

November 1, 2021

Ms. Stacey Zee
SpaceX PEA, c/o ICF
9300 Lee Highway
Fairfax, VA 22031.

RE: Comments on Environmental Assessment for SpaceX Proposal

I write to express concern with important elements of the FAA's process for implementing the National Environmental Policy Act (NEPA) proposal to decide whether to approve SpaceX Starship/Super Heavy Launch Vehicle Program at the SpaceX Boca Chica Launch Site in Cameron County, Texas . In particular, I am concerned that the FAA demonstrates too much deference for the applicant in the NEPA process. Further, the potential effects from this proposed action require that the FAA should commence preparation of an environmental impact statement.

For the record, I served as Deputy General Counsel for the Council on Environmental Quality (CEQ) from May 1981 to January 1983 and as CEQ's General Counsel from January 1983 to 1993. I served again as General Counsel from January 1995 through 2007. During these periods, I had substantial responsibility for oversight of the National Environmental Policy Act (NEPA).

I have continued to stay active in the field professionally and have had both professional and personal reasons to visit the Rio Grande Valley in Texas several times, beginning in 2008. Those trips included a visit to the Boca Chica beach area. While I have not travelled for any purpose since the beginning of the Covid-19 pandemic, I plan to resume travelling in the near future and intend to visit the Boca Chica again. I am keenly aware of the unique ecological features of the Rio Grande Valley and Boca Chica, including very rare wildlife and unique habitat, as well as the rich cultural and indigenous traditions of the area. Indeed, my point in personal travel there has been to see and enjoy the unique wildlife of the lower Rio Grande Valley, especially in the national wildlife refuges, as well as to learn more about the history and culture of this interesting area.

Appropriate Role of the Applicant and Analysis of Reasonable Alternatives

While applicants for proposed actions are permitted to draft environmental assessments, the FAA has taken, as it must, responsibility for the document. The FAA has also appropriately warned SpaceX that the launch tower and other infrastructure it has or is constructing has not been approved, that SpaceX is proceeding at its own risk in undertaking that construction, and that Space X's proposed actions are not covered by the 2014 environmental impact statement (EIS).

It is disappointing, however, that the FAA appears to have inappropriately deferred entirely to Space X's evaluation of reasonable alternatives to the proposed action. Without the requirement to analyze all reasonable alternatives as rigorously and objectively as possible, the NEPA process becomes merely an evaluation of the impacts of a decision already made, not a process for making a decision in accord with this nation's national environmental policies.

The statutory basis for alternatives analysis in EA requires that agencies, "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."¹ Certainly, the situation at issue involves serious unresolved conflicts. The fact that the proposal comes from an applicant instead of the FAA does not lessen the FAA's responsibility to take a "hard look" at alternatives to the proposed action, especially those that would mitigate some of the serious effects of Space X's ongoing and potentially expanded operations.²

In the draft EA, the FAA examines only two alternatives – SpaceX's alternative and the no action alternative. The brief discussion of "Alternatives Considered but Eliminated from Further Consideration" in Section 2.3 of the EA succinctly reveals how completely the FAA ceded the alternatives analysis to Space X. It begins by stating that to meet "the purpose and need of SpaceX's proposed Starship/SuperHeavy launch program, Space X determined that action alternatives must meet the following criteria"³ But there is no legal authority that permits agencies to simply adopt the purpose and need statement of an applicant; indeed, federal courts have cautioned agencies not to frame the purpose and need statement in a way that would "define competing 'reasonable alternatives' out of consideration (and even out of existence)."⁴ The criteria that follow in the EA are clearly and openly framed by SpaceX's needs and evaluation alone ("SpaceX evaluated its existing launch facilities SpaceX dismissed these launch sites from detailed review."⁵) But while the FAA must understand the applicant's goals, nothing in NEPA law permits the FAA to cede evaluation of alternatives solely based on the applicant's evaluation of its own purpose and need. Indeed, the purpose and need statement and EA violates the FAA's own NEPA procedures that states:

Purpose and Need. This section briefly describes the underlying purpose and need for the Federal action. It presents the problem being addressed and describes what the FAA is trying to achieve with the proposed action. The purpose and need for the proposed action must be clearly explained and stated in terms that are understandable to individuals who are not familiar with aviation or commercial

¹ 42 U.S.C. § 4332(E).

² Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986). See also, Davis v. Mineta, 302 F.3d 1104, 1120 (10th Cir. 2002) ("A properly-drafted EA must include a discussion of appropriate alternatives to the proposed action.")

³ EA, Section 2.3 p. 34.

⁴ Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997).

⁵ EA, Section 2.3, p. 35.

*aerospace activities. To provide context while keeping this section of the EA brief, the FAA may incorporate by reference any supporting data, inventories, assessments, analyses, or studies.*⁶

The FAA Order contains the legally appropriate direction – to identify the federal purpose and need; that is, what the FAA is trying to achieve with this proposed action. Unfortunately, this monumentally inadequate consideration of alternatives leads the reader to conclude that, despite its statements to the contrary, the FAA is trying to get to an approval of SpaceX’s proposal without a thoughtful, objective consideration of alternatives.

