

Fire Island Inlet to Montauk Point, NY Final General Reevaluation Report



APPENDIX H LAND MANAGEMENT

U.S. Army Corps of Engineers
New York District



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FIRE ISLAND TO MONTAUK POINT REFORMULATION STUDY – FINAL GRR

Appendix H

Land Management

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This appendix to the Final General Reevaluation Report summarizes USACE’s investigation of planned and potential future land use management actions within the Study Area. USACE acknowledges that some of the recommended actions included in this appendix are outside of the scope of the Fire Island to Montauk Point project, and are not within the jurisdiction of the federal government. Where applicable, potential or actual roles and responsibilities of federal, state, and local stakeholders are described.

I. Context of Land Management Considerations in the Fire Island Inlet to Montauk Point Project

The Reformulation Study was undertaken to identify a long-term (50-year) plan to reduce the risk of storm damages, while maintaining, enhancing or restoring the existing environment. USACE coordinated with project stakeholders to establish the approach to formulating, evaluating, and recommending storm damage reduction projects for the study area under the reformulation effort. The team sought to identify opportunities to reduce storm damages through less intrusive measures, and in a manner which allows for restoration and enhancement of the natural coastal processes.

Land use and development management alternatives include regulations and policies that could reduce the risk of storm damages to existing development in high risk areas and reduce development pressure in those areas. At-risk areas generally include areas vulnerable to flooding, erosion or both. The reformulation study process developed land management recommendations for the study area which are applicable to the FIMP Project Area addressed by this coastal storm risk management project.

An examination of the with-out project conditions in the study area noted that the existing collection of land use regulations has inefficiencies in addressing development and redevelopment in these at-risk areas, particularly in areas vulnerable to erosion. This analysis identifies the extent to which features implemented under this project could change the effectiveness of these regulations. The following sections present a summary of the land-use regulations, the additional challenges and opportunities inherent with the different alternatives, and recommendations that could be implemented as part of a floodplain management plan to more effectively address the development and redevelopment concerns in the hazard areas.

State and local governments have authorities and responsibilities for managing risk that should be utilized in coordination with the jointly implemented storm risk management efforts. The FIMP project will not eliminate all flood risks so additional measures by other public sector and private interests are necessary to help achieve resilience. Mechanisms available to local interests to better understand and reduce risk include comprehensive land use plans, Local Waterfront Revitalization Programs (LWRPs), and local Hazard Mitigation Plans, to name a few. Other land-use management regulations, discussed below, are measures that could be implemented in a Floodplain Management Plan (FPMP) to reduce risk to development in high hazard areas or reduce development pressures in those areas.

II. Existing Land Management Authorities

Within the study area, federal, state and county governments each have regulatory authority, the local governments have regulatory jurisdiction with respect to land management, principally through zoning and through management of environmental features such as freshwater and tidal wetlands. In addition,

FIIS is administered by the NPS under the DOI, a federal agency with land use and environmental management authority, for a portion of the Project Area.

In New York State, the primary responsibility for zoning land use regulations rests with local municipalities, including towns and incorporated cities or villages, under the system known as “home rule”. However, in the case of shorefront areas potentially subject to flooding or coastal erosion, and for Fire Island in particular, a number of other federal and state zoning and other land use regulations pertain, as described below.

Fire Island National Seashore

When Congress enacted FIIS-enabling legislation, the law mandated the Secretary of the Interior to establish federal zoning regulations. These regulations provide standards for local zoning to protect and preserve Fire Island, and they exist solely as an overarching law to which local ordinances must conform.

Federal zoning regulations provide a set of standards for the use, maintenance, renovation, repair, and development of property within FIIS. NPS has established three districts within its boundary, which are: 1) the Community Development District; 2) the Seashore District; and 3) the Dune District. The Community Development District comprises 17 communities and encompasses the existing communities and villages. In the Community Development District, existing uses and development of single-family houses are allowed. The Seashore District includes all land in FIIS that is not in the Community District. No new development is allowed in the Seashore District, but existing structures may remain.

