

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1212

INTRODUCER: Judiciary Committee, Senators Constantine and Gardiner, and others

SUBJECT: Public Transit

DATE: March 13, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Eichin</u>	<u>Meyer</u>	<u>TR</u>	Favorable
2.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>TA</u>	_____
4.	_____	_____	<u>WPSC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill provides additional direction for the development of the Florida Department of Transportation's (DOT or department) rail system program. Additionally, the bill provides DOT with the authority to contractually indemnify from liability any freight rail operator, or its successors, from whom DOT acquires a real property interest in the rail corridor.

This bill substantially amends sections 341.301 and 341.302, Florida Statutes.

II. Present Situation:

Florida's Rail System Plan

Section 341.302, F.S., prescribes the duties and responsibilities of the Florida Department of Transportation (DOT or department) in relation to Florida's rail program. The department, in conjunction with other governmental units and the private sector, is directed to develop and

implement a statewide rail program ensuring “the proper maintenance, safety, revitalization, and expansion of the rail system” necessary to respond to statewide mobility needs.¹

Among other things, DOT is required to develop a rail system plan that is consistent with the Florida Transportation Plan.² The rail system plan must identify the priorities, programs, and funding levels required to meet statewide needs and assure the maximum use of existing facilities along with the integration and coordination of the various modes of transportation in the most cost-effective manner possible.³ The department is required to update the rail system plan every two years and include plans for both passenger and freight rail service.⁴

Liability on Rail Corridors

Commuter rail has been defined as “a type of public transit that is characterized by passenger trains operating on railroad tracks and providing regional service.”⁵ Commuter rail operators often seek to use existing track or right-of-way, which is primarily owned by freight rail operators, because the cost of building new infrastructure is too expensive.⁶ Consequently, commuter rail operators must enter into agreements with the freight rail operators regarding how they will access the right-of-way. The most common challenge that occurs during negotiations between the commuter rail operator and the freight rail operator is determining liability.⁷

The introduction of commuter trains on rail corridors that were previously used exclusively for freight operations inherently raises the freight operators’ risk of liability due to the increased number of persons and trains present within the corridor. Accordingly, most freight rail operators want the commuter rail operator to assume all risks associated with the presence of the commuter rail service. Freight rail operators refer to this as the “but for” argument – “but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks; therefore, the freight railroads should be held harmless.”⁸ Recognizing the exposure of liability for both parties, Congress passed the Amtrak Reform and Accountability Act of 1997, which limited the aggregate overall damage liability to all passengers from a single accident to \$200 million.⁹

When Amtrak was created by Congress in 1970,¹⁰ Amtrak contracted with freight railroads to operate passenger rail service within freight corridors. These agreements were predicated on a no-fault allocation of liability. For example, a typical agreement indemnified the freight

¹ Section 341.302, F.S.

² The Florida Transportation Plan is governed by s. 339.155, F.S. The purpose of the Florida Transportation Plan is to establish and define the state’s transportation goals and objectives over the next 20 years within the context of the State Comprehensive Plan.

³ Section 341.302(3), F.S.

⁴ *Id.*

⁵ U.S. General Accounting Office, *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, Report GAO-04-240, 5 (Jan. 2004), available at <http://www.gao.gov/new.items/d04240.pdf> (last visited March 5, 2009).

⁶ *Id.* at 1.

⁷ *Id.* at 17.

⁸ *Id.* at 18.

⁹ *Id.*; see also 49 U.S.C. s. 28103.

¹⁰ Congress passed the Rail Passenger Service Act of 1970, creating Amtrak to take over passenger rail service and relieving freight railroads of the responsibility of providing passenger service. U.S. General Accounting Office, *supra* note 5, at 8.

operators for “any injury, death or property damage to any Amtrak employees, Amtrak property or Amtrak passengers,” and the freight operators would also indemnify and hold harmless Amtrak for “any injury, death or property damage” to freight employees and property.¹¹ According to one report, despite this language, some courts have held that the provisions do not apply in cases of gross negligence.¹²

