

Dr. Duval,

I appreciate your immediate feedback. Please allow me to address several of your key points.

1) I have tremendous concern about your comment regarding SAFMC "being bound" by federal law to initiate a closure. The Magnuson Stevens Act does not bind NOAA and the MFCs to seasonal closure as the only accountability measure. Here is the language in the MSA:

http://www.nmfs.noaa.gov/sfa/laws_policies/msa/documents/msa_amended_2007.pdf
109-479 (15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

The decision to have a closure be the only accountability measure was made as part of the regulatory process in the development of the FMP, not authored into the MSA. There are countless examples of regulatory agencies issuing final rulemakings and then adjusting when it is determined that the unintended consequence of the rulemaking resulting from a faulty federal calculation will violate the intent of the law.

Here is one example. In 2009, Congress passed the American Recovery and Reinvestment Act. Within the act was Title XIII, an embedded piece of legislation called Health Information Technology for Economic and Clinical Health (**HITECH**) Act- which created the CMS Electronic Health Record Incentive Program. The law required eligible hospitals and providers to report quality metrics to CMS as part of the mechanism for receiving incentive payments to adopt electronic health records. It also instituted a penalty for those who did not report in the later years of the program.

CMS then developed a series of rulemakings. First came "Meaningful Use Stage 1" final rule, which created specific reporting parameters for providers and hospitals for the first two years of the program. Then came "Meaningful Use Stage 2" in 2012. <https://www.gpo.gov/fdsys/pkg/FR-2012-09-04/html/2012-21050.htm>

The most significant change was that CMS would not allow providers and hospitals the option to attest their quality measures. Instead, hospitals and providers were required to electronically report clinical quality measures by directly extracting their quality data from their electronic health record and transmit it to CMS using a very specific data transmission standard. EHRs were certified by the Office of the National Coordinator (HHS) to indicate that the EHR could successfully perform this function.

Into the first reporting period it quickly became very evident that there were numerous problems with electronic reporting. 100% of the 93 clinical quality measures that made up the menu set of measures that hospitals and providers could report from had errors in their electronic specifications that tainted the data and created huge variances in

results from when the same measures were used in the same site with a paper chart abstraction. Also, the QRDAI reporting standard had not been fully field tested and was not working correctly. Finally, because the Office of the National Coordinator had not required ALL of the measures to be certified for an EHR product to be certified (9 of 64 for ambulatory care measures, 16 of 29 for hospital measures) many specialty hospitals like pediatric hospitals owned EHRs that were not certified for pediatric measures. Hence, they had no data to report and it was unclear if they could report zeros to CMS and still receive the incentive or avoid penalty.

The intent of the MSA was not to penalize hospitals and providers because of faulty data, CMS not having the ability to do electronic submissions, or the unintended consequence of allowing CEHRT to only be certified for the minimum number of measures that a provider or hospital needed to report. The intent was to ensure that a health information technology infrastructure would be in place to support improved population health and prevention and improve patient outcomes. Deep into the 2014 "Meaningful Use" reporting cycle, CMS changed course. They published the CMS Medicare and Medicaid Programs; Modifications to the Medicare and Medicaid Electronic Health Record (EHR) Incentive Program for 2014 and Other Changes to the EHR Incentive Program; and Health Information Technology: Revisions to the Certified EHR Technology Definition and EHR Certification Changes Related to Standards. This allowed flexibility, most notably allowing providers and hospitals to report using older Certification standards and continue to attest their quality measures. There was no change to the HITECH Act. CMS made a decision through rulemaking to correct a policy that had consequence that ran opposite to the intent of the law. To their credit, the most recent round of Meaningful Use rulemaking continues to allow for attestation of quality measures until 2018. This allows for the healthcare industry and policy makers to address the barriers to effective data collection before using faulty data to hurt stakeholders.

There are significant parallels here to the cobia issue. Given the economic impact of the closures and the huge variability and uncertainty of the data; given the intent of the MSA to balance economic impact and the health of the fishery; and given almost universal consensus between both the regulators and the fishing community that cobia are not overfished, I urge SAFMC to take responsible action and call for a root cause analysis of the data collection and analysis methods to determine an appropriate ACL. A 400% variance between one season and the previous 7 seasons is too significant to ignore and should not be a "end all" policy driver. There is nothing in the MSA that says SAFMC does not have that latitude, and there is plenty of language in the MSA that directs SAFMC to make responsible management policy that generates the optimum yield while balancing the needs of access and economic impact of the fishery.

2) Regarding the zone split (and regardless of the reason, it was a split- the 2014 ACL is almost exactly the sum of the 2015 GA-NY and East Florida ACL combined), I can say that I am not savvy enough to the migratory patterns of the cobia species to be considered an expert. However, many people who are much smarter than me indicate that the cobia spend a very short season in Florida waters (mid March-late April) before

moving on. However, they are in the Chesapeake Bay and the waters north of Cape Hatteras (almost exclusively in waters that reside under state jurisdiction) from mid May through the end of September. Unlike Florida, those fish are the primary target of both food and trophy anglers who are constrained to inshore waters. For Florida to receive a larger ACL than the Georgia-New York zone, where the fish reside for a much longer season, does not treat NC and VA anglers equitably with Florida anglers.

3) Regarding Kim's comment about Virginia "liaison's" to the SAFMC, liaison's do not represent official appointees, and their vote is negated by the three Florida representatives, who can vote for punitive restrictions on the GA-NY cobia fishery because there is no negative impact to their constituents. At the very least, the Florida representatives should recuse themselves for this discussion.

