

DERAILING BRIGHTLINE

THE COST OF TAXPAYER-FUNDED LAWSUITS

JANUARY 2018



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Dear Fellow Taxpayer:

By the year 2035, it is expected that more than 25 million people will call Florida home. This growth will put tremendous pressure on the state's intermodal transportation system and challenge our ability to safely and efficiently move people and goods from one region of the state to another. Many urban and interregional highway corridors will experience heavy congestion, and not just during peak hours. Many of Florida's airports and seaports will operate at or near capacity. The number of intercity trips is expected to increase to nearly 200 million trips in 2020, and to 320 million trips in 2040.

There is strong public support for improved intercity passenger rail service as a way to reduce highway congestion and provide travelers with an additional means of transportation. Improved rail service is an integral component of the state's intermodal transportation system planning efforts. All Aboard Florida has proposed to construct and operate an express train service, called "Brightline" which, when completed, will provide express passenger rail service from Miami to West Palm Beach, and then to Orlando. Unlike other high-speed rail projects, this project does not require public grants. Ridership risk will be borne by the private sector.

The minimal number of stops and concerns about safety have prompted opponents from the Treasure Coast region to pursue legislative and legal actions intended to derail Brightline. Millions of taxpayer dollars have been spent to stop this privately-funded activity which is in the best interest of the state. These taxpayer-funded legal actions call into question the wisdom of trying to stop Brightline, instead of working with All Aboard Florida to identify and mitigate the local governments' concerns.

The All Aboard Florida project is filling a public need using private funds. Florida TaxWatch believes such enterprises should be encouraged rather than discouraged.

Sincerely,

Dominic M. Calabro
President & CEO

EXECUTIVE SUMMARY

Rail transportation will play an increasingly important role in meeting the mobility needs of Florida residents, businesses, and visitors. Florida's continued population growth will add to the congestion on Florida's urban and interregional highway corridors and create a need for greater transportation capacity to accommodate the movement of people and goods from one region of the state to another.

All Aboard Florida (AAF) is a privately-owned and operated intercity passenger rail service. When fully operational, AAF will provide express passenger rail service (known as "Brightline") from Miami to Orlando, with stops in Ft. Lauderdale and West Palm Beach. With top speeds ranging from 79 mph to 125 mph, and a minimal number of planned stops between Miami and Orlando, Brightline will offer passengers an opportunity to travel from Orlando to Miami in roughly three hours.

Unlike other high-speed rail projects, Brightline will not require direct taxpayer appropriations. Ridership risk will be borne by the private sector. Funding for the construction and operation of Brightline will come from a combination of tax-exempt private activity bonds (PABs), which are backed by project revenues, and federal Railroad Rehabilitation and Improvement Financing (RRIF) Program loans and loan guarantees. Should the project default, only those who invested in the project are on the hook, not the taxpayers.

When completed, Brightline will pass through the Treasure Coast region of the state without any planned stops. This has prompted local governments in the Treasure Coast region to pursue legislative and legal remedies in an attempt to derail Brightline.

During the 2017 legislative session, legislators from the Treasure Coast region filed proposed bills (HB 269 / SB 386) that, if passed, would give state and local governments additional authority to regulate intrastate "high-speed" passenger rail systems in Florida, and would require AAF to assume responsibility and costs for maintaining grade crossings. Both bills died in committee.

Indian River and Martin counties filed federal lawsuits challenging the funding plan for Brightline. The counties also asserted the noise, vibration, air emissions, and traffic delays generated by Brightline would have adverse effects on the conservation and natural areas that abut the rail corridor and on numerous historic resources within their boundaries. The counties also expected to see reduced property and sales tax revenues, and reduced tourist development tax revenues. When the USDOT rescinded its approval for \$1.75 billion of tax-exempt private activity bonds to fund Phase II of Brightline, the U.S. District Court dismissed the counties' lawsuits.

Indian River County and the Indian River Farms Water Control District, a special district funded by taxpayer dollars, filed petitions for an administrative hearing challenging the St. Johns River Water Management District's (SJRWMD's) proposed issuance of Environmental Resource Permit (ERP) No. 135214-2. The ERP would allow AAF to widen existing railway bridges over Indian River County waterways which, according to the Petitioners, would increase the risk of flooding. Indian River County eventually withdrew its petition. After a final evidentiary hearing in January 2017, the Administrative Law Judge issued an order in March 2017 recommending issuance of the ERP. The ERP was issued in June 2017.

Martin and St. Lucie counties filed petitions for an administrative hearing challenging the proposed agency action of the South Florida Water Management District (SFWMD) to issue a modification of ERP 13-05321-P to AAF. After a final hearing, the Administrative Law Judge issued an order in September 2017 recommending issuance of the ERP.

All told, the counties have spent \$6.8 million to derail Brightline. The counties have very little to show for their \$6.8 million expenditure. To continue to spend taxpayer dollars in an effort to delay Brightline further or otherwise make it more expensive to construct and operate Brightline is not good public policy.

Florida needs Brightline. Brightline is part of a larger statewide strategy to reduce congestion on Florida's highways and increase the mobility of business travelers, Florida residents, and tourists. Brightline will provide, at no cost to taxpayers, benefits to the state in the form of reduced traffic congestion, job creation and labor income, improved air quality, and improved health and safety.

Brightline will divert an estimated 1.5 million passengers annually from other modes of transportation and, in so doing, will decrease harmful emissions and improve overall air quality. Brightline is projected to create 1,100 new jobs which will generate \$294 million in labor income through the year 2021. The direct economic benefit to the state because of Brightline is projected to exceed \$915 million.

It is not too late for the parties to pursue a settlement agreement to resolve this dispute. One solution that has been proffered is for AAF to establish a Brightline stop somewhere in the Treasure Coast region. If an additional stop could be incorporated into Brightline's route without significantly increasing Brightline's estimated 3-hour travel time from Miami to Orlando, then taxpayers and travelers could claim a "win-win." Hopefully, that train has not yet left the station.

INTRODUCTION

America's love affair with trains began in the 1860s with the creation of the first intercontinental railroad. Linking the east and west coasts by rail opened new opportunities for commerce and began a love affair between Americans and trains that continues to this day. The construction of additional railroad lines facilitated the establishment and growth of towns in the Midwest and West by providing a relatively rapid means of transporting goods and people. Towns depended on the railroads and, therefore, were developed along railroad lines. In the East, railroads were built to serve existing towns and cities.¹

Today, railroads are major movers of bulk materials and products such as chemicals, equipment, coal, lumber and forest products, motor vehicles, and food products. In addition, a limited number of publicly and privately-operated passenger services operate on Class I railroads.

