

**STATE OF CALIFORNIA
THE NATURAL RESOURCES AGENCY
CENTRAL VALLEY FLOOD PROTECTION BOARD
RESOLUTION NO. 2018-06 FOR
ACCEPTABLE OPERATION AND MAINTENANCE OF THE
STATE PLAN OF FLOOD CONTROL**

BACKGROUND:

- A. WHEREAS**, in 1911 the Legislature created the Reclamation Board. The Reclamation Board was given regulatory authority over the Sacramento Valley’s levee system and levee maintaining agencies with the objectives of (1) assuring a logical, integrated system for controlling flooding along the Sacramento and San Joaquin Rivers and their tributaries in cooperation with the United States Army Corps of Engineers (USACE), (2) cooperating with various agencies in planning, constructing, operating, and maintaining flood control works, and (3) maintaining the integrity of the flood control system and designated floodways. In 1913 the Reclamation Board was given regulatory authority over the San Joaquin Valley’s levee system and levee maintaining agencies. In 2007 the Legislature restructured the Reclamation Board and renamed it as the “Central Valley Flood Protection Board”; and
- B. WHEREAS**, as the non-federal sponsor of the State-federal flood control system in California’s Central Valley, the Central Valley Flood Protection Board (Board) has provided the federal government with assurances that the flood control system would be operated and maintained as prescribed by regulations of the Secretary of the Army that require compliance with the USACE Standard Operation and Maintenance (O&M) manuals for the Sacramento River Flood Control Project (1955) and for the Lower San Joaquin River Levees – Lower San Joaquin River and Tributaries Project (1959) pursuant to the authority in California Water Code Section 8617; and
- C. WHEREAS**, pursuant to Section 3 of the Flood Control Act of 1936 and Section 103 of the Water Resources Development Act of 1986 (WRDA 86), non-Federal interests are required to pay 100 percent of the costs of operation, maintenance, repair, replacement, and rehabilitation (OMRR&R) of structural flood damage reduction projects. In addition, the USACE has issued a policy guidance memorandum dated August 16, 2005 which states that a project is only eligible for reconstruction assistance from the USACE if a non-federal sponsor has performed adequate maintenance; and
- D. WHEREAS**, the USACE has issued Engineering Regulation (ER) 1110-2-401, dated September 30, 1994 which defines “repair, replacement, and rehabilitation” for projects managed by non-federal sponsors. “Repair” is considered to entail those activities of a routine nature that maintain the project in a well-kept condition. “Replacement” covers those activities taken when a worn-out element or portion thereof is replaced. “Rehabilitation” refers to a set of activities as necessary to bring a deteriorated project back to its original condition; and

- E. WHEREAS**, the legislature granted the Board jurisdiction and authority over the State Plan of Flood Control (SPFC) as denoted in California Water Code, including Section 8534, which requires the Board to enforce on behalf of the State the erection, maintenance and protection of the SPFC which in its judgment will best serve the interests of the State and Section 8608 which requires the Board to establish and enforce standards for the operations and maintenance of the SPFC; and
- F. WHEREAS**, California Water Code Section 12642 states “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.”; and
- G. WHEREAS**, California Water Code Section 12828 states “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...”; and
- H. WHEREAS**, many local maintaining partners provided assurances to the Board and signed agreements with the Board for continued operation and maintenance prescribed by regulations of the Secretary of the Army for the flood control system in the Central Valley; and
- I. WHEREAS**, in 2005, Hurricane Katrina caused portions of the federal levee system to fail in New Orleans, resulting in significant loss of life and property and subsequently, the USACE embarked upon a nationwide scrutiny of the federal levee system; and
- J. WHEREAS**, after Hurricane Katrina, the people of California recognized the Sacramento-San Joaquin Valley as an area significantly at risk for similar devastation suffered by New Orleans and passed Proposition 1E, which provided \$4 billion for flood protection for the Central Valley, which has been utilized over the past 11 years to significantly improve the SPFC facilities in the Central Valley; and
- K. WHEREAS**, the Central Valley Flood Protection Act of 2008 (2008 Act) directed that the Department of Water Resources (DWR) prepare a Central Valley Flood Protection Plan (CVFPP) to be adopted by the Board by July 1, 2012 (CWC § 9612(b)); and
- L. WHEREAS**, DWR prepared a 2017 update to the CVFPP pursuant to the requirements of the 2008 Act. The 2017 update was adopted by the Board through Resolution of Adoption 2017-10 on August 25, 2017; and

