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116TH CONGRESS }
1st Session }

SENATE

{ REPORT
116-166

DRIFTNET MODERNIZATION AND BYCATCH
REDUCTION ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 906



DECEMBER 5, 2019.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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Mr. WICKER, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 906]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 906) to improve the management of driftnet fishing, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 906 is to phase out the U.S. West Coast large-scale driftnet fishery, which primarily targets swordfish, and to implement a program to help the affected fishers transition to alternative gear types.

BACKGROUND AND NEEDS

Large-scale driftnet fishing, as defined by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), is a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of two and one-half kilometers (just over one and one half statute miles) or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish.¹ The only such large-scale drift gillnet fishery in the United States is on the west coast and primarily targets swordfish, but also harvests other commercially

¹ 16 U.S.C. 1802(25).

valuable species, such as thresher, mako shark, and opah (also known as moonfish).

BYCATCH ISSUES IN THE DRIFT GILLNET FISHERY

The term “bycatch” refers to species that are harvested in a fishery, but are not sold or kept for personal use, and includes both unmarketable and regulatory discards.² In the early 1990s, the U.S. swordfish gillnet fishery off the west coast killed hundreds of whales, sea turtles, and dolphins annually.³ Beginning in 1996, the National Marine Fisheries Service (NMFS) convened the Pacific Offshore Cetacean Take Reduction Team under the authority of the Marine Mammal Protection Act (MMPA) to develop strategies to reduce entanglement of protected species, which included net modifications and sound-emitting devices. NMFS also designated two large conservation areas off the west coast that are closed to drift gillnet fishing when endangered sea turtles are known to be frequently present. These measures have resulted in a decline of bycatch of protected species to levels comparable to other U.S. fisheries, including the U.S. Atlantic swordfish longline fishery.⁴

PERMITTING HISTORY

The MSA prohibits large-scale driftnet fishing in areas subject to United States jurisdiction and by U.S. vessels beyond the exclusive economic zone (EEZ)⁵ of any nation.⁶ Within the U.S. EEZ, the drift gillnet fishery on the west coast⁷ is co-managed by the National Oceanic and Atmospheric Administration (NOAA), the Pacific Fishery Management Council (PFMC), and the State of California. The fishery operates under a limited entry permit system⁸ with mandatory gear requirements and time-area closures. Federal management of the West Coast drift gillnet fishery occurs under the PFMC’s Highly Migratory Species (HMS) Fishery Management Plan (FMP). NOAA partially approved the HMS FMP in 2004, but did not establish Federal permission of the draft gillnet fishery until 2018. Prior to 2018, the West Coast drift gillnet fishery permits were only issued by States.

Originally, the Oregon Fish and Wildlife Commission managed the drift gillnet fishery for swordfish under the Developmental Fisheries Program. However, when Oregon removed swordfish from the program in 2009, the State banned permits to fish with drift gillnet gear off Oregon’s coast, leaving California as the only State

² 16 U.S.C. 1802(2).

³ NOAA National Marine Fisheries Service, “Two Decades Later, Focused Efforts on Reducing Entanglements in Gillnet Fishery Still Paying Off,” June 2017 (http://www.westcoast.fisheries.noaa.gov/stories/2017/09_06082017_drift_gillnet.html) (accessed July 18, 2018).

⁴ Id.

⁵ The U.S. EEZ is a zone contiguous to the territorial sea of the United States, Puerto Rico, the Northern Mariana Islands, and U.S. overseas territories and possessions that extends 200 nautical miles from shore, as established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of the MSA, the inner boundary of the EEZ is a line coterminous with the seaward boundary of each of the coastal States.

⁶ 16 U.S.C. 1857(1)(M).

⁷ As defined in 60 CFR 660.702, a drift gillnet is a panel of netting, 14 inch (35.5 cm) stretched mesh or greater, suspended vertically in the water by floats along the top and weights along the bottom. A drift gillnet is not stationary or anchored to the bottom.