Rail transportation will play an increasingly important role in meeting the mobility needs of Florida residents, businesses, and visitors. Florida's continued population growth will add to the congestion on Florida's urban and interregional highway corridors and create a need for greater transportation capacity to accommodate the movement of people and goods from one region of the state to another. Since no single mode of transportation can be expected to meet the growing demand for mobility, Florida has invested in a multi-modal, interconnected transportation system (Strategic Intermodal System) that will position Florida well to compete globally in the 21st century.

The Florida Rail System Plan² ("Plan") provides a statewide vision for Florida's rail transportation system that recognizes the vital role that passenger and freight rail will play in meeting Florida's future mobility demands. Passenger rail will steadily become more important as an alternative to the congestion on Florida's highways and increase the mobility of tourists, business travelers, and citizens, especially older Floridians.³

The Plan identifies several "key implementation strategies," including a focus on using rail to move passengers and freight between centers of population. The Plan also promotes and encourages the use of public-private partnerships to fund future rail projects, when such projects are "in the public interest."

1 U.S. Department of Transportation, "Railroad-Highway Grade Crossing Handbook, Revised Second Edition," August 2007.

2 Florida Department of Transportation, "The Florida Rail System Plan: Policy Element," March 2009.

3 Ibid.

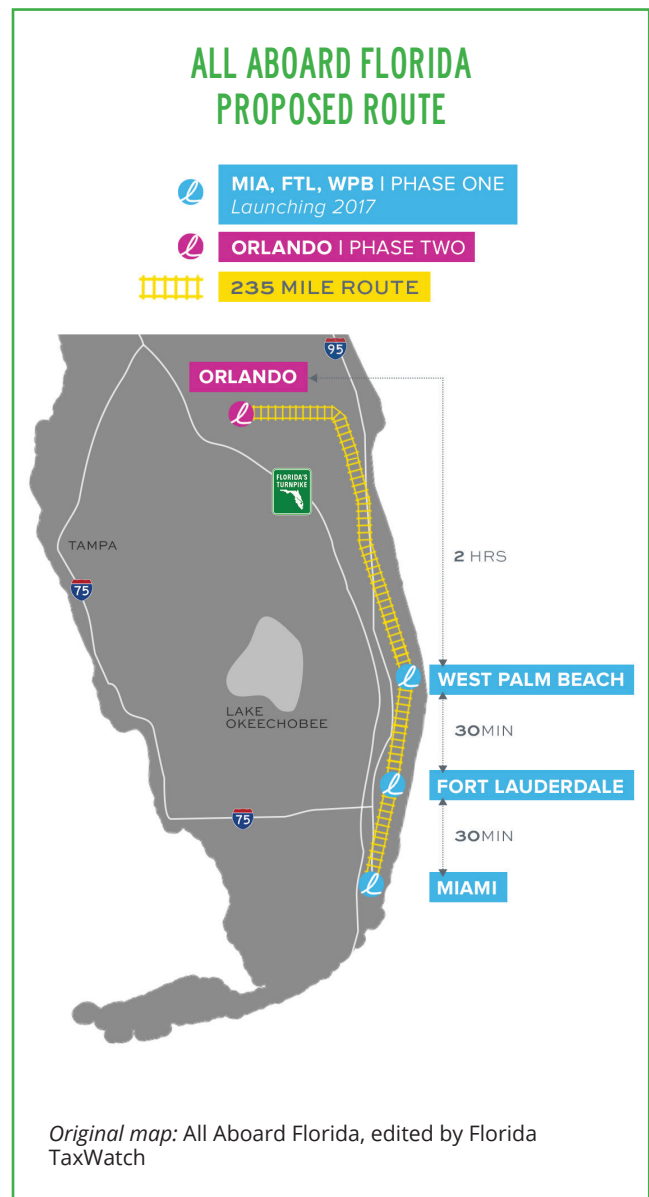
ALL ABOARD FLORIDA

All Aboard Florida (AAF) is a privately-owned and operated intercity passenger rail service. When fully operational, AAF will provide express passenger rail service (known as “Brightline”) from Miami to Orlando, with stops in Ft. Lauderdale and West Palm Beach (See Figure 1). With top speeds ranging from 79 mph to 125 mph, and a minimal number of planned stops between Miami and Orlando, Brightline will offer passengers an opportunity to travel from Orlando to Miami in roughly three hours.⁴

Phase I of the Brightline project includes the construction of three new rail stations in Miami, Ft. Lauderdale and West Palm Beach; the purchase of five new train sets; the construction of a second track along an existing 66.5-mile corridor of the Florida East Coast Railroad; and adding 16 round-trip (32 one-way) trips on the West Palm Beach to Miami corridor section of the FECR corridor. Phase II involves the construction of additional new tracks extending Brightline’s passenger rail service from West Palm Beach to Orlando, and the construction of a new rail station at the Orlando International Airport.⁵

Scheduled to begin service from Miami to Ft. Lauderdale and West Palm Beach during the first quarter of 2018, AAF estimates that Brightline will take 3,000,000 vehicles off congested South and Central Florida roadways each year, saving time and fuel and reducing carbon emissions.⁶

AAF estimates a direct impact of more than \$6 billion on Florida’s economy over the next eight years, creating more than 10,000 jobs each year during rail and infrastructure construction.⁷



4 Retrieved from <http://www.allaboardflorida.com>, October 18, 2017.

5 Martin County, “Complaint for Injunctive and Declaratory Relief,” Case 1:15-cv-00632, filed 04/27/15.

6 Letter from Michael Reininger, AAF President and Chief Development Officer, to Paul Baumer, U.S. Department of Transportation, transmitting AAF’s application for Private Activity Bonds, August 15, 2014.

