

ISSUE

Is Mr. McLeod eligible to receive a Subsistence Halibut Registration Certificate as a resident of a rural community under 50 C.F.R. § 300.65(g)(1)?

ANALYSIS

The regulations governing the subsistence harvesting of Pacific halibut in waters in and off Alaska took effect on May 15, 2003.⁵ Under these regulations, no person may engage in subsistence fishing for halibut unless the person qualifies for such fishing pursuant to 50 C.F.R. § 300.65(g) and holds a Subsistence Halibut Registration Certificate [SHARC] issued by NMFS under 50 C.F.R. § 300.65(i).

A person may qualify for subsistence halibut fishing either as a resident of a rural community listed in the regulations or as a member of an Alaska Native tribe listed in the regulations. Mr. McLeod applied for a SHARC on the basis of claimed residency in a rural community. He does not claim membership in an Alaska Native tribe.

Mr. McLeod lives in a remote cabin in the Haines Borough. Mr. McLeod explains:

I live in a remote cabin at Saint James Point (lot 2) which is just south of Saint James Bay which is in the Haines Borough. I live there year round and travel by boat about 10 times a year to resupply and get my mail. I am not a resident of Juneau. I live a subsistence lifestyle in every sense of the word at the St. James property and the property taxes are paid to the Haines Borough.⁶

The Haines Municipality is smaller than, and completely within, the Haines Borough.⁷ Every resident of the Haines Municipality is also a resident of the Haines Borough, but the reverse is not true. The IAD denied Mr. McLeod a SHARC because 50 CFR § 300.65(g)(1) grants subsistence halibut certificates to residents of the Haines Municipality, but not other residents of the Haines Borough. The regulation provides:

A person is eligible to harvest subsistence halibut if he or she is a rural resident of a community with customary and traditional uses of halibut listed in the following table:

⁵ Final Rule, 68 Fed. Reg. 18,145 (Apr. 15, 2003), codified primarily at 50 C.F.R. §§ 300.61, 300.65, 300.66.

⁶ Mr. McLeod's Letter to RAM (July 18, 2008).

⁷ State of Alaska, Alaska Division of Community Advocacy, Community Database Online, http://www.dced.state.ak.us/dca/commdb/CF_BLOCK.cfm (last visited Oct. 1, 2008).

Halibut Regulatory Area 2C

Rural Community	Organized Entity
Angoon	Municipality
Coffman Cove	Municipality
Craig	Municipality
Edna Bay	Census Designated Place
Elfin Cove	Census Designated Place
Gustavus	Census Designated Place
Haines	Municipality
Hollis	Census Designated Place
. . . . [emphasis added, rest of list omitted]. ⁸	

The Haines Borough is not listed in the table.

On appeal, Mr. McLeod argues that, even though he does not live in the Haines Municipality, he clearly lives in a rural area: “You can’t get more remote than the area of which I am a year round resident.”⁹ I accept that as true, but I can only interpret and apply the regulations as they exist. The regulation that governs who can receive a SHARC certificate is 50 C.F.R. § 300.65(g)(1). That regulation requires that, to receive a SHARC, a person be “a rural resident of a community with customary and traditional uses of halibut **listed in the following table.**” 50 C.F.R. § 300.65(g)(1) (emphasis added).

If an applicant does not reside in a community listed in 50 C.F.R. § 300.65(g)(1), the applicant cannot receive a SHARC as a rural resident. Haines Borough is not listed in the table. I therefore conclude that Mr. McLeod is not eligible to receive a SHARC as a rural resident under 50 C.F.R. § 300.65(g)(1).

Mr. McLeod’s neighbor and contact person for the appeal, Gary Lehnhart, stated that it made no sense to him that people who live in downtown Haines can subsistence fish for halibut but Mr. McLeod, who lives in a remote, difficult-to-access, cabin, cannot.¹⁰ Mr. Lehnhart noted that Mr. McLeod was in his sixties and it was not clear how much longer Mr. McLeod could continue his subsistence activities.¹¹ Mr. McLeod states: “The law as written is discriminating against rural

⁸ 50 C.F.R. § 300.65(g)(1).

⁹ Mr. McLeod’s Appeal Letter (Sep. 16, 2008).

¹⁰ Memo to File re Contact with Gary Lehnhart (Oct. 2, 2008). Mr. McLeod designated Mr. Lehnhart as his contact person and representative for this appeal.

