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# Analysis of S. 2198: Emergency Drought Relief Act of 2014

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## Summary

Over the past five years, portions of the country have been gripped with extensive drought, including the state of California. Drought conditions in California are “exceptional” and “extreme” in much of the state, including in prime agricultural areas of the Central Valley, according to the U.S. Drought Monitor. Such conditions pose significant challenges to water managers who before this dry winter were already grappling with below-normal surface water storage in the state’s largest reservoirs. Groundwater levels in many areas of the state also have declined due to increased pumping over the last three dry years. While recent rains have improved the water year outlook somewhat—moving the year from the driest on record in terms of precipitation to date to the third-driest—water managers are fearful of the long-term impacts of a relatively dry winter and little existing snowpack to refresh supplies later in the year.

Because of the extent of the drought in California, drought impacts are varied and widespread. Most of the San Joaquin Valley is in exceptional drought, and federal and state water supply allotments are at historic lows. Many farmers are fallowing lands and some are removing permanent tree crops. Cities and towns have also been affected, and the governor has requested voluntary water use cutbacks of 20%. The effects of the drought are also likely to be felt on fish and wildlife species and the recreational and commercial activities they support, potentially including North Coast salmon fisheries. The intensity of the drought in California has generated congressional interest.

Several bills have been introduced to address drought conditions in California. This report discusses S. 2198, which would address drought impacts in California and other states, and assist with drought response. This bill has two titles. Title I contains provisions ranging from mandating maximization of California water supplies through specific project development, management, and operations directives and addressing project environmental reviews—as long as actions are consistent with applicable law and regulations and not highly inefficient—to reauthorizing several water resources management laws. In addressing drought effects, Title I also would address project operations that relate to long-standing and controversial issues associated with management of the federal Bureau of Reclamation’s Central Valley Project (CVP) and the California Department of Water Resources’ State Water Project (SWP). Title II would expand the assistance potentially available under an emergency declaration for drought (or other emergency) pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended.

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## Introduction

Several states are experiencing varying degrees of drought, with several western states experiencing severe to exceptional drought conditions. Drought conditions persist in all counties in California, with a majority classified as in either extreme or exceptional drought.<sup>1</sup> Notwithstanding recent rains,<sup>2</sup> California is experiencing its third consecutive dry year, which has resulted in abnormally low reservoir levels, as well as low surface and groundwater levels. Current drought conditions in California and much of the West have fueled congressional interest in drought and its effects on water supplies, agriculture, and ecosystems.<sup>3</sup>

Several bills have been introduced in the 113<sup>th</sup> Congress to address different aspects of drought in California and other regions.<sup>4</sup> This report focuses on S. 2198, the “Emergency Drought Relief Act,” which was introduced April 2, 2014, and may proceed quickly to the Senate floor under an expedited rule, Senate Rule XIV.<sup>5</sup> S. 2198 is largely a revision of a previous drought bill, S. 2016, the “California Emergency Drought Relief Act.” Some provisions in S. 2198 have been broadened to apply to states outside of California; however, certain provisions in Title I remain focused on California water project development, management, and operation. Additionally, S. 2016 contained numerous direct spending provisions that are not included in S. 2198.

Overall, S. 2198 directs the Secretary of the Interior, the Secretary of Commerce, and the Administrator of the Environmental Protection Agency (EPA), to undertake numerous actions that would address emergency drought impacts in California and other states, by aiming to increase water supplies for California water users, expanding purposes of program funding for drought mitigation activities, streamlining environmental reviews, providing drought planning assistance, addressing Colorado River water supplies, addressing Klamath River Basin water issues, and expanding the availability of federal emergency disaster assistance. The bill also would reauthorize and modify several water resource management programs.

S. 2198 includes two titles:

- **Title I**, “Emergency Drought Relief,” contains 14 provisions ranging from mandating maximization of California water supplies—consistent with laws and regulations—through specific project development, management, and operations directives and addressing project environmental reviews, to reauthorizing several water resources management laws (CALFED, P.L. 108-361;<sup>6</sup> the Reclamation

<sup>1</sup> See <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>.

<sup>2</sup> Although on February 1, 2014, it looked as though 2014 would be the driest year on record for California, recent precipitation has improved conditions slightly, and as of April 1, the year registers as the third-driest on record.

<sup>3</sup> For information on drought in general, see CRS Report R43407, *Drought in the United States: Causes and Current Understanding*, by (name redacted) and (name redacted).

