

Operations and Maintenance Legal Framework

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Operations & Maintenance Legal Framework Overview

- 33 United States Code 701c (1936) Non-Federal Sponsor Assurances to Federal Government
 - (1) Acquire lands, easements, rights-of-way for construction
 - (2) Indemnify (save and hold harmless Fed. Gov't)
 - (3) Maintain & Operate all works after construction is complete according to regulations prescribed by Sec. of Army.
- State and Local Responsibility for O&M
 - Assurance Agreements—agreement between fed gov't and non-federal sponsor (a state or local agency) per 33 USC 701c. In the Central Valley, assurance agreements are typically between federal gov't & CVFPB, and legal responsibility is passed from the CVFPB to an LMA through an agreement between the CVFPB and the LMA per Water Code.
- Federal Regulation 33 CFR 208.10 (1944) Operation & Maintenance Requirements
 - Requirements of this regulation form the foundational requirements for O&M that non-federal sponsors agree to comply with and are the requirements that O&M manuals are based on.
 - Summary of requirements
 - Explicitly includes repair as part of O&M, also requires replacement of certain features (e.g. missing or broken parts of drainage structures)
- State Law Requirements
 - Water Code Section 8361 (DWR requirement for O&M of portions of the Sacramento River Flood Control Project)
 - Water Code Section 8370 (LMA requirement for O&M of all other portions the Sacramento River Flood Control Project)
 - Water Code Section 12642 (applies to entire state requires the relevant maintainer (the State or LMA) to save and hold harmless the State and fed gov't free from damages)
 - Water Code Section 12828 (requires LMAs to save and hold harmless CVFPB (formerly Rec. Board) and to assume O&M obligations)
- “Replace and Rehabilitation”—WRDA 1986 explicitly required that new assurance agreements include “replacement and rehabilitation” as part of O&M requirements—“repair” and limited “replacement” responsibilities were already included as part of 33 CFR 208.10
- Maintenance Area requirements—Water Code Section 12878 *et seq.* Procedures and requirements for formation of Maintenance Areas by the State, if LMAs do not comply with Federal & State O&M requirements

Federal Law Requiring State or Local Assurances

- 33 United States Code 701c (1936) Assurances to Federal Government
 - Provides that no money shall be expended “on the construction of any project until States, political subdivisions thereof, or other local agencies have given assurances satisfactory that they will provide without cost to the United States” all of the following:
 - (1) Lands, easements, rights-of-way for construction
 - (2) Indemnify (save and hold harmless Fed. Gov’t)
 - (3) Maintain & Operate all works after construction is complete according to regulations prescribed by Sec. of Army (33 CFR 208.10).

Federal Regulation 33 CFR 208.10

Federal Regulation 33 CFR 208.10 (1944) Operation & Maintenance Requirements

Requirements of this regulation form the foundational requirements for O&M that non-federal sponsors agree to comply with, and the LMAs agree to comply with through their agreements with the CVFPB, and are the requirements that O&M manuals are based on.

“The structures and facilities constructed by the United States for local flood protection shall be continuously maintained in such a manner and operated at such times and for such periods as may be necessary to obtain the maximum benefits”

- The State, political subdivision thereof, or other responsible local agency, which furnished assurance that it will maintain and operate flood control works in accordance with regulations prescribed by the Secretary of the Army, as required by law, shall appoint a permanent committee consisting of or headed by an official hereinafter called the “Superintendent,” who shall be responsible for the development and maintenance of, and directly in charge of, an organization responsible for the efficient operation and maintenance of all of the structures and facilities during flood periods and for continuous inspection and maintenance of the project works during periods of low water, all without cost to the United States.*
- A reserve supply of materials needed during a flood emergency shall be kept on hand at all times.*
- No encroachment or trespass which will adversely affect the efficient operation or maintenance of the project works shall be permitted upon the rights-of-way for the protective facilities.*
- Maintenance measures or repairs which the District Engineer deems necessary shall be promptly taken or made.*
- The Department of the Army will furnish local interests with an Operation and Maintenance Manual for each completed project, or separate useful part thereof, to assist them in carrying out their obligations under this part.*

Federal Regulation 33 CFR 208.10 cont.

