

The Water Infrastructure Improvements for the Nation (WIIN) Act:

Understanding Reimbursement for Eligible Response Costs Incurred Due to the Gold King Mine Release

PURPOSE:

- To provide guidelines for the implementation of WIIN § 5004(c), which directs the Agency to pay “any claim made by a State, Indian tribe, or local government for eligible response costs relating to the Gold King Mine [(GKM)] release.”
- These guidelines are intended to help Regions determine what costs constitute “eligible response costs relating to the GKM release” within the context of the WIIN Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and assistance agreement requirements such as those for cooperative agreements under 40 CFR Part 35 Subpart O and the federal cost principles identified in 2 CFR Part 200.
- These guidelines are intended to help Regions evaluate and reimburse entities for “eligible response costs relating to the GKM release” through (a) CERCLA Cooperative Agreements under Subpart O, and (b) CERCLA § 111(a)(2) claims.
 - The WIIN Act authorizes the use of the CERCLA claims process for states, tribes and local governments. However, the intended recipients of the WIIN Act may not be able to meet statutory and regulatory requirements for CERCLA § 111(a)(2) claims.
 - The WIIN Act does not foreclose the use of cooperative agreements for EPA to reimburse eligible response costs relating to the GKM release.
 - As explained below, cooperative agreements may be the most expeditious approach for EPA to reimburse eligible response costs incurred by states, tribes, and local governments.

BACKGROUND:

- Regions 6, 8, and 9 have reimbursed states, tribes, and local governments more than \$3.5 million in documented and allowable response costs related to the emergency response to the GKM release. Examples of allowable response costs include field evaluations, sampling, laboratory analysis, and related personnel costs.
- Examples of disallowed costs include requests to construct new infrastructure, purchase of emergency response vehicles not used during the response, hiring new staff, or payment for outside counsel who may have been used to explore pursuing legal action against EPA.

- Until this point, EPA generally has not reimbursed costs beyond what was considered the conclusion of the emergency response (generally through October 2015, but varied by Region depending on when impacted waterways returned to pre-spill conditions).

KEY GUIDELINES:

1. The WIIN Act does not foreclose the use of CERCLA cooperative agreements.
2. The WIIN Act’s directive to pay “eligible response costs” should be read in keeping with the intent of the WIIN Act and the Agency’s stated commitments regarding the GKM release. Regions should follow a more expansive approach to evaluating reimbursement of allowable costs than the previous approach taken to reimburse states, tribes, and local governments for costs incurred as part of the emergency response period (generally through October 2015).
3. For existing CERCLA cooperative agreements, evaluation of response cost reimbursement requests should take note of the following:
 - a. No limitation based on August-October 2015 emergency response period: Regions should evaluate whether costs are “eligible response costs” that are “relating to the GKM release,” § 5004(c)(1). Response costs, as defined in CERCLA, include removal and remedial activities and are not limited to emergency response activities.
 - b. Criteria for reimbursement:
 - Eligible response costs must relate “to the GKM release;”
 - Costs incurred must be consistent with the NCP;
 - Applications for reimbursement must still be accompanied by adequate documentation;
 - Payment must still satisfy federal cost principles (i.e., necessary, reasonable, allocable, and allowable per 2 CFR Part 200); and
 - Eligible response costs incurred through September 9, 2016¹ do not need prior approval from EPA before the costs were incurred in order for reimbursement to be made. A Region may choose to reimburse pre-award costs through existing cooperative agreements as authorized by the pre-award cost deviation approved by the Office of Grants and Debarment on November 2, 2015. If a Region intends to reimburse any pre-award costs using a *new* cooperative agreement, a *new* pre-award cost deviation may be

¹ On September 9, 2016, the EPA listed the Bonita Peak Mining District, which includes Gold King Mine and other mines, on the National Priorities List bringing it into the Superfund remedial process. Since then, the Agency has begun preliminary investigations and assessments of the listing area as part of the remedial process.

necessary to ensure compliance with the pre-award cost limitation in Subpart O.

- For costs incurred after September 9, 2016, EPA should have approved those costs before the costs were incurred in order for reimbursement to be made.
- c. Requirement to make decisions on and pay eligible response costs within a 90-day timeframe:
- For costs submitted no later than December 16, 2016: If the costs were not paid or not evaluated for payment because they were incurred after the end of the emergency response, Regions should evaluate the costs in light of this guidance, and if necessary, pay by March 16, 2017, presuming adequate documentation. If the costs were incurred prior to the end of the emergency response, and disallowed, those decisions do not need to be amended unless the WIIN Act would change the determinations.
 - For costs submitted after December 16, 2016, decisions on eligibility and payment should occur within 90 days of receipt, presuming adequate documentation.
- d. The WIIN Act does not apply to response costs incurred by private parties.
- e. All costs, regardless of when incurred, are subject to the same “eligible response cost” analysis described above and as required by CERCLA, Subpart O, and the federal cost principles.
4. The WIIN Act authorizes states, tribes, and local governments to submit a CERCLA § 111(a)(2) claim. The WIIN Act:
- a. Authorizes states, tribes and local governments to submit claims under CERCLA § 111(a)(2), a process which is generally reserved for private entities and individuals.
 - b. Waives the preauthorization requirement for CERCLA § 111(a)(2) costs incurred through September 9, 2016.
 - c. Requires that response costs incurred after September 9, 2016, be preapproved by EPA in order to be reimbursable “eligible response costs” under the Act.
 - d. Only explicitly waives the preauthorization requirement for some costs (those incurred through September 9, 2016), but not other requirements, such as, but not limited to, the requirements that:
 - “No claim may be asserted against the fund unless such claim” is first presented to any known PRP, CERCLA § 112(a); and

- “No claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim,” *id.*
- e. Consequently, states, tribes, and local governments may find it most expeditious to seek reimbursement through cooperative agreements as indicated above.