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Analysis of Senate-Passed 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 March rain had 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. The state has also had to restrict diversions from some rivers and streams, including the Sacramento and San Joaquin Rivers, two of the state's largest rivers. 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.

Congress is considering several bills that would address drought conditions in California. This report discusses S. 2198, as passed by the Senate on May 22, 2014. S. 2198 would address drought impacts in California and assist with drought response. The Senate-passed version of S. 2198 contains eight sections, whose provisions range from mandating maximization of California water supplies, through specific emergency 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 prioritizing funding for certain emergency drought activities under existing water laws. In maximizing water supplies, the bill 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), which are operated in coordination under a coordinated operations agreement (COA). Title II of S. 2198 as introduced, which would have expanded the assistance potentially available under an emergency declaration for drought (or other emergencies), was not included in the Senate-passed version of S. 2198.

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Introduction

Several western states are experiencing varying degrees of drought, with much of the West 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.[1] Notwithstanding March rains,[2] 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 fish and wildlife.[3]

Water deliveries to the federal Central Valley Project (CVP) and the California State Water Project (SWP), among others, have received significant attention during the drought. Deliveries to the CVP and SWP are sometimes limited due to federal and state endangered species regulations, as well as state water quality regulations. Such regulations often limit how much and when water is released from reservoirs and pumped from the San Francisco Bay and San Joaquin and Sacramento Rivers Delta (Bay-Delta), and thus result in reduced water deliveries to project water users. Additionally, the amount of available water that is allocated to water contractors during drought is based on state water rights allocations, with "senior" water rights holders—those who were first in line to receive water historically—receiving first priority for available water. In drought years such as 2014, water contractors with rights "junior" to senior water rights might see their CVP water deliveries reduced to zero supply. Reductions to water deliveries from all of the above factors are controversial and are at the crux of management disputes among water contractors, environmental groups, fisheries interests, and others. Additional water delivery curtailments resulting from the drought have resulted in some calling for increased operational flexibility and limits on these environmental restrictions.

Several bills have been introduced in the 113th Congress to address different aspects of drought in California and other regions.[4] This report focuses on Sections 4 through 8 of the Senate-passed version of S. 2198, the "Emergency Drought Relief Act." The original version of the bill was introduced April 2, 2014, and went to the Senate floor, bypassing committee consideration, under an expedited rule, Senate Rule XIV.[5] S. 2198 as introduced was largely a revision of a previous emergency drought bill, S. 2016, the "California Emergency Drought Relief Act."[6] Some provisions in S. 2198 as introduced were broadened to apply to states outside of California; however, the Senate-passed version of S. 2198 dropped many of these provisions. Additionally, S. 2016 contained numerous direct spending provisions that are not included in S. 2198 as introduced or as passed by the Senate.

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[1] See http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA.

[2] 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.

[3] 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).

[4] 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).

[5] 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.

[6] For analysis of S. 2198 as introduced, see CRS Report R43469, *Analysis of S. 2198: Emergency Drought Relief Act of 2014*, by (name redacted) and (name redacted).

S. 2198 as passed by the Senate would direct the Secretary of Agriculture (added since introduction), the Secretary of Commerce, the Secretary of the Interior, 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, prioritizing and expediting program funding for certain drought mitigation activities (e.g., projects providing drinking water and avoiding loss of permanent crops, and including grants for pilot projects increasing reservoir supplies in the Colorado River Basin), providing for emergency environmental reviews, and addressing Klamath River Basin water issues.

The Senate-passed version of S. 2198 includes eight sections, whose provisions range 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 prioritizing funding for certain emergency drought activities under existing water laws and directing development of a comprehensive National Academy of Sciences study on increasing water supplies through control of an invasive plant species known as saltcedar (Tamarix ramosissima).

Senate-passed S. 2198 is narrower in scope than the bill as first introduced. Much of the bill focuses on specific issues related to water infrastructure and conveyance in California. For example, the bill would direct federal agencies to maximize water supplies and streamline environmental reviews while remaining "consistent" with laws 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.

Key issues for Congress include whether the activities mandated and authorized under the bill would provide adequate supplies of water for irrigation of permanent and other crops and public health and safety needs, and whether such activities would hasten the decline of certain fish species protected under state and federal endangered species laws. While the bill would direct federal agencies to operate within existing laws and regulations, it mandates certain CVP and SWP operational activities for which long-term consequences on listed species habitat and water supply are unknown. The proposed provisions related to these projects and operations raise several additional questions that are noted throughout the analysis of S. 2198 below. The remainder of this report discusses key provisions of the Senate-passed S. 2198. The discussion focuses on selected provisions (including subsections) that have received the most attention in congressional debates and in media and stakeholder accounts.

Emergency Drought Relief

The Senate-passed version of S. 2198 includes numerous sections related to emergency drought relief. As noted above, these sections range widely. The first three sections of the bill cover the table of contents, findings, and definitions. The final five sections of S. 2198 are the focus of this report. Some parts of Section 4 of the bill have received significant attention and are thus discussed in detail, including specific emergency actions related to California water supply management, such as in Sections 4(a) and 4(c)(4) through 4(c)(6). Other sections apply to other activities, such as studying the water supply effects of saltcedar and directing participation in and funding for pilot water projects in the Colorado River Basin (Section 4(b)(7)). Many of the bill's

provisions would expire upon suspension of the state emergency drought declaration. The Senate-passed version of S. 2198 would also modify implementation of financial assistance for some water resource and water quality programs. These include the WaterSMART program under 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 (Section 7) would direct the Secretary of the Interior to fund or participate in pilot projects to increase water supplies in the Colorado River Basin.