<sup>4</sup> Other selected bills that address drought or water management in California include H.R. 3964, which passed the House on February 5, 2014; H.R. 1927; H.R. 4039; H.R. 4239; H.R. 4300; and some bills that address water storage specifically (e.g., H.R. 4126 and H.R. 4127).

<sup>5</sup> For information on Senate Rule XVI, see CRS Report RS22309, *Senate Rule XIV Procedure for Placing Measures Directly on the Senate Calendar*, by (name redacted) and Christina Wu.

<sup>6</sup> Section 108 of S. 2198. CALFED is a program created to address water supply and ecosystem restoration issues in the California Bay-Delta. The program and specific federal agency actions were authorized under P.L. 108-361. S. 2198 would reauthorize funding for activities authorized under P.L. 108-361 until 2018.

States Emergency Drought Relief Act, P.L. 102-250, 106 Stat. 53, as amended;<sup>7</sup> and the Secure Water Act, P.L. 111-11, Subtitle F).<sup>8</sup>

- **Title II**, “Federal Disaster Assistance,” expands the assistance potentially available under an emergency declaration for drought (or other emergency) pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, and discusses in congressional findings the application of the act to drought.

The scope of S. 2198 is fairly broad, as it would address certain drought-related assistance for states that are experiencing drought, as well as specific issues related to water infrastructure and conveyance in California. In relation to projects and operations that would address drought in California, S. 2198 would direct federal agencies to maximize water supplies and streamline environmental reviews while remaining “consistent” with law and regulations. This policy approach is aimed at addressing drought, and in doing so, touches upon many long-standing and controversial issues associated with operations of the federal Central Valley Project (CVP), managed by the U.S. Bureau of Reclamation (hereinafter referred to as Reclamation), and the State Water Project (SWP), managed by the California Department of Water Resources. Proposed provisions related to these projects and operations raise several questions that are noted throughout the analysis of Title I below.

## **Title I: Emergency Drought Relief**

Title I of S. 2198 includes numerous sections related to emergency drought relief. As noted above, these sections range widely. While Section 103 of the bill focuses on specific actions related to California water supply management, other sections apply to any state during the time for which a state emergency drought declaration is in effect or a U.S. Department of Agriculture (USDA) natural or agricultural disaster declaration is in effect. S. 2198 also would change, or in some cases modify, implementation procedures or financial assistance for several water resource and water quality programs. These include the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2201 et seq.), the Secure Water Act of 2009 (42 U.S.C. 10361 et seq.), and State Revolving Funds (SRFs) administered by the Environmental Protection Agency (EPA) under the federal Clean Water Act (33 U.S.C. 1231 et seq.) and the Safe Drinking Water Act (42 U.S.C. 300j-12). One such provision would direct the Secretary of the Interior to fund or participate in pilot projects to increase water supplies in Colorado River Storage Project reservoirs.<sup>9</sup>

Title I of S. 2198 also would authorize federal drought planning assistance, including hydrologic forecasting and other planning or technical assistance, upon the request of CVP or Klamath Project contractors or other Reclamation project contractors in California.<sup>10</sup> Title I would reauthorize funding for CALFED activities through 2018 and the Reclamation States Emergency Drought Relief Act through 2019, and increase the funding ceiling for the Secure Water Act. The bill also would expand the Secure Water Act to include the state of Hawaii.

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<sup>7</sup> Section 109 of S. 2198.

<sup>8</sup> Section 110 of S. 2198.

<sup>9</sup> Section 111 of S. 2198.

<sup>10</sup> Section 107 of S. 2198.

Title I provisions related to California water flow, infrastructure development and operations, and environmental permitting have one overarching theme: maximization of water supplies available for general agricultural and municipal and industrial demand while an emergency drought declaration is in effect—consistent with existing law and regulations. Other provisions under Title I would largely modify, expand, or reauthorize existing program authorizations.

## Section 103. Emergency Projects<sup>11</sup>

### Section 103(a). In General

Section 103(a) would direct the Secretary of the Interior, the Secretary of Commerce, and the Administrator of the Environmental Protection Agency (together defined as “the Secretaries” under the act) to provide the maximum quantity of water supplies possible to CVP and Klamath Project agricultural, municipal and industrial (M&I), and refuge service and repayment contractors; SWP contractors; and any other locality or municipality in the state of California, by approving, consistent with applicable laws and regulations, the following types of projects and operations:<sup>12</sup>

- any project or operations to provide additional water supplies “if there is any possible way whatsoever that the Secretaries can do so,” unless the project or operations result in a highly inefficient way of providing additional supplies;
- any project or operations “as quickly as possible” to address emergency conditions.