The Dune District extends from Mean High Water (MHW) to 40 feet landward of the primary natural high dune crest which has been mapped by NPS. This district overlaps the other two districts. Only pedestrians, and necessary vehicles such as ambulances, are allowed in the Dune District. Like the Seashore District, existing legal structures may remain and may be repaired and maintained. The existing dune district was established based upon the dune condition in 1976 and adopted by Congress. The dune district has not been re-mapped, and presently is not an accurate representation of the existing dune. NPS developed federal zoning standards that became effective September 30, 1991 under 36 CFR Part 28. These set standards that local zoning must meet to be exempt from the condemnation authority of the Secretary of the Interior.

These standards include controlling population density and protecting natural resources, limiting development to single-family homes, and prohibiting any new commercial or industrial uses. NPS is not responsible for enforcing the federal zoning standards in the communities and villages, despite the presence of federal regulations. It is the responsibility of the local governments to maintain regulatory jurisdiction. The federal government ensures local compliance with the federal law by maintaining the power of condemnation; in cases where the law is not met, FIIS has statutory authority to purchase and condemn the non-compliant building. While local zoning ordinances conform to standards issued by the Secretary of the Interior, the federal power of condemnation is suspended. In practice, this authority has been seldom exercised, and Congress has not given funding to FIIS for this purpose in recent years.

FEMA

Other agencies also have responsibility to affect land use regulation in the project area. An organization that indirectly affects land use regulation is the Federal Emergency Management Agency (FEMA). Any community seeking to register with the Federal Insurance Association, which allows homeowners to obtain flood insurance, must join FEMA's National Flood Insurance Program (NFIP). Participation in the NFIP requires a municipality to adopt a local floodplain management ordinance that regulates floodplain development and redevelopment following damage. The intent of the local ordinance is to reduce damage to buildings and property through the establishment of base flood elevations, building code requirements, and restrictions on allowable development in floodplain areas. Specific provisions include the requirement that the first finished floor or new construction must be elevated above the base flood elevation. All municipalities within the study area participate in the NFIP.

USFWS

The Coastal Barrier Resources Act of 1990 established the Coastal Barrier Resources System (CBRA), which consists of specifically identified undeveloped coastal barriers on the United States coastline. The U.S. Fish and Wildlife Service (USFWS) is the responsible agency for administering CBRA. Coastal barriers include barrier islands, bay barriers, and other geological features that protect landward aquatic habitats from direct wind and waves. CBRA units are prohibited from receiving federal monies or financial assistance or insurance for new development in CBRA in areas. The CBRA, however, identifies exceptions to this restriction, including non-structural shoreline stabilization similar to natural stabilization systems; the maintenance of channel improvements, jetties, and roads; necessary oil and gas exploration and development; essential military activities; and scientific studies.

NYS CEHA

In 1981, the Coastal Erosion Hazard Area (CEHA) Act, Article 34 of Environmental Conservation Law was enacted to provide for the identification and regulation of critical erosion hazard areas along New York's coastlines, in order to minimize damage from erosion. Article 34 established statutory authority for identifying these erosion hazard areas, restricting development in these areas, and establishing criteria for the development of a statewide

Coastal Erosion Management (CEM) regulatory program. 6 NYCRR Part 505, the Coastal Erosion Management Regulations, provides the framework and criteria which allow the State and local governments to administer a local CEM program that is consistent with Article 34 for affected shoreline communities. Under Article 34 and Part 505, CEHA consists of two separate jurisdictions, which include the Natural Protective Feature Area (NPFA), which is defined by the natural protective features (dune, beach, bluff and near shore areas) found along a particular stretch of shoreline, and the Structural Hazard Area (SHA), which is delineated landward of the NPFA along shorelines with a long term annual rate of shoreline recession greater than one foot per year.

Currently no SHA has been identified within the study area. Therefore, the terms CEHA and NPFA are used interchangeably throughout this report because only the NPFA jurisdiction is applicable within the study area. However, SHA may be delineated within the project area in the future if technical data determines it to be appropriate.

CEHA jurisdiction extends from the seaward limit of the near shore area (1,000 feet seaward of mean low water or a water depth of 15 feet; whichever is greater) to the landward edge of the most landward natural protective feature. For most of the reformulation study area, the primary dune is the most landward natural protective feature. The primary dune extends 25 feet landward from the landward toe, as identified on the Coastal Erosion Hazard Area maps and is the landward limit of CEHA jurisdiction. Where the landward most natural protective feature is a bluff or a beach, the CEHA jurisdiction extends 25 feet landward from the crest of a bluff or 100 feet landward from the change of vegetation or physiographic form on a beach. Presently, all of the towns within the study area have in effect either a State CEHA program administered by the Department of Environmental Conservation or a certified local law administered locally. The Village of Saltaire, Ocean Beach, and the Town of Brookhaven administer the program under their local laws.

