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April 29, 2008

Ms. Karen Niiya, Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, California 95814

Re: Comment Letter – AB 2121 Policy

Dear Ms. Niiya:

This firm represents the North Gualala Water Company (“North Gualala”). North Gualala holds four water-right permits for diversions and beneficial uses of water in local creeks in Mendocino County. In the future, North Gualala may file petitions to amend some or all of these permits, or an application for a new permit. On behalf of North Gualala, we submit the following comments on the State Water Resources Control Board’s draft “Policy For Maintaining Instream Flows In Northern California Coastal Streams” (the “Draft Policy”).

As discussed in the August 2007 Task 3 Report, “North Coast Instream Flow Policy: Scientific Basis and Development of Alternatives Protecting Anadromous Salmonids,” the proposed “regionally protective instream flow criteria” were developed from data that were collected on only 13 creeks in Humboldt, Mendocino, Sonoma, Napa and Marin Counties. Considering this limited data set, this report recognizes that these regional criteria may not be appropriate for other creeks in the Policy area:

The extent to which the proposed levels of [minimum bypass flows] may or may not be protective at the regional scale was evaluated using a limited set of habitat-flow data from a few sites. However, since the Policy is to be applied at a regional scale, results from a small number of sites may not be representative of habitat-flow needs over the entire range of stream types and varied topography found across the Policy area.

(Aug. 2007 Task 3 Report, App. E, p. E-1.)

The regional criteria do not contain any site-specific provisions, and such site-specific provisions may be very important for many projects. Project proponents therefore should have the option of preparing site-specific studies for a specific project, and the SWRCB should favor such site-specific studies over the regional criteria.

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SACRAMENTO
STATE WATER RESOURCES CONTROL BOARD

On page 2, the Draft Policy appears to recognize this when it states: "Site-specific studies may be conducted to evaluate whether alternative protective criteria could be applied." Similarly, on page 15, the Draft Policy refers to "the policy's regional criteria or site specific criteria for the minimum bypass flow and maximum cumulative diversion."

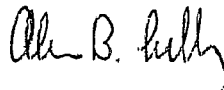
However, the operative provisions of the Draft Policy nevertheless appear to assume that the regional criteria should be the starting point for any development of instream-flow requirements, and that alternative, site-specific criteria should be allowed only if the applicant can convince the SWRCB that the alternative, site-specific criteria may replace the regional criteria. Thus, Section 4.1.8 of the Draft Policy repeatedly refers to site-specific criteria as "variances from the regional criteria." (See Draft Policy, pp. 16-18.)

This proposed approach is logically backwards. Because the Draft Policy's regional criteria were developed through a general analysis of a few creeks in five counties, the SWRCB should not presume that these regional criteria are more protective of the native fish populations in a particular stream than site-specific criteria that are developed for the particular stream through a site-specific study. Similarly, the SWRCB should not assume that proposed "variances" will be "less restrictive," as the Draft Policy does. (See Draft Policy, p. 3.) Instead, the SWRCB should give petitioners and applicants opportunities to perform site-specific studies and to develop site-specific criteria for the streams involved in their projects, and the SWRCB should consider and evaluate such criteria with an open mind and not with a preconceived notion that they will not be as protective of native fish as the regional criteria.

We therefore request that the Draft Policy be edited to change "variances" to "alternative, site-specific criteria" throughout the document, and to remove to presumption that the regional criteria will be the starting point for evaluation of the alternative, site-specific criteria. Our requested changes to the Draft Policy to address this problem are attached as Exhibit A to these comments.

Thank you for giving us the opportunity to provide these comments. We look forward to continuing to work with the SWRCB to develop an appropriate North Coast Instream Flow Policy.

Very truly yours,



ALAN B. LILLY

ABL:tmo
Encl.

EXHIBIT A

Construction and operation of dams and diversions have created barriers to fish migration, thereby blocking fish from access to historical habitat. Dams also disrupt the flow of food (i.e., aquatic insects), woody debris, and gravel needed to maintain downstream fish habitat.

