**MEMORANDUM**

**TO:** **Jay Lamm, 24 Hours of LeMons**

**FROM:** **Pat Mulry**

**DATE:** **February 9, 2016**

**RE:** **EPA Rule Change Regarding Ban on Modifying Emissions of Certified Vehicles & Potential Effect on Motorsport**

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Pursuant to our telephone conversation this morning regarding the so-called "LeMons Law", I have reviewed the existing applicable U.S. Code sections, the Code of Federal Regulations ("CFR") and the rules changes proposed by the EPA, as set forth in volume 80 of the Federal Register. These are the rules changes referred to in the SEMA press release of February 8, 2016. This memo will review the applicable law, explain the proposed changes in the law, and discuss the likely impact these changes would have on motorsport in the United States.

## 1. Background

SEMA sent out a press release on February 8, 2016 stating that the EPA has proposed a regulation to prohibit conversion of vehicles originally designed for on-road use into race cars. It stated that the regulation would impact "all vehicle types," including the light-duty passenger cars and light-duty trucks typically modified for racing. The press release contained no citations to the actual rules that the EPA is proposing to change, but noted that Congress has never authorized nor extended the Clean Air Act to regulate competition motor vehicles.

## 2. Existing Law

In order to understand the current issue, we must begin with understanding the current state of the law regarding emissions as it relates to competition motor vehicles.[1]

As noted by SEMA in its official comment on the proposed rules, the Motor Vehicle Air Pollution Control Act of 1965 (the "1965 Act") was the first federal law to regulate motor vehicle emissions. The 1965 Act first defined the term "motor vehicle" as "any self-propelled

[1] For the purposes of this Memorandum, the discussion of "competition motor vehicles" is limited to those vehicles that began their lives as passenger cars and light-duty trucks – street cars – which were certified for use on the streets and highways of the U.S. This Memorandum is not concerned with purpose-built race cars, such as tube-frame oval track cars, IndyCars, etc., as those are exempted from emissions regulations.

vehicle designed for transporting persons or property on a street or highway."[2] 50 years later, that remains the definition of "motor vehicle" contained in the United States Code.[3]

In 1970, Congress passed the Clean Air Act Amendments (the "CAA"). The CAA did not disturb the definition of "motor vehicle" as set forth in the 1965 Act, but it did mandate new emissions standards and expanded the anti-tampering provision to require that no person render emissions controls inoperative after first sale. While on first blush that would seem to require emissions controls on all racing vehicles that are converted from their original street use, the committee notes make it clear that the intent of the legislation was never to regulate racing vehicles:

> MR. 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 motor racing events which, of course, are held very infrequently but which utilize all types of vehicles and vehicle engines?"
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> 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."[4]

The CAA has been amended numerous times since 1970, including in 1977 and in 1990. Neither amendment sought to include racing vehicles in the definition of "motor vehicle," which has remained the legal term for a motorized vehicle intended to carry people or objects on public roads.

Motorized vehicles which are *not* intended to carry people or objects on public roads—bulldozers, farm tractors, snowmobiles, airplanes, etc. – are generally considered "nonroad vehicles." In 1990, Congress amended the definition of "nonroad vehicle" to permit the EPA to regulate some nonroad vehicles such as locomotives, snowmobiles, and off-highway motorcycles. However, Congress unequivocally excluded competition vehicles from the definition of "nonroad vehicle" ("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").

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[2] Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) at §208 (2).
[3] 42 U.S.C. §7550 (2) (2015).
[4] 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).

Similarly, a "nonroad engine" means an internal combustion engine that is not used in a motor vehicle or a vehicle used solely for competition.[6]

As a result, based on the statutory text and the legislative history, *competition vehicle emissions have never fallen under the ambit of the EPA and the CAA, as amended*. As discussed in the section below, the EPA shares this understanding and is seeking to end the emissions control exemption for competition motor vehicles such as the light-duty motor vehicles commonly used in motorsport.

### 3. EPA's Proposed Changes: Bring Competition Motor Vehicle Emissions Within the CAA and thus EPA Control

On Monday, July 13, 2015, the EPA published its proposed rules[7] entitled "Greenhouse Gas Emissions and Fuel efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2." The stated purpose of the proposed rules is "to establish a comprehensive national program to reduce greenhouse gas emissions and fuel consumption for new on-road heavy-duty vehicles, particularly for tractor-trailers, heavy-duty pickups and vans, and vocational vehicles (such as farm tractors)."[8] The EPA intends to publish the final rule in July 2016.

