**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
WASHINGTON, D.C. 20460

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

November 2, 2015

**MEMORANDUM**

**SUBJECT:** Gold King Mine Deviation

**FROM:** Howard Corcoran, Director
Office of Grants and Debarment

**TO:** Richard Buhl, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation

I am responding to your deviation request from the requirements in 40 CFR 35.6275, Period of Availability of Funds, 40 CFR 35.6200, Eligibility for Removal Cooperative Agreements and 2 CFR 1500.8, Revision of budget and program plans. The deviation would allow Region 8, Region 6 and Region 9 to award new or modify existing Cooperative Agreements responding 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 EPA was conducting an investigation of the mine and excavating above the old adit, 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. EPA implemented an emergency response action immediately after the spill occurred which involved personnel from the EPA Regions 8, 6 and 9. These Regions continue to work closely with the affected communities to help ameliorate the environmental impacts in the affected areas. These three Regions have also been working in concert to ensure that the response is coordinated in an effective manner across the affected regions. These Regions have agreed to accept and consider funding for Superfund Cooperative Agreement applications under 40 CFR Part 35, Subpart O from States, Local Governments and Indian Tribes for their involvement in the removal response activities directly related to the incident.

EPA Regions 8, 6 and 9 request approval of a deviation from 40 CFR §35.6275(b), Period of availability of funds, and 2 CFR§1500.8, Revision of budget and program plans. Approval of this deviation would permit the States, Local Governments and Indian Tribes affected by the Gold King Mine Waste Water Spill to include appropriate and allowable pre-award costs incurred up to 180 calendar days prior to the signed award in the approved budget of their Subpart O Cooperative Agreements awards. 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 the applicant's involvement with the emergency response activities and are otherwise allowable. The specific expenses and activities will be outlined in the subject Cooperative Agreement's statement of work.

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, Eligibility for removal Cooperative Agreements, 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.

While not expressly requested, a deviation from 2 CFR 200.458, Pre-award costs, is necessary as some of the costs incurred prior to the new or amended Cooperative Agreements responding to the Gold King Mine Waster Water Spill may not be directly pursuant to the negotiation and/or anticipation of the Federal award due to the unexpected nature of this emergency. OGD is therefore incorporating 2 CFR 200.458 into the deviation request. Approval of a deviation from this provision is consistent with the limitations on class exceptions in 2 CFR 200.102, in that approval allows EPA to apply the exception to individual governmental applicants as appropriate within three EPA Regions on a case-by-case basis consistent with 2 CFR 200.102(b) as opposed to a "class" of recipients.

**ACTION**

I have reviewed the request for a deviation from 2 CFR 1500.8, 2 CFR 200.458, 40 CFR 35.6200 and 40 CFR 35.6275. Based on the information provided and the support of the National Program Office and Office of General Counsel, the deviation is needed to allow 1) EPA to award removal Cooperative Agreements to non-federal entities with no planning period of at least six months to affected communities and 2) States, Local Governments and Indian Tribes affected by the Gold King Mine Waste Water Spill to include allowable, allocable and reasonable pre-award costs in the approved budget of their Subpart O Cooperative Agreements awards up to 180 calendar days prior to the signed award. I, therefore, approve the deviation with the understanding that such pre-award costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the EPA Award Official.

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