach set forth in this report is implemented, the location and nature of disturbances from motorized mining will differ from the status quo. Therefore, understanding these changes is relevant to shaping adaptive management.
- Based on data collected during the permitting, compliance monitoring, and enforcement process -- as well as any specific research or developments in the scientific literature -- the lead agency would be able to document where the highest levels of mining are occurring, the concentration and extent of that mining, and how much is occurring in SBR waters, areas of high risk based on stream geomorphology, or areas of high social conflict.
- Where concerns exist over high levels of activity and cumulative impacts – especially where such activity is located in SBR waters, areas of high risk based on stream geomorphology, or areas of high social conflict – the lead agency could establish an additional management zone or zones.
  - A management zone could be designed to address conditions unique to that zone through:
    - Establishment of caps on the total number of permits issued in that zone, the total number of permits available in SBR waters, restrictions on certain portions of the zone, or other measures.
    - Specific enhanced time, place, and manner restrictions to address issues of concern within that zone, including increased spacing requirements between suction dredge equipment.
    - Focused research, monitoring, compliance and enforcement efforts.

#### D. Cultural Resources

SB 838 Sec. 8(1)(d) requires the revised regulatory framework to advance conditions and restrictions designed to address concerns related to cultural resources. SB 838 study group members expressed that they value cultural resources as a general matter and also recognized that these resources often have particular relevance to tribal cultures. To address the cultural resource provision of SB 838, the study group formed a subgroup comprised of tribal historic preservation staff, the State Historic Preservation Office, and project team members. The

subgroup crafted a proposed approach to address cultural resource concerns that was presented to the full study group. During the subgroup and study group processes, tribal representatives consistently and clearly expressed that cultural resources are more than simply artifacts and archeological sites; they also include the natural resources (e.g., plants, animals, water), functions, and spiritual places of significance to tribal cultures.

In addition to the protections provided to archeological and biological cultural resources from the proposed approach's restrictions and prohibitions, the recommended approach is to minimize potential impacts to cultural resources through the permitting process by:

- Screening permit applications to identify potential impacts to cultural resources (see below);
- Providing online educational materials regarding cultural resources as part of the permit application process, and requiring permit applicants to affirm they have reviewed educational materials before a permit can be issued;
- Including an "Inadvertent Discovery Plan" provision in permits in order to ensure mining operators understand what to do in the event they encounter an artifact or site of archeological relevance, including immediate communication with state and tribal cultural resource entities; and
- Providing training to OSP and other state agencies on cultural resource protections and issues.

The cultural resources subgroup recommended the following approach to screening applications / mining locations for potential cultural resource impacts. The subgroup and project team acknowledged that additional state resources would be required to conduct and coordinate the cultural resources review process.

1. Have an eligibility / time window for applications each year (e.g. January 1 – February 28). Applications received during this window could then be sorted by mining type, geography or other means and batched in order to best ensure efficient application review, including cultural resource review by the State and tribes.
2. Require that applications include:
  - a. Specific mining location(s)--an online GIS tool would help applicants with this and provide greater accuracy.
  - b. Information regarding how the mining site will be accessed (e.g., by road, and which one(s)) as well as if and where camping or land occupancy will occur during the mining activity.
3. State agencies would provide archaeological expertise (staff or consultants) to help with application review, including cross-referencing an application location with the SHPO archaeological database, and coordination with interested tribes.
4. In addition to SHPO review, cultural resource staff of interested tribes would be provided the opportunity to review applications before issuance of a permit decision in order to identify any potential conflicts with cultural resources not otherwise apparent from the SHPO database.
  - a. Provide 30 days for tribes to review and comment on applications.

- b. Notice to tribes:
  - i. Tribes would indicate to the State the counties for which they are interested in receiving application information, as well as contact information for the relevant tribal cultural resource review staff.
  - ii. Tribes would be notified of applications within those counties via email (based on screening and batching of the applications that arrive during the state eligibility window). As applicable and feasible, the State could also provide application data in GIS format to advance ease and efficiency in cross-referencing with tribal maps / data.
  - iii. Tribes would also receive notice if SHPO database review shows resources in the vicinity of a proposed operation.
5. Tribes would have the opportunity to provide feedback to the State regarding cultural resource concerns (including natural resources), which would be additional information in informing the State's application review and decision process.
6. The State's application review would incorporate recommendations that address tribal cultural resource concerns to the extent possible into its permit decision (e.g., protection conditions, identification of avoidance zones, or permit denial).
7. Input from tribes regarding cultural resources could result in converting a general permit application into an individual permit with site-specific conditions.

#### E. Social Issues related to Noise, Recreation Conflicts:

In addition to cultural resources, SB 838 Sec. 8(1)(d) also directs the revised regulatory framework to advance conditions and restrictions designed to address other social values:

**“including concerns related to safety, noise, navigation, ... and other uses of waterways.”**

The proposed approach would focus on addressing particular areas of potential conflict as opposed to taking a generalized approach. In particular, the proposed approach recommends the creation or clarification of statutory language to authorize and achieve the following as part of the permit process:

- Amend SB 838 Section 5(1)(c)'s current prohibition of motorized mining activity outside of 9am to 5pm. Rather than applying this limitation as a general matter, direct the permit process to apply this limitation in areas proximate to residences, campgrounds, parks, or other areas where noise from or the presence of motorized suction dredge or motorized upland placer mining would reasonably be expected to create social conflict related to noise, safety, navigation, and other uses of waterways (e.g., boat launch sites, popular non-motorized recreation areas, streamside sites being used for legally-conducted large events such as cultural gatherings, weddings, etc.).
- In addition to the time restrictions described above, authorize distance restrictions from residences, campgrounds, parks, or other areas where noise from or the presence of motorized suction dredge or motorized upland placer mining would reasonably be

expected to create social conflict related to noise, safety, navigation, and other uses of waterways.

- Authorize conditions that prohibit behavior that creates a navigation hazard and/or safety problem. This includes modification of current SB 838 language:
  - SB 838 Section 5(1)(b) prohibits motorized mining equipment from being left unattended within the wetted perimeter of state waters.
  - The proposed approach recommends modifying this current language to require suction dredges to be pulled to the side of the waterway and situated where they do not interfere with navigation or conflict with other uses such as boat launching or recreation. Any hazardous material, including gasoline, must be removed from the dredge and safely away from the waterbody when the equipment is unattended.

#### *IV. MONITORING, COMPLIANCE, and ENFORCEMENT:*

SB 838 Section 8(1)(b) directs that the proposed revised regulatory framework include:

**“Effective compliance, monitoring and enforcement mechanisms related to mining described in this section.”**

Over the course of its meetings, the SB 838 study group heard presentations, shared perspectives, and discussed issues related to how the current regulatory system is achieving compliance, monitoring, and enforcement objectives, and how these objectives could be better attained. The proposed approach would address SB 838’s direction related to monitoring, compliance, and enforcement and improve upon the current approach as follows:

- Advance the following enforcement-specific provisions:
  - Establish permanent statutory authorization for OSP to issue citations for violations of the statutes, regulations, or permit provisions relevant to the mining subject to SB 838. The study group reached consensus on this recommendation. This new authority would be additional to and not a substitute for OSP’s current misdemeanor authority.
  - Use technology to make permitting data and related information readily available to officers while on patrol.
  - Ensure that statutory authority exists to impose fines and revoke permits for violating any permit conditions or other provisions of state law, including for conditions related to cultural and social issues as outlined above. In addition, ensure the level of fines and penalties is adequate to serve as a deterrent.

- SB 838 Sec. 8(1)(a)(A) requires that permits, licenses, or other forms of authorization: **“must be displayed in plain view and be clearly visible on the motorized equipment in order to aid in the identification of persons carrying out mining activities[.]”** Based on this directive and study group discussions, the proposed approach recommends refinement of this statutory language. The recommended approach below would achieve the intent of the above SB 838 language while effectively advancing compliance and enforcement objectives.
  - Advance new statutory provisions requiring mining operators to visibly display their permit number (issued as part of the consolidated permitting process) on the suction dredge and on or near upland-based mining equipment at all times, whether the equipment is actively in use or not.
  - The individual’s permit number does not have to be permanently affixed to equipment but must be displayed in the location and in a size, color, and manner that (a) ensures it is visibly associated with the equipment, and (b) optimizes its visibility and legibility for purposes of identification with the plain eye from banks and shorelines at a distance.
- Require permittees to report on the location and extent of mining activity. For example, as raised in the “Consolidated Regulatory Process” section of this report, require permittees to collect GPS-based data (e.g., location and extent) and record it in a daily activity log, which would be included in information reported to the permitting agency. Such information will provide better information to monitor the location and extent of mining statewide, the relative intensity in certain areas, and track compliance with permit conditions and location restrictions.
- Strategically target state-based monitoring efforts and compliance checks in areas where it may be most useful based on high levels of mining activity, potential for conflict, cumulative impact or compliance concerns, or relevant research questions.
- Build an adaptive management approach into the permitting system. This approach would ensure flexibility exists to adjust program elements (including cultural resources, water quality, or habitat / species-based restrictions) in response to new information gained through monitoring, research, compliance efforts, or updates to mapping and related land or water designations. Ensure statutory provisions allow for this kind of adaptive management flexibility.

## V. *ADEQUATE FEE STRUCTURE*

SB 838 Section 8(1)(c) directs the revised state regulatory framework to include:

**“Adequate fee structures to cover administration, compliance, monitoring, enforcement, outreach and education related to any permit, license, authorization, or other form of permission required by law from a state agency ... including ways to maximize the efficiency in the use of existing state resources.”**



For purposes of the proposed approach set forth in this report, further evaluation is needed related to potential savings from the proposed consolidation elements as well as costs for permitting, monitoring, compliance, enforcement, outreach / education, and administration. The extent of costs associated with a revised regulatory framework will vary greatly based on the nature and extent any new, revised framework the state chooses to advance. It is expected, however, that the proposed system will cost substantially more than the current system. That is in part due to what exists under the current system, including an inadequacy of funding. Relevant to the issue of adequately covering the costs described in SB 838 is the issue of who pays.

