

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 Transportation and Economic Development Appropriations Committee

BILL: HB 1-B, Engrossed 1

INTRODUCER: Economic Development & Community Affairs Policy Council and Rep. Aubuchon

SUBJECT: Transportation

DATE: December 8, 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>	Favorable
3.	<u>Noble</u>	<u>Noble</u>	<u>TA</u>	Favorable
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Generally, this bill provides a statutory framework for enhancing the consideration of passenger rail as a modal choice in the development and operation of Florida’s transportation network.

Essentially, the bill:

- Creates a Florida Rail Enterprise (enterprise), modeled after the Florida Turnpike Enterprise, to coordinate the development and operation of passenger rail services statewide, including high-speed rail;
- Establishes a Statewide Passenger Rail Commission to monitor, advise, and review publicly-funded passenger rail systems;
- Creates dedicated funding sources for the South Florida Regional Transportation Authority (SFRTA) and for future passenger rail development and operations, and revises funding levels and duration for operating costs;
- Revises, beginning in 2014, the documentary stamp tax revenues that are allocated among the Small County Outreach Program, the Transportation Regional Incentive Program, and the Strategic Intermodal System.
- Requires the Florida Department of Transportation (DOT or department) to identify and address the impacts of freight rail traffic changes resulting from passenger rail activities;
- Grants DOT the authority to contractually indemnify freight rail operators from whom DOT acquires a real property interest in a rail corridor in certain circumstances;
- Authorizes DOT to purchase insurance and establish a self-insurance retention fund to insure against liability risks;

- Allows for an escrowed closing of the Central Florida Rail Corridor contingent upon the receipt of certain federal funds; and
- Revises definitions and deletes obsolete provisions relating to DOT's rail system program.

This bill substantially amends the following sections of Florida Statutes: 20.23, 110.205, 201.15, 339.135, 341.301, 341.302, 341.303, 341.8201, 341.8203, 341.822, 341.836, 341.838, 341.839, and 343.58.

This bill repeals the following sections of Florida Statutes: 341.8202, 341.821, 341.823, 341.824, 341.827, 341.828, 341.829, 341.830, 341.831, 341.832, 341.833, 341.834, 341.835, 341.837, and 341.841.

This bill creates section 341.8225, 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 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

Commuter Rail in Florida

In 1988, DOT and CSX Transportation, Inc., (CSX) entered into an agreement under which the department 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.⁵ 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

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 See Tri-Rail, *Destinations*, <http://www.tri-rail.com/destinations/> (last visited December 4, 2009).

share the liability for third-party damages outside the corridor when both parties are involved.⁶ The agreement also required DOT to establish a \$5 million self-insurance fund and to obtain \$125 million of insurance, including punitive damage coverage.⁷

The Legislature authorized DOT to enter into the agreement through proviso language in the 1988 General Appropriations Act.⁸ During the implementation of the agreement, DOT realized 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)⁹ from the provisions of ch. 287, F.S.¹⁰ 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.¹¹ 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.¹²

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 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.¹³ The project, known as SunRail, is expected to begin passenger service in 2011.¹⁴

High-Speed Rail

In November 2000, the Florida voters approved a constitutional amendment¹⁵ mandating the construction of a high-speed transportation system for the state. The amendment required the use of train technologies that operate at speeds in excess of 120 miles per hour. The high-speed rail system was to link the five largest urban areas in Florida, and construction was mandated to begin by November 1, 2003. To implement the constitutional amendment, the Florida Legislature enacted the Florida High-Speed Rail Authority Act¹⁶ and created the Florida High-Speed Rail Authority (authority) in 2001.

⁶ *CSX Liability Issues* (on file with the Senate Committee on Judiciary).

⁷ *Id.*

⁸ See ch. 87-98, proviso accompanying Specific Appropriation 1700B, Laws of Fla.

⁹ See ch. 2003-159, Laws of Fla.; see also South Florida Regional Transportation Authority, *Overview*, <http://www.sfrta.fl.gov/overview.html> (last visited December 4, 2009).

