

Vaughn, Lorena

From: Mahita Shankar <mahita@txenvirolaw.com>
Sent: Monday, October 21, 2024 4:52 PM
To: Vaughn, Lorena
Cc: Marisa Perales; Lauren Ice
Subject: Comments re. Proposed Administrative Penalty Order Against SpaceX; Docket No. CWA- 06-2024-1768
Attachments: 2024.10.21 Comments re EPA Compliance Order CWA-06-2024-1768.pdf

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Good afternoon,

On behalf of Marisa Perales and Lauren Ice, please find attached comments regarding the Proposed Administrative Penalty Order against Space Explorations Technologies Corp. for violations of the Clean Water Act, Docket No. CWA-06-2024-1768.

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October 21, 2024

Lorena Vaughn
Regional Hearing Clerk (6ORC)
U.S. Environmental Protection Agency, Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270-2102

Via Email: vaughn.lorena@epa.gov

Re: Comments Regarding the Proposed Administrative Penalty Order against Space Explorations Technologies Corp. for Clean Water Act Violation, Docket No. CWA-06-2024-1768.

Dear Ms. Vaughn:

Save RGV submits these comments regarding the proposed Consent Agreement and Final Order against Space Exploration Technologies Corp. ("SpaceX") for violations of the Clean Water Act (hereinafter, the "CAFO").

I. The comment deadline should be extended.

On September 6, 2024, our office submitted a request for public information to EPA (assigned EPA FOIA Request No. 2024-EPA-07069) that is relevant to the SpaceX deluge system. On October 11, 2024, we were informed that the anticipated completion date is December 20, 2024. Because this information is directly pertinent to the public's ability to comment on this proposed CAFO, we request that the comment deadline be extended for 30 days following the day this information is produced.

This information is relevant and necessary to inform public comments in this matter, because it will clarify what information has been made available to federal agencies and is being considered in decisions related to permitting and enforcement actions regarding SpaceX's ongoing operation of its deluge system at the Boca Chica Launch Site. This information could be relevant to determining the amount of a penalty assessed under Section 309(g)(3), because it could reveal important information about the nature, circumstances, extent, and gravity of the violation, or violations (particularly since SpaceX has been aware for some time that its discharges constitute a violation of the CWA). Specifically, our request seeks communications between EPA and SpaceX related to unlawful discharges at the Boca Chica Launch Site since July 2022 and communications with FAA related to FAA's July 2024 Draft Tiered Environmental Assessment for the SpaceX Starship/Super Heavy Vehicle Increased Cadence at the Boca Chica Launch Site in Cameron County, Texas (Draft EA). One example of information that may be relevant was revealed in a recent FAA document, in which SpaceX apparently admits to having activated the deluge system

“on nineteen occasions to date.” *Written Re-evaluation of the 2022 Final Programmatic Environmental Assessment for the SpaceX Starship/Super Heavy Launch Vehicle Program at the Boca Chica Launch Site in Cameron County, Texas* at 3. Yet, the EPA CAFO only lists seven instances.

Furthermore, as the EPA CAFO acknowledges, the deluge system is unpermitted. As a result of this, there is minimal monitoring data publicly available despite multiple uses of the deluge system to date. At the same time, SpaceX is requesting to increase its launch frequency to 25 times per year, which would correlate to a large increase in the use of the deluge system as well, the impacts of which are to be considered during the preparation of the Draft EA. There is likely information being shared between EPA, FAA, and SpaceX that, though not made publicly available and accessible through discharge monitoring reports kept in compliance with a lawfully permitted discharge, is, nonetheless, public information to which Save RGV and other members of the public have a right of access. This requested information would also include EPA’s penalty calculation, as explained below. Because that information is not available at this time, the comment period should be extended another 30 days from the date it is made available.

II. EPA should increase its penalty calculations to include that SpaceX’s violations of the CWA were committed knowingly or commence a civil action to deter violations.

In determining the amount of any penalty assessed, the EPA shall take into account “the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.” 33 U.S.C. § 1319(g)(3).

Without the requested public information described above, it is not possible to determine on which of these factors EPA has based its penalty calculation, but, certainly, several of them are absolutely critical if EPA’s CAFO will play any role in deterring future violations by SpaceX. The EPA should publish its penalty calculation and extend the comment period for another 30 days from the date the penalty calculation (and all other requested public information) is made available.

The public (and EPA) does have some information at this time that indicates SpaceX’s violations have been committed knowingly—a fact that should weigh heavily in EPA’s penalty calculation. For example, as the EPA CAFO acknowledges, on March 13, 2024, EPA issued Administrative Order CWA-062024-1746. But EPA also followed up on April 16, 2024, to communicate in no uncertain terms that the deluge system activities are not covered by the stormwater multi-sector permit and that the deluge system required an individual permit. Nevertheless, as outlined in the EPA CAFO, SpaceX proceeded with a May 29, 2024 static fire test and the June 6, 2024 Starship rocket launch knowing that use of deluge system constituted a violation of the Clean Water Act.

