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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEAR BOX Z, INC.

Defendant.

No. CV-20-08003-PCT-JJT

Brief of Amicus Curiae Specialty Equipment Market Association in Support of Defendant

Amicus Curiae, Specialty Equipment Market Association (SEMA), submits this brief to assist the Court in deciding an issue of first impression—whether the Clean Air Act authorizes EPA to pursue enforcement of anti-tampering for certified motor vehicles converted to dedicated racing vehicles. The answer is no.

BACKGROUND

Founded in 1963, SEMA is a national trade association that represents more than 7,000 businesses that manufacture, market and sell specialty automotive aftermarket products, including appearance, performance, comfort, convenience and technology in this $46 billion industry.

SEMA advocates for responsible laws so that companies can thrive and consumers can benefit while also protecting consumers' rights to own and drive customized vehicles. For decades, SEMA has worked with the U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) to promote emissions compliance with the Clean Air Act (CAA or Act) and parallel California laws.

SEMA also operates the nation's leading emissions testing lab for the aftermarket industry, SEMA Garage, which gives SEMA members access to state of the art tools for emissions measurements. This enables SEMA members to demonstrate that their products meet emissions compliance criteria—a compliance path for installing performance and engine aftermarket products on motor vehicles.

SEMA estimates that over one million racers across the U.S. enjoy track racing in all 50 states. Few racing enthusiasts could afford a race car originally built for competition use.

A Formula One or IndyCar engine alone can cost multiple millions of dollars.[1] NASCAR can cost as much as $1 million annually when vehicle costs, safety equipment, and racing fees are taken into account.[2] Amateur racers therefore convert regular motor vehicles to full-time racers using race parts or competition use only parts.

In this proceeding, EPA has declared that disabling emission controls when converting motor vehicles to full-time racers is unlawful, arguing that Section 203(a)(3)(B) prohibits modifications to motor vehicles for exclusive use in competitive racing. 42 U.S.C. § 7522(a)(3)(B). But the agency's interpretation breaks from the plain language of the CAA, the legislative history, and EPA's regulations and guidance. Indeed, EPA withdrew a proposed rule in 2015 that would have banned "road-to-track" conversions. Also, the government argues that, in all events, the *defendant* must prove that sales were for full-time racing. This reverses the burden of proof and offends Due Process.

In short, this boils down to EPA requesting this Court to resurrect EPA's withdrawn regulation and declare the mere sale of all racing parts illegal, robbing amateur racers and small business owners of their rights to sell parts designed for legal racing used in legal racing markets. Doc. 46 at 10-11.[3]

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[1] *See* Mike Miller, "What's it cost to compete in Formula One? Any IndyCar comparison," NBC Sports, May 22, 2013, *available at* *https://motorsports.nbcsports.com/2013/05/22/whats-it-cost-to-compete-in-formula-one-an-indycar-comparison/*.

[2] *See* Daniel Macht, "Race Car Costs: The High Price of Fielding a Racing Team," NBC Washington, May 25, 2017, *available at* https://www.nbcwashington.com/news/national-international/race-car-costs-the-high-price-of-fielding-a-racing-team/2016238/#:~:text=Each%20primary%20car%20cost%20approximately,for%20the%20weekend%20totaled%20%24900.

[3] The competition motor sports issue arose when the United States responded to Gear Box Z's opposition. In its Complaint and Preliminary Injunction Motion, the government did not claim the CAA prohibits converting certified motor vehicles to competition vehicles. Docs. 1, 37.

This Court should reject the United States' unreasonable interpretation that would apply the anti-tampering provisions to certified motor vehicles converted to dedicated racing vehicles.

ARGUMENT

I. In the Decades Since the Clean Air Act's Enactment, Motorsports has Grown and Air Quality Has Improved

When Congress originally enacted the Clean Air Act in 1967, amateur racing and tracks were a well-established past time. As EPA has admitted, there is now a "decades-old practice of converting certified production vehicles to competition vehicles that are to be used solely for sanctioned events." Doc. 50, Ex. 1, Attach. 2.[4] Until its now-abandoned 2015 rulemaking, EPA never suggested that the Act prohibited road-to-track conversions. During this time, motorsports has grown into a popular, multi-billion dollar industry, while air quality in America has improved significantly.

A. Motorsports has become part of the fabric of American life

There are an estimated 195,000 active race cars in the United States, with an estimated 1.3 million racers participating in competitions. To support these competitions, there are over 1,200 race tracks in the United States with several in Arizona.[5] By far, the dominant mode of racing is with cars and trucks.

[4] Sanctioning bodies include, but are not limited to: Automobile Racing Club of America; International Conference of Sports Car Clubs; International Hot Rod Association; International Motor Sports Association; National Association for Stock Car Auto Racing; National Auto Sport Association; National Hot Rod Association; Sports Car Club of America; United States Auto Club; Southern California Timing Association; United States Hot Rod Association.

[5] *See* National Speedway Directory, *available at* http://speedwaysonline.com/tracks/category/all-tracks (last accessed Feb. 15, 2021).

This industry employs over one million Americans across the country, leading to large indirect economic benefits. These racing competitors are supported by millions of enthusiasts and fans producing billions of dollars in jobs, tourism, innovation, education and much more.

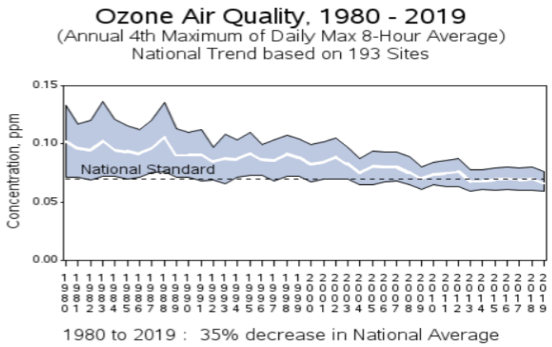
Nearly all track racing is done with converted motor vehicles that have been modified for use strictly at the track – with parts and equipment produced and sold by the specialty equipment automotive aftermarket industry. A typical amateur racing vehicle may start as an ordinary used motor vehicle. It is then modified for racing purposes, both inside the cabin (*e.g.*, removing seats, unnecessary dashboard components and installing a roll cage and harnesses) and out (*e.g.*, modifying the rear end, drive train, and exhaust), and trailered to the track. To facilitate track racing, converted motor vehicles may use race parts or competition-use only parts to improve performance and safety, and some may also remove components of the emission control system. As an example, exhaust gas recirculation (EGR) removal kits are used on vehicles in tractor pull racing events because an EGR failure could cause engine coolant to leak into the combustion chamber and result in an engine explosion.

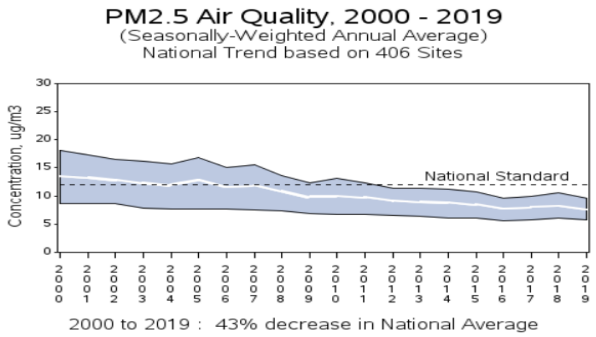
The lifeblood of competitive motor sports are small businesses. More than 90% of SEMA's members are small businesses – and many are family run businesses. SEMA's annual trade show is considered the largest gathering of small businesses in the world.

B. The Nation's Air Quality Has Improved Markedly

EPA raises concerns for the excess air pollution coming from illegally-modified vehicles and engines operated on streets and highways. *E.g.*, Doc. 37 at 9. In truth, modified competition vehicles contribute relatively little to excess pollution as modified competition

vehicles are few in number, when compared to the hundreds of millions of on-road motor vehicles, and a competition race car will see only a fraction of the actual mileage of a typical street car. Indeed, as amateur competition racing has increased in popularity, nationwide air quality has improved. For example, ground-level ozone (smog) and PM 2.5 (fine particles) have dropped dramatically, as shown in Figures 1 and 2 below.[6]





II. The CAA Allows Modification of Motor Vehicles to Full-time Race Vehicles for Competition

The CAA's anti-tampering provision in Section 203 of the Act prohibits selling parts

> *intended for use with*, or as part of, *any motor vehicle or motor vehicle engine*, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a *motor vehicle or motor vehicle engine* in compliance with regulations . . . and where the person *knows or should know* that such part or component is being offered for sale or installed for *such use* or put to *such use*.

42 U.S.C. § 7522(a)(3)(B) (emphasis added). Congress thus targeted tampering at the knowing and intentional sales of products for "use" in "motor vehicles."

The plain language of the Act, statutory structure, and legislative history show that Congress never intended EPA to regulate full-time racers as "motor

[6] *See* "National Air Quality Standards: Status and Trends of Key Air Pollutants," *available at* www.epa.gov/air-trends (last accessed Feb. 15, 2021).

vehicles," regardless of whether those race vehicles originally received an EPA certification. That interpretation is confirmed by EPA's regulations and guidance.

A. EPA's "Original Design" Interpretation of "Motor Vehicle" Fails

Section 216 of the Act defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway," 42 U.S.C. § 7550(2). As EPA recognizes, vehicles designed exclusively for competition use are, by definition, not motor vehicles because they do not operate on a street or highway and are therefore not regulated under the Act. Doc. 46 at 10. But EPA goes further to read in a "*original* design" qualification that once a motor vehicle is certified, it is forever subject to the Act regardless of whether subsequent design modifications convert the vehicle into one used exclusively for competition off of a street or highway. Doc. 46 at 11.