Those 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 4. Emergency Projects[7]

Section 4(a), Water Supplies, and Section 4(b), Limitation

Section 4(a) would direct the Secretary of Agriculture, the Secretary of Commerce, the Secretary of the Interior, and the Administrator of the Environmental Protection Agency (together defined as "the Secretaries" under Section 3(4) of the act) to provide the "maximum quantity of water supplies possible" to CVP agricultural, municipal and industrial (M&I), and refuge service and repayment contractors; SWP contractors; the Klamath project or operations; 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:[8]

- any project or operations "as quickly as possible based on available information" to address emergency conditions;
- projects that do not need congressional authorization; and
- projects that have followed procedures required by applicable law.

This provision provides broad authority to the Secretaries to approve "any" project or operational change to address emergency provisions; however, limitations on this authority, provided in Section 4(b), prevent undertaking projects (operations are not addressed) that would otherwise require congressional authorization, or without following procedures required by applicable law.

[7] Section 2 of S. 2198 as passed the Senate 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 red acted), for an update of California precipitation and snowpack conditions. Section 3 of the Senate-passed S. 2198 includes definitions.

[8] Sections 4(a) and 4(c) of Senate-passed S. 2198 direct the Secretaries of the Interior, Agriculture, and Commerce, and the Administrator of the Environmental Protection Agency (EPA), together defined as the "Secretaries" under Section 3 of S. 2198, to maximize water supplies for users within the scope of state and federal laws and regulations. Section 7 states that no state laws in effect on the date of this bill being enacted will be preempted, including area-of-origin and other water rights protections. Further, in carrying out emergency projects authorized under Section 4(c), the bill specifically states that projects carried out are to be "consistent with applicable laws (including regulations)."

Projects that could be approved could include, for example, relatively small conservation or efficiency projects, or large projects not needing congressional approval that would expand storage or conveyance facilities to provide additional water to users throughout different seasons, or projects that adjust operations at reservoirs or in the Delta to increase water supplies.[9] Additionally, this section would create the authority necessary for federal participation in state-driven projects intended to address the drought. California recently passed a law providing $687.4 million to address the drought. The intent of this section, which is similar to the bill as introduced, 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.[10] There are several questions or issues that might arise from this section. A brief summary of each is listed below.

- Section 4(a) raises the question of how agencies would provide the "maximum quantity of water supplies possible" to CVP and other contractors and, relatedly, how they would make such a determination consistent with laws and regulations. Implementation of the provision could be difficult and possibly contentious. For example, while "take" limits under the federal or state Endangered Species Acts[11] may be possible to monitor, the effects of providing maximum water supplies on species survival and 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 believe the agencies are not doing enough and are advocating relaxation of some laws and regulations.
- Some may respond that if the bill is enacted, agency actions specified under this section would be directed to maximize water supplies for contractors as a priority over other considerations (e.g., water quality or habitat conservation). In response to this concern, others might contend that other factors such as water quality and species needs are addressed in laws and regulations that would prevent harm. Essentially, agencies would have to balance the new directives with parameters prescribed in existing law and regulations, thus making it difficult to estimate what effect the provision would have on projects, project operations, and the multiple interests that rely upon water supplies through project operations.

[9] Some might contend that this provision could pave the way for activities under the proposed Bay-Delta Conservation Plan (BDCP) that do not need congressional approval; 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. An earlier version of S. 2198 did not include the limitation section provided in Section 4(b) of the Senate-passed version, which some viewed as a possible authorization for the BDCP. 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.

[10] 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.

[11] Under the federal Endangered Species Act, agencies may receive permission to "take" (harm or kill) a specified number of species within certain limits. For operation of the CVP, take limits are identified for fish killed at the CVP pumps in the Delta.

- Projects or operations that would be authorized under this section are to provide maximum quantities of water by approving projects and operations to provide "additional water supplies as quickly as possible"; 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 is tempered by language stating that projects and actions must be consistent with applicable law. It appears that projects could be conducted throughout the state and not just limited to the CVP or SWP service areas.
- 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 by itself 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. However, the new limitation in Section 4(b) that would require that projects follow procedures required by applicable law may mitigate this issue. Regardless, ultimately, it may be left to the courts to determine what is or is not consistent with laws and regulations and whether all applicable legal procedures were followed.
- The authority in this section would also be limited by the duration of the drought emergency declaration. Specifically, Section 8 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 authority would enjoy permanent authorization or how it would be funded after the drought emergency declaration is lifted.
- The provision also would mandate that projects or operations be implemented as quickly as possible. It appears that 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 4(c). Administration

Section 4(c) of S. 2198 contains 13 subsections that would direct the Secretaries to implement several specific project-related and operational actions largely in California for carrying out Section 4(a). As with Section 4(a), Section 4(c) states that all actions are to be accomplished

consistent with applicable laws and regulations. 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.[12]

Several provisions in Section 4(c) of S. 2198 as passed touch upon long-standing operational issues associated with managing the CVP and SWP. For example, 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 often limit how much and when water is released from reservoirs and pumped from the San Francisco Bay and San Joaquin and Sacramento Rivers Delta (Bay-Delta), and thus result in reduced water deliveries to project water users. 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 4(c) address specific projects and project operations that may have an effect on project water deliveries, as well as species viability and water quality. Following is a summary and analysis of the 13 subsections under Section 4(c).[13]

Section 4(c)(1) and (2)

Section 4(c)(1) would direct the Secretaries to ensure that the Delta Cross Channel Gates (Delta Gates) will remain open to the greatest possible extent timed to maximize peak tide flood periods and to provide water supply and water quality benefits. This would be for the duration of the emergency drought declaration by the state. According to the section, this operation is to be consistent with the State Water Resources Control Board (SWRCB) order for a temporary urgency change (TUC) in terms of response to the drought, effective January 31, 2014, as modified by subsequent orders.[14]

There are some questions and potential issues that could arise from changes in the operations of the Delta Gates.