The EPA[9] recognizes that competition vehicle emissions do not fall squarely within the purview of the CAA (as amended), and seeks to eliminate that exclusion beginning in 2018. As the EPA states in the explanatory notes for "Miscellaneous EPA Amendments,"

> EPA is proposing in 40 CFR 1037.601(a)(3) to clarify that the Clean Air Act does not allow any person to disable, remove, or render inoperative (i.e., tamper with) emission controls on a certified motor vehicle for purposes of competition.[10] An existing provision in 40 CFR 1068.235 provides an exemption for nonroad engines converted for competition use. This provision reflects the explicit exclusion of engines used solely for competition from the CAA definition of "nonroad engine." The proposed amendment clarifies that this part 1068 exemption does not apply for motor vehicles.

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[6] 42 U.S.C. §7550 (11) (2015) ("nonroad vehicle"); 42 U.S.C. §7550 (10) (2015) ("nonroad engine").

[7] Rules and regulations derive their legal authority from the original law passed by Congress. The CAA, as amended, is a law passed by Congress in the way that we all remember from Schoolhouse Rock and/or high school civics class. Rules and regulations promulgated by Federal agencies are published in the Code of Federal Regulations ("CFR") for the purpose of administering the laws enacted by Congress. Once the final rule is written by the Federal agency and published in the CFR, it has the full weight and effect of a law of the United States. A good tutorial on this process can be found at https://www.archives.gov/federal-register/tutorial/tutorial_070.pdf

[8] 80 Fed. Reg. 40138 (2015).

[9] More precisely, the proposed changes discussed herein to the CFR are jointly proposed by the EPA and the NHTSA, as both have jurisdiction over rules regarding emissions and fuel consumption. Because the proposed rule refers to both entities simply as the EPA, this memorandum will do so also.

[10] The EPA's use here of "clarify" seems Orwellian at best.

Given the reference to various sections of the CFR, the provision above may benefit from further explanation. The reference in the first sentence to 40 C.F.R. § 1037.601(a)(3) would require that those who modify heavy-duty vehicles for competition use cannot tamper with emissions controls. [11,12] While troublesome for some autosport enthusiasts of heavy-duty vehicles and those who like to "roll coal" on their competition brodozers, it is likely that alone, this would not be problematic for most motorsport activities.

However, the second sentence reveals the ultimate intent of the EPA to bring competition motor vehicles – in particular, light-duty vehicles and light-duty trucks – within its regulatory authority. As the EPA notes, 40 C.F.R. § 1068.235 provides an express exemption from the CAA for nonroad engines in competition use[13], but not for street vehicles modified for use solely in competition. The EPA repeatedly proposes to amend various sections of the CFR to clarify that the 1068.235 exception for nonroad engines in competition use does not apply to competition motor vehicles. Competition motor vehicles, which were necessarily once motor vehicles with certified emissions control systems, can never acquire nonroad status in the EPA's scheme.

The EPA's approach reaches its zenith in two different sections of the proposed rule. 40 CFR 86.1854-12(b)(5)[14] states that

> Certified motor vehicles[15] 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 USC 7522(a)(3).

The proposed rule is more draconian in 40 CFR 1068.101[16], "What general actions does this regulation prohibit?" The answer is "don't modify your engine, ever." It bans:

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[11] 40 C.F.R. § 1037 is the section that contains the administrative rules for "Control of Emissions from Heavy-Duty Motor Vehicles."

[12] Heavy-duty vehicles are generally defined as exceeding 8,500 pounds GVWR or having a curb weight in excess of 6,000 pounds or a basic vehicle frontal area in excess of 45 square feet.

[13] Racing snowmobiles, racing dirt bikes, racing ATV's, etc.

[14] 40 C.F.R. § 86 is the section that contains the administrative rules for "Control of Emissions from New and In-Use Highway Vehicles and Engines."

[15] A certified motor vehicle or engine/emissions system is a vehicle or system that has passed the EPA testing and has received a certificate of conformity from the EPA Administrator – essentially every production car sold in the U.S.

