Testimony of

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before the

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Introduction

Chairman Loudermilk, Ranking Member Beyer, and members of the Subcommittee, I appreciate the opportunity to speak with you today about a proposed regulation by the U.S. Environmental Protection Agency (EPA) to prohibit the conversion of motor vehicles into vehicles used solely for competition or, as they are more commonly called, racecars.

My name is Chris Kersting and I am the President and CEO of the Specialty Equipment Market Association (SEMA). SEMA is a national trade association that represents more than 6,500 mostly small businesses that manufacture, market and sell specialty automotive aftermarket products, including appearance, performance, comfort, convenience and technology products for vehicles. Our members sell a wide variety of products, everything from truck caps for pickup trucks to wheels and tires to products that enhance the performance of motor vehicles used in motorsports competition. SEMA also hosts the SEMA Show, the largest annual gathering of small businesses in the U.S.

In July of 2015, the EPA issued its proposed regulations to make illegal the act of converting a motor vehicle – defined in the Clean Air Act as a car, truck or motorcycle designed for use on the public streets and highways – into a racecar. This prohibition would include even those vehicles used solely at the track and never again used on public roads. As will be described, this regulation would contradict 46 years of EPA policy and practice under the Clean Air Act as well as the intent of Congress when the act was made law in 1970. SEMA contends that the EPA is seeking to exceed the bounds of statutory authority to regulate road vehicles, stretching its authority to include vehicles converted and used exclusively as racecars.

SEMA applauds the recent introduction of bipartisan legislation by Representatives McHenry, Cuellar, Hudson, Posey and Zeldin to eliminate any question as to the intention of Congress under the Clean Air Act. H.R. 4715, the "Recognizing the Protection of Motorsports Act of 2016" (the RPM Act) makes clear that converting street vehicles to racecars used exclusively in competition does not violate the law.

Collaboration with Federal/State Regulatory Agencies

SEMA was founded in 1963 by companies that produced performance equipment for early speed competition, but quickly expanded in the following years to represent the entire specialty equipment market. A key priority for SEMA has been to collaborate with lawmakers and regulators both at the state and federal levels to ensure that laws and regulations for these products are effective, necessary and least burdensome. SEMA seeks reasonable and responsible application of the law so that companies can thrive and consumers can benefit from the resulting product benefits and technological advances.

It is useful to mention some of the many safety and environmental advances that originated in the specialty aftermarket. They include cruise control, retractable seat belts, recessed steering wheels, reinforced roofs, roll bars, door locks, air bags, intermittent windshield wipers, door-mounted mirrors, back-up cameras, hands-free technology, catalytic converters and gasoline

direct injection technology. Many of these products were first developed for racecars and eventually became standard equipment on motor vehicles.

Since its founding in the 1960s, SEMA has worked closely with officials from the EPA and California Air Resources Board (CARB) as regulations were developed and implemented for street vehicles and emissions-related aftermarket parts. Under both EPA and CARB regulations, it is illegal to knowingly manufacture, sell, or install a part or component that would negatively affect emissions performance of a regulated vehicle.

In 1974, the EPA issued Memorandum 1A to provide guidance on how the agency would enforce the anti-tampering provision of the Clean Air Act "without imposing unnecessary restraints on commerce in the automotive aftermarket."[1] In short, the EPA settled on a policy whereby aftermarket parts can be used so long as there is a "reasonable basis for knowing that such use will not adversely affect emissions performance."

Working with the specialty parts industry in the early years of vehicle regulations, CARB developed an emissions certification program, the Executive Order or "E.O." program that allows specialty parts makers to certify that a particular part does not negatively impact emissions. The EPA accepts CARB E.O. certification as sufficient for demonstrating a "reasonable basis" that emissions are not negatively affected.

SEMA's services to its members include instructing the industry on compliance with relevant laws and regulations. In furtherance of that mission, SEMA recently built and operates a state-of-the-art emissions testing facility where companies can demonstrate that their on-road products comply with emission requirements under CARB's E.O. testing protocol.

SEMA also facilitates communications between regulators and industry members. For example, the annual SEMA Show held in Las Vegas is a gathering point for industry leaders. Besides displaying their newest products, company representatives are available to attend seminars and meetings with lawmakers and regulators. SEMA has regularly arranged for EPA and CARB officials to attend the SEMA Show, walk the aisles, and participate in panel discussions and seminars on emissions regulations.