7 Ibid.

BRIGHTLINE FUNDING

Unlike other high-speed rail projects, Brightline will not require the direct appropriation of public funds. Ridership risk will be borne by the private sector. Funding for the construction and operation of Brightline will come from a combination of tax-exempt private activity bonds (PABs), which are backed by project revenues, and federal Railroad Rehabilitation and Improvement Financing (RRIF) Program loans and loan guarantees. Should the project default, only those who invested in the project are on the hook, not the taxpayers.⁸

In December 2014, the U.S. Department of Transportation (USDOT) approved AAF's application for \$1.75 billion in tax-exempt PABs to build and operate the West Palm Beach - Orlando segment (Phase II) of Brightline. PABs are issued by a governmental entity, in this case the Florida Development Finance Corporation (FDIC), to encourage private sector investment in infrastructure projects when those projects serve certain defined public purposes. What distinguishes PABs from other bonds is that their proceeds chiefly benefit a private business.⁹

In November 2016, at the request of AAF, the USDOT rescinded its approval for \$1.75 billion of tax-exempt PABs and instead approved \$600 million in PABs for the Miami-West Palm Beach segment (Phase I) of the project.¹⁰ In December 2017, AAF announced that the USDOT had approved an additional \$1.15 billion PAB allocation.¹¹

To fund Phase II of the project, AAF applied for \$1.6 billion in federal funds through the RRIF Program. RRIF is both a federal loan and loan guarantee program administered by the Federal Railroad Administration (FRA) for the development and improvement of railroad tracks, equipment, and facilities.¹² The RRIF Program was created to offer long-term, low-cost loans to railroad operators to help them finance improvements to infrastructure and investments in equipment.

The RRIF Program is intended to operate at no cost to the government, and it does not receive an annual appropriation. Applicants are charged a fee of 0.5% of the amount requested to cover the cost of processing their applications. Borrowers are charged another fee (the credit risk premium) at the time a loan is issued, which is intended to offset the risk of a default on their loan.¹³ The interest rate on RRIF loans must be not less than the rate necessary to recover the cost of making the loan. The credit risk premium attributable to each drawdown request must be paid on a pro rata basis prior to each disbursement.¹⁴

⁸ Florida TaxWatch, "All Aboard Florida Facing a Rough Track Ahead," Session Spotlight, March 2017.

⁹ Stephanie M. Rochel, "Private Activity Bonds: An Introduction and Look Ahead," retrieved from <http://watttieder.com/resources/articles/private-activity-bonds>, July 24, 2017.

¹⁰ Lisa Broadt, "All Aboard Florida Withdraws Funding Plan, Gets Federal OK for Another," TCPalm, November 29, 2016.

¹¹ All Aboard Florida, "Brightline Receives Approval From U.S. DOT on \$1.15 Billion Private Activity Bond Allocation, News Release, December 22, 2017.

¹² Indian River and Martin counties, "Memorandum Opinion," Case 1:15-cv-00460-CRC, Document 29, filed 06/10/15.

¹³ David Randall Peterman, "The Railroad Rehabilitation and Improvement Financing (RRIF) Program," Congressional Research Service, May 15, 2017.

¹⁴ U.S. Department of Transportation, "Railroad Rehabilitation & Improvement Financing Program Guide," July 2014.

TAXPAYER-FUNDED LOCAL GOVERNMENT ACTIONS

When completed, Brightline will pass through the Treasure Coast region of the state without any planned stops. This has prompted opponents in the Treasure Coast region to pursue legislative and legal remedies in an attempt to derail Brightline.

INDIAN RIVER AND MARTIN COUNTIES VERSUS USDOT

In March 2015, Indian River County filed a federal lawsuit challenging the funding plan for Brightline. Indian River County contended that the allocation of \$1.75 billion in PABs was unlawful because, as of the date the allocation was approved, no Final Environmental Impact Statement (FEIS) or Record of Decision had been issued.¹⁵ The County alleged that the allocation of PABs violated the National Historic Preservation Act for similar reasons. Indian River County contended that the USDOT's letter of approval constituted "final agency action," an action that was taken before the FEIS was completed. Indian River County also contended that the Brightline project would degrade the quality of life in the County, harm tourism that is vital to the County's economy and tax revenues, adversely affect socioeconomic conditions along the rail corridor, and degrade environmental areas within the County.¹⁶

In April 2015, Martin County filed a federal lawsuit, similar to the lawsuit filed by Indian River

County, challenging the funding plan for Brightline. In its complaint, Martin County also contended that the statutory authority referenced by AAF as the basis for eligibility to receive funds does not permit the USDOT to allocate PABs to AAF. The County maintained that Title 23 of the United States Code permits funds to be used to eliminate hazards at railway-highway grade crossings, but does not permit PABs to be used to fund the entire project, as proposed by AAF.¹⁷

Martin County also contended that the disruption caused by 32 passenger trains passing through the County each day at speeds of more than 100 miles per hour would result in traffic tie-ups near railroad crossings; increase closures of the St. Lucie River Bridge (drawbridge); increase maritime wait times; create safety concerns, noise, and harm to County parks; and damage to neighborhoods and environmental resources.¹⁸

In June 2015, the Court found that the counties' concerns about the impact of PAB authorization on FRA's environmental review do not, standing alone, establish a redressable injury that can form the basis of a federal lawsuit. The Court found that the counties had not met their burden of demonstrating standing because they had failed to show that enjoining¹⁹ USDOT's authorization would significantly increase the likelihood of halting construction on Phase II of the project, the portion that runs through their borders.²⁰

The Court did, however, grant the counties' request to conduct additional (jurisdictional) discovery.

¹⁷ 23 U.S.C. § 101(a)(4)(E).

¹⁵ The NEPA requires that an environmental review be completed before the USDOT takes any final action. The NEPA also requires federal agencies to assess reasonable alternatives, and to document that assessment as part of the FEIS.

¹⁶ Indian River County, "Complaint for Injunctive and Declaratory Relief," Case 1:15-cv-00460, filed 03/31/15.

¹⁸ Martin County, "Complaint for Injunctive and Declaratory Relief," Case 1:15-cv-00632, filed 04/27/15.

¹⁹ A legal term to order someone to do something or to prohibit someone from doing something.

²⁰ United States District Court for the District of Columbia, "Memorandum Opinion," Case 1:15-cv-00632-CRC, filed 06/10/15.

This afforded the counties an opportunity to uncover additional evidence to support their contention that, without issuance of the \$1.75 billion in tax-free PABs, AAF would be less likely to proceed with the project. In August 2016, the Court found that invalidating USDOT's decision to authorize \$1.75 billion in PABs would significantly increase the likelihood that AAF would not complete Phase II of the project. The Court concluded that the counties had now met their burden of demonstrating standing.²¹

In November 2016, at the request of AAF, the USDOT rescinded its approval for \$1.75 billion of tax-exempt PABs and instead approved \$600 million of PABs for the Miami-West Palm Beach segment (Phase I) of the project.²² In May 2017, the Court dismissed the counties' lawsuits. The Court found that, absent the PABs, AAF's ability to fund the West Palm Beach – Orlando segment (Phase II) would decrease significantly, thereby averting any injuries alleged by the counties.

