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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (REGION IX) –
PETITION FOR DECLARATORY ORDER**

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: February 13, 2014

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Norfolk Southern Railway Company (“NS”) files these comments in response to the Petition for a Declaratory Order (“Petition”) filed by the Region IX of the United States Environmental Protection Agency (“Region IX”) in the above captioned proceeding.¹ The Petition presents a clear case of proposed regulations so intrusive on railroad operations and so burdensome on interstate commerce that they are preempted by the Interstate Commerce Commission Termination Act of 1996 (“ICCTA”). 49 U.S.C. 10501(b).

I. The Issue Presented By the Petition Is One of National Importance

Although the matter is raised by a Petition filed by Region IX, a single Region of the EPA with authority in California, and related to regulations proposed by the South Coast Air Quality Management District (“SCAQMD”), the issue presented is one of national importance for at least three reasons. First, at any given time, a significant

¹ NS also joins in the Comments of the Association of American Railroads filed in this proceeding.

number (upwards of several hundred) of any Class I railroad's locomotives operate on other railroads and may end up anywhere in the country, including California.

Second, The potential to create a patchwork of regulation on locomotive manufacture and operation makes the issue presented by the Petition one of national importance – not just of significance in a part of the State of California. The regulations proposed by a single area within a state could easily become the template for other localities to adopt these or other regulations governing locomotives used by railroads. Indeed, NS has worked cooperatively in the Atlanta area and in Illinois, as examples, to reduce emissions. But if Atlanta or Illinois sought to move away from a cooperative model, this Petition seeks to pave the way to localized regulation of locomotives. Indeed, given that locomotive idling is a frequent topic raised by municipal, county, and even state governments, it is almost a certainty that such a patchwork of regulation would result.

Third, localized regulations that restrict idling arbitrarily and impose burdensome monitoring and reporting requirements have an even more pernicious impact – balkanization through the adoption of differing and conflicting rules. Uniform, national rules for locomotives are essential for carriers and commerce; a balkanized system is a substantial burden on interstate commerce. In fact, the United States Environmental Protection Agency's rules already cover the field of locomotive idling and are in harmony with ICCTA. Those federal rules – which really are federal law and implemented in a consistent manner across the country – require that new and rebuilt locomotives include idle reduction technologies that reduce idling times and as such lead to lower emissions.

II. Direct Regulation of Locomotives By Localities Would Be a Substantial Burden for NS and for Commerce.

If permitted in NS's service territory, regulations like those in the Petition would be intrusive, burdensome, and disrupting to the NS network. NS's rail lines pass through thousands of communities in the 22 states in the Eastern United States in which NS operates. Most of these states have non-attainment or maintenance areas.² The commodities and products that make the American economy move are all transported on these lines – automobiles, metals, lumber for construction, coal for generating electricity and for making steel, intermodal boxes with goods destined for retailers all over the country, and farm products, to name just a few. Disruptions caused by the SCAQMD's proposed regulations would affect movements for customers shipping all of these products.

Therefore, the Board must not consider the current Petition in isolation; it must also consider the effect of other states or regions attempting to follow suit to implement idling regulations, which inevitably will differ from those being proposed in California and impede NS's and other railroads' ability to move commerce. There are practical impediments to such regulations, and especially a patchwork of such regulations, from a railroad operations standpoint. For instance, compliance with idling time limitations that may vary by state or county would not be feasible in many instances. Railroad operations by their nature require that locomotives remain running for a variety of safety and operational reasons. Locomotives will idle, for instance, where trains await the switching and pickup of cars for movement. Because, unlike automobiles, locomotive coolant does not contain antifreeze, engines must be kept idling at cold temperatures to avoid freezing

² See <http://www.epa.gov/oaqps001/greenbk/ancl.html>

of the coolant and destruction of the engine block. In addition, many of the systems on a locomotive, including heating and air conditioning equipment, brake pressure, communications equipment, and other important safety equipment, require that the engine remain operative unless the locomotive is intended to be inoperable for a long time. Restarting a locomotive engine and ensuring that the locomotive and its attached freight cars have fully charged air brakes in compliance with Federal Railroad Administration regulations is a time consuming procedure. Therefore, turning a locomotive engine off and then back on within a relatively short time period is not always practical. In addition, normal train operations that must take place while the train is stopped, such as switching cars, uncoupling cars, throwing rail switches, and checking that gates are open for basic inspections, would be disrupted under this proposal. To perform these tasks, a conductor must often times walk the entire length of the train, which may exceed a mile in length and in itself could take longer than an arbitrary time limitation set in a locality.

III. SCAQMD's Proposed Regulations Are Clearly Preempted and Unless Addressed Definitively Now Expose a Slippery Slope and Promote Bad Public Policy.