⁸ NOAA National Marine Fisheries Service West Coast Region, “Swordfish Large Mesh Drift Gillnet” (http://www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/hms_DGN_gear.html) (accessed July 18, 2018).

permitting the drift gillnet fishery.⁹ In September 2018, California enacted legislation to phase out the use of large-mesh drift gillnets and compensate permit holders—\$10,000 for permits and \$100,000 for gear.¹⁰ Under California law, a State permit is required to land swordfish caught with drift gillnets, even if the swordfish are caught in Federal waters. Thus, swordfish caught legally under Federal law are made illegal by California’s State laws.

At the Federal level, in March 2017, the PFMC recommended amending the HMS FMP to implement a limited entry drift gillnet permit which would put the drift gillnet fishery under MSA authority. In March 2018, the NOAA National Marine Fisheries Service (NMFS) issued a final rule to create a Federal limited entry permit for the California/Oregon large-mesh drift gillnet fishery.¹¹ Under the FMP as amended, the relatively few remaining California permit holders (the number of active participating vessels in the fishery has remained low, with under 50 vessels since 2003, and an average of only 20 active vessels per year from 2010 through 2015¹²) have until March 31, 2019, to obtain their Federal permits. However, as noted above, recent changes in California law may render a Federal permit unusable.

ALTERNATIVE GEAR

The only other gear currently authorized for targeting swordfish in the U.S. West Coast EEZ is harpoon gear. In 2014, the PFMC recommended, and in 2015 NMFS approved, the first of several exempted fishing permits to evaluate the success and economic viability of alternative gears to target swordfish in the Eastern Pacific Ocean.¹³ These alternative gears include deep-set buoys and deep-set longlines. The West Coast design for deep-set buoy gear uses heavy weights to lower baited hooks to depths of more than 1,000 feet during the day, avoiding unmarketable or federally protected species that reside in shallower waters. The buoy gear uses an electronic strike detection system to alert fishermen when a fish is on the line and allows for quick retrieval when hooked.¹⁴ Swordfish caught by deep-set buoy gear can fetch higher market prices for fishermen with a lower rate of bycatch of nonmarketable species and protected species,¹⁵ though it is not yet known if this would translate to higher market value for all permitted fishers if the entire fishery were to transition to deep-set buoy gear.

⁹Pacific Fishery Management Council, Current HMS SAFE Report: Commercial Fisheries Descriptions, May 3, 2018 (<https://www.pcouncil.org/highly-migratory-species/stock-assessment-and-fishery-evaluation-safe-documents/current-hms-safe-document/commercial-fisheries-descriptions/#dgn>) (accessed July 20, 2018).

¹⁰See 2018 Cal.Stat. ch. 844.

¹¹NOAA NMFS, Fisheries Off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Implementation of a Federal Limited Entry Drift Gillnet Permit, 83 Federal Register 11146 (Mar. 14, 2018).

¹²NOAA NMFS West Coast Region, Final Regulatory Impact Review and Final Regulatory Flexibility Analysis for the Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery Proposed Rule, RIN 0648–BG23, May 2017.

¹³NOAA NMFS West Coast Region, “Status of Exempted Fishing Permits” (http://www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/status_exempted_permits.html) (accessed February 23, 2018).

¹⁴NOAA NMFS West Coast Region, “Innovation in Swordfish Fishery Fetches a Higher Market Price,” February 2017 (http://www.westcoast.fisheries.noaa.gov/stories/2017/06_02062017_swordfish_ejp_tagging.html).

¹⁵Id.

