

## Reclamation Manual Transmittal Sheet

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# Reclamation Manual

Directives and Standards

## *TEMPORARY RELEASE*

*(Expires 08/29/2013)*

<b>Subject:</b>	Extended Repayment of Extraordinary Operation and Maintenance Costs
<b>Purpose:</b>	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 Reclamation offices and personnel.
<b>Authority:</b>	The Reclamation Act of 1902 (32 Stat. 388) and acts amendatory of and supplemental to that Act, particularly Title IX, Subtitle G of the Omnibus Public Land Management Act of March 30, 2009 (Pub. L. 111-11; 43 U.S.C. § 510).
<b>Approving Official:</b>	Director, Policy and Administration (Policy)
<b>Contact:</b>	Water and Environmental Resource Division, 84-55000

1. **Introduction.** The Omnibus Public Land Management Act of 2009, Title IX, Subtitle G (the Act) (attached as Appendix A), provides authority for extended repayment of costs of extraordinary operation and maintenance (XOM) which, prior to the Act, were required to be paid in advance. The Act establishes the requirements of any contract for the repayment of such costs. The Act does not authorize extended repayment of 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 under 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 available Federal appropriations and the need to prioritize that limited funding to accomplish 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 appropriations are utilized only after all other reasonably available 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 Operation and Maintenance or EXOM.** XOM that Reclamation determines to be necessary to minimize the risk of imminent harm to public health or safety, or property.

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- B. **Extraordinary Operation and Maintenance or XOM.** Major nonrecurring maintenance on a project facility that is intended to ensure the continued safe<sup>1</sup>, dependable, and reliable delivery of authorized project benefits. 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).
- C. **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.
- D. **Reserved Works.** Any project facility at which Reclamation carries out the O&M of the facility.
- E. **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.
- F. **Transferred Works Operating Entity.** The organization which is contractually responsible for O&M of transferred works.
4. **Responsibilities.**
- A. **Director, Policy.** The Director 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.
- B. **Regional Director.** Preparation of a BON is the responsibility of the appropriate regional director (RD). In preparing the BON, the RD will determine the appropriate financial review and engineering 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 determination that XOM is substantially complete and subsequent preparation and transmittal of a written notice of substantial completion to begin repayment of the costs of XOM is also the responsibility of the RD<sup>2</sup>.

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

<sup>2</sup>Where 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 should therefore be made by Reclamation.

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#### 5. Advance of Funds and Requirement to Contract.

- A. **Use of Reserve Funds Required.** Funds shall not be expended by Reclamation or advanced to the transferred works operating entity until at least 75 percent of the available amounts from contractually required reserve funds, up to 75 percent of the contractually required amount, designated for the type of XOM work to be performed have been expended on, or applied towards funding of, the needed XOM work. If no explicitly-designated reserve funds are required by an existing contract the repayment entity has with Reclamation, 75 percent of any funds that the entity has previously designated for XOM type work must have been expended on, or applied towards funding of, the needed XOM work before Reclamation may expend funds or advance funds to the transferred works operating entity. The availability of reserve funds for XOM work will be verified during the financial analysis that is further described in Paragraph 7.B. below.
- B. **XOM.** Except as provided for EXOM in Paragraph 5.C. below, funds shall only be expended by Reclamation or advanced to the transferred works operating entity following execution of a contract for payment of the project beneficiary(ies)' repayment obligation for XOM.
- C. **EXOM.** 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 EXOM, and receipt of a written assurance from the 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 determination of whether the work fits the criteria for EXOM in accordance with Paragraph 6.B. below. This determination will subsequently be formalized through the BON and approval memorandum process as discussed in Paragraph 8 below.
6. **Eligibility Analysis.** The following criteria will be used in implementing Section 9603 of the Act to determine if work (1) qualifies as XOM; (2) is an emergency; and (3) qualifies for reduced reimbursability. In order to determine the eligibility for funding as XOM work under the program, the proposed work must be analyzed under the following criteria.
- A. **XOM.**
- (1) Is this major, non-recurring maintenance of mission critical Reclamation-owned facilities or facility components?
  - (2) Is the work greater than 10 percent of Reclamation's or the transferred works operating entity's annual O&M budget for the facility, and \$100,000?

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- (3) Is the work 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.
  - (4) If the work does not meet all three of the above criteria, the work is not eligible to be funded and repaid under the authority of the Act.
- B. **EXOM.** If work qualifies as XOM; is the work necessary to minimize the risk of imminent harm to public health or safety, or property, as evidenced by flow or water surface elevation restrictions having been implemented as a result of deficiencies identified in the inspection resulting in the need for this major nonrecurring maintenance activity? If yes, the work will be determined to be EXOM.
- C. **Qualified EXOM (35 Percent Non-Reimbursable).** If work qualifies as EXOM, for transferred works, during the last 10 years;
- (1) Have Category 1 items, 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 XOM work, that have been identified under the canal inspections or through inspection/assessments conducted under existing programs been corrected within 6 months of identification?
  - (2) Have Category 2 items, as defined in Paragraph 9.A.(2) of FAC 01-04, related to the XOM work, that have been identified under the canal inspections or through inspection/assessments conducted under existing programs, and reasonably within the ability of the operating entity to address, been corrected by the initial recommended date documented in the examination report or the Dam Safety Information System?
  - (3) If both of the above criteria are met, the work shall be deemed to be qualified EXOM, and 35 percent of the costs of the work allocable to the beneficiaries of the project facility will be non-reimbursable, in accordance with Paragraph 7.A.(3) below. Otherwise, the work will be reimbursable in the same manner as XOM work.