¹⁰ Chapter 90-136, s. 88, Laws of Fla.

¹¹ *CSX Liability Issues*, *supra* note 6

¹² 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).

¹³ SunRail, *What about freight?*, http://www.sunrail.com/cr_whataboutfreight.asp (last visited December 4, 2009).

¹⁴ SunRail, *When can I ride?*, http://www.sunrail.com/cr_whenicaniride.asp (last visited December 4, 2009).

¹⁵ Section 19, Article X of the State Constitution.

¹⁶ Sections 341.8201 through 341.842, F.S.

In November 2004, the 2000 constitutional amendment was repealed. Prior to repeal of the constitutional amendment, the authority developed a strategic plan for high-speed rail in Florida, undertook the project development and environmental study process for the initial Tampa to Orlando segment, and conducted a planning study for the Orlando to Miami segment. Although the amendment has been repealed, the Florida High-Speed Rail Authority Act is still in effect.

The authority operated with funds derived from appropriations by the state and specific Congressional earmarks. Since fiscal year 2004-2005, no state funds have been appropriated, and the authority operated on surplus funds from previous years. The authority is currently not active, and the terms of its members have expired.

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.”¹⁷ 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.¹⁸ 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.¹⁹

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.”²⁰ 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.²¹

When Amtrak was created by Congress in 1970,²² 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 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.²³

¹⁷ 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 December 4, 2009).

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18.

²¹ *Id.*; see also 49 U.S.C. s. 28103.

²² 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 17, at 8.

²³ *CSX Liability Issues*, *supra* note 6.

According to one report, despite this language, some courts have held that the provisions do not apply in cases of gross negligence.²⁴

III. Effect of Proposed Changes:

Florida Rail Enterprise

The bill revises s. 20.23, F.S., as well as numerous sections of ch. 341, F.S., including those previously cited as the “Florida High-Speed Rail Authority Act,” to establish the Florida Rail Enterprise (enterprise). The bill authorizes the enterprise to develop a high-speed rail system in Florida, reassigns many of the High-Speed Rail Authority’s (authority) powers and duties to the enterprise, and repeals obsolete provisions. The establishment of the enterprise elevates the administration of rail issues to the same level within the Florida Department of Transportation (DOT or department) as the DOT districts and the Florida Turnpike Enterprise.

Like the Florida Turnpike Enterprise it is modeled after, the rail enterprise is to be headed by an executive director who is appointed by the Secretary of DOT and who must meet the qualifications established for DOT district secretaries and the turnpike executive director. The enterprise is to be headquartered in Leon County and is given the responsibility for developing and operating the state-owned passenger rail systems in Florida including high-speed rail, funding passenger rail systems, and coordinating publicly-funded passenger rail operations, including interoperability issues with freight rail. More specifically:

- Section 341.303, F.S., is amended to provide that the enterprise will be a single budget entity within DOT. The bill establishes that unexpended funds appropriated to the enterprise are carried forward from year to year.
- Section 341.822, F.S., is amended to:
 - Authorize the enterprise to locate, plan, design, finance, construct, maintain, own, operate, administer, and manage the state’s high-speed rail system. These powers include, but are not limited to, the ability to plan, construct, maintain, repair, and operate a high-speed rail system and to coordinate the development and operation of a publicly-funded passenger rail system in the state.
 - Provide the legislative intent of the Florida Rail Enterprise Act that the enterprise be authorized to plan, develop, own, purchase, lease, or otherwise, acquire, demolish, construct, improve, relocate, equip, repair, maintain, operate, and manage the high-speed rail system; to expend funds to publicize, advertise, and promote the advantages of using the high-speed rail system and its facilities; and to cooperate, coordinate, partner, and contract with other entities, public and private.
 - Authorize the enterprise to employ procurement methods available to the DOT under chs. 255, 287, 334, and 337, F.S., or otherwise allowed by law. The enterprise may also solicit proposals and, with legislative approval as evidenced by approval of the project in DOT’s work program, enter into agreements with

²⁴ 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 December 4, 2009).