Since 2008, SEMA has been working directly with EPA officials to target equipment that would be illegal if used on road-going vehicles. The goal has been to identify better means by which the agency could restrict racing products to their intended purpose and keep them off public roadways. Since its founding, SEMA has sought to work cooperatively with regulators and is disappointed that the current proposal was issued by the agency amid these discussions without notice to the regulated community.

[1] OFFICE OF ENFORCEMENT & GEN. COUNSEL, EPA, MOBILE SOURCE ENFORCEMENT MEMORANDUM NO. 1A, INTERIM TAMPERING ENFORCEMENT POLICY (1974).

New Application of the Clean Air Act to Racecars

The EPA is not authorized to regulate racecars, whether they be purpose-built or production cars modified for racing. Congress first addressed this issue in the Motor Vehicle Air Pollution Control Act of 1965, when it defined "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." When the Clean Air Act Amendments were enacted in 1970, Congress clarified in conference committee deliberations that the term "motor vehicle" does not extend to vehicles manufactured or modified for racing.[2] 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 racecars, Congress included language to unequivocally exclude vehicles used solely for competition from the definition of "nonroad vehicle."[3]

Despite the clarity of congressional intent, last July the EPA issued a proposed regulation that would make it illegal to convert a motor vehicle into a high performance racecar used exclusively at the track. To do so would be a violation of the tampering provisions of the law, subject to civil fines and related penalties. The EPA proposed regulation reads in part as follows:

> EPA Proposal: 40 CFR **§** 86.1854-12(b) covering "Prohibited Acts" would be amended to add the following provision:
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> > 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; anyone modifying a certified motor vehicle or motor vehicle engine for any reason is subject to the tampering and defeat device prohibitions of paragraph (a)(3) of this section and 42 U.S.C. 7522(a)(3).

The EPA's proposed regulation would apply to any vehicle, including sports cars, sedans and hatch-backs, which started life as a street car or motorcycle originally certified to federal emissions standards. The rule would prohibit modifications affecting any emissions-related component, which is broadly construed to include changes to engines, engine control modules, intakes, exhaust systems and more, even if the vehicle is converted into a dedicated track car and never again used on the streets. Because the federal emission standards went into effect

[2] *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.").

[3] *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.").

beginning in 1968, the EPA's proposal would cover all vehicles dating back to that year. In fact, older vehicles are frequently raced with an original body and chassis, but with completely new performance engines and parts under the hood. These upgrades improve the performance, and in most cases, the emissions of these older racecars, but would be illegal under the EPA's proposal.

Statements from the EPA suggest that the agency has proposed this change because it needs further enforcement authority to go after emissions defeat devices on street vehicles. 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. The agency is now claiming that the Clean Air Act authorizes it to regulate equipment taken off the public roads and used solely as racecars. This policy conflicts with the legislative history and the statutory definition of "motor vehicle."

The Clean Air Act was enacted 46 years ago and SEMA is unaware of a single instance in which the EPA previously took the position that the law applies to motor vehicles converted for race-use-only. Industry, the public and lawmakers have had a clear understanding that these vehicles are excluded from the Clean Air Act. The EPA's enforcement division is now attempting to rewrite the law.

The proposed policy even conflicts with the EPA's "Green Racing Program" which seeks to collaborate with industry and race sanctioning organizations to promote innovative product development through racing. Phrased differently, the EPA's Green Racing Program serves as a testing platform for new safety and performance technologies that will eventually benefit the public when they are incorporated into mass-produced vehicles. Yet, the EPA's enforcement division is proposing to stifle the program and the new products that could emerge.

Given that SEMA views the proposal as a dramatic shift in EPA policy that has never been previously applied, it is important to note how the EPA made the public aware of this interpretation. The proposed regulation was tucked deep within an unrelated greenhouse gas rulemaking for trucks and buses issued in July, 2015. In the table of contents for the 629-page rule, there was no reference to "Competition Use Engines/Vehicles" or any similar heading. The topic was included with other seemingly minor issues under the heading "XIV. Other Proposed Regulatory Provisions." Since the subject rulemaking applies to medium- and heavy-duty engines for model year 2018 and beyond, these markers were wholly insufficient in alerting the public to a regulation applicable to light-duty vehicles and that would eliminate a large portion of the U.S. motorsports activity and heritage dating back to 1968.

Not surprisingly, there was not a single public comment submitted on the racecar provision until SEMA discovered it and then submitted comments on Dec. 28, 2015, after the formal comment period had ended. However, when SEMA issued a press release and the public became aware of the EPA proposal on Feb. 8th, over 100,000 individuals signed a White House petition in less than 24 hours, asking the administration to direct the EPA to withdraw its proposal.