NYS CMP

The CMP and Article 42 establish a balanced approach for managing development and providing for the protection of resources within the state's designated coastal area. The policies of New York State, reflected in the CMP, express clear preference for non-structural solutions for erosion and flooding, such as elevating or flood-proofing buildings. Municipalities are encouraged to prepare Local Waterfront Revitalization Programs (LWRPs) in order to refine the state's CMP and take local factors into account. In communities with fully approved LWRPs, federal actions must be consistent with the LWRP policies in order for a consistency determination to be issued.

III. Evaluation of Land Use and Development Implication of Coastal Storm Damage Features

There are limitations in the existing collection of land use regulations to discourage development or restrict building and rebuilding in high hazard areas along the coast.

Some of the proposed project features could create additional land development challenges or intensify those that already exist. Alternately, some features could reduce these pressures. The following presents the alternatives, and land-use challenges and opportunities associated with them.

Breach Response. The breach response plans introduce some land use and development management challenges that may not be realized in the without project condition. Existing land management measures do not address rebuilding in breach locations, or locations that are likely to remain vulnerable to breaches in the future. Based upon the final recommended plan, there are limited locations where this is an issue of concern over the first 30 years. This issue would be of greater concern in years 31 - 50. Land and development management measures should consider the need for restricting redevelopment in locations that are likely to remain as vulnerable to breaching and overwash. Not only will this address reducing development at risk, but could be important to facilitate continued breach response requirements, and can help provide a desirable habitat mosaic by maintaining an open bay to ocean connection.

Inlet Management. The inlet management plans do not introduce any specific land use and development management challenges.

Non-Structural. The non-structural plans complement existing land use and development management measures that discourage development in high risk flooding areas. The project includes several location that recommend acquiring rather than retrofitting structures in some situations, including instances where 1) buildings are in sparsely developed areas, where habitat connectivity could be achieved, or 2) buildings located at such low ground elevations that under future sea level rise conditions would be in the intertidal zone. Acquisition could provide flood risk management benefits, flood water retention, and habitat restoration. The recommendations acknowledge that there are opportunities to review the nonstructural recommendations to fine-tune the plan for structure acquisition rather than retrofit alternatives, considering if the additional costs for acquisition would be warranted.

Beachfill. Beachfill plans introduce both challenges and opportunities for land use management. Along the shorefront area, the existing land management regulations that limit the investment in the primary dune have limited effectiveness. A number of structures exist within the dune, partially because they were constructed prior to the implementation of these regulations, and partially due to long-term changes in the dune position, and development pressure in the primary dune. In the absence of a project, it is likely that the number of pre-existing, non-conforming structures would be reduced as a result of storms that would destroy these buildings beyond repair, with the acknowledgement that additional buildings would be at risk, and added to the regulatory zone, due to the long-term evolution of the dune position. With a beachfill project in place, it is much less likely that the structures in the CEHA would be destroyed, and would likely persist, and the CEHA would be less subject to change over time.

It is unlikely that a beachfill and dune project would increase development, because of the existing, high level of development. It must be noted that the proposed plans also create opportunities to address existing development that is at risk. Construction of a beachfill and dune project requires real estate. These real estate easements for the beach and dune preclude development in the footprint of the project.

The renourishment component of the project is an opportunity to communicate the long-term risks. The project proposes renourishment over the first thirty years of the project, rather than fifty. This approach is consistent with long term disinvestment in expenditures to secure and place sediment in a dynamic environment. This initial commitment to maintain the protective profile complies with New York State law, and allows existing development to phase retreat actions.during the duration of the project.

Beach nourishment is recommended to protect public infrastructure, most notably in Robert Moses State Park, and Smith Point County Park. Relocation of public infrastructure in these areas through adaptive management could reduce the long-term requirement for renourishment in these areas.

Groin modification. The groin modification alternatives do not directly present land management or development management challenges. However, the implementation of the groin modification alternative in the vicinity of Ocean Beach could increase the vulnerability of the existing development, which is addressed with project features, including the recommended renourishment.