INDIAN RIVER COUNTY VERSUS FDFC

In August 2015, Indian River County filed a lawsuit challenging the FDFC's decision to issue \$1.75 billion in tax-exempt PABs in the Florida Second Judicial Circuit (Tallahassee).²³ The County asserted that: (1) the FDFC failed to disclose certain ex parte communications at the Board meeting at which the decision to issue the PABs was made; and (2) the decision to approve issuance of the PABs was made in the absence of a quorum. In June 2016, the Court issued a final order finding that the County had failed to

establish standing to challenge FDFC's decision and dismissing the County's claim.²⁴

MARTIN COUNTY VERSUS FDFC

In August 2015, Martin County petitioned the FDFC for formal administrative proceedings challenging the decision to issue \$1.75 billion in tax-exempt PABs. In September 2015, FDFC denied the Petition on grounds that: (1) FDFC is not an agency that is subject to Florida's Administrative Procedures Act; and (2) the County had failed to demonstrate sufficient standing.²⁵

The County subsequently appealed FDFC's denial of the petition with the Florida Fourth District Court of Appeal. In October 2015, the Court ruled against the County and denied the petition.

In September 2015, Martin County filed a lawsuit, similar to that filed by Indian River County, challenging the FDFC's decision to issue \$1.75 billion in tax-exempt PABs in the Florida Ninth Judicial Circuit (Orlando).²⁶ The County asserted that: (1) it was not afforded sufficient notice and opportunity to be heard; (2) the FDFC failed to disclose certain ex parte communications at the Board meeting at which the decision to issue the PABs was made; (3) the FDFC improperly applied its enabling statute in approving the PABs; and (4) the FDFC's decision was not supported by competent and substantial evidence. Later that month, Martin County withdrew its claim and the case was dismissed with prejudice.

21 United States District Court for the District of Columbia, "Memorandum Opinion," Case 1:15-cv-00632-CRC, issued 08/16/16.

22 Lisa Broadt, All Aboard Florida Withdraws Funding Plan, Gets Federal OK for Another, "TCPalm," November 29, 2016.

23 Indian River County v. FDFC, et. Al., Case No. 2015 AP 000040 (Fla. Cir. Ct.).

24 Final Order, Indian River County v. FDFC, et. Al., Case No. 2015 AP 000040 (Fla. Cir. Ct.), June 10, 2016.

25 Martin County v. FDFC et al., Case No. 4D15-3467 (Fla. 4th Dist. Ct. Appeal).

26 Martin County v. FDFC, et al., Case No. 2015-CA-008256-O (Fla. Cir. Ct.).

INDIAN RIVER FARMS WATER CONTROL DISTRICT VERSUS ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

In August 2016, Indian River Farms Water Control District (“IRFWCD”), a special district funded by taxpayer dollars, filed a petition for an administrative hearing with the St. Johns River Water Management District (SJRWMD) challenging the District’s proposed issuance of Environmental Resource Permit (ERP) No. 135214-2. The ERP would allow AAF to widen existing railway bridges over Indian River County waterways which, according to the petitioners, would increase the risk of flooding. In September 2016, the SJRWMD dismissed the IRFWCD’s petition on grounds that the petition failed to substantially comply with the rules governing the required contents of petitions for administrative hearings.²⁷

The IRFWCD filed an amended petition challenging the proposed ERP, which the SJRWMD forwarded to the Division of Administrative Hearings (DOAH) for review. In October 2016, the DOAH Administrative Law Judge issued an order dismissing the petition. In November 2016, the IRFWCD filed a second amended petition which was also dismissed by the Administrative Law Judge. After a final evidentiary hearing in January 2017, the Administrative Law Judge issued an order in March 2017 recommending issuance of the ERP. The ERP was issued in June 2017.

INDIAN RIVER COUNTY VERSUS ALL ABOARD FLORIDA

In September 2016, Indian River County also filed a petition for an administrative hearing with the SJRWMD challenging the District’s proposed

issuance of ERP No. 135214-2.²⁸ In November 2016, the County subsequently withdrew its petition and the matter was closed.

MARTIN AND ST. LUCIE COUNTIES VERSUS ALL ABOARD FLORIDA

In September 2016, St. Lucie and Martin counties jointly filed a petition requesting an administrative hearing concerning the proposed agency action of the South Florida Water Management District (SFWMD) to issue a modification of ERP 13-05321-P to AAF.²⁹ The SFWMD issued an order striking portions of the Petition and referred the remaining issued to DOAH. After a final hearing, the Administrative Law Judge issued an order in September 2017 recommending issuance of the ERP. In December 2017, AAF announced that the final SFWMD permits required for the construction of the segment between Cocoa and Orlando had been secured.³⁰

LEGISLATION

During the 2017 legislative session, Legislators from the Treasure Coast region filed proposed bills (HB 269 / SB 386) that, if passed, would give state and local governments additional authority to regulate intrastate “high-speed” passenger rail systems in Florida, and would require AAF to assume responsibility and costs for maintaining grade crossings. A Committee Substitute for SB 386 was approved by the Senate Transportation Committee and referred to the Senate Community Affairs Committee, where it was indefinitely postponed and withdrawn from consideration. HB 269 was referred to the Transportation &

27 Indian River Farms Water Control District a. All Aboard Florida – Operations, LLC, et al., Case No. 16-006165 (Fla. Div. Admin. Hrgs.).

28 Indian River County v. All Aboard Florida – Operations, et al., Case No. 16-005720 (Fla. Div. Admin. Hrgs.).

29 Martin County and St. Lucie County v. All Aboard Florida – Operations, LLC and Florida East Coast Railway, LLC, Case Nos. 16-5718 & 17-2566 (Fla. Div. Admin. Hrgs.).

30 All Aboard Florida, “Brightline Receives Approval From U.S. DOT on \$1.15 Billion Private Activity Bond Allocation, News Release, December 22, 2017.

Infrastructure Subcommittee, where it too was indefinitely postponed and withdrawn from consideration. Both bills died in committee.

TAXPAYERS FOOT THE LEGAL BILL

The legal challenges mounted by Martin, St. Lucie, and Indian River counties are costing taxpayers a considerable amount of money. Taxpayer moneys have funded outside legal counsel (i.e., eminent domain, and rail safety) as well as numerous consultant and professional services. All told, as of October 2017, the counties have spent more than \$6.8 million in an attempt to derail Phase II of Brightline:

- Martin County has spent \$3,478,600;³¹
- St. Lucie County has spent \$1,096,247;³² and
- Indian River has spent \$2,254,063.³³

In January 2018, the Martin County Commission voted to join Indian River County and renew their federal court challenge against Brightline. The Martin County Commission voted to set aside up to \$350,000 to pursue alleged violations of the National Environmental Policy Act and challenge the recent USDOT allocation of PABs.³⁴

ISSUES IN DISPUTE

The legal and legislative actions initiated by Indian River, St. Lucie, and Martin counties were based upon concerns that the noise, vibration, air emissions, and traffic delays generated by Brightline would have adverse effects on public safety, the conservation and natural areas that abut the rail corridor, and on numerous community resources within their boundaries. The counties alleged that Brightline would also reduce property and sales tax revenues, and reduce tourist development tax revenues.