This provision provides broad authority to the Secretaries to approve “any” project or operational change that would provide additional water supplies (unless the action is highly inefficient or inconsistent with “applicable” laws). This could include, for example, projects ranging from relatively small conservation or efficiency projects to large projects expanding storage or conveyance facilities to provide additional water to users throughout different seasons, as well as to adjusting operations at reservoirs or in the Delta to increase water supplies.<sup>13</sup> Additionally, this section would create the authority necessary for federal participation in state-driven projects to address the drought. California recently passed a law providing \$687.4 million to address the

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<sup>11</sup> Section 101 of S. 2198 includes findings related to drought conditions in California, some of which have changed since S. 2016, a predecessor bill to S. 2198, was introduced and upon which findings in S. 2198 appear to be based. See CRS Report IF00008, *California Drought: Water Supply and Conveyance Issues (In Focus)*, by (name redacted), for an update of California precipitation and snowpack conditions. Section 102 of S. 2198 includes definitions.

<sup>12</sup> Sections 103(a) and 103(b) of S. 2198 direct the Secretaries of the Interior and Commerce and the Administrator of the Environmental Protection Agency (EPA), together defined as the “Secretaries” under Section 102 of S. 2198, to maximize water supplies for users within the scope of state and federal laws and regulations. Section 112 states that no state laws in effect on the date of this bill being enacted will be preempted, including area-of-origin and water rights protections. Further, in carrying out emergency projects authorized under Section 103(b), the bill specifically states that projects carried out are to be “consistent with applicable laws (including regulations).”

<sup>13</sup> Some might contend that this provision could constitute federal approval to begin activities under the proposed Bay-Delta Conservation Plan (BDCP); however, to date, BDCP documents indicate that the plan is not intended to provide new, additional water supplies beyond what is authorized. Seasonal increases in the amount of water supplies provided could result from the BDCP. (See Bay-Delta Conservation Plan: Your Questions Answered, Surface Water and Storage at <http://baydeltaconservationplan.com/AboutBDCP/YourQuestionsAnswered.aspx>.) At least one group has raised this issue. See Friends of the River, “Senate Drought Bill Has Some Real Solutions, *but does it prioritize agribusiness over urban communities running out of water?*,” press release, February 11, 2014. [http://www.friendsoftheriver.org/site/DocServer/FOR\\_Media\\_Release—Senate\\_Drought\\_Bill.pdf?docID=7481](http://www.friendsoftheriver.org/site/DocServer/FOR_Media_Release—Senate_Drought_Bill.pdf?docID=7481).

drought. The intent of this section, according to some sponsors of the bill, is to provide flexibility to increase water supplies and allow federal agencies to use water supplies during periods of increased precipitation.<sup>14</sup> There are several questions or issues that might arise from this section. A brief summary of each is listed below.

- Section 103(a) raises the question as to how agencies are to provide the maximum amount of water supplies and, relatedly, how they would determine what constitutes maximization of water supplies consistent with laws and regulations. Implementation of the provision could be difficult and possibly contentious. For example, the effects of providing maximum water supplies on species viability and water quality may not be apparent, quantifiable, or known for several years into the future. Conversely, agencies and water users may not agree that particular actions are providing maximum water quantities. Some observers already believe the agencies are maximizing water supplies to the detriment of species; while others are advocating relaxation of some laws and regulations.
- Projects or operations authorized under this section are to provide maximum quantities of water by approving projects and operations to provide “additional water supplies”; however, there is no definition for additional water supplies in S. 2198. The lack of specificity raises the question of whether the language is meant to apply to water supplies during parts of the year, the entire year, or several years.
- The broad variety of potential projects that could be authorized under this section are tempered by language stating that projects and actions must be consistent with applicable law and should not be a “highly inefficient way of providing additional water supplies.” The term “highly inefficient” is not defined and a determination would presumably be subject to the discretion or judgment of the Secretaries. Whether the term “highly inefficient” relates to cost efficiency, water supply efficiency, procedural efficiency, or perhaps all of these, is not specified.
- Projects and operational changes would have to be consistent with state and federal endangered species laws and regulations, as well as with the National Environmental Policy Act (NEPA; 42 U.S.C. §4321, et seq.), California Environmental Quality Act (CEQA), and water quality laws and regulations, among other laws and regulations. This provision raises the question of how the term “consistent with the law” might be interpreted as opposed to “pursuant to” or “in compliance with” applicable laws. Some might question if the phrase “consistent with law” would allow for more agency discretion or flexibility than other phrases. Ultimately, determining what is or is not consistent with laws and regulations may be left to the courts.
- The authority in this section would also be limited by the duration of the drought emergency declaration. Specifically, Section 112 states that the authority for this section of the bill would expire when the governor suspends the state drought emergency declaration. It is unclear; however, if a project started under this

