



US Labor Department announces final rule on recreational vessels under Longshore Act

The U.S. Department of Labor's Office of Workers' Compensation Programs has issued a final rule implementing the Longshore and Harbor Workers' Compensation Act's exclusion for recreational vessel workers. The rule defines what constitutes a "recreational vessel" when applying the exclusion.

The final rule clarifies both the definition of "recreational vessel" and those circumstances under which workers are excluded from LHWCA coverage when working on those vessels. The final rule also withdraws a proposed rule that would have codified current case law and the Department's longstanding view that employees are covered under the LHWCA so long as some of their work constitutes "maritime employment" within the meaning of the statute.

According to USDOL, the final rule adopts several recommendations made by members of the public who commented on a notice of proposed rulemaking issued Aug. 17, 2010 (see attached for reference). The rule generally uses the U.S. Coast Guard's standards for defining a recreational vessel. The Labor Department has added two provisions to make it easier to apply these standards in the LHWCA context. First, a manufacturer or builder may determine whether a vessel is recreational within the meaning of the regulation based on the vessel's design rather than on its end use. Second, noncommercial vessels that are recreational by design and owned or chartered by the federal or a state government fall within the recreational vessel definition.

The rule also adopts a 20% rule that permits occasional commercial use of a recreational vessel, and retains the recreational vessel exemption for "public vessels", i.e. those recreational vessels chartered by federal, state, and local government for official use.

The rule can also be viewed on the Federal Register's website at <http://federalregister.gov/a/2011-32880>. Frequently asked questions are available at www.dol.gov/owcp/dlhwc/lsnewregfaqs.htm. Additional information is available on OWCP's website at <http://www.dol.gov/owcp/dlhwc/lsnewregulation.htm>.

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038-AC72

Acknowledgment Letters for Customer Funds and Secured Amount Funds; Correction

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This document corrects a heading in the notice of proposed rulemaking published in the **Federal Register** of August 9, 2010, regarding Acknowledgment Letters for Customer Funds and Secured Amount Funds.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, 202-418-5096.

Correction

In the notice of proposed rulemaking, beginning on page 47738 in the issue of August 9, 2010, make the following correction.

§ 1.20 [Corrected]

On page 47743 in the middle column, correct the heading "Appendix § 1.20—Acknowledgment Letter for CFTC Regulation 1.20 Customer Segregated Account" to read "Appendix A to § 1.20—Acknowledgment Letter for CFTC Regulation 1.20 Customer Segregated Account."

Dated: August 11, 2010.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010-20311 Filed 8-16-10; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Part 701

RIN 1240-AA02

Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Notice of Proposed Rulemaking; request for comments.

SUMMARY: This document contains proposed regulations implementing amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA) by the American Recovery and Reinvestment Act of 2009 (ARRA), relating to the exclusion of certain recreational-vessel workers from the LHWCA's definition of "employee." These regulations would clarify both the definition of "recreational vessel" and those circumstances under which workers are excluded from LHWCA coverage when working on those vessels. The proposed rules also codify the Department's longstanding view that employees are covered under the LHWCA so long as some of their work constitutes "maritime employment" within the meaning of the statute.

DATES: The Department invites written comments on the proposed rule from interested parties. The Department is particularly interested in receiving comments regarding the proposed definition of "recreational vessel." Written comments must be received by October 18, 2010.

ADDRESSES: You may submit written comments, identified by RIN number 1240-AA02, by any of the following methods. To facilitate the receipt and processing of comment letters, OWCP encourages interested parties to submit their comments electronically.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

- *Facsimile:* (202) 693-1380 (this is not a toll-free number). Only comments of ten or fewer pages (including a FAX cover sheet and attachments, if any) will be accepted by FAX.

- *Regular Mail:* Submit comments on paper, disk, or CD-ROM to the Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C-4315, 200 Constitution Avenue, NW., Washington, DC 20210. The Department's receipt of U.S. mail may be significantly delayed due to security procedures. You must take this into consideration when preparing to meet the deadline for submitting comments.

- *Hand Delivery/Courier:* Submit comments on paper, disk, or CD-ROM to the Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C-4315, 200 Constitution Avenue, NW., Washington, DC 20210.

Instructions: All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: To read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Michael Niss, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C-4315, 200 Constitution Avenue, NW., Washington, DC 20210. *Telephone:* (202) 693-0038 (this is not a toll-free number). TTY/TDD callers may dial toll free 1-800-877-8339 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

Section 2(3) of the LHWCA defines "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker * * *." 33 U.S.C. 902(3). The remainder of this provision, initially enacted as part of the 1984 amendments to the LHWCA, lists eight categories of workers who are excluded from the definition of "employee" and therefore excluded from LHWCA coverage. 33 U.S.C. 902(3)(A)-(H). Section 2(3)(F) in particular excluded from coverage "individuals employed to

build, repair, or dismantle any recreational vessel under sixty-five feet in length,” provided that such individuals were “subject to coverage under a State workers’ compensation law.” 33 U.S.C. 902(3)(F).

Section 803 of Title IX of the American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115, 127 (2009), amended the section 2(3)(F) exclusion. That provision now excludes “individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel,” and retains the State-workers’-compensation-coverage proviso. 33 U.S.C. 902(3)(F), as amended by Public Law 111–5 section 803, 123 Stat 115, 187 (2009) (emphasis supplied).

Thus, under the original version of section 2(3)(F), all individuals working on recreational vessels shorter than sixty-five feet were excluded from the definition of “employee.” The amended exclusion retains this same rule for employees building recreational vessels. For individuals who repair or dismantle recreational vessels, however, the amended exclusion provides for different treatment. Now, workers who repair recreational vessels or dismantle them for repair are excluded from the definition of “employee” regardless of the vessel’s length. With the removal of the sixty-five feet length limit, the number of vessels that will be considered recreational for LHWCA purposes will increase; and as vessel numbers increase, the number of workers who repair or dismantle them for repair will naturally increase as well. On the other hand, amended section 2(3)(F) no longer excludes workers who dismantle recreational vessels, except when the dismantling is in connection with a repair. Thus, some workers previously excluded may now be considered “employees” under section 2(3).

The proposed regulations clarify how amended section 2(3)(F) should be interpreted and applied in several respects.

II. Summary of the Proposed Rule

A. Effective Date of Amendment and Retroactive Impact (§§ 701.503–701.505)

The Department proposes to issue a regulation clarifying the effective date of the section 2(3)(F) amendment, as well as delineating which claims or injuries are affected by it. The purpose of this section is to prevent or alleviate confusion among interested parties, and

to make plain whether a particular claim or injury is excluded from LHWCA coverage as a result of the amendment.

Effective Date

ARRA contains neither a general effective-date provision nor a specific effective date for the section 2(3)(F) amendment. Where an act of Congress does not specify its effective date, the law will take effect on the date it is enacted into law, *i.e.*, the date it is signed by the President. *See Altizer v. Deeds*, 191 F.3d 540, 545 (4th Cir. 1999); 3 Norman J. Singer, *Sutherland Statutory Construction* section 33:6 (6th ed. 2002). Thus, the section 2(3)(F) amendment became effective on February 17, 2009, the date the President signed the ARRA. The Department proposes to codify this date in the regulation.

Injuries and Claims Affected

In addition to no effective date, the section 2(3)(F) amendment does not specify whether it applies to injuries and claims occurring prior to the effective date. Retroactive application of statutes is generally disfavored, especially where private rights are affected. *See Landgraf v. USI Film Products*, 511 U.S. 244, 264–73 (1994). Thus, courts will presume that a statute affecting substantive rights does not apply retroactively absent clear congressional intent to the contrary. *Landgraf*, 511 U.S. at 264, 280; *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *cf. Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) (with respect to procedural and collateral issues, a court is generally required “to apply the law in effect at the time it renders its decision”).

In *Landgraf*, the Court stated that, in determining whether a statute applies retroactively, the focus should be on “whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” 511 U.S. at 280. If the statute does affect a substantive right, then the presumption against retroactive application applies. *Id.* In contrast, the presumption does not apply where the statute addresses prospective relief (changing the remedies available to the prevailing party), procedural issues or collateral matters (*e.g.*, attorney fees). 511 U.S. at 276–79.

The Court subsequently fashioned “a sequence of analysis” for courts to use when applying these principles to a statutory provision. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37–38 (2006).