- private entities, or consortia thereof, for the building, operation, ownership, or financing of the high-speed rail system.
 - Require the executive director of the enterprise to appoint a staff, who will be exempt from the career service system.
 - Provide that the powers conferred upon the enterprise under this act are in addition to and supplemental to the existing powers of DOT and the rail enterprise, and these powers are not to be construed as repealing any other law, but supersede other laws that are inconsistent with this act and provide a complete method for the exercise of such powers.
 - Require any rail enterprise project or improvement to be developed in accordance with the Florida Transportation Plan and be included in DOT's work program.
- Section 341.8225, F.S., is created to provide that DOT is the only governmental entity that may acquire, construct, maintain, or operate the high-speed rail system, except upon specific authorization from the Legislature. The bill also provides that local governmental entities may negotiate with DOT for the design, right-of-way acquisition, and construction of any component of the high-speed rail system within areas of their respective jurisdictions or within counties with which they have interlocal agreements.
- Section 341.836, F.S., which relates to development associated with the high-speed rail system, is amended to remove the requirement that the associated development have pedestrian ingress and egress from the rail station.
- Section 341.838, F.S., which authorized the authority to set various rents, fees, and charges, is revised to authorize the enterprise to establish fares, rates, rents, fees, and other charges. The bill removes the ability to pay administrative expenses of the enterprise from these revenues and clarifies that revenues received are not subject to the supervision or regulation of another department.
- Additionally, s. 20.23, F.S., is amended to direct the Secretary of DOT to delegate the responsibility for developing and operating the high-speed and passenger rail systems to the executive director of the enterprise, who serves under and reports directly to the secretary. Like the Florida Turnpike Enterprise, the rail enterprise, although a part of DOT, is exempt from DOT policies, procedures, and standards to "facilitate the most efficient and effective management of the rail enterprise, including the use of the best business practices employed by the private sector."

The bill repeals the following sections of the Florida High-Speed Rail Authority Act, which are obsolete under the new enterprise framework:

- Section 341.8202, F.S., Legislative findings, policy, purpose, and intent.
- Section 341.821, F.S., Florida High-Speed Rail Authority.
- Section 341.823, F.S., Criteria for assessment and recommendations.
- Section 341.824, F.S., Technical, scientific, or other assistance.
- Section 341.827, F.S., Service areas; segment designations.
- Section 341.828, F.S., Permitting.

- Section 341.829, F.S., Conflict prevention, mitigation, and resolution.
- Section 341.830, F.S., Procurement.
- Section 341.831, F.S., Prequalification.
- Section 341.832, F.S., Request for qualifications.
- Section 341.833, F.S., Request for proposals.
- Section 341.834, F.S., Award of contract.
- Section 341.835, F.S., Acquisition of property, rights-of-way, and the disposal of land.
- Section 341.837, F.S., Payment of expenses.
- Section 341.841, F.S., Report; audit.

Statewide Passenger Rail Commission

The bill amends s. 20.23, F.S., creating the Florida Statewide Passenger Rail Commission (commission) to:

- Monitor the efficiency, productivity, and management of all publicly-funded passenger rail systems in the state. The commission is required to advise the transportation authorities operating passenger rail systems of its findings and recommendations. The commission is also required to conduct a periodic review of the authorities' passenger rail and associated transit operations and budget, acquisition of property, management of revenue and bond proceeds, and compliance with applicable laws and generally accepted accounting principles. The commission may seek the assistance of the Auditor General to conduct these reviews. The commission must also report to the Legislature findings from these reviews. This does not preclude the Florida Transportation Commission from conducting its performance and work program monitoring responsibilities;
- Advise DOT on policies and strategies used in the planning, designing, building, operating, financing, and maintaining of a coordinated passenger rail system; and
- Evaluate passenger rail policies and provide advice and recommendations to the Legislature.

The commission will consist of nine members:

- Three members appointed by the Governor – one with a background addressing environmental issues, one with a legislative background, and one with a general business background;
- Three members appointed by the President of the Senate – one with a background in civil engineering, one with a background in transportation construction, and one with a general business background; and
- Three members appointed by the Speaker of the House of Representatives – one with a legal background, one with a financial background, and one with a general business background.