## 7. Contract Requirements.

- A. **Repayment Obligation of Project Beneficiaries.** The repayment obligation of a project beneficiary for costs associated with XOM and EXOM will be established as follows:

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- (1) **Allocation of Costs.** Costs for XOM and EXOM 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.
  - (2) **Repayment Obligation.** Costs of XOM allocated to reimbursable purposes will be repaid in accordance with this D&S, and the Act.
  - (3) **Transferred Works.** For qualified EXOM work on transferred works consistent with the requirements of Paragraph 6.C. above, 35 percent of the costs of the EXOM work allocable to the beneficiaries of the project facility will be non-reimbursable.
  - (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; however, statutory credits cannot be applied against annual O&M costs. For additional information on the application of statutory credits toward an XOM cost obligation see Paragraph 6.A.(1) of Reclamation Manual D&S, *Crediting Requirements for Incidental Revenues* (PEC 03-01).
- B. **Term of Repayment.** Repayment of the obligation of a project beneficiary for XOM and EXOM 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 XOM or EXOM 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. 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 the expiration of the existing water service contract. The financial analysis must, at a minimum, consist of a review of the project beneficiary(ies)' financial records to determine the minimum appropriate repayment period and availability of reserve funds for XOM work; a completed ability to pay study may be used if available, but is not required. Because work performed and funded under Section 9603 of the Act is XOM, rather than construction, ability to pay relief/aid to irrigation is 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. Deferrals allowed under Section 17.B of the 1939 Act, as amended, apply to repayment of construction costs under that act, and are not authorized under Pub. L. 111-11.

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- C. **Interest Rate.** Interest will be assessed on all reimbursable costs of XOM and EXOM 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 XOM and EXOM 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 XOM or EXOM is commenced, which corresponds to the applicable reimbursement period. It should be noted 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](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 XOM and EXOM work pursuant to the Act will be as identified in the table below. In addition to the required standard articles identified below, the RD may require additional standard articles in any contract entered pursuant to the Act as he or she deems appropriate.

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D&S	Standard Article	Reserved Works	Transferred Works
PEC 10-01	Contracts with Third Parties	N/A	Required
PEC 10-02	Failure to Complete Work	N/A	Required
PEC 10-03	Charges for Delinquent Payments	Required	
PEC 10-04	General Obligation - Benefits Conditioned Upon Payment	Required	
PEC 10-05	O&M of Transferred Works (Federal Construction)	N/A	Required (select appropriate)
PEC 10-06	O&M of Transferred Works (Federally Assisted Construction)	N/A	
PEC 10-07	Examination, Inspection, and Audit of Project Works, Records, and Reports for Determining Adequacy of Operation and Maintenance	N/A	Required
PEC 10-08	Emergency Reserve Fund (Annual Deposit)	Required unless present in existing contract (select appropriate)	
PEC 10-09	Emergency Reserve Fund (One-Time Deposit)		
PEC 10-10	Confirmation of Contract	N/A	
PEC 10-11	Notices	Required	
PEC 10-12	Contingent on Appropriation or Allotment of Funds	Required	
PEC 10-13	Officials Not to Benefit	Required	
PEC 10-14	Changes in Contractor's Organization	Required	
PEC 10-15	Assignment Limited - Successors and Assigns Obligated	Required	
PEC 10-16	Books, Records, and Reports	Required	
PEC 10-17	Compliance with Federal Reclamation Laws/Small Reclamation Project Laws (Vers. B, Paragraph (b) is to be used as contracts entered under the Act do not specifically invoke the RRA and the provisions of Vers. A are thus inappropriate)	Required	
PEC 10-18	Administration of Federal Project Lands	N/A	Required
PEC 10-19	Protection of Water and Air Quality	Required	
PEC 10-20	Contamination or Pollution of Federal Property	N/A	Required
PEC 10-21	Clean Air and Water	N/A	Required
PEC 10-22	Water Conservation	N/A	
PEC 10-23	Equal Employment Opportunity (Federal Construction)	Required (select appropriate)	
PEC 10-24	Equal Employment Opportunity (Federally Assisted Construction)		
PEC 10-25	Compliance with Civil Rights Laws and Regulations	Required	
PEC 10-26	Certification of Nonsegregated Facilities	Required	
PEC 10-27	Relocation Assistance and Real Property Acquisition	N/A	
PEC 10-28	Privacy Act Compliance	N/A	
PEC 10-29	Pest Management	N/A	Required
PEC 10-30	Medium for Transmitting Payments	Required	
PEC 10-31	Contract Drafting Considerations	Required	
PEC 10-32	Constraints on Availability of Water	Required	Optional <sup>3</sup>

**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 XOM or EXOM will not:

<sup>3</sup>The "Constraints on Availability of Water" article is required in contracts where the operation of an upstream facility by Reclamation could impact the ability of the contractor to receive water in a transferred works.

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- (1) be considered in determining whether a district as defined in Section 202(2) of the Reclamation Reform Act of 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;
  - (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.
8. **BON Requirements.** Except as noted in Paragraph 5.C. above, a BON and approval memorandum are required for all advances and repayment of funds for XOM or EXOM 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. **XOM.** In preparing a BON for XOM, the responsible RD will include:
    - (1) a determination that the required XOM work is eligible to be funded under the provisions of the Act, 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 statement regarding the expected service life of the XOM work; and
    - (4) a statement explaining how the proposed contract will meet the requirements of Paragraph 5.A. above.
  - B. **EXOM.** In addition to the requirements above, if funds are expected to be advanced prior to execution of a contract, the written assurance required by Paragraph 5.C. above, will be included with the BON. If the RD determines that the work on the project facility will meet the criteria for qualified EXOM, the RD will include in the BON a justification for that determination, and, if appropriate, a recommendation that 35 percent of the EXOM costs be non-reimbursable. The final decision on this determination will be made by the Commissioner in the approval memorandum.