First, the court must determine if Congress expressly prescribed the temporal application of the statute, or if congressional intent can be gleaned from the application of the canons of statutory construction. 548 U.S. at 37. If this does not settle the matter, then the court must determine if the statute affected “substantive rights, liabilities or duties [on the basis of] conduct arising before [its] enactment.” *Id.* (quoting *Landgraf*, 511 U.S. at 278) (brackets in *Fernandez-Vargas*). If a substantive right is affected, then the presumption against retroactivity precludes application of the statute. 548 U.S. at 37–38.

Applying this sequence of analysis to the section 2(3)(F) amendment, the Department has concluded that the amendment cannot be applied to injuries occurring before February 17, 2009. First, Congress did not expressly address whether the section 2(3)(F) amendment applies retroactively. Likewise, it is not possible to determine congressional intent through the application of principles of statutory construction. The legislative history is silent regarding retroactive application of the provision and there is no clue in the language of the amendment or the ARRA generally.

Second, the amendment plainly affects a substantive right. It effectively removes from LHWCA coverage a class of employees (*e.g.*, workers repairing recreational vessels sixty-five feet in length or greater) who previously had been covered. If applied to injuries occurring prior to February 17, 2009, the amendment would strip those employees of a right to recover LHWCA benefits which had vested at the time of their injuries. In addition, the amendment no longer excludes from coverage a class of employees (*e.g.*, workers who dismantle obsolete recreational vessels) who previously had been excluded. Applying the amendment retroactively to these individuals would alter the employers’ pre-existing duties by making them liable for LHWCA benefits.

Thus, for injuries occurring prior to February 17, 2009, the Department has concluded that the amendment does not apply because Congress did not explicitly make the amendment retroactive. The proposed rule provides that the compensability of these injuries remains governed by section 2(3)(F) as it existed prior to the ARRA amendment. For injuries occurring on or after February 17, 2009, the effective date of the amendment, the proposed rules state the obvious: The compensability of these injuries is governed by the section 2(3)(F) amendment.

The Department's proposal is also consistent with Congress' treatment of previous amendments to the LHWCA's coverage provisions. The 1972 amendments (expanding coverage to land-based workers who met the situs and status tests) took effect thirty days after enactment (*i.e.*, November 26, 1972). Public Law 92-576 § 22, 86 Stat. 1251, 1265 (1972). The courts held that, with respect to coverage, those amendments did not apply to injuries occurring prior to the effective date. *See, e.g., A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928, 930 n. 1 (4th Cir. 1977). Similarly, Congress expressly provided that the coverage provisions of the 1984 amendments (creating certain exclusions from coverage, including section 2(3)(F)) would apply only to injuries occurring after September 28, 1984, the date of enactment of the amendments. Public Law 98-426 § 28(c), 98 Stat. 1639, 1655 (1984).

Date of Injury

The key date in determining LHWCA coverage generally is the date of injury. It is the occurrence of an injury arising out of and in the course of employment that gives rise to a LHWCA claim. *Ins. Co. of North Am. v. U.S. Dep't of Labor*, 969 F.2d 1400, 1404 (2d Cir. 1992) ("An injury causing disability or death triggers the provisions of the Act."). As a result, whether an employee is covered under section 2(3) must be determined as of the date of his injury. *See, e.g., Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99-101 (2d Cir. 1991).

Given the importance of the date of injury, the proposed regulations contain standards for determining the date of injury for different types of potentially compensable injuries: Traumatic injury, occupational illness, hearing loss and death benefits. These regulations will help clarify when the section 2(3)(F) amendment applies.

Traumatic Injuries. For traumatic injuries, the Department proposes to codify what is self-evident: The date of injury is the date when the employee suffers harm. If the injury occurred before February 17, 2009, a recreational vessel worker may be a covered "employee" even if the worker is in the class that would be excluded by the ARRA amendment (*e.g.*, a worker who repairs recreational vessels 100 feet in length). If the injury occurs on or after February 17, 2009, the employee's eligibility is governed by the section 2(3)(F) amendment.

Occupational Disease. The date of injury is not as obvious in the occupational disease (or infection)

context. Because they may surface only after a long latency period, courts confronted with this question in various LHWCA contexts have consistently held that the date of injury is the date the disease, its work-related nature, and a resulting disability (*i.e.*, a loss of wage-earning capacity) all become manifest to the employee. *See, e.g., Ins. Co. of North Am.*, 969 F.2d at 1404-05; *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1438-40 (9th Cir. 1990). These decisions are consistent with the effective-date provisions Congress adopted for the 1984 LHWCA amendments, which created the section 2(3)(F) exclusion. Congress provided that where the date of injury determines the applicability of the amendments, the date of injury for an occupational disease would be the date of manifestation. Public Law 98-426 § 28(g), 98 Stat. 1639, 1655 (1984). That provision states:

[I]n the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease[.]

Id. *See also* 33 U.S.C. 910(i) (linking time of injury to manifestation in occupational disease cases for purposes of computing compensation); 33 U.S.C. 912 (employee suffering occupational disease must give notice of injury within one year of manifestation); 33 U.S.C. 913 (employee suffering occupational disease must file claim for compensation within two years of manifestation).

The proposed rules codify the position adopted by Congress and the courts for purposes of the section 2(3)(F) amendment. Under the proposal, the date of injury for an occupational illness will be the date that all three of the following facts are manifest to the employee: (1) The employee suffers a disease; (2) the disease is related to his employment with the responsible employer; and (3) the employee is suffering from a disability related to the disease. If the condition became manifest prior to February 17, 2009, then the employee remains eligible for coverage under the LHWCA, even if the employee is in the class affected by the ARRA amendment. If, however, the condition became manifest on or after February 17, 2009, the employee's eligibility is governed by the section 2(3)(F) amendment, even if the last exposure to injurious stimuli was prior to that date.

Hearing Loss. Determining the date of injury in the hearing loss context poses special challenges that warrant specific

regulatory guidance. Unlike a long-latency disease such as asbestosis—a classic occupational disease—an employee who is exposed to excessive noise and suffers a hearing loss has an immediate injury and disability. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 162-63 (1993). Yet determining the precise date of injury may still be difficult. The proposed regulation resolves this issue by using the date the employee receives an audiogram that documents an employment-related hearing loss. This regulation echoes the statutory and regulatory standards for triggering the time for filing a notice of injury or claim for compensation for hearing loss. 33 U.S.C. 908(c)(13)(D); 20 CFR 702.212(a)(3), 702.221(b).

Death-Benefit Claims. The LHWCA provides benefits to survivors of employees who died as the result of a work-related injury. 33 U.S.C. 909. The courts have long recognized that a death-benefits claim "is a distinct right governed by the law in effect when death occurs." *State Ins. Fund v. Pesce*, 548 F.2d 1112, 1114 (2d Cir. 1977) (citing *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950)); *see also Ins. Co. of No. America v. U.S. Dep't of Labor*, 969 F.2d 1400, 1405-06 (2d Cir. 1992). In effect, these cases establish that the date of death is the date of injury for determining whether a death-benefit claim is covered by the LHWCA. The Department proposes to codify this rule in the regulation. Under the Department's proposal, where an employee is in the class affected by the amendment to section 2(3)(F), the employee's survivors remain eligible to receive death benefits if the employee died prior to February 17, 2009. If the employee died on or after February 17, however, the survivors cannot obtain benefits.

Prior Awards

Finally, the Department has already learned of some confusion among claimants, employers, and insurers with respect to prior awards to employees who would be excluded from coverage had their injuries occurred on or after February 17, 2009. Thus, the proposed rules clarify that where a compensation order has already been issued with respect to a pre-February 17, 2009, injury, the amendment to Section 2(3)(F) has no effect on such an order. Employers and insurers must still comply with all terms of the order, even if the employee would be excluded from coverage under the LHWCA if the injury occurred on or after February 17, 2009. This is in keeping with the

Department's view that the amendment has no retroactive effect.

B. What is a recreational vessel? (§ 701.501)

The proposed regulation updates and refines the definition of "recreational vessel." The Department's regulations have long defined "recreational vessel" as a vessel "manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure." 20 CFR 701.301(a)(12)(iii)(F) (2009). Taken verbatim from a statute administered by the Coast Guard, *see* 46 U.S.C. 2101(25), the Department adopted this definition in 1984, at the urging of many commenters, after the section 2(3)(F) exclusion was first enacted. 51 FR 4273 (Feb. 3, 1986). As noted above, the original section 2(3)(F) exclusion limited this general definition by vessel length, and excluded only those individuals who worked on recreational vessels under sixty-five feet in length.