Regulations, like those that are the subject of the Petition, that create impediments to efficient rail movements by directly regulating the way railroads operate locomotives are preempted by ICCTA. The Board and courts around the country have held that many less onerous regulations are preempted. For example, local regulations governing the operation of rail yards (*see, e.g., Rushing v. Kan. City Southern Ry.*, 194 F. Supp. 2d 493, 500-05 (S.D. Miss. 2001)) and governing blocked crossings (*see, e.g., Friberg v. Kansas*

City Southern Ry. Co., 267 F.3d 439, 443-44 (5th Cir. 2001)) have been held to be preempted by ICCTA because of the extent to which they interfere with and burden interstate commerce – and those regulations are less of a burden on interstate commerce than regulations regarding locomotives applicable in limited locations as SCAQMD seeks. *See, e.g., Middlesex County Health Dep't v. Conrail, Corp.*, 2008 U.S. Dist. LEXIS 106362 (D.N.J. Dec. 16, 2008) (local idling restrictions preempted by ICCTA and CAA); *Village of Ridgefield Park v. New York, S. & W. Ry. Corp.*, 750 A.2d 57, 67 (N.J. 2000) (application of local nuisance law to regulate noise, fumes, soot, and ground vibrations from locomotive idling and refueling operations preempted by ICCTA). Moreover, SCAQMD's proposed regulations and the Petition are at most an attempt to use "federal environmental laws . . . to regulate rail operations" (*Grafton & Upton R.R. Co. – Petition for Declaratory Order*, 2014 STB LEXIS 14 (Jan. 27, 2014)) in a way that is facially preempted or, more likely, merely an attempt by a state to disregard prior court findings that these regulations are facially preempted (*Assoc. of Am. R.R. v. South Coast Air Quality Management Dist.*, 2007 WL 2439499 (C.D. Cal. 2007)).

The Board should proactively address the balkanization problem squarely presented by the Petition before a slide down a slippery slope begins. Could SCAQMD or another locality use the same tactic to adopt other direct and competing regulations on rail operations, such as regulations governing when locomotives can operate, providing for different idling controls that currently required by EPA, or specifying different types of locomotive that must be used (and therefore manufactured and purchased) in their territory? To operate its rail network and move its customers' products, NS owns or leases more than 4,000 locomotives (NS 2012 Annual Report at K9) of various types that

are made by different manufacturers and have different components. But, it uses these locomotives across its system. NS's road locomotives operate across the entire NS network (and sometimes on the network of other railroads) and are not confined to one area. A locomotive may be on an intermodal train from Norfolk to Chicago today and on a general merchandise train from Chicago to Harrisburg the next. In other words, NS assigns locomotives based on need. Locomotives do not stay in one locality. They do not stop at county or state lines, and crews may not even be aware where those lines on a map are drawn. Therefore, it is not a lengthy slide down this slippery slope of localized regulation of locomotives before NS's ability to allocate locomotives to the demands of the traffic and to fulfill its common carrier obligation is disrupted. NS has managed its fleet to comply with the federal standards. It would be infeasible to manage a locomotive fleet that traverses more than half the country in a way that could comply with state by state – or county by county – equipment requirements.

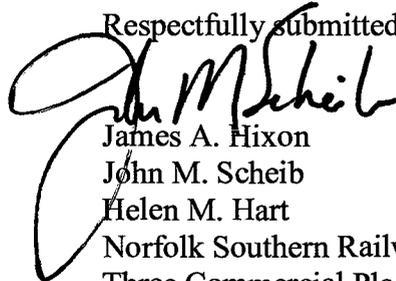
Finally, the disruptions to the railroad industry caused by SCAQMD's regulations, or by the regulations waiting just slightly further down the slippery slope, would create the perverse result of significant increases in local and regional air pollution. First, the delays it will introduce into the rail network will slow trains, reducing the tremendous environmental benefits of shipping via rail. Second, limitations on rail transportation throughout the country would create incentives to switch transportation mode from rail to trucks. Rail transportation is more than three times more fuel and energy efficient than transportation by truck, and diversion of freight from rail to truck not only would increase emissions due to this modal shift, but would increase

emissions arising from the concomitant increase in highway congestion. These results are contrary to national and state transportation, energy and environmental goals.

IV. Conclusion.

The Board should find that the California proposal is preempted and compliance with that and the inevitable patchwork of other local idling regulations would be infeasible as a practical matter. In addition, the proposal is contrary to national and state transportation, energy and environmental goals. Accordingly, NS urges the Board to rule that SCAQMD's localized attempt to regulate rail locomotives and their operations is a direct regulation of transportation and is preempted.

Respectfully submitted,



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