Commuter Rail in Florida

In 1988, the Florida Department of Transportation (DOT or department) and CSX Transportation, Inc., (CSX) entered into an agreement under which DOT bought approximately 81 miles of CSX track and right-of-way in order to operate commuter rail in South Florida. The commuter rail system (Tri-Rail) serves Miami-Dade, Broward, and Palm Beach counties.¹³ Pursuant to the agreement between DOT and CSX, the parties agreed to a no-fault allocation of liability. Specifically, CSX pays 100 percent of all freight damages, DOT pays 100 percent of all commuter rail damages, and both parties equally share the liability for third-party damages outside the corridor when both parties are involved.¹⁴ The agreement also required DOT to establish a \$5 million self-insurance fund and to obtain \$120 million of insurance, including punitive damage coverage.¹⁵

The Legislature authorized DOT to enter into the agreement through proviso language in the 1988 General Appropriations Act.¹⁶ During the implementation of the agreement, DOT realized that procuring the requisite insurance coverage was difficult. Chapter 287, F.S., requires the Department of Management Services (DMS) to purchase insurance for state agencies. However, commuter rail liability insurance is a specialized offering available from relatively few insurance providers. Therefore, in 1990, due to difficulties in obtaining this insurance domestically, the Legislature exempted the purchase of insurance for Tri-Rail (now operated by the South Florida Regional Transportation Authority)¹⁷ from the provisions of ch. 287, F.S.¹⁸ This effectively granted Tri-Rail authority to obtain insurance from offshore companies, and coverage was purchased from a variety of providers primarily located in London and Bermuda.¹⁹ Since then the annual premium costs have fluctuated between \$1.8 million in 1992 and \$738,795 in 2002. In 2008, Tri-Rail’s liability premium was \$1.35 million.²⁰

In 2007, the department entered into an agreement with CSX to purchase 61.5 miles of track or right-of-way in Central Florida. This agreement is contingent on the passage of legislation

¹¹ *CSX Liability Issues*, on file with the Senate Committee on Judiciary.

¹² Center for Transportation Research, The University of Texas at Austin, *Passenger Rail Sharing Freight Infrastructure: Creating Win-Win Agreements*, Project Summary Report 0-5022-S, 3 (March 2006), available at http://www.utexas.edu/research/ctr/pdf_reports/0_5022_S.pdf (last visited March 5, 2009).

¹³ See Tri-Rail, *Destinations*, http://www.tri-rail.com/destinations/md_county.htm (last visited March 5, 2009).

¹⁴ *CSX Liability Issues*, *supra* note 11.

¹⁵ *Id.*

¹⁶ See ch. 87-98, proviso accompanying Specific Appropriation 1700B, Laws of Fla.

¹⁷ See ch. 2003-159, Laws of Fla.; see also South Florida Regional Transportation Authority, *Overview*, <http://www.sfrta.fl.gov/overview.html> (last visited March 5, 2009).

¹⁸ Chapter 90-136, s. 88, Laws of Fla.

¹⁹ *CSX Liability Issues*, *supra* note 11.

²⁰ E-mail from Jenny Robertson, Legislative Affairs Director, Dep’t of Management Services to staff of the Senate Committee on Governmental Oversight and Accountability (Jan. 28, 2008) (on file with the Senate Committee on Judiciary).

containing certain indemnification provisions. The department plans to use existing freight tracks to provide commuter rail service, while CSX continues to operate freight trains in the corridor. The track goes from Deland in Volusia County to Poinciana in Osceola County.²¹ The project, known as SunRail, is expected to begin passenger service in 2011.²²

III. Effect of Proposed Changes:

This bill provides additional direction for the development of the Florida Department of Transportation's (DOT or department) rail system program, as well as grants DOT the authority to contractually indemnify from liability any freight rail operator, or its successors, from whom DOT acquires a real property interest in the rail corridor. Additionally, the bill authorizes DOT to purchase insurance and establish a self-retention fund to insure against liability risks. The bill also provides for regional components and definitions relating to the department's rail system program.

Florida's Rail System Plan

The bill amends s. 341.302(3), F.S., to provide that the state's rail system plan includes regional perspectives and allows for regional components with particular direction to address the improvement of freight and passenger mobility in Florida. The bill revises the updating requirement of the plan from once every two years to once every five years and requires that the plan be accompanied by a report to the Legislature. The bill also directs the department to:

