

Reclamation Manual

Directives and Standards

Subject:	Extended Repayment of Extraordinary Maintenance Costs
Purpose:	To provide requirements for implementing the repayment provisions of Title IX, Subtitle G of the Omnibus Public Land Management Act of March 30, 2009. The benefit of this Directive and Standard is consistent and budget-conscious application of these provisions by Bureau of Reclamation offices and personnel.
Authority:	The Reclamation Act of June 17, 1902 (32 Stat. 388), as amended and supplemented, in particular Title IX, Subtitle G of the Omnibus Public Land Management Act of March 30, 2009 (43 U.S.C. § 510).
Approving Official:	Director, Policy and Administration (Policy)
Contact:	Reclamation Law Administration Division, 84-55000

1. **Introduction.** The Omnibus Public Land Management Act of 2009, Title IX, Subtitle G (the Act) (Appendix A), provides authority for extended repayment of extraordinary maintenance (XM) costs which, prior to the Act, were required to be paid in advance. The Act establishes the requirements for repayment of such costs. The Act does not authorize extended repayment of costs for annual, routine operation and maintenance (O&M) activities. It should be noted that the Act is an authorizing statute, not a source of appropriations; any Reclamation-provided funding pursuant to the Act must be secured from within Reclamation's limited existing appropriations or in the form of a new appropriations request in the budget formulation process. This Directive and Standard (D&S) is intended to ensure that Reclamation implements the Act in a manner that reflects the limited availability of Federal funding and the need to prioritize that limited funding to address the most critical needs of Reclamation's aging infrastructure. In recognition of these objectives, the provisions of the D&S are also designed to ensure that Federal funding is utilized only after all other reasonably available non-Federal funding options have been considered.
2. **Applicability.** This D&S applies to all Reclamation offices and personnel in administering the provisions of the Act.
3. **Definitions.**
 - A. **Emergency Extraordinary Maintenance or EXM.** XM that Reclamation determines to be necessary to minimize the risk of imminent harm to public health or safety, or property.
 - B. **Extraordinary Maintenance or XM.** Major nonrecurring maintenance on a project facility that is intended to ensure the continued safe¹, dependable, and reliable delivery

¹The term "safe" in this definition is intended to include the concept of structural safety of the facility.

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of authorized project benefits². The cost of the work must be greater than 10 percent of the annual O&M budget for the project facility and at least \$100,000 in total cost. Work does not meet this definition if it is eligible to be performed or funded under the repayment provisions of Section 4(c) of the Reclamation Safety of Dams Act of November 2, 1978, as amended (43 U.S.C. § 506).³

- C. **Mission Critical.** A mission-critical asset is a facility or structure that sustains essential functions of a Reclamation project, for which an alternative facility or structure capable of continuously sustaining those functions is unavailable. This definition encompasses major asset classes such as dams, power plants, canals, siphons, pipelines, distribution systems, and associated structural, mechanical, and electrical systems and subcomponents.
 - D. **Project Facility.** Any part or incidental feature of a Reclamation-owned project that was constructed under the authority of the Reclamation Act of June 17, 1902, or acts amendatory of or supplemental to that act.
 - E. **Reserved Works.** Any project facility at which Reclamation carries out the O&M of the facility.
 - F. **Transferred Works.** A project facility, the O&M of which is carried out by a non-Federal entity, under the provisions of a formal O&M transfer contract.
 - G. **Transferred Works Operating Entity.** The organization which is contractually responsible for O&M of transferred works.
4. **Responsibilities.**
- A. **Policy.** Policy will review a submitted basis of negotiation (BON) to verify compliance with the requirements of the Act, Reclamation law and policy, and this D&S, and will prepare a delegation of authority in the form of an approval memorandum for the Commissioner's signature, pursuant to the requirements of Paragraph 6.N.(4) of Reclamation Manual Delegations of Authority.
 - B. **Regional Director (RD).** Preparation of a BON, as discussed in Paragraph 8 below, and negotiation and execution of the repayment contract in accordance with the approved delegation of authority, is the responsibility of the appropriate RD. In

²Authorized project benefits includes Reclamation owned and operated, single-purpose power facilities.

³Subtitle G of Public Law 111-11 uses the term "Extraordinary Operation and Maintenance Work." Reclamation is using the definition associated with that term in the statute, but choosing the term "Extraordinary Maintenance" instead, to ensure precision and clarity in this D&S and across related Reclamation programs. This is not meant to substantively change the statutory definition or exclude any work that would otherwise qualify under the definition provided in the Act, except that as a matter of policy, Reclamation has determined that only work that meets both the \$100,000 threshold AND the "greater than 10 percent of the annual O&M budget for the project facility" threshold will be eligible for funding under the terms of this D&S.