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<sup>14</sup> Senator Diane Feinstein, “California, Oregon Senators Introduce Drought Relief Legislation,” press release, February 11, 2014, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=e7668832-d0be-4329-a30f-d1e5e47863aa>.



authority would enjoy permanent authorization or how it would be funded after the emergency funding under Section 104 of S. 2198 expires.

- The provision also would mandate that projects or operations be implemented as quickly as possible. It appears this provision could provide additional authority for agencies to streamline permit processes or feasibility studies for implementing projects, as long as such actions were consistent with existing laws and regulations. Although streamlining or shortening these processes would arguably lower the time it takes for operations and projects to become operational, and would therefore have a more immediate effect on reducing drought impacts, it is not clear whether such action would be helpful in the long run, for example, if full effects on species were not accounted for and species declined at a rapid pace.

### **Section 103(b). Mandate**

Section 103(b) of S. 2198 contains 12 subsections that would direct the Secretaries to implement several specific project-related and operational actions in California for carrying out Section 103(a). As with Section 103(a), Section 103(b) states that all actions are to be accomplished consistent with applicable laws and regulations. Project water deliveries from the CVP and SWP are sometimes limited due to federal and state endangered species regulations, as well as state water quality regulations. Such regulations may limit how much and when water is released from reservoirs and pumped from the Bay-Delta. These reductions are controversial and are at the crux of management disputes among water contractors, environmental groups, fisheries interests, and others. Several subsections of Section 103(b) address specific projects and project operations that may have an effect on project water deliveries, as well as species viability and water quality.

Some selected actions directed by Section 103(b) include the following:

- modifying the operations of water conveyance infrastructure to maximize supplies for water users;
- modifying water flows to increase water supplies;
- establishing a deadline for the U.S. Fish and Wildlife Service (FWS) and Reclamation to meet NEPA and ESA requirements for certain decisions involving land fallowing;
- addressing water transfers so that maximum water supplies are available;
- addressing the effects of actions authorized under Section 103(b) on species viability and implementing projects to offset any effects;
- using scientific tools to assess if any changes to water conveyance and flow operations could result in additional water supplies.

Several of these specified actions are focused on increasing water supplies (or minimizing reductions to water supplies); however, their effectiveness in achieving their objectives will be tempered by the condition that they are to be implemented consistent with applicable laws and regulations. Further, the actions specified in this section are only in effect until the governor of the state suspends the state of drought emergency declaration. This section generates similar



questions and potential issues to those discussed in relation to Section 103(a). This section also generates some potentially broad questions, discussed below.<sup>15</sup>

- Some might question how the projects and operations specified in this section will differ from existing actions if they are to be consistent with the law and regulations. For example, the section raises the question as to whether or not agencies are already maximizing water supplies or have any flexibility to do more than they are currently doing under existing laws and regulations.
- Some may respond that agency actions specified under this section will be directed to maximize water supplies as a priority over other considerations if the bill is enacted. On the other hand, others might argue that such would not be consistent with existing law and regulations. Agencies would have to balance the new directives with parameters prescribed in existing law and regulations, thus making it difficult to estimate what affect the provision would have on projects and project operations.
- Some might question if the actions in this section and the direction to maximize water supplies for users might have unintended or long-term consequences for species in or migrating through the Bay-Delta. Some of the provisions under Section 103(b) contain directions to monitor the effects of actions on species and, in some cases, recommend changes to regulations. However, these actions appear to cover short-term effects, such as entrainment of species at project pumps, and might not address or contemplate long-term effects on species.

### **Section 103(c). Other Agencies**

Section 103(c) states that the provisions of Section 103 shall apply to all federal agencies that have a role in approving projects in Sections 103(a) and 103(b) of this bill. Thus, although not specifically mentioned, if the Corps of Engineers or another agency has a permitting or approval role in one of the projects that could be implemented under Section 103, the provisions of Section 103 would also apply to that agency.

