



PERMITTING COUNCIL

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

May 23, 2022

Mid-Barataria Sediment Diversion; Environmental Impact Statement (EIS)

I. Summary

The Mid-Barataria Sediment Diversion project (Project), sponsored by the Louisiana Coastal Protection and Restoration Authority (project sponsor), is a “covered project” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.* On May 19, 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), submitted a request to the Federal Permitting Improvement Steering Council (Permitting Council) Executive Director to extend the final completion date from September 22, 2022, to December 23, 2022, for USACE’s EIS process, listed on the Permitting Dashboard as “Issuance of Lead Agency Record of Decision.” USACE also requests to extend the date for the interim EIS milestone titled “Official Notice of Availability of a Final EIS published in the FR beginning both the public review period and concurrent CAA Section 309 Review” from June 24, 2022, to September 23, 2022. Finally, USACE requests to extend other, dependent Federal agency action milestones, including: (i) “Section 106 Review, Section 106 consultation concluded;” (ii) “Section 10 Rivers and Harbors Act of 1899 and Section 404 Clean Water Act, Final Verification/Permit Decision Rendered”; (iii) “Section 408 Permit, Issuance of decision for permit/approval”; and (iv) “Fish and Wildlife Coordination Act Review (DOI-FWS), Fish and Wildlife Coordination Act review concluded,” all of which would be extended to coincide with the Record of Decision for the EIS.

USACE requests these extensions for the following reasons: (i) additional time is necessary to properly and adequately respond to the voluminous comments that were received on the Draft EIS; and (ii) additional time is needed for the National Historic Preservation Act section 106 (Section 106) process due to discovery of a previously uninvestigated potential historic resource site. 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 by more than 30 days after the originally established final completion date only if it consults with the project sponsor 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 whether to grant the lead agency authority to make the date change. The Executive Director's determination is 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
- (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. § 370m-2(c)(2)(D)(iv)(I).

III. Background

In January 2022, USACE requested, and in February 2022 the Executive Director granted, a date change for USACE's issuance of the Final EIS and the Record of Decision on the EIS, and a date change for other, dependent Federal actions. USACE now requests a second extension of these dates. The original completion dates, the dates resulting from the first extension request, and the new dates proposed in the second extension request are shown in the table below:

Milestone	Original Target Date	1st Extension Target Date	2nd Extension Target Date
Official Notice of Availability of a Final EIS published in the FR beginning both the public review period and concurrent CAA Section 309 Review	March 11, 2022	June 24, 2022	September 23, 2022
EIS, Issuance of Lead Agency Record of Decision	April 11, 2022	September 22, 2022	December 23, 2022
Section 106 consultation concluded	July 23, 2021	September 22, 2022	December 23, 2022
Section 10 Rivers and Harbors Act of 1899 and Section 404 Clean Water Act, Final Verification/Permit Decision Rendered	October 31, 2022	September 22, 2022	December 23, 2022
Section 408 Permit, Issuance for decision for permit/approval	October 31, 2022	September 22, 2022	December 23, 2022
Fish and Wildlife Coordination Act Review (DOI – FWS), review concluded ¹	June 26, 2020	September 22, 2022	December 23, 2022

USACE requested the first extension because the agency had extended the public comment period, it had received an unexpectedly high number of public comments, and its review of public comments was interrupted by Hurricane Ida (which disrupted the work of USACE, the project sponsor, and cooperating agency staff located in the area).

¹ This is the third extension for the final completion date for the Fish and Wildlife Coordination Act Review. In October 2021, the Executive Director granted USACE’s request to extend the Fish and Wildlife Service’s “Fish and Wildlife Coordination Act Review” completion date because the previous completion date initially was entered in error.

USACE has provided two reasons for requesting a second extension of the EIS-related and other, dependent dates on the Project's permitting timetable.