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preparing the BON, the RD will determine the appropriate financial review and technical analysis (regarding the service life of the repairs) that will be required for determining the repayment term, as discussed in Paragraph 7.B. below. The RD is also responsible for making the determination that XM is substantially complete and subsequently preparing and transmitting a written notice of substantial completion to initiate repayment of the costs of XM⁴. Additionally, the RD is responsible for determining the appropriate administrative costs to be paid in advance by the project beneficiary for the development of the BON and negotiation of the necessary contract(s).

5. Advance of Funds and Requirement to Contract.

- A. **Advance of Funds.** The Act provides authority for Reclamation to expend or advance funds and enter contracts for extended repayment of those funds. All funds that are advanced pursuant to the Act are to be provided before expenditures are necessary for that portion of work that is to be covered by the advance funds.
- B. **Use of Reserve Funds Required.** Funds for XM work shall not be expended by Reclamation or advanced to the transferred works operating entity until at least 75 percent of any contractually required reserve funds are expended on the work subject to the funding request. Pursuant to the terms and conditions of a project beneficiary's existing contract(s), in instances where a project beneficiary has previously used a portion of the reserve funds and is current in re-accumulating the fund through the contractually required deposits, the 75 percent will be based on whatever amount the project beneficiary has accumulated. In instances where the project beneficiary has not maintained the contractually required reserve fund amount, Reclamation will require it to expend an amount equal to 75 percent of the contractually required but un-accumulated reserve fund amount. If no explicitly-designated reserve funds are required by an existing contract between the project beneficiary and Reclamation, 75 percent of any funds that the project beneficiary has previously designated for XM type work must have been expended on, or applied towards funding of, the needed XM work before Reclamation will expend funds or advance funds to the transferred works operating entity. The availability of reserve funds for XM work will be verified during the financial analysis that is described in Paragraph 7.B. below.
- C. **XM.** Except as provided for EXM in Paragraph 5.D. below, no funds shall be expended by Reclamation or advanced to the transferred works operating entity before execution of a contract or contracts for the repayment of the XM cost obligation of the project beneficiary.

⁴Where work is performed by a transferred works operating entity, coordination with that entity will be necessary; however, the RD will still be responsible for making a determination and notice of substantial completion, since this declaration initiates the repayment period and must be made by Reclamation.

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- D. **EXM.** Funds shall only be expended by Reclamation or advanced to the transferred works operating entity prior to execution of a repayment contract after a determination that the project facility requires EXM, and receipt of a written assurance from the governing body of a project beneficiary that the project beneficiary will enter into good faith negotiations toward execution of a repayment contract. For purposes of authorizing any advance of funds without a repayment contract, the Commissioner will make an initial written determination of whether the work meets the criteria for EXM in accordance with Paragraph 6.B. below in response to a written request for the determination from the appropriate RD. This determination will subsequently be formalized through the BON and approval memorandum process as discussed in Paragraph 8 below.
- E. **No External Discussion of Pre-Decisional Positions.** Reclamation managers and employees will not make any pre-decisional commitment to the transferred works operating entity concerning the eligibility of proposed XM work for emergency status until a written initial determination of eligibility has been received from the Commissioner. Reclamation managers and employees will also not make any pre-decisional commitment to the transferred works operating entity concerning reduced reimbursability until a final determination, of whether the proposed XM work meets the criteria of qualified EXM as described in Paragraph 6.C. below, has been received from the Commissioner in the approval memorandum.
- F. **Administrative Costs.** The RD will require each project beneficiary to provide an advance payment sufficient to cover an appropriate share of the administrative costs of the environmental compliance, development of the BON, and development and negotiation of the contract(s).
6. **Eligibility Analysis.** The following criteria will be used in implementing Section 9603 of the Act to determine if work (1) qualifies as XM; (2) is an emergency (EXM); and (3) qualifies for reduced reimbursability. In order to determine the eligibility for funding as XM work under the program, the proposed work must be analyzed under the following criteria.
- A. **XM.** Work that does not meet all three of the criteria below is **not** eligible to be funded and repaid under the authority of the Act. To be eligible for funding as XM:
- (1) the work must be major, non-recurring maintenance of mission critical Reclamation-owned facilities or facility components;
 - (2) the costs of the work must be greater than 10 percent of Reclamation's or the transferred works operating entity's annual O&M budget for the facility, and at least \$100,000 in total costs; and

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(3) the work must be intended to ensure the continued safe, dependable, and reliable delivery of authorized project benefits. Any additional benefits resulting from the work must be strictly incidental to the work required to maintain present authorized project benefits.