- The provision raises the question as to how it would change existing operations and ultimately, whether the provision would result in additional water being provided to CVP and SWP water contractors.[15] Some might contend that existing operations are already implemented to maximize water supplies and that this provision does not add to existing authorities to operate the gates if such action

[12] 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.

[13] 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, many of the actions specified in this section are only in effect until the governor of the state suspends the state of drought emergency declaration.

[14] For information on the TUCs, see Thomas Howard, Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (With Modifications Dated February 7, 2014, February 28, 2014), State Water Resources Control Board, Order, February 28, 2014. Available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/022814_revised_tucp_order.pdf. The order has been modified several times since that time. For a listing of related actions, see http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp.shtml.

[15] This is based on the premise that the gates are opened to maximize flows within environmental regulations.

would harm listed species or violate state water quality standards. Others might counter this sentiment by noting that the direction provided in Section 4(c)(1) would ensure that maximum flows are being sent through the Delta during peak flood tide, and that the provision would provide definitive authority for the Secretary of the Interior to maximize flows—as long as such activities are consistent with laws and regulations. The practical effect of the provision would depend on how the state and federal agencies or courts determine what and when such actions are consistent with laws and regulations.

Background on Delta Cross Channel Gates

The Delta Gates control water in the Delta Cross Channel, which diverts fresh water from the Sacramento River into a branch of the Mokelumne River and through the Delta. The water eventually makes its way across the Delta to the pumping stations in the South Delta for export with other tributary water via state and federal pumps. The water is then distributed via aqueduct to contractors within the SWP and CVP service areas south of the Delta. The Delta Gates are operated according to SWRCB Decision 1641 and federal biological opinions (BiOps)[16] under the federal Endangered Species Act (ESA). The Delta Gates are required to be closed during "selected periods" when the Sacramento River is experiencing high-level flows to protect fish migration.[17] The current operation of the Delta Gates includes being closed for up to 45 days during the period of October 1 to January 31 for fisheries protection; closed from February 1 to May 20; closed for a total of 14 days during the period of May 21 to June 15; and generally open from June 16 to September 30, pending water quality and fisheries conditions which might necessitate a closure.[18]

Opening the Delta Gates allows more freshwater to move from the Sacramento River through the interior Delta to the Southern Delta where pumps are located, instead of following the river's natural flow south and westward toward San Francisco Bay. The influx of freshwater reduces the salinity in the interior Delta and increases freshwater supplies for pumping from the Delta. However, depending on the conditions and timing of opening the Delta gates, there could be negative effects on migrating salmon. When the Delta gates are closed there is better connectivity of migratory routes for fish species and improved protection against flooding in the San Joaquin River section of the Delta. When Delta gates are open, migratory patterns for juvenile salmon can be altered, causing salmon to enter the Delta and lower their survival rates. Further, closing the Delta Gates increases salinity in the western Delta, affecting water quality in areas such as the Contra Costa Water District.

Operation of the Delta Gates is addressed in federal BiOps under the federal ESA and SWRCB Decision 1641.

- Section 4(c)(1) also specifically states that Delta Gates are to be operated consistent with SWRCB orders approving temporary urgency changes (TUCs) to D-1641.[19] TUCs would allow the Delta Gates to be opened during the period that they were normally closed unless species are affected.[20] If changes to the

[16] Federal biological opinions contain "reasonable and prudent alternatives" (RPAs) to an agency's planned operations as required by the ESA when a jeopardy decision is reached. Because NMFS and FWS (the Services) found in their respective BiOps that the planned Reclamation operations were likely to lead to the extinction of the Delta smelt and salmon species, the ESA required the Services to issue alternative operations that would not imperil those species. Those measures are called RPAs and are considered part of the BiOp.

[17] Craig M. Wilson, Delta Watermaster, *Gates and Barriers in the Delta*, California Water Boards, State Water Resources Control Board, A report to the State Water Resources Control Board and Delta Stewardship Council, Sacramento, CA, April 2013, p. 5.

[18] For more information, see https://www.usbr.gov/mp/PA/docs/fact_sheets/Delta_Cross_Channel_Canal.pdf.

[19] Decision 1641 is a decision of the California State Water Resources Control Board, which implements the state's Water Quality Control Plan. D-1641 includes specific water quality and flow criteria, which affect how much water can be pumped at specific times and released from reservoirs to manage fish and water quality objectives in the Delta.

[20] There are several other requirements in the TUCs that would require compliance by the California DWR and Reclamation, including modeling and monitoring of changes in water supplies and flows, and setting up the operations (continued...)

operations of the gates are outside the parameters of existing ESA permits for coordinated operations of the CVP and SWP, California Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) would presumably be responsible for obtaining applicable new permits under the ESA.

Section 4(c)(2)(A) would direct the Secretaries to collect data associated with the operations of the Delta Gates and the effect of operations on threatened and endangered species listed under the Endangered Species Act (ESA), water quality, and water supply. Section 4(c)(2)(B) would direct an assessment of the data collected, and require the Director of the National Marine Fisheries Service (NMFS) to make recommendations for changing the operations of the CVP and SWP, including, if appropriate, changes to reasonable and prudent alternatives in the BiOps issued by NMFS on June 4, 2009. The provision states that the changes should be likely to produce fishery, water quality, and water supply benefits.