33 CFR 208.10(b)(1)&(2) Levee Maintenance and Operation

- (1) Maintenance. The Superintendent shall provide at all times such maintenance as may be required to insure serviceability of the structures in time of flood. Measures shall be taken to promote the growth of sod, exterminate burrowing animals, and to provide for routine mowing of the grass and weeds, removal of wild growth and drift deposits, **and repair of damage caused by erosion or other forces.** Where practicable, measures shall be taken to retard bank erosion by planting of willows or other suitable growth on areas riverward of the levees. Periodic inspections shall be made by the Superintendent to insure that the above maintenance measures are being effectively carried out and, further, to be certain that:
 - (i) No unusual settlement, sloughing, or material loss of grade or levee cross section has taken place;
 - (ii) No caving has occurred on either the land side or the river side of the levee which might affect the stability of the levee section;
 - (iii) No seepage, saturated areas, or sand boils are occurring;
 - (iv) Toe drainage systems and pressure relief wells are in good working condition, and that such facilities are not becoming clogged;
 - (v) Drains through the levees and gates on said drains are in good working condition;
 - (vi) No revetment work or riprap has been displaced, washed out, or removed;

Federal Regulation 33 CFR 208.10 cont.

33 CFR 208.10(b)(1)&(2) Levee Maintenance and Operation cont.

- (vii) No action is being taken, such as burning grass and weeds during inappropriate seasons, which will retard or destroy the growth of sod;
- (viii) Access roads to and on the levee are being properly maintained;
- (ix) Cattle guards and gates are in good condition;
- (x) Crown of levee is shaped so as to drain readily, and roadway thereon, if any, is well shaped and maintained;
- (xi) There is no unauthorized grazing or vehicular traffic on the levees;
- (xii) Encroachments are not being made on the levee right-of-way which might endanger the structure or hinder its proper and efficient functioning during times of emergency.
- Such inspections shall be made immediately prior to the beginning of the flood season; immediately following each major high water period, and otherwise at intervals not exceeding 90 days, and such intermediate times as may be necessary to insure the best possible care of the levee. Immediate steps will be taken to correct dangerous conditions disclosed by such inspections. Regular maintenance repair measures shall be accomplished during the appropriate season as scheduled by the Superintendent.

Federal Regulation 33 CFR 208.10 cont.

33 CFR 208.10(b)(1)&(2) Levee Maintenance and Operation cont.

- (2) Operation. During flood periods the levee shall be patrolled continuously to locate possible sand boils or unusual wetness of the landward slope and to be certain that:
 - (i) There are no indications of slides or sloughs developing;
 - (ii) Wave wash or scouring action is not occurring;
 - (iii) No low reaches of levee exist which may be overtopped;
 - (iv) No other conditions exist which might endanger the structure.
- Appropriate advance measures will be taken to insure the availability of adequate labor and materials to meet all contingencies. Immediate steps will be taken to control any condition which endangers the levee and to repair the damaged section.

Federal Regulation 33 CFR 208.10 cont.

33 CFR 208.10(c)-(h) includes O&M requirements for the following:

- Flood Walls
- Drainage Structures
- Closure Structures
- Pumping Plants
- Channels and Floodways
- Miscellaneous Facilities

WRDA 1986—Replacement, Rehabilitation

WRDA 1986 explicitly required that new assurance agreements include “replacement and rehabilitation” as part of O&M requirements—“repair” was already included as part of 33 CFR 208.10

*33 USC 2213 “Any project to which this section applies (other than a project for hydroelectric power) shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operation, maintenance, and **replacement and rehabilitation** costs of the project, to pay the non-Federal share of the costs of construction required by this section, and to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors.”*

State and Local Responsibility for O&M

- Assurance Agreements—Agreement between Federal Government and non-federal sponsor (state or local agency per 33 USC 701c). In the Central Valley, assurance agreements are typically between Federal Government & the CVFPB, and the responsibility O&M is passed from the CVFPB to an LMA through an agreement between the CVFPB and the LMA.

State and Local Responsibility for O&M

Water Code Section 8361 DWR Responsibility regarding the Sacramento River Flood Control Project

- The department shall maintain and operate on behalf of the state the following units or portions of the works of the Sacramento River Flood Control Project, and the cost of maintenance and operation shall be defrayed by the state:
 - (a) The east levee of the Sutter Bypass north of Nelson Slough.
 - (b) The levees and channels of the Wadsworth Canal, Willow Slough Channel downstream from the Southern Pacific Railroad from Davis to Woodland except that portion of the north levee thereof lying within Reclamation District No. 2035, Putah Creek downstream from Winters, the intercepting canals draining into them, and all structures incidental thereto.
 - (c) The collecting canals, sumps, pumps, and structures of the drainage system of Project No. 6 east of the Sutter Bypass.
 - (d) The bypass channels of the Butte Slough Bypass, the Sutter Bypass, the Tisdale Bypass, the Yolo Bypass, and the Sacramento Bypass with all cuts, canals, bridges, dams, and other structures and improvements contained therein and in the borrow pits thereof.
 - (e) The levees of the Sacramento Bypass.
 - (f) The channels and overflow channels of the Sacramento River and its tributaries and the major and minor tributaries' flood control projects as authorized and defined in Sections 12648, 12648.1, and 12656.5.
 - (g) The Knights Landing ridge cut flowage area.