¹¹ According to Mr. McLeod’s SHARC application, he is 68 years old.

residents like myself.”¹²

I take Mr. McLeod’s arguments to mean that he believes the regulation is unfair or violates a statute or violates the federal or state constitution. As an administrative judge, I must interpret and apply the regulations as they exist. I do not have authority to decide whether a regulation is unfair, violates a statute or violates the constitution and then, if I conclude any of those things, order NMFS to not apply that regulation.

The North Pacific Fishery Management Council (Council) and NMFS have recognized the need to change the SHARC regulation precisely because it prohibits persons like Mr. McLeod from subsistence fishing for halibut even though they reside in areas as rural, or more rural, than areas where the regulation allows people to subsistence fish for halibut. The Council explained the problem:

The Council has received numerous requests from the public to revise the criteria [to receive a SHARC], because the regulatory language excludes rural communities (or ‘places’) that were not recognized as places by the U.S. Census, but whose residents are equivalently situated to those who reside in places that do qualify. . . .

This proposed action is needed, because some subsistence halibut applicants are “too rural” to be eligible, as they do not reside in a municipality or census designated place that is listed as eligible under Federal regulations. As a result, certain rural residents are unable to subsistence fish. Individuals in remote locations, within eligible subsistence use areas, practice the same patterns of use as eligible participants.

This action would not remove the current list of eligible places, but would add additional clarifying text and maps to the regulations, as necessary. The purpose of this action is to provide subsistence halibut harvest opportunities for rural residents, which were contemplated under the original subsistence action.¹³

To correct this problem, the Council approved a motion in June 2008 that NMFS adopt a regulation that would define all residents of Southeast Alaska, except for residents of Juneau and

¹² Mr. McLeod’s Appeal Letter (Sep. 16, 2008).

¹³ Final Action Draft, Proposed Regulatory Amendment to the Subsistence Halibut Program to Revise the Definition of Rural Eligibility, Regulatory Impact Review (May 12, 2008) at iii, available at the NPFMC website, Rural Definition Halibut Analysis 5/08, http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm (last visited Sep. 30, 2008).

Ketchikan, as rural residents eligible to receive a SHARC.¹⁴ Under that Motion, all residents of the Haines Borough would be eligible to receive a SHARC.

I cannot order NMFS to apply the Council Motion until NMFS adopts it in the form of a regulation. To adopt a new regulation, NMFS must follow the legal requirements for adopting a new regulation, including the Administrative Procedure Act [APA].¹⁵ Under the APA, NMFS must publish a proposed rule, receive public comment, respond to comments, make any changes in the proposed rule warranted by public comment and then publish a new rule. NMFS is planning to publish a proposed rule that embodies the Council Motion, but has not done so yet.¹⁶ Assuming public comments reveal no fundamental problems with the proposed rule, NMFS will adopt a new regulation that would make all residents of the Haines Borough eligible to receive a subsistence halibut certificate.

I am sympathetic to Mr. McLeod's frustration that even though the Council has acknowledged that the regulation wrongly excludes people like him, and that people in his circumstances should be able to subsistence fish for halibut, the regulation stopping him from subsistence fishing for halibut is still in place.

CONCLUSIONS OF LAW

1. As an administrative judge, I cannot decide whether a regulation is unwise, violates a statute or violates the constitution and, based on that decision, order NMFS to not follow that regulation.
2. As an administrative judge, I cannot order NMFS to apply the June 2008 Council Motion on Subsistence Halibut until NMFS adopts it in the form of a regulation.
3. Mr. McLeod is not eligible to receive a Subsistence Halibut Registration Certificate as a resident of a rural community under 50 C.F.R. § 300.65(g)(1).

DISPOSITION

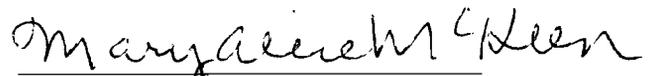
The IAD that is the subject of this Decision is **AFFIRMED**. This Decision takes effect November 7, 2008, unless by that date the Regional Administrator orders review of this Decision. Mr. McLeod or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, October 20, 2008. A Motion for Reconsideration must be in writing, must specify one or more

¹⁴ Council Motion, available at the NPFMC website, Halibut subsistence motion, 6/08: http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm (last visited Sep. 30, 2008).

¹⁵ 5 U.S.C. §§ 554.

¹⁶ Email from Jay Ginter to Mary Alice McKeen (Sep. 30, 2008).

material matters of fact or law that I overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.



Mary Alice McKeen
Administrative Judge