However, EPA's original design theory emerges from whole cloth. Nowhere did Congress say that a certified motor vehicle converted to a competition vehicle is still subject to the Act. Nor does the Act provide that a vehicle initially "designed" to be used on city streets remains a "motor vehicle" even if "re-designed" for a different function or purpose, such as use in competition. Congress could have said a motor vehicle is a vehicle "originally" designed for street use – or that a motor vehicle may never be "modified" to non-street use without violating the Act. It did not. *See, e.g.*, *Knisley v. United States*, 901 F.2d 793, 796 (9th Cir. 1990) (rejecting an implicit limitation on statutory language because "if Congress had wanted to limit" the language, "then it would have said so"). Indeed, instead of prohibiting the conversion, the straightforward reading of Congress' definition of

"motor vehicle" is that if a vehicle is modified for racing, it has an entirely different function and purpose – and thus is no longer "designed" for street use.

EPA's reliance on an implied rejection of a competition only limit on motor vehicles is contrary to the language of the statute, and, even if plausible, at best hinges on an ambiguity created by the lack of greater specificity in the statute. Such statutory ambiguity must be construed narrowly where a statute has both criminal and civil uses, even in a civil enforcement action. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (the rule of lenity must apply in a civil settings where the statutory provision has criminal applications). The rule of lenity provides that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). EPA's application of the CAA's tampering prohibition here has criminal implications—the government is now charging companies and individuals with emissions tampering with "motor vehicles". *See, e.g.*, Information, *United States v. Rockwater Northeast LLC*, 4:20-cr-00230-MWB (M.D. Pa. filed Sept. 24, 2020) (Exhibit 1). As such, this Court must interpret the statute consistently and apply the rule of lenity.

B. The Statutory Competition Use Exclusion Applies to Full-time Race Vehicles Converted from Certified Motor Vehicles

Besides the definition of "motor vehicle," other provisions of the Act manifest Congress considered judgment to exclude full-time competition vehicles from EPA's purview. *See, e.g., Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050 (9th Cir. 2018) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular

statutory language at issue, as well as the language and design of the statute as a whole.") (internal quotation marks and citation omitted).

CAA Section 213 establishes emission requirements for "nonroad vehicles" but, by definition, Congress excluded from those requirements any vehicles "used solely for competition[s]," *i.e.*, competition vehicles.[7] *See* 42 U.S.C. § 7550(11) ("nonroad vehicle" is "a vehicle that is powered by a nonroad engine and that is not a motor vehicle *or a vehicle used solely for competition*.") (emphasis added). In creating a category of "nonroad vehicles," Congress made express what is clearly implied in Section 203—that a competition vehicle is neither a motor vehicle or a nonroad vehicle.

EPA, however, takes a view of this exclusion that defies logic, history, and common sense. The agency again agrees that regulating competition use vehicles is outside the scope of the Act, but suggests that because the explicit exclusion of competition vehicles is housed in the statutory definition of "nonroad vehicle," but not in the definition of "motor vehicle," Congress only allows for the conversion of modified nonroad vehicles to competition use but not the conversion of motor vehicles to competition use. *E.g.*, Doc. 46 at 11 n.5.

To be sure, the presence of particular provision exclusion in one part of a statute, and its absence in another, may be relied upon in some instances to infer congressional intent. *E.g., United States v. Johnson*, 680 F.3d 1140, 144 (9th Cir. 2012). But that "negative pregnant" canon of statutory construction is a starting presumption and yields to other factors such as overall structure of the statute. *E.g., United States v. Campbell*, 937 F.3d 1254, 1257-58 (9th

[7] Section 213 directed EPA to promulgate rules to "determine compliance with, and enforce, standards" for nonroad. 42 U.S.C. § 7547(d). EPA codified nonroad engine tampering rules in 40 C.F.R. § 1068.101.

Cir. 2019) (rejecting the application of the negative pregnant rule based on the statutory context).

That is the case here. Congress had to carve-out competition use vehicles from the definition of "nonroad vehicle" because without it, Congress would be placing under EPA's jurisdiction the entire racing industry, which of course necessarily is conducted off-road. *See, e.g., United States v. Reed*, 734 F.3d 881, 889-90 (9th Cir. 2013) (rejecting negative pregnant canon of statutory construction based on history and context of an issue). No one may reasonably dispute that track racing would otherwise be a nonroad activity, whether conducted with a Formula One car or motor vehicle that has been converted to a full-time racer. However, based on the definition of "motor vehicle," no explicit competition-use carve-out is necessary. EPA's own regulations also make clear that competition use vehicles are distinct from both "motor vehicles" and "nonroad" vehicles, no matter if the vehicle is originally designed for competition use or subsequently modified for competition use.[8]

EPA's position also rests on the absurd assumption that Congress explicitly reserved an allowance to convert certified nonroad vehicles—a category that includes broad swath of equipment, such as bulldozers, forklifts, baggage carts, and even Zamboni's at ice rinks, that would never be used for racing-—without making an allowance to convert certified "motor vehicles," the predominant mode of track racing.[9]

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[8] EPA's regulations provide that new nonroad vehicles produced "that are used solely for competition are excluded from emission standards," as are modified nonroad engines already "placed into service in the United States" provided they are "used solely for competition." 40 C.F.R. §§ 1068.235(a), (b).

[9] *See, e.g.*, EPA, Regulation for Emissions of Nonroad Vehicles and Engines, *available at* *https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-emissions-*

Congress aimed the competition exclusion at race tracks, not ice rinks. The competition exclusion applies to motor vehicles converted to competition vehicles.

C. The Act's Legislative History Shows that Congress Never Intended to Regulate Competition Racing

The Clean Air Act's legislative history expressly confirms that Congress *never* intended to impose the constraints EPA would seek to apply. *See Pac. Coast Fed'n of Fishermen's v. Glaser*, 937 F. 3d 1191, 1196 (9th Cir. 2019) (courts "may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent"). When Congress amended the CAA in 1970, it explicitly clarified that the term "motor vehicle" does *not* extend to vehicles manufactured or "modified for" racing. The exchange between Representative Nichols from Alabama and Representative Staggers, one of the bill's sponsors and chairman of the House Committee on Interstate and Foreign Commerce, could not be more clear:

> Representative Nichols: "I would ask the distinguished chairman if I am correct in stating that the terms "vehicle' and "vehicle engine" as used in the act do not include vehicles or vehicle engines *manufactured for, modified for* or utilized in organized motorized racing events which, of course, are held very infrequently but *which utilize all types of vehicles and vehicle engines*?"
>
> Representative Staggers: "I would say to the gentleman *they would not come under the provisions of this act, because the act deals only with automobiles used on our roads in everyday use. The act would not cover the types of racing vehicles to which the gentleman referred . . . .*"[10]

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nonroad-vehicles-and-engines (last accessed Feb. 15, 2021) (listing relevant regulations); EPA, Basic Information about the Emission Standards Reference Guide for On-road and Nonroad Vehicles and Engines, *available at* *https://www.epa.gov/emission-standards-reference-guide/basic-information-about-emission-standards-reference-guide-road* (last accessed Feb. 15, 2021) (providing illustrative lists of regulated nonroad vehicles).

[10] *See* House Consideration of the Report of the Conference Committee, Dec. 18, 1970 (reprinted in "A Legislative History of the Clean Air Amendments of 1970," together with a

Thus, in this exchange, Congress expressly addressed the specific question at issue in this litigation: whether the Act would regulate "vehicles or vehicle engines… modified for … organized motorized racing events." And Congress emphatically answered no - "the act deals only with automobiles used on our roads in everyday use," and thus the law "would not cover" vehicles or vehicle engines modified for organized motorized racing events. *See generally Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("[F]loor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, . . . and they are given even more weight where, as here, other legislators did not offer any contrary view.") (internal citation omitted).

D. EPA's litigation position contradicts its longstanding guidance and regulations

In this Court, EPA argues that the applicability of the CAA's tampering prohibition "turns on vehicle *design attributes* and makes no exclusion for how the vehicle is ultimately used." Doc 61 at 2-3 (emphasis in original). The agency declares unequivocally that "there is no competition use exemption." *Id.* at 10.

EPA has told the public a different story. The agency's guidance on importing vehicles makes clear that "vehicles are excluded from the motor vehicle emission requirements of the Clean Air Act," if the vehicles are for "***exclusive use for competition or***

section-by-section index, U.S. LIBRARY OF CONGRESS, ENVIRONMENTAL POLICY DIVISION, Washington: U.S. Govt. Print. Off. Serial No. 93-18, 1974, p. 117).

racing," or lack "features associated with practical street or highway use" including "features ***that have been removed***" from the vehicle.[11]

This guidance is consistent with the agency's regulations, which confirm that a certified "motor vehicle" may be modified into a racing vehicle. Specifically, a vehicle is not a "motor vehicle" if certain "criteria" related to the vehicle's operation, use and features are present. 40 C.F.R. § 85.1703(a). Hence, according to EPA's regulation, a vehicle is not a "motor vehicle" if it "lacks features customarily associated with safe and practical street or highway use, such features including, but not being limited to, a reverse gear (except in the case of motorcycles), a differential, or safety features required by state and/or federal law" or if it "exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely . . . ." *Id.* § 85.1703(a)(2)-(3). In fact, the regulation makes no reference to the vehicle's original *design*.

EPA's regulations and guidance governing imports likewise recognize "racing vehicles" as a subset of "motor vehicles" based on physical attributes and use and *not* original design. For instance, EPA's import rules define racing vehicle as a vehicle meeting one or more criteria, all of which relate to physical attributes of the vehicle. *See* 40 C.F.R. §§ 85.1511(e) *and* 85.1703. Nowhere does EPA indicate that a vehicle must have been designed or originally manufactured with such physical attributes. Accordingly, a motor

[11] *See* EPA Office of Transp. & Air Quality, "Overview of EPA Import Requirements for Vehicles and Engines," at pp. 13-14, EPA-420-B-1-015 (Mar. 2011) (EPA Import Overview), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100AKFO.pdf.;

vehicle could be modified to exhibit such physical characteristics and it would no longer be a motor vehicle subject to the Act.