### **Section 103(d). Accelerated Project Decision and Elevation<sup>16</sup>**

Section 103(d)(1) directs federal agencies, upon request of the state of California, to use “expedited procedures under this subsection” to make final decisions related to federal projects or operations that would provide additional water or address emergency drought conditions under Sections 103(a) and 103(b). Pursuant to Section 103(d)(2), after receiving a request from the state, the head of an agency referred to in Section 103(a), or the head of another federal agency responsible for reviewing a project, the Secretary of the Interior would be required to convene a “final project decision meeting” with the heads of all relevant federal agencies “to decide whether to approve a project to provide emergency water supplies.”

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<sup>15</sup> A detailed analysis of the subsections under §103(b) can be found in a CRS Congressional Distribution Memorandum by (name redacted) and (name redacted). Please contact them for the memorandum.

<sup>16</sup> The summary of this subsection was prepared by (name redacted), CRS Analyst in Environmental Policy. (name redacted), CRS Legislative Attorney, also contributed to this section.

After receiving a request for resolution, the Secretary would be required to notify the heads of all relevant agencies of the request for resolution, the project to be reviewed, and the date of the meeting. The meeting must be convened within seven days of the request for resolution. Not later than 10 days after that meeting, S. 2198 would require the head of the relevant federal agency to issue a final decision on the project. The Secretary (presumably the Secretary of the Interior) is authorized to convene a final project decision meeting at any time, regardless of whether a request for resolution is requested by the state.

The accelerated project decision and elevation provisions would not mandate federal agency approval of a project. Instead, they would establish procedures to expedite the federal agency process for deciding *whether* to approve a project. As discussed above, provisions in Section 103(b) specify that projects carried out shall be consistent with current laws and regulations. As a result, it would appear that agencies could decide not to approve a project.

- This subsection appears to apply to a broad set of projects and operations, as long as such are requested by the state or agency heads for final approval. Specifically, it appears that this subsection might supersede regular processes for final project decisions under various laws, including but not limited to NEPA and ESA. However, earlier parts of S. 2198 mandate that actions be consistent with current laws and regulations. Thus, it is not clear how this provision might be implemented.<sup>17</sup>
- Given the short timeframe for deciding whether to approve the project—10 days from the request of the state or agency heads—it is difficult to determine whether a state or agency head may make a request for resolution for a project unless or until that project complies with applicable law.
- Also, a final decision related to a project pursuant to Sections 103(a) and 103(b) would be subject to the meetings convened by the Secretary instead of the traditional processes established by the federal agencies. The specific process for approving or not approving a project is not provided in the bill and therefore raises the question of how final project decisions would be made (e.g., by consensus, majority vote).
- Presuming that a meeting could be requested as soon as a project is submitted, it is uncertain how much analysis of a project could be done within the 10-day time frame to approve a project. A question to consider is, if not enough time is provided to make a decision, could the meeting result in a default rejection of the project?

## Section 104. Emergency Funding<sup>18</sup>

Section 104 would authorize the use of funds for the Secretary (presumably the Secretary of Commerce or the Secretary of Interior, but it is not specified) to provide “financial assistance” under the Reclamation States Emergency Drought Relief Act (RSEDR Act), the Secure Water Act

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<sup>17</sup> For legal questions related to how this process might differ from current practice, please contact (name redacted), CRS Legislative Attorney, at 7-.....

<sup>18</sup> The summary of Section 104 was prepared by Nicole Carter, CRS Specialist in Natural Resources Policy. For more information on these programs, contact (name redacted), Specialist in Natural Resources Policy, 7-....., or (name redacted), Specialist in Natural Resources Policy, 7-.....

(Secure), and other federal law “for eligible water projects to assist drought-plagued areas of the State [California] and the West.” By referencing “the West,” Section 104 may limit the geographic eligibility for financial assistance to the 17 Reclamation states.<sup>19</sup> Section 104(a)(2) appears to expand the eligibility for financial assistance to organizations and entities (public or private) engaged in collaborative processes to restore the environment, water rights settlements, and restoration settlements.

Section 104(b) identifies a range of projects that would be eligible for assistance: it specifically identifies water diversion, pumping, water wells, conservation, irrigation, agricultural water conservation, maintenance of crop cover for dust management for public health purposes, and technical irrigation assistance, and would provide the Secretary discretion for assistance to other activities that increase available water supplies and mitigate drought impacts. Most, but perhaps not all of these purposes, are already authorized under RSEDR Act, Secure, or WaterSMART.

Section 103 states that funding made available under Section 104 may be used to meet the “contract water supply needs of Central Valley Project refuges through the improvement or installation of wells to use groundwater resources and the purchase of water from willing sellers.”