IV. Land and Development Management Opportunities in Formulation

The reformulation effort investigated land management alternatives to reduce the exposure of people and property to erosive forces in the study area, as part of the iterative plan formulation process. Table H.1 highlights the possible land and development management alternatives that could be implemented to address the existing land use challenges. This table, with supporting information, was considered by local municipalities and stakeholder groups to develop recommendations for alternatives to address these challenges.

The evaluation of alternatives has identified that the biggest challenge is addressing building and rebuilding in erosion-prone areas. These discussions have resulted in a framework to address these concerns, which generally consider solutions that improve upon or modify the existing set of regulations that are presently in place, rather than the introduction of new land-use regulations.

An important outcome of this analysis was the identification of the techniques that should be evaluated for possible inclusion for Federal implementation in the recommended plan, and which techniques would be recommended for inclusion in a non-federally implemented Flood Plain Management Plan (FPMP) as a component of the overall plan. A number of the alternatives can be included in both. The USACE does not possess authority to modify or implement local land use regulations; this power rests at the municipal and state levels, and thus certain alternatives are assigned only to the FPMP. Table H.1 shows the applicable authority to implement each alternative and who can evaluate and adapt its application. As it pertains to improved local land use management, NYSDOS, in cooperation with NYSDEC, is preparing model local laws that include consideration of future physical climate risk due to flooding, storm surge, and sea level rise under authority of the NYS Community Risk and Resiliency Act. These model laws, which include categories for zoning, floodplain development management, resilient construction, and more, will be made available for use by municipalities. These model local laws can be adapted for use by municipalities that are interested in better managing risk on the local level.

Planning in the form of pre- and post-storm response is critical for communities that are at risk of flooding and storm damage. In addition to these types of local storm response and preparation plans, other planning documents, such as a local or regional Hazard Mitigation Plans or a Local Waterfront Revitalization Program (LWRP), can help bolster and prepare communities for future storm and flooding impacts. These types of planning efforts should include an assessment of the hazards and risks to a community and its assets, along with regional implications. Post-storm redevelopment planning should not solely focus on rebuilding back to pre-storm conditions, but preparing in advance for future storm events so that capital spending and redevelopment are completed in a resilient manner. Lessons learned from past storms can help shape future recommendations for rebuilding restrictions, rebuilding to safer standards or relocating out of hazardous areas.

Table H.1 SUMMARY OF NON-STRUCTURAL TECHNIQUE EVALUATION

NON-STRUCTURAL TECHNIQUE	RECOMMENDED FOR FURTHER EVALUATION UNDER:		
	FIMP Reformulation Plan USACE*	Non-Federal Flood Plain Management Plan	
		State	Local
Land Use and Regulatory Measures			
Zoning/Land Use Controls		+	+
New Infrastructure Controls		+	+
Landform and Habitat Regulations		+	+
Construction Standards and Practices		+	+
Tax Incentives		+	+
Building Retrofit Measures			
Relocation	+	+	+
Elevation	+	+	+
Free-Standing Barriers (mainland only)	+		
Dry Floodproofing (mainland only)	+	+	+
Utilities Protection	+	+	+
Land Acquisition			
Purchase of Property	+	+	+
Exchange of Property		+	+
Transfer of Development Rights		+	+
Easements and Deed Restrictions	+	+	+
Other			
Wetlands Protection & Restoration	+	+	+
Vegetative Stabilization	+	+	+
Post-Storm Response Planning	+	+	+
* It is acknowledged that there are other Federal agencies (including the NPS, within the jurisdictional boundaries of FINS; FEMA; and USFWS) that have a Federal Role in these activities			

The following land and development management scenarios were identified to reduce development pressures, and the existing development in high hazard areas.

- Scenario 1: Improving the effectiveness of the existing regulatory program, by establishing a common funding source, establishing common and clearly communicated boundaries for regulated hazard areas, increasing training of local officials, and coordination to ensure consistent implementation across regulatory boundaries.
- Scenario 2: Modification of statutes to allow for more effective implementation of the existing laws.
- Scenario 3: Establishing a funding mechanism to acquire vacant parcels, or buildings that are at risk.
- Scenario 4: Establishment of post-storm response plans to guide recovery following major, catastrophic events.