AUTHORITY TO ISSUE PABs

The lawsuits filed by Indian River and Martin counties alleged that the USDOT's authorization of \$1.75 billion of tax-exempt PABs to build the Brightline project was unlawful because, as of the date the authorization was approved, no Final Environmental Impact Statement (FEIS) or Record of Decision had been issued. The National Environmental Policy Act of 1969 (NEPA) requires that an environmental review be completed before the USDOT takes any final action. The NEPA also requires federal agencies to assess reasonable alternatives, and to document that assessment as part of the FEIS. The counties contended that the USDOT's letter of approval constituted "final agency action," an action that was taken before the FEIS was completed.

Martin County also contended that the statutory authority referenced by AAF as the basis for eligibility to receive funds does not permit the USDOT to allocate PABs to AAF. Martin County alleged that Title 23 of the United States Code permits funds to be used to eliminate hazards at railway-highway grade crossings, but does not permit PABs to be used to fund the entire

31 October 3, 2017 e-mail from Martin County Attorney's Office.

32 October 3, 2017 e-mail from St. Lucie County Attorney's Office.

33 Retrieved from <https://ircgov.legistar.com/DepartmentDetail.aspx?ID=31089&GUID=EC7BF96E-D862-4E37-AF5F-93195F7F6ECF&Mode=MainBody>, October 3, 2017.

34 Lisa Broadt, "Brightline Federal Court Case to be Renewed by Martin, Indian River Counties," TCPalm, January 10, 2018.

project, as proposed by AAF.³⁵ The USDOT, however, determined that AAF is eligible for a PAB allocation as a surface transportation project that receives federal assistance under Title 23 to eliminate railway-highway crossing hazards.

RESPONSIBILITY FOR RAILROAD CROSSING MAINTENANCE COSTS

Under existing railroad crossing agreements, local governments along the rail lines usually have the responsibility for crossing signal installation, track bed and roadway surface improvements, pedestrian gates and sidewalks, and crossing maintenance costs.³⁶ Under the proposed Florida High-Speed Passenger Rail Safety Act (HB 269 / SB 386), however, AAF would be responsible for paying all of these costs. AAF would also be responsible for the costs to construct and maintain fencing on both sides of its tracks.

As rail service expanded near the end of the 19th century, many communities both welcomed and actively encouraged the construction of new railroad lines. As the railroad system grew, so too did the communities. Railroads were allowed to build their tracks across existing streets and roads at grade level, primarily to avoid the high capital costs of grade separations.³⁷ At first, there were few safety concerns at highway-rail grade crossings. The trains were slow and few in number, and most of the highway travel was by horse, horse-drawn carriages, bicycles, or by foot.

With the advent of automobile travel in the 1900s, safety and delays at highway-rail grade crossings became more of a concern. As the number of highway miles increased, so too did

the number of highway-rail grade crossings. Many states, cities, and towns adopted laws, ordinances, and regulations that required the railroads to eliminate some crossings and provide safety improvements at others.³⁸

In 1893, the Supreme Court, in *New York and N. E. Ry. v. Town of Bristol*, upheld a Connecticut statute that required the railroads to pay three-fourths the costs to improve or eliminate crossings where the highway was in existence before the railroad. If the highway was constructed after the railroad, the state required the railroad to pay one-half of such costs. From 1896 to 1935, the Supreme Court maintained the position that a state could allocate to the railroads all or a portion of the expense or cost for the construction, maintenance, improvement, or elimination of public highway-rail grade crossings.³⁹

During the 1930s, legislation was passed⁴⁰ that made available federal funds for the construction of highway-rail grade separations and installation of traffic control devices at highway-rail grade crossings. This brought about a change in responsibility for highway-rail crossings, with the burden of responsibility shifting from the railroads to the public. In 1935, the Supreme Court ruled that:

*“The railroad has ceased to be the prime instrument of danger and the main cause of collisions. It is the railroad which now requires protection from dangers incident to motor transportation.”*⁴¹

35 23 U.S.C. § 101(a)(4)(E).

36 Committee on Transportation, “Bill Analysis and Fiscal Impact Statement, CS/SB 386,” Florida Senate, March 15, 2017.

37 U.S. Department of Transportation, “Railroad-Highway Grade Crossing Handbook, Revised Second Edition,” August 2007.

38 Ibid.

39 Ibid.

40 The National Recovery Act of 1933 and the Hayden-Cartwright Act of 1934.

41 *Nashville, C. & St. L. Ry. v. Walters* (1935).

A 1962 study of highway-rail grade crossing safety by the Interstate Commerce Commission⁴² also concluded that the public was responsible for crossing grade safety and recommended that Congress take appropriate action by stating:

“In the past it was the railroad’s responsibility for the protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal. Railroads were in operation before the problem presented itself and if the increasing seriousness is a result of the increasing development of highways for public use, why should not the cost of grade crossing protection be assessed to the public?”

“Highway users are the principal recipients of the benefits following from rail-highway grade separations and from special protection at highway-rail grade crossings. For this reason, the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices.”

It is clear from this that, as federal funds became available for the construction of highway-rail grade separations and installation of traffic control devices at highway-rail grade crossings, the responsibility for highway-rail crossings shifted from the railroads to the public. The provisions in the proposed Florida High-Speed Passenger Rail Safety Act (HB 269 / SB 386) that would make AAF responsible for paying all of the grade maintenance costs are contrary to this policy.

42 Interstate Commerce Commission (ICC), “Prevention of Rail-Highway Grade Crossing Accidents Involving Railway Trains and Motor Vehicles,” Washington, DC, November 1962.

TRANSPORTATION SYSTEM IMPACTS

The counties contended that the extraordinary queues and delays at more than 50 at-grade crossings will degrade traffic flow, threaten traffic safety, and impede the ability to respond of emergency vehicles and evacuation efforts. The FEIS issued by the FRA concluded that Brightline would not impact local vehicular traffic along the east-west corridor or along the segment to the Orlando airport, since there would be no at-grade crossings.

