



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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MEMORANDUM

**SUBJECT:** Request for Deviation from 40 CFR 35.6275 Period of Availability of Funds, 2 CFR 1500.8 Revision of budget and program plans and 40 CFR 35.6200 Eligibility for removal Cooperative Agreements

**FROM:** Martin Hestmark, Assistant Regional Administrator  
Office of Ecosystems Protection and Remediation

Richard D. Buhl, Assistant Regional Administrator  
Office of Technical Management Services

**THRU:** Wayne Anthofer, Director  
R8 Grants, Audit and Procurement Program  
Office of Technical Management Services

**TO:** Kysha Holliday, Acting Director  
National Policy, Training, and Compliance Division  
Office of Grants and Debarment

Purpose

Pursuant to 40 CFR 35.6025 "Deviation from this subpart," 2 CFR §200.102(b) "Exceptions", and 2 CFR §1500.3 "Exceptions", the EPA Region 8, Region 6, and Region 9 request a deviation from the requirements of 40 CFR §35.6275 "Period of Availability of Funds", 2 CFR 1500.8 "Revision of budget and program plans" and 40 CFR §35.6200 "Eligibility for Removal Cooperative Agreements".

This deviation request, if approved, would apply only to new and existing Cooperative Agreements that are awarded by the EPA to States, Political Subdivisions or Indian Tribes that demonstrate their direct involvement in and response to the Gold King Mine Waste Water Spill.

Background

The Gold King Mine Waste Water Spill occurred on August 5, 2015, at the Gold King Mine near Silverton, Colorado. While the EPA was conducting an investigation of the mine and excavating above the old audit, pressurized water began leaking above the mine tunnel, spilling approximately three million gallons of water and waste into Cement Creek, a tributary of the Animas River. By August 10, 2015, the waste had reached the San Juan River in New Mexico. States, local governments, and tribes along the San Juan River were directly impacted by this incident. The EPA implemented an emergency response action immediately after the spill occurred which involved personnel from the EPA Regions 8, 6 and 9. The regions continue to work closely with the affected communities to help ameliorate the environmental impacts in the affected areas. The three regions have also been working in concert to ensure that the response is coordinated in an effective manner across the affected regions. These EPA

regions have agreed to accept Superfund Cooperative Agreement applications under 40 CFR Part 35, Subpart O from States, Local Governments and Indian Tribes for their future involvement in the removal response activities directly related to the incident.

### Regulations

40 CFR §35.6025 “Deviation from this subpart” allows the EPA to consider requests for an official deviation from the non-statutory provisions of 40 CFR Part 35, Subpart O on a case-by-case basis.

2 CFR §200.102(b) “Exceptions” allows Federal awarding agencies to grant exceptions on a case-by-case basis to non-Federal entities except where otherwise required by law or where Office of Management and Budget or other approval is expressly required.

2 CFR §1500.3 “Exceptions” allows the EPA Director of the Office of Grants and Debarment or designee to approve grant exceptions on a case-by-case basis to the EPA program specific assistance regulations other than those which implement statutory and executive order requirements.

2 CFR §1500.8 “Revision of budget and program plans. *Pre-award Costs*” allows the EPA award recipients to incur allowable project costs 90 calendar days prior to award. EPA prior approval is required for expenses incurred by recipients more than 90 calendar days prior to the award.

40 CFR Part 35.6275 “Period of availability of funds” requires the Award Official to sign a Cooperative Agreement before costs are incurred. The recipient may only incur costs between the date the award official signs the Cooperative Agreement and the date the recipient signs the agreement, if the costs are identified in the agreement and no changes are made.

40 CFR 35.6200 “Eligibility for Removal Cooperative Agreements” requires a planning period of more than six months if States, Political Subdivisions or Indian Tribes wish to apply for removal Cooperative Agreements.

The requirements of 40 CFR §35.6275, 2 CFR 1500.8 and 40 CFR §35.6200 are regulatory not statutory requirements; therefore the EPA may issue a deviation under 40 CFR §35.6025, 2 CFR §200.102(b), and 2 CFR §1500.3.

#### 1. Pre-award costs

The EPA Regions 8, 6 and 9 request approval of a deviation from 40 CFR §35.6275(b) and 2 CFR §1500.8. Approval of this deviation would permit the States, Local Governments and Indian Tribes affected by the Gold King Mine Blowout to include appropriate pre-award costs in the approved budget of their Subpart O Cooperative Agreements awards up to 180 calendar days prior to the signed award. The incident necessitated the immediate support and involvement of the many communities and resulted in an unanticipated financial hardship. The deviation would not allow costs incurred preceding the date of the incident, August 5, 2015. Each application for pre-award costs will be closely reviewed to confirm that the submitted costs incurred are eligible, directly result from their involvement with the emergency response activities and are otherwise allowable.

With respect to the Indian Tribes which were impacted by the incident, Executive Order 13084, (May 14, 1998), requires Federal agencies to consider deviation or waiver requests from Indian tribal



governments with the aim of increasing flexible policy approaches at the tribal level where otherwise appropriate and consistent with policy objectives. In this case, the Agency expects that certain costs that have been incurred by the Tribes are of a type that are otherwise eligible for funding, and the Tribes have given the EPA notice that such costs were incurred on or about the time of the incident. This exception request is consistent with the EPA policy objectives regarding Superfund activities and Indian tribal participation. As such, it is an appropriate case for an exception from the restrictions of 40 CFR §35.6275(b) and 2 CFR §1500.8.

The specific expenses and activities shall be outlined in the subject Cooperative Agreement's statement of work.

## 2. Six-month planning period

Because the Gold King Mine Waste Water Spill was not predicted, and considered an emergency there was no planning period of at least six months available to the affected communities as required under 40 CFR §.35.6200 for removal response Cooperative Agreements. The removal activities began on August 5, 2015, necessitating the immediate response and involvement of the concerned States, Political Subdivisions and Indian Tribes. If the exception is not granted, the EPA cannot award removal response Cooperative Agreements to any non-federal entities. Consequently, impacted communities may not be able to work on emergency or time-critical activities due to the lack of adequate funding. Such result would not achieve the EPA's goal of helping impacted communities of the Gold King Mine Waste Water Spill fully recover from both the environmental and economic impacts of the spill. Despite the need to move forward expeditiously, Regions 8, 6, and 9 believe a sufficient amount of time is available to execute the Cooperative Agreements while meeting the substantive requirements of the regulatory requirements due to the nature of the work and the regions' high level of experience.

In sum, the EPA Regions 8, 6 and 9 agree that it is necessary and appropriate to reimburse the allowable costs the States, Political Subdivisions and Indian Tribes have incurred and to continue their substantial involvement in the monitoring activities related to the Gold King Mine. Further, environmental recovery associated with the response actions will not be fully realized if these Cooperative Agreements are not awarded.

If you have any questions or need additional information, please contact Cinna Vallejos at (303) 312-6376.

cc:

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