B. **EXM.** The requested work will be determined to be EXM only if it qualifies as XM and is necessary to minimize the risk of imminent harm to public health or safety, or property. As an indication that the requested work is EXM, the requested work must correct deficiencies that have caused the implementation of appropriate flow or water surface elevation restrictions commensurate with the identification of these deficiencies during inspections or routine surveillance.

C. **Qualified EXM (35 Percent Non-Reimbursable).** If work qualifies as EXM on transferred works and if during the last 10 years the criteria in Paragraphs 6.C.(1) and 6.C.(2) below, have been met, the work shall be deemed to be qualified EXM work and 35 percent of the advanced funds allocable to the transferred works operating entity will be non-reimbursable, in accordance with Paragraph 7.A.(3) below. Otherwise, the work will be reimbursable in the same manner as XM work.

(1) Category 1 O&M recommendations, as defined in Paragraph 9.A.(1) of Reclamation Manual D&S, *Review of Operation and Maintenance (RO&M) Program Examination of Associated Facilities (Facilities other than High- and Significant-Hazard Dams)*, (FAC 01-04), related to the XM work, that have been identified under the urbanized canal inspections or through inspection/assessments conducted under existing review programs have been corrected within 6 months of identification; and

(2) Category 2 O&M recommendations, as defined in Paragraph 9.A.(2) of FAC 01-04 related to the XM work, that have been identified under the urbanized canal inspections or through inspection/assessments conducted under existing review programs, and reasonably within the ability of the operating entity to address, have been corrected by the initial recommended date documented in the examination report or the Dam Safety Information System.

7. Contract Requirements.

A. **Obligation of Project Beneficiaries to Repay.** The obligation of a project beneficiary to repay the costs associated with XM and EXM will be established as follows:

(1) **Allocation of Costs.** Costs for XM and EXM work will be allocated in accordance with the existing allocation of O&M costs of the project. See Reclamation Manual Policy, *Allocation of Operation and Maintenance Costs* (PEC P07), for specific requirements associated with allocation of project O&M costs.

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- (2) **Obligation to Repay.** Costs of XM work allocated to reimbursable purposes will be repaid in accordance with this D&S and the Act.
- (3) **Transferred Works.** For qualified EXM work on transferred works consistent with the requirements of Paragraph 6.C. above, 35 percent of the advanced funds for the costs of the EXM work allocable to the transferred works operating entity will be non-reimbursable, in accordance with Section 9603(c)(3) of the Act.
- (4) **Statutory Credits to the Project.** Repayment obligations established pursuant to the Act will be repaid with available statutory credits only if the work has been authorized and funds appropriated; statutory credits cannot be applied against annual O&M costs. For additional information on the application of statutory credits toward an XM cost obligation see Paragraph 6.A.(1) of Reclamation Manual D&S, *Crediting Requirements for Incidental Revenues* (PEC 03-01).

B. Term of Repayment.

- (1) Repayment of the obligation of a project beneficiary for XM and EXM costs performed pursuant to the Act will be completed no later than 50 years from the date on which the work is declared substantially complete. The repayment period for XM or EXM costs will be established as the minimum period that is necessary for the project beneficiary to repay its full repayment obligation, as indicated by an appropriate financial analysis; but in no case will the repayment period exceed the service life of the repair.
- (2) The financial analysis must, at a minimum, consist of a review of the project beneficiary's financial records to determine the minimum appropriate repayment period and availability of reserve funds for XM work; an existing ability to pay study that has been completed within 5 years will be used if available, but preparation of a new ability to pay study is not required for the financial analysis. If the project beneficiary receives a water supply from a water service contract with Reclamation (as opposed to a repayment contract), the full obligation must be repaid no later than upon the expiration of the existing water service contract.
- (3) In certain instances, the expiration of the project beneficiary's water service contract is sufficiently close to the initiation of the XM work that repayment of XM costs within the remaining term of the water service contract will pose a financial hardship upon the project beneficiary. If the RD determines that the XM repayment period will extend beyond the expiration of the water service contract, the RD will include in the BON why a longer repayment period is an acceptable risk for Reclamation. Policy will review the justification and will make a recommendation to the Commissioner whether or not the longer repayment period represents an acceptable risk. The final decision on this determination will be documented in the approval memorandum.