The EPA failed to comply with Administrative Procedure Act and Clean Air Act requirements that are intended to provide adequate opportunity for the public to comment on proposed rules. Constitutional due process also demands agencies provide adequate notice to regulated

individuals. Further, the EPA failed to conduct an economic analysis, regulatory-flexibility analysis or small business analysis on the racecar provisions, as required under law.

On March 2, 2016, the EPA issued a "Notice of Data Availability" that recognizes SEMA's concerns over the proposed racecar regulation. The EPA did not defend its position. Rather, it simply asked the public to comment on SEMA's December 2015 comments. While the rulemaking has been reopened for public comment, there is no supplemental information to fulfill EPA obligations to conduct an economic analysis, regulatory-flexibility analysis or small business analysis. Instead of ending the debate and withdrawing its flawed interpretation, the EPA is allowing it to move forward for an indefinite period of time. Hence, it remains the EPA's official policy that racecars dating back to 1968 are subject to enforcement.

Impact of the EPA Proposal on the Industry

The EPA's proposed regulation would have a devastating impact on motorsports since many types of racing rely on production vehicles that have been modified for use strictly at the track. It would also devastate the industry that supplies the products used in motorsports. The specialty equipment automotive aftermarket employs about one million Americans across all 50 states. Current retail sales of racing products make up a $1.4 billion annual market. Beyond specialty racing equipment, the regulation would have a significant negative impact on racing-related divisions among the vehicle manufacturers, involving advanced product engineering and development, development of safety systems and sales and marketing. The number of jobs lost in the automotive industry as a result of the regulation will be considerable.

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 an average salaries of $63,000.[4] Indianapolis Motor Speedway alone contributes over $510 million of economic activity annually in Indiana.[5] In Ohio, Summit Motorsports Park sponsored by aftermarket parts supplier Summit Racing has a $99.5 million economic impact on the surrounding community.[6] That translates into jobs lost as well as denying Americans the ability to enjoy the sport of racing, either as drivers, teams or spectators. Legitimate racing products may no longer be developed and sold to the racers, and businesses may no longer be willing to modify vehicles.

Motor vehicles are also regulated by the National Highway Traffic Safety Administration (NHTSA). Similar to the Clean Air Act's tampering prohibition, under the Motor Vehicle Safety Act it is illegal for a manufacturer, distributor, dealer, or motor vehicle repair business to knowingly make inoperative any part of a device or element of design installed on or in a motor

[4] 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.
[5] Drew Klacik, *Estimating the Annual Economic Contributions of Indianapolis Motor Speedway*, INDIANA UNIVERSITY PUBLIC POLICY INSTITUTE at 3 (2013), *available at* http://www.imsproject100.com/wp-content/uploads/2013/07/Report_Update.pdf.
[6] *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.

vehicle or motor vehicle equipment in compliance with a motor vehicle safety standard. The Motor Vehicle Safety Act's "make inoperative" prohibition does not apply to a certified motor vehicle that has been modified into a vehicle used solely for competition, placing it in conflict with the EPA's proposed interpretation of the Clean Air Act's tampering prohibition. Beyond statutory differences, the issue has significant economic and safety implications. Competition use vehicles are modified in shops across the nation and the vehicles are outfitted with safety equipment such as five-point seat belts, roll bars, cages and safety netting, suspension, wheels and tires. These ancillary sales and services would cease as a result of the EPA's proposed policy because performance modifications to make the vehicles suitable for racing would be prohibited.

The EPA's proposal would also 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.[7] In settlement agreements with non-complying companies, CARB routinely requires companies to appropriately label racing-use-only products with disclaimers to inform consumers that the part may only be used for competition.[8]

Conclusion

The public and regulated industry need certainty regarding how the Clean Air Act is applied. Until July 2015, there never appeared to be any confusion regarding congressional directives and intent with respect to the racecar conversion issue. SEMA supports passage of H.R. 4715, the "Recognizing the Protection of Motorsports Act of 2016", that would confirm those directives and intent.

Thank you again for this opportunity to speak on behalf of SEMA.

[7] *See* Cal. Health & Safety Code § 43001 (2016) ("The provisions of this part [Part 5 – Vehicular Air Pollution Control] shall not apply to: (a) Racing vehicles."); *see also* Cal. Health & Safety Code § 39048 (2016) ("'Racing vehicle' means a competition vehicle not used on public highways.").

[8] *See* 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,'…").