The ARRA amendment, however, removed the vessel-length limitation for workers who either repair recreational vessels or dismantle them for repair, effectively rendering the current regulatory definition of "recreational vessel" as one without any limitation. As a result, both employers and employees could more frequently encounter difficulties determining which vessels are recreational. Further, the Department wishes to ensure that individuals who perform repair work on vessels that have a significant commercial purpose are not improperly excluded under amended section 2(3)(F) because the definition of "recreational vessel" is overly vague. Thus, the Department believes that further clarification of the definition is needed, especially with regard to the potential misclassification of passenger vessels.

To develop a precise definition of "recreational vessel," the Department believes it is appropriate to look again, as it did in 1984, to statutes and regulations outside the LHWCA context. This allows for formulation of a more widely-familiar and workable definition of the term.

In 1983, Congress passed a comprehensive maritime bill, which consolidated earlier laws and set forth various categories of vessels and the types of safety requirements applicable to each category. Public Law 98-89, 97 Stat. 500 (1983). This bill included the definition of "recreational vessel" that appears in the Department's current regulation. *Id.* at § 2101, 97 Stat. at 504, codified at 46 U.S.C. 2101(25). In conjunction with the statutory definition, the Coast Guard has also

promulgated regulations and developed additional guidance materials to make clear what vessels are recreational for inspection purposes and what vessels fall into other categories. *E.g.*, 46 CFR 2.01-7; Navigation and Vessel Inspection Circular No. 7-94 (Sept. 30, 1994). These regulations and guidance take into account other amendments to the 1983 Act, including the Passenger Vessel Safety Act of 1993, Title V, Coast Guard Authorization Act of 1993, Public Law 103-206 sections 501-513, 107 Stat. 2419, 2439-43 (1993).

To clarify the statutory definition of "recreational vessel," Coast Guard regulations and guidance set forth precise criteria for defining a "recreational vessel." Essentially, the Coast Guard deems the following to be recreational: Any unchartered passenger vessel used for pleasure and carrying no passengers-for-hire (*i.e.*, paying passengers); and any chartered passenger vessel used for pleasure with no crew provided and with fewer than twelve passengers, none of whom is for-hire. All other passenger-carrying vessels fall into one of the following three categories: Uninspected passenger vessel; small passenger vessel; and passenger vessel. 46 CFR 2.01-7; Navigation and Vessel Inspection Circular No. 7-94 (Sept. 30, 1994). The latter two categories are subject to inspection by the Coast Guard, and all three of these non-recreational categories face more stringent safety standards than those imposed on recreational vessels.

The Coast Guard categories have been found to be a workable model for defining passenger vessels in other contexts. For example, the Environmental Protection Agency, in a regulation related to engine emissions standards for recreational vessels, excluded vessels defined by the Coast Guard as "small passenger vessels" and "passenger vessels." 40 CFR 94.2. And Congress, in drafting the Clean Boating Act of 2008, which related to engine discharge standards for recreational vessels, also incorporated the Coast Guard definition: The 2008 Act excluded from the "recreational vessel" definition any vessel subject to Coast Guard inspection, provided the vessel was commercial or carried passengers-for-hire. Public Law 110-288 section 3, 122 Stat. 2650, codified at 33 U.S.C. 1362(25)(B).

The consistent use of the Coast Guard vessel categories across boating safety and environmental laws suggests broad familiarity with their parameters within the boating community. Moreover, each of the various Coast Guard categories is based on specific factors, such as

whether there are passengers-for-hire or hired crew. Thus, these categories provide a clear, objective basis by which employers and employees can readily ascertain whether a vessel being repaired is a "recreational vessel" for LHWCA coverage purposes. Furthermore, passenger vessels and small passenger vessels must display certificates of inspection, and uninspected passenger vessels are subject to certain safety requirements and must have a licensed operator. These indicia of non-recreational status will make it easier for employers and employees to recognize passenger vessels that should not be considered "recreational vessels" for purposes of the amended section 2(3)(F) exclusion.

Finally, the regulation clarifies the Department's intent to create a "general reference" to the Coast Guard statutes, so that subsequent amendments to those laws, as well as their implementing regulations, apply. In this way, the regulation is dynamic: changes in the industry that necessitate changes in the referenced statutes and their implementing regulations will be reflected in the LHWCA context as well.

C. What types of recreational-vessel work are excluded from coverage? (§ 701.502)

The proposed rule sets forth what types of recreational-vessel work may result in an individual being excluded from the definition "employee" under section 2(3)(F). For ease of application, the proposed rule includes separate standards for individuals whose injuries occurred before February 17, 2009 and those occurring on or after that date.

As previously noted, section 2(3) of the LHWCA defines "employee" as "any person engaged in maritime employment * * * including a ship repairman, shipbuilder, and ship-breaker" unless excluded by sections 2(3)(A)-(H). 33 U.S.C. 902(3). Prior to the ARRA amendment, section 2(3)(F) excluded all three of these occupations from the definition of "employee" when the individuals worked on recreational vessels under sixty-five feet in length. 33 U.S.C. 902(3)(F) (excluding "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length"). Proposed § 701.502(a)(1) reflects this statutory standard.

Amended section 2(3)(F), however, takes a different approach and treats each of these occupations separately. It specifically excludes "individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any

part of a recreational vessel in connection with the repair of such vessel.” Thus, individuals who build recreational vessels (*i.e.*, shipbuilders) are excluded only when working on vessels under sixty-five feet in length. Individuals who repair recreational vessels or dismantle them for repair (*i.e.*, repairmen) are excluded without regard to the vessel’s size. But individuals who dismantle recreational vessels outside the repair context (*i.e.*, ship-breakers) are no longer excluded: Amended section 2(3)(F) is simply silent with regard to workers who dismantle obsolete recreational vessels.

The express inclusion of ship-breakers in the definition of “employee” coupled with amended section 2(3)(F)’s silence regarding workers who dismantle obsolete recreational vessels leads to the conclusion that these workers are covered under the LHWCA. The plain language of the statute dictates this result. Proposed § 701.502(a)(2) sets forth this distinction for injuries governed by the amended exclusion.

Proposed § 701.502(b)(1) revises the current regulatory definition of how recreational-vessel length is measured by excluding from the measurement certain attached structures. Currently, the regulations state that “length means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.” 20 CFR 701.301(a)(12)(iii)(F). This definition has proven uncontroversial but incomplete. Specifically, the Benefits Review Board had to determine whether certain attachments to a boat were to be counted in measuring length. The Board held that “the length of a recreational vessel is measured from the foremost part of the vessel to the aftmost part, including fixtures attached by the builder, for purposes of determining whether an employee is a maritime employee covered by the Act.” *Powers v. Sea-Ray Boats*, 31 BRBS 206, 212 (1998).

The Department has determined that the regulation should be clarified by incorporating the Coast Guard’s standard for excluding attachments from the length measurement. See 33 CFR 183.3. As noted above in the context of defining recreational vessels generally, adopting the Coast Guard’s approach in this context has the advantage of wide knowledge and acceptance within the boating community. The proposed rule supplements the existing vessel-length regulation to create a bright-line

standard for determining what structures are included in measuring length so that boat builders will face no uncertainty in determining their statutory obligations.

Proposed § 701.502(b)(2) and (3) clarify what constitutes “repair” and “dismantling” of a recreational vessel. Section 2(3)(F) (both pre- and post-amendment) excludes from the definition of “employee” individuals who “repair” recreational vessels. In general parlance, “repair” means to restore or mend. See, *e.g.*, The New Shorter *Oxford English Dictionary* (1993) (defining “repair” as to “[r]estore (a structure, machine, *etc.*) to unimpaired condition by replacing or fixing worn or damaged parts; mend.”). In most instances, work performed on an existing vessel that maintains the vessel’s character will be considered a “repair” of the vessel. But when the work is done to transform a recreational vessel into another type of vessel—one that no longer falls within the regulatory definition of “recreational vessel”—the work goes beyond restoring or mending and is properly classified as conversion rather than repair. See, *e.g.*, 46 U.S.C. 2101(14a)(B) (defining “major conversion” as including a conversion that “changes the type of the vessel”). The proposed regulation clarifies the Department’s view that individuals who are employed to convert a recreational vessel to a different type of vessel do not fall into the section 2(3)(F) exclusion. For the same reasons, the proposed regulation similarly provides that the opposite process—converting a vessel that does not satisfy the regulatory definition of “recreational vessel” to one that does—does not constitute “repair” of a recreational vessel under section 2(3)(F).

