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Executive Director Determination re Extending FAST-41 Final Completion Date by More Than 30 Days

February 8, 2022

Mid-Barataria Sediment Diversion; Environmental Impact Statement (EIS), et al.

I. Summary

On January 24, 2022, the U.S. Army Corps of Engineers (USACE), the lead agency for the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) to support permitting decisions for the Louisiana Coastal Protection and Restoration Authority's (project sponsor) Mid-Barataria Sediment Diversion project (Project)—a “covered project” under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.*—submitted a request to the Federal Permitting Improvement Steering Council (Permitting Council) Executive Director to extend the final completion date for the USACE action, “Environmental Impact Statement (EIS), Issuance of Lead Agency Record of Decision,” from April 11, 2022 to September 22, 2022. The USACE requests the extension because USACE received over 43,000 comments on the draft EIS the agency issued in March 2021, which was far more than originally anticipated. Because USACE believes that public interest in the Project and the final EIS will continue to be high, USACE requests to extend the final completion dates for the Record of Decision (ROD) and other, dependent Federal agency action milestones, including: (i) “Section 106 Review, Section 106 consultation concluded;” and (ii) Fish and Wildlife Coordination Act Review (DOI-FWS), Fish and Wildlife Coordination Act review concluded” For the following reasons, the extension request is **GRANTED**, and the Project permitting timetable has been revised accordingly.

II. Legal Standard

Pursuant to 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(II) & (IV), a lead agency may extend a final completion date under a FAST-41 permitting timetable to a date more than 30 days after the final completion date originally established in the permitting timetable only if it consults with the project sponsor and requests and obtains Executive Director approval. After receiving an extension request from the lead agency, the Executive Director must consult with the project sponsor and make a determination on the record that approves or denies the request based on consideration of “relevant factors,” including, but not limited to:

- (i) the size and complexity of the covered project;
- (ii) the resources available to each participating agency;
- (iii) the regional or national economic significance of the project;
- (iv) the sensitivity of the natural or historic resources that may be affected by the project;
- (v) the financing plan for the project; and



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- (vi) the extent to which similar projects in geographic proximity to the project were recently subject to environmental review or similar procedures under State law.

42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(IV). Executive Director determinations made pursuant to 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV) are not subject to judicial review. 42 U.S.C. § 4370m-2(c)(2)(D)(iv)(I).

III. Background

On March 5, 2021, the USACE circulated the draft EIS for a 60-day public review period. In response to several public requests to extend the public review timeframe due to the EIS length, and the complexity and regional significance of the Project, the USACE extended the draft EIS public review period by 30 days. At the conclusion of the public review period, the USACE had received over 43,000 comments on the draft EIS.

Since the close of the public review period, the USACE has been working with the project sponsor and cooperating Federal agencies to respond to and incorporate the public comments and prepare the final EIS. This process was interrupted by the August 29, 2021, landfall of Hurricane Ida in southeast LA, which disrupted the work of USACE, the Project sponsor, and cooperating agency staff located in the region. The USACE states that extended public comment period, the unexpectedly high number of public comments received, and the impacts of Hurricane Ida, have made it impracticable for USACE to complete the interim milestone “Official Notice of Availability of a Final EIS published in the FR beginning both the public review period and concurrent CAA Section 309 Review,” by March 11, 2022, and the dependent Record of Decision to be issued by the previously anticipated completion date of April 11, 2022.

The USACE intends to extend the completion date for the intermediate milestone, “Official Notice of Availability of a Final EIS published in the FR beginning both the public review period and concurrent CAA Section 309 Review,” by 3.5-months, from March 11, 2022, to June 24, 2022. This extension will necessitate an extension of the final completion date, “Issuance of Lead Agency Record of Decision” (ROD issuance), which was scheduled to occur 30-days after issuance of the final EIS. However, because USACE believes that the final EIS, like the draft EIS, will draw a significant number of public comments, USACE seeks to extend the final completion date for ROD issuance from April 11, 2022, to September 22, 2022, which is more than 30 days from the originally established completion date of June 30, 2022.¹

¹ See <https://www.permits.performance.gov/permitting-projects/mid-barataria-sediment-diversion> (showing an original completion (i.e., “target”) date of 6/30/2022. The original completion date is the completion date that was first established by USACE for the ROD when the Project permitting timetable was first developed.



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Extending the completion dates for “Official Notice of Availability of a Final EIS published in the FR beginning both the public review period and concurrent CAA Section 309 Review,” likewise necessitates extension of the final completion dates for “Section 106 Review, Section 106 consultation concluded,” and “Fish and Wildlife Coordination Act Review (DOI-FWS), Fish and Wildlife Coordination Act review concluded,” because those actions only can be completed based on information that will be contained in the final EIS. Accordingly, USACE requests that these completion dates, like the ROD issuance completion date, also be extended to September 22, 2022 (i.e., 90 days after the final EIS is issued).

The USACE states that it has coordinated with and received concurrence from the affected cooperating agencies and the project sponsor on the proposed new completion dates. The Office of the Executive Director has consulted with the project sponsor and confirmed project sponsor concurrence.

IV. Determination

Although 42 U.S.C. § 4370m-2(c)(2)(D)(i)(III) does not expressly identify accommodating a high level of public interest in a FAST-41 covered project as a “relevant factor” on which the Executive Director may base granting a permitting timetable extension request, the list of relevant factors is not comprehensive and Executive Director in this case considers accommodating substantial public comment to be a relevant factor on which to base modification of the FAST-41 permitting timetable. A permitting process flexible enough to accommodate unexpectedly high levels of public interest should be encouraged. USACE’s request to extend future final completion dates sufficiently to accommodate anticipated continued high levels of public interest in the Project is simply good planning. Additionally, as indicated by USACE, many of the comments received indicate that “the size and complexity of the covered project” and “the regional or national economic significance of the project” merit extending the permitting timetable to accommodate full public engagement. Accordingly, USACE’s extension request is **GRANTED**, and the permitting timetable is revised as requested.

Christine Harada
Executive Director
Federal Permitting Improvement
Steering Council