

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 Committee

BILL: SB 1212

INTRODUCER: Senators Constantine and Gardiner

SUBJECT: Public Transit

DATE: February 24, 2009 REVISED: 3/4/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Eichin	Meyer	TR	Favorable
2.			JU	
3.			TA	
4.			WPSC	
5.				
6.				

I. Summary:

SB 1212 revises ss. 341.301 and 341.302, F.S., to provide additional direction for the development of the Florida Department of Transportation’s (FDOT) rail system program, and to provide authority to FDOT to contractually indemnify freight rail operators when using a rail corridor with commuter rail operations.

This bill substantially amends ss. 341.301 and 341.302, F.S.

II. Present Situation:

FDOT Rail Program

Section 341.302, F.S., ascribes the duties and responsibilities of FDOT in relation to the state’s rail program. FDOT, 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.

Section 341.302(3), F.S., specifically directs FDOT to develop and bi-ennially update the freight and passenger components of the rail system plan based on an analysis of statewide transportation needs. This biannual Florida Rail Plan is the rail component of the Florida Transportation Plan, which is, in turn, the transportation component of the State Comprehensive Plan. The Florida Rail Plan identifies the priorities, programs, and funding levels required to meet statewide needs, assuring the maximum use of existing facilities and the optimum integration and coordination of the various modes of transportation, public and private, in the most cost-effective manner possible.

Liability on Rail Corridors

The introduction of passenger operations on rail corridors previously used exclusively for freight operations inherently raises the freight carriers' risk of liability due to the increased numbers of persons and trains present within the corridor. When this occurs, freight operators have typically required the passenger rail operator to assume a substantial portion of the liability risk, irrespective of which entity owns the corridor. For example, in the 1970's when Amtrak contracted with freight railroads to operate passenger rail service within freight corridors, the agreements were predicated on a no-fault allocation of liability. A typical agreement would indemnify the freight operators for any injury, death, or property damage to any Amtrak employees, Amtrak property, or Amtrak passengers, and the freight operators would indemnify and hold harmless Amtrak for any injury, death, or property damage to their employees and property. Freight operators have claimed that but for the presence of the trains and persons placed on the corridor by the passenger service, such liability would not exist.

In 1988, FDOT and CSX Transportation, Incorporated (CSX) entered an agreement selling a segment of CSX track and right-of-way (eventually totally about 81 miles) to the State, allowing commuter rail (Tri-Rail) to operate in South Florida. The agreement included a no-fault allocation of liability where CSX pays 100% of all freight damages, FDOT pays 100% of all commuter rail damages, and both parties equally share the liability for third-party damages outside the corridor when both parties are involved. The agreement also required FDOT to establish a \$5 million self-insurance fund and to obtain \$120 million of insurance. FDOT was authorized to enter the agreement by proviso language.

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) from the provisions of ch. 287, F.S. 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. Since this time, the annual premium costs have fluctuated between \$1.8 million in 1992 and \$634,000 in 2002. In 2008, Tri-Rail's liability premium was \$1.35 million.

III. Effect of Proposed Changes:

Generally, the bill revises s. 341.302, F.S., to:

- provide additional direction in the development of the rail system plan, particularly in regards to regional components, and to
- grant authority to FDOT to contractually indemnify freight rail operators up to \$200 million in conjunction with owning and using rail corridors.

Rail System Planning

Section 341.302(3), F.S., is amended to increase the update cycle for the rail system plan from once every two years to once every 5 years and to require the plan to be accompanied by a report to the Legislature. The rail system planning process is revised to include regional perspectives

and allow for regional components with particular direction to address the improvement of freight and passenger mobility in Central Florida. The department is directed to:

- Work closely with the City of Lakeland and Polk County to identify and address impacts associated with increased rail freight traffic;
- Identify and develop, if feasible, an alternative route for freight which would bypass the City of Lakeland;
- 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. Counties to be provided assistance include:
 - Brevard
 - Citrus
 - Hernando
 - Hillsborough
 - Lake
 - Marion
 - Orange
 - Osceola
 - Pasco
 - Pinellas
 - Polk
 - Manatee
 - Sarasota
 - Seminole
 - Sumter
 - Volusia

The regional rail system 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 FDOT Alternate Rail Traffic Evaluation.