- Work closely with all affected communities, including the City of Lakeland, the City of Plant City, and Polk County, to identify and address anticipated impacts associated with increased freight rail traffic;
- Finalize all viable alternatives from the department's Rail Traffic Evaluation Study²³ to identify and develop an alternative route for through-freight rail traffic moving through Central Florida;
- Begin a project development and environmental study, which must be reviewed and approved by federal agencies, in order to identify a preferred alternative that minimizes the impacts associated with freight rail movements along the corridor. The preferred alternative identified shall become the basis for future development of the rail corridor.
- Prioritize the preferred alternative for funding in the department's work program no later than 10 years from commencement of construction of the CSX Transportation, Inc., (CSX) Integrated Logistics Center; and
- Provide technical assistance to several Central Florida counties for the purpose of developing a regional rail system plan addressing passenger and freight opportunities within the region. This plan must be consistent with the Florida Rail System Plan and incorporate elements of the Tampa Bay Area Regional Authority Master Plan, the Metroplan Orlando Regional Transit System Concept Plan, and the department's Alternate Rail Traffic Evaluation.

²¹ SunRail, *What about freight?*, http://www.sunrail.com/cr_whataboutfreight.asp (last visited March 5, 2009).

²² SunRail, *When can I ride?*, http://www.sunrail.com/cr_whencaniride.asp (last visited March 5, 2009).

²³ The department began this study approximately one year ago to analyze the issues related to freight rail traffic and to identify possible solutions. The study is anticipated to be completed by the end of March 2009. Phone conversation with staff of the Florida Department of Transportation (March 10, 2009).

As stated above, the bill requires the department to prioritize the preferred alternative identified in the project development and environmental study for funding in the department's work program. The department's work program is a "five-year project specific list of transportation activities and improvements." The work program is designed to "strategically and efficiently program, fund, and administer Florida's transportation system on a project specific basis."²⁴ Section 339.135, F.S., authorizes and establishes guidelines that the department must follow in developing the work program. Federal law also requires that certain projects be developed in cooperation with metropolitan planning organizations (MPOs), which are multi-jurisdictional agencies "mandated by federal and state law for urbanized areas of more than 50,000 people."²⁵ The work program "reflects the priorities of MPOs . . . , along with the department's centrally managed programs."²⁶ The portion of the bill that directs the department to prioritize the preferred alternative in the work program may be seen as bypassing the current work plan process.

Liability on Rail Corridors

The bill amends s. 341.302, F.S., providing the Florida Department of Transportation (DOT or department) with authority to indemnify and hold harmless, through contract, freight rail operators, and their officers, agents, and employees, from whom the department has purchased real property in the rail corridor. Specifically, the bill provides that the department will be solely responsible for any loss, injury, or damage to commuter rail passengers, rail corridor invitees, or trespassers, regardless of circumstances or cause, including negligence, misconduct, nonfeasance, or misfeasance. The bill provides parameters for the contractual indemnification (irrespective of fault) as follows:

- If only a freight train is involved in an accident, then the freight operator is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, but the department pays for loss, injury, or damage to any commuter rail passengers, invitees, or trespassers.
- If only a department train (or other train, as explained below) is involved in an accident, then the department is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, including all commuter rail passengers, invitees, or trespassers.
 - The bill provides that any train that is neither the department's train nor the freight rail operator's train, is considered an "other train." An other train is treated as a department train solely for purposes of allocation of liability between the department and the freight rail operator, as long as the department and the freight

²⁴ Comm. on Transportation, Fla. Senate, *Development of the Florida Department of Transportation's 5-Year Work Program*, 1 (Issue Brief 2009-334) (Oct. 2008), available at http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-334tr.pdf (last visited March 11, 2009). The Senate Committee on Transportation's issue brief also explains the development process of the department's work program.

²⁵ The Center for Urban Transportation Research, University of South Florida, *Review of MPO Long Range Transportation Plans and Regional MPO Planning Activities and Products*, 1 (Aug. 2005), available at http://www.dot.state.fl.us/research-center/Completed_Proj/Summary_PL/FDOT_BD544_21_rpt.pdf (last visited March 11, 2009).

²⁶ Comm. on Transportation, *supra* note 24.

rail operator share responsibility equally as to third parties injured outside the rail corridor.

- If both a freight train and a department train, or a freight train and another train, are involved in an accident, then the freight operator is solely responsible (pays 100 percent) for all freight damage including any persons on its train, DOT is solely responsible (pays 100 percent) for the department train and any passengers, invitees, or trespassers within the corridor, and the freight operator and DOT share responsibility one-half each (pays 50 percent) for any third-party damage resulting outside the corridor.
- If a department train, a freight train, and any other train are involved in an accident, then the allocation of liability remains one-half each between DOT and the freight operator for any loss, injury, or damage to third parties outside the rail corridor. If the other train makes any payment to third parties injured outside the corridor, the allocation of credit shall not reduce the freight operator's allocation to less than one-third of the total third-party liability.

