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Senators Eye Possible Narrowed Race Car Air Act Exemption In Bid For Deal

By Stuart Parker and Dawn Reeves
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Members of the Senate Environment and Public Works Committee (EPW) are pushing for a bipartisan compromise that could boost support for a bill to exempt racecar drivers and their equipment suppliers from Clean Air Act enforcement against “defeat devices” that remove air emissions controls, but key concerns remain among Democrats.

At a Sept. 7 hearing of the panel, Sen. Mark Kelly (D-AZ), [a co-sponsor of legislation](#) introduced by Sen. Richard Burr (R-NC), pressed for a solution that would persuade more Democrats to back the bill. Burr’s bill, S. 2736, aims to prohibit EPA from pursuing enforcement action against the racing community for modification of street cars into racecars, amid an ongoing EPA campaign against emissions control defeat devices.

The bill “will help provide some certainty” for racers, who are currently faced, at least in theory, with the possibility of enforcement action for modifying an EPA-certified “motor vehicle” to remove emissions controls, Kelly said.

But as written, the bill is too broad for some Democrats, who fear it would undermine EPA’s enforcement powers, Kelly recognized.

The legislation currently has 31 co-sponsors, including 11 Democrats. Other Democratic co-sponsors include Sens. Jon Tester (MT), Joe Manchin (WV), Gary Peters (MI), Kyrsten Sinema (D-AZ), Tammy Baldwin (WI), Robert Casey (PA), Catherine Cortez Masto (NV), Amy Klobuchar (MN), Margaret Hassan (NH) and Jeanne Shaheen (NH).

EPA’s current position is that under the Clean Air Act, modified road vehicles remain “motor vehicles” even if they are intended only for track use. But in practice, the agency has never pursued enforcement action against racing drivers.

Kelly conceded that “this bill needs work” in order to create a “narrow exemption” that would allow EPA to continue enforcement against makers of defeat devices that sell their products to the general public, and not only to racers. Kelly said his staff and EPW staff are discussing a “potential path forward” to refine the bill.

GOP senators on the panel spoke out in favor of Burr’s bill, including Ranking Member Shelley Moore Capito (R-WV) and Sen. Joni Ernst (R-IA), while some other Democrats sounded at least somewhat sympathetic to a possibly narrower bill, including Sen. Jeff Merkley (D-OR) and EPW Chairman Tom Carper (D-DE).

But it is still apparent that Democrats have serious concerns about any adverse impact on EPA’s ability to clamp down on defeat device sales outside the racing community. Carper warned that EPA is finding “massive” air law violations by companies selling defeat devices, while Sen. Ed Markey (D-MA) warned of “crazy” excess emissions of pollutants including nitrogen oxides (NOx) from vehicles that are using defeat devices.

Testifying at the hearing, Natural Resources Defense Council (NRDC) attorney John Walke warned that in its current form, S. 2736 could make the situation even worse, by curtailing EPA’s ability to bring enforcement actions where they are needed. Currently, only 2 percent of defeat devices sold are actually used on racecars, Walke said, and the companies making them are “hiding behind” racers.

To be acceptable, the bill would require a “truly narrow amendment” that would ensure the Clean Air Act is not weakened, Walke said.

“We should not be holding racecar drivers accountable,” said Walke, adding that the problem is defeat device manufacturers. But the bill would now limit EPA’s enforcement ability and “would make things worse.”

Kelly pressed Walke on possible paths to compromise on the issue. For example, he floated the idea of requiring that the state road registration of modified racecars be revoked; of requiring EPA to craft regulations to ensure that enforcement can continue against defeat devices sales for road use before any statutory change takes effect; and of requiring manufacturers to document their sales in more detail.

The latter point may run into GOP opposition, however, given that the Burr bill prohibits EPA from requiring that manufacturers keep and report such data.

Walke responded that the key to successful enforcement is to keep the onus on device manufacturers to ensure that they comply with the law.

EPA Enforcement

Attention to the racing exemption question has grown since the U.S. Court of Appeals for the District of Columbia Circuit Aug. 8 [dismissed a lawsuit](#) from equipment makers, *Racing Enthusiast & Suppliers Coalition v. EPA, et al.*, for lack of standing on the part of equipment suppliers, and lack of EPA “final action.”

However, the court left open the possibility that a new challenge might succeed, if petitioners could demonstrate material harm from an EPA action, not merely speculative harm from an “aside” in a rulemaking preamble.

Should Burr’s bill become law, it would achieve what the racing coalition could not in its lawsuit, and obviate the need for further litigation.

Others also point to the potential harmful effects of S. 2736 as written, in the light of recent EPA enforcement action. For example, sources point to a new \$10 million default judgment EPA and the Department of Justice (DOJ) secured against a Michigan-based aftermarket parts maker as reason for why the bill should not pass.

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Judge Denise Page Hood in [an Aug. 29 final judgment](#) ordered the defendants to pay a \$10 million civil penalty “for knowingly manufacturing, selling, offering to sell, or installing, parts or components intended for use . . . where a principal effect of the part or component is to bypass, defeat, and or render inoperative any device or element of design installed on or in a motor vehicle in compliance with regulations in violation of the Clean Air Act.”

DOJ and EPA say in a Sept. 1 announcement that the violations stem from a December 2021 complaint, with the judgment sending “a strong message that selling and installing defeat devices on engines and vehicles will not be tolerated.”

Dave Cooke of the Union of Concerned Scientists says the Burr bill could make such tampering legal or at least muddy the waters so much it would be impossible to enforce because it would be too easy to claim a racing exemption.

Cooke says the Michigan case stands out due to the hefty fines imposed, likely due to the fact the companies continued to sell the defeat devices even after the EPA/DOJ investigation.

Most other defeat device cases are settled, with fines in the tens or hundreds of thousands of dollars -- usually due to the company's inability to pay. A handful have had more than a million dollars in penalties assessed since the agency's national compliance initiative (NCI) began in fiscal year 2020.

Cooke says EPA has never gone after individual racecars as part of the NCI and that environmentalists would not object if the bill were truly a narrow racecar exemption.

Other Legislation

Meanwhile, EPW also considered S.1475, which would permanently prohibit federal GHG and other air permitting of farming and ranching. The bill would bar EPA from requiring permits "for any carbon dioxide, nitrogen oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production."

While EPW Republicans supported the measure, sponsored by Sen. John Thune (R-SD), Democrats did not voice support. Carper noted that a permitting prohibition has been included in several recent appropriations bills, while Markey said that concentrated animal feeding operations release "immense" pollution, including GHGs and other air pollutants, and that codifying a permanent exemption would be a "bad move, I am afraid," a sentiment echoed by NRDC's Walke.

Thune said that "regulating animal emissions could ultimately lead to higher food prices," and warned against "demonizing" cattle and other livestock production because of its GHG emissions.

Scott VanderWal, president of the South Dakota Farm Bureau and vice president of the American Farm Bureau Federation, supported the bill, saying that livestock emissions account for only 4 percent of U.S. GHG emissions.

Merkley spoke in support of his two bills, S. 2661 and S. 2421, that aim for better preparedness for wildfires and mitigation of their highly polluting smoke.

The measures promote research on wildfires, better air monitoring and communications to affected communities, measures to reduce exposures, and grants to help communities mitigate smoke effects. S. 2421 would require EPA to establish four "centers of excellence for wildfire smoke" in higher education institutions to study the health effects of wildfires and possible measures to mitigate the effect.

The panel did not discuss the merits of the bills, but Democrats at the hearing, including Carper, warned of the increasing risks to public health from wildfire smoke, and rising frequency and intensity of wildfires, driven in part by climate change.

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