[16] 40 C.F.R. § 1068 is the section that contains the administrative rules for "General Compliance Provisions for Highway, Stationary, and Nonroad Programs" The proposed rule also amends 40 C.F.R. § 1068.1 so that Part 1068 applies to light-duty vehicles and light-duty trucks ("vehicles we regulate under 40 CFR Part 86, subpart S…."), 80 Fed. Reg. 40714 (2015) (to be codified as 40 C.F.R. § 1068.1(a)(1)).

- Knowingly removing or rendering inoperative *any device or element of design* installed on or in engines/equipment in compliance with the regulations after such sale and delivery to the ultimate purchaser. Violation of same by a manufacturer or dealer comes with a civil penalty of $37,500 for each engine or piece of equipment in violation; violation by anyone else may be assessed a civil penalty of up to $3,750 per engine or piece of equipment;[17]
- Knowingly manufacturing, selling, offering to sell, or installing any component that bypasses, impairs, defeats, or disables the control of emissions of any regulated pollutant. Violation of same may draw a civil penalty of up to $3,750 for each component in violation;[18]
- Certified motor vehicles and motor vehicle engines 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 1068.101(b): a civil penalty of $37,500 may be subjected for each engine or piece of equipment in violation by a manufacturer or dealer; violation by anyone else may be assessed a civil penalty of up to $3,750 per engine or piece of equipment;[19]
- Importation of uncertified engines or equipment is prohibited if it is defined to be "new." The definition of "new" is broad for imported engines and equipment; uncertified equipment, including used engines and equipment, will generally be considered to be "new;" violators are subject to the manufacturer/dealer penalty of $37,500 for each piece of equipment in violation.[20]

Perhaps most troubling is the provision in 40 CFR 1068.101(a) that states that it is prohibited to sell, offer for sale, import, or introduce or deliver into commerce in the US any new engine or equipment after emissions standards take effect for the engine or equipment unless it is covered by a valid certificate of conformity for the model year and has the required label or tag.[21] Although another note indicates that the heavy-duty truck and engine categories would not begin until 2021,[22] this provision could be interpreted to indicate that the proposed rule be applied to any engine/equipment that was certified prior to the effective date of the rule – thus prohibiting modification to any motor vehicle engine in competition that was ever certified for use by the EPA – essentially every engine system sold in the US since the early 70's.

[17] 80 Fed. Reg. 40720 (2015) (to be codified as 40 CFR 1068.101(b)(1)).
[18] 80 Fed. Reg. 40720 (2015) (to be codified as 40 CFR 1068.101(b)(2)).
[19] 80 Fed. Reg. 40720 (2015) (to be codified as 40 CFR 1068.101 (b)(4)(ii)).
[20] 80 Fed. Reg. 40720 (2015) (to be codified as 40 CFR 1068.101 (b)(5)).
[21] 80 Fed. Reg. 40719-40720 (2015) (to be codified as 40 CFR 1068.101 (a)(1)).
[22] 80 Fed. Reg. 40138 (2015).

**4. What Impact Would this Have on Motorsport in the US?**

The proposed rules essentially ban the modification of any component of the engine, fuel, and emissions systems. By placing draconian fines on anyone who could be considered a manufacturer or dealer of aftermarket parts that would be used on production-based racing vehicles, these proposed rules will have an incalculably chilling effect on the aftermarket parts market. It is difficult to see how any aftermarket part manufacturer could continue to make and market performance parts without running afoul of this proposed rule unless the part was essentially identical to the factory-certified part.

The result of the die-off of aftermarket parts manufacturers will be dramatic. The proposed rules would also ban users from doing many of the things that draw participants to motorsport – including and in particular to mechanically creative series such as 24 Hours of LeMons. For example, weird engine swaps will be a thing of the past if motor vehicles and motor vehicle engines must remain in their certified configuration even if they are used solely for competition. Cam swaps, different exhaust headers, different intake manifolds are among the equipment which will be banned due to their impact on increased emissions. Not only will the fuel cell manufacturers essentially cease to exist (other than by making fuel cells for purpose-built race cars that are competition vehicles from the outset), it will become illegal to put a fuel cell into the former street cars that comprise the vast majority of motorsport activity in the US. In short, the impact would be devastating.

As we discussed this morning, I would be glad to work on coordinating 24 Hours of LeMons' response to this proposed rule. I will be in the office again all day on Wednesday if you want to discuss this matter further.