M. WHEREAS, through Resolution of Adoption 2017-10, the Board stated the following:

- i. That in order to successfully implement the 2017 CVFPP Update, essential and adequate funding is necessary to continue to operate and maintain the flood system, that additional funding is required to correct identified deferred maintenance issues, and that further funding is essential to continue to make vital improvements to California's aging flood system.
- ii. That since the adoption of the 2012 CVFPP, the levee inspection reports provided by the USACE indicate severe levee maintenance deficiencies in over 90% of State Plan of Flood Control levee systems.
- iii. That it is committed to working with the local maintaining agencies to correct these operation and maintenance deficiencies in order to obtain or regain eligibility for the Public Law 84-99 Rehabilitation Program.
- iv. That it acknowledges the importance of all eight key policy issues identified in the 2017 CVFPP Update and will facilitate resolution of these interrelated policy issues with the understanding that the Board has identified funding and operation and maintenance of the flood system as the highest priorities to advance prior to the 2022 CVFPP Update.

N. WHEREAS, through multiple successful Coordinating Committee meetings, the Board has facilitated a discussion regarding the definitions of OMRR&R, including valuable participation by the USACE, maintaining agencies, and stakeholders.

NOW, THEREFORE THE BOARD FINDS:

1. That the above recitals are true and correct.
2. That this Resolution 2018-06 is being adopted by the Board as confirmation of the State's standards for OMRR&R for SPFC facilities. It is also intended to notify all interested parties that the Board will enforce its standards as necessary to fulfill its mandates pursuant to California Water Code and its federal assurances.
3. That the USACE requires that all SPFC facilities be operated and maintained in accordance with the Code of Federal Regulations, Title 33, Section 208.10 (33 CFR 208.10), with federal O&M manuals, in accord with ER 1110-2-401 and that all levee systems pass periodic inspections with acceptable ratings to be eligible for the federal Public Law 84-99 Rehabilitation Program.
4. That except as noted below, the State's priority and long-term goal is for maintaining agencies to substantially improve operation and maintenance practices to reach compliance with all requirements of applicable federal regulations and O&M manuals ensuring eligibility for the federal Public Law 84-99 Rehabilitation Program under current federal interim guidelines. The State does not believe that compliance with the USACE vegetation standards is appropriate or practical within the SPFC in light of

competing interests under the Endangered Species Act and therefore has promoted alternative levee vegetation objectives that require maintaining agencies to instead comply with the State's current levee vegetation management strategy.

5. That the obligation to perform routine operation and maintenance did not change with the addition of 33 U.S.C. 2213 from WRDA1986.
6. That the required operations and maintenance as identified in existing O&M manuals includes "repair, replacement, and rehabilitation" as described in ER 1110-2-401, but does not include reconstruction of a project or project segment that has reached the end of its design service life or is deficient due to a design or construction defect.
7. That many local maintaining agencies have advised the State that lack of sustainable funding is a major hurdle to adequately operate and maintain SPFC facilities.
8. That identifying and securing a sustainable funding source for operation and maintenance of the SPFC is a State priority.
9. That the State is committed to working with the maintaining agencies to correct operation and maintenance deficiencies that will reduce risk to the people and property of the Central Valley, and obtain, regain, and maintain eligibility for the federal Public Law 84-99 Rehabilitation Program.
10. That the State acknowledges the value of maintaining agencies and applauds those agencies which received acceptable ratings. The State appreciates those maintaining agencies that have developed and submitted System Wide Improvement Framework (SWIF) plans.
11. That the State encourages all other maintaining agencies currently not meeting federal Public Law 84-99 Rehabilitation Program eligibility criteria to develop, submit, and adhere to SWIFs as an initial phase to regain eligibility for the federal Public Law 84-99 Rehabilitation Program. As an interim phase of compliance with the requirements of 33 CFR 208.10 and federal O&M manuals, the maintaining agencies may address the unacceptable items identified in the USACE inspection reports that fall within the list of items used to determine Public Law 84-99 eligibility, currently described in the USACE memorandum dated March 21, 2014 with subject line "Interim Policy for Determining Eligibility Status of Flood Risk Management Projects for the Rehabilitation Program Pursuant to Public Law (P.L.) 84-99".
12. The Board will seek to update or execute assurance agreements with local maintaining agencies to standardize such agreements in a manner that explicitly recognizes operation and maintenance requirements include repair, rehabilitation, and replacement as defined in ER 1110-2-104..