Board members are appointed to four-year terms. However, the legislative appointees' initial terms are staggered to ensure continuity of experience. Board members are not eligible for compensation but may be reimbursed for travel and other expenses. Administrative support and services will be provided by DOT.

The bill eliminates the Florida Transportation Commission's oversight of any regional transportation authority operating under the oversight of the newly created Florida Statewide Passenger Rail Commission.

Rail Funding Provisions

The bill contains several provisions related to funding rail.

Dedicated Funding for State-Owned Passenger Rail Systems

The bill establishes a dedicated funding source for state-owned passenger rail systems by reallocating a portion of the documentary stamp tax proceeds currently distributed to the State Transportation Trust Fund. The bill also establishes the uses of these funds for rail projects. Finally, the bill provides additional funding to the SFRTA for operations.

Documentary Stamp Taxes

Currently, the documentary stamp tax revenues distributed to the State Transportation Trust Fund (STTF) are allocated as follows:

- Of the total amount distributed to the STTF:
 - 10 percent for capital funding for the New Starts Transit Program
 - 5 percent for the Small County Outreach Program²⁵ (SCOP).
- Of the remaining funds :
 - 75 percent of the remaining funds after the New Starts and Small County allocations for the Strategic Intermodal System (SIS).
 - 25 percent of the remaining funds after the New Starts and Small County allocations to the Transportation Regional Incentive Program²⁶ (TRIP).

The bill amends provisions of s. 201.15(1)(c), F.S., relating to the distribution of documentary stamp tax revenues allocated to the State Transportation Trust Fund (STTF). Specifically, the bill redistributes the allocation of SCOP and TRIP funds beginning in fiscal year 2014-2015 as described below:

²⁵ Section 339.2818, F.S., creates the Small County Outreach Program (SCOP) within DOT to assist small county governments in resurfacing or reconstructing county roads, or in capacity or safety improvements to county roads. Counties with a population of 150,000 or less are eligible to compete for funds designated for this program. For projects on county roads funded by the SCOP program, DOT funds 75 percent of the cost, and the county funds the remaining 25 percent. In order to receive funds, the project must be on a county road, and the county must attempt to keep county roads in satisfactory condition.

²⁶ The Transportation Regional Incentive Program (TRIP) was created in 2005 as part of major growth management legislation. The purpose of the program is to encourage regional planning by providing state matching funds for improvements to regionally significant transportation facilities identified and prioritized by regional partners. TRIP funds are to be used to match local or regional funds on a 50 percent/50 percent basis or to match up to 50 percent of the total project costs for public transportation projects. TRIP funds are distributed to the FDOT Districts based on a statutory formula of equal parts population and fuel tax collections.

- Effective July 1, 2014, the bill increases the funds allocated to SCOP from 5 percent to 10 percent of the documentary stamp tax revenues allocated to STTF.
- Effective on July 1, 2014, the bill requires the first \$60 million of documentary stamp tax revenues allocated to the Transportation Regional Incentive Program is to be allocated to the Florida Rail Enterprise for certain rail funding.

Thus, under the bill, the documentary stamp tax revenues distributed to the State Transportation Trust Fund (STTF) are allocated as follows:

- Of the total amount distributed to the STTF:
 - 10 percent for capital funding for the New Starts Transit Program.
 - 10 percent for the Small County Outreach Program (SCOP).
- Of the remaining funds :
 - 75 percent of the remaining funds after the New Starts and Small County allocations for the Strategic Intermodal System.
 - 25 percent of the remaining funds after the New Starts and Small County allocations to the Transportation Regional Incentive Program (TRIP).
 - First \$60 million allocated to TRIP is to be allocated to the Florida Rail Enterprise beginning in the 2014-15 fiscal year.