The department's duty to indemnify a freight rail operator is capped at \$200 million. The department is required to purchase up to \$200 million in liability insurance and establish a self-insurance retention fund to cover any deductible, provided that any parties covered under the insurance must pay a reasonable monetary contribution to cover the cost. The insurance and self-insurance retention fund may provide coverage for all damages, including punitive damages. The bill provides that s. 287.022(1), F.S., which requires the Department of Management Services to purchase all insurance for state agencies, does not apply, allowing DOT to purchase insurance from offshore companies.

The bill specifies that none of the provisions of the bill are deemed to be a waiver of any defense of sovereign immunity as provided in s. 768.28, F.S.

Additional Provisions

The bill provides that the Florida Department of Transportation (DOT or department) is authorized to incur expenses for advertising, marketing, and promoting the rail system. The bill also provides definitions for the following terms:

- "Commuter rail passenger" or "passengers" means all persons, ticketed or unticketed, using the commuter rail service on a department-owned rail corridor:
 - On board trains, locomotives, rail cars, or rail equipment employed in commuter rail service or entraining and detraining therefrom;
 - On or about the rail corridor for any purpose related to the commuter rail service; or
 - Meeting, assisting, or in the company of any person described above.
- "Commuter rail service" means the transportation of commuter rail passengers and other passengers by rail provided by the department or any other governmental entities.
- "Rail corridor invitee" means all persons who are on or about a department-owned rail corridor:
 - For any purpose related to any ancillary development; or
 - Meeting, assisting, or in the company of any person described above.

- “Rail corridor” means a linear contiguous strip of real property that is used for rail service. The term includes the corridor and structures essential to railroad operations, including the land, structures, improvements, rights-of-way, easements, rail lines, rail beds, guideway structures, switches, yards, parking facilities, power relays, switching houses, rail stations, ancillary development, and any other facilities or equipment used for the purpose of construction, operation, or maintenance of a railroad that provides rail service.
- “Railroad operations” means the use of the rail corridor to conduct commuter rail service, intercity rail passenger service, or freight rail service.
- “Ancillary development” includes any lessee or licensee of the department within a department-owned rail corridor.
- “Governmental entity” or “entities” has the same meaning as in s. 11.45, F.S.,²⁷ including a “public agency” as defined in s. 163.01, F.S.²⁸

Other Potential Implications:

The indemnification provisions in the bill reflect contractual contingencies in an agreement entered into by the Florida Department of Transportation (DOT or department) and CSX Transportation, Inc., (CSX) relating to the purchase of track and right-of-way for use by the Central Florida Commuter Rail Authority (SunRail). In the event the Legislature does not adopt the statutory changes, the conditions of the agreement are not met and the agreement may be terminated by either party. A synopsis of SunRail and the agreement is provided below.²⁹

Central Florida Commuter Rail (SunRail)

The department, in cooperation with the federal government and local governments in Orange, Seminole, Volusia, and Osceola counties, is advancing a commuter rail transit project (SunRail) to operate along a 61-mile stretch of existing rail freight tracks in the four-county area. The 31-mile Phase 1 segment would link DeBary to Orlando. Phase II would expand north to DeLand and south to Poinciana. Service is expected to begin in 2011 – just as DOT starts an I-4 reconstruction project through the area.

Alignment

- 61-miles in length along existing CSX freight tracks
- Phase 1 (2011) – DeBary to Sand Lake Road station – 31 miles
- Phase II (2013) – Sand Lake Road to Poinciana south of Kissimmee
- Future Phase (no date) – North from DeBary to DeLand – 30 miles

²⁷ A “governmental entity” is “a state agency, a county agency, or any other entity, however styled, that independently exercises any type of state or local governmental function.” Section 11.45(1)(d), F.S.

²⁸ A “public agency” is defined as “a political subdivision, agency, or officer of this state or of any state of the United States, including, but not limited to, state government, county, city, school district, single and multipurpose special district, single and multipurpose public authority, metropolitan or consolidated government, a separate legal entity or administrative entity . . . , an independently elected county officer, any agency of the United States Government, a federally recognized Native American tribe, and any similar entity of any other state of the United States.” Section 163.01(3)(b), F.S.