EPA has said as much directly to SEMA's members. At a 2010 SEMA show, EPA provided a briefing on "racing vehicle determinations" and "racing exclusions," including an explanation of how owners qualify their vehicles as racing vehicles. EPA defined a racing vehicle as one that "has been extensively *modified* for racing, and is incapable of safe and practical street or highway use" and that "determinations are based on the *capability* of the vehicle, not its intended use." *See* "Racing to Regulate: EPA's Latest Overreach on Amateur Drivers," Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Sci., Space, and Tech., No. 114-65 (Mar. 15, 2016) at 129-30 (emphasis added) (excerpt at Exhibit 2); *see also id.* at 130 (racing vehicles are defined, in part, by "street features that are lacking (*features that have been removed* or have never been installed that would permit safe driving on streets or highways")). (emphasis added).

III. EPA's Argument that the Act Prohibits Road-to-Track Conversions Should be Rejected Because It Conflicts with the Agency's 2015 Rulemaking and Guidance

EPA claims it has been "clear and consistent" that road-to-track conversions are "illegal, regardless of whether the vehicle is exclusively for competition purposes." Doc. 61, at 2, 4. This is revisionist history: EPA *abandoned* a proposed rulemaking to ban road-to-track conversions because that proposal would have broken from decades of agency interpretations and practice.

Specifically, in 2015 – 45 years after the Congress stated its intent *not* to cover vehicles modified for racing use – EPA for the first time proposed a regulation that would have banned converting a certified motor vehicle for exclusive competition use. *See*

Proposed Rule, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," 80 Fed. Reg. 40,138, 40,527 (July 13, 2015) (providing that "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicles for competition use").

SEMA, several state attorneys general, and others challenged EPA's proposal as contrary to law. [12] EPA's proposal also generated congressional oversight. *See, e.g.*, "Racing to Regulate, *supra* 14 at 5 (Statement of Rep. Loudermilk) (emphasis added).

In response, EPA walked back its position:

> Our focus on defeat devices in the enforcement context has recently led to concerns in the racing community that perhaps the EPA seeks to stop the decades-old practice of converting certified production vehicles to competition vehicles that are to be used solely for sanctioned events. To be clear: we are not. . . . [J]ust like the purpose-built, dedicated competition vehicles . . . , *the EPA likewise has no interest in vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to sanctioned competition-use only vehicles.*" [13]

Given that EPA clearly stated that it had "no interest" in vehicles that were originally designed as motor vehicles and then converted to racing vehicles, it is hard to conceive that EPA actually believed the Act bans such conversions or that EPA's current interpretation has any validity or warrants any deference here.

EPA ultimately decided not to finalize its proposal, again explaining that it had "included a clarification related to vehicles used for competition to ensure that the Clean Air

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[12] *See* SEMA Comments on the Proposed Rule dated April 1, 2016 (Exhibit 3); Ohio, West Virginia, Arkansas, Alabama, Louisiana, Michigan, and Georgia State Attorneys General Comments on the Proposed Rule dated April 1, 2016 (Exhibit 4).

[13] *See* Letter from Cynthia Giles, EPA Assistant Administrator for Enforcement and Compliance Assurance to Nicholas W. Craw, President & CEO, Automobile Competition Committee for the United States, FIA Inc. dated May 13, 2016 (Doc. 50, Ex. 1, Attach. 2).

Act requirements are followed for vehicles used on public roads."[14] Instead, EPA claimed that it "supports motorsports and its contributions to the American economy and communities all across the country. EPA's focus is not *(nor has it ever been)* on vehicles built or used exclusively for racing, but on companies that violate the rules by making and selling products that disable pollution controls on motor vehicles used on public roads." [15]

Since the 2015 rulemaking, EPA has repeatedly affirmed to Congress that it has "no interest" in full-time converted racers. After filing this matter, EPA reiterated to Congressman Roe that "[d]edicated competition-use only vehicles should be able to operate as they historically have."[16] The agency's contrary statements here deserve no deference and should be rejected.

IV. The Court Should Require the United States to Meet its Burden of Proof

The United States argues that "even if there were a competition exemption," then the defendant bears the burden to show that its products end up on competition vehicles. Doc. 61, at 2. But "in an enforcement proceeding under the Clean Air Act, the burden of establishing a violation of the applicable regulation is on the government." *United States v. SCM Corp.*, 667 F. Supp. 1110, 1124 (D. Md. 1987).

The tampering claim at issue in Section 203(a)(3)(B) of the Act makes it a violation to manufacture or sell parts or components (1) "intended for use with, or as part of, any motor

[14] *See* EPA/NHTSA Response to Comments for Joint Rulemaking, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles - Phase 2," EPA-420-R-16-901 (August 2016) at p. 1915, *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi/P100P8IS.PDF?Dockey=P100P8IS.PDF

[15] *Id.* (emphasis added).

[16] *See* Letter from S. Bodine, EPA Ass't. Admin. for Enforcement and Compliance Assurance to Congressmen David P. Roe, M.D., Sept. 11, 2020 at 1 (Doc. 48-4); Doc. 48-3.

vehicle or motor vehicle engine … (2) where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." 42 U.S.C. §7522(a)(3)(B). Race vehicles fall outside the statutory ambit of the Act's definition of "motor vehicle," as discussed above.

Thus, a Section 203 tampering claim requires the government to prove that the defendant knew or should have known that a part was intended for a motor vehicle, namely a vehicle driven on roads and streets. That showing is a heightened standard: the Act generally imposes strict liability for civil violations. *See, e.g., United States v. Dell'Aquilla Enters.*, 150 F.3d 329, 332 (3d Cir. 1998). Construing Section 203 to shift the burden to the defendant would undermine Congress' deliberate choice to impose a heightened scienter requirement for tampering violations. *See, e.g., Varjabedian v. Emulex Corp.*, 888 F.3d 399, 411 (9th Cir. 2018) (explaining the importance of giving effect to "different levels of culpability" that Congress selects within "a single statute") (discussing *Aaron v. SEC*, 446 US 680, 697 (1980)).

Without expressing a position on whether the United States may make its case in this matter, SEMA has significant concerns about any ruling that shifts the burden of proof to aftermarket companies. Most aftermarket companies are small businesses. As a consequence, most of the settlements with EPA are based on "ability-to-pay," meaning the defendant could not afford the full penalty due to its financial limitations.

In contrast, the United States possesses ample authority and resources to prove its cases. Section 208 of the Act grants EPA information-gathering authority before filing a case. 42 U.S.C. § 7542. Congress provided a generous five-year statute of limitations for

seeking civil penalties. 28 U.S.C. § 2462. During that time, EPA may seek records of sales and other information to determine whether a company knowingly and intentionally sold race delete parts for on-road use.

CONCLUSION

The Government's Motion for Preliminary Injunctions incorrectly interprets the Clean Air Act to authorize application of the anti-tampering provisions to EPA-certified motor vehicles converted into dedicated competition vehicles.

DATED this 15th day of February, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record in this matter.

/s/ Aaron L. Flyer
Aaron L. Flyer

Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	No.
	:	
v.	:	
	:	
ROCKWATER NORTHEAST LLC, Defendant	:	(electronically filed)

INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNTS 1 THROUGH 31
Violations of the Clean Air Act
42 U.S.C. § 7413(c)(2)(C)

I. Introduction

At times material to the Information:

Relevant Individuals and Entities

1. Defendant ROCKWATER NORTHEAST LLC (ROCKWATER) was a company headquartered in Canonsburg, Pennsylvania, with facilities in the Middle District of Pennsylvania and the Western District of Pennsylvania. ROCKWATER provided services to the hydraulic fracturing industry in Pennsylvania, including the provision and transportation of water and wastewater.

2. The Environmental Protection Agency (EPA) was an agency

of the United States responsible for enforcing and administering the Clean Air Act.

3. The Federal Motor Carrier Safety Administration (FMCSA) was an agency of the United States Department of Transportation (USDOT) responsible for regulating the safe and efficient travel of commercial motor vehicles. Companies that maintained commercial motor vehicles to transport passengers or haul cargo in interstate commerce were required to register with the FMCSA and obtain a USDOT number that served as a unique identifier.

4. ROCKWATER, when it was formerly known as Red Oak Water Transfer Northeast LLC, registered with FMCSA as an interstate carrier of oil field equipment and was assigned USDOT number 1893956.

Emissions Systems and Regulations

5. The purpose of the Clean Air Act was to protect and enhance the quality of the nation's air resources, thus promoting public health and welfare by, among other things, reducing the emission of pollutants, such as nitrogen oxides, particulate matter, hydrocarbons,

and carbon monoxide, from motor vehicles.

6. The Clean Air Act and its implementing regulations established standards limiting the emission of pollutants from various classes of motor vehicle engines, including heavy-duty diesel engines.

7. To meet emissions standards, manufacturers of vehicles bearing heavy-duty diesel engines installed a variety of hardware emissions control devices, including exhaust gas recirculation systems, selective catalytic reduction systems, and diesel particulate filters. After verifying that the emissions control devices conformed to emissions standards, the EPA issued Certificates of Conformity to vehicle manufacturers specific to each annual vehicle class.

8. To enforce compliance with emissions standards, the EPA, pursuant to its regulatory authority, created regulations requiring manufacturers to install on-board diagnostic systems (OBDs) on vehicles. OBDs monitored emissions-related sensors and the hardware emissions control devices of heavy-duty diesel engine systems and components.

9. OBDs alerted vehicle operators, through a malfunction

indicator light, when a component of the emissions-monitoring system deteriorated or malfunctioned. When the malfunction was left unaddressed and the vehicle's emissions exceeded certain emissions level thresholds, the OBD forced the vehicle's engine to shut down, or limited the vehicle to a maximum speed of as low as five miles per hour; an effect commonly referred to as "limp mode" or "power reduced mode."