Use of State Funds for Rail Projects

Currently, paragraph (a) of s. 341.303(4), F.S., authorizes DOT to fund up to 50 percent of the net operating costs of any eligible intercity or commuter rail service development project that is local in scope, not to exceed the local match. Paragraph (b) of the same subsection, authorizes DOT to fund up to 100 percent of the net operating costs of any eligible intercity or commuter rail service development project that is statewide in scope or involves more than one county if no other governmental unit of appropriate jurisdiction exists. The department's participation is limited to 50 percent of the net operating costs after the 5th year of operation.

The bill substantially revises this section to authorize DOT to fund up to 100 percent of the net operating costs²⁷ for any intercity or commuter rail system regardless of its scope, for up to seven years, beginning when the system is open to service. The bill authorizes DOT through the Florida Rail Enterprise to use the allocation of documentary stamp revenues dedicated to rail through the TRIP program, up to \$60 million per year, to fund the following:

- Up to 50 percent of the nonfederal share of the costs of any eligible passenger rail capital improvement project.
- Up to 100 percent of planning and development costs related to the provision of a passenger rail system.
- The high-speed rail system.
- Projects necessary to identify or address anticipated impacts of increased freight rail traffic resulting from the implementation of state-owned passenger rail.

²⁷ The statutory meaning of "net operating costs" is "all operating costs of the project less any federal funds, fares, or other sources of income to the project." Section 341.303(4), F.S.

Funding for South Florida Regional Transportation Authority

Current law requires each of the three counties in Tri-Rail's service area to contribute \$2.67 million every year to fund Tri-Rail,²⁸ plus an additional \$1.565 million for operating expenses. The bill continues to require these local revenues, and clarifies that the \$2.67 million annually provided by the counties may be used for capital, operations, and maintenance.

In its negotiations with CSX, DOT renegotiated the terms of the South Florida Operating & Maintenance Agreement (SFOMA) to establish full operations control of the South Florida Rail Corridor by SFRTA. This agreement increases the charges assessed to CSX for freight use within the corridor, while giving control of all the operations, maintenance, and dispatch of the corridor to SFRTA.²⁹

The bill requires DOT, effective July 1, 2010, to transfer from the STTF the following amounts to SFRTA:

- If SFRTA becomes responsible for operating, maintaining, and dispatching the rail corridor, \$15 million for operations, maintenance, and dispatch and an amount no less than DOT's work program commitments for fiscal year 2010-2011, as of July 1, 2009, for operating assistance, corridor track maintenance, and contract maintenance.
- If SFRTA does not become responsible for operating, maintaining, and dispatching the rail corridor, \$13.3 million for operations, maintenance, and dispatch and an amount no less than DOT's work program commitments for fiscal year 2010-2011, as of July 1, 2009, for operating assistance, corridor track maintenance, and contract maintenance.

The bill requires the additional funds provided to the SFRTA be allocated from the first proceeds of the increased revenues to be deposited into the State Transportation Trust Fund estimated by the November 2009 Transportation Revenue Estimating Conference. Specifically, the bill notwithstanding the following statutory distributions to ensure that the transfer of such funds shall not negatively impact projects included in the fiscal years 2009-2010 through 2013-2014 transportation work program:

- Allocation of funds for new construction based on equal parts population and fuel tax collections (s. 339.135(4)(a)1., F.S.).
- Minimum 50 percent of new discretionary highway capacity funds to Strategic Intermodal System (s. 339.135(4)(a)2., F.S.).
- Minimum 15 percent to Public Transportation Projects (s. 206.46(3), F.S.).
- Minimum 1.5 percent for Highway Beautification Projects (s. 334.044(26), F.S.).

Further, the bill provides that these dedicated funds to the SFRTA may not be provided from the documentary stamp tax distribution to the Florida Rail Enterprise for rail programs.

²⁸ While this has historically been used for capital expenses, the statute is silent as to what it may be used for.

²⁹ Under the original agreement for Tri-Rail, CSX retained maintenance and dispatch control of the corridor.