²⁹ The information is from materials provided to staff of the Senate Committee on Judiciary by staff of the Senate Committee on Transportation (on file with the Senate Committee on Judiciary).

Stations

- 10-12 stations planned for Phase I; a total of 17 at build-out
- At-grade stations with pedestrian connections
- Two intermodal centers at Lynx Central Station in downtown Orlando and in the Sand Lake Road area
- Enhanced bus and other transportation services at station stops
- 12 park-and-ride lots in outlying areas at no cost to user

Operating Plan

- 30-minute peak service in each direction from 5:30 a.m. to 8:30 a.m. and from 3:30 p.m. to 6:30 p.m.
- Two-hour off-peak service in each direction
- Maintenance facilities located in the Sanford area
- Average speed of 45 miles per hour
- Up to a 3-car train set

The Central Florida Commuter Rail Commission Governing Board was established by interlocal agreement on August 29, 2007, to assist DOT with policy direction during the planning, design, construction, and first seven years of operation for the SunRail system. The Governing Board consists of five members, all locally elected officials – one each from Volusia, Seminole, Orange, and Osceola counties, as well as the City of Orlando.

The funding plan for SunRail is shown in the following table:

Central Florida Commuter Rail Transit Funding Plan (through 2039) ⁽¹⁾ (in millions)		Funding Participation			
	Amount	FDOT	Locals	Federal	Farebox ⁽²⁾
“A-Line” and Rolling Stock Capital Plan	\$615.40	\$153.85	\$153.85	\$307.70	
CRT Operations & Maintenance ⁽³⁾	947.71	64.07	175.90	197.41	510.32
Capital Plan ⁽⁴⁾	397.41	24.00	195.93	177.49	
Support Costs ⁽⁵⁾	42.20	41.50	0.70		
Debt Service - Fixed Guideway Bonds ⁽⁶⁾	339.88	101.96	237.92		
Total	\$2,342.60	\$385.38	\$764.29	\$682.60	\$510.32

Source: DOT

(1) As of 12/15/2008 – Costs continue to be refined during Project Design

(2) Includes Ancillary Revenue, Interest Earnings & Amtrak/CSX Usage Fees

(3) Assumes payment of O&M by DOT beginning FY 2012-2019 (FY 2019 is a partial-year payment); Locals begin payment in FY 2019. Amounts are from FY 2012-2036

(4) Costs related to the overhaul and purchase of rolling stock

(5) Includes costs programmed in Work Program from FY 2008-2014

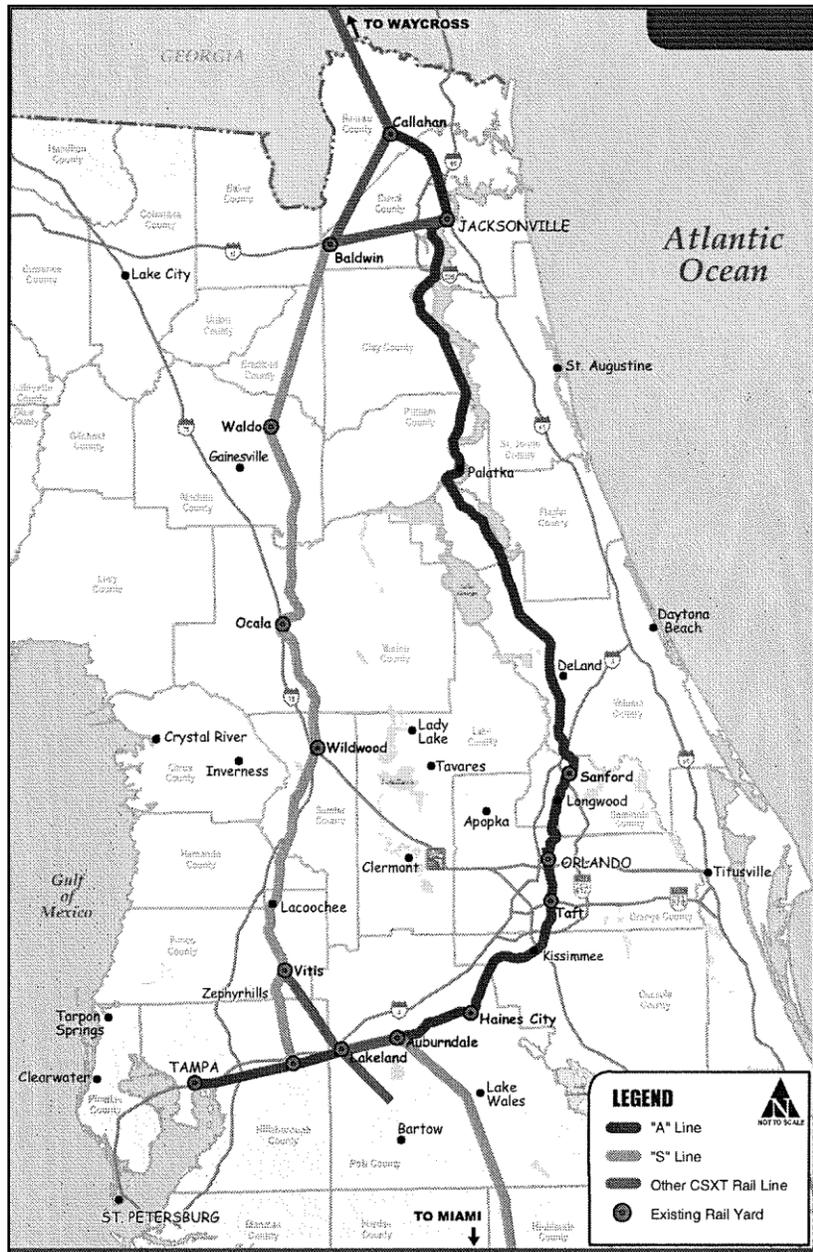
(6) Includes 30-Year Bond Debt Service from FY 2010-2039