Adoption of a bright-line rule for conversions will simplify the coverage inquiry. In both circumstances, the work necessarily includes some qualifying maritime employment (*i.e.*, the work performed at the beginning or the end of the conversion process when the vessel is not a recreational vessel). Adopting a bright-line rule avoids the problems inherent in determining exactly when in the conversion process the vessel in fact changes character and either becomes or ceases to be recreational.

Finally, proposed § 701.502(c) clarifies that a recreational-vessel worker may still be an “employee” if he or she performs other duties on recreational vessels that do not result in exclusion under section 2(3)(F) (*e.g.*, building a ninety-foot long recreational vessel) or performs other qualifying maritime employment in addition to

non-qualifying recreational-vessel work. This provision recognizes what the Department proposes to make explicit by regulation: That individuals who walk in and out of qualifying employment in the course of their work are covered “employees.” See discussion of § 701.303.

D. Walking In and Out of Qualifying Employment (§ 701.303)

This proposed regulation codifies the Director’s longstanding position that the LHWCA covers a maritime employee if he or she regularly performs at least some duties as part of his or her overall employment that come within the ambit of the statute (*i.e.*, “qualifying” employment). Although the Supreme Court and the courts of appeals have generally endorsed this principle, the longshore community would benefit from the codification of a uniform legal standard for employees whose duties are not exclusively qualifying “maritime employment.” In addition, the proposed rule clarifies that LHWCA coverage does not depend on whether the employee is performing qualifying maritime work or non-qualifying work at the time of injury.

While the proposed rule will apply to all LHWCA cases, codifying these principles at this time may alleviate some of the difficulties employees and employers will face in applying the amended recreational-vessel exclusion. Prior to the ARRA amendment, anyone building or repairing vessels sixty-five feet in length or longer would have been considered an “employee” regardless of the nature of the vessel (recreational or commercial). Now that the length limitation has been removed for repairing and dismantling for repair, the walking in and out of coverage problem will likely be exacerbated. Shipyards and repair facilities that can handle larger recreational vessels are more likely to be firms that also have the skills and capacity to handle commercial vessels. The proposed regulation ensures that employee status is not affected by the fact that the individual performs work on recreational vessels provided at least some of his or her work otherwise qualifies as “maritime employment.”

Congress enacted the LHWCA in 1927 after the United States Supreme Court held that the States could not extend their workers’ compensation laws to maritime workers injured on the navigable waters of the United States. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217–18 (1917). Between 1927 and 1972, the water’s edge defined the respective jurisdictions of the LHWCA and State law: State law covered any

injury occurring on land, while the LHWCA covered any injury occurring on water. This division of jurisdiction gave rise to the so-called “walk in/walk out” problem. A maritime employee ordinarily moved between ship and shore in the course of his daily employment. Thus, at any given time, the employee also moved in and out of LHWCA coverage; while on land, the employee would be subject to the vagaries of the particular State’s workers’ compensation law. To remedy this problem, Congress amended the LHWCA in 1972 to extend its reach landward to geographic areas where maritime work was performed. Public Law 92–576, 86 Stat. 1251 (1972). Nevertheless, the walk in/walk out problem remained unresolved to the extent that an employee’s land-based duties still included tasks outside LHWCA coverage. And, significantly, the employee could sustain a work-related injury while performing either qualifying maritime work or non-qualifying tasks as part of his overall employment.

The Supreme Court’s seminal decision in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), provides a framework for analyzing the walk in/walk out question. The principal issue presented for judicial review was whether two employees who were injured while handling cargo at land-based terminals were covered under the LHWCA. Blundo worked as a “checker” marking cargo that was being unloaded from a dock-side container. Caputo loaded cargo that had already been discharged from ships onto consignees’ trucks. Both employees could receive assignments on any given day that would require them to work either on land or aboard ships. The Court held that both employees were covered by the LHWCA.

The Court first undertook an extensive historical review of the LHWCA and the problems arising from the strict limitation on pre-1972 LHWCA coverage, which limited coverage to injuries occurring on navigable waters. 432 U.S. at 256–66. Of special concern was the lack of uniformity in coverage and benefits inherent in dividing jurisdiction between the State workers’ compensation schemes and the Federal statute based solely on the situs of the injury. The Court concluded that the 1972 amendments “changed what had been essentially only a ‘situs’ test of eligibility for compensation to one looking to both the ‘situs’ of the injury and the ‘status’ of the injured.” *Id.* at 264–65.

The Court then discussed whether Blundo and Caputo were “engaged in maritime employment” at the time of their injuries so as to satisfy the LHWCA’s new status requirement. Citing the lack of guidance provided by Congress concerning the scope of the term, the Court considered a principal legislative motive in expanding LHWCA coverage shoreward: Modern methods of cargo-handling had shifted much of the longshore work from the ship’s hold to the adjoining land facilities. *Id.* at 269–71. The Court held that Blundo was clearly covered because his job checking unloaded cargo was an integral part of the overall unloading process “as altered by the advent of containerization.” *Id.* at 271.

As for Caputo, accommodating cargo-handling changes was not relevant to the status inquiry because he “was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck.” *Id.* at 271–72. Thus, unlike Blundo, Caputo was injured after the unloading activities had terminated. The Court found the answer in “[a]nother dominant theme underlying the 1972 Amendments:”

Congress wanted a “uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.” It wanted a system that did not depend on the “fortuitous circumstances of whether the injury (to the longshoreman) occurred on land or over water.” It therefore extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs.

Id. at 272, quoting S. Rep. No. 92–1125, at 13; H.R. Rep. No. 92–1441, at 10–11, as reprinted in 1972 *U.S. Code Cong. & Admin. News*, 4698, 4708. In another passage aimed directly at the walk in/walk out coverage issue, the Court further observed:

The Act focuses primarily on occupations: longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover “longshoremen,” it had in mind *persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.*

* * * * *

Thus, had Caputo avoided injury and completed loading the consignee’s truck on the day of the accident, he then could have been assigned to unload a lighter. Since it is clear that he would have been covered while

unloading such a vessel, to exclude him from the Act’s coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

Id. at 273 (emphasis supplied), 274 (citation and footnote omitted). Accordingly, the Court held that Caputo, too, was covered by the LHWCA.

The basic premise of *Caputo* is that the 1972 amendments repudiated the unpredictability inherent in the pre-1972 walk in/walk out LHWCA coverage by looking to the overall occupational status of the employee. In two subsequent cases, the Court addressed the walk in/walk out issue in the context of the particular activities the employees were performing when they were injured. Significantly, however, the Court did not deviate from Caputo’s bedrock principle that “maritime employment” for LHWCA purposes is a unitary concept: Coverage is established whether or not the employee was performing a particular covered activity when injured so long as his overall employment includes “some” qualifying maritime employment.

In *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), two employees were injured while performing land-based tasks handling cargo. *Id.* at 71. Contractual agreements restricted both employees to land-based work; neither employee could be assigned tasks moving cargo between vessels and shoreside. But because both employees performed intermediate tasks in the loading process, the Court held that they were engaged in maritime employment covered by the LHWCA. *Id.* at 82–83. Significantly, the Court suggested that its decision did not represent a departure from *Caputo* despite its focus on the employees’ particular activities when they were injured:

Congress was especially concerned that some workers might walk in and walk out of coverage. Our observation that [the employees] were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 273–274 [remaining reporter citations omitted], that a worker is covered if he spends some of his time in indisputably longshoring operations and if, without the 1972 Act, he would be only partially covered. *Id.* at 83 n.18.

The Court reiterated its support for *Caputo* once again in *Chesapeake & Ohio Railway Co. v. Schwab*, 493 U.S. 40 (1989). The Court held that repairing and maintaining equipment used in the loading or unloading process is an essential maritime function and, thus, employees injured doing that work were

covered under the LHWCA. *Id.* at 47. In so finding, the Court also remarked: “Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions.” *Id.* Three Justices joined in a concurring opinion to emphasize that the lead decision should not be interpreted as a departure from *Caputo*:

I do not understand our decision as in any way repudiating the “amphibious workers” doctrine this Court articulated in [*Caputo*, 432 U.S. at 272–74]. We hold today that [the injured employees] are covered by the LHWCA since they were injured while performing tasks essential to the process of loading ships. In light of *Northeast Marine Terminal Co.*, however, it is not essential to our holding that the employees were injured while actually engaged in these tasks. They are covered by the LHWCA even if, at the moment of injury, they had been performing other work that was not essential to the loading process.