PREVIOUS RULEMAKING

In 2016, the PFMC recommended that NMFS implement regulations for the California/Oregon large-mesh drift gillnet fishery to establish hard caps on the number of certain protected species (sea turtles, Endangered Species Act-listed marine mammals, bottlenose dolphins, and short-finned pilot whales) caught, and close the fishery for the remainder of the season if the caps are met or exceeded within a rolling 2-year period. NOAA proposed this rulemaking in October 2016,¹⁶ but later withdrew it in June 2017,¹⁷ having concluded that the proposal would have likely imposed significant new costs while also overlapping existing conservation measures already in place and therefore not providing significant conservation benefit.¹⁸ The Marine Mammal Commission found the proposed regulations inadequately justified, and expressed concern about potentially undermining the integrity of the take reduction process of the MMPA.¹⁹ On October 24, 2018, the U.S. District Court for the Central District of California held that NOAA's withdrawal of the October 2016 rulemaking exceeded the agency's authority under the MSA and the Administrative Procedure Act (APA).²⁰ The court remanded the matter for further action by NOAA consistent with the requirements of section 304 of the MSA (16 U.S.C. 1854) and the APA.

SUMMARY OF PROVISIONS

If enacted, S. 906, the Driftnet Modernization and Bycatch Reduction Act, would do the following:

- Direct the Secretary of Commerce to conduct a transition program for existing driftnet permit holders to facilitate the adoption of alternative fishing gear and to authorize grants to affected fishers.
- Prohibit the use of large-scale driftnet fishing by U.S. vessels within the U.S. EEZ not later than 5 years after the date of enactment of this Act.

LEGISLATIVE HISTORY

S. 906, the Driftnet Modernization and Bycatch Reduction Act, was introduced on March 27, 2019, by Senator Feinstein (for herself and Senator Capito) and was referred to the Committee on Commerce, Science, and Transportation of the Senate. Senators Blumenthal, Coons, and Harris are additional cosponsors. On April 3, 2019, the Committee met in open Executive Session and, by voice vote, ordered S. 906 reported favorably with an amendment (in the nature of a substitute). Senator Sullivan offered an amend-

¹⁶NOAA NMFS, Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, RIN 0648-BG23, 81 Federal Register 70660 (October 1, 2016).

¹⁷NOAA NMFS, Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, RIN 0648-BG23, 82 Federal Register 26902 (June 12, 2017).

¹⁸NOAA NMFS West Coast Region, "FAQs: West Coast Drift Gillnet (DGN) Fishery & Protected Species," June 8, 2017.

¹⁹Marine Mammal Commission letter to NMFS West Coast Region Re: NOAA-NMFS-2016-0123. December 28, 2016 (<http://www.mmc.gov/wp-content/uploads/16-12-28Enriques-DGN-Fishery-Hard-Caps.pdf>).

²⁰See generally Order Re: Plaintiff's Motion for Summary Judgment (DE 54) and Defendant's Cross-Motion for Summary Judgment, *Oceana Inc. v. Ross*, Case No. 2:17-cv-05146-RGK-JEM (C.D.Cal. 2018).

ment that was adopted by voice vote to permit the Secretary of Commerce to collect fees from charter vessel operators who harvest Pacific halibut.

A companion bill, H.R. 1979, was introduced on March 28, 2019, by Representative Lieu (for himself and Representative Fitzpatrick) and was referred to the Committee on Natural Resources of the House of Representatives. There are six additional cosponsors.

In the 115th Congress, S. 2773 was introduced on April 26, 2018, by Senator Feinstein (for herself and Senators Capito and Harris) and was referred to the Committee on Commerce, Science, and Transportation of the Senate. Senators Wicker and Blumenthal joined as cosponsors. On September 5, 2018, the Committee met in open Executive Session and, by voice vote, ordered S. 2773 reported favorably with an amendment (in the nature of a substitute).

A companion bill to S. 2773, H.R. 5638, was introduced on April 26, 2018, by Representative Lieu (for himself) and was referred to the Subcommittee on Water, Power and Oceans of the Committee on Natural Resources of the House of Representatives. Representatives Fitzpatrick and Lofgren joined as cosponsors.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 906, Driftnet Modernization and Bycatch Reduction Act			
As ordered reported by the Senate Committee on Commerce, Science, and Transportation on April 3, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	*	*
Revenues	0	*	*
Deficit Effect	0	*	*
Spending Subject to Appropriation (Outlays)	0	4	n.e.
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Under Threshold
n.e. = not estimated; * = between -\$500,000 and \$500,000.			