10. Repairs for malfunctioning or deteriorating emissions systems on diesel vehicles in "limp mode" ordinarily cost between approximately $1,000 and $10,000. Repairs ordinarily took several days or weeks to complete, during which time the vehicles were inoperable.

11. The Clean Air Act prohibited any person from tampering with or rendering inaccurate vehicle emissions monitoring devices and methods, including OBDs and hardware emissions control devices.

12. The FMCSA, pursuant to its regulatory authority, required commercial motor vehicles to pass annual inspections. The FMCSA delegated the administration of those inspections to certain states, including Pennsylvania, whose inspection standards met minimum

federal standards.

13. In Pennsylvania, the Pennsylvania Department of Transportation (PennDOT) oversaw motor vehicle safety inspection programs. PennDOT, pursuant to its regulatory authority, required commercial diesel-powered motor vehicles to pass a safety inspection, and prohibited any device or modification that bypassed exhaust system emissions components. Pennsylvania prohibited the intentional modification or alteration of a factory-installed smoke control system on diesel-powered vehicles and their fuel systems that limited the system's ability to control smoke. Pennsylvania also prohibited removal of the smoke control system, except for repair or installation of a proper replacement. Pennsylvania further prohibited disabling, altering, and changing an emission control system of a vehicle, requiring all original emissions control components to be present and functioning.

14. PennDOT required annual vehicle safety inspections to ensure that vehicles were maintained for safe operation. The safety inspection procedure included inspection and testing of a variety of vehicle components, including hardware emissions systems. Certified

vehicle safety inspectors performed vehicle safety inspections at official PennDOT inspection stations. Certified vehicle safety inspectors affixed a certificate to vehicles that passed inspection, to demonstrate compliance with PennDOT inspection standards, and reported the inspection results to PennDOT.

Emissions System Tampering Devices

15. Hardware emissions control devices and OBDs could be disabled on commercial vehicles bearing heavy-duty diesel engines, using a variety of aftermarket devices. Disabling the emissions control systems defeated their ability to limit pollutant gases and particulate matter into the atmosphere.

16. One method used to disable hardware emissions control devices was to remove the portion of the vehicle's exhaust system that contain the emission control devices and replace it with a section of exhaust tubing or a "straight pipe" that did not limit emissions.

17. Another, generally less expensive method used to disable hardware emissions control devices was to remove certain components, such as the selective catalytic reduction system and diesel particulate

filter, by hollowing out their casing in the vehicle's exhaust pipe, and then re-welding the entry point to create the false appearance that the hardware emissions control devices remained installed.

18. OBDs detected disabling modifications to the hardware emissions control devices on vehicles. Thus, any modifications to the hardware emissions control devices necessarily included a contemporaneous disabling of the OBD, to avoid the vehicle going into "limp mode."

19. The devices used to disable OBDs commonly were referred to as "defeat devices," "DPF defeats," "delete devices," "tuners," "performance tuners," "conversion kits," and "programmers," (collectively referred to as "defeat devices"). Several manufacturers offered a variety of defeat devices.

20. One type of defeat device was an apparatus that plugged into a vehicle's data link connector to "tune" the OBD. Those defeat devices, when plugged in, allowed the vehicle operator to activate at will the software modifications that manipulated the OBD.

21. Another type of defeat device was a software program that

reprogrammed, or "flashed," the vehicle's diesel engine computer module, through use of a computer or electronic device that modified the OBD after being connected to the vehicle on a single occasion. Those defeat devices permanently adjusted the diesel engine timing and other parameters to bypass the OBD.

22. In addition to disabling the OBD, defeat devices also improved heavy-duty diesel engines' horsepower, torque, and fuel efficiency.

Rockwater Tampering with Emissions Systems

23. At times material to the Information, ROCKWATER owned, possessed, and maintained at its Pennsylvania facilities commercial vehicles bearing heavy-duty diesel engines, for business purposes and use by employees, contractors, and agents.

24. ROCKWATER managers and employees replaced and caused to be replaced hardware emissions control devices on ROCKWATER commercial motor vehicles containing heavy-duty diesel engines, with exhaust tubing or "straight pipes."

25. ROCKWATER managers and employees removed and

caused to be removed hardware emissions control devices on ROCKWATER commercial motor vehicles containing heavy-duty diesel engines, by extracting the emissions control devices from their compartments, and then re-welding the entry point to create the false appearance that the hardware emissions control devices remained installed.

26. ROCKWATER purchased defeat devices from third-party vendors, and ROCKWATER managers and employees used and caused to be used those defeat devices to disable the OBDs on ROCKWATER vehicles whose hardware emissions control devices had been removed.

27. ROCKWATER managers and employees arranged and caused to be arranged for ROCKWATER vehicles with disabled OBDs and hardware emissions control devices, to undergo annual PennDOT vehicle safety inspections by third parties. ROCKWATER managers and employees arranged and caused to be arranged for those third parties to issue certificates stating that Rockwater vehicles with disabled OBDs and hardware emissions control devices met PennDOT inspection standards, when in fact they did not.

28. Between on or about August 1, 2013 and June 30, 2014, ROCKWATER managers and employees removed hardware emissions control devices from 31 ROCKWATER commercial motor vehicles containing heavy-duty diesel engines, and used defeat devices to disable the OBDs for those 31 vehicles.

29. As a result of the emissions systems tampering, ROCKWATER obtained economic benefits, including fuel savings from improved fuel economy on modified vehicles; reduced expenditures on diesel exhaust fluids required to operate emissions systems components; reduced repair and maintenance costs for malfunctioning or deteriorating emissions systems; and the avoidance of lost business and revenue from vehicles rendered out of service while undergoing emissions systems repair and maintenance.

30. As a result of the emissions systems tampering, modified ROCKWATER vehicles emitted tons of excess emissions, including nitrogen oxides and particulate matter, into the atmosphere.

II. Statutory Allegations

31. From on or about August 1, 2013 through on or about June 30, 2014, in the Middle District of Pennsylvania, and elsewhere, the defendant,

ROCKWATER NORTHEAST LLC,

did knowingly falsify, tamper with, render inaccurate, and fail to install a monitoring device and method required to be maintained under the Clean Air Act, that is, emissions systems components on the ROCKWATER NORTHEAST LLC commercial motor vehicles containing heavy-duty diesel engines listed below, with each vehicle being a separate count:

Count	Rockwater Unit Number	Make & Model	Year	VIN Number
1	185	Chevy 3500	2011	1GC4KZC80BF147310
2	189	Chevy 3500	2011	1GB4K0CL6BF162656
3	225	GMC 3500	2011	1GT422C8XBF177874
4	251	Chevy 2500	2011	1GT422C89BF204112
5	P-278	Chevy 3500	2011	1GC4KZC86BF227050
6	186	Chevy 2500	2011	1GC4KZC88BF150312
7	223	GMC 3500	2011	1GT422C8XBF202840
8	P-281	GMC 2500	2011	1GT422C89BF231262
9	173	Chevy 3500	2011	1GC4KZC80BF147615
10	216	GMC 3500	2011	1GT422C8XBF177941
11	141	Chevy 3500	2011	1GC4KZC82BF117919
12	153	Chevy 3500	2011	1GB4KZCL9BF13l857
13	159	GMC 3500	2011	1GD422CL9BF148401
14	161	GMC 3500	2011	1GD422CL0BF150327
15	164	GMC 3500	2011	1GD422CL3BF149592
16	175	Chevy 3500	2011	1GC4KZC84BF150257
17	187	Chevy 3500	2011	1GB4KZCL8BF149217
18	199	GMC 3500	2011	1GT422C82BF178548
19	202	GMC 3500	2011	1GT422C86BF178326
20	217	GMC 3500	2011	1GT422C85BF178074
21	248	GMC 3500	2011	1GT422C89BF209570
22	201	GMC 3500	2011	1GT422C84BF179281
23	325	Chevy 3500	2011	1GC1KVC8XCF189030
24	191	Chevy 3500	2011	1GB4KZCL7BF149760
25	285	Chevy 2500	2011	1GC1KXC84BF256974
26	170	Chevy 3500	2011	1GC4KZC8XBF111611
27	181	Chevy 3500	2011	1GC4KZC85BF148324
28	192	Chevy 3500	2011	1GB4KZCL7BF155963
29	284	Chevy 3500	2011	1GC4KZC8XCF114848
30	250	GMC 3500	2011	1GT422C83BF204106
31	178	Chevy 3500	2011	1GB4KZCL3BF149271

In violation of Title 42, United States Code, Section 7413(c)(2)(C).