The FAA Should Move Directly to Publication of Notice of Intent to Prepare an Environmental Impact Statement

Based on the information presented in the EA, I strongly urge the FAA to move forward to noticing preparation of an EIS. On its face, the EA and the accompanying Biological Assessment demonstrates that this proposed action will adversely affect eighteen historic properties. Further, it is “likely to adversely affect” the Kemp’s Ridley Sea Turtle, the Leatherback Sea Turtle, the Hawksbill Sea turtle, the ocelot, the Gulf Coast jaguarundi and the Northern Aplomado Falcon, all endangered species, as well as the Piping Plover, the Red Knot, the Green Sea Turtle and the Loggerhead Sea Turtle, all listed as threatened species under the Endangered Species Act. The action would increase the already constrained access to public land and add serious noise impacts over communities and public lands. These projected impacts far exceed, in my experience, the threshold for preparation of an EIS.

Then there is this truly unique standard by which the EA attempts to conclude that the proposed action is not expected to result in significant climate-related impacts: Because the amount of greenhouse gases (GHG) to be emitted from this project – approximately 47,522 metric tons of carbon dioxide equivalent per year – “is substantially less than the total GHG emissions generated by the United States in 2018.”⁷ This is a remarkable statement. FERC does not and cannot, to my knowledge, cite any legal precedent for the idea that an agency is excused from analyzing climate impacts under NEPA if a proposed action is likely to emit less than the United States’ total GHG emissions

The EA also states that, “. . . at present, no methodology exists that would enable estimating the specific impacts (if any) that this change in GHGs would produce locally or globally.”⁸ The federal courts have long warned against agencies hiding behind the rubric of uncertainty to avoid any type of analysis of climate change. For example, in *Mid States Coalition for Progress v. Surface Transportation Board*,⁹ the Court of Appeals for

⁶ FAA Order 1050, Section 6-2.1(c).

⁷ EA, Table S-3, p. S-11.

⁸ EA, p. 46.

⁹ 345 F.3d 520 (8th Cir. 2003).

the Eighth Circuit dealt with the proposed expansion of a railroad specifically intended to transport low sulfur coal. The Court addressed the lead agency's reluctance to characterize the climate change impacts that would be caused by the increased availability of coal, driving the construction of additional power plants and associated impacts. The applicant plead uncertainty as to where those new power plants would be, arguing that it was not possible to calculate GHG emissions with certainty. As the Court stated (18 years ago!), even if that assertion was accurate, it shows only that the extent of the effect is speculative. "The nature of the effect, however, is far from speculative. " And indeed, a number of federal court decisions have held that agencies must do far more than simply quantify GHG. They must analyze and present in NEPA analyses the "actual environmental effects resulting from . . . emissions of GHG.¹⁰ The FAA must do no less here.

The Applicant's Failure to Meet Closure Limitations Set forth in the 2014 EIS and other Actions Should Increase the FAA's Independent Analysis and Oversight in this Action

I am also concerned about the many indications that SpaceX simply chooses to comply or not with FAA requirements when and if it is convenient. For example, according to public reports, SpaceX violated its launch license in December, 2020¹¹, constructed a new tower despite knowing that the FAA had not approved it,¹² has allegedly and repeatedly violated a memorandum of Agreement between Cameron County and the Texas General Land Office that sets forth requirements that are supposed to be met by SpaceX before the public is denied access to Boca Chica beach,¹³ and actually attempted to thwart an investigation by the Cameron County District Attorney into these allegations by, among other things, denying access to County staff to County roads.¹⁴ Further, Space X's activities have significantly impeded access to areas of the Lower Rio Grande Valley National Wildlife Refuge, as well as causing considerable damage to tidal flats and other assets in the national wildlife refuge. These impacts have been characterized as "both 'adverse' and 'severe' impacts to Refuge public use, management, wildlife, and habitat."¹⁵ This is an unacceptable degradation of public resources for private gain. Additionally, these actions undermine the public's ability to

¹⁰ *Sierra Club v. FERC*, 867 F.3d 1357, 1374-75 (D.C. Cir. 2017); *see also*, *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216 (9th Cir. 2008), "The EA does not discuss the *actual* environmental effects resulting from those emissions or place those emissions in context of other CAFÉ rulemakings." (emphasis in original).

¹¹ <https://www.theverge.com/2021/1/29/22256657/spacex-launch-violation-explosive-starship-faa-investigation-elon-musk>.

¹² <https://www.reuters.com/business/aerospace-defense/faa-warns-spacex-it-has-not-approved-new-texas-launch-site-tower-2021-07-14/>

¹³ Letter from Bill Berg, Agent, Save RGV to Luis Saenz, Cameron County District Attorney and Eddie Trevino, Jr., Cameron County Judge, June 3, 2021.

¹⁴ Letter from Louis V. Saenz, Cameron County District Attorney to Shyamal Patel, Senior Director-Starship Operations SpaceX, June 11, 2011.

¹⁵ Letter from Manuel Perez III, Acting Complex Refuge Manager, South Texas Refuge Complex, to Daniel P. Murray, Manager, Safety Division, FAA, October 7, 2020.

have confidence that the FAA will be able to effectively manage its responsibilities vis-a-vi Space X.

I do understand that that there is a great deal of pressure on the FAA about this proposed action. Please do the right thing and initiate preparation of an EIS for this proposed action. We need to do the right thing on earth right now.

Sincerely,

Dinah Bear

cc: Ms. Katherine B. Andrus Manager, Environmental Policy and Operations, Office of Environment and Energy (AEE-400)