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- (4) Because work performed and funded under Section 9603 of the Act is XM, rather than construction, ability to pay relief and aid to irrigation are not available for repayment of these costs. Therefore, a financial analysis or ability to pay study will not serve to reduce the repayment obligation of a project beneficiary; the analysis or study will only serve to help establish the minimum repayment term that is necessary for the project beneficiary to complete full repayment of its obligation.
- (5) Deferrals allowed under Section 17.B of the Reclamation Projects Act of August 4, 1939, as amended (43 U.S.C. § 485b-1), apply to repayment of construction costs under that act, and are not authorized under the Act.
- C. **Interest Rate.** Interest will be assessed on all reimbursable costs of XM and EXM regardless of the purpose to which the costs are allocated. The interest will be assessed on the repayment amount as of the date of disbursement of the funds, through completion of repayment. The interest rate for the reimbursable costs of XM and EXM work performed pursuant to the provisions of the Act will be the rate determined by the Secretary of the Treasury that is in effect for the fiscal year in which the XM or EXM work is commenced, which corresponds to the applicable reimbursement period. Note that in most cases, shorter repayment terms carry lower interest rates. The applicable rates can be found in the Range of Maturities (Table 1) for the year in which construction commences, located at:
http://www.treasurydirect.gov/govt/rates/tcir/tcir_index_opdirannual.htm
- D. **Standard Articles.** The standard articles required for any contract entered into for the repayment of XM and EXM work pursuant to the Act will be as identified in Appendix B, attached, and are subject to the relevant requirements of Reclamation Manual Policy, *Reclamation Standard Water-Related Contract Articles* (PEC P10) and of the Reclamation Manual D&Ss in which the articles appear, as identified in the furthest left column of Appendix B's table of required articles. In addition to the required standard articles identified in Appendix B, additional standard articles, as the RD determines to be appropriate, will be required in any contract entered into pursuant to the Act.
- E. **Acreage Limitation.** Because the authorities to perform this work are O&M authorities and not construction, the acreage limitation provisions of Federal reclamation law do not apply. Specifically, contracts for repayment of the costs of XM or EXM will not:
- (1) be considered in determining whether a district as defined in Section 202(2) of the Reclamation Reform Act of October 12, 1982 (43 U.S.C. § 390bb), has discharged its obligation to repay the construction costs of the project facilities used to make irrigation water available for delivery to land in the district;

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- (2) serve as the basis for reinstating acreage limitation provisions in a district that has completed payment of its construction obligation; or
 - (3) serve as the basis for increasing the construction repayment obligation of the district and thereby extending the period during which the acreage limitation provisions will apply.
- F. **Public Participation.** Public participation is required for all contracts for repayment of the costs of XM and EXM; refer to Reclamation Manual Policy, *Water-Related Contracts—General Principles and Requirements* (PEC P05) for general public participation requirements for water-related contracts.
8. **BON Requirements.** Except as noted in Paragraph 5.D. above, a BON and approval memorandum are required for all advances and repayment of funds for XM or EXM work pursuant to the Act; refer to Reclamation Manual D&S, *Preparing Bases of Negotiation for New, and Amendatory Water Service, Repayment, and Related Contracts* (PEC 06-01) for the general requirements of the BON and approval memorandum. In addition to the requirements of PEC 06-01, the following requirements apply for requests pursuant to the Act:
- A. **XM.** In preparing a BON for XM, the responsible RD will include:
 - (1) a determination that the required XM work is eligible to be funded under the provisions of the Act and provide evidence to support such determination, pursuant to the eligibility analysis of Paragraphs 5. and 6., above;
 - (2) an estimate of costs allocable to the project beneficiaries, in accordance with the existing annual O&M allocation of the project facility;
 - (3) a proposed term for repayment of XM costs, which shall represent the minimum period for repayment as established pursuant to Paragraph 7.B., above; and
 - (4) a statement explaining how the proposed contract will meet the requirements of Paragraph 5.B., above.
 - B. **EXM.** In addition to the requirements in Paragraph 8.A. above, if funds are expected to be advanced prior to execution of a contract, the written assurance required by Paragraph 5.D., above, will be included with the BON. If the RD determines that the work on the project facility will likely meet the criteria for qualified EXM, the RD will include in the BON a justification for that determination and a recommendation that 35 percent of the advanced funds for the EXM costs be non-reimbursable. The final decision on this determination will be documented in the approval memorandum.

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