

**Secretary's Order No.: 2011-F-0029**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3541,  
*Atlantic Sharks***

**Date of Issuance: May 17, 2011**

**Effective Date of the Amendment: June 11, 2011**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

**Background and Procedural History**

This Order considers proposed regulations to amend 7 DE Admin. Code 3541, *Atlantic Sharks*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2011-03. The Department published its initial proposed regulation Amendments in the March 1, 2011 *Delaware Register of Regulations*, and held a public hearing on March 25, 2011. Public comment was received by the Department during all phases of this promulgation (pre-hearing, post-hearing and at that time of the public hearing), and