First, according to USACE, it took several months longer to respond to comments on the Draft EIS than anticipated in the agency's first extension request. That is due, in part, to the fact that USACE made its first extension request while it was in the early stages of reviewing the more than 43,000 public comments received. USACE represents that it needs additional time to incorporate and comprehensively respond to the comments. USACE also represents that additional time also is needed to facilitate necessary coordination on the comment responses among the numerous federal, state, and local agencies involved in the process. The Project EIS is intended to meet all federal, state, and local environmental review requirements for the various permits, approvals, and authorizations for the Project. The EIS informs USACE's decisions made pursuant to section 10 of the Rivers and Harbors Act and sections 404 and 408 of the Clean Water Act. Additionally, the EIS will be used to inform funding decisions that the Deepwater Horizon Natural Resource Damage Assessment Louisiana Trustee Implementation Group (LA TIG) may make regarding restoration planning in the Barataria Basin under the Oil Pollution Act and the Deepwater Horizon Oil Spill Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic EIS (Deepwater Horizon Restoration Plan) and associated Record of Decision. The LA TIG, which includes the U.S. Environmental Protection Agency, National Oceanic and Atmospheric Administration, U.S. Department of the Interior, U.S. Department of Agriculture, and five Louisiana state agencies (including the project sponsor), is evaluating the Project for implementation. Because the EIS must meet the diverse needs of all these entities, they all have a stake in reviewing and responding to the public comments on the EIS.

Given the many different interagency equities represented in this document, the interested parties participated in interagency coordination meetings to review and respond to comments. USACE has determined that it needed to schedule additional rounds of meetings to fully coordinate and collaborate on a single set of comment responses that comprehensively address the needs of all the Federal, state, and local entities involved. These additional rounds of coordination meetings extended the time needed to complete the EIS process.

Second, USACE explained that investigations undertaken as part of its Section 106 review revealed a possible cultural resource site that previously had not been investigated. In January 2022, the project sponsor notified USACE of the need to conduct additional site investigations. As of May 18, 2022, the project sponsor has completed the site investigations and provided a Phase II Cultural Investigations Report to USACE for review. The Phase II report and USACE eligibility determination letter is scheduled to be provided to the State Historic Preservation Office (SHPO) and consulting agencies no later than June 13, 2022. Per the procedures in 36 C.F.R. § 800.3 and 33 C.F.R. § 325 Appendix C, the SHPO has 30 days to review the report and respond to the eligibility determination. Through USACE's ongoing Section 106 coordination efforts, the interested parties have agreed that the Final EIS cannot be

completed until the SHPO and consulting parties complete their review of the report, and USACE concludes the Section 106 consultation process and incorporates the findings into the Final EIS.

Prior to submitting its extension request to the Permitting Council Executive Director, USACE consulted with the project sponsor per 42 U.S.C. § 4370m-2(c)(2)(D)(i)(I), and USACE and the project sponsor worked together to identify the new dates for the permitting timetable. The Executive Director also consulted with the project sponsor, as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV), and confirmed that the project sponsor concurs with the requested date changes. The project sponsor, however, intends to continue to work with USACE to identify ways to make up some of the lost time.

IV. Discussion

The Executive Director granted USACE's first extension request because accommodating substantial public comment is a relevant factor on which to base modification of the FAST-41 permitting timetable. While the Executive Director continues to find that accommodating substantial public comment justifies modification of the permitting timetable, she notes that USACE's need for a second extension to respond to comments and finalize the EIS is related to a lack of early coordination among the parties rather than the number of comments received. However, USACE and the project sponsor both have indicated there is a new commitment to cooperation among the parties and have developed an agreed upon plan for completing the FEIS. With the new commitment to collaboration, USACE has been able to schedule interagency meetings with all the Federal stakeholders and the LA TIG, and USACE also included USACE counsel in the newly scheduled coordination meetings. Early participation and concurrent review by all necessary parties will ensure a more coordinated, efficient process while ensuring that all substantive requirements are met.

The FAST-41 statute expressly identifies the sensitivity of the natural or historic resources that may be affected by the project as a relevant factor to consider when modifying the permitting timetable. The need to further investigate the possibility of a previously unidentified potential historic resource in the Project area justifies extending the completion date for the Section 106 process.

V. Determination

For the reasons identified above, USACE's extension request is **GRANTED**, and the permitting timetable is revised as requested.



Christine Harada
Executive Director
Federal Permitting Improvement Steering Council