This policy establishes principles and guidelines for maintaining instream flows for the protection of fishery resources. It does not specify the terms and conditions that will be incorporated into water right permits, licenses, and registrations. It prescribes protective measures regarding the season of diversion, minimum bypass flow, and maximum cumulative diversion. ~~Site-specific studies may be conducted to evaluate whether alternative protective criteria could be applied.~~ The policy also limits construction of new onstream dams and contains measures to ensure that approval of new onstream dams does not adversely affect instream flows needed for fishery resources. The policy provides for a watershed-based approach to evaluate the effects of multiple diversions on instream flows within a watershed as an alternative to evaluating water diversion projects on an individual basis. Enforcement requirements contained in this policy include a framework for compliance assurance, prioritization of enforcement cases, and descriptions of enforcement actions. The policy contains guidelines for evaluating whether a proposed water diversion, in combination with existing diversions in a watershed, may affect instream flows needed for the protection of fishery resources.

development

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2.0 POLICY FRAMEWORK

2.1 Development of Instream Flow Criteria

In developing this policy, the State Water Board considered the 2002 draft "Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams" (DFG-NMFS Draft Guidelines) jointly developed by DFG and NMFS. (Wat. Code, § 1259.4, subd. (b).) The DFG-NMFS Draft Guidelines were specifically developed to protect and restore anadromous salmonids and their habitat. The DFG-NMFS Draft Guidelines were intended to preserve a level of stream flow that ensures anadromous salmonids are protected from deleterious effects of water diversions.

2.2 Principles for Maintaining Instream Flows

Protection of fishery resources is in the public interest. The primary objective of this policy is to ensure that the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resources. This policy establishes the following five principles that will be applied in the administration of water rights:

1. Water diversions shall be seasonally limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat;

2. Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning and passage;
3. The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish;
4. Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed and permitted in a manner that does not adversely affect fish and their habitat; and
5. The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized.

2.3 Regionally Protective Instream Flow Criteria

Regionally protective instream flow criteria and other provisions of this policy ensure that water right administration is consistent with the principles established in Section 2.2. The regionally protective criteria¹ are policy area-wide requirements for the season of diversion, minimum bypass flow, and maximum cumulative diversion. ~~Variations from these regionally protective criteria may be obtained if site specific study demonstrates that less restrictive criteria is protective of fishery resources for a specific diversion and its watershed.~~

Applicants may conduct

studies and propose site-specific

to protect

2.3.1 Season of Diversion

The season of diversion is the calendar period during which water may be diverted. New diversions cannot be permitted during the late spring, summer, and early fall because instream flows during this period generally limit anadromous salmonid rearing habitat quantity and quality in the policy area. Although the DFG-NMFS Draft Guidelines recommended a season of diversion from December 15 through March 31, an earlier diversion season start date is still protective of fishery resources when minimum instream flows and natural flow variability are maintained. This policy limits new water diversions in the policy area to a diversion season beginning on October 1 and ending on March 31 of the succeeding year.

2.3.2 Minimum Bypass Flow

Adequate minimum stream flows are needed to provide habitat for fish spawning and upstream passage. The minimum bypass flow is the minimum instantaneous flow rate of water that is adequate for fish spawning and passage, as measured at a particular point in the stream. In applying the minimum bypass flow to a diversion, it is the minimum instantaneous flow rate of water that must be moving past the point of diversion (POD) before water may be diverted. The stream flow may naturally fall

¹ For the scientific basis for the regionally protective criteria, see R2 Resources Consultants and Stetson Engineers, 2007a.

reduction in instantaneous flow of 10% or more at a location where fish are present.

2. If the applicant has submitted a water available analysis and an analysis of cumulative flow-related impacts prior to January 1, 2008, and the State Water Board determines that the project is not consistent with any of recommendations contained the NMFS-DFG Guidelines, then all of the requirements of this policy shall apply.
3. If a water availability analysis and an analysis of cumulative flow-related impacts have not been submitted prior to January 1, 2008, all of the requirements of this policy shall apply.
4. If, prior to the adoption of the policy, the State Water Board has circulated for public review a negative declaration, mitigated negative declaration, or environmental impact report, pursuant to the California Environmental Quality Act, the State Water Board may continue processing the application without applying the regionally protective criteria contained in Section 2.3.

4.1 Water Availability Analysis

Before the State Water Board can issue a water right permit, it must find that there is "unappropriated water available to supply the applicant." (Wat. Code, § 1375, subd. (d).) "In determining the amount of water available for appropriation for other beneficial uses, the [State Water Board] shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." (*Id.*, § 1243.)

4.1.1 Submittal Requirements

A water availability analysis consists of (1) a Water Supply Report, which quantifies the amount of unappropriated water remaining instream after senior rights are accounted for; and (2) an Instream Flow Analysis, which evaluates the effects of the proposed project, in combination with existing diverters, on instream flows needed for protection of fishery resources.

The following technical reports shall be submitted to document the water availability analysis:

1. Water Supply Report
2. Upper Limit of Anadromy determination, where applicable
3. Instream Flow Analysis
4. Report on site specific studies to obtain variances from the regional criteria, where applicable

The technical reports shall document all underlying analyses.

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1. The details of the calculation of the season of diversion, minimum bypass flow, and maximum cumulative diversion criteria;
2. Reports on site specific studies for ~~obtaining variances from the regional~~ *site-specific* criteria that contain information addressing the site specific study requirements provided in Section 4.1.8, if site specific studies were performed;
3. The details of an analysis of the estimated effects of the proposed projects and senior diversions on instream flows needed for spawning and passage at each point of interest, including an evaluation of the number of days that instream flows meet or exceed the minimum bypass flow requirement at each POI for three flow conditions: unimpaired; impaired without the proposed project; and impaired with the proposed project.
4. The details of an analysis of the estimated effects of the proposed project and senior diversions on channel maintenance flows, which consists of calculating the 1.5-year instantaneous peak flow for three flow conditions: unimpaired, impaired without the proposed project, and impaired with the proposed project, then either comparing these values against the maximum cumulative diversion criteria or comparing impaired conditions with and without the project.

If the analysis shows that the proposed project, in combination with senior diversions, affects the instream flow needs of fishery resources using the regional criteria or site specific criteria, then there may not be enough water available for the project as proposed.

If the analysis indicates the proposed project, in combination with senior diversions, complies with the regional criteria or site specific criteria, then water is available for the proposed project.

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4.1.8 ~~Site-Specific Study to Obtain Variances from the Regional~~ **Criteria for Diversion Season, Minimum Bypass Flow and/or Maximum Cumulative Diversion**

The applicant may conduct site-specific studies to support a request for the State Water Board to consider ~~granting a variance from the regional~~ *site-specific* criteria that is protective of instream flows. The site-specific studies shall be conducted by a qualified fisheries biologist. Fisheries biologist qualifications are described in section 4.1.5. Prior to conducting the site-specific studies, the name(s) and qualifications of the individual(s) selected to perform the studies shall be provided to the State Water Board for review and approval. The results of the site-specific study shall be submitted for review by the State Water Board. If the State Water