Id. at 49 (Blackmun, Marshall and O’Connor, JJ., concurring). The concurring opinion reinforced its view by quoting *Ford*, 444 U.S. at 83 n.18, (quoted *supra*), in which the Court had disavowed any intention to undermine *Caputo* even though the employees there were performing longshoring duties when they were injured. 493 U.S. at 49–50. The concurring opinion concluded:

To suggest that a worker like Schwalb, McClone, or Goode, who spends part of his time maintaining or repairing loading equipment, and part of his time on other tasks (even general clean up, or repair of equipment not used for loading), is covered only if he is injured while engaged in the former kind of work, would bring the “walking in and out of coverage” problem back with a vengeance.

Id. at 50.

Caputo frames the coverage issue in terms of “persons whose employment is such that they spend *at least some of their time in indisputably longshoring operations * * **” 432 U.S. at 273 (emphasis supplied). *Ford* and *Schwalb* did not depart from this standard even though the Court focused on the nature of the employees’ activities at the time of injury. And no court of appeals has concluded that the later Court cases deviate from *Caputo*’s basic premise. See *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 618 n.4 (11th Cir. 1990) (stating that a coverage test based on either the overall nature of the employee’s work or the specific activity performed at the time of injury is consistent with *Schwalb*). In the interest of clarity, the proposed regulation provides that the work being performed at the time of injury does not alone

determine whether LHWCA coverage is available to the employee.

The remaining issue concerns the meaning of “some” time spent in maritime employment in order to qualify for LHWCA coverage. None of the three Supreme Court decisions provide any guidance as to the quantitative or qualitative meaning of “some” time. Since *Caputo*, the courts of appeals have addressed the issue in a variety of circumstances. The cases fall into two general categories. In some cases, the court relied on a specific percentage of the employee’s time spent in qualifying maritime activities to determine coverage. See, e.g., *Coastal Production Services v. Hudson*, 555 F.3d 426, 441 (5th Cir. 2009) (finding coverage for employee who spent 9.7 percent of employment in maritime work); *Maier Terminals, Inc. v. Director, OWCP [Riggio]*, 330 F.3d 162, 169–70 (3d Cir. 2003) (finding coverage for employee who spent 50 percent of employment in maritime work); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1347–48 (5th Cir. 1980) (finding coverage for employee who spent 2.5–5 percent of employment in maritime work); *Vicknair v. Avondale Ind., Inc.*, 51 Fed. Appx. 929, 2002 WL 31415174 (5th Cir. 2002) (finding coverage for employee who spent less than one percent of employment in maritime work). In other cases, the court considered more generally whether the employee’s qualifying maritime work was “regular” or “episodic.” See, e.g., *Peru v. Sharpshooter Spectrum Venture LLC*, 493 F.3d 1058, 1066 (9th Cir. 2007) (stating that coverage should apply if employee’s maritime activities were more than *de minimis*); *Lennon v. Waterfront Transport*, 20 F.3d 658, 660–61 (5th Cir. 1994) (coverage is available if employee’s maritime work is “sufficiently regular so as not to be considered episodic events”); *Alcala v. Director, OWCP*, 141 F.3d 942, 945 (9th Cir. 1998) (finding no coverage because employee’s covered work “was infrequent or episodic and entirely discretionary in nature”); *Levins v. Benefits Review Board*, 724 F.2d 4, 9 (1st Cir. 1984) (coverage is available if employee’s maritime work is “a regular portion of the overall tasks” assigned or assignable to employee) (emphasis in original); *Schwabenland v. Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982) (rejecting requirement that maritime employment must comprise “substantial” portion of employee’s overall employment). No court, however, has provided a bright-line rule based on a quantitative relationship between the employee’s qualifying

maritime work and his overall duties that determines the availability of LHWCA coverage.

The proposed regulation follows *Caputo*’s formulation of LHWCA coverage in requiring that only “some” portion of the employee’s overall work be qualifying maritime employment. The proposed rule then places an outer limit on what constitutes “some”: The maritime employment must be more than infrequent or episodic, and must be considered a regular part of the employee’s job. As such, the proposed regulation is consistent with the general trend of the court cases in focusing on whether the employee’s qualifying maritime work is regular or irregular in order to determine whether the employee’s overall work should be covered by the LHWCA. This approach therefore leaves the determination to the adjudicator in each case to assess the coverage issue on the facts presented. Finally, the proposed regulation repudiates any concern (as expressed by the concurring opinion in *Schwalb*) that an employee may walk in/walk out of coverage depending on whether he is injured while performing a qualifying maritime function or injured while performing other duties.

E. Technical Changes

To accommodate the addition of the proposed rules, the Department intends to: Re-title § 701.301 and the subheading immediately preceding it; move the lengthy definition of “employee” that currently appears in § 701.301 into a new § 701.302, and update the language of the paragraph containing the recreational vessel exclusion to reflect the amended statute and cross-reference new §§ 701.501–701.505; and add a new § 701.303 for the walking in and out of qualifying employment regulation.

III. Statutory Authority

Section 39(a) of the LHWCA (33 U.S.C. 939(a)) authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration and enforcement of the Act and its extensions.

IV. Information Collection Requirements (Subject to the Paperwork Reduction Act) Imposed Under the Proposed Rule

This rulemaking imposes no new collections of information.

V. Executive Order 12866 (Regulatory Planning and Review)

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), entitled “The Principles of Regulation.”

The Department has determined that this proposed rule is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

VI. Small Business Regulatory Enforcement Fairness Act of 1996

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, enacted as Title II of Public Law 104–121 sections 201–253, 110 Stat. 847, 857 (1996), the Department will report promulgation of this proposed rule to both Houses of the Congress and to the Comptroller General prior to its effective date as a final rule. The report will state that the Department has concluded that the rule is not a "major rule" as defined under 5 U.S.C. 804(2).

VII. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector, "other than to the extent that such regulations incorporate requirements specifically set forth in law." For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased expenditures by State, local, and Tribal governments, or increased expenditures by the private sector of more than \$100,000,000.

VIII. Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*), requires an agency to prepare a regulatory flexibility analysis when it proposes regulations that will have "a significant economic impact on a substantial number of small entities," or to certify that the proposed regulations will have no such impact, and to make the analysis or certification available for public comment. The Department believes that the LHWCA itself accounts for most, if not all, of the costs imposed on the industry and that the proposed rules do not add to those costs. The primary cost lies in purchasing commercial insurance or qualifying as a self-insurer to insure workers covered by the LHWCA. This requirement is imposed by statute. 33 U.S.C. 904, 932. By expanding the number of recreational vessel workers who will be excluded from coverage, the section

2(3)(F) amendment will generally reduce the recreational vessel industry's costs for purchasing workers' compensation insurance or, in the case of a self-insurer, providing compensation. Nonetheless, because the recreational-vessel building and repair industries include many small firms, the Department has conducted an initial regulatory flexibility analysis. A summary of that analysis is set forth below. A copy of the complete economic analysis, which includes references to source materials, is available upon request directed to the Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C–4315, 200 Constitution Avenue, NW., Washington, DC 20210.

Description of the Reasons That Action by the Agency Is Being Considered

The Department is proposing these rules to implement the ARRA amendment to section 2(3)(F) of the LHWCA. That amendment, *inter alia*, excludes from the definition of "employee" workers who repair or dismantle for repair all recreational vessels, so long as the workers are subject to coverage under a State's workers' compensation law. This amendment expanded the existing exclusion, which limited the exclusion to workers repairing recreational vessels less than sixty-five feet in length.

Objectives of, and Legal Basis for, the Proposed Rule

The primary goal of the rule is to provide a clear, workable definition of "recreational vessel." Because the sixty-five-foot limitation on what constitutes a recreational vessel has been removed, the amended exclusion presents more opportunities for confusion among vessel-repair enterprises about whether the boats their workers repair are "recreational vessels" within the meaning of the LHWCA. The Department has determined that the current regulatory definition of "recreational vessel" does not provide adequate guidance to the industry and its employees, and therefore proposes to adopt a revised rule that more clearly defines the term.

This definition, in turn, serves several purposes. It gives entities that build or repair vessels guidance regarding the classification of vessels their employees are working on so that they may insure themselves under the appropriate workers' compensation scheme (*i.e.*, the LHWCA or a State). Similarly, the definition provides guidance to workers who might otherwise be unsure of their

rights under the LHWCA. Finally, a clear definition reduces the possibility of litigation over when the section 2(3)(F) exclusion applies.