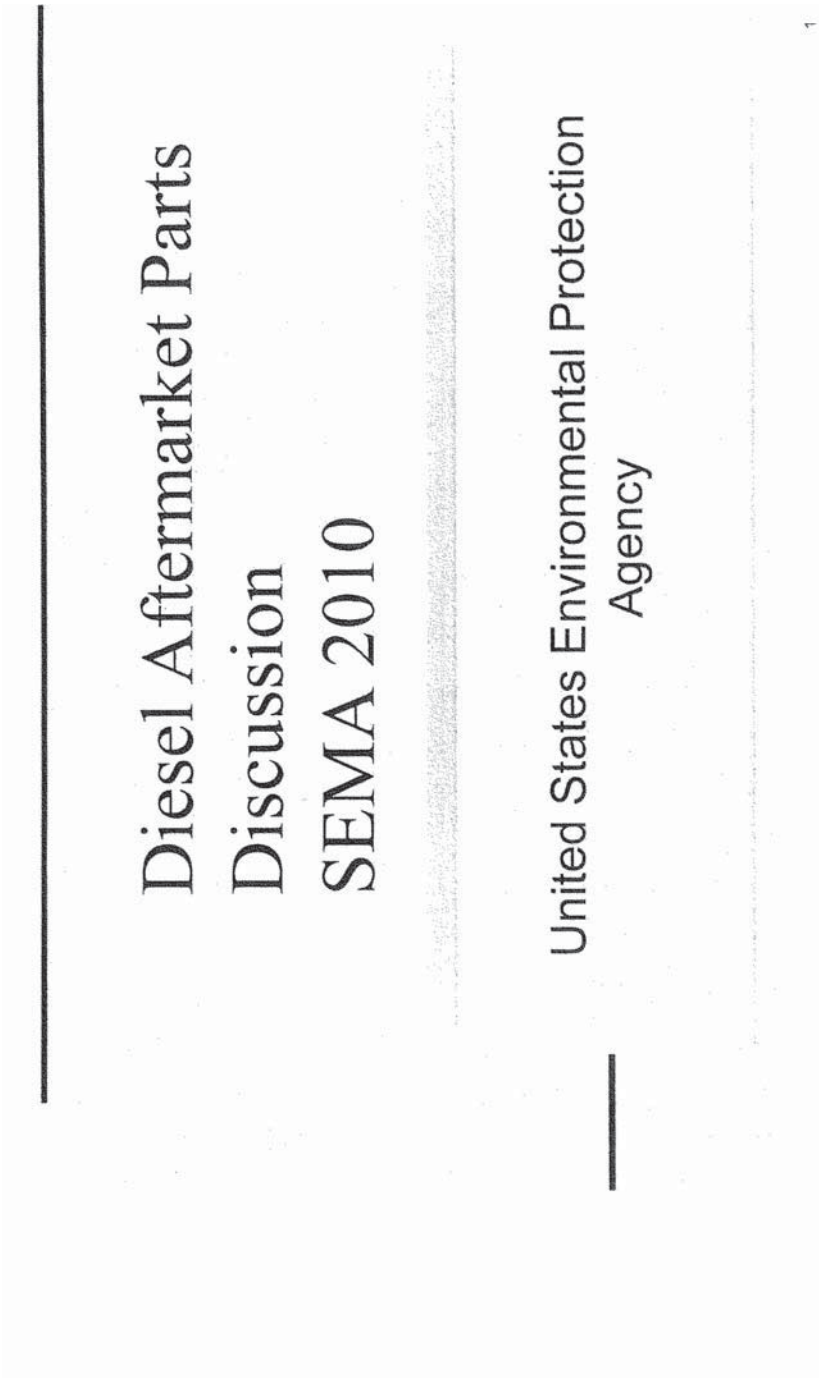
DAVID J. FREED
United States Attorney

Date: 9/21/20

By: _____

PHILLIP J. CARABALLO
SEAN A. CAMONI
Assistant United States Attorneys
PATRICIA C. MILLER
Special Assistant United States Attorney

Exhibit 2


Diesel Aftermarket Parts
Discussion
SEMA 2010
United States Environmental Protection
Agency

EPA Participants: Anne Wick, Jacqueline Robles-Werner

Jacqueline Robles-Werner is the Chief of the Mobile Source Enforcement Branch (MSEB) at EPA, and is an attorney with over 15 years of experience in Clean Air Act mobile source enforcement.

Anne Wick is the MSEB Vehicle and Engine Enforcement Team Leader. Anne is a Mechanical Engineer with over 18 years of experience at EPA in enforcement and certification.

EPA Racing Vehicle Determinations

- Racing vehicle: A vehicle which, in general, has been extensively modified for racing, and is incapable of safe and practical street or highway use because it lacks features associated with safe and practical street or highway use. Such features include, but are not limited to, a reverse gear (except in the case of motorcycles), a differential, or other safety features required by state and/or Federal law.
- Not all vehicles used in races are excluded from emissions compliance. Determinations are based on the capability of the vehicle, not its intended use.
- Restrictions: Vehicle may not be registered or licensed for use on or operated on the public roads or highways.
- Reference: http://www.epa.gov/otaq/imports/420b10027.pdf
- EPA Contact for Exemptions and Exclusions (Racing and Competition Engines) John LaCroix 734-214-4463.

Application for EPA Racing Exclusion: Required Content

1. Name, address, and daytime telephone number;
2. Vehicle information (make, model, model year and VIN);
3. A list of racing features (features that make the vehicle a racing vehicle);
4. A list of street features that are lacking (features that have been removed or have never been installed that would permit safe driving on streets or highways);
5. At least four photographs showing the front, rear, and each side view; and if a vehicle with an interior, photographs of the interior;
6. The name of the sanctioning body and competition class;
7. A schedule of racing events, including dates and locations where the vehicle will participate;
8. A copy of the competition racing license; and
9. Other proof that the vehicle cannot be used on streets and highways, such as a letter from a state's Department of Motor Vehicles (DMV) that explains the vehicle cannot be licensed for use on public roads, and explains why it cannot be licensed.

Exhibit 3

April 1, 2016

Filed: www.regulations.gov

U.S. Environmental Protection Agency (EPA)
Air Docket (MC-28221T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

National Highway Traffic Safety Administration (NHTSA)
Docket Management Facility (M-30) West Building, Rm. W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Docket ID No.: EPA–HQ–OAR–2014–0827; NHTSA-2014-0132
Comments: Proposed Rule: Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2: Vehicles Used Solely in Competition

Dear Sir/Madam:

The Specialty Equipment Market Association (SEMA) respectfully submits these comments in response to a Notice of Data Availability (NODA) issued by the U.S. Environmental Protection Agency (EPA) on March 2, 2016.[1] These comments supplement SEMA's initial comments to the docket on the racing vehicle issue.[2]

The EPA published a Notice of Proposed Rulemaking (NPRM) on July 13, 2015 for the primary purpose of proposing a second round of greenhouse gas emission standards for medium- and heavy-duty vehicles.[3] Within the NPRM, the EPA included changes to existing regulations to put in place a policy that would prohibit any person from decertifying a motor vehicle to transform it into a vehicle to be used solely for competition (i.e., a racing vehicle). This new regulatory framework for racing vehicles represents a departure from previous EPA policy and was included in the NPRM without adequate notice or consideration of the impact on affected parties. Further, the changes are not in accord with the Clean Air Act, the statute under which they have been proposed. Lastly, the proposal is unnecessary and unreasonable in relation to the EPA's stated purpose to enforce against the sale of illegal emissions defeat devices used on street vehicles.

[1] Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2--Notice of Data Availability, 81 Fed. Reg. 10822 (March 2, 2016) (hereinafter referred to as "NODA").
[2] Comments of the Specialty Equipment Market Association, Cite SEMA's initial comments (Dec. 28, 2015).
[3] Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2, 80 Fed. Reg. 40,138 (proposed July 13, 2015) (hereinafter referred to as "NPRM").

When the NPRM was originally released in the summer of 2015, industry stakeholders were unaware that changes to prohibit the conversion of mass-produced street vehicles into track-only racing vehicles had been included within the 629-page proposed rule on greenhouse gas standards for medium- and heavy-duty vehicles. SEMA did not discover the changes until late in 2015, after the comment period had closed, and submitted comments to the docket on December 28, 2015.[4] Prior to SEMA's submission, not a single comment out of the thousands that were submitted to the docket made any mention of the racing vehicle issue. SEMA issued a press release to alert the public of the proposed changes on February 9, 2016.[5] Within 24 hours, a petition to the White House requesting the EPA withdraw the proposal had received more than 100,000 signatures.[6] When the NODA was published on March 2, 2016, SEMA was disappointed to find that the EPA had not provided any explanation or analysis on the proposal relative to racing, and instead requested comments on issues raised in SEMA's comments.[7] While the rulemaking has been reopened for public comment, there is no supplemental information to fulfill EPA's obligations to provide meaningful notice that would allow the public, small businesses, the Congress and the Government Accountability Office (GAO) to have a full understanding of the changes, the costs versus the benefits of the proposal, the impact it would have on small entities or the economic impact to the economy at large.

New and Unreasonable Policy

The EPA's proposal to prohibit racing vehicle conversions and the effective ban on use of parts in converted racing vehicles hinges on the EPA's interpretation of the term "motor vehicle" in the Clean Air Act. A motor vehicle is defined in the Clean Air Act as "any self-propelled vehicle designed for transporting persons or property *on a street or highway*" (emphasis added).[8] In 1974, the EPA issued its first regulations interpreting the term "motor vehicle" in Part 85, Subpart R – "Exclusion and Exemption of Motor Vehicles and Motor Vehicle Engines."[9] The definition of "motor vehicle" that the agency ultimately adopted excludes vehicles based on certain characteristics, such as whether the vehicle "lacks features customarily associated with safe and practical street or highway use" or "exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely."[10] These criteria are used to assess whether a vehicle is used on-road, and is thus a "motor vehicle," or has undergone significant modifications such that it will no longer be used on-road, which would naturally exclude vehicles substantially modified for racing or combat operations.[11]

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[4] Public Comment from the Specialty Equipment Market Association, EPA-HQ-OAR-2014-0827-1469-A1 (Dec. 28, 2015).
[5] Press Release, Specialty Equipment Market Association, EPA Seeks to Prohibit Conversion of Vehicles into Racecars (Feb. 8, 2016) (on file with author).
[6] *See EPA Petition: Keep the Momentum Going!*, SEMA (Feb. 11, 2016), https://www.sema.org/sema-enews/2016/06/epa-petition-keep-the-momentum-going.
[7] NODA, *supra* note 1.
[8] 42 U.S.C. § 7550(2) (2016).
[9] Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Exclusion and Exemption of Motor Vehicles and Motor Vehicle Engines, 39 Fed. Reg. 32,609 (Sept. 10, 1974) (to be codified at 40 C.F.R. pt. 85).
[10] 40 C.F.R. § 85.1703(a)(2)-(3) (2016).
[11] *See* Anne Wick & Jacqueline Robles-Werner, SEMA Show 2010 Presentation by EPA at slide 10 (on file with author) ("Racing vehicle: A vehicle which, in general, has been extensively modified for racing, and is incapable of safe and practical street or highway use because it lacks features associated with safe and practical street or highway

The EPA is now proposing a change to the definition of "motor vehicle" that could significantly limit the exclusion of racing vehicles.[12] The change modifies the criteria used to determine whether a vehicle is excluded from the term "motor vehicle" by adding the following language as a new subparagraph (b):

> Note that, in applying the criterion in paragraph (a)(2) of this section, vehicles that are clearly intended for operation on highways are motor vehicles. Absence of a particular safety feature is relevant only when absence of that feature would prevent operation on highways.[13]

This limiting language is so severe that absence of a particular feature must *prevent* the vehicle from being operated on the highways in order to qualify for exclusion.[14] This would present a stark departure from current regulatory guidance on the import of modified racing vehicles, which relies on the definition of "motor vehicle" to determine whether a modified racing vehicle qualifies for an exclusion.[15] The agency has failed to explain how the change would affect the continued importation and conversion of racing vehicles.