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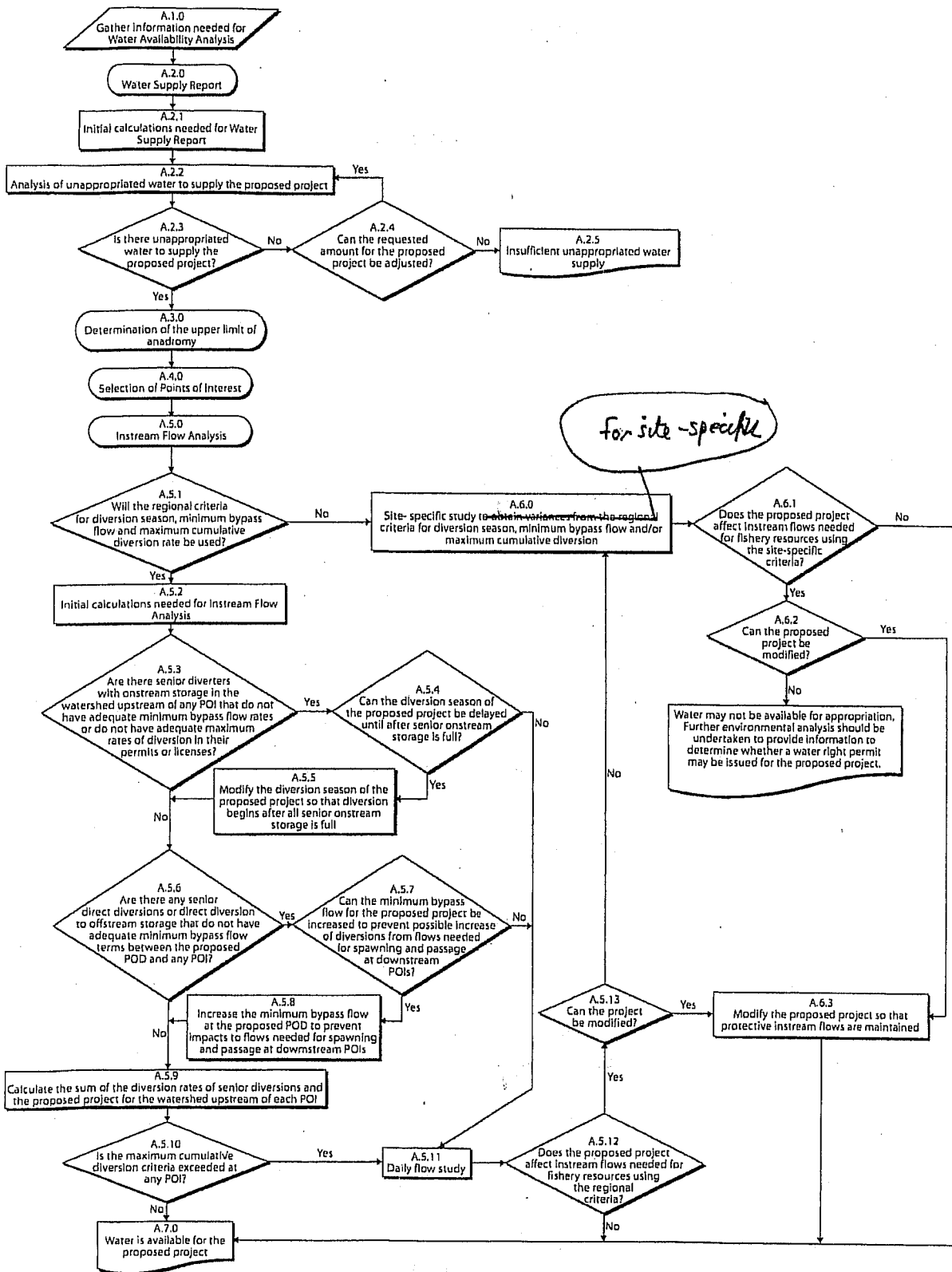
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Board approves the proposed variances to the regional criteria, the site-specific criteria may be used to evaluate whether there is enough water available for the proposed project while providing protective instream flows for fish and their habitat.