- This provision would require NMFS to develop recommendations to change BiOps under ESA that regulate operations of the Delta Gates to address salmon populations in the Delta. It is uncertain if or how the recommendations would result in changes to the BiOps. For example, NMFS might reject recommendations for changes and implement a modified version of the recommendations, which might have unintended consequences for some stakeholders. Some might question if this provision would result in changes to NMFS's implementation of its 2009 BiOp. The 2009 NMFS BiOp has never been fully implemented due to court order.[21]

Section 4(c)(3)

Section 4(c)(3)(A) would direct the Secretaries to implement turbidity control strategies that would allow for increased water deliveries while avoiding jeopardy to adult delta smelt at the SWP and CVP pumps.[22] Section 4(c)(3)(B) would direct the Secretaries to manage reverse flow in the Old and Middle Rivers (OMR) according to the FWS Delta smelt biological opinion (BiOp) dated December 15, 2008,[23] and the NMFS BiOp for salmonids, dated June 4, 2009, to minimize water supply reductions for the CVP and SWP.

- It is uncertain if existing strategies to address turbidity have been vetted and could be implemented rapidly to maximize their benefit in addressing drought conditions and still be consistent with laws and regulations.
- It appears that Section 4(c)(3) would provide direct authority to manage flows with the objective of minimizing water supply reductions to SWP and CVP users, as opposed to relying solely on discretionary actions allowed, or ranges specified,

(...continued)

management process noted above.

[21] Consolidated Salmonid Cases, 791 F. Supp. 2d 802 (E.D. Cal. 2011).

[22] Delta smelt use turbid waters to consume nutrients and provide cover to hide from predators. Pumps create turbid waters because of the nutrients and matter being drawn to them from the pumping. Minimizing turbidity at the pumps is a conservation strategy for smelt because with less turbidity, fewer smelt would arguably be attracted to the pumps and get entrained.

[23] The 2008 FWS BiOp also has not been fully implemented; however, a March 13 Ninth Circuit Court decision upheld the 2008 BiOp, so measures covered by the BiOp would go into effect even without S. 2198, but are not currently in place. Delta Smelt Consolidated Cases, 747 F.3d 581 (9th Cir. 2014).

within reasonable and prudent alternatives (RPAs) under the BiOps. As such, it raises the question of how the agencies might balance the directive to minimize water supply reductions with the other legal requirements related to OMR flows, in particular with water quality and ESA requirements that at times result in water supply reductions. The outcome of this language would depend on how Reclamation and DWR implement this provision, as some discretion already exists, and whether the direction provided in S. 2198 would result in different management than under temporary operations or under the newly upheld 2008 FWS BiOp, and under the NMFS BiOp.

- As with Section 4(c)(1) above, at issue for implementing agencies would be how to balance the directives to maximize water supplies in the short term with obligations to protect species and habitat over the short and long terms. For example, the effects of the changed OMR flows may not be immediately visible or detectible for several years.

Section 4(c)(4)

Section 4(c)(4) would direct the Secretaries to adopt a 1:1 inflow-to-export ratio (I:E ratio) for increased San Joaquin River flows resulting from water transfers and exchanges, among other purposes. The flow would be measured on a three-day rolling average from April 1 through May 31 at Vernalis, as long as the governor's drought emergency declaration is in effect.[24]

The 1:1 I:E ratio for the increased San Joaquin River flows is currently allowed in "critically dry" years and is expected to be in effect from February through May of 2014.[25] However, the I:E ratio under the 2009 NMFS BiOp changes based on water year type, and is 2:1 in "dry" years; 3:1 in "below normal" years; and 4:1 in "above normal" and "wet" years.[26] The bill's original sponsor noted that the goal of an identical provision found in S. 2016 is to allow 100% of transferred or exchanged water to be moved through the Delta, instead of a fraction.[27]

[24] The projected hydrologic year-type, upon which the current 1:1 I:E ratio is based, and the duration of a drought declaration may not go hand-in-hand. For example, California governor Arnold Schwarzenegger declared a drought emergency in 2009 (a "dry" year for the Sacramento River and "below normal" for the San Joaquin), but the drought declaration was not rescinded until 2011 by the next governor, Governor Brown. The water year-type in 2010 was "below normal" under the Sacramento River index and "above normal" under the San Joaquin River index. The water year-type for 2011 was "wet" under both indices. Thus, under S. 2198, the I:E ratio for water resulting from water transfers and exchanges may last longer than under current operations for the overall I:E ratio. It is not clear what effect such a change might have on fish and wildlife or how much more water might be exported under the language. (For historical data on water year types, see California Dept. of Water Resources, California Data Exchange Center, *Chronological Reconstructed Sacramento and San Joaquin Valley Water Year Hydrologic Classification Indices*: http://cdec.water.ca.gov/cgi-progs/iodir/WSIHIST. Note: these year types do not necessarily reflect the projected year type at the time when initial CVP and SWP water allocations were made for each year.)

[25] U.S. Dept. of the Interior, *Central Valley Project Water Plan 2014*, Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA, February 3, 2014, p. 8. Hereinafter referred to as "2014 CVP Water Plan," http://www.usbr.gov/mp/PA/water/docs/2014_water_plan_v10.pdf.

[26] 2011 Amendments to the 2009 NMFS BiOp: http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/040711_ocap_opinion_2011_amendments.pdf, p. 70.

[27] Senator Feinstein, "California Emergency Drought Relief Act of 2014, Bill Summary," bill summary for S. 2016, February, 2014: http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=fbdeb35c-1863-47e3-89aa-39e7a97b95cd.