In addition to overhauling the definition of motor vehicle that has been in place since 1974, language was inserted into various sections of the proposed rule to expressly prohibit the conversion of a motor vehicle into a nonroad vehicle or vehicle to be used solely for competition.[16] The EPA claims in its explanation of the changes that it is changing the language to reflect longstanding policies, such as a policy that "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use."[17] Essentially, the EPA is saying "once a motor vehicle, always a motor vehicle."[18] However, this contradicts long-standing agency policy, which has for decades recognized that vehicles that are used solely for competition are excluded from the EPA's regulations under the Clean Air Act

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use. Such features include, but are not limited to, a reverse gear (except in the case of motorcycles), a differential, or other safety features required by state and/or Federal law."); *see also* 40 C.F.R. § 85.1511(e) (2016) ("Racing vehicles may be imported by any person provided the vehicles meet one or more of the exclusion criteria specified in § 85.1703."); U.S. ENVTL. PROT. AGENCY, EPA-420-B-11-015, OVERVIEW OF EPA IMPORT REQUIREMENTS FOR VEHICLES AND ENGINES 14 (2011) (explaining the documentation that must be presented to qualify for the racing vehicle exclusion to include: "A list of racing features (features that make the vehicle a racing vehicle)… A list of street features that are lacking (features that have been moved or have never been installed that would permit safe driving on streets or highways)… and Other proof that the vehicle cannot be used on streets and highways, such as a letter from a state's Department of Motor Vehicles (DMV) that explains the vehicle cannot be licensed for use on public roads, and explains why it cannot be licensed.").

[12] *See* NPRM, *supra* note 3, at 40,552.

[13] *Id*.

[14] *Id*.

[15] *See* 40 C.F.R. § 85.1511(e), *supra* note 11; *see also* OVERVIEW OF EPA IMPORT REQUIREMENTS, *supra* note 11.

[16] *See* NPRM, *supra* note 3, at 40,552, 40,565, 40,596, 40,650, 40,720, 40,724-25.

[17] *Id*. at 40,527.

[18] *See* NPRM, *supra* note 3, at 40,527 ("if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat device prohibitions"; "it is not permissible to remove a motor vehicle or motor vehicle engine from its certified configuration regardless of the purpose for doing so.").

because they no longer meet the definition of "motor vehicle."[19] In spite of the EPA's claims in comments to the media, [20] the policy prohibiting street-to-race conversions is indeed a new one. In testifying before a March 15, 2016 congressional hearing on this issue, a Congressional Research Service (CRS) section manager confirmed that "CRS was unable to find a document from EPA from before 2015 that explicitly stated that conversions of motor vehicles for racing were not eligible for an exemption."[21]

Within the NPRM, significant changes have also been made to Part 1068 to make it generally applicable to all light-duty vehicles and highway motorcycles. The current Part 1068 expressly excludes light-duty vehicles and highway motorcycles, so this change is notable. The implications of the change are not adequately addressed in light of its significance. Along with applying Part 1068 to all light-duty vehicles and highway motorcycles, the EPA has amended the investigatory procedures under Part 1068 to remove provisions dealing with EPA investigators securing warrants or court orders before entering a facility. In the current Part 1068, a facility owner may deny entry to investigators who do not present a warrant or court order.[22] The EPA is deleting this provision such that a court order or warrant will no longer be required under the agency's rules.[23] These proposed changes may well serve the EPA's enforcement strategy, but legitimate businesses in good standing in their communities deserve further guidance from the agency before investigators show up unannounced and without documentation.

Proposal Contradicts Other State and Federal Policies

The EPA's proposal would subject the industry to two contradictory stances on competition use only products, since they would become illegal at the federal level but permitted by the State of California.[24] Under section 43001 of the California Health and Safety Code, the vehicular air pollution control provisions contain the following exclusion:

> The provisions of this part shall not apply to:
>
> (a) Racing vehicles.[25]

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[19] *See* SEMA Show 2010 Presentation by EPA, *supra* note 11; *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (explaining that particular scrutiny should be paid to agency actions when "an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.").
[20] *See* Jeremy Korzeniewski, *Update: EPA says your racecar is probably already illegal*, Autoblog, Feb. 9, 2016, 4:01 PM, http://www.autoblog.com/2016/02/09/epa-racecar-emissions-illegal-update-official/; *see also* Ryan Beene, *EPA, SEMA at odds over proposed racecar rule*, AUTOMOTIVE NEWS, Feb. 9, 2016, 5:10 PM), http://www.autonews.com/article/20160209/OEM10/160209811/epa-sema-at-odds-over-proposed-racecar-rule ("An EPA spokeswoman says the new language merely clarifies a prohibition that has long been agency policy.").
[21] *Racing to Regulate: EPA's Latest Overreach on Amateur Drivers Hearing Before the H. Comm. on Sci., Space, and Tech., Subcomm. on Oversight*, 114th Cong. 3 (2016) (testimony of Brent D. Yacobucci, Section Research Manager for the Congressional Research Service), *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY21-WState-BYacobucci-20160315.pdf.
[22] 40 C.F.R. § 1068.20(b) (2016) ("May EPA enter my facilities for inspections? If we come to inspect, we may or may not have a warrant or court order. If we do not have a warrant or court order, you may deny us entry. If we have a warrant or court order, you must allow us to enter the facility and carry out the activities it describes").
[23] *See* NPRM, *supra* note 3, at 40,715 ("227. Section 1068.20 is amended by removing paragraphs (b) and (c) and redesignating paragraphs (d) through (f) as paragraphs (b) through (d), respectively.").
[24] Cal. Health & Safety Code § 43001 (2016).
[25] *Id.*

For purposes of this exclusion, "'racing vehicle' means a competition vehicle not used on public highways."[26] The California Air Resources Board (CARB) routinely reinforces this exclusion in settlement agreements by requiring companies to appropriately label racing products with disclaimers to inform consumers that the part is legal only for racing and can never be used on a street or highway.[27]

Regulations governing the import of racing vehicles also allow for street vehicles to be converted into racing vehicles in other countries and imported into the U.S. under the racing vehicle exclusion.[28] To maintain this policy for imported racing vehicles that have been converted from street vehicles, but remove the ability to conduct the same activity in the U.S., would create an inconsistent and arbitrary policy. It could also lead to the absurd result of U.S. residents having to export a vehicle to be used in racing to another country to have it converted and brought back in as a racing vehicle under the EPA's import guidance.

Incorrect Interpretation of Clean Air Act in Light of Legislative History

The EPA's interpretation of the term "motor vehicle" and the anti-tampering provision is not supported by the language, congressional intent or legislative history of the Clean Air Act.

The seminal case on deference to an agency's interpretations of statutory language is *Chevron v. NRDC*.[29] *Chevron* instructs that when Congress has left a particular issue unresolved, an agency may interpret the statute through rulemaking and courts generally give the agency's interpretations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[30] However, this deference is only available where a court is unable to determine Congress' intent on a particular issue.[31] Where congressional intent contradicts the agency's interpretation, a court will not defer to the agency.[32]

In contrast to the ambiguous term "source" in *Chevron*, Congress has spoken to the meaning of "motor vehicle" as it relates to racing vehicles. Congress first addressed this issue in the Motor Vehicle Air Pollution Control Act of 1965, when it defined "motor vehicle" as "any self-

[26] Cal. Health & Safety Code § 39048 (2016).
[27] *E.g.*, Settlement Agreement and Release, ARB and LeMans Corporation at 6 (Jan. 16, 2016), *available at* http://www.arb.ca.gov/enf/casesett/sa/lemans_corp_sa.pdf ("To the extent LEMANS advertises non-exempt parts in California, it shall use one of the following disclaimers:.. C. 'LEGAL IN CALIFORNIA ONLY FOR RACING VEHICLES WHICH MAY NEVER BE USED, OR REGISTERED OR LICENSED FOR USE, UPON A HIGHWAY,' or D. 'FOR CLOSED COURSE COMPETITION USE ONLY. NOT INTENDED FOR STREET USE,'…").
[28] *See* 40 C.F.R. § 85.1511(e), *supra* note 11; *see also* OVERVIEW OF EPA IMPORT REQUIREMENTS, *supra* note 11.
[29] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[30] *See Id*. at 843-844.
[31] *See Id*. at 862 (Court unable to ascertain what Congress meant by "source" in the Clean Air Act because legislative history was ambiguous on this point); *see also Util. Air Regulatory Grp.*, *supra* note 19 at 2442 ("Under *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority.'") (quoting *Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013)).
[32] *Id*. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

propelled vehicle designed for transporting persons or property on a street or highway."[33] When the Clean Air Act Amendments were enacted in 1970, Congress made clear in conference committee deliberations that the term "motor vehicle" does not extend to vehicles manufactured or modified for racing.[34] In 1990, Congress provided the EPA with the authority to regulate nonroad vehicles/engines. Since the term "nonroad vehicle" could easily have been interpreted to include racing vehicles, Congress added language to unequivocally exclude vehicles used solely for competition from the definition of "nonroad vehicle."[35]