State and Local Responsibility for O&M

Water Code Section 8361 DWR Responsibility regarding the Sacramento River Flood Control Project cont.

- (h) The flood relief channels controlled by the Moulton and Colusa Weirs and the training levees thereof.
- (i) The levee on the left bank of the Sacramento River adjoining Butte Basin, from the Butte Slough outfall gates upstream to a point four miles northerly from the Moulton Weir, after completion.
- (j) All weirs and flood relief structures.
- (k) The west levee of the Yolo Bypass, extending from the west end of the Fremont Weir southerly to the Cache Creek Settling Basin and from Willow Slough Channel to Putah Creek and the east levee of the Yolo Bypass from Fremont Weir southerly two miles.
- (l) The levee on the west bank of Feather River extending a distance of about two miles southerly from the Sutter-Butte Canal headgate.
- (m) The levees of Cache Creek and the easterly and westerly levees of Cache Creek Settling Basin; excepting the portion of the southerly levee of Cache Creek lying upstream from State Highway Route 7 (U.S. 99W).
- (n) The flowage area of Western Pacific Intercepting Canal extending northerly for a distance of five miles from Bear River.
- (o) The levees of Tisdale Bypass from Tisdale Weir 4.5 miles easterly to Sutter Bypass.
- (p) The flood relief structures or weirs and other structures or facilities essential for their proper functioning in the vicinity of the Sacramento River between Big Chico Creek and the north boundary of Glenn County Levee District No. 3.

State and Local Responsibility for O&M

- **Water Code Section 8370 Maintenance & Operation of Works—
other portions of the Sacramento River Flood Control Project**

“It is the responsibility, liability and duty of the reclamation districts, levee districts, protection districts, drainage districts, municipalities, and other public agencies within the Sacramento River Flood Control Project limits, to maintain and operate the works of the project within the boundaries or jurisdiction of such agencies, excepting only those works enumerated in Section 8361 and those for which provision for maintenance and operation is made by Federal law.”

State and Local Responsibility for O&M

Water Code Section 12642 Local Agencies; Maintenance of Work

“In all cases where the Federal Government does not maintain and operate projects, it is the responsibility and duty of the county, city, state agency, or public district affected to maintain and operate flood control and other works, constructed pursuant to Chapters 1 and 2 of this part, after their completion and hold and save the State and the United States free from damages.”

State and Local Responsibility for O&M

Water Code Section 12828—LMA Agreement Requirement

Except where the co-operation required by the United States in addition to the costs of all lands, easements, and rights-of-way, has been authorized to be assumed by the State prior to March 12, 1946, the department shall not reallocate the funds allocated to it, nor shall the Reclamation Board expend any funds appropriated directly to it, for acquisition of property rights or contributions to the United States, for any project for which the Reclamation Board is directed to give assurances to the United States unless and until a public agency other than the Reclamation Board has either assumed the obligations of maintenance and holding the United States harmless from damages due to the construction of works, directly with the United States, or has by binding agreement with the Reclamation Board agreed to assume such obligations and to hold the State and the Reclamation Board harmless from any claims therefor.

This section is not intended to prevent the expenditure of project funds by the Reclamation Board for planning and design engineering, title reports and appraisals, and other incidental expenses required in advance of actual acquisition of property rights.

Maintenance Area Law 12878 *et seq*

- **Water Code Section 12878.1 Formation of Maintenance Areas**
- (a) If the department determines that a unit of a project is not being operated or maintained in accordance with the standards established by federal regulations, if the department determines that the modification of a unit of a project that has been permitted by the board and that provides flood protection is not being operated or maintained in accordance with the requirements established by the board or the department, or if the governing body of a local agency obligated to operate and maintain that unit by resolution duly adopted and filed with the department declares that it no longer desires to operate and maintain the project unit, the department shall prepare a statement to that effect specifying in detail the particular items of work necessary to be done in order to comply with the standards of the federal government and the requirements of the board or the department together with an estimate of the cost thereof for the current fiscal year and for the immediately ensuing fiscal year.
- (b) Subject to subdivision (c), but notwithstanding any other provision of law, the board or the department is not required to proceed in accordance with subdivision (a) or with the formation of a maintenance area under this chapter if neither the board nor the department has given the nonfederal assurances to the United States required for the project. If neither the board nor the department has given the nonfederal assurances to the United States required for the project, the board or department may elect to proceed with the formation if it determines that the formation of a maintenance area is in the best interest of the state.