DOT Work Program includes \$5 million in FY 2009 for Self Insurance Retention

The funding plan above estimates the cost to run SunRail after the rail is purchased from CSX. The cost to purchase the 61.5 miles of “A-Line” track from CSX is an additional cost. See the “Estimated Cost of CSX Agreement” chart below.

Summary of Agreement between DOT and CSX

On August 2, 2006, DOT announced an agreement in principle with CSX for rail infrastructure and operational modifications statewide, and the purchase of 61.5 miles of CSX “A-Line” track in Central Florida, from Deland in Volusia County south to the Poinciana area in Osceola County. See the diagram below:



Source: DOT

Highlights of the agreement affecting Central Florida Commuter Rail executed on November 30, 2007, include:

- Exclusive passenger use of the 61.5-mile Central Florida corridor for 12 hours/day, exclusive freight use for 5 hours/day, and mixed use for 7 hours/day.
- Department assumption of all maintenance and dispatch responsibilities along the 61.5-mile Central Florida corridor. After seven years, the Central Florida Commuter Rail Commission assumes responsibility.
- CSX will re-route at least six daily freight trains to the “S-Line” but retains an easement on the “A-Line” for exclusive freight operations. CSX will compensate DOT for the use of the line.
- Relocation of Taft intermodal operations to the new Integrated Logistics Center (ILC) in Winter Haven.

The agreement also modifies control and operational responsibilities relating to the 81-mile South Florida Rail Corridor (Tri-Rail):

- The department and the South Florida Regional Transportation Authority (SFRTA) assume control of dispatch and maintenance responsibilities with no responsibility of labor protection for CSX employees.
- The department and CSX will revise the maintenance cost-sharing formula and adopt a per car charge structure. Under the agreement, CSX will pay DOT \$0.44 per car mile in addition to a flat fee of \$1.6 million per year.
- Structured cooperation with the goal of extending commuter rail from Miami International Airport toward Homestead.

The agreement further provides for operational, safety, and capacity modifications statewide:

- “S-Line” and Other Rail Improvements
 - A bundle of 21 projects increasing capacity on the “S-Line.” Identified in the 2006 DOT Rail System Plan as the Central Florida Freight Rail Capacity Projects.
 - An additional 20 CSX projects to expand capacity on other portions of CSX’s Florida network, including the line parallel to Interstate 10. These are identified as the Florida Improvement Plan.
- Five new or improved grade crossings in Alachua, Marion, and Sumter counties.
- Road access to the new ILC in Winter Haven.
- Creation of a Statewide Rail Freight Safety Task Force.