Unnecessary to Accomplish EPA's Stated Goals

Statements from the EPA suggest that the agency has proposed the changes relative to racing vehicles because it needs further enforcement authority to go after emissions defeat devices used on street vehicles.[36] However, the EPA already has authority to enforce against anyone who offers, sells or installs products that knowingly take a regulated motor vehicle out of compliance with emissions standards.[37] In fact, the EPA has successfully pursued these cases in the past. In 2007, the EPA successfully brought an enforcement action against Casper Electronics for selling defeat devices used in "'on road' or 'on highway' vehicles."[38] The EPA explained that the defeat devices were marketed for "off road" use, and explained that "there is no general 'off road' use exemption from the pollution control requirements of the Clean Air Act."[39] SEMA recognizes that there is no exemption for "off road" use because the EPA is authorized by the Clean Air Act amendments of 1990 to regulate emissions from nonroad vehicles.[40] However, the

[33] Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 993 (1965).
[34] *See* House Consideration of the Report of the Conference Committee, Dec. 18, 1970 (reprinted in *A legislative history of the Clean air amendments of 1970, together with a section-by-section index*, U.S. LIBRARY OF CONGRESS, ENVIRONMENTAL POLICY DIVISION, Washington: U.S. Govt. Print. Off. Serial No. 93-18, 1974, p. 117) (Representative Nichols: "I would ask the distinguished chairman if I am correct in stating that the terms "vehicle' and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, modified for or utilized in organized motorized racing events which, of course, are held very infrequently but which utilize all types of vehicles and vehicle engines?"; Representative Staggers: "In response to the gentleman from Alabama, I would say to the gentleman they would not come under the provisions of this act, because the act deals only with automobiles used on our roads in everyday use. The act would not cover the types of racing vehicles to which the gentleman referred, and present law does not cover them either.").
[35] *See* 42 U.S.C. § 7550(10) (2016) ("The term 'nonroad vehicle' means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.").
[36] *See* Ryan Beene, *EPA: Race car proposal targets 'defeat devices,' not racers*, AUTOMOTIVE NEWS, Feb. 15, 2016, 12:01 AM), http://www.autonews.com/article/20160215/OEM11/302159901/epa-target-is-defeat-devices-not-racers (quoting EPA deputy press secretary as stating: "The EPA remains primarily concerned with cases where the tampered vehicle is used on public roads, and more specifically with aftermarket manufacturers who sell devices that defeat emission-control systems on vehicles used on public roads.").
[37] *See* 42 U.S.C. § 7522(a)(3)(B) (2016); *see also* 40 C.F.R. § 86.1854-12(a)(3)(ii) (2016); 40 C.F.R. § 1068.101(b)(2) (2016).
[38] *See Casper's Electronics Inc. Clean Air Act*, EPA, https://www.epa.gov/enforcement/caspers-electronics-inc-clean-air-act (last visited April 1, 2016); *see also United States v. Casper's Electronics, Inc.*, Civil Action No. 1:06-cv-03542 (N.D. Ill. 2007) (Consent Decree), *available at* https://www.epa.gov/sites/production/files/2013-09/documents/casper-cd.pdf.
[39] *See Id.*
[40] *See* Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

agency is not authorized to regulate emissions from "vehicles used solely for competition."[41] The EPA again exercised its enforcement authority to regulate products for on-road use when it brought enforcement actions against Edge Products, LLC in 2013 and H&S Performance, LLC in 2015.[42] It is unclear why the EPA believes it is no longer able to successfully pursue these cases. By making all non-certified emissions-related parts that could be used on mass-produced vehicles illegal, the EPA would indeed make it much easier for the agency to bring cases against sellers of these parts. However, such an overbroad approach is the equivalent of killing a fly with a howitzer: it is not only completely unnecessary, it causes a great deal of collateral damage to sellers of legitimate racing products.

Failure to Engage in Reasoned Decision Making

Despite all of the significant changes contained within the NPRM, the regulated community was not provided adequate notice prior to the close of the initial comment period and the EPA has still not provided a detailed statement of basis and purpose for the changes, all of which are required under the Administrative Procedures Act[43] and the Clean Air Act.[44] The rationale behind the changes relative to racing vehicles was inexplicably absent from the NPRM and no explanation was included in the NODA, which merely requested the public comment on issues raised in SEMA's comments.[45]

While the EPA does not disclose the specific statutory authority for the changes relative to racing vehicles, the Clean Air Act is cited as the overarching statutory authority. Certain rulemakings undertaken by the EPA under the Clean Air Act are subject to the procedures at section 307(d) of the Act.[46] Section 307(d) states that proposed rules "shall be accompanied by a statement of its basis and purpose…"[47] There are minimum requirements for the statement of basis and purpose, such as "the major legal interpretations and policy considerations underlying the proposed rule."[48] Adequate notice to interested parties is required under both the procedural provisions of the Clean Air Act and the Administrative Procedure Act, which governs rulemakings conducted by federal agencies more generally.[49] Agencies "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[50] In reviewing the

[41] *See* 42 U.S.C. § 7550(10)-(11) (2016) (defining "nonroad engine" as any "internal combustion engine… that is not used in a motor vehicle or a vehicle used solely for competition" and "nonroad vehicle" as any "vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition").
[42] *See United States v. Edge Products, L.L.C.*, _____ (N.D. Utah 2013) (Consent Decree), *available at* https://www.epa.gov/sites/production/files/documents/edgeproducts-cd.pdf; *see also* H&S Performance, LLC, Docket No. CAA-HQ-2015-8248 (EAB 2015) (Consent Agreement), *available at* https://www.epa.gov/sites/production/files/2016-01/documents/hscafo.pdf.
[43] *See* 5 U.S.C. § 553 (2016).
[44] *See* 42 U.S.C. § 7607(d) (2016).
[45] *See* NODA, *supra* note 1 ("EPA is soliciting additional comments on issues discussed in a late comment related to light-duty motor vehicles used for racing").
[46] *See* 42 U.S.C. § 7607(d), *supra* note 44.
[47] *Id*.
[48] *Id*.
[49] *See* 5 U.S.C. § 553, *supra* note 43; *see also* Theodore L. Garrett and Sonya D. Winner, *Administrative Procedure and Judicial Review*, 22 ENVTL. L. J. 10313 (1992) ("the procedures established under § 307(d) in most respects parallel the APA").
[50] *See National Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1172 (D.C. Cir. 1996) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989)).

agency's conduct, a court determines whether the agency's process was conducted in an arbitrary and capricious manner, including looking to whether the "agency set forth the reasons for its actions."[51] Constitutional due process also demands "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[52]

In attempting to regulate converted racing vehicles and parts used thereon, the EPA has failed to fulfill the basic procedural requirements found in the Clean Air Act and Administrative Procedure Act. The NPRM contains no basis for the changes or the EPA's purpose in proposing them, only that "clarification" is needed – but clarification never comes.[53] Instead of offering legal interpretations and policy considerations, the EPA flatly states that, unlike the exemptions available for nonroad vehicles used for competition, "[t]here is no comparable allowance for motor vehicles."[54] This bald statement does not equate to a useful explanation of the changes or the extensive impact they have on the regulated industry. In explaining its position to the public, the EPA issued statements muddying the issue further by stating that it is merely explaining the difference between "nonroad vehicles" and "motor vehicles" and indicating that it does not plan on pursuing enforcement against individual racers.[55] The public's confusion is indicative of a failure on the part of the agency to adequately explain the implications of the proposed changes. SEMA would also like to take this opportunity to note that the EPA's frequent reference to nonroad vehicles used solely for competition is an oxymoron and confusing in itself, as the statutory definition of "nonroad vehicle" explicitly excludes any "vehicle used solely for competition."[56] When Congress sought to regulate nonroad vehicles, it added the exclusionary language for racing vehicles because it had not directed these vehicles to be regulated as "motor vehicles" and had no intention of having them regulated under the nonroad provisions either.

Congress has put in place additional requirements to maintain the proper checks and balances on agency action, including the Regulatory-Flexibility Act ("Reg-Flex Act"), the Small Business Regulatory Enforcement Fairness Act and the Congressional Review Act.[57] The Reg-Flex Act

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[51] *See Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949 (D.C. Cir. 2004) ("A rationale buried in a document published in 1989 simply does not 'accompany' a rule proposed and promulgated more than a decade later. Nor can such a reference satisfy the fundamental requirement of nonarbitrary administrative decisionmaking: that an agency set forth the reasons for its actions.").

[52] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[53] *See* NPRM, *supra* note 3, at 40,526 ("EPA is proposing to add a clarification that the exemption from the tampering prohibition for competition purposes does not apply to heavy-duty highway vehicles. This aligns with the statutory provisions for the racing exemption.").

[54] *See* NPRM, *supra* note 3, at 40,527.

[55] *See* Bob Sorokanich, *No, the EPA Didn't Just Outlaw Your Race Car*, ROAD AND TRACK, Feb. 9, 2016, http://www.roadandtrack.com/motorsports/news/a28135/heres-what-the-epas-track-car-proposal-actually-means/ (admitting that it "isn't clear is how the EPA's newly clarified language will affect hobby racers going forward" and quoting EPA deputy press secretary as stating: "the proposed language in the Heavy-Duty Greenhouse Gas rulemaking simply clarifies the distinction between motor vehicles and nonroad vehicles such as dirt bikes and snowmobiles"); *see also* Korzeniewski, *supra* note 20 ("In an attempt to clarify its position on the modification of vehicles to be used solely for competition purposes, the Environmental Protection Agency has issued a statement to Autoblog. While we appreciate the effort to clear the air (sorry... pun intended), in reality, we're left with just as many questions as we started with.").

[56] 42 U.S.C. § 7550 (11) (2016).