Despite these intentional violations, the fact that they have been ongoing for more than one year, SpaceX’s demonstrated ability to pay and the economic benefit it has derived by proceeding with launches and tests absent a permit, and that the effluent is known to contain hazardous metals, such as copper, zinc, mercury, nickel, thallium, and hexavalent chromium, a known carcinogen, the EPA CAFO would assess a penalty of only \$148,378. Section 309(g) authorizes Class II civil

penalties up to \$10,000 per day for each day during which the violation continues, with a maximum of \$125,000 (which effectively amounts to capping violations that have been ongoing for more than 12.5 days). SpaceX admits to having committed at least 19 violations, and these violations go back for more than one year.

Moreover, the violations continued to occur at the time of this proposed CAFO and even as recently as October 2024 (with SpaceX's fifth Starship launch) while this CAFO was subjected to public comment. Therefore, the maximum penalty at this time could be more than \$2 million, which would, at a minimum, be necessary to make any headway toward deterring future noncompliance. Therefore, EPA must adjust the administrative penalty accordingly or commence a civil action so that it is properly deterring future violations.

III. The proposed TCEQ Agreed Order would violate CWA delegation because an agreed order may not authorize temporary discharges without a TPDES permit.

The Clean Water Act requires that all discharges covered by the statute must be in accordance with a NPDES permit or state-delegated permit, such as Texas's TPDES permit. *See* 33 U.S.C. § 1311(a). It is well recognized that this requirement is "unconditional and absolute." *Puget Soundkeeper All. v. Cruise Terminals of Am., LLC*, No. C14-0476-JCC, 2014 WL 4649952, at *2, n. 4 (W.D. Wash. Sept. 16, 2014). TCEQ's proposed AO does not provide any authority for disregarding the CWA's requirement for a permit, yet it does propose to authorize SpaceX to continue to discharge from the deluge system until such time that a permit is obtained or until 300 days after the effective date of the AO.

The TCEQ AO is not and cannot be a substitute for the required CWA permit. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498 (2d Cir. 2005) ("The Clean Water Act demands regulation in fact, not only in principle."); *Montgomery Env'tl. Coal., Inc. v. U.S. E.P.A.*, 1983 U.S. App. LEXIS 27509, n.6 (D.C. Cir. 1983) (not designated for publication) (explaining that a compliance order does not relieve a permittee from its legal obligation of complying with its NPDES permit and that the permittee may still be liable under a citizen's suit).

First, the CWA prescribes specific procedural and substantive requirements for issuance of a permit, many of which cannot be satisfied by an agreed order (and would not be satisfied by the proposed TCEQ Agreed Order). For example, approved state programs must provide for public notice and comment on draft permits, the issuing agency must provide a response to public comments, the interested persons must have the opportunity to request a hearing. *See* 40 C.F.R. § 123.25(26)-(33). *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 458 (W.D. Pa. 2013). Texas has incorporated these provisions pursuant to its delegation, and to deviate from them, except to make the requirements more stringent, would run afoul of this delegation. *See* 40 C.F.R. § 123.25(a).

Second, during the delegation of the NPDES permitting program to Texas, EPA specifically stated that TCEQ could not use a temporary or emergency authorization in lieu of a NPDES permit. 63 Fed. Reg. 51181 ("TNRCC will not have the authority to issue permit-type discharge authorizations via emergency or temporary orders under the TPDES program."); *see also* 30 Tex. Admin. Code § 35.303(b) (prohibiting emergency orders and temporary orders from

authorizing a discharge of waste or pollutants where the discharge is not already subject to a NPDES or TPDES permit).

EPA's factual allegations against SpaceX acknowledge that SpaceX does not have a TPDES permit for the deluge system. Accordingly, the proposed TCEQ AO may not authorize the temporary discharge. EPA's CAFO acknowledges that the proposed TCEQ AO is not final, and still subject to public comment prior to Commission approval. It is not clear whether the proposed TCEQ AO is relevant to the EPA's proposed penalty in some way, but regardless, because it would violate NPDES delegation as written, the EPA's proposed penalty should not be based on it, or the EPA should clarify in its CAFO that its penalty is not based on TCEQ's proposed AO, Ordering Provision 2 (Subsection IV.2, proposing to temporarily allow operation of the deluge system *without* a TPDES permit).

IV. Conclusion

For the foregoing reasons, Save RGV urges EPA to amend its Proposed Administrative Penalty Order and provide for additional time to comment as described above. Please contact us with any questions.

Respectfully submitted,

/s/ Lauren Ice

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