Indemnification

A new paragraph (17) is added to s. 341.302, F.S., providing FDOT authority to indemnify and hold harmless freight rail operators from whom the department has purchased real property within the corridor and its agents from liability, regardless of fault. The paragraph allocates liability (irrespective of fault) as follows:

- If only a freight train is involved in an accident, then the freight operator pays 100 percent of injury or damage (except for any commuter rail passengers, invitees, or trespassers in the corridor.)
- If only a commuter train (or any other train not operated by the freight operator) is involved in an accident, then FDOT pays 100 percent of injury or damage.
- If both a freight train and a commuter train collide, then the freight operator pays 100 percent of all freight damage including any persons on its train, FDOT pays for 100 percent of the commuter train and passenger damage including people within the corridor, and the freight operator and FDOT each pay 50 percent of any third party damage resulting outside the corridor.

FDOT's duty to indemnify a freight rail operator is capped at \$200 million; any liability above that amount is the responsibility of the freight operator. FDOT is required and authorized to maintain a \$5 million self insurance retention fund to cover any deductible and to carry \$200 million of liability insurance, inclusive of punitive damages, provided the freight operator contributes to the cost of coverage as a sole beneficiary. The provisions of s. 287.022 (1), F.S., which require DMS to purchase all insurance for state agencies, do not apply, effectively allowing FDOT to purchase insurance from offshore companies.

The bill specifies neither the indemnification, purchase of insurance, nor retention of self-insurance may be deemed to be a waiver of sovereign immunity for torts nor increase a governmental entities liability for torts.

The bill also provides definitions for the following terms as used in ss. 341.302 and 341.303, F.S.:

- Commuter rail passenger
- Commuter rail service
- Rail corridor invitee
- Rail corridor
- Railroad operations
- Ancillary development, and
- Governmental entity

Other Potential Implications:

The indemnification provisions in the bill reflect contractual contingencies in an agreement entered into by FDOT and 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 follows:

Central Florida Commuter Rail (SunRail)

FDOT, in cooperation with the federal government and local governments in Orange, Seminole, Volusia and Osceola, 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 FDOT starts a major 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 and North from DeBary to DeLand – 30 miles

Stations

- 10 - 12 stations planned for Phase I. 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 FDOT with policy direction during the planning, design, construction and first seven years of operation for the Central Florida Commuter Rail 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

(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 FDOT 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