Rail Liability and Other Rail Corridor Provisions

Section 341.302, F.S., is amended to provide DOT the statutory authority to indemnify a freight operator for any loss, injury, or damage to commuter rail passengers or rail corridor invitees, regardless of circumstances or cause, including negligence, misconduct, nonfeasance, or misfeasance. The contractual indemnification, however, is subject to the following parameters and exceptions:

- If only a freight train is involved in an incident, the freight rail operator is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, as well as for losses related to incidents involving trespassers and grade crossings. The department pays for loss, injury, or damage to any commuter rail passengers or invitees.
- If only a DOT train (or “other train,” as explained below) is involved in an incident, DOT is solely responsible (pays 100 percent) for any loss, injury, or damage to its property and people, as well as for losses related to commuter rail passengers, rail corridor invitees, trespassers, and grade crossings.
 - Any train that is neither DOT’s train nor the freight rail operator’s train is considered an “other train.” An “other train” is treated as a DOT train solely for purposes of allocation of liability between DOT and the freight rail operator, as long as DOT and the freight rail operator share responsibility equally as to third parties injured outside the rail corridor.
- If both a freight train and a DOT train, or a freight train and an “other train,” are involved in an accident, the freight rail operator is solely responsible (pays 100 percent) for its property and all of its people. The freight rail operator and DOT share responsibility one-half each (each pays 50 percent) for any third-party damage resulting outside the corridor or for damage relating to trespassers. The department is solely responsible (pays 100 percent) for its property and all of its people, including commuter rail passengers and invitees, except in certain cases involving willful misconduct or resulting in the award of punitive or exemplary damages, as explained below.
 - When there is a collision between a DOT train and a freight train only and the freight rail operator’s conduct amounts to willful misconduct or results in the award of punitive or exemplary damages, DOT pays amounts in excess of its insurance deductible or self-insurance fund only if the freight rail operator pays for the amount of the insurance deductible or self-insurance fund (which is capped at \$10 million).
- If a DOT train, a freight train, and any “other train” are involved in an incident, the allocation of liability remains one-half each between DOT and the freight rail 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 rail operator’s allocation to less than one-third of the total third-party liability.

There are two liability provisions of the bill that may be subject to interpretation. First, the bill specifies that in an incident involving a DOT train and a freight train (or an “other train” and a

freight train) the department and the freight rail operator share responsibility one-half each (each pays 50 percent) as to damages to trespassers and third parties outside the rail corridor. In a case in which three trains are involved – a DOT train, a freight train, and an “other train” – the bill reiterates that the department and the freight rail operator share responsibility one-half each as to damages to third parties outside the rail corridor, but the bill is silent as to trespassers. Therefore, the treatment of trespasser damages in a three-train incident may be subject to interpretation.

Additionally, the bill specifies that in a freight-train-only accident the freight rail operator is solely responsible for all damages relating to incidents with trespassers or at grade crossings. In a DOT-train-only accident, the department is solely responsible for all damages relating to incidents with trespassers or at grade crossings. In an incident involving a DOT train (or an “other train”) and a freight train, the bill specifies that the department and the freight rail operator share responsibility one-half each as to damages to trespassers and third parties outside the rail corridor; however, the bill is silent as to damages relating to incidents at grade crossings. Therefore, the treatment of grade-crossing damages in a two-train (and also possibly a three-train) incident may be subject to interpretation.

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 of the insurance. The self-insurance fund or deductible shall not exceed \$10 million. 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 in offshore markets.

The intent of the insurance provision appears to be for DOT to have insurance to cover its own direct liability (e.g., for its own negligence) and to cover any risk it has contractually agreed to indemnify. The bill also contemplates that the freight rail operator will make a contribution to the cost of DOT’s insurance as part of the exchange for indemnification. However, in referencing contributions toward the insurance, the bill’s use of the term “insureds” and the phrase “for the sole benefit of the insured” may be subject to the interpretation that the freight rail operator and other contributing entities are actually named insureds, rather than additional insureds, whose contribution is for their particular protection.³⁰

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.

Significant differences from a comparable 2009 Regular Session commuter rail proposal include:³¹

³⁰ A “named insured” is a “person designated in an insurance policy as the one covered by the policy,” whereas an “additional insured” is a “person who is covered by an insurance policy but who is not the primary insured.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³¹ See SB 1212 and HB 7009 (2009 Reg. Session).