4) Regarding the statements at the NCMFC meeting, I disagree with your assertion. Both Dr. Daniels and you made it abundantly clear that closures were going to happen in both federal and state waters regardless of any measures levied by the NCMFC. The 1 fish per person daily creel perhaps bought NC anglers an additional handful of days. For anglers limited to pier fishing for cobia (northern OBX piers do not see cobia consistently until July and August due to cool water stemming from upwelling caused by prevailing southwest winds), even a slightly extended season does us no benefit and still harms a significant part of the season for Oregon Inlet based cobia charters. That doesn't factor the danger to both the fish and the angler associated with drop-netting (instead of gaffing) a large cobia from the pier and releasing it. I fear the mortality rate for pier caught fish (and the number of ER visits as result of efforts to release an angry cobia) will be further unintended consequences. And, for Virginia anglers (where cobia arrive around June 1st), a closure will be devastating and could drive another unintended consequence: Virginia boats docking in Hatteras and significantly increasing early season pressure on cobia. This will likely result in the total fishery hitting the 620,000 pound mark even quicker, which will produce earlier closures next season. This is a very slippery slope.

Please weigh this input in the decision making for both 2016 and future policies. As CMS showed (to their credit), a reversal of policy is within the latitude of NOAA and SAFMC if that reversal is consistent with the aims of the legislation.

Thank You. I will not be able to attend the in-person meeting. However, I will be part of the webex. I would strongly encourage SAFMC explore means to allow for webex submitted public comments for fishermen who do not live within reach of the public meeting site.

Respectfully,
Jonathan French

On Fri, Mar 4, 2016 at 5:20 PM, Duval, Michelle <michelle.duval@ncdenr.gov> wrote:

Dear Mr. French,

I very much appreciate you sending your comments and concerns regarding cobia to the Council, and apologize for the delayed response – it has been a busy day. I am glad that Kim Iverson was able to provide information regarding next week's meeting, and representation from the Mid-Atlantic Fishery Management Council during the public input process.

Please be assured that the Council is very concerned about the devastating economic impacts of a shortened cobia season; we spent a significant amount of time discussing the 2015 recreational harvest data at our December meeting and the implications for the 2016 season. Everyone was equally alarmed and unhappy, knowing the importance of this fishery along the Atlantic coast. The shortest timeframe for modifying management measures takes 6-8 months (a "framework" amendment) and is unlikely to have a measurable impact on harvest for this year. As Kim indicated, the Council will be discussing options for recreational cobia management in the future that will hopefully prevent this situation from arising in the future.

You have clearly done a tremendous amount of research, and there are several statements in your letter I wanted to address:

- Please understand that the SAFMC is not voting on whether or when to close the recreational cobia season in 2016 at its meeting next week. The federal regulations detailing the accountability measures in the event of a recreational overage were implemented through Amendment 18 to the fishery management plan and have been in place since January 2012. The National Marine Fisheries Service is bound to carry out those regulations. If it was possible to keep the season open with a vote from the Council, I am certain most members would support it. As Kim indicated in her email, the National Marine Fisheries Service conducts the analysis determining the length of the following year's season when an overage such as this occurs.
- The accountability measures already require the use of a three-year running average to evaluate catch against the ACL, **except for the year in which the ACL is updated due to a new stock assessment**. Because a new ACL became effective in 2015, the three-year running average re-sets. (This information was contained in the briefing materials for the N.C. Marine Fisheries Commission, which you referenced below). The accountability measures can be found in the Code of Federal Regulations here: http://www.ecfr.gov/cgi-bin/text-idx?SID=e51cdc27aa09f646de2fd4e324bee5fc&mc=true&node=se50.12.622_1388&rgn=div8.

- The Council discussed in December whether a transfer of unused ACL from East FL to the GA-NY stock was possible. Unfortunately it is not. The split between GA-NY and East FL was not to create different ‘zones’; the 2013 stock assessment determined based on genetic analysis and tagging that the stock boundary between Gulf and Atlantic stocks was the GA/FL border. This is why East FL has a separate ACL that is actually a proportion of the Gulf of Mexico stock. (The determination of stock boundary is not a decision that the Council makes; it is an outcome of the stock assessment). I have no doubt that one of the topics of discussion will be when an update to the GA-NY assessment can be conducted.
- In the past, the Council has requested that harvest estimates from the Marine Recreational Information Program (MRIP) be re-examined, particularly for species that tend to be rarely intercepted (such as snowy grouper and tilefishes) or pulse fisheries, which cobia tends to be. There have been changes to the catch estimation methodology used by MRIP in recent years, and I expect the Council will have questions regarding how those changes may have impacted harvest estimates for 2015.
- The 1-fish recreational bag limit implemented by the N.C. Marine Fisheries Commission (effective Feb. 27) is being taken into consideration by the National Marine Fisheries Service in their season length calculations for 2016. Because VA has had a 1-fish recreational bag limit for quite some time, this baseline is already a part of those calculations for a coastwide season.
- Finally, I must correct your misstatement that I “instructed” the N.C. Marine Fisheries Commission to issue a closure in state waters at their Feb. 18-19, 2016 meeting prior to the SAFMC public meeting. The Commission was informed that North Carolina has never failed to complement a closure of a federally-managed species in state waters when one was issued.

Again, I thank you for your thoughtful and thorough comments. Please do not hesitate to contact me should you have questions, and I hope that you have the opportunity to listen to the Council’s deliberations on Thursday.

Sincerely,

Michelle Duval