Scenario 1. The following measures improve the effectiveness of the existing land-use regulations through establishment of common funding, and improved implementation of the law, generally includes the following:

Update the Existing Dune District in FIIS

The FIIS enabling legislation set the established dune location in 1978; this line does not reflect the current dune location. Effective implementation of the regulation would benefit from a common definition of the dune, and a common regulatory jurisdiction with the CEHA Program. The federal law should be revised to create the same definition of a dune and the same requirement as contained in CEHA for a 10-year remapping process. This common mapping would require the identification of an agreement on a common defining feature. Presently, the CEHA jurisdiction as identified on the CEHA maps is based upon the landward toe of the primary dune, plus 25 feet. The federal dune district is based upon the dune crest plus forty feet. Furthermore, the NYS process provides for a public hearing as input into the process, which is not a provision of the Federal dune district. Since the CEHA mechanism has been applied throughout the state, provides for public input, and is more current than the dune district, it is recommended that the provisions within the FIIS enabling legislation be changed to identify that the dune district have the same criteria as the CEHA jurisdiction, and be allowed to change with changes in the CEHA designation.

CEHA Improvements. CEHA improvements include map updates, additional funding to implement the program, and provisions for improved DEC monitoring of local implementation of CEHA. These improvements are described below:

Updating CEHA Maps across the FIMP Area. CEHA law and regulations require the review and revision of the Coastal Erosion Hazard Areas every 10 years. Given the dynamic nature of New York's coastal systems, timely map revisions are essential to ensure that the State's sensitive coastal natural protective features such as beaches, bluffs, and dunes are properly protected. The NYSDEC is currently in the process of reviewing and revising the Coastal Erosion Hazard Areas throughout New York State, including within the FIMP project area. The one exception is Fire Island, which is scheduled for map revisions after completion of the FIMI project. Revisions following major man-made or natural events or major storms as well as routine revisions of CEHA scheduled every ten years are necessary to provide local government and property owners the information they need to make informed decisions with respect to land management and also to effectively implement the CEHA program.

Improve DEC monitoring and support of local implementation of CEHA and establish adequate funding for effective implementation of CEHA. Based on State law, the DEC has delegated the implementation of CEHA to local communities who have requested this delegation and have met the requirements of state law and regulation. DEC monitors all delegated programs for compliance by collecting annual permitting information from each community so that any local deficiencies can be addressed. This review assists communities in assuring that their management of the program meets state requirements and results in the protection of the natural protective features that are instrumental in the protection of people and their properties. These reviews assist in the improvement of management and communication, assist in consistent implementation of the program, and where

necessary, provide the State with information regarding whether a community's delegation needs to be withdrawn. The State provides detailed annual reviews for a small number of communities each year that are having issues in implementing their program. DEC also provides training to local communities as requested or needed for their proper implementation of the program. The State's CEHA program could be further expanded to provide more oversight of locally administered CEHA programs and more information about CEHA for municipalities that have chosen not to administer their own local CEHA program. This expanded program would allow for better technical and legal support for municipalities who administer their program which in turn would improve their effectiveness. It would also make non-delegated coastal communities more aware of CEHA and the importance of its proper implementation.

Scenario 2. Modification of statutes to allow for more effective implementation of the existing laws. The following are measures that could be added to the above to further increase the effectiveness of existing regulations.

CEHA Statutory changes. Make statutory and rule changes to enhance enforcement authority and provide indemnification by New York State for properly administered local CEHA programs against takings claims to reduce the influence of potential litigation costs, including potential takings claims, on local program decision making. Presently, local municipalities are responsible for providing the legal defense in the instance where CEHA variance requests are taken to court. Often the cost of defending these lawsuits is comparable to the costs associated with acquiring properties, and beyond the means of the municipalities. State indemnification for properly administered CEHA programs would mitigate this issue.

Scenario 3: Establishing a local program to acquire vacant parcels, or buildings that are at risk

Improved implementation of the land use regulations can help address inappropriate building and rebuilding in the CEHA area. It is acknowledged however, that even with such improvements, these programs would benefit from a funding mechanism made available to purchase vacant developable property, or for acquisition of vulnerable shorefront structures. This could serve as a means to acquire properties when enforcement of the regulations establishes a "taking", or in a broader application could be applied to reduce the number of structures within the CEHA and other high risk coastal locations that would be vulnerable to storm damages. Creation and application of an acquisition fund should be considered as a way that could create a model for addressing these issues.