The estimated cost of the agreement to purchase the track from CSX is shown in the following table:

Estimated Cost of CSX Agreement

Item	Amount (millions)
Commuter Rail "Direct Costs"	
"A-Line" Purchase	\$150
Relocation of CSX Taft Yard	23
Subtotal	\$173
"S-Line" Improvements	
Capacity Improvements	\$198
Eliminate Roadway Rail Grade Crossings ⁽¹⁾	59
Access Road to the Integrated Logistics Center	9
Subtotal	\$266
Other Freight Improvements	\$52
Total	\$491
Sources of Funding	Amount
DOT Strategic Intermodal System	\$267
DOT District 5	\$51
Fixed Guideway Bonds	\$173
Total	\$491

⁽¹⁾ Note: The \$59 million noted in the CSX agreement for grade separation improvements was DOT's minimum pledge to the counties and communities. CSX agreed to use this amount as a credit toward the \$491 million in the purchase agreement. These improvements will take place regardless of whether the CSX agreement moves forward.

The following are the grade separation improvement projects with current estimated costs:

Item 420561-2 Rail Overpass Reserve	\$2,135,638
Item 411665-2 SR 464 Overpass – Project Underway	\$47,455,544
Item 411665-5 SR 464 Contamination – Project Underway	\$38,500
Item 411665-3 SR 44 Overpass – Project Underway	\$45,037,784
Item 411257-3 SR 35/US 301 (a portion of the total road project) – R/W Has Begun	\$2,641,763
item 411665-4 SR 35/US 301 Overpass – Project Underway	\$39,953,758
Item 207831-1 US 301/SR 26 Overpass – R/W Complete	\$4,486,868
Item 423028-1 SR 200/US301 Overpass – To be Let in FY 2009	\$29,425,304
Item 207714-1 SR 20 Overpass – COMPLETED ITEM	<u>\$42,183,324</u>
Total for Grade Separation Improvement Projects	<u><u>\$213,358,483</u></u>

Source: DOT

The overall cost, including the cost to purchase the right-of-way from CSX and the cost to run SunRail over an extended period of time, is estimated to be \$2,987,958,483.

Effective Date

This bill shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

As stated previously, the most common challenge in negotiating agreements for commuter rail operations to occur on freight rail right-of-way is determining liability. The issue of liability was addressed by Congress when it enacted the Amtrak Reform and Accountability Act of 1997 (Reform Act). Specifically, 49 U.S.C. s. 28103(b), provides that “[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.” This language not only protects Amtrak, but any commuter rail operator,³⁰ and some courts have found that the language also preempts certain state laws.³¹

In 2009, one court held that the Reform Act preempts the Pennsylvania sovereign immunity statute to the extent the statute is raised as a defense to enforcement of an indemnification contract.³² In that case, a state-created rail authority argued that it did not have to comply with its indemnification contract with Amtrak because of the state’s sovereign immunity statute. The court relied on the legislative history of the Reform Act, finding that the act “was intended to ensure the enforceability of indemnification agreements” and that such contractual agreements are consistent with Federal law and public policy.³³ The court found that “the Pennsylvania sovereign immunity statute [is] an obstacle to the accomplishment of Congress’ full objectives under the Reform Act” and, therefore, the Southeastern Pennsylvania Transportation Authority’s contractual

³⁰ U.S. General Accounting Office, *supra* note 5, at 43.

³¹ See *Deweese v. Nat’l R.R. Passenger Corp.*, 2009 WL 222986 (E.D. Pa. 2009); *O&G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153 (2d Cir. 2008).

³² *Deweese v. Nat’l R.R. Passenger Corp.*, 2009 WL 222986 (E.D. Pa. 2009).

³³ *Id.* at *7, 8.

obligation to indemnify Amtrak “is not subject to, nor limited by, the Pennsylvania sovereign immunity statute.”³⁴

This bill provides that the assumption by contract to indemnify a freight rail operator shall not be a waiver of any defense of sovereign immunity for torts as provided in s. 768.28, F.S.³⁵ To the extent that the bill’s preservation of the defense of sovereign immunity is viewed as a basis for invalidating or limiting the contractual obligation to indemnify a freight rail operator, this provision may raise preemption questions under federal law. However, the provision appears to preserve the ability of the state or any other governmental entity to continue to assert a defense of sovereign immunity and the limits on liability prescribed in s. 768.28, F.S., in a tort action claiming that the government was negligent.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill provides the Florida Department of Transportation (DOT or department) with the authority to contractually indemnify from liability any freight rail operator, or its successors, from whom DOT acquires a real property interest in the rail corridor. Accordingly, freight rail operators from whom the department has acquired real property will experience reduced exposure to liability claims arising from non-freight operations.