Some degradation in levels of service at grade crossings and intersections along the north-south corridor, however, is expected. With three train crossings per hour, the majority of each hour of operation would not be affected by the introduction of passenger train service along the north-south corridor. Typical at-grade crossings would be closed an average of 54 times per day (three times per hour), with estimated closure times of 1.7 minutes each. The total hourly closure would range from 4.2 minutes per hour to 4.5 minutes per hour.⁴³

The FRA acknowledged that Brightline would have a beneficial impact on the passenger rail transportation network between Orlando and West Palm Beach by providing potential customers with an alternative means of transportation. With an estimated 69 percent of Brightline ridership diverted from automobile modes, Brightline is projected to remove 1.2 million vehicles from congested Florida roadways in 2019. About 10 percent of Brightline’s projected long-distance riders will be diverted from private intercity motorbus services, which totals approximately 152,630 annual bus passenger trips per year.

43 USDOT Federal Railroad Administration, “Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project,” August 2015.

About 2 percent of the Brightline long-distance ridership is forecast to come from Amtrak passenger rail services. In 2019, this amounts to approximately 30,526 annual trips diverted from Amtrak.⁴⁴

The FRA concluded that, while greater frequency of trains may increase the frequency of opportunities for conflict between trains and vehicles or people, Brightline would have an overall beneficial effect on public health, safety, and security in the rail corridor. The FEIS acknowledged AAF's commitment to implement recommended grade crossing safety improvements (pedestrian gates, vehicle presence detection, four and three-quadrant gates, locked gates, raised medians, and other crossing improvements as appropriate).⁴⁵ Reduced congestion and the potential for fewer vehicular crashes and fewer air emissions will provide additional public health and safety benefits.

The FRA acknowledged that existing fixed bridges would have to be replaced, or new fixed bridges constructed to maintain the existing vertical and horizontal clearances and maintain existing navigation conditions. Brightline would not decrease the existing clearance for the proposed new rail bridge over the St. Johns River or cause any change in the structure or the dimensions of the opening for the St. Lucie River or Loxahatchee (Jupiter) River bridges.⁴⁶

Movable bridges (drawbridges) over the St. Lucie and Loxahatchee rivers would be closed more frequently to accommodate the increased number of trains. Model simulation results on vessel queuing, non-zero wait time, average wait time, and boat arrivals show that the most likely vessel

wait time would increase. The FRA acknowledged that AAF has developed an operating plan that minimizes the number and duration of closures, and implements new measures to notify mariners of the bridge closure times and to make closure times more predictable. These mitigation measures will reduce delays and help to reduce queue lengths and times.⁴⁷

A side-by-side comparison of Brightline's positive and negative impacts on the transportation system is presented in Appendix A.

COMMUNITY IMPACTS

Adverse impacts to communities and demographics are those that involve long-term residential displacement and neighborhood fragmentation or the loss of continuity between neighborhoods; however, the FRA concluded that no neighborhood fragmentation or loss of continuity between neighborhoods is projected.⁴⁸

The counties contended that noise during construction would affect residences and other buildings close to the Brightline project area. The FRA concluded that there would be no adverse noise impacts along the segment to the Orlando airport. Along the east-west corridor, noise impacts would be primarily due to the increased noise propagation from elevated portions of track. Along the north-south corridor, the use of wayside (pole-mounted) horns would eliminate any severe impacts and would reduce noise levels. Noise mitigation along elevated portions of track may include sound barriers on the edge of the elevated structures to mitigate potential severe impacts.⁴⁹

The FRA acknowledged AAF's commitment to mitigating impacts from the increased frequency of warning horn use at highway-rail at-grade

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ USDOT Federal Railroad Administration, "Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project," August 2015.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

crossings by installing stationary wayside horns at each of the grade crossings where severe, unmitigated impacts would occur. AAF has expressed its commitment to cooperating with local jurisdictions in the establishment of quiet zones instead of wayside horns.

The FRA concluded that there is no potential vibration impact along the segment to the Orlando airport. Along the east-west corridor, however, there is the potential for vibration impact at 118 residences and 12 institutions. The greatest potential for vibration impact is along the north-south corridor, with potential vibration impacts at 3,317 residences, 513 institutions as well as 18 other vibration-sensitive land uses (TV studios, recording studios, auditoriums, and theaters).⁵⁰ AAF has committed to minimize vibration impacts by wheel and rail maintenance that will control unacceptably high vibration levels. Vibration levels would be minor and are not expected to exceed the threshold for structural damage to buildings.

Economic impacts are those that involve the displacement of businesses, changes in employment, the loss of real estate taxes, and the beneficial effects from construction-period spending or long-term economic changes. Neither the segment to the Orlando airport nor the north-south corridor will result in the reduction of municipal property tax revenues.

The FRA concluded that construction of the east-west corridor would require the acquisition of several privately-owned parcels outside the SR 528 right-of-way, but would not result in a significant loss of property tax revenues in Orange or Brevard counties. The relocated Fort Lauderdale Station, within the north-south corridor, would require acquisition of three parcels adjoining the Florida East Coast Corridor.

⁵⁰ Ibid.

These businesses are expected to relocate elsewhere in Fort Lauderdale.⁵¹

No business or job losses are projected. Phases I and II of Brightline would have long-term direct economic benefits through the creation of approximately 1,100 cumulative jobs through 2021 and labor income valued at nearly \$294 million through 2021.⁵² Construction of Brightline would have a direct total economic impact of \$915.6 million, with the largest benefit to be had in Orange County at \$302.2 million. Brightline operations would have a direct total economic impact of \$507.2 million between 2016 and 2021, with an average direct economic impact of \$84.5 million per year.⁵³

The FRA acknowledged that construction of the north-south corridor will require that two historic bridges (Eau Gallie River and St. Sebastian River) be demolished and that two other National Register of Historic Places (NRHP)-eligible bridges be rehabilitated.⁵⁴ The FRA has determined that no archaeological sites would be adversely affected by Brightline. This “conditional” determination is based on the understanding that AAF will continue to consult with State Historic Preservation Officer through the design process, as needed, to ensure compatibility and appropriate sensitivity to the Florida East Coast Railroad (FECR) Railway Historic District and bridge resources.⁵⁵

⁵¹ USDOT Federal Railroad Administration, “Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project,” August 2015.

⁵² Ibid.

⁵³ The Washington Economics Group, Inc., “Economic Impacts of the All Aboard Intercity Passenger Rail Project,” May 20, 2014.

⁵⁴ USDOT Federal Railroad Administration, “Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project,” August 2015.