- In a freight-train-only accident, the freight rail operator pays damages relating to trespassers and for incidents involving grade crossings. In the 2009 Regular Session proposal, DOT would have paid such damages.
- In an incident involving a DOT train (or an “other train”) and a freight train, DOT and the freight rail operator will split (50 percent each) damages relating to trespassers. In the 2009 Regular Session proposal, DOT would have paid 100 percent of such damages.
- When there is a collision involving a DOT train and a freight train, and the freight operator’s conduct amounts to willful misconduct or results in the award of punitive or exemplary damages, DOT is only required to pay amounts in excess of its insurance deductible or self-insurance fund if the freight rail operator agrees to pay for the amount of the deductible or self-insurance fund. In the 2009 Regular Session proposal, under such circumstances, DOT would not have received a contribution or reimbursement from the freight rail operator based on the behavior. (The state would have been solely responsible for its property and all of its people, including commuter rail passengers, invitees, trespassers, and grade-crossing incidents, and would have shared in responsibility for damages awarded to third parties outside the rail corridor.)
- In this (2009-B) bill, the self-insurance retention fund or deductible shall not exceed \$10 million. In the 2009 Regular Session proposal, there was no such cap.

The bill provides that DOT is authorized to incur expenses for advertising, marketing, and promoting the rail system. Additionally, any procurement for the construction, operation, maintenance, and management of a state-owned rail corridor must follow the requirements of s. 287.057, F.S.,³² and shall include criteria for the consideration of qualifications, technical aspects of the proposal, and price. Any design-build contracts must be procured pursuant to the criteria in s. 337.11(7), F.S.³³

The bill also provides definitions for the following terms:

- “Ancillary development” includes any lessee or licensee of the department within a department-owned rail corridor. The term includes air and subsurface rights, services that provide a local area network for devices for transmitting data over wireless networks, and advertising.
- “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 thereon 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.

³² Section 287.057, F.S., relates to the procurement of commodities or contractual services. Generally, all such contracts for the purchase of commodities or contractual services in excess of \$25,000 must be done via a competitive sealed bid.

³³ Subsection (7) of s. 337.11, F.S., provides the requirements for procuring a design-build contract. Construction activities may not begin on any portion of a project until the department obtains title to all necessary rights-of-ways or easements.

- “Commuter rail service” means the transportation of commuter rail passengers and other passengers by rail provided by the department or any other governmental entity.
- “Governmental entity” or “entities” has the same meaning as in s. 11.45, F.S.,³⁴ including a “public agency” as defined in s. 163.01, F.S.³⁵
- “Limited covered accident” means a collision directly between the trains, locomotives, rail cars, or rail equipment of the department and the freight rail operator only, where the collision is caused by or arising from the willful misconduct of the freight rail operator or where punitive damages or exemplary damages are awarded due to the conduct of the freight rail operator.
- “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.
- “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.
- “Railroad” or “rail system” means any common carrier fixed-guideway transportation system, including the high-speed rail system defined in s. 341.8203, F.S.³⁶
- “Railroad operations” means the use of the rail corridor to conduct commuter rail service, intercity rail passenger service, or freight rail service.

Purchase of the Central Florida Rail Corridor

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.

The bill allows DOT to complete an escrowed closing on the pending Central Florida Rail Corridor acquisition. However, the drawing of the escrowed closing shall not occur unless and

³⁴ 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.

³⁵ 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.

³⁶ A “high-speed rail system” means “any high-speed fixed guideway system for transporting people or goods, which system is capable of operating at speeds in excess of 120 miles per hour.” Section 341.8203(6), F.S. Section 11 of HB 1-B, First Eng., proposes to revise this definition to use a standard speed of at least 110 miles per hour.

until Federal Transit Administration full-funding grant agreement approval is obtained for the proposed Central Florida Commuter Rail Transit Project Initial Operating Segment.