At present, for motorized suction dredge mining:

- There is no fee for obtaining the current DSL GA. Compliance, monitoring, and enforcement of the GA is performed by DSL and OSP, but these activities are limited due to the lack of dedicated funds.
- A statutorily-established fee of \$25 exists for one year (or \$100 for five years) for DEQ's 700PM suction dredge permit. Miners who cannot meet the terms of the general permit and instead apply for an individual permit from DEQ pay a statutorily-set fee of \$300, but this option has not been utilized.
  - DEQ estimates that 700PM permit fee revenues have been roughly covering the cost of processing permit applications. For needs beyond that, DEQ relies upon other wastewater permitting program revenues to fund about 0.5 FTE to provide technical assistance to miners and coordinate with other state and federal agencies. DEQ does not have any dedicated resources for permit development (permit needs to be updated and reissued every five years), effectiveness monitoring, compliance monitoring or enforcement.

For motorized upland placer mining:

- The majority of upland mining operations that involve water discharges are regulated under a Water Pollution Control Facilities general permit issued by DEQ (a.k.a., WPCF 600 general permit). There is no fee for operations processing less than 1500 cubic yards or for permit renewals, and a \$213 fee for operations processing between 1500 and 10,000 cubic yards.
- Individual WPCF permits are available for operations that do not qualify for the general permit, but at present, there are only 8 active individual permits as compared to 1423 operators registered to the WPCF 600 general permit. Fees for individual permits are substantially higher than general permits and tiered according to the size and nature of the operation.

In 2013, through SB 838 Section 12, the legislature advanced a \$150 surcharge on suction dredge permits for the purpose of funding DEQ data collection and reporting on suction dredge mining. The surcharge applies from October 1, 2013 to December 31, 2015. To date, the surcharge has generated approximately \$80,000. Over the same period, the amount of suction dredge mining in Oregon has been observed to have decreased from levels prior to the 2013

enactment of SB 838. Approximately 1205 permitted miners existed in 2010, 1385 in 2011, 1941 in 2012, 1831 in 2013 and 536 in 2014. This decline may have to do with a variety of factors, but the ability to adequately cover regulatory system costs from mining permit fees alone depends on (a) the costs of the system, and (b) the number of miners paying for permits in the system, which in turn depends upon the number of permits allowed and the cost of obtaining those permits.

As to who should pay the costs of the proposed revised regulatory framework or any approach advanced by the legislature, SB 838 study group members had disparate opinions. Perspectives ranged from putting the entire cost of any cost increases beyond the status quo on miners / permittees to covering the cost increases with public funds. The following comments represent this range of opinion on this policy question:

- *“Miners will not benefit from the new, more complicated system, and since mining is a benefit for the general public, the general public is the entity that must absorb the additional permitting costs.”*
- *“Suggest that fee structure be organized to be a self-funded program. Placing the burden for regulating damage to public resources for private profit on the taxpayer is not appropriate.”*

Implementation of the current regulatory system is based on a shared funding approach, including reliance upon DEQ wastewater permitting program funds (a combination of general funds, federal funds and permit fees paid by other dischargers than SB 838 types of mining) and the DSL Common School Fund. However, as noted earlier, the portion of costs paid by mining permit fees is very low and the ability of the system to deliver on the compliance, monitoring, enforcement and education / outreach objectives listed in SB 838 is compromised.

The proposed approach recommends continuing to share the costs of the regulatory system for motorized suction dredge and motorized upland placer mining between permit fees and public funds derived from or associated with other sources, including agency base budgets and/or program funding. Defining the appropriate, equitable proportion or share of costs between permit fees versus public funds for the proposed revised regulatory structure, however, is a matter for further conversation in the policy realm.

Given the relative lack of current dedicated funding tied to the existing GA or DEQ permits, and in keeping with SB 838’s direction (emphasis added) to advance “[a]dequate fee structures to cover” the regulatory system elements mentioned in Section 8(1)(c), the proposed approach recommends an increase in fees paid by motorized suction dredge and upland mining permittees seeking to extract precious metals from the beds, banks, and uplands of Oregon waterbodies. This could include the continuation of the SB 838 Section 12 surcharge on suction dredge permits (but converting it to a base fee and re-purposing it towards the broader SB 838 Sec. 8(1)(c) elements) or crafting additional fees tied to some portion of certain regulatory system costs, or both.

Finally, the proposed approach addresses the “maximize the efficiency in the use of existing resources” language in SB 838 Sec. 8(1)(c) through the “Consolidated Regulatory Process” section of this report, including the elements of a single lead agency, single permit application, use of technology, and enhanced communication and coordination. In addition, the proposed approach recommends maximizing efficient use of existing resources through exploring and advancing partnerships related to the funding and implementation of:

- Compliance and Enforcement -- (e.g., federal funds made available to counties; engagement of tribal enforcement officers; coordination between federal, state, and tribal staff and/or officers in compliance monitoring and enforcement).
- Monitoring and Research -- (e.g., engagement of university system research / graduate work; federal funds and staff; tribal engagement on species of concern / interest).

## Appendices

\*\* See Attached Appendix A-D.