S. 906 would require the National Oceanic and Atmospheric Administration (NOAA) to conduct a transition program to facilitate the phaseout of large-scale driftnet fishing. The bill would authorize NOAA to provide grants to operators of driftnet fishing vessels with federal permits. Those grants would cover the cost of permits, the forfeiture of existing fishing gear, and the acquisition of alternative new fishing gear. The bill also would allow NOAA to implement fees on charter vessels that harvest Pacific halibut in certain parts of the northern Pacific Ocean.

According to NOAA, 56 vessels currently have driftnet fishing permits. CBO expects that most but not all of those vessels would apply for the grants authorized by S. 906. Using information from

NOAA about the expected costs to reimburse fishers for the forfeited fishing gear and to purchase alternate gear, CBO estimates that implementing S. 906 would cost \$4 million over the 2019–2024 period. Such spending would be subject to availability of appropriated funds.

Enacting S. 906 also could affect revenues and associated direct spending because the bill would authorize NOAA to levy additional fees on certain charter vessels that harvest Pacific halibut. Those fees would be classified as revenues and could be spent without further appropriation to fund halibut conservation and research, administrative costs for the Recreational Quota Entity program, and to buy halibut quota shares from the International Pacific Halibut Commission.

Using information from NOAA on the number of vessels that could be charged fees under the bill, CBO estimates that any additional fees collected would not be significant over the 2019–2029 period. Moreover, because any fees collected would probably be spent soon thereafter, CBO estimates the net effect on the deficit would be negligible.

S. 906 would impose private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) on certain fishing operations. CBO estimates that the aggregate cost to comply with the bill's requirements would fall below the annual threshold established in UMRA for private-sector mandates (\$164 million in 2019, adjusted annually for inflation).

The bill would limit the type of nets that may be used in the drift gillnet (DGN) fishery off of the West Coast. Current law only limits driftnet length. S. 906 would amend the definition of large-scale driftnet fishing to include nets with a mesh size that is at least 14 inches. The new definition would effectively prohibit the use of large driftnets in the fishery. The cost of the mandate would be any revenue forgone by fishing operations whose catch decreases as a result of the new limitation. CBO expects that fewer than 40 entities would be affected, and the loss of revenue would be small.

The bill also would require charter operators to pay fees on vessels that harvest Pacific halibut. Using information from NOAA, CBO expects those fee collections would be small.

S. 906 contains no intergovernmental mandates as defined in UMRA.

The CBO staff contacts for this estimate are Robert Reese (for federal costs) and Susan Willie (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 906, as reported, would impose new regulatory requirements on Federal drift gillnet permit holders, which has numbered an average of 20 active permitted vessels per year from 2010 through 2015.

ECONOMIC IMPACT

Enactment of this legislation is not expected to have a negative impact on the Nation's economy. Current permit holders may be able to transition to other fisheries or gear types, but some fishermen may not choose to transition to the new gear type. Existing California law may end the fishery, even in the absence of Federal action.

PRIVACY

The reported bill is not expected to impact the personal privacy of individuals.

PAPERWORK

S. 906 would not create increases in paperwork burdens if enacted.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section would provide that the bill may be cited as the "Driftnet Modernization and Bycatch Reduction Act".

Section 2. Definition.

This section would amend section 3(25) of the MSA to define large-scale driftnet fishing to specify that it also includes nets with a mesh size of 14 inches or greater, aligning with the drift gillnet definition in the Code of Federal Regulations.

Section 3. Findings and policy.

This section would amend section 206 of the MSA, the Driftnet Act Amendments of 1990, to add that Congress finds that large-scale driftnet fishing causes significant entanglement and mortality of living marine resources. This section also would amend section 206 to declare that it is the policy of Congress to prioritize the phase out of large-scale driftnet fishing in the EEZ and promote development of alternative gear types that reduce incidental bycatch of living marine resources.

Section 4. Transition program.