- According to Reclamation, the agency normally assumes a 10% conveyance or transport loss associated with transfers and exchanges "from the point of release and point of Delta diversion." Thus, typically, 90% would be available for export, not 100% as called for in S. 2198.
- Reclamation is planning for a 1:1 ratio in 2014, and because other factors that might affect the ratio are not anticipated at this time, Section 4(c)(4) would not be expected to affect operations, assuming the critically dry hydrologic situation continues.[28] However, according to Reclamation, the language could hamper operations if the hydrologic situation improves or if other opportunities arise where Reclamation could change operations to improve water supply.[29]
- Determining the net effect this provision would have on water supply available for export and on fish and wildlife habitat is beyond the scope of this report. However, according to the Westlands Water District, the provision, combined with direction to manage reverse flow in the "Old and Middle Rivers (OMR) as prescribed" in the 2008 FWS Delta Smelt BiOp "to minimize water supply reductions" for the CVP and SWP (Section 103(b)(3)(B)), could generate more than 500,000 acre-feet of water for CVP and SWP exports from the Delta.[30] On the other hand, some environmental groups state that this provision could be harmful to salmon species because hydrologic conditions may improve before a drought declaration is lifted.[31] In either case, it is important to note that the 1:1 ratio in S. 2198 would be limited to water made available from transfers and exchanges, not the total San Joaquin River run-off.

Section 4(c)(5)

Section 4(c)(5) would direct the Secretaries to issue "all necessary permit decisions" under their authority for temporary barriers or operable gates in Delta channels to improve water quantity and quality for SWP and CVP south-of-Delta water contractors and other water users within 30 days of receiving a permit application from the state. According to this section, barriers or gates "should" provide species benefits and protection and in-Delta water quality and "shall" be designed so that formal Section 7 consultation under ESA would not be necessary.

- The directive in this provision could be controversial if such studies noted above are not completed and considered in the decision. For example, some boaters have already objected to proposed barriers.[32] Further, a 30-day time limit might not be enough time to render a decision. On the other hand, temporary barriers and gates have been studied for several years (see box below).

[28] E-mail communication with Reclamation, March 14, 2016.

[29] Ibid.

[30] Westlands Water District, "Statement of Westlands Water District on the Introduction of the California Emergency Drought Relief Act of 2014," press release, February 11, 2014, http://www.westlandswater.org/wwd/pr/statement20140211.pdf.

[31] Letter from conservation groups (Audubon, Audubon California, Defenders of Wildlife, Earthjustice, Endangered Species Coalition, Environmental Defense Fund, League of Conservation Voters, Natural Resources Defense Council, Pacific Coast Federation of Fishermen's Associations, Sierra Club California, The Nature Conservancy California Chapter) to Senators Feinstein, Boxer, Wyden, and Merkley, March 3, 2014, p. 2.

[32] See http://www.tradeonlytoday.com/2014/04/california-group-fears-drought-barriers-harm-boating/.

- It appears the language could alter or obscure the priority of purposes for which the temporary and operable gates might be employed, particularly for the South Delta. According to the Delta Watermaster report, the objectives of the South Delta Temporary Barriers Project are "1) to reduce fisheries impacts by improving fishery conditions and 2) to increase water levels and improve circulation patterns in the Southern Delta area for local agricultural diversions."[33] The priority in Section 4(c)(5) would appear to be first "to improve water quantity and quality for SWP and CVP South-of-Delta water contractors and other water users," as such is directed by the section, while species benefits and in-Delta water quality "should"—but would not have to be—provided (as long as such is consistent with existing laws and regulations, per Section 4(a)).

Overview of Temporary Barriers

Temporary barriers and operable gates have been considered and used in the Delta for many years. Examples include Suisun Marsh Salinity Control Gates in the Northern Delta, Delta Cross Channel (DCC) Gates in the Central Delta, and South Delta Temporary Barriers Project in the Southern Delta. Non-physical barriers have also been employed as part of pilot projects in the South Delta and North Delta, and operation and modification of existing gates and barriers have also been under study. Proposals have included widening the DCC gates, dredging near the DCC gates, automating the DCC gates (i.e., making them operable), and making the South Delta temporary barriers permanent with operable gates. According to a 2013 report of the Delta Watermaster, the latter proposal was "on hold indefinitely" pending fisheries studies and agency approvals.

- Additionally, it is not clear how the barriers and gates could be designed such that formal Section 7 consultation is not necessary. Temporary gates and operable barriers could affect listed fish species and potentially affect their habitat, which presumably could trigger Section 7 consultation (if not covered elsewhere under CVP operations to which existing BiOps apply). The bill summary accompanying S. 2016 (which S. 2198 is based upon) states that such barriers and gates would "help protect the fish in order to allow additional flexibility for pumping of Delta channels and to improve water quantity and quality for water users."[34]

Section 4(c)(6)(A)

Section 4(c)(6)(A) would direct the head of the FWS and the Commissioner of Reclamation to complete all necessary NEPA and ESA requirements, within 30 days of receiving a request for a permit, for final permit decisions on water transfers associated with voluntary fallowing of nonpermanent crops in the state of California. Reclamation currently has programmatic NEPA documentation in place for certain CVP transfers, including within-basin transfers and a 25-year

[33] Craig M. Wilson, Delta Watermaster, *Gates and Barriers in the Delta*, California Water Boards, State Water Resources Control Board, A report to the State Water Resources Control Board and Delta Stewardship Council, Sacramento, CA, April 2013, p. 6.

