



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105**

December 8, 2016

Mr. Cordell Shortey
Navajo Nation Office of Management and Budget
Navajo Nation
P.O. Box 646
Window Rock, AZ 86515-0646

Re: Navajo Nation Gold King Mine Removal Response Cooperative Agreement
Assistance ID Number: 99T40201

Dear Mr. Shortey,

We thank Navajo Nation for working with us to establish a cooperative agreement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to reimburse Navajo Nation government entities for allowable response costs for the Gold King Mine (GKM) release that occurred on August 5, 2015. This letter is intended to convey the U.S. Environmental Protection Agency's (EPA) final decision on the reimbursement of allowable costs to Navajo Nation government entities, and those costs that EPA disallowed under the Navajo Nation's cooperative agreement application submitted on January 29, 2016.

We understand that the Navajo Nation's response to the release required extensive resources. Under a removal response cooperative agreement, EPA has reimbursed Navajo Nation \$602,794 for allowable costs incurred in responding to the release. The EPA also dedicated funding and personnel to assist the Navajo Nation in responding to the release. Through an interagency agreement with the Bureau of Indian Affairs, EPA spent approximately \$900,000 to provide livestock and agricultural water to Navajo farmers and ranchers. EPA also paid the Navajo Agricultural Products Industry about \$143,000 for hay and salt blocks that were delivered to Navajo communities. EPA coordinated sampling activities on the San Juan River and Lake Powell during the response, deployed over 30 personnel to specifically address impacts to the Navajo Nation, and held public meetings to inform impacted communities of the spill. On August 19, 2015, EPA determined that the San Juan River on the Navajo Nation returned to pre-event conditions. EPA continues to monitor the impacted watershed through our post-Gold King Mine incident monitoring plan and has provided Navajo Nation \$465,000 for water quality monitoring in the San Juan River under the Clean Water Act.

Attachment A contains the specific costs that were disallowed under the removal response cooperative agreement and the Agency's basis for the disallowance. Navajo Nation may dispute this Agency decision, in accordance with the procedures specified at 2 C.F.R. Part 1500, Subpart E (§§ 1500.12-1500.19), by filing an appeal electronically within 30 calendar days from the date this Agency decision is electronically transmitted to Navajo Nation. The appeal must be transmitted via email to the EPA Region 9 Disputes Decision Official (DDO), Serena McIlwain,

at McIlwain.Serena@epa.gov, with a copy to Craig Wills, Action Official, at Wills.Craig@epa.gov, within this 30-calendar day period. The appeal must include the following:

- (1) An electronic copy of the disputed Agency decision.
- (2) A detailed statement of the specific legal and factual grounds for the appeal including electronic copies of any supporting documents.
- (3) The specific remedy or relief Navajo Nation is seeking under the appeal.
- (4) The name and contact information, including email address, of Navajo Nation's designated point of contact for the appeal.

If Navajo Nation requires a time extension to file the appeal, Navajo Nation may submit, by electronic means, a written request for the extension to the DDO (with a copy to Craig Wills, Action Official) before the expiration of the 30-day period. The DDO may grant a one-time extension of up to 30 calendar days when justified by the situation.

If Navajo Nation has questions about the disputes process, please contact Sandra Leon, Office of Regional Counsel, at 415-972-3878 or Leon.Sandra@epa.gov.

Sincerely,



Craig A. Wills,
Grants Management Officer/Action Official
Region 9, Grants Management Office

Attachment A

I. Background

On January 29, 2016, Navajo Nation submitted an application for assistance in the amount of \$2.1 million for Gold King Mine removal response costs. On July 27, 2016, Navajo Nation submitted a revised budget requesting \$1.4 million of removal response costs. Prior to and after receiving the cooperative agreement application, EPA emphasized to Navajo Nation the need to provide adequate documentation to support any response costs for which Navajo Nation was seeking reimbursement. Navajo Nation was able to provide some documentation which enabled the EPA to award a removal response cooperative agreement in the amount of \$157,756 on March 10, 2016. After receiving additional supporting documentation, EPA amended the agreement to include an additional \$445,038 on August 5, 2016. In total, EPA has reimbursed Navajo Nation \$602,794 through the cooperative agreement for response activities associated with the Gold King Mine release. As described in the allowable costs section below, EPA has fully reimbursed 11 Navajo Nation entities for the costs requested in the cooperative agreement application. Separate from this cooperative agreement, EPA, through its contractor, has also reimbursed the Navajo Agricultural Products Industry (NAPI) a total of about \$143,000 for hay and salt blocks that were provided to Navajo farmers and ranchers during the response.