In addition, the Department anticipates that in the absence of a size limitation, more questions will be raised regarding coverage for workers who perform a combination of qualifying work (*e.g.*, building a seventy-foot recreational vessel) and non-qualifying work (*e.g.*, repairing a seventy-foot recreational vessel). The Department thus wishes to clarify how the LHWCA applies to workers engaged in qualifying maritime employment whose job duties also include tasks that do not come within the ambit of the LHWCA. The proposed rule merely codifies existing law and therefore will have no cost effect on the industry.

The LHWCA empowers the Secretary of Labor "to make such rules and regulations * * * as may be necessary" to administer the statute. 33 U.S.C. 939. In addition, the Department, like any other administrative agency, possesses the inherent authority to promulgate regulations in order to fill gaps in the legislation that it is responsible for administering. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984). The Secretary has delegated her authority to the Director, Office of Workers' Compensation Programs. Secretary's Order 10–2009 (Nov. 6, 2009). This proposed rule falls within the Director's delegated authority.

Small Entities to Which the Proposed Rule Will Apply

To estimate the number of small businesses to which the proposed rule would apply, the Department considered both the numbers and size of recreational vessels and the nature of those business entities that build or repair vessels.

In 1988, there were 3,176 registered recreational vessels sixty-five feet or longer, accounting for less than 0.1 percent of 9.5 million recreational vessels in the United States. At that time, recreational vessels twenty-six feet and under represented more than 96 percent of all registered boats, with 5.2 million boats under sixteen feet and 4.0 million boats sixteen to less than twenty-six feet in length. Therefore, the effect of the 1984 Amendments to the Longshore Act, which first adopted the section 2(3)(F) exclusion, was to exempt practically all of the recreational marine industry from Longshore insurance.

In the subsequent twenty years, the number of recreational vessels sixty-five feet or longer increased almost three fold, to 11,514 boats by 2008. However,

these boats still represent 0.1 percent of all registered recreational vessels. The industry is still dominated by boats that are less than twenty-six feet in length. The prevailing trend has been toward boats sixteen to less than twenty-six feet in length; during the 1988–2008 period, the number of these boats grew 55.8 percent to 6.3 million vessels, whereas boats under sixteen feet declined 21.7 percent to 4.0 million. Together, these two categories account for 94.6 percent of the 10.9 million total registered recreational vessels.

In line with national statistics, there were 817 recreational vessels registered in Florida that were sixty-five feet or longer in 2008, which accounted for less than 0.1 percent of the almost 1 million statewide recreational vessels.

The small share of recreational vessels greater than sixty-five feet in length suggests that the boat repair industry's work is predominantly focused on smaller boats. However, the registered vessel records from the U.S. Coast Guard do not include foreign flagged vessels, which may be serviced by domestic boat repair establishments while sailing within U.S. waters. Therefore, the number and frequency of domestic and foreign owned recreational vessels greater than sixty-five feet in length that receive service by domestic boat repair establishments is probably relatively small but difficult to measure with any precision.

Within the larger vessel category, there were close to 5,000 "super-yachts" (vessels over eighty feet in length) globally in 2008, with 43 percent of those vessels between eighty and 100 feet and 36 percent between 100 and 165 feet. There were also 420 worldwide yachts over 165 feet in length and eighty-eight vessels over 235 feet. While many of these large boats are registered outside the United States, their size and ocean-going capability means that they could potentially enter U.S. waters for service or repair. Slightly less than half of the catalogue of vessels greater than eighty feet in length were built before 2000, while 22 percent were built before 1990. From 1990 through 2000, about 130 super-yachts were produced each year. However, since 2000, production has accelerated as the demand for these vessels continues to grow. From 2000 through 2008, an average of 310 super-yachts were produced each year, with 510 such yachts being built in 2008 alone. Within this large vessel category, 32 percent were built in Italy and 21 percent were produced in the United States.

Although recreational vessels greater than sixty-five feet in length compose a very small minority of total registered

boats, the frequency and nature of their repair is dramatically different than smaller vessels. Anecdotal information provided by industry sources indicate that larger boats require more frequent servicing and that work is of a more specialized nature relative to smaller vessels. Larger vessels, which are more intricate, require substantially more maintenance and are more likely to require professional maintenance. Therefore, the proportion of boat repair establishments servicing recreational vessels sixty-five feet or larger is assumed to be substantially greater than the relative number of those vessels. For instance, the servicing of recreational vessels sixty-five feet or larger is estimated to comprise between 25 and 35 percent of the total business of recreational boat repair establishments that are located on coastal waters.

The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. It is also the standard used to classify small businesses for the Regulatory Flexibility Act. See 5 U.S.C. 601(3), 15 U.S.C. 632(a). NAICS was developed under the auspices of the Office of Management and Budget, and adopted in 1997 to replace the Standard Industrial Classification (SIC) system.

An explicit analysis of the recreational vessel building and repair industry is problematic because there are no designated NAICS codes assigned specifically to this industry. Instead, the boat building and repair industry is currently segmented into two NAICS industries:

(1) NAICS industry 336612 (Boat Building) comprises establishments primarily engaged in building boats that are suitable or intended for personal use, but exclude the repair and servicing of those boats. The key word in this industry definition is "primarily." Firms classified in this industry earn at least half of their revenue from boat building. Some of these firms may conduct significant repair service work (especially major renovations of yachts), but they are classified as boat builders based on the majority revenue source.

(2) NAICS industry 811490 (Other Personal and Household Goods Repair and Maintenance) comprise establishments primarily engaged in repairing and servicing personal or household-type goods. This broad industry includes, but does not separate, the repair of items such as garments, watches, jewelry, musical instruments,

bicycles and motorcycles, motorboats, canoes, sailboats, and other recreational boats.

Industry data such as the number of establishments, annual revenue, and employment that are specific to the recreational vessel industry are, therefore, not directly available because the boat repair segment of this industry is combined with other personal and household repair and maintenance industries. However, prior to the current industry classification system, the SIC combined the two segments into one industry: SIC 3732 (Boat Building and Repairing). Therefore, the most recently available detailed SIC-based data are used to provide disaggregated estimates based on current NAICS-based data.¹

In 1997, there were 2,782 establishments primarily engaged in building and repairing recreational boats. These establishments employed 50,876 workers and generated \$6.4 billion in shipment value.² The boat repair segment accounted for 1,739 or 62.5 percent of the broader industry's establishments, but only 9,454 or 18.6 percent of the employees and \$821 million or 12.7 percent of shipments.

In 2007, there were 1,102 establishments in NAICS industry 336612 (Recreational Boat Building). These establishments employed 53,466 workers, generated \$11.1 billion in shipments, and had a payroll of \$1.9 billion. This implies a 5.3 percent increase in recreational boat building establishments and a 29.1 percent increase in workers in the boat building segment since 1997.

As part of the SIC to NAICS conversion, the boat building portion of SIC 3732 was allocated to the standalone NAICS industry 336612 (Boat Building), while the boat repair segment of SIC 3732 was allocated within NAICS industry 81149 (Other Personal and Household Goods Repair and Maintenance). Within this broad NAICS industry, the boat repair industry accounted for 18.4 percent of the revenue in 1997, 11.9 percent of the establishments, 14.5 percent of the paid employees, and 17.9 percent of the total annual payroll.

In 2007, there were 9,631 establishments classified under NAICS industry 81149 (Other Personal and

¹ Although separate NAICS data is available for marinas, the Department did not rely on this data because marina workers are separately excluded from the ambit of the LHWCA if subject to a State workers' compensation law. 33 U.S.C. 902(3)(C).

² Manufacturers' shipments measure the dollar value of products sold by manufacturing establishments and are based on net selling values, f.o.b. (free on board) plant, after discounts and allowances are excluded.

Household Goods Repair and Maintenance). These establishments employed 33,136 workers, generated \$2.8 billion in revenue, and had \$882.5 million in annual payroll.³ Applying the 1997 SIC-to-NAICS distribution ratios, an estimated 1,150 of those establishments were primarily engaged in recreational boat repair in 2007 and employed 4,800 workers. However, this method assumes that the distribution of establishments within NAICS 81149 was fixed from 1997 through 2007. Therefore, a 33.9 percent decrease in the number of other personal and household goods repair and maintenance establishments and a 49.2 percent decrease in employment imply commensurate declines in the boat repair industry. This seems highly improbable given the increase of establishments and employment within the boat building industry; the steady number of overall recreational vessel registrations; the demand shift toward larger recreational boats; and the changing nature of the other establishments within NAICS 81149. Therefore, applying the same industry growth rates experienced by boat building establishments, an estimated 1,837 establishments were primarily engaged in recreational boat repair in 2007. These establishments employed 12,203 workers, generated \$1.6 billion in revenue, and had \$436 million in annual payroll.⁴ This seems to be the more credible estimate of the size of the boat repair industry in 2007.