[34] Senator Feinstein, "California Emergency Drought Relief Act of 2014, Bill Summary," bill summary for S. 2016, February, 2014, p. 2: http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=fbdeb35c-1863-47e3-89aa-39e7a97b95cd.

transfer program involving San Joaquin Exchange Contractors south of the Delta, and it is working on streamlined NEPA documentation for others.[35]

The transfer process involves both NEPA and the ESA in distinct steps, and where listed species are involved, appears to take much longer than 30 days. For uncomplicated transfers, Reclamation completes environmental analysis of water generated by a transfer proposal—taking into account how much water would have been used by the proposed fallowed crop and whether such water would have been available to the grower during the current water year. That analysis generally takes between 30 and 60 days. Upon completion, Reclamation issues a biological assessment (BA) of the proposed action if it finds its action may affect a listed species, pursuant to the ESA, thus initiating the consultation process with FWS. FWS then reviews whether the transfer may jeopardize the continued existence of species protected under the ESA. Reclamation issues an environmental assessment or environmental impact statement under NEPA.[36] Transfer proposals involving fallowing of crops north of the Delta often require ESA consultation with FWS due to potential harm to threatened or endangered species, in particular, the giant garter snake (*Thamnophis gigas*), whose habitat includes watery areas such as irrigation canals and ditches and surrounding areas, including rice fields and marshy or wetland areas.[37] The consultation process may take up to 135 days to complete once FWS receives the BA from Reclamation. According to Reclamation, the agency has been working closely with FWS "to shorten this process considerably."[38] The result of the 30-day deadline in S. 2198 may be that FWS might deny permits where a listed species is involved in order to meet the statutory deadline.

Reclamation issues environmental assessments or environmental impact statements for transfers under NEPA.[39] Under NEPA, Reclamation had expected to issue a finding of no significant impact (FONSI) for the 2014 water transfer program by the end of April 2014;[40] however, it is not clear from Reclamation's website if it has done so.[41] Reclamation also notes that although water made available through fallowing is difficult to estimate, some contractors have indicated that perhaps up to 80,000 acre-feet might be made available from fallowing in 2014.[42] Even so, Reclamation also notes that the current CVP BiOps allow for transfers of water through the Delta (north to south transfers) only from July through September, but the most demand for such water south of the Delta is during May and June.

- It appears that the proposed legislation would shorten the current time period for completing NEPA and ESA requirements, especially when a listed species is involved, but it is not clear how much water ultimately might be made available

[35] 2014 CVP Water Plan, p. 9.

[36] E-mail communication from Reclamation, March 14, 2014.

[37] Ibid.

[38] Ibid., see also FWS, Sacramento Fish and Wildlife Office, "Species Account, Giant Garter Snake, *Thamnophis gigas*, last updated Feb. 27, 2014. The giant garter snake was listed as threatened under the federal ESA on October 20, 1993. Although the snake's presence is noted in many counties throughout the CVP service area, including several counties south of the Delta, "[t]here have been only a few recent sightings of giant garter snakes in the San Joaquin Valley," according to the above referenced FWS species account.

[39] E-mail communication from Reclamation, March 14, 2014.

[40] Ibid. A draft EA was released on March 13, 2014, and is available for public comment for 20 days. (See https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=46245.)

[41] See http://www.usbr.gov/mp/nepa/nepa_base.cfm?location=ncao.

[42] Ibid.

for export from the Delta under the expedited review process. Nor is it clear what effect the process could have on species habitat and survival.

Section 4(c)(6)(B)

Section 4(c)(6)(B) would direct the head of FWS to allow "any water transfer request associated with fallowing" to maximize water supplies for non-habitat use, as long as the action would comply with federal law and regulations.

Section 4(c)(6)(A) directs the head of FWS to allow "any water transfer request associated with fallowing" to maximize water supplies for non-habitat use, as long as the action would comply with federal law and regulations.

- This subsection again appears to be aimed at the garter snake issue in California related to fallowing; however, it is not explicitly stated, nor is the subsection identified as only applying to California. There may be other species listings for which the FWS might need to consult on fallowing of lands. By maximizing (as long as consistent with laws and regulations) allowance of water transfers for "non-habitat use," the provision raises the question of whether it would suggest prioritization of agricultural, municipal and industrial (M&I), power, or other uses over water supplies for wildlife refuges, or for rice fields that may support fish and wildlife while not in production. In other words, does such maximization result in water reductions for habitat uses?

Section 4(c)(7)

Section 4(c)(7) would direct the Secretaries, as soon as practicable, to participate in, provide grants to, or provide funding for, under existing authority available to the Secretary of the Interior, pilot projects to increase water in reservoirs in regional river basins that are experiencing "extreme, exceptional, or sustained drought." These basins would have to directly affect the water supply of California (including the Colorado River basin). Further, the Secretary (it is not explicitly stated whether this refers to the Secretary of the Interior), with respect to the Upper Division of the Colorado River, would be participating with or providing funding to the "respective State" in regards to grants, participation, or funding. (It appears that "State" in this instance refers to the state with which the Secretary is participating or providing funding.)

- Section 4(c)(7) appears to be aimed at addressing 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. Existing authority available to the Secretary of the Interior might include grants made under the Department's WaterSMART or other programs.

Section 4(c)(8)

Section 4(c)(8) would direct the Secretaries to maintain all rescheduled water supplies in San Luis Reservoir and Millerton Reservoir for the following year, unless unable to do so due to storage

capacity limitations.[43] Rescheduling is currently done under agency guidelines, not as a matter of law. Under agency guidelines, rescheduled water is released when San Luis Reservoir and Millerton Lake refill. According to Reclamation, the spill priority is included in agency guidelines. Such practices can cause operational problems when there are extreme low water supplies such that Reclamation cannot fill all following-year obligations, including senior water rights.