The site-specific study shall consist of the following elements:

1. For proposed ~~variances from the regional~~ ^{site-specific} criteria, the geographic scope of the site-specific study shall include all POIs.
2. A description, supported by scientific evidence, of the historical and current presence of anadromous salmonids by fish species and life history stages from the POD to the ocean or to the confluence with a flow-regulated watercourse.
3. A determination of the upper limit of anadromy. Procedures for determining the upper limit of anadromy are described in section 4.1.4.
4. Description of the proposed variance(s) ~~from the regional~~ ^{site-specific} criteria for diversion season, minimum bypass flow, and/or maximum cumulative diversion.
5. A scientifically based analysis using site specific data and reproducible methods demonstrating that the proposed variance(s) will be protective of instream flows needed for anadromous salmonid habitat. The analysis shall consist of hydraulic analysis, geomorphologic analysis, and aquatic habitat analysis; and shall evaluate the stream flows needed at the POIs for ensuring adequate flows exist for protection of the following anadromous salmonid life history stages and habitat needs:
 - a. upstream passage if a ~~variance to the~~ ^{site-specific} minimum bypass flow criteria is proposed;
 - b. spawning and incubation habitat if a ~~variance to the~~ ^{site-specific} minimum bypass flow criteria is proposed;
 - c. for POIs on Class I or II streams, maintenance of channel forming functions, riparian habitat, and gravel and wood transport if a ~~variance to the~~ ^{site-specific} maximum cumulative diversion criteria is proposed;
 - d. for POIs on Class III streams, maintenance of gravel and wood transport if a ~~variance to the~~ ^{site-specific} maximum cumulative diversion criteria is proposed; and/or
 - e. the effects of water temperature on summer rearing habitat and upstream (adult) and downstream (juvenile) migration if a ~~variance to the~~ ^{site-specific} season of diversion criteria is proposed.
6. Daily flow analyses shall be performed with the site-specific criteria to evaluate whether the project described in the proposed project, in combination with senior water rights, may affect instream flows needed for

Figure A-1. Guidelines for Preparation of Water Supply Report and Instream Flow Analysis



2. A daily flow study method, for projects that cannot obtain a streamlined water availability determination, to assess whether the proposed project, in combination with senior diversions, will affect instream flows needed for fishery resources (sections A.5.11 through A.5.13); and
3. Guidance for conducting site-specific studies to obtain variances to the regional criteria (section A.6.0).

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A.5.1 Will the regional criteria for diversion season, minimum bypass flow and maximum cumulative diversion rate be used?

This decision allows the applicant to choose whether to (1) complete the instream flow analysis using the regional criteria for diversion season, minimum bypass flow and maximum cumulative diversion, or (2) go directly to conducting a site-specific study to develop site-specific criteria, then complete the instream flow analysis using the site-specific criteria.

Most applicants would probably perform the instream flow analysis using the regional criteria first, then conduct a site-specific study for a variance from the regional criteria if the analysis indicates that the proposed project may negatively impact the instream flows needed for fishery resources. However, the applicant has the option to go directly to site-specific studies, especially if there is existing information available that indicates that a variance to the regional criteria may be warranted or other site specific information is readily available. The site-specific study requirements are described in section A.6.0.

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A.5.2 Initial calculations needed for Instream Flow Analysis

After the POIs have been selected, the applicant will need additional information to complete the analysis of the impacts to instream flows. The stream flow records and the information on senior water right holders from State Water Board Division of Water Rights files that have already been gathered will be used in this analysis. In addition the applicant will need to calculate the following at the POIs:

- Drainage area, using methods previously described in section A.2.1.1;
- Average annual precipitation, using methods previously described in section A.2.1.2;
- Mean annual unimpaired flow (section A.5.2.1);
- Minimum bypass flow (section A.5.2.2), and
- Maximum cumulative diversion (section A.5.2.3).

A.5.2.1 Estimate the mean annual unimpaired flow at the POIs

Mean annual unimpaired flow is the average rate of flow past a location if no diversions (impairments) were taking place in the watershed above that point.

A.5.12 Does the proposed project affect instream flows needed for fishery resources using the regional criteria?