⁵⁵ Ibid.

The FEIS concluded that Brightline would not impact parks or recreational lands along the segment to the Orlando airport, since no parks or recreation lands are located on this property. The east-west corridor is adjacent to the Tosohatchee Wildlife Management Area and the Canaveral Marshes Conservation Area; however, constructing the east-west corridor would not require acquisition of new right-of-way within the property limits of these resources. The existing north-south corridor bisects the Hobe Sound National Wildlife Refuge and Jonathan Dickinson State Park. All Brightline construction would take place within the existing FECR-owned right-of-way and would not require acquisition of new right-of-way.⁵⁶

A side-by-side comparison of Brightline's positive and negative impacts on local communities is presented in Appendix B.

ENVIRONMENTAL IMPACTS

The air quality analysis in the FEIS evaluated the emission of air pollutants from Brightline, the resulting concentrations of pollutants in the regional areas, and carbon monoxide concentrations at intersections affected by changes in traffic patterns. This evaluation applied primary and secondary air quality standards identified by the National Ambient Air Quality Standards (NAAQS) to evaluate if Brightline might cause any new violation of the NAAQS, increase the frequency or severity of any existing violations, or delay attainment of any NAAQS.⁵⁷

The FRA concluded that air quality in the region would be improved through the reduction of vehicles from the roads and highways as riders

move instead to the proposed passenger rail service between Orlando and West Palm Beach. Brightline would decrease emissions of carbon monoxide (CO), nitrogen oxides (NOx), sulfur dioxide (SO₂), volatile organic compounds (VOCs), particulate matter less than 10 microns in diameter (PM₁₀) and particulate matter less than 2.5 microns in diameter (PM_{2.5}). By 2030, Brightline is projected to reduce CO emissions by 1,654 tons, NOx by 192 tons, VOCs by 59 tons and PM₁₀ by 7 tons.⁵⁸

The FRA concluded that the installation of concrete pilings and abutments within surface waters during bridge construction will have direct permanent impacts to surface waters. New impervious surfaces (pavement and buildings) constructed in the segment to the Orlando airport would require stormwater management systems to protect surface and groundwater quality. Along the east-west corridor, the proposed railroad would convert existing pervious land to a ballasted railroad bed and unpaved access road, resulting in minor changes to stormwater runoff and infiltration.⁵⁹

The FRA acknowledged AAF's commitment to implement best management practices (BMPs), which are often required as part of the environmental review permit process and would comply with all Florida Department of Environmental Protection and local ordinances. As a result, no significant impacts to surface waters and groundwater resources are anticipated.

The FRA concluded that Brightline would have moderate direct and indirect effects to wetlands. Wetlands would be filled during the construction of both the north-south and east-west corridors. Bridge construction would have minor effects on

⁵⁶ Ibid.

⁵⁷ USDOT Federal Railroad Administration, "Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project," August 2015.

⁵⁸ Ibid.

⁵⁹ Ibid.

wetlands due to installing new pilings, abutments and riprap protection, and cutting mangrove vegetation beneath the bridges. Brightline would have indirect effects on wetland quality and functions along the east-west corridor; however, these would be minor since the wetlands are already affected by proximity to the heavily traveled SR 528 corridor. All wetlands impacts would be mitigated by AAF through the purchase of appropriate mitigation bank credits from federally-approved mitigation banks.⁶⁰

Flood insurance rate maps prepared by the Federal Emergency Management Agency show that the east-west corridor crosses several floodplains, primarily those associated with the Econlockhatchee River and the St. Johns River. The north-south corridor uses the existing FECR right-of-way, which crosses numerous floodplains primarily associated with coastal waters and estuaries. AAF will mitigate potential harm to the floodplains by retaining existing elevations where feasible, constructing stormwater mitigation measures and retention ponds, and minimizing fill in sensitive areas.⁶¹

The FRA concluded that Brightline would result in direct impacts to biological resources and natural ecological systems in the form of lost natural vegetation (forested plant communities) along the east-west corridor, south of State Road 528 (SR 528). The potential loss of wildlife habitat could result in indirect or secondary effects to wildlife such as habitat fragmentation and associated “edge effects,” the loss of genetic diversity of plant and animal populations, increased competition for resources, and physical or psychological restrictions on movements caused by some feature within a corridor that wildlife are

unwilling or unable to cross. It is also possible that the operation of Brightline could displace some individual wildlife populations that are sensitive to noise and vibration; however, these effects are negligible due to the existing effects of SR 528 and other transportation facilities.⁶²

Placing rip-rap/fill for the bridge approaches, placing bridge pilings, and excavating where existing timber pilings will be replaced would have unavoidable minor impacts. No significant adverse effects on essential fish habitat are anticipated. Erosion and sedimentation would be controlled using best management practices, such as silt fences and turbidity curtains, in accordance with an approved erosion and sedimentation control plan, during construction of the bridges.⁶³

Development of the east-west corridor immediately adjacent to an existing transportation corridor would minimize any impacts to biological resources and natural ecological system. The Brightline project also includes a new wildlife crossing adjacent to the Tosohatchee Wildlife Management Area to facilitate future movement along the Florida Wildlife Corridor.⁶⁴

The FRA acknowledged that Brightline would potentially affect habitats used by federal and state listed wildlife and plant species. Results of scrubjays field surveys conducted along the north-south corridor document the presence of scrub-jays at Savannas Preserve State Park and indicate it is likely scrubjays will occur within the rail corridor at times. Brightline is anticipated to result in an “incidental take” of this species; however, this will not jeopardize the continued existence of the species or affect local populations. The FRA

60 Ibid.

61 USDOT Federal Railroad Administration, “Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project,” August 2015.

62 Ibid.

63 USDOT Federal Railroad Administration, “Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project,” August 2015.

64 Ibid.

acknowledges that AAF has purchased mitigation credits to offset these impacts.⁶⁵

There are numerous other wildlife and plant species identified in the FEIS that would be potentially impacted by Brightline. The FRA acknowledged that AAF has proposed specific mitigation for potential temporary and permanent impacts to the habitat of state and federally listed species, in addition to conducting pre-construction surveys for rare animal species and plant species that may occur within the construction area.⁶⁶

A side-by-side comparison of Brightline's positive and negative environmental impacts is presented in Appendix C.

CONCLUSIONS AND RECOMMENDATIONS

Florida needs Brightline. Brightline is part of a larger statewide strategy to reduce congestion on Florida's highways and increase the mobility of business travelers, Florida residents, and tourists. Brightline will provide, at no cost to taxpayers, benefits to the state in the form of reduced traffic congestion, job creation and labor income, improved air quality, and improved health and safety.