- This provision would address a situation that occurred earlier in the 2014 water year, whereby Reclamation suggested that 2013 rescheduled water supplies might not be able to be met because water supplies were not available from San Luis and Millerton Reservoirs. The uncertainty with such a policy given that it is in guidelines and not a matter of law is of concern to many water users who forgo water in one season or part of a season as an investment in the next water year. The issue relates not just to the opportunity costs of not using that water, but also to other costs that water contractors incur when they reschedule water. On the other hand, if rescheduled water is taking up storage space that otherwise might have been able to hold water for another year, balancing such demands becomes very difficult.

Section 4(c)(9)(A)

Section 4(c)(9) would direct the Secretaries to "the maximum extent possible ... without causing land subsidence[44] or violating water quality standards" to meet contract water supply needs of CVP refuges through the use of water conservation measures, water conveyance facilities, and wells for groundwater resources. To accomplish these activities, the Secretaries would use funding available under the Water Assistance Program or WaterSMART Program of DOI. Further, Section 4(c)(9)(B) would redirect a quantity of water obtained from measures in subparagraph (A) from refuges to CVP contractors.

Currently, multiple state and federally owned wildlife refuges in the Central Valley are served by surface water contract deliveries and other means (including wells and water purchases) required under CVPIA. These water supplies are generally divided into two "levels": Level 2 and Level 4.[45] Although Level 4 refuge supplies were directed for certain refuges in 2002 under the CVPIA, Reclamation has only recently delivered full Level 4 refuge water supplies to refuges.[46] Instead, supplies have been largely limited to Level 2 supplies—422,000 acre-feet.[47] Sections 3406(b)(3) and 3406(d) of CVPIA identify and authorize the use of many options for increasing water supply for fish and wildlife, including purchases, land fallowing, and project operations modifications.

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[43] Rescheduling is currently done under agency guidelines, not as a matter of law. Under agency guidelines, rescheduled water is spilled when San Luis Reservoir and Millerton Lake refill.

[44] "Subsidence" refers to the gradual settling or sinking of surface due to subsurface movement of materials, such as movement of water from underground aquifers resulting from groundwater pumping.

[45] CVPIA called for providing water supply to refuges through two sources: Level 2 supplies, which were provided directly from CVP yield (422,000 acre-feet); and incremental Level 4 supplies, which were to be acquired in addition to Level 2 and equal the amount of water supplies needed to achieve optimal waterfowl habitat management.

[46] While some refuges began receiving full Level 4 water supplies in recent years, 4 of 19 refuges still were unable to receive Level 4 supplies, according to a 2013 Reclamation Refuge Water Supply Program work plan. Additionally, the plan notes that 32 of 46 construction projects for refuge water supply had been completed at that time. (See http://www.usbr.gov/mp/cvpia/docs_reports/meetings/2013/RWSP_AWP_Presentation_Jan172012_DALEfinal.pdf).

[47] Ibid.

Further, the Secretary is directed under CVPIA to "endeavor to diversify sources of supply in order to minimize possible adverse effects upon Central Valley Project contractors."[48]

- This language raises the question of whether it effectively could change temporarily the priority of CVP water delivery for wildlife refuges under CVPIA, in that Reclamation would be finding new sources of water for refuges and then transferring a like-kind of water to CVP contractors. The amount of water for refuges would still appear to be guaranteed; however, it is not clear that the quality of water would be the same, even though such activities are not to violate water quality standards.
- The provisions would authorize the Secretary to use existing programs to fund new conservation projects, conveyance facilities, and wells; however, there is no mention of whether CVP water users would have to pay an additional cost for water obtained by Reclamation through these new activities. It is possible that such contractor deliveries would be presumed to be supplementing contract water supply, for which the cost would be known, but this is not clear. That said, it is not clear if Reclamation would have the authority to provide the water under existing contracts from this new source. If Reclamation did not charge to offset the costs of the new activities, it appears that the provision would essentially be transferring a new cost for refuge water to the general public. Such an arrangement does not appear to be any more efficient than Reclamation providing grants to CVP contractors for conservation measures, water conveyance facilities, and wells for groundwater resources, all of which are allowed under existing authorities; however, there could be a conveyance or distributional aspect of such an arrangement that is not apparent.

Section 4(c)(10)

Section 4(c)(10) would authorize the Secretaries to coordinate with the Secretary of Agriculture to create an agreement with the National Academy of Sciences to conduct a study on the effectiveness and environmental impacts of saltcedar tree[49] biological control activities and their effect on increasing water supplies and improving habitat on the Colorado River in California and elsewhere.

Section 4(c)(11)

Section 4(c)(11) would direct that any WaterSMART grant funding allocated to California be made available on a "priority and expedited basis": (1) for emergency drinking and municipal supplies to meet minimum public health and safety needs; (2) to prevent loss of permanent crops; (3) to minimize economic losses from drought; and (4) to provide conservation tools and technology with immediate water supply benefits.[50] WaterSMART grants currently are made available for a host of conservation and efficiency projects with long-term benefits; Reclamation

[48] Section 3406(d)(1), 3406(d)(2), and 3406(d)(5) of CVPIA (P.L. 102-575).

[49] Salt Cedar (also known as Tamarix) is an invasive shrub that has been implicated as causing additional stress on water supplies.