Impacts of Additional Freight on Local Communities

The bill addresses rail planning and impacts to local communities of additional freight traffic due to implementation of passenger rail. Specifically, the bill:

- Provides that the rail system plan may contain detailed regional components, consistent with the regional transportation plans, as needed to ensure connectivity within the state's regions, and include regional needs in the plan.
- Revises the updating requirement for the rail plan from at least every two years to at least every five years, beginning with an update by January 1, 2011. The rail plan must be accompanied by a status report to the Legislature.
- Recognizes DOT's role in the enhancement of the state's rail system to improve freight and passenger mobility, and requires DOT to:
 - Work closely with all affected communities along an impacted freight rail corridor to identify and address anticipated impacts of increased freight rail traffic due to the implementation of passenger rail.
 - Work with the impacted local governments and CSX Transportation Company to finalize all viable alternatives from DOT's Rail Traffic Evaluation Study to identify and develop an alternative route for through-freight rail traffic moving through Central Florida, to the extent practicable, the effects of commuter rail.
 - Requires DOT to provide technical assistance to a coalition of local governments in Central Florida, to develop a regional rail system plan that addresses passenger and freight opportunities in the region. This plan is to be consistent with the Florida Rail System Plan and the Long Range Transportation Plans of the impacted counties, incorporates appropriate elements of the Tampa Bay Area Regional Authority Master Plan, the Metroplan Orlando Regional Transit System Concept Plan, including the SunRail project, and the Florida Department of Transportation Alternate Rail Traffic Evaluation. The coalition includes Brevard, Citrus, Hernando, Hillsborough, Lake, Marion, Orange, Osceola, Pasco, Pinellas, Polk, Manatee, Sarasota, Seminole, Sumter, and Volusia counties and the municipalities within those counties. The regional rail system plan may include the design and implementation of a multi-use corridor.

Other Potential Implications:

As stated previously, the indemnification provisions in the bill reflect contractual contingencies in an agreement entered into by DOT and CSX Transportation, Inc., relating to the purchase of track and right-of-way for use by the Central Florida Commuter Rail Authority. 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.

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:

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,³⁷ and some courts have found that the language also preempts certain state laws.³⁸

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.³⁹ 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.⁴⁰ 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

³⁷ U.S. General Accounting Office, *supra* note 17, at 43.

³⁸ See *Deweese v. Nat’l R.R. Passenger Corp.*, 645 F. Supp. 2d 344 (E.D. Pa. 2009); *O & G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153 (2d Cir. 2008).

³⁹ *Deweese v. Nat’l R.R. Passenger Corp.*, 645 F. Supp. 2d 344 (E.D. Pa. 2009).

⁴⁰ *Id.* at 351-52.

obligation to indemnify Amtrak “is not subject to, nor limited by, the Pennsylvania sovereign immunity statute.”⁴¹

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.⁴² 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. 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.

This bill’s facilitation of passenger rail development impacts the private sector statewide through jobs created by the construction, operation, and other economic development associated with passenger rail systems.

C. Government Sector Impact:

The establishment of the Florida Rail Enterprise is accomplished through a restructuring of the current DOT organizational structure and no additional employees or appropriation

⁴¹ *Id.* at 353.

⁴² 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.

are required. One employee position would be reclassified from Selected Exempt status to Senior Management Service status resulting in a de minimis increase in retirement benefit contributions. The rail system planning provisions of the bill may result in additional workload to DOT, which can be accommodated without additional appropriation.

The bill allocates a portion of the additional revenues estimated by the November 2009 Transportation Revenue Estimating Conference (REC) in the State Transportation Trust Fund (STTF) to SFRTA as a dedicated funding source for Tri-Rail.

If SFRTA assumes responsibility for maintenance and dispatch of the South Florida Rail Corridor, DOT transfers to SFRTA, the first \$15 million of the increased revenues. If SFRTA does not assume responsibility for maintenance and dispatch of the corridor, DOT will transfer the first \$13.3 million of the increased revenues to the authority. Since the transfer of the additional funds (either \$15 million or \$13.3 million) comes from the increased revenues identified by the November REC there will be no impacts to projects in the DOT 5-year work program.

The bill requires DOT 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 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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.