

the report to Congress by the end of June 2004.

History of the ZMRG

When the MMPA was enacted in 1972, the ZMRG was directed solely at the yellowfin tuna purse seine fishery in the Eastern Tropical Pacific Ocean (ETP), where participants in the fishery deliberately encircled dolphins to catch tuna. Hundreds of thousands of dolphins were being killed each year in the course of this fishing practice. Since 1972, Congress addressed the ZMRG several times from 1972 to 1997, and a brief history of Congressional action and guidance related to ZMRG is presented below.

The MMPA of 1972 (Public Law No. 92-522, 86 Stat. 1027)

Congress developed the legislative guidance for protecting marine mammals and defining the ZMRG in response to unsustainable mortality levels. The House committee noted that it was not their intent to shut down or significantly curtail the activities of the tuna fleet so long as the Secretary of Commerce "is satisfied that the tuna fishermen are using the best available technology to assure minimal hazards to marine mammal populations" (H.R. Rep. No. 92-707, at 24 (1971)). The Senate added that regulations should be imposed "as soon as practicable to minimize marine mammal fatalities through the use of currently available technology..." (S. Rep. No. 92-863, at 6 (1972)). The Senate report included guidance that, "while it should be the goal of Congress and the Executive eventually to eliminate totally the killing of porpoises, present technology is not adequate to the task." House and Senate Conferees agreed on a provision in MMPA section 101(a)(2), 16 U.S.C. 1371(a)(2), as follows: "In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." (H. R. Conf. Rep. No. 92-1488, at 5 (1972)). In the Joint Explanatory Statement the report provided, "...the objective of regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals...It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear." (H. R. Conf. Rep. No. 92-1488 at 23)

In its original form, the ZMRG was directed at the ETP tuna fishery but was sufficiently broad that it could include other fisheries in waters under U.S.

jurisdiction. The ZMRG guided NMFS to regulate the tuna fleet to minimize incidental mortality immediately to the extent that the current technology would allow; however, neither NMFS nor the industry could be satisfied with that effort and should continue to strive to eliminate incidental mortality of marine mammals in the fishery. In the regulation of the tuna fleet, however, NMFS could not significantly curtail fishing activities if fishers were using the best available technology. Thus, the original ZMRG contained the following elements: immediate reduction of incidental mortality to the extent that current technology would allow, economic consideration of regulating fishing operations, and the long-term necessity to continue technological improvement for applying to future fishing operations.

MMPA Amendments of 1981 (Public Law No. 97-58, 95 Stat. 979)

In developing the amendments to the MMPA in 1981, the House committee noted successes of the MMPA, including, "In the area of reducing the incidental take of porpoises in tuna fishing operations, for example, the number of porpoises killed has dropped from an estimated 368,000 animals in 1972 to an estimated 15,303 porpoises in 1980." (H. R. Rep. No. 97-228 at 11 (1981)). The report explained that an amendment to MMPA section 101(a)(2) was being made to clarify that ZMRG "is satisfied in the case of the purse seine fishery for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." (H. R. Rep. No. 97-228 at 17) The "best techniques" approach was reaffirmed in 1984 when Congress reauthorized the MMPA (H. R. Rep. No. 98-758 at 8 (1984)).

The House committee declined, however, to modify ZMRG for other commercial fisheries. The committee recognized that other fisheries (citing the foreign high seas salmon gillnet fishery as an example) had not developed new techniques and equipment for reducing incidental mortality. Therefore, the goal in MMPA section 101(a)(2) would remain unchanged for other commercial fisheries "to stimulate new technology for reducing the incidental taking of marine mammals." (H. R. Rep. No. 97-228 at 17-18 (1981)).

MMPA Amendments of 1988 (Public Law No. 100-711, 102 Stat. 4755)

In the Interim Exemption for Commercial Fisheries under MMPA

section 114, 16 U.S.C. 1383a, Congress retained the ZMRG as an objective of a regime to govern interactions between marine mammals and commercial fishing operations other than the commercial yellowfin tuna fishery (H. R. Rep. No. 100-970 at 21 (1988), S. Rep. No. 100-592 at 16 (1988)). The 1988 Amendments also required the Marine Mammal Commission to recommend guidelines to govern the incidental taking of marine mammals in the course of fishing operations after the interim exemption expired. The Commission's guidelines (Recommended Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations After October 1993, July 1990) maintained the ZMRG as an important component of the MMPA, but did not present additional insight into the meaning of insignificant levels approaching a zero mortality and serious injury rate. The Commission's guidelines provided a quantitative approach for evaluating whether or not marine mammal mortality was having a negligible effect on the affected population and included an impact whose effect lasted for less than one year or one that would cause less than a 10 percent increase in time it would take a depleted stock to reach its maximum net productivity level. The first of these two criteria may be appropriate for a one-time activity; however, commercial fishing is repeated annually, and some level of incidental mortality is likely to continue after one year. The second criterion, no more than a 10 percent delay in recovery of a depleted stock, addresses the annual level of incidental mortality and serious injury to assess the effects of continuing fishery interactions with marine mammals. However, this approach applies to the recovery of depleted stocks, and not all stocks are depleted. Consequently, this criterion would not necessarily be applicable to all stocks, and an additional criterion would have to apply to those cases.

International Dolphin Conservation Act of 1992 (Public Law No. 102-523, 106 Stat. 3425)

Congress passed the International Dolphin Conservation Act of 1992, which, among other things, prohibited U.S. vessels from setting nets on or to encircle dolphins to catch tuna and limited dolphin mortality from U.S. vessels to specific numbers for specific periods. In doing so, Congress reversed its course for reducing dolphin mortality in the ETP and, thus, cast some question on legislative intent regarding the ability of the "best