Under Section 114 of the bill, the authority under Section 104 would expire on the earlier of when a state-declared drought declaration is withdrawn, or a USDA-declared natural disaster declaration is suspended.

## **Section 105. Emergency Environmental Reviews<sup>20</sup>**

Emergency environmental review provisions in Section 105 may affect how certain emergency federal and federally funded drought projects in California would be required to demonstrate compliance with NEPA. Broadly speaking, NEPA requires federal agencies to identify and consider the environmental impacts of a proposed federal action before a final agency decision is made on that action. In doing so, NEPA intends to inform the federal decision-making process with regard to agency actions that would affect the environment.

Section 105 directs agencies responsible for implementing projects under this bill to consult with the Council on Environmental Quality (CEQ) to develop “alternative arrangements” to comply with NEPA in accordance with existing regulations. Emergency compliance arrangements are currently allowed in existing CEQ regulations implementing NEPA.<sup>21</sup> These regulations provide that an agency may seek such alternative arrangements when an emergency makes it necessary to take “an action with significant environmental impact.”<sup>22</sup> This provision would apply to any states while a state-declared drought declaration or a USDA-declared natural disaster declaration is in effect. It is difficult to identify whether and/or to which projects such alternative

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<sup>19</sup> Whether the authority provided in Section 104 would apply to Hawaii due to the expansion of eligibility provided in Section 110 is not specified. Under the Reclamation Act of 1902, as amended, the 17 Reclamation states include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

<sup>20</sup> Summary of Section 105 was prepared by (name redacted), Analyst in Environmental Policy, CRS Resources, Science, and Industry Division. (name redacted), Legislative Attorney in the CRS American Law Division, also contributed to this section.

<sup>21</sup> 40 C.F.R. 1506.11.

<sup>22</sup> *Ibid.*

arrangements would apply. For example, there is some question as to whether the projects mandated in Section 103(b) would require review under NEPA. Although the statute is not explicitly repealed, and courts disfavor repeals by implication, courts have found that where a law gives no discretion to an agency, NEPA does not apply. The theory is that if the NEPA review would not inform agency decision making—because the actions are strictly mandated by Congress—NEPA does not apply. In making such a determination, a court would consider whether a federal agency had control over the action. Under the Section 103(b) projects, agencies would be required to carry out 13 mandated actions. Some of these 103(b) mandates are very specific (e.g., the mandated 1:1 inflow-to-export ratio for the increased flow of the San Joaquin River in Section 103(b)(4)). It is possible that the specificity of this action could lead a court to decide that the agency lacked discretion and that a NEPA review was not required. Other federal and state environmental laws may still apply, however.

- Regardless of whether NEPA applies or how NEPA compliance must be demonstrated, an agency would still be required to determine whether the project’s impacts would require compliance with state or federal environmental requirements established under other laws, regulations, or executive orders. That is, even if compliance with NEPA was not required, the actions required or funded under S. 2198 would need to be consistent with applicable requirements such as those established under the ESA or state and federal water quality laws, among others. The language raises the question as to how such consistency is to be demonstrated, and at what point that burden of demonstration falls.

## **Section 106. State Revolving Funds<sup>23</sup>**

Section 106 addresses California’s use of monies in its State Revolving Fund programs that assist wastewater and drinking water infrastructure projects, pursuant to the federal Clean Water Act (CWA) and the federal Safe Drinking Water Act (SDWA), respectively. The SRFs provide loans and other types of financing assistance under specific terms set by California and other states. S. 2198 adds no new or supplemental funding for California’s SRF programs. Rather, S. 2198 directs the Environmental Protection Agency (EPA) Administrator, when allocating SRF funds, to require that the state of California review and give priority to projects that will “provide additional water supplies most expeditiously to areas that are at risk of having inadequate supply of water for public health and safety purposes or to improve resilience to droughts.”

- The bill does not appear to add new types of project eligibility under the SRF programs. Instead, it appears intended to direct the state’s priorities when awarding assistance among projects that already are SRF-eligible. These could include water recycling projects (e.g., recycled water treatment works and recycled water distribution systems) and water conservation measures, which currently are eligible under the state’s clean water SRF program. It also could include source water and water storage projects that address the state’s public health priorities, which are eligible under California’s drinking water SRF program.

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<sup>23</sup> The summary of Section 106 was prepared by (name redacted), Specialist in Resources and Environmental Policy, CRS Resources, Science, and Industry Division.