If the daily flow studies show that the proposed project, in combination with senior diversions, affects the instream flow needs of fishery resources using the regional criteria, then there may not be enough water available for the project as proposed.

If the daily flow studies indicate the proposed project, in combination with senior diversions, complies with the regional criteria, then water is available for the proposed project.

A.5.13 Can the project be modified?

If the daily flow studies indicate the proposed project, in combination with senior diversions, does not comply with the regional criteria, the applicant may modify the proposed project so that it complies with the regional criteria, or do site-specific studies to obtain variances from the regional criteria.

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There are numerous ways in which the applicant could modify the project. Examples of project modifications include: reductions in the amount of water collected to storage, reductions in the rate of direct diversion, placing a cap on the maximum rate of diversion, or raising the minimum bypass flow.

Depending on the modification to the project, the applicant may need to conduct additional daily flow studies to demonstrate the modified project is protective of the instream flow needs of fishery resources. If the modified project complies with the regional criteria, water is available for appropriation.

If the project cannot be modified, or if the modified project still does not comply with the regional criteria, then the applicant may conduct site-specific studies to evaluate whether variances may be obtained from the regional criteria for diversion season, minimum bypass flow, and/or maximum cumulative diversion.

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are appropriate.

A.6.0 Site-specific Study to Obtain Variances From the Regional Criteria for Diversion Season, Minimum Bypass Flow and/or Maximum Cumulative Diversion

for Site Specific

The applicant may conduct site-specific studies to support a request for the State Water Board to consider granting a variance from the regional criteria that is protective of instream flows.

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The site-specific studies shall be conducted by a qualified fisheries biologist. Fisheries biologist qualifications are described in section A.3.1. Prior to conducting the site-specific studies, the name(s) and qualifications of the individual(s) selected to perform the studies shall be provided to the State Water Board for review and

site-specific

approval. The results of the site-specific study shall be submitted to the State Water Board for review and approval. If the State Water Board approves the proposed ~~variances to the regional~~ criteria, the site-specific criteria may be used to evaluate whether there is enough water available for the proposed project while providing protective instream flows for fish and their habitat.

The site-specific study shall consist of the following elements:

site-specific

1. For proposed ~~variances from the regional~~ criteria, the geographic scope of the site-specific study shall extend to all POIs.
2. A description, supported by scientific evidence, of the historical and current presence of anadromous salmonids by fish species and life history stages from the POD to the ocean or to the confluence with a flow-regulated watercourse.
3. A determination of the upper limit of anadromy. Procedures for determining the upper limit of anadromy are described in section A.3.0
4. Description of the proposed ~~variance(s) from the regional~~ criteria for diversion season, minimum bypass flow, and/or maximum cumulative diversion.

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5. A scientifically based analysis using site specific data and reproducible methods demonstrating that the proposed ~~variance(s)~~ will be protective of instream flows needed for anadromous salmonid habitat. The analysis shall consist of hydraulic analysis, geomorphologic analysis, and aquatic habitat analysis; and shall evaluate the stream flows needed at the POIs for ensuring adequate flows exist for protection of the following anadromous salmonid life history stages and habitat needs:

site-specific criteria

site-specific

- a. upstream passage if a ~~variance to the~~ minimum bypass flow criteria is proposed;
- b. spawning and incubation habitat if a ~~variance to the~~ minimum bypass flow criteria is proposed;
- c. maintenance of channel and riparian habitat if a ~~variance to the~~ maximum cumulative diversion criteria is proposed; and/or
- d. the effects of water temperature on summer rearing habitat and upstream (adult) and downstream (juvenile) migration if a ~~variance to the~~ season of diversion criteria is proposed.

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6. Daily flow analysis shall be performed with the site-specific criteria to evaluate whether the proposed project, in combination with senior diversions, may affect instream flows needed for the protection of fishery resources. The method in section A.5.11 may be used for a