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

Source: FDOT

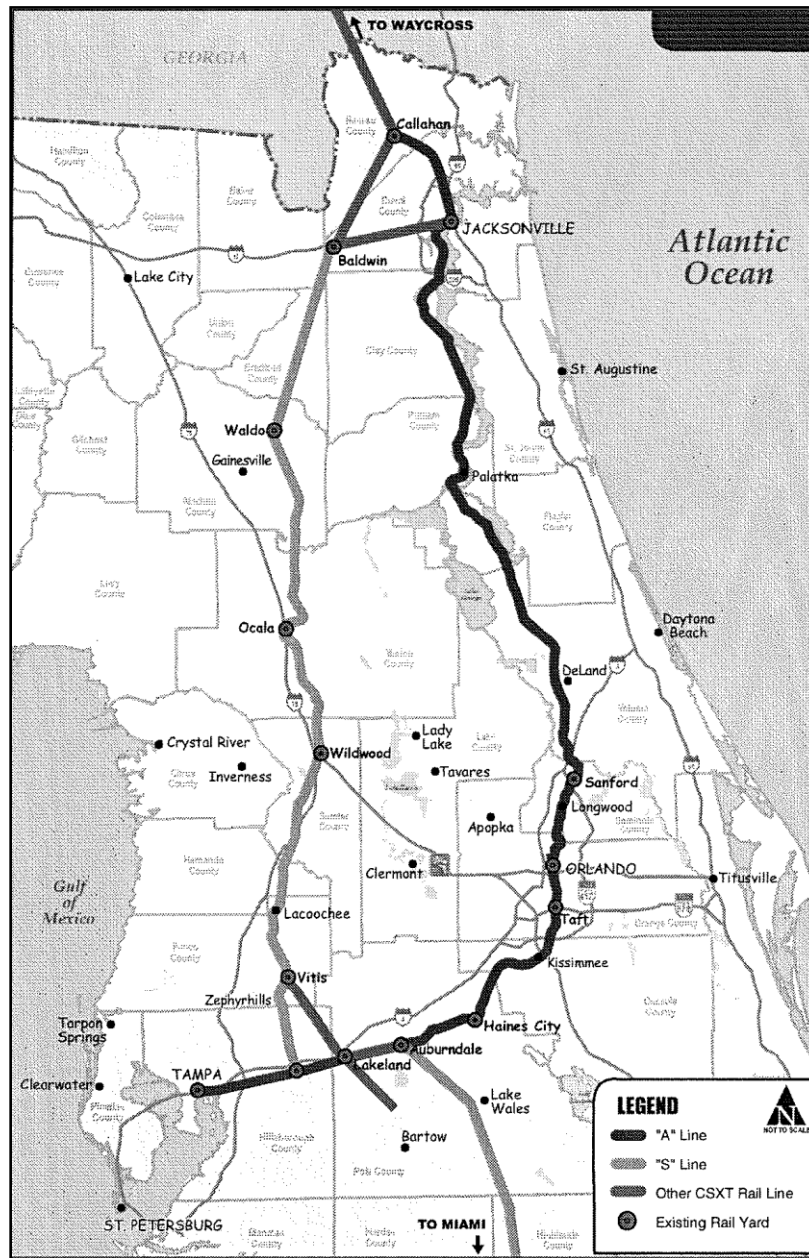
Summary of Agreement between FDOT and CSX

On August 2, 2006, FDOT 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.

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.

- FDOT assumption of all maintenance and dispatch responsibilities along the 61.5 mile Central Florida corridor. After 7 years, the Central Florida Commuter Rail Commission assumes responsibility.
- CSX will re-route at least 6 daily freight trains to the “S- line” but retains an easement on the “A-Line” for exclusive freight operations. CSX will compensate FDOT for the use of the line.
- Relocation of Taft intermodal operations to the new Integrated Logistics Center (ILC) in Winter Haven.



Source: FDOT

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

- FDOT/South Florida Regional Transportation Authority (SFRTA) assume control of dispatch and maintenance responsibilities with no responsibility of labor protection for CSX employees.
- As a result, FDOT and CSX have revised the maintenance cost sharing formula and adopted a per car charge structure. Under the agreement, CSX will pay FDOT \$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 also provided 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 FDOT Rail System Plan as the Central Florida Freight Rail Capacity Projects.
 - An additional 20 CSX projects to expand capacity on other portions of the 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 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

Estimated Cost of CSX Agreement

Item	Amount (millions)
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 FDOT's minimum pledge to the counties and communities. CSX agreed to use this amount as a credit towards the \$491 million in the purchase agreement. These improvements will take place regardless of whether the CSX agreement moves forward or not.

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>

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill does not directly convey any fiscal instrument to a private sector entity. However, freight rail operators from whom FDOT 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 FDOT and CSX to purchase CSX property for the purpose of operating commuter rail in Central Florida. The agreement stipulates 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 FDOT’s Strategic Intermodal System programmed for funding in the department’s work program.

Under the terms of the agreement, CSX will pay the State 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.

C. Government Sector Impact:

The rail system planning provisions of the bill will result in additional workload to FDOT which can be accommodated without additional appropriation.

The indemnification provisions do not require additional budget or appropriation. However, the Department of Financial Services¹ 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.”

and:

“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

¹ In a memorandum to Chief Financial Officer Alex Sink from Dan Sumner, General Counsel dated February 6, 2008.

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.”

VI. Technical Deficiencies:

The word “integrated” is misspelled on line167.

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 Winter Haven ILC.

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.