As noted above, the indemnification provisions of the bill reflect conditions established in an agreement between DOT and CSX Transportation, Inc., (CSX) to purchase CSX property for the purpose of operating commuter rail in Central Florida. The agreement stipulates that all but the \$150 million “A-Line” purchase price be used by CSX to offset improvements made to other CSX freight rail projects included in DOT’s Strategic Intermodal System programmed for funding in the department’s work program.

Under the terms of the agreement, CSX will pay the department a fixed fee of \$1.25 million annually for the right to use the rail line for its freight carriage operations. Additionally, CSX will pay \$0.39 for each car mile handled on the state-owned rail line. This variable fee is to be paid quarterly and may be adjusted annually to reflect increases or decreases in the costs of labor and materials associated with corridor maintenance.

To the extent that operation of commuter rail generates job creation and other economic activities, the bill’s facilitation of commuter rail may have positive impacts for the private sector, as well as the state.

³⁴ *Id.* at *8, 9

³⁵ Section 768.28, F.S., limits the state’s liability, or that of any of its agencies or subdivisions, for tort claims to \$100,000 per person or \$200,000 per incident.

C. Government Sector Impact:

The rail system planning provisions of the bill will result in additional workload to the Florida Department of Transportation (DOT or department), which can be accommodated without additional appropriation.

The indemnification provisions do not require any appropriation from the Legislature. However, the Department of Financial Services³⁶ noted the following concerns relating to liability:

This broad assumption of liability would cover liability “whatever nature or degree of fault” or “misconduct.” This language would include gross negligence and intentional acts. The assumption of liability would extend not only to the railroad company (or its successors) and its officers and employees, but to the railroad company’s agents. Thus, the assumption of liability extends to acts of any magnitude or egregiousness, not only by the rail company and its employees and officers, but also an unknown series of agency relationships. A major concern is that when an assumption of liability by the state is for activities where public safety is involved (such as an operation and maintenance of a rail corridor), a “moral hazard” is created whereby the incentive for private entities to exercise effective risk management to avoid liability has been removed for the railroad company, its officers and employees and its agents.

....

Despite the efforts to limit liability, through specific caps and liability and self insurance retention limits, the practical and legal reality is that in order to meet its contractual duty under the statute in good faith, the department would be obligated to cover through liability insurance and self insured retention the reasonably anticipated exposure from the liability assumed. This could be a very high level of exposure.

The estimated cost to purchase the right-of-way from CSX and to run SunRail over an extended period of time is \$2,987,958,483. This cost, however, is divided among federal funding, state funding, and local funding. The state’s portion of the cost of the project is estimated to be \$857,858,483.

The bill requires the department to purchase up to \$200 million in liability insurance and establish a self-insurance retention fund for the purpose of paying the deductible limit established in the insurance policies it obtains. The bill also provides that the parties

³⁶ Memorandum to Chief Financial Officer Alex Sink from Dan Sumner, General Counsel (Feb. 6, 2008) (on file with the Senate Committee on Judiciary).

covered under the insurance, such as a freight rail operator, must pay a reasonable monetary contribution to cover the cost of the liability coverage. The estimated cost of the insurance premium, according to DOT staff, is \$2 million for the first year. However, premiums may fluctuate annually based on the claims history.

The bill requires the department to conduct a project development and environmental study in order to identify a preferred alternative that minimizes the impacts associated with freight rail movements. The precise cost of this study to the department, if any, is unknown at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Re-routing freight trains from the “A-Line” to the “S-Line” will decrease freight rail traffic in Orlando and other Central Florida locations; however, there will be a commensurate, and possibly more significant, increase in freight rail traffic in downtown Lakeland as trains travel to and from the Integrated Logistics Center.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 11, 2009:

The committee substitute revises the language relating to the Florida Department of Transportation’s (DOT or department) efforts to try and address impacts to communities affected by an increase in freight rail traffic. Specifically, the committee substitute directs the department to:

- Continue to work with all affected communities;
- Finalize viable alternatives from its traffic evaluation study and develop an alternative route for through-freight rail traffic;
- Begin a project development and environmental study to identify the preferred alternative; and
- Prioritize the preferred alternative for funding in the department’s work program.

The committee substitute also changes the effective date of the legislation from July 1, 2009, to “upon becoming a law.”

B. Amendments:

None.