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December 27, 2016

**VIA FACSIMILE-CERTIFIED MAIL-EMAIL**

The Honorable Gina McCarthy  
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The Honorable Janet McCabe  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
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Washington, DC 20460  
[mccabe.janet@epa.gov](mailto:mccabe.janet@epa.gov)  
Fax No: 202-501-0986

Re: Petition for Reconsideration

Dear Administrator McCarthy and Assistant Administrator McCabe:

Please find attached a Petition for Reconsideration filed on behalf of the Racing Enthusiasts and Suppliers Coalition with respect to the rule entitled, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2; Final Rule*, 81 Fed. Reg. 73,478 (Oct. 25, 2016), codified at 40 C.F.R. Parts 9, 22, 85, 86, 600, 1033, 1036, 1037, 1039, 1042, 1043, 1065, 1066, 1068 and 49 C.F.R. Parts 523, 534, 535, and 538, Docket Id. No. EPA-HQ-OAR-2014-0827.

Feel free to contact me (415.975.3718) to discuss the Petition.

Sincerely,

Shannon S. Broome

Attachment

cc: Christopher Grundler, Office of Transportation and Air Quality



## I. INTRODUCTION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act,<sup>1</sup> the Racing Enthusiasts and Suppliers Coalition (Petitioner) respectfully petitions the U.S. Environmental Protection Agency (EPA or Agency) to reconsider certain aspects of the nationally applicable final action entitled, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2; Final Rule*, 81 Fed. Reg. 73,478 (Oct. 25, 2016), codified at 40 C.F.R. Parts 9, 22, 85, 86, 600, 1033, 1036, 1037, 1039, 1042, 1043, 1065, 1066, 1068 and 49 C.F.R. Parts 523, 534, 535, and 538 (Final Action). As a courtesy, Petitioner notes that it has also filed a petition for judicial review of the Final Action and that it intends to raise in that litigation the issues on which reconsideration is requested below.

## II. BACKGROUND

The conversion of on-road vehicles into competition vehicles has long been a pastime of many. In July 2015, EPA proposed to add regulatory language that would be counter to the definition of motor vehicle in Section 216 of the Clean Air Act for competition vehicles. EPA stated the following in the preamble to the proposed rule:

The existing prohibitions and exemptions in 40 CFR part 1068 related to competition engines and vehicles need to be amended to account for differing policies for nonroad and motor vehicle applications. In particular, we generally consider nonroad engines and vehicles to be “used solely for competition” based on usage characteristics. This allows EPA to set up an administrative process to approve competition exemptions, and to create an exemption from the tampering prohibition for products that are modified for competition purposes. There is no comparable allowance for motor vehicles. A motor vehicle qualifies for a competition exclusion based on the physical characteristics of the vehicle, not on its use. Also, 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. There is no prohibition against actual use of certified motor vehicles or motor vehicle engines for competition purposes; however, it is not permissible to remove a motor vehicle or motor vehicle engine from its certified configuration regardless of the purpose for doing so.<sup>2</sup>

Specific regulatory language was proposed to be added including in proposed 40 C.F.R. Section 86.1854-12:

### **§ 86.1854–12 Prohibited acts.**

(b) For the purposes of enforcement of this subpart, the following apply:

...

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<sup>1</sup> 42 U.S.C. § 7607(d)(7)(B).

<sup>2</sup> 80 Fed. Reg. 40,138, 40,527 (July 13, 2015) (emphasis added).

(5) 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).<sup>3</sup>

Although EPA opted to remove the controversial provisions in the Final Action, the Agency maintained that longstanding activities of hobbyists and those who supply them parts to use automobiles in competition violate Title II of the Clean Air Act, stating:

The proposal included a clarification related to vehicles used for competition to ensure that the Clean Air Act requirements are followed for vehicles used on public roads. This clarification is not being finalized. EPA 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. These unlawful defeat devices lead to harmful pollution and adverse health effects. The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, EPA has decided to eliminate the proposed language from the final rule.

EPA will continue to engage with the racing industry and others in its support for racing, while maintaining the Agency's focus where it has always been: Reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.<sup>4</sup>

### ARGUMENT

Section 216(2) of the Clean Air Act defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway."<sup>5</sup> Since off-road racing/competition vehicles ought not and generally are not driven on streets or highways, they have long been considered to fall outside of the Clean Air Act anti-tampering provisions. Additionally, Section 85.1703 of EPA's regulations provides the criteria for determining the applicability of Section 216(2) of the Clean Air Act:

(a) For the purpose of determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met,

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<sup>3</sup> 80 Fed. Reg. at 40,565.