This section would amend section 206 of the MSA to direct the Secretary of Commerce to conduct a transition program to facilitate the phase-out of large-scale driftnet fishing and make affected permit holders eligible to receive grants.

Section 5. Exception.

This section would add an exception to section 307 of the MSA that would prohibit the use of large-scale driftnet fishing by U.S.

vessels within the U.S. EEZ not later than 5 years after the date of enactment of this Act.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

* * * * *

[16 U.S.C. 1802(25)]

SEC. 3. DEFINITIONS.

As used in this Act, unless the context otherwise requires—

(1) * * *

(25) The term “large-scale driftnet fishing” means a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of two and one-half kilometers or more, *or with a mesh size of 14 inches or greater*, is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing.

* * * * *

[16 U.S.C. 1826(b)]

SEC. 206. LARGE-SCALE DRIFTNET FISHING.

(a) **SHORT TITLE.**—This section incorporates and expands upon provisions of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 and may be cited as the “Driftnet Act Amendments of 1990”.

(b) **FINDINGS.**—The Congress finds that—

(1) * * *

(6) the nations of the South Pacific have agreed to a moratorium on the use of large-scale driftnets in the South Pacific through the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, which was agreed to in Wellington, New Zealand, on November 29, 1989; **[and]**

(7) increasing population pressures and new knowledge of the importance of living marine resources to the health of the global ecosystem demand that greater responsibility be exercised by persons fishing or developing new fisheries beyond the exclusive economic zone of any nation**[.]**; *and*

(8) *within the exclusive economic zone, large-scale driftnet fishing that deploys nets with large mesh sizes causes significant entanglement and mortality of living marine resources, including myriad protected species, despite limitations on the lengths of such nets.*

(c) **POLICY.**—It is declared to be the policy of the Congress in this section that the United States should—

(1) implement the moratorium called for by the United Nations General Assembly in Resolution Numbered 44–225;

(2) support the Tarawa Declaration and the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; [and]

(3) secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation[.]; and

(4) *prioritize the phase out of large-scale driftnet fishing in the exclusive economic zone and promote the development and adoption of alternative fishing methods and gear types that minimize the incidental catch of living marine resources.*

(d) * * *

(i) **FISHING GEAR TRANSITION PROGRAM.**—

(1) **IN GENERAL.**—*During the 5-year period beginning on the date of enactment of the Driftnet Modernization and Bycatch Reduction Act, the Secretary shall conduct a transition program to facilitate the phase-out of large-scale driftnet fishing and adoption of alternative fishing practices that minimize the incidental catch of living marine resources, and shall award grants to eligible permit holders who participate in the program.*

(2) **PERMISSIBLE USES.**—*Any permit holder receiving a grant under paragraph (1) may use such funds only for the purpose of covering—*

(A) *any fee originally associated with a permit authorizing participation in a large-scale driftnet fishery, if such permit is surrendered for permanent revocation, and such permit holder relinquishes any claim associated with the permit;*

(B) *a forfeiture of fishing gear associated with a permit described in subparagraph (A); or*

(C) *the purchase of alternative gear with minimal incidental catch of living marine resources, if the fishery participant is authorized to continue fishing using such alternative gears.*

(3) **CERTIFICATION.**—*The Secretary shall certify that, with respect to each participant in the program under this subsection, any permit authorizing participation in a large-scale driftnet fishery has been permanently revoked and that no new permits will be issued to authorize such fishing.*

* * * * *

[16 U.S.C. 1857(1)(M)]

SEC. 307. PROHIBITED ACTS.

It is unlawful—

(1) for any person—

(A) * * *

(M) to engage in large-scale driftnet fishing that is subject to the jurisdiction of the United States, including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone of any nation, *unless such large-scale driftnet fishing—*

(i) *deploys, within the exclusive economic zone, a net with a total length of less than two and one-half kilometers and a mesh size of 14 inches or greater; and*

(ii) is conducted within 5 years of the date of enactment of the Driftnet Modernization and Bycatch Reduction Act;

* * * * *

○