II. Foundational Authorities

Superfund removal response cooperative agreements are authorized under Section 104(d)(1) of CERCLA, 42 U.S.C. §9604(d)(1), and implementing regulations at 40 C.F.R. Part 35, Subpart O. Pursuant to 40 C.F.R. §35.6200, removal response cooperative agreements may be awarded when a planning period of more than six months is available. Under 40 C.F.R. §35.6275(b), the EPA award official must sign Subpart O cooperative agreements before costs are incurred.

In order to reimburse Navajo Nation under a removal response cooperative agreement for allowable response costs that were incurred following the Gold King Mine release on August 5, 2015, EPA secured deviations from the regulatory provisions of 40 C.F.R. §35.6200 and 40 C.F.R. §35.6275(b) from the EPA Office of Grants and Debarment in accordance with 40 C.F.R. §35.6025, 2 C.F.R. §200.102(b), and 2 C.F.R. §1500.3(a). These deviations allowed EPA to include pre-award costs in the cooperative agreement.

III. General Provisions and Analysis

The CERCLA defines removal response costs as costs for “the cleanup or removal of released hazardous substances from the environment, . . . such actions that may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of the United States or to the environment, which may otherwise result from a release or threat of release.” 42 U.S.C. § 9601(23).

Consistent with these CERCLA requirements, EPA also took into account when the Agency determined that the San Juan River returned to pre-event conditions, when Navajo Nation lifted agricultural restrictions on parts or all of the River,¹ when other jurisdictions in the Animas-San Juan Watershed lifted restrictions, and when Navajo Nation ended their response activities. These considerations were important in assessing which response costs fell within the parameters of the CERCLA removal response activities and those that did not.

Federal cost principles, codified at 2 C.F.R. Part 200, Subpart E, provide that in order for a cost to be allowable under a federal award, it must be necessary and reasonable for the performance of the award and allocable to the award. 2 C.F.R. §200.403(a). In addition, all costs must be adequately documented. *Id.* §200.403(g). The cost principles at 2 C.F.R. Part 200, Subpart E, contain additional limitations with respect to specific types of costs.

A. Allowable Costs

EPA fully reimbursed response costs requested by the following eleven Navajo Nation entities:

Navajo Nation Department or Entity Fully Reimbursed	Costs Reimbursed
1. Navajo Agricultural Products Industry	\$172,876*
2. Department of Agriculture	\$71,886
3. Navajo Department of Transportation	\$39,850
4. Navajo Nation Environmental Protection Agency	\$17,423
5. Department of Natural Resources	\$13,217
6. Historic Preservation Department	\$8,805
7. Navajo Division of Health	\$8,680
8. Navajo Mountain Chapter	\$7,881
9. Navajo Rangers	\$7,648
10. Department of Water Resources, Water Management Branch	\$2,576
11. Department of Public Safety	\$2,050

*Note: EPA reimbursed \$29,740 of NAPI’s requested costs through the cooperative agreement. The remainder of NAPI’s requested costs were paid to NAPI directly by EPA’s Contractor.

¹ On August 28, 2015, Navajo Nation President Russell Begaye issued a press release indicating that Navajo Nation had lifted irrigation restrictions on the San Juan River for the Navajo Nation Chapters of Upper Fruitland, San Juan and Nenahnezad. On October 15, 2015, the Navajo Nation issued a notice on the Operation Yellow Water website indicating that the San Juan River was safe for irrigation and agricultural use. Operation Yellow Water includes the activities that Navajo Nation undertook in response to the Gold King Mine release.

B. Unallowable Costs

EPA determined that removal response costs requested by the following five Navajo Nation entities were unallowable in whole or in part:

Navajo Nation Department or Entity Partially or Not Reimbursed	Costs Requested	Cost Reimbursed
1. Navajo Tribal Utility Authority	\$420,870	\$197,943
2. Navajo Nation Emergency Operations Center	\$197,771	\$153,835
3. Navajo Nation Department of Justice	\$442,864	\$41,263
4. Department of Water Resources, Technical, Construction, and Operations Branch	\$129,804	\$0
5. Navajo Nation Washington Office	\$9,452	\$0

1. Navajo Tribal Utility Authority (NTUA) Requested Costs

NTUA requested \$25,741 for costs associated with installing fiber optic cables and providing direct internet access to emergency operation centers during the response. These costs were fully reimbursed.

