

as well as the laws of most States, including Illinois), that the train horn can make a positive contribution at the margin. FRA believes this option would not have been a rational choice.

FRA has chosen the third option, and has further determined that the lower estimate of ban impacts should be applied only to crossings in Pre-Rule Quiet Zones. The need to determine the impact of no-whistle policies on accident rates derives from the statutory definition of supplementary safety measures. The statute permits certain crossings to be excepted from the requirement to sound the train horn, including crossings “for which, in the judgment of the Secretary, supplementary safety measures fully compensate for the absence of the warning provided by the locomotive horn [emphasis supplied].” As delegate of the Secretary, FRA makes this judgment in light of the following considerations:

- Utilizing an estimate of approximately 17 percent, despite the limited statistical significance of the estimate, takes advantage of the best and most current analysis available and fully recognizes the conclusion of the Westat report that the “ban effect for gated crossings was significantly different in the Chicago area. \* \* \*

- Not only was the input data set of no-whistle crossings for the final Westat study much improved from the prior work, but the time period of the study included the period when several Chicago-area jurisdictions were making special efforts to address crossing risk, particularly where no-whistle policies were in place. Reliance on the lower estimate has the practical effect of rewarding effort already expended, taking into account scores of comments by Chicago area officials and residents as well as the “interests” of communities wishing to retain existing no-whistle policies.

- The recent study takes into consideration other variables that may have closed the risk gap in the region, particularly completion of the retrofit of auxiliary alerting lights, as well as special efforts made in the region (e.g., Metra’s election to utilize both low-mounted “ditch lights” and oscillating lights, rather than just ditch lights).

- Use of the lower estimate is fully consistent with what FRA understands regarding the application of no-whistle policies, *i.e.*,

- Discretionary selection has almost certainly occurred in the region. Under current State law (which will be preempted by this interim final rule), railroads have the latitude to sound the horn or refrain from sounding the horn

at individual crossings excepted from train horn sounding.

- Following their interest in safety and limitation of liability, overall railroads likely have elected to use the train horn where risk is higher or have exacted responsive action from communities to compensate for use of the train horn.

- The most extensive use of no-whistle policies has been made on commuter lines where many trains are scheduled, train counts are high, and motorists are thus more likely to expect a train. Although the absolute effect of silencing the horn at these crossings is still a matter of substantial concern given the high exposure at these crossings, the proportional effect of silencing the train horn is lower (again, because motorists are conditioned to believe the train will come, most trains are very conspicuous with two forms of alerting lights, and—on lines where commuter trains are predominant—motorist tolerance of delays is reduced by the expectation that the train will clear the crossing rapidly).

FRA believes that the combination of these various factors provides a fully rational basis for selecting this option over the equally rational first option and the unsupportable second option, described above. FRA notes that the application of this lower effectiveness rate for the train horn to pre-rule, no-whistle gated Chicago Region crossings does not mean that the acceptable risk at those crossings will be measured differently. To the contrary, those crossings will be subject to the same Nationwide Significant Risk Threshold as all other pre-rule, no-whistle crossings. The unique effectiveness rate, which applies only at Chicago Region gated crossings, determines only the amount of reduction that may be required to meet this national risk standard. FRA believes that a reduced estimate of ban-induced accidents at grade crossings is appropriate for existing (pre-rule) no-whistle crossings. However, a reduced estimate would not be appropriate for current crossings in the Chicago Region where the train horn presently sounds, should those communities desire New Quiet Zones. Even on the commuter rail network, the risk characteristics of those crossings may be substantially different (e.g., more difficult geometry or sight distances, less local commitment to enforcement, etc.) Indeed, the comparisons between train horn and no-whistle crossings in the region confirm that a reduced estimate at the 17 percent level would not be appropriate for those crossings. Nor can FRA say that there is an intermediate level which is well

supported empirically or judgmentally. Accordingly, FRA will apply the national estimate of ban impacts to New Quiet Zones in the Chicago Region.

FRA recognizes the potential downside of qualifying Pre-Rule Quiet Zones using a lower estimate of ban effects. It is possible that some or all of the difference in performance has to do with factors that are beyond the control of this interim final rule. For instance, the extensive coverage of this rulemaking by the Chicago media will end as the rule is implemented, and that may result in future motorist behavior that is less favorable than in the past. Changes in local risk to which railroads might previously have reacted by resuming use of the train horn may become a source of concern, given the mandate of the rule to run silent through Pre-Rule Quiet Zones that have been qualified under the new procedures. Accordingly, FRA will monitor results in the region and consider further action as indicated.

#### Note on Intra-Regional Comparisons

Commenters in the proceeding also asked FRA to compare Chicago ban crossings to Chicago crossings where the train horn sounds, and FRA charged Westat with including that element in its analysis. As noted above, Westat reported that no statistically significant effect from the train horn was found when Chicago Region gated crossings, where the train horn sounds, are compared with the Chicago Region whistle ban crossings. This is neither surprising nor in conflict with the hypothesis that the train horn is useful. No accident prediction formula can capture all factors present at individual crossings, and in Illinois railroads have the latitude under law to sound the horn at exempt crossings. It is logical to expect that railroads would as a matter of discretion elect to sound the horn at crossings with very high known accident potential (given factors such as roadway geometry, accident history and observed motorist behavior), at least in those cases where community objections to noise are not sufficiently strenuous to convince them otherwise. Further, in those cases where the railroads did not make this election and the accident counts rose significantly, the ICC could eventually be expected to intervene. Neither the railroads nor the ICC could be expected to go too far in the direction of discretionary use of the train horn, however, given vocal community objections.

The result has been, FRA believes, that the train horn is sounded as a matter of discretion at many (but by no means all) of the very riskiest crossings