- The California agencies that administer the SRF programs have well-established procedures for identifying and prioritizing projects eligible for assistance. Intended Use Plans are prepared annually and are open to public participation. While the apparent intention of this section of S. 2198 is to provide funds expeditiously, it is unclear how quickly this could occur, in light of the state's existing priorities.

For projects that are awarded assistance pursuant to Section 106, the bill would direct the EPA Administrator to expedite review of Buy American waiver requests, if such requests are submitted, and it authorizes 40-year loan repayments to the SRFs. Under both of the SRF programs, loans are normally to be repaid to a state within 20 years, but terms may be extended to 30 years in cases such as economically disadvantaged communities. Under the legislation, both of these provisions also would apply to any other state that has a state-declared drought declaration in force, or for which the Secretary of Agriculture has declared a drought or agricultural disaster.

Finally, the bill provides that nothing in Section 106 authorizes EPA to modify existing state-by-state funding allocations, funding criteria, or other requirements related to the CWA and SDWA SRF programs for any states other than California or a state that has a state-declared drought or USDA-declared disaster declaration.

Under Section 114 of the bill, the authority under Section 106 would expire on the earlier of when a state-declared drought declaration is withdrawn, or a USDA-declared natural disaster declaration is suspended.

## **Section 107. Drought Planning Assistance**

Section 107 directs that upon the request of Reclamation Project contractors in California (as well as all Klamath contractors), Reclamation shall provide water supply planning assistance for and in response to dry, critically dry, and below-normal water year types.

## **Section 108. CALFED Bay-Delta Act Reauthorization**

Section 108 reauthorizes the CALFED Bay-Delta Act (P.L. 108-361) through 2018. Many water- and species-related activities conducted by Reclamation and other federal agencies in the Bay-Delta are authorized under this act.

## **Section 109. Reclamation States Emergency Drought Relief Act Reauthorization**

Section 109 would extend the authorization of appropriations for the Reclamation States Emergency Drought Relief Act through FY2019 and increase the total authorized amount for FY2006 to FY2019 from \$90 million to \$190 million. It also would postpone the expiration of the program's authority from 2017 to 2019.

## **Section 110. Secure Water Act Reauthorization**

As part of Interior’s WaterSMART initiative, Reclamation manages a water and energy efficiency grant program using an authority provided by the Secure Water Act (42 U.S.C. 10364) and other authorities. Section 110 would increase the authorization of appropriations for the grants authorized by the Secure Water Act from \$200 million to \$300 million and would expand eligibility to include entities in the state of Hawaii.<sup>24</sup> Section 110 also would provide the Commissioner of Reclamation with the ability to waive all associated nonfederal cost-share requirements to address emergency situations (e.g., waive the 50% nonfederal cost share). Section 110 would also allow the Commissioner to prioritize projects that “expeditiously yield water supply benefits” during drought.

## **Section 111. Colorado River Basin System Water**

Section 111 would address water supply concerns in the Colorado River Basin. The basin has experienced decreasing water supplies over the last 14 years, and many fear it is in danger of reaching levels in Lake Mead that would trigger implementation of water shortage allocations for Colorado River water users. Section 111 would attempt to address these concerns by directing the Secretary of the Interior, as soon as practicable, to fund or participate in pilot projects to increase water in Lake Mead and other reservoirs of “initial” units of the Colorado River Storage Project (as authorized under the first section of the Act of April 11, 1956; 43 U.S.C. 620). Funding for the pilot projects would be directed to come from grants made by the Secretary to public entities that use Colorado River Basin water for municipal purposes and would be for projects implemented by one or more nonfederal entities or for implementing water conservation agreements in existence on the date of enactment of S. 2198. Section 111(c) specifically notes that Upper Colorado River Basin Fund moneys would not be available for use in carrying out this section.

- The pilot projects in this section are limited to purposes as outlined in the Secure Water Act (42. U.S.C. 10364), which are quite varied. The provision appears to prioritize Colorado River Basin grants in that it would direct the Secretary to provide them as soon as practicable, whereas other existing laws authorize the Secretary to provide funding for various projects but do not necessarily direct him/her to do so. It is not clear what funding source the Secretary would use to fund this provision, although it is clear that the Secretary could not use the Upper Colorado River Basin Fund.

## **Section 112. Effect on State Laws**

Section 112 of S. 2198 states that if the bill were to be enacted, it would not preempt any California state law in effect on the date of such enactment, including area-of-origin, or other water rights protections.

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<sup>24</sup> Whether the authority provided in Section 104 would apply to Hawaii is not specified.