The combined boat building and estimated boat repair industry, therefore, had approximately 2,900 establishments in 2007 that employed 65,700 workers, generated about \$12.8 billion in combined shipments and revenue, and had a \$2.3 billion payroll. The boat building segment comprised 81 percent of the overall employment and payroll and generated 87 percent of the output value. However, for every one boat building firm there were three, more labor-intensive, boat repair establishments.

Small establishments dominate both industries, although they are more heavily weighted within the boat repair industry. In 2007, the average establishment in the boat building industry employed 48.5 workers,

whereas the average boat repair establishment employed 6.6 workers. Confirming this employment dynamic, estimates using data from the U.S. Census Bureau's County Business Patterns reveal that of the 1,102 establishments engaged in boat building, 651 (59 percent) had 9 employees or fewer and 928 (84 percent) had 49 employees or fewer. Another 186 establishments (17 percent) employed between 50 and 249 workers, while an additional 19 establishments employed 500 or more workers. Conversely, approximately 86 percent of boat repair establishments had 9 employees or fewer and 95 percent employed 19 or fewer workers.

The Small Business Administration (SBA) defines establishment size standards to determine whether a business entity, including all of its affiliates, is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. A size standard is usually stated in number of employees for manufacturing industries and average annual receipts for most nonmanufacturing industries.

The SBA size standard for the ship building and repair industry (NAICS 336611) is 1,000 employees; boat building (NAICS 336612) is 500 employees; and other personal and household goods repair and maintenance (NAICS 811490) is \$7.0 million in annual receipts. In 2007, the average establishment in the boat building industry generated \$10.1 million in shipments, whereas the average boat repair establishment generated approximately \$886,000 in revenues. Therefore, for the purpose of the proposed regulations, the typical establishment within the boat repair industry falls within the small business designation.

The Department is not able to determine, however, which of these small businesses will be affected by the proposed rule due to a lack of data. The available data does not segregate establishments by work performed on the specific types of vessels identified as recreational by the Coast Guard and as adopted in the proposed rules. Moreover, it is likely that some of these building and repair businesses engage in both commercial and recreational-vessel work. To the extent the employer uses a common work force for both tasks, the statute would require the employer to obtain LHWCA insurance by virtue of the commercial work. Accordingly, the Department invites comments on this issue.

Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed rules do not directly impose any reporting or recordkeeping requirements on any entities, regardless of size. Nor do the rules impose other significant costs beyond those imposed by the LHWCA itself. The statute requires employers whose employees are covered by the LHWCA to secure the payment of compensation by either purchasing commercial insurance or qualifying as a Department-approved self-insurer. 33 U.S.C. 904, 932. The ARRA amendment to section 2(3)(F) significantly expanded the exclusion for recreational vessel workers, thereby reducing the number of workers considered employees for LHWCA coverage purposes. Thus, both small and large businesses that repair recreational vessels sixty-five feet or greater in length who had previously been required to purchase LHWCA insurance may be relieved of that obligation. Instead, these employers generally will only be required to purchase lower-cost State insurance.

Given that small establishments dominate the recreational-vessel industry, very few (if any) would attempt to qualify as a self-insurer. Thus, the Department has focused the cost inquiry on those entities purchasing commercial insurance. The Department has surveyed the cost of purchasing LHWCA insurance and compared it to the cost of various States' workers' compensation insurance. On average, LHWCA insurance is 50–100 percent more expensive than State workers' compensation insurance. Because the premium for both LHWCA and State workers' compensation coverage is calculated as a percentage of the employer's payroll, regardless of payroll size, the cost for both small establishments and larger employers is the same in relative terms.

To the extent the proposed rule defines certain boats as "recreational vessels," the rule will have an impact on whether a particular employer must purchase LHWCA insurance. The Department does not anticipate that the proposed rule will cause many businesses that would otherwise be exempt from the LHWCA to fall under the statute: the rule is designed to clarify the definition so that there is no ambiguity regarding what vessels are recreational, and not to reduce the number of vessels categorized as

³ See U.S. Census Bureau, 2007 Economic Census.

⁴ This methodology also holds constant the 1997 allocations of boat building and repair. Furthermore, this method implies that the boat repair establishment proportion of NAICS 81149 increased from 11.9 percent in 1997 to 19.1 percent in 2007 and that the number of all other establishments within NAICS 81149 declined by 39 percent, as the overall sector contracted by 34 percent.

recreational. Moreover, businesses that perform work on both recreational and non-recreational vessels as defined in the proposed rule can reduce their insurance-cost burden by segmenting their workplace into recreational vessel and non-recreational vessel operations, further minimizing any cost implications of the proposed rule.

Identification of Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The proposed rules adopt the Coast Guard’s standards for delineating recreational as opposed to non-recreational vessels. As set forth above, the Department has chosen these standards because their use will eliminate duplicative or overlapping standards, rather than create them. The Department is unaware of any other rules that may duplicate, overlap or conflict with the proposed rule.

Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) Any Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

The Department considered not revising the current broad regulatory definition of recreational vessel, see 20 CFR 701.301(a)(12)(iii)(F), but rejected that course. Prior to the ARRA amendment, the sixty-five foot length limit provided an outer boundary for the definition; any vessel sixty-five feet or longer was not a recreational vessel for purposes of the section 2(3)(F) exclusion. Without this boundary, the Department believes that both small and large businesses will benefit from a clearer definition of recreational vessel. Boat builders and repairers will be able to structure their operations with greater certainty. A refined definition also diminishes the chances of litigation, resulting in reduced legal costs.

Because the exact number of businesses performing work on each type of vessel described in the proposed rule is unknown, it is correspondingly difficult to determine whether adopting some other definition would impose

fewer direct costs on small businesses. The Department considered using a size measure other than length, such as tonnage alone. But the ARRA amendment indicates Congress’ preference for defining recreational vessels by the nature of the vessel and its use rather than by its size. Adopting the Coast Guard classifications is consistent with this approach.

The exemption for recreational-vessel workers is a creature of statute. All businesses, small or otherwise, must make determinations regarding their need to procure LHWCA or State workers’ compensation insurance. The proposed rule attempts to simplify these determinations by adopting an existing classification scheme well-known to the industry.

Finally, the LHWCA does not allow for imposing differential requirements on small businesses to lower their costs. The cost of compensation payments drive the cost of LHWCA insurance, which is priced by private insurance carriers. Logically, then, lower compensation payments would lead to lower insurance costs. But the statute establishes the amount of compensation an injured worker must be paid, and that amount remains the same for employers of all sizes.

Questions for Comment To Assist Regulatory Flexibility Analysis

The Department invites all interested parties to submit comments regarding the costs and benefits of the proposed rule with particular attention to the effect of the rule on small entities described in the analysis above. The Department is particularly interested in information regarding: (a) The number of businesses performing work on the respective vessel categories under the proposed rule and the proportion of their work devoted to those vessels; (b) the administrative burden, if any, of determining vessel status under the proposed rule; and (c) the existence of other categorization schemes for recreational vessels and whether those alternate schemes are widely understood.

IX. Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” The proposed rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various

levels of government,” if promulgated as a final rule.

X. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

XI. Congressional Review Act

This proposed rule is not a “major rule” as defined in the Congressional Review Act (5 U.S.C. 801 *et seq.*). If promulgated as a final rule, this rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 20 CFR Part 701

Longshore and harbor workers, Organization and functions (government agencies), Workers’ compensation.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR Part 701 as follows:

PART 701—GENERAL; ADMINISTERING AGENCY; DEFINITIONS AND USE OF TERMS

1. The authority citation for Part 701 is revised to read as follows:

Authority: 5 U.S.C. 301 and 8171 *et seq.*; 33 U.S.C. 939; 36 DC Code 501 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1331; Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR, 1949–1953 Comp., p. 1004, 64 Stat. 1263; Secretary’s Order 10–2009; Pub. L. 111–5 § 803, 123 Stat. 115, 187 (2009).

2. Amend § 701.301 as follows:
 a. Redesignate paragraph (a)(12) as § 701.302, with its sub-paragraphs redesignated according to the following table:

Former designation in § 701.301	New designation in § 701.302
(a)(12)(i) introductory text.	(a) introductory text.
(a)(12)(i)(A)	(a)(1).
(a)(12)(i)(B)	(a)(2).
(a)(12)(i)(C)	(a)(3).
(a)(12)(ii) introductory text.	(b) introductory text.
(a)(12)(ii)(A)	(b)(1).
(a)(12)(ii)(B)	(b)(2).