[50] Typically, WaterSMART grants are used for a host of conservation and efficiency projects with long-term benefits; it was not designed as an emergency drought program.

has a separate emergency drought assistance authorization for largely temporary projects, except in the case of wells.[51]

- This provision would apply only to WaterSMART funding allocated to California. An earlier version of the bill, S. 2016, would prioritize California projects within all limited funds available through this Reclamation-wide program.[52]

Section 4(c)(12)

Section 4(c)(12) would direct the Secretaries to implement "offsite upstream projects" in the Delta and upstream Sacramento River and San Joaquin River basins in coordination with California Department of Water Resources and Department of Fish and Wildlife. Projects are to offset the effects of actions taken under this act on ESA listed species.

- It appears that this language could apply to a broad range of projects, including habitat restoration projects. Projects might include habitat restoration, water quality improvements, storage, or potentially flow adjustments as long as they offset the effects of other projects that might be implemented under this bill. Further, it is unclear what "offsite" refers to, both in terms of location and type and location of projects.[53]

Section 4(c)(13)

Section 4(c)(13) would direct the Secretaries to use "all available scientific tools" to identify and implement any changes to the real-time operations of any Reclamation, state, and local water projects that could result in additional water supplies.

- This provision raises the question of what scientific tools might be available that Reclamation is not using or would not have the authority to use under current law. Note, however, that those changes would have to be consistent with law and regulations per Sections 4(a) and 4(c). Thus, it is uncertain how this provision adds to existing authorities or practices. Also, although most of the subsections in 4(c) clearly apply to California, this subsection does not explicitly indicate such.

Section 4(d). Other Agencies

Section 4(d) states that the provisions of Section 4 shall apply to all federal agencies that have a role in approving projects in Sections 4(a) and 4(c) 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 4, the provisions of Sections 4(a) and 4(c) would also apply to that agency.

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[51] The Reclamation States Emergency Drought Relief Act.

[52] The enacted WaterSMART program appropriation for FY2014 is $48.9 million. The President's request for FY2015 is $52.0 million. See http://www.usbr.gov/budget/2015/FY%202015%20Reclamation%20Budget%20Justifications.pdf, p. *Water and Related Resources – 3*.

[53] For example, it is not clear if "offsite" implies outside the Delta or would include projects such as the "offstream" project under study by Reclamation for Sites Reservoir, a new storage reservoir north of the Delta.

Section 4(e). Accelerated Project Decision and Elevation[54]

Section 4(e) would direct 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 4(a) and 4(c). Pursuant to Section 4(e)(2), after receiving a request from the state, the head of an agency referred to in Section 4(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." 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 would need to be convened within seven days of the request for resolution. Not later than 10 days after that meeting is requested, Section 4(e)(4) would require the head of the relevant federal agency to issue a final decision on the project. Under Section 4(e)(5), the Secretary of the Interior would be authorized to convene a final project decision meeting at any time, regardless of whether a request for resolution is requested under 4(e)(2).

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 a result, it would appear that agencies could decide not to approve a project. Unlike several other provisions in Section 4, this provision would not expire at the time when the drought emergency declaration is withdrawn.

- This subsection would appear 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 could supersede regular processes for final project decisions under various laws, including but not limited to NEPA and ESA. However, Section 4(a) notes that actions are to be consistent with current laws and regulations, and Section 4(b) would provide other limitations. Thus, it is not clear how this provision would be implemented.[55]
- 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 4(a) and 4(c) 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, etc.).
- 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

[54] The summary of this subsection was prepared by (nameredacted), CRS Analyst in Environmental Policy. (name red acted), CRS Legislative Attorney, also contributed to this section.

[55] For legal questions related to how this process might differ from current practice, please contact (name redacted), CRS Legislative Attorney, at 7-.....

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 5. Emergency Environmental Reviews[56]

Section 5 would direct the "head of each applicable Federal agency" to consult with the Council on Environmental Quality (CEQ)[57] to develop "alternative arrangements" to comply with NEPA in accordance with existing regulations "during the emergency."

Emergency environmental review provisions in Section 5 could 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.

Emergency compliance arrangements are currently allowed in existing CEQ regulations implementing NEPA.[58] 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."[59] Section 5 would apply in California only while the governor's drought emergency declaration is in effect. It is difficult to identify whether and/or to which projects such alternative arrangements would apply. For example, there is some question as to whether the projects and operations mandated in Section 4(c) 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. Some of the Section 4(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 4(c)(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 were 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,

[56] 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.

[57] This is to be done in accordance with 40 CFR §1506.11, including successor regulations.

[58] 40 C.F.R 1506.11.

[59] Ibid.

among others. The language raises the question as to how such consistency could be demonstrated, and at what point that burden of demonstration would cease.

Section 6. State Revolving Funds[60]

Section 6 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 would direct 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 resiliency to drought."

For projects in California that are awarded assistance pursuant to Section 6, 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.

Finally, the bill provides that nothing in Section 6 authorizes EPA to modify existing state-by-state funding allocations, funding criteria, or other requirements related to the CWA and SDWA SRF programs for the state of California.

- 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.
- 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.

Under Section 8 of the bill, the authority under Section 6 would expire when a state-declared drought declaration is suspended by the governor.

[60] The summary of Section 106 was prepared by (name redacted), Specialist in Resources and Environmental Policy, CRS Resources, Science, and Industry Division.

Section 7. Effect on State Laws

Section 7 of S. 2198 states that nothing in the act would preempt any California state law in effect on the date of such enactment, including area-of-origin and other water rights protections.

Section 8. Termination of Authorities.

Section 8 states that authorities under Section 4(a); Section 4(c), subsections (1) through (6), (8) and (9), and (11) through (13); Section 5; and Section 6 would permanently expire when the governor of the state suspends the drought emergency declaration.

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