Brightline will divert an estimated 1.5 million passengers annually from other modes of transportation and, in so doing, will decrease harmful emissions and improve overall air quality. Brightline is projected to create 1,100 new jobs which will generate \$294 million in labor income through the year 2021. The direct economic benefit to the state because of Brightline is projected to exceed \$915 million.

So, why then have local governments within the Treasure Coast region spent more than \$6.8 million of taxpayer money to derail Phase II of Brightline? One reason is the adverse impacts to the environment, neighborhoods, and other important resources within the region. It is difficult to imagine a project the size and scope of Brightline being built along the east coast of Florida and having no adverse impacts. The FEIS identifies a number of adverse impacts, none of which is significant enough (either alone or in conjunction with other impacts) to warrant denial of required permits, and all of which can be effectively mitigated.

Another reason is that, when completed, Brightline will speed through the Treasure Coast region with no planned stops. Under existing agreements,

65 USDOT Federal Railroad Administration, "Final Environmental Impact Statement and Section 4(f) Determination, All Aboard Florida Intercity Passenger Rail Project," August 2015.

66 Ibid.

local governments will continue to bear the financial responsibility of maintaining highway-grade crossings and making needed safety and other improvements. In return, Treasure Coast residents will enjoy reduced traffic congestion and improved air quality, increased economic income and job creation, and improved health and safety. Obviously, that is not enough.

It is important for the taxpayers to “take a step back” and look at what they have gotten for their \$6.8 million. The counties that have taken legal and other actions have not been able to completely derail Brightline. These local government actions have been able to delay the operation of Phase II until 2020, which could be considered a “win” for the local governments, although the benefits resulting from Brightline have also been delayed. The decision by the USDOT to rescind its approval for \$1.75 billion of tax-exempt PABs, prompting AAF to apply for \$1.6 billion in federal funds through the Railroad Rehabilitation and Improvement Financing program (RRIF) to fund Phase II, may also be considered a “win” for the local governments, in that it required AAF to revise its funding strategy.

It is unclear whether these “wins” sufficiently justify the expenditure of almost \$7 million in taxpayer dollars. It is also unclear what, if any, legal options remain available for the counties to pursue. Although the federal lawsuits and environmental permit challenges have been dismissed, local governments are facing the decision whether to continue to set taxpayer money aside for additional litigation. This is an important decision because public opinion on the continued use of taxpayer dollars to fund opposition to Brightline is mixed. A July 2017 poll by TCPalm found that, although 57 percent of the survey respondents supported additional government spending and

efforts to stop AAF, more than one-third (38 percent) of the respondents felt the counties’ use of taxpayer dollars to stop AAF was a “waste of time.”⁶⁷

Florida TaxWatch agrees with local officials who have begun to question the continued expenditure of taxpayer funds to litigate this issue.⁶⁸ To continue to spend taxpayer dollars in an effort to delay Brightline further or otherwise make it more expensive to construct and operate Brightline is not good public policy.

It is not too late for the parties to pursue a settlement agreement to resolve this dispute. One solution that has been proffered is for AAF to establish a Brightline stop somewhere in the Treasure Coast region. If an additional stop could be incorporated into Brightline’s route without significantly increasing Brightline’s estimated 3-hour travel time from Miami to Orlando, then taxpayers and travelers could claim a “win-win.” Hopefully, that train has not yet left the station.

67 “Poll: What is Your View of the Counties’ Use of Taxpayer Money to Fight Brightline?,” TCPalm, retrieved from <http://www.tcpalm.com/story/opinion/2017/07/13/poll-what-your-view-counties-use-taxpayer-money-fight-brightline/476481001/>, October 6, 2017.

68 “This litigation stuff has got to stop and we have got to stop the bleeding,” comments by Martin County Commission Chair Doug Smith at the final budget hearing, September 26, 2017.

APPENDIX A

TRANSPORTATION SYSTEM IMPACTS		
Positive		Negative
No impacts along east-west corridor or Orlando airport segment		Level of service degradations along north-south corridor
Provides an alternative means of transportation		54 (ave.) grade closings per day
Remove 1.2 million vehicles from congested roadways		Total hourly grade closures ranging from 4.2 minutes to 4.5 minutes
Diversion of more than 150,000 passengers from intercity motorbuses		More opportunities for conflicts between trains and trains and vehicles/people
Diversion of more than 30,000 annual Amtrak trips		Need to replace existing fixed bridges or build new bridges
AAF's willingness to make grade crossing safety and other improvements		More frequent closure of movable bridges (drawbridges)
AAF plan to minimize average wait times for vessels		Increased vessel wait times

APPENDIX B

COMMUNITY IMPACTS	
Positive	Negative
No neighborhood fragmentation or loss of continuity between neighborhoods	Adverse noise impacts along east-west and north-south segments
No adverse noise impacts along the segment to the Orlando airport	Potential adverse vibration impacts at 118 residences & 12 institutions along the east-west sector
AAF commitment to mitigate noise and vibration impacts	Potential adverse vibration impacts at 3,317 residences, 513 institutions, and 18 other vibration-sensitive land uses along the north-south sector
No adverse vibration impacts along the segment to the Orlando airport	(Insignificant) loss of property tax revenues along east-west segment
No reduction in property tax revenues along the segment to the Orlando airport or north-south corridor	Required demolition of 2 historic bridges and rehabilitation of 2 NRHP-eligible bridges
No business or job losses are projected	
1,100 new jobs and \$294 million in labor income through 2021	
Direct total economic benefit (projected) of \$915.6 million	
No impacts on parks or recreational lands	

APPENDIX C

ENVNIRONMENTAL IMPACTS		
Positive		Negative
Air quality in the region would be improved through reduction of vehicles		Bridge construction will have direct permanent impact on surface waters.
Decreased emissions of CO, NO _x , SO ₂ , VOCs, PM10, and PM2.5		Conversion of pervious land along east-west segment to ballasted railroad bed will have minor stormwater runoff and infiltration impacts
AAF's commitment to implement best management practices (BMPs) to mitigate impacts		Moderate direct and indirect impacts on wetland quality and functions along the east-west and north-south corridors
No significant impacts to surface and ground waters		East-west and north-south corridors cross numerous floodplains
AAF purchase of appropriate mitigation credits from federally-approved mitigation banks		Potential loss of wildlife habitat along the east-west corridor
		Negligible displacement of animal species that are sensitive to noise and vibration
		Potential impacts on wildlife habitat used by listed wildlife and plant species

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