The scope of the local acquisition plan could range from a plan to acquire properties when there is a determination of a taking, to a broader scope that would allow for the acquisition of structures from willing-sellers in high-risk areas, and could also include an acquisition plan for breach vulnerable areas. With this larger concept, there are a number of acquisition scenarios that could be developed as an incentive for increased participation. An example is presented below.

Voluntary sales with retained occupancy or lease-back programs. In the past, FINS has purchased noncommercial residence at fair market value, reduced by up to 25% allowing for the right to no more than 25 years of retained occupancy, unless the house is destroyed. Federal leaseback programs are

generally very restrictive but state, county or local programs may have provisions for retained occupancies or less restrictive lease-back arrangements. This type of program could encourage voluntary participation by landowners. Landowners who recognize the hazards presented by their location may find such programs attractive as it provides them a fixed sum upfront based upon a pre-storm appraisal and the opportunity to continue to use the structure for the term or until it is destroyed. It allows homeowners to spread their risks, as a post-storm value for a destroyed and eroded parcel would be far less. The advantage for the public is that while structures will remain on the dunes and continue to inhibit natural dune growth; this voluntary approach could substantially reduce the controversies around immediate condemnation, reduces acquisition costs by at least 25%, and particularly for the secondary line of houses, will facilitate dune advancement over time, ultimately achieving a more sustainable dune.

The entity or entities that would be responsible for purchasing property must be determined. On Fire Island, this could be the National Park Service using federal appropriations. FEMA could also acquire property and is a potential source of funding for acquisition. In order to address regulatory issues, DEC, who has authority to purchase lands, could be the agency to acquire property. For other state purposes and in other locations, DEC, OGS, and OPRHP have authority to accept donations or purchase lands and would need access to the acquisition funds. For regional purposes, Suffolk County might be a logical body; having significant experience in recent years with acquisition of parcels from willing sellers. Current laws, policies and practices may need to be modified for the project to be viable.

Scenario 4. Establishment of post-storm response plans

It is acknowledged that no plan will reduce all risks. It is likely that over the project life, a storm will occur which will compromise the design, and result in damages. This could occur in areas that are protected, or areas that are not protected as a result of this project. The FPMP should consider the development and implementation of local post-storm redevelopment plans, which would recognize the storm risks and provide direction for the rebuilding of communities in a more sustainable manner.

V. Recommended Integration of Appropriate Land Use and Development Management Measures

The above measures contained in scenarios 1-4 identify opportunities that could be implemented by partner agencies. USACE has limited authority in land management decisions and these complementary actions should be contained in a FPMP.

The reformulation effort implements several actions consistent with sound land management policy.

Dune Alignment: The proposed project recommends a dune alignment that requires the acquisition of structures. This more landward alignment was initially constructed during the Fire Island Inlet to Moriches Inlet stabilization effort. This alignment required acquisition of buildings, prior to construction, and reduces the number of structures in the high-risk area.

Dune easements: The reformulation project will reduce development significantly within the high risk project areas. The length of shoreline will contain perpetual easements for all locations where beachfill is placed. These easements severely restrict development. Greater detail of the real estate actions is provided within the Real Estate Appendix.

Project Monitoring: The Corps can discourage development within the project area through annual inspections and monitoring of the completed project in accordance with the project's Easement Language, Project Partnership Agreement (PPA) and Operation, Maintenance, Repair, Rehabilitation and Replacement (OMRR&R) manual (legally binding agreements) that are prepared in cooperation and coordination with the nonfederal sponsor and cooperating agencies.

The Corps would monitor the enforcement of these easements through the Inspection of Completed Works (ICW) program to ensure that permanent easements identified for the project to function as designed, would remain undeveloped. Failure for these easements to remain undeveloped for the project life may result in the project being removed from the ICW program and also limit the Corps' ability to renourish the project. A project that is removed from the ICW program is not eligible for federal disaster funding under Public Law 84-99 that provides for project repair (to design standards) as a result of a disaster declaration.

These inspections and reporting would continue for the life of the project and to ensure enforcement of project agreements and responsibilities by all project partners.