**NOW, THEREFORE, BE IT RESOLVED, THAT THE BOARD ESTABLISHES
THE FOLLOWING POLICIES:**

- I. Maintaining agencies who have not received acceptable ratings from recent Department inspections, shall make every effort to receive “acceptable” ratings from annual Department inspections.
- II. Maintaining agencies shall make every effort to obtain or regain, and maintain, eligibility for the federal Public Law 84-99 Rehabilitation Program, including participating in the federal SWIF program as an initial phase while working toward an interim phase of compliance by addressing the unacceptable items within the USACE’s list described in the USACE’s interim policy.
- III. Maintaining agencies shall make every effort to comply with the State’s long-term requirement of full compliance with 33 CFR 208.10 and federal O&M manuals consistent with the State’s current levee vegetation management strategy.
- IV. Maintaining agencies that are unable to meet OMRR&R requirements shall seek necessary funding to comply with OMRR&R requirements or participate in the federal SWIF program.
- V. The State is committed to improving operation and maintenance of SPFC facilities in all areas. Where the State is required to perform OMRR&R, the State shall continue to obtain, regain, and maintain eligibility in the Public Law 84-99 Rehabilitation Program. The State shall also make every effort to address non-compliant encroachments systemwide.
- VI. The State will investigate all remedies available to it as authorized by California Water Code, in areas where local maintaining agencies are unable or unwilling to fund proper operation and maintenance practices in compliance with 33 CFR 208.10 and federal O&M manuals.

This resolution shall constitute the written decision of the Board in the matter of acceptable operation and maintenance of the State Plan of Flood Control.

PASSED AND ADOPTED by vote of the Board on Month XX, 2018

William H. Edgar, President

Jane Dolan, Secretary

General Note:

The Board staff and members received many thoughtful comments from stakeholders at the August 10 workshop. Staff incorporated those comments into the version which was posted for adoption at the Board meeting on August 24. Subsequently, staff received additional comments and proposed edits from Scott Shapiro, (identified herein as SS) attorney representing the Central Valley Flood Control Association.

Staff did consider the comments from Jacob Katz and Julie Rentner regarding multi-benefit projects and the desire to reiterate the Board's commitment to multi-benefit projects and ecosystem uplift. We did not incorporate any of those changes because this resolution is targeted to the two Board priorities of funding and improved operation and maintenance, and its adoption will not preclude any of the other priorities from the 2017 Resolution of Adoption.

To avoid confusion, staff is posting the recent changes made in response to comments received since the August 10, 2018 Board Workshop. That document follows. The clean copy of this resolution is the version that staff will be requesting the Board adopt on Friday.

WHEREAS

Paragraph A: Addition of "Levee system" and removal of "local" at request of SS.

Paragraph B: Minor style edit.

Paragraph C and D (added): After reviewing SS comments and additional comments from Jacob Katz, staff realized we had not closed the loop on our citations back to federal authority. Adding the WRDA language and the ER which defined the RRR terms is clarified in paragraphs C and D.

Paragraph F and G (formerly D): SS opined we had misstated the law in the prior edition. In order to clarify, paragraphs now recite the pertinent parts of the Water Code Sections at issue verbatim.

FINDINGS

SS suggested reorganizing the findings section. We appreciate his comments, but chose to leave the paragraphs in their original order.

Finding #2: SS suggested that the resolution only addressed the “locals” without addressing the state obligations. This paragraph intends to clarify that the Board is setting standards for the system’s OMRR&R regardless of what type of entity is charged with performing the OMRR&R. Staff stands strong by the second part of this paragraph that notifies all interested parties that the State, through the Board’s authorities, will enforce the standards cited here and in federal regulation as required by state and federal law and agreements.

Finding #3: Board staff added ER 1110-2-401 for clarity and consistency.

Finding #4: SS edits accepted to clarify state’s position on vegetation management.

Finding #5: Minor changes replacing “expand” with “change” and adding the ER 1110-2-401 for consistency.

Finding 6: SS suggested additional specific language be added. Staff considered and chose to refer back to the definitions in ER 1110-2-401 as that specifies and clarifies the terms.

Finding #12: Staff added language to refer back to the definitions in ER 1110-2-401 as that specifies and clarifies the terms.

POLICIES:

Remove “local” to clarify that applies to all maintaining agencies.

Policy III: SS edits accepted.

Policy V: Edited to clarify State’s commitment to improving management overall, and specifically where State is maintainer.

Policy VI. SS edit “changing “will” to “may” not accepted. Water Code requires the Board and DWR to take action in cases where local maintainers are not performing adequate maintenance.