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]

---

[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

---

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]

---

[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

---

[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

---

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,

Christopher J. Kersting
President & CEO
Specialty Equipment Market Association
1575 S. Valley Vista Drive
Diamond Bar, CA 91765
909/610-2030
chrisk@sema.org

[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.*