<sup>4</sup> 81 Fed. Reg. at 73,957-58 (emphasis added).

<sup>5</sup> 42 U.S.C. § 7550(2).

in which case the vehicle shall be deemed not a motor vehicle:

- (1) The vehicle cannot exceed a maximum speed of 25 miles per hour over level, paved surfaces; or
- (2) The vehicle 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
- (3) The vehicle exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely, such features including, but not being limited to, tracked road contact means, an inordinate size, or features ordinarily associated with military combat or tactical vehicles such as armor and/or weaponry.<sup>6</sup>

Vehicles that have been modified for off-road racing/competition have traditionally been held to fall under the second criterion. Modified competition vehicles have features that are not associated with “safe and practical street or highway use” and indeed, are meant to be used on racetracks and closed circuits. Some competition vehicles may also fall under the third criterion, depending on how they are equipped. Similarly, modified off-roading vehicles virtually always fall under the second or third criterion, generally because components or features are added to the vehicle to enhance the off-roading experience, not that components are removed to enhance racing.

The request for reconsideration presented here are limited. As noted above, it has been a long accepted understanding that the Clean Air Act does not prohibit the modification of certain vehicles and/or engines if those vehicles and/or engines are used “solely for competition” on race tracks and closed circuits, or used for exclusive use at off-road rally events. This understanding has been based, in large part on the Clean Air Act definition of “motor vehicle” and EPA’s regulations, as well as EPA’s longstanding practice of respecting these activities and never suggesting that individuals or companies who modify vehicles and/or engines for off-road racing/competition purposes or that manufacturers of parts for these individuals and companies would be considered a violation of the Clean Air Act.

As stated in the preamble, it appears that the average hobbyist, professional racers (many of whose cars began life as road-going cars), and suppliers of equipment that enable the conversion of road-going vehicles into racecars (*i.e.*, cars used for competition only) could be considered in violation of federal law. EPA’s suggestion that it only intends to enforce against parts suppliers, sparing, *in its discretion*, individual hobbyists, does not cure the fundamental error in EPA’s legal analysis of its authority and only serves to highlight the ill-advised policy it has adopted.

This is inappropriate and contrary to the statute and sound policy. We respectfully request that you convene a reconsideration proceeding to address this issue.

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<sup>6</sup> 40 C.F.R. § 85.1703.

Respectfully submitted,



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*Counsel for the Racing Enthusiasts and  
Suppliers Coalition*

Dated: December 27, 2016

## CERTIFICATE OF SERVICE

A copy of the preceding was sent on December 27, 2016 to the following *via* facsimile, certified mail and email:

The Honorable Gina McCarthy  
Administrator  
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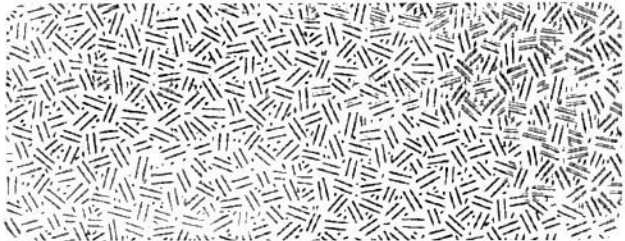
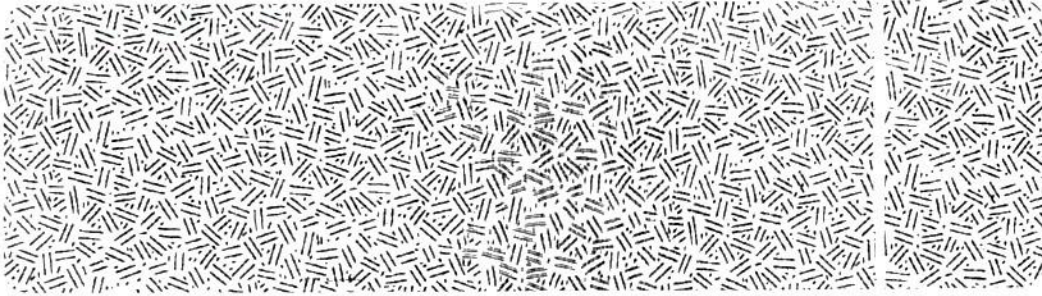
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