NTUA requested \$74,195 for costs associated with drinking water monitoring. EPA determined that \$69,711 of these costs were allowable and reimbursed this amount. EPA determined that the remaining monitoring costs were not reasonable and necessary to the performance of the award because they were incurred after the Navajo Nation Emergency Operations Center demobilized in mid-October 2015.

NTUA requested \$152,474 in costs related to water hauling for the Montezuma Creek drinking water system, and \$192,393 in water hauling and other costs associated with the Kayenta/Halchita drinking water system. EPA determined that the San Juan River was back to pre-event conditions on August 19, 2015. Out of an abundance of caution and in order to allow for confirmatory sampling by the Navajo Nation, EPA determined that costs through early September associated with drinking water hauling for both systems were allowable.² As a result, EPA reimbursed Navajo Nation \$49,377 for water hauling for the Montezuma Creek System through September 1, 2015, and \$44,528 for drinking water hauling for the Kayenta/Halchita system through September 3, 2015.³

² On August 27, 2015, Navajo Nation EPA confirmed that the Gold King Mine release had not impacted the Montezuma Creek System, as discussed in a letter on that date from Dr. Donald Benn, Executive Director of Navajo Nation EPA, to Rex Coontz, Deputy Manager of the Navajo Tribal Utility Authority.

³ Emails EPA received from the Indian Health Service and Navajo Nation EPA on August 7, 2015 confirmed that the Kayenta/Halchita system was taken off-line prior to the August 5, 2015 release for other reasons. On June 23, 2016, NTUA confirmed that while this system was taken

2. Navajo Nation Emergency Operations Center (NN EOC) Requested Costs

The NN EOC requested reimbursement for \$197,771 in removal response costs. EPA determined that \$153,835 of these costs were allowable.

Unallowable costs included water tanks that were meant to provide alternative livestock water that had a purchase requisition date of October 28, 2015. Navajo Nation lifted all agricultural restrictions on the San Juan River in mid-October. Because all agricultural restrictions were lifted in mid-October, EPA determined that these were not eligible response costs. Unallowable costs also included supplies that were ordered on November 17, 2015, well after the EOC was demobilized in mid-October.

The NN EOC also requested \$75,171 to cover contractual costs for a contract with Test America for testing of the San Juan River during the response. Documentation provided by the NN EOC showed that only a subset of the contract funds had been used for Operation Yellow Water. EPA reimbursed the amount of the contract funds that had been used for Operation Yellow Water which totaled \$56,473 in direct costs as these costs were considered eligible removal response costs under CERCLA.

3. Navajo Nation Department of Justice (NN DOJ) Requested Costs

Navajo Nation requested reimbursement for \$229,901 for outside counsel, \$183,096 for in-house counsel, and \$29,867 for technical consultants. EPA received detailed documentation for \$41,263 of in-house counsel costs, and included that amount in the award. By regulation, EPA is barred from reimbursing any costs associated with Navajo Nation prosecuting claims against the United States. 2 C.F.R. §200.435(g). In addition, professional service costs, such as the costs of outside counsel or consultants, must be reasonable in relation to services rendered. 2 C.F.R. §200.459(a). EPA cannot reimburse the remainder of requested costs absent sufficient documentation to verify that requested legal or technical consulting costs are not related to prosecuting claims against the United States, and that the costs are reasonable in relation to the services rendered.

4. Department of Water Resources, Technical, Construction, and Operations (TCO) Branch Requested Costs

Based on the brief description provided, the \$129,804 requested by the Department of Water Resources, TCO Branch may be eligible response costs. The requested costs relate to closing irrigation canal systems that drew water from the San Juan River and communicating information about the closures and livestock watering points to impacted chapters in the early days of the response. However, EPA is unable to reimburse these costs at this time because Navajo Department of Water Resources, TCO Branch has not provided documentation to substantiate these costs.

off-line for other reasons, it could not be put back on-line because of the Gold King Mine release.

5. Navajo Nation Washington Office (NNWO) Requested Costs

The NNWO requested \$9,452 for costs associated with preparing for and participating in congressional hearings. EPA has determined that these costs are not allowable because participation in hearings of this nature do not constitute removal of released hazardous substances from the environment under CERCLA. Further, to the extent participation in the congressional hearings was intended to influence the Navajo Nation's receipt of any grants, contracts, cooperative agreement or loans, those activities are deemed an unallowable lobbying cost in accordance with 2 C.F.R. § 200.450, and do not fall within the exception in 2 C.F.R. § 200.450(c)(2)(i) applicable to technical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement.