

Reclamation Manual

Directives and Standards

Subject:	Extended Repayment of Extraordinary Maintenance Costs
Purpose:	To provide requirements for implementing the repayment provisions of the Omnibus Public Land Management Act of March 30, 2009, Title IX, Subtitle G. 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 by Title IX, Subtitle G of the Omnibus Public Land Management Act of March 30, 2009 (43 U.S.C. 510, <i>et seq.</i>).
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) authorizes Reclamation to fund extraordinary maintenance (XM) work with its existing appropriations and to enter contracts for extended repayment of the reimbursable costs. The Act does not authorize extended repayment of annual, routine operation, maintenance, and replacement (OM&R) costs. This Directive and Standard (D&S) is intended to ensure that Reclamation implements the Act in a manner that focuses its limited funding on the most critical needs.
2. **Applicability.** This D&S applies to all Reclamation offices and personnel in administering the provisions of the Act.
3. **Definitions.**
 - A. **Advanced Funds.** Funds that Reclamation advances to an operating entity to cover costs of extraordinary maintenance or emergency extraordinary maintenance work performed pursuant to the Act.
 - B. **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 to property.

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- C. **Extraordinary Maintenance or XM.**¹ Major nonrecurring maintenance on a project facility that is intended to ensure the continued safe,² dependable, and reliable delivery of authorized project benefits,³ and that otherwise meets the conditions stated under Paragraph 7.A. of this D&S.
- D. **Mission Critical Asset.** A facility or structure that sustains essential functions of a Reclamation project and 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.
- E. **Operating Entity.** An organization that is contractually responsible for OM&R of transferred works.
- F. **Project Facility.** Any part or 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.
- G. **Qualified EXM.** EXM that meets the criteria for designating 35 percent of funding provided as non-reimbursable in accordance with Paragraph 5.C.(3) below.
- H. **Reserved Works.** Any project facility at which Reclamation carries out the OM&R of the facility.
- I. **Risk of Imminent Harm.** Immediate danger or threat of injury to persons or damage to or loss of tangible property.
- J. **Transferred Works.** Project facilities for which the OM&R is carried out by an operating entity under the provisions of a formal contract.

¹The Act 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” to ensure clarity in this D&S. Reclamation, in its use of “Extraordinary Maintenance” does not intend to substantively depart from the statutory definition or exclude any work that would otherwise qualify under the Act, except that Reclamation has determined that only work that meets both the \$100,000 threshold *and* the “greater than 10 percent of the annual OM&R budget for the project facility” threshold will be eligible for funding under the terms of this D&S. See Paragraph 7.A.(2), below.

²The term “safe” in this definition is intended to include the concept of structural safety of the facility.

³Including benefits from Reclamation owned and operated, single-purpose power facilities.

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4. Responsibilities.

A. **POLICY.** POLICY is responsible for:

- (1) reviewing submitted bases of negotiation (BONs) to verify compliance with the requirements of the Act, Reclamation law and policy, and this D&S; and
- (2) preparing delegations of authority in the form of approval memoranda for the Commissioner's signature, pursuant to the requirements of Paragraph 6.N.(4) of Reclamation Manual *Delegations of Authority*.

B. **Regional Director (RD).** RDs are responsible for:

- (1) preparing BONs, as discussed in Paragraph 7 below, and negotiating and executing repayment contracts in accordance with the approved delegation of authority;
- (2) determining the appropriate financial review and technical analysis required for determining the repayment term;
- (3) making the determination that XM is substantially complete and preparing and transmitting a written notice of substantial completion to initiate repayment of the costs of XM⁴; and
- (4) "ensuring appropriate administrative costs are paid in advance by the project beneficiary prior to the development of the BON and negotiation of the necessary contract(s)."

5. Funding Requirements and Conditions.

A. **Availability of Funding.** Funding is dependent on appropriations. The availability of Federal funds to pay XM costs must be determined and priorities for the use of available funds considered before expenditures are made or funds advanced.

B. **Requirement of a Contract.**

- (1) **XM.** Reclamation will not advance funds for XM work before execution of a repayment contract or contracts in accordance with Paragraph 6 below.

⁴Where XM work is performed by an operating entity, coordination with that entity will be necessary; however, the RD will still be responsible for making a determination and providing the operating entity with a written notice of substantial completion. The written declaration of substantial completion by Reclamation to the operating entity initiates commencement of the repayment period.

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- (2) **EXM.** Reclamation will only advance funds for EXM work without first executing a repayment contract if:
- (a) Reclamation has received written assurance from the governing body of a project beneficiary that it will enter into good faith negotiations toward execution of a repayment contract in accordance with Paragraph 6 below; and
 - (b) the Commissioner has made an initial written determination that the intended work meets the EXM criteria under Paragraph 6.B. and has authorized the advancement of funds prior to execution of a contract. (This determination will be formalized through the BON and approval memorandum process as discussed in Paragraph 7 below.)
- C. **Funding Eligibility Analysis.** The following criteria will be used to determine the extent to which work qualifies as XM, EXM, or qualified EXM, such that it is eligible for funding under this D&S.
- (1) **XM.** Work qualifies as XM if:
 - (a) it is major, non-recurring maintenance of a mission critical asset;
 - (b) its purpose is to ensure the continued safe, dependable, and reliable delivery of authorized project benefits (any additional benefits being strictly incidental to that purpose);
 - (c) its costs are greater than 10 percent of Reclamation's or the operating entity's annual O&M budget for the facility and at least \$100,000 in total; and
 - (d) it is not 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).
 - (2) **EXM.** Work qualifies as EXM only to the extent that (1) it qualifies as XM under Paragraph 5.A.(1) above, and (2) it is necessary to minimize the risk of imminent harm to public health or safety, or to property.
 - (3) **Qualified EXM.** If designated as qualified EXM, in accordance with Paragraph 7.B., 35 percent of the total Federal funding advanced or expended shall be non-reimbursable. Otherwise, the work will be reimbursable in the same manner as XM work. XM work on Transferred Works that meets the criteria for EXM and the additional conditions outlined below is eligible for designation as qualified EXM.

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- (a) During the last 10 years, all Category 1 OM&R 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 an identified timeframe for work to be completed and work has been completed within that timeframe.
- (b) During the last 10 years, all Category 2 OM&R 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 an identified timeframe for work to be completed and work has been completed within that timeframe.

D. Additional Conditions and Limitations for Advanced Funds Applicable to Transferred Works.

- (1) **Use of Operating Entity's Funds Required.** The advancement of funds is conditional on the operating entity's expenditure of its own funds as follows:
 - (a) Advanced Funds for EXM will not be advanced to the operating entity until it has expended an amount equal to at least 75 percent of any contractually required reserve funds on the emergency work for which the funding is requested.
 - (i) Where a contractor has expended reserve funds and is current in re-accumulating the funds expended according to contractual requirements, the 75 percent will be based on whatever amount the contractor has accumulated.
 - (ii) Where the contractor has not maintained the reserve fund in accordance with the contract, Reclamation will require it to expend an amount equal to 75 percent of the contractually required reserve fund.
 - (b) If no explicitly designated reserve funds are required by an existing contract between the operating entity and Reclamation, the RD will make a determination of an appropriate amount of funds the operating entity must expend before Reclamation will advance funds. This determination will be included in the BON.
 - (c) The availability of reserve funds for XM work will be verified during the financial analysis that is described in Paragraph 6.B.(1)(b) below.

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- (2) **Exhausting Non-Federal Funding Options.** Advanced funds for XM work will not be advanced to the operating entity before all other reasonably available non-Federal funding options have been considered, to the RD's satisfaction.
- (3) **Limits on Use of Advanced Funds.**
 - (a) Advanced funds must be used solely for the purposes for which advanced.
 - (b) Advanced funds may not be used as reimbursement for expenses previously incurred, except to cover eligible non-reimbursable qualified EXM costs as determined by Reclamation.

6. Contracting Requirements.

A. **Obligation of Project Beneficiaries to Repay.** Costs of XM and EXM work allocated to reimbursable purposes will be repaid in accordance with this D&S and the Act. 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 OM&R costs of the project or facility. See Reclamation Manual Policy, *Allocation of Operation and Maintenance Costs* (PEC P07), for specific requirements associated with allocation of OM&R costs.
- (2) **Qualified EXM.** For qualified EXM work on transferred works consistent with the requirements of Paragraph 5.C. above, 35 percent of the advanced funds for the costs of the EXM work allocable to the operating entity will be non-reimbursable, in accordance with Section 9603(c)(3) of the Act.
- (3) **Statutory Credits to the Project.** Repayment obligations established pursuant to the Act will be repaid with available statutory credits only after the work has been authorized and funds appropriated. Statutory credits cannot be applied against annual OM&R 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. Repayment.

- (1) **Repayment Period.** The repayment period will be the minimum period necessary for the contractor to complete repayment, as indicated by an appropriate financial analysis, but will not either exceed the service life of the repair or 50 years from the date on which the work is declared substantially complete.

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- (a) **Water Service Contractors.** In general, where the repayment entity's primary contract with Reclamation is a water service contract, the period for repaying XM or EXM costs will not exceed the remaining term of the water service contract. If the RD determines that the repayment period should extend beyond the expiration of the contractor's water service contract because the remaining term is short, and the requirement will place a financial hardship upon the contractor, the RD will include this information in the BON.
 - (b) **Financial Analysis.** The financial analysis must, at a minimum, include a review of the contractor's financial records to determine the minimum appropriate repayment period and availability of reserve funds for XM work. If an ability-to-pay study has been completed within the last 5 years, it will be used in the financial analysis, but a new ability-to-pay study is not required.
- (2) **Interest.** 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/tcjr/tcjr_index_opdirannual.htm.
 - (3) **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).
 - (4) **Ability to Pay.** 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.
 - (5) **Deferrals.** Deferrals allowed under Section 17.B of the Reclamation Project 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. **Standard Articles.** Paragraph 6 of Reclamation Manual Policy, *Reclamation Standard Water-Related Contract Articles* (PEC P10) identifies the standard articles required for XM and EXM contracts. Standard articles 5, 6, 7, 8, 9, 14, 18, 19, 20, 21, and 29 may be excluded if the primary O&M transfer contract includes their most recent version.

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- D. **Acreage Limitation.** Because the authorities to perform this work are OM&R 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;
 - (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.
- E. **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.
- F. **No External Discussion of Pre-Decisional Positions.** Reclamation managers and employees will not make any pre-decisional commitment to the 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 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 5.C.(3) above, has been received from the Commissioner in the approval memorandum.
- G. **Davis-Bacon and Related Acts.** The relevant provisions of the Davis-Bacon and Related Acts (40 U.S.C. 3141, 29 U.S.C. 201, 41 U.S.C. 351, 40 U.S.C. 3701, 41 U.S.C. 35, 40 U.S.C 3145) apply to every contract in excess of \$2,000 to which the Federal Government is a party, for the construction, alteration, or repair, of public buildings and public works of the Federal Government and which requires or involves the employment of mechanics and laborers.
7. **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:

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- A. **XM BONs.** In preparing a BON for XM, the responsible RD will include:
- (1) a determination of eligibility under Paragraph 5.C. which must be accompanied by supporting evidence;
 - (2) an estimate of costs allocable to the project beneficiaries, in accordance with the existing annual OM&R allocation for the relevant facilities;
 - (3) a proposed repayment term reflecting the minimum period for repayment as established pursuant to Paragraph 6.B., above; and
 - (4) if applicable, a statement explaining how the proposed contract will meet the requirements of Paragraph 5.D., above.
- B. **EXM BONs.** In addition to the requirements in Paragraph 7.A. above:
- (1) if funds are expected to be advanced prior to execution of a contract, the written assurance required by Paragraph 5.D. will be included with the BON; and
 - (2) if the RD determines that the work on the project facility will likely meet the criteria for Qualified EXM, the BON will include 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.

RECLAMATION MANUAL TRANSMITTAL SHEET

Effective Date: _____

Release No. _____

Ensure all employees needing this information are provided a copy of this release.

Reclamation Manual Release Number and Subject

Summary of Changes

NOTE: This Reclamation Manual release applies to all Reclamation employees. When an exclusive bargaining unit exists, changes to this release may be subject to the provisions of collective bargaining agreements.

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