[57] *See* Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612 (2016) (hereinafter the "Reg-Flex Act"); Small Business Regulatory Enforcement

instructs federal agencies that they must "consider the impact of their regulatory proposals on small entities, [] analyze alternatives that minimize impacts on small entities, and [] make the agencies' analyses available for public comment."[58] The Congressional Review Act requires an agency to submit reports explaining how it has complied with the Reg-Flex Act and any applicable Executive Orders, as well as any cost-benefit analyses, to Congress and the GAO.[59] Rules that are considered "major" are subject to greater scrutiny, with a "major rule" defined as a rule that would "likely have an annual effect on the economy of $100 million or more… increase costs or prices for consumers, industries, or state and local governments… or have significant adverse effects on the economy."[60] Given the overwhelming impact that this proposal would have on the specialty equipment aftermarket, which generates approximately $36 billion a year and employs Americans across all 50 states, this rule certainly qualifies for enhanced scrutiny under the Congressional Review Act.[61]

The EPA has failed to conduct an analysis of how small businesses would be impacted or any cost-benefit analysis on the race vehicle provisions as required under the Reg-Flex Act and the Congressional Review Act. For example, the EPA's rule would prohibit the sale of racing products for vehicles that started life as street vehicles but which have been converted into racing vehicles. If this change remains in the final rule, thousands of businesses selling products for use on converted racing vehicles would be considered to be operating outside the law overnight.[62] Many of these businesses are small entities, and the EPA has made no attempt to explain how the benefits of the proposed changes outweigh the substantial costs and disruption to the economy. Racers that use converted street vehicles for their sport and the shops that undertake the modifications are also put out of business. Motorsports as an industry generates billions of dollars of economic activity across the nation. Many states see motorsports-related industry as a driving force of their economies, such as Indiana, which has an estimated 23,000 Indiana residents employed by motorsports companies with average salaries of $63,000.[63] In Ohio, Summit Motorsports Park sponsored by aftermarket parts supplier Summit Racing has a $99.5 million economic impact on the surrounding community.[64] That translates into jobs lost as well as denying Americans the ability to enjoy the sport of racing, and an indirect hit to all the local

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Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. and 15 U.S.C.); Congressional Review Act, 5 U.S.C. §§ 801-808 (2016).

[58] RONALD E. MEISBURG ET AL., THE NEW VOCABULARY OF NLRB RULEMAKING, AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW 5 (2012), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/2012/02/committee_on_practice_procedure_under_the_nlra_midwinter_meeting/mw2012pp_meisburg.authcheckdam.pdf.

[59] *See* MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 15 (2013).

[60] Meisburg, *supra* note 58, at 7-8.

[61] 2015 SEMA MARKET REPORT, SEMA 2 (2015).

[62] Racing products alone account for an estimated $1.4 billion in retail sales. 2015 SEMA Market Report.

[63] *See* Rich Van Wyk, *Study Shows Motorsports Impact on Indiana Economy*, WTHR (Dec. 6, 2012), available at http://www.wthr.com/story/20281896/study-shows-motorsports-impact-on-indiana-economy; *see also* Drew Klacik, *Estimating the Annual Economic Contributions of Indianapolis Motor Speedway*, INDIANA UNIVERSITY PUBLIC POLICY INSTITUTE 3 (2013), *available at* http://www.imsproject100.com/wp-content/uploads/2013/07/Report_Update.pdf (explaining that the Indianapolis Motor Speedway alone contributes over $510 million of economic activity annually in Indiana).

[64] *Economic impact study released: Race track generates $99.5 million a year for other local businesses*, Summit News (Feb. 28, 2013), *available at* http://www.summitmotorsportspark.com/news/81-news/217-economic-impact-study-released.

businesses catering to the participants and spectators. The EPA has not made any attempt to explain the potential impact on motorsports, motorsport facilities, the industries that have developed around motorsports or the Americans whose livelihood depends on motorsports. Foreclosing this degree of economic activity without explaining the logic and rationale for the changes falls short of the procedural statutes and judicial precedent.[65]

Reliance Interests

Many individuals and businesses have also relied on previous EPA guidance issued in 2002 that provided for modifications for the purpose of converting certified vehicles into racing vehicles.[66] The EPA's 2002 guidance document presents the question: "May I modify a vehicle for competition?"[67] The EPA answers the question by explaining that modifications to vehicles not subject to EPA standards are fine and followed with: "You may also modify EPA-certified vehicles if you will use them only for competition."[68] While the EPA may assert it meant this guidance solely for certified dirt bikes and snowmobiles, the language is certainly susceptible to the interpretation on which many in the industry have come to rely.

For the forgoing reasons, SEMA respectfully requests the EPA withdraw the proposed regulations prohibiting the conversion of motor vehicles into vehicles to be used solely for competition. SEMA also requests the EPA more adequately explain the other proposed regulatory changes that will impact small businesses and give further guidance to businesses on compliance with existing policies

Thank you for the opportunity to submit comments.

Sincerely,

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[65] *See Michigan v. EPA*, 135 S.Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998)) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.").
[66] The EPA now contends this guidance is limited to "nonroad vehicles," but has not taken steps over the years to correct the public's misunderstanding.
[67] U.S. ENVTL. PROT. AGENCY, EPA420-F-02-045, FREQUENTLY ASKED QUESTIONS: EMISSION EXEMPTION FOR RACING MOTORCYCLES AND OTHER COMPETITION VEHICLES 3-4 (2002).
[68] *Id.*

Exhibit 4

April 1, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket: EPA-HQ-OAR-2014-0827; NHTSA-2014-0132 Comments: Proposed Rule: Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles—Phase 2: Vehicles Used Solely in Competition (RIN 2060-AS16)

Dear Administrator McCarthy,

As the chief legal officers of our states, we write to express our concerns about a conflict with the federal Clean Air Act found within the provisions of the 629-page rule referenced above, which states: "Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines."

As proposed, this rule attempts to expand the USEPA's statutory jurisdiction under the Clean Air Act to cover vehicles modified solely for racing or competition. This approach is contrary to the law and would reverse decades of practice by the USEPA. This unnecessary regulation conflicts with the expressed intent of Congress, and we urge you to remedy this problem in the final rule by deleting the provision quoted above.

Throughout the United States, modifying and racing cars is one of our nation's pastimes. It is also a large part of our country's economy. In 2014, consumers spent $36 billion on automotive specialty equipment parts and accessories. All over the U.S., manufacturers, retailers, and technicians represent tens of thousands of jobs and billions of dollars. This proposed rule would purport to make many of the products made, sold, and installed by those businesses illegal, dealing a heavy blow to our economy.

While the federal Clean Air Act prohibits certain modifications to everyday motor vehicles used on public roads, statutory language and the USEPA's historic practice have made it clear that vehicles built or modified for racing purposes, and not used on public streets, are not regulated under the Clean Air Act.

For example, 42 U.S.C. § 7550(2) limits the definition of a covered "motor vehicle" to a vehicle designed for transport "on a street or highway" as opposed to operation on a racetrack. Correspondingly, 42 U.S.C. § 7550(10) limits the term "nonroad engine" to an engine "that is not used in a motor vehicle or a vehicle used solely for competition," while 42 U.S.C. § 7550(11) makes clear that the term "nonroad vehicle" also does not apply to "a motor vehicle or a vehicle used solely for competition."

Congress did not make these choices at random. It intended to differentiate between a vehicle covered by this sort of rule and "a vehicle used solely for competition." In fact, the House Committee on Foreign and Interstate Commerce identified and discussed this issue before passing the Clean Air Act in 1970:

> MR. NICHOLS. I would like to ask a question of the chairman, if I may.
>
> I am sure the distinguished chairman would recognize and agree with me, I hope, that many automobile improvements in the efficiency and safety of motor vehicles have resulted from experience gained in operating motor vehicles under demanding circumstances such as those circumstances encountered in motor racing. I refer to the tracks as Talladega in my own State, to Daytona and Indianapolis, competition. I would ask the distinguished chairman if I am correct in stating that the terms "vehicle" and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, modified for or utilized in organized motorized racing events which, of course, are held very infrequently but which utilize all types of vehicles and vehicle engines?
>
> MR. STAGGERS. In response to the gentleman from Alabama, I would say to the gentleman they would not come under the provisions of this act, because the act deals only with automobiles used on our roads in everyday use. The act would not cover the types of racing vehicles to which the gentleman referred, and present law does not cover them either[1].

Statutory language and legislative history clearly show that vehicles used solely for competition, including a race vehicle that has been converted from a certified highway vehicle, are not regulated under the Clean Air Act. While the USEPA is authorized to create regulations that interpret laws passed by Congress, the agency cannot rewrite statutory definitions and—as the United States Supreme Court has made clear—"must always give effect to the unambiguously expressed intent of Congress."[2]

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[1] House Consideration of the Report of the Conference Committee, Dec. 18, 1970 (reprinted in *A legislative history of the Clean air amendments of 1970, together with a section-by-section index*, U.S. LIBRARY OF CONGRESS, ENVIRONMENTAL POLICY DIVISION, Washington: U.S. Govt. Print. Off. Serial No. 93-18, 1974, p. 117).

[2] *Utility Air Regulatory Group v. Environmental Protection Agency* 573 U. S. ____ (2014), quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665.

On behalf of the undersigned states, we strongly urge the USEPA to remove the aforementioned language referencing vehicles "used solely for competition" from the final rule. Not only is this language inconsistent with the federal Clean Air Act, but any purported benefit from this change would pale in comparison to the economic damage caused by this regulation.

Sincerely,

Mike DeWine
Attorney General
State of Ohio

Patrick Morrisey
Attorney General
State of West Virginia

Leslie Rutledge
Attorney General
State of Arkansas

Luther Strange
Attorney General
State of Alabama

Jeff Landry
Attorney General
State of Louisiana

Bill Schuette
Attorney General
State of Michigan

Sam Olens
Attorney General
State of Georgia