## **Section 113. Klamath Basin Water Supply**

Section 113 of the bill would provide a general authorization for the Secretary of the Interior to conduct ecosystem restoration and water conservation activities in the Klamath Basin watershed. The water conservation activities authorized under this section could potentially decrease water demand in the Klamath Basin, an over-allocated basin in a prolonged state of drought. The ecosystem restoration activities could potentially increase the resilience of some fish species in the Klamath Basin that have been stressed by drought, among other things. Notably, both types of activities have previously been proposed in the Klamath Basin Restoration Agreement (KBRA), a water rights settlement involving the federal government, which is controversial among some and has yet to be authorized by Congress. Examples of KBRA activities that may be authorized by Section 113 include programs to purchase and “retire” certain water rights in the basin, restore endangered fish habitat, and reintroduce some fish populations.

## **Section 114. Termination of Authorities.**

Section 114 states that authorities under Section 103 expire when the governor of the state suspends the drought emergency declaration. The authority under Sections 104, 105, and 106 expires in a state or area on the earlier of (1) the date the emergency declaration is withdrawn; or (2) the date when the Secretary of Agriculture suspends the national disaster declaration issued under the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)) for drought or an agricultural disaster area.

## **Title II: Federal Disaster Assistance<sup>25</sup>**

Title II of S. 2198 would amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5192(a)), to expand the available programs under an emergency declaration to include disaster unemployment assistance (DUA), emergency nutrition assistance, and crisis counseling assistance. The provision would apply to emergency declarations broadly; that is, it is not limited to drought declarations. Emergency declarations are short-term and, given the immediacy of their work, include an abbreviated group of assistance programs when compared to assistance available under a major disaster declaration. Title II also includes congressional findings indicating that a major drought may be eligible for a major disaster or state of emergency declaration by the President for purposes of the Stafford Act.

If the effects of a drought overwhelm state or local resources, the President, at the request of the state governor or tribal governing body, is authorized under the Stafford Act (42 U.S.C. 5121 et seq.) to issue major disaster or emergency declarations resulting in federal aid to affected parties. However, requests by states for Stafford Act drought-related declarations and related assistance since the 1980s have been denied. The infrequency of presidential domestic drought declarations increases the uncertainty about the circumstances under which such a declaration is likely to be made. The de facto federal policy since the 1980s has been that the U.S. Secretary of Agriculture is the lead in responding and declaring eligibility for federal agricultural disaster assistance, including drought-related disasters. A declaration of an agricultural disaster area by the Secretary

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<sup>25</sup> The summary for Title II was prepared by Francis McCarthy, Analyst in Emergency Management Policy, CRS Government and Finance Division.



of Agriculture triggers the availability of multiple agricultural assistance programs, most notably the programs of the Farm Services Agency (FSA), and may trigger availability of other federal programs, such as the Economic Injury Disaster Loans of the Small Business Administration (SBA).

Since FEMA has deferred to USDA over the past three decades, there are no sections of the Stafford Act, nor regulations or policy guidance documents, that address or even appear to lend themselves to a prolonged drought event as opposed to a disaster incident. FEMA has published a listing of the factors that are considered when evaluating a major disaster request by a governor. However, similar factors are not listed for an emergency declaration, since that action is intended to provide emergency assistance to save lives and protect property and to lessen the threat of a more catastrophic event.

In addition, while governors may request an emergency declaration, the law also provides to the President the authority to issue an emergency declaration if the emergency involves what is considered primarily a federal responsibility. As previously noted, emergency declarations are short-term and include an abbreviated portfolio of assistance programs compared to assistance associated with major disaster declarations. For example, while an emergency declaration can provide debris-removal assistance, it cannot offer any form of repair to damaged permanent facilities. Similarly, while emergency temporary housing is available through Section 408 of the Stafford Act, other programs assisting families and individuals are not. In light of those differences, Title II of S. 2198 would expand the available programs under an emergency declaration to include disaster unemployment assistance (DUA), emergency nutrition assistance, and crisis counseling assistance.

While each of those programs offers special, targeted assistance for unique problems caused by a disaster event, the reference to the DUA program has the closest link to previous FEMA actions. For example, the President declared a disaster due to a freeze during the winter of 2007. The main form of assistance provided at that time was DUA for farmworkers unemployed by the weather event. The proposed changes to the emergency section would arguably provide the President the authority to provide similar assistance under an emergency declaration without having to reach the bar set by the disaster declaration factors noted earlier.

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