Former designation in § 701.301	New designation in § 701.302
(a)(12)(iii) introductory text.	(c) introductory text.
(a)(12)(iii)(A)	(c)(1).
(a)(12)(iii)(B)	(c)(2).
(a)(12)(iii)(C)	(c)(3).
(a)(12)(iii)(D)	(c)(4).
(a)(12)(iii)(E)	(c)(5).
(a)(12)(iii)(F)	(c)(6).

b. Redesignate paragraphs (a)(13) through (a)(16) as (a)(12) through (a)(15); and

c. Revise the undesignated center heading following § 701.203 and immediately preceding § 701.301, and revise the section heading of § 701.301 to read as follows:

Definitions and Use of Terms

§ 701.301 What do certain terms in this subchapter mean?

* * * * *

3. Amend newly designated § 701.302 by adding a section heading, and by revising paragraph (c)(6) to read as follows:

§ 701.302 Who is an employee?

* * * * *

(c) * * *

(6) Individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel. For purposes of this paragraph, the special rules set forth at §§ 701.501 through 701.505 apply.

4. Add § 701.303 to read as follows:

§ 701.303 Is a worker who engages in both qualifying “maritime employment” and non-qualifying duties in the course of employment an “employee” covered by the LHWCA?

(a) An individual is a covered “employee” if he or she performs at least some work in the course of employment that qualifies as “maritime employment” and that work is not—

- (1) Infrequent, episodic, or too minimal to be a regular part of his or her overall employment; or
- (2) Otherwise excluded from coverage under § 701.302.

(b) The individual’s status as a covered “employee” does not depend on whether he or she was engaged in qualifying maritime employment or non-qualifying work when injured.

5. Add a new undesignated center heading following § 701.401 and add § 701.501 to read as follows:

Special Rules for the Recreational Vessel Exclusion from the Definition of “Employee”

§ 701.501 What is a Recreational Vessel?

(a) *Recreational vessel* means a vessel—
 (1) Being manufactured or operated primarily for pleasure; or
 (2) Leased, rented, or chartered to another for the latter’s pleasure.
 (b) Recreational vessel does not include a—

- (1) “Passenger vessel” as defined by 46 U.S.C. 2101(22);
- (2) “Small passenger vessel” as defined by 46 U.S.C. 2101(35);
- (3) “Uninspected passenger vessel” as defined by 46 U.S.C. 2101(42);
- (4) Vessel routinely engaged in “commercial service” as defined by 46 U.S.C. 2101(5); or
- (5) Vessel that routinely carries “passengers for hire” as defined by 46 U.S.C. 2101(21a).

(c) All subsequent amendments to the statutes referenced in paragraph (b) of this section are incorporated. The statutes referenced in paragraph (b) and all subsequent amendments thereto apply as interpreted by regulations in Title 46 of the Code of Federal Regulations.

6. Add § 701.502 to read as follows:

§ 701.502 What types of work may exclude a recreational-vessel worker from the definition of “employee”?

(a) An individual who works on recreational vessels may be excluded from the definition of “employee” when:

(1) The individual’s date of injury is before February 17, 2009, the injury is covered under a State workers’ compensation law, and the individual is employed to:

- (i) Build any recreational vessel under sixty-five feet in length; or
- (ii) Repair any recreational vessel under sixty-five feet in length; or
- (iii) Dismantle any recreational vessel under sixty-five feet in length.

(2) The individual’s date of injury is on or after February 17, 2009, the injury is covered under a State workers’ compensation law, and the individual is employed to:

- (i) Build any recreational vessel under sixty-five feet in length; or
- (ii) Repair any recreational vessel; or
- (iii) Dismantle any recreational vessel to repair it.

(b) In applying paragraph (a) of this section, the following rules apply:

(1) “Length” means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The

measurement must be from end to end over the deck, excluding sheer. Bow sprits, bumpkins, rudders, outboard motor brackets, handles, and other similar fittings, attachments, and extensions are not included in the measurement.

(2) “Repair” means any repair of a vessel including installations, painting and maintenance work. Repair does not include alterations or conversions that render the vessel a non-recreational vessel under § 701.501. For example, a worker who installs equipment on a private yacht to convert it to a passenger-carrying whale-watching vessel is not employed to “repair” a recreational vessel. Repair also does not include alterations or conversions that render a non-recreational vessel recreational under § 701.501.

(3) “Dismantle” means dismantling any part of a vessel to complete a repair but does not include dismantling any part of a vessel to complete alterations or conversions that render the vessel a non-recreational vessel under § 701.501, or render the vessel recreational under § 701.501, or to scrap or dispose of the vessel at the end of the vessel’s life.

(c) An individual who performs recreational-vessel work not excluded under paragraph (a) of this section or who engages in other qualifying maritime employment in addition to recreational-vessel work excluded under paragraph (a) of this section will not be excluded from the definition of “employee.” (See § 701.303).

7. Add § 701.503 to read as follows:

§ 701.503 Did the American Recovery and Reinvestment Act of 2009 Amend the Recreational Vessel Exclusion?

Yes. The amended exclusion was effective February 17, 2009, the effective date of the American Recovery and Reinvestment Act of 2009.

8. Add § 701.504 to read as follows:

§ 701.504 When does the 2009 amended version of the recreational vessel exclusion apply?

(a) *Date of injury.* Whether the amended version applies depends on the date of the injury for which compensation is claimed. The following rules apply to determining the date of injury:

(1) *Traumatic injury.* If the individual claims compensation for a traumatic injury, the date of injury is the date the employee suffered harm. For example, if the individual injures an arm or leg in the course of his or her employment, the date of injury is the date on which the individual was hurt.

(2) *Occupational disease or infection.* Occupational illnesses and infections

are generally caused by exposure to a harmful substance or condition. If the individual claims compensation for an occupational illness or infection, the date of injury is the date the illness becomes "manifest" to the individual. The injury is "manifest" when the individual learns, or reasonably should have learned, that he or she is suffering from the illness, that the illness is related to his or her work with the responsible employer, and that he or she is disabled as a result of the illness.

(3) *Hearing loss.* If the individual claims compensation for hearing loss, the date of injury is the date the individual receives an audiogram with an accompanying report which indicates the individual has suffered a loss of hearing that is related to employment.

(4) *Death-benefit claims.* If the individual claims compensation for an employee's death, the date of injury is the date of the employee's death, even if his or her death was the result of an event or incident that happened on an earlier date.

(b) If the date of injury is before February 17, 2009, the individual's entitlement is governed by section 2(3)(F) as it existed prior to the 2009 amendment.

(c) If the date of injury is on or after February 17, 2009, the employee's eligibility is governed by the 2009 amendment to section 2(3)(F).

9. Add § 701.505 to read as follows:

§ 701.505 May an employer stop paying benefits awarded prior to the effective date of the recreational vessel exclusion amendment if the employee would now fall within the exclusion?

No. If an individual was awarded compensation for an injury occurring before February 17, 2009, the employer must still pay all benefits awarded, including disability compensation and medical benefits, even if the employee would be excluded from coverage under the amended exclusion.

Signed at Washington, DC, this 9th day of August 2010.

Shelby Hallmark,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2010-20080 Filed 8-16-10; 8:45 am]

BILLING CODE 4510-CF-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2010-0529; FRL-9189-9]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Transportation Conformity Consultation Requirement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Indiana State Implementation Plan (SIP) submitted on June 4, 2010. This revision consists of transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation related control measures and mitigation measures. This approval will meet a requirement of the Clean Air Act and Transportation Conformity regulations.

DATES: Comments must be received on or before September 16, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2010-0529, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail:* bortzer.Jay@epa.gov.
3. *Fax:* (312) 692-2054.
4. *Mail:* Jay Elmer Bortzer, Chief, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery:* Jay Elmer Bortzer, Chief, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT:

Patricia Morris, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-8656, morris.patricia@epa.gov.

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: August 5, 2010.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 2010-20183 Filed 8-16-10; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

RIN 0920-AA34

Public Health Security and Bioterrorism Preparedness and Response Act of 2002: Biennial Review and Republication of the Select Agent and Toxin List

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Extension of public comment period.

SUMMARY: On July 21, 2010, the Department of Health and Human Services (HHS) published an Advanced Notice of Proposed Rulemaking (ANPRM) requesting public comment on the current HHS list of select agents and toxins. This document is extending the comment period for that ANPRM in order to align the comment period with the comment period of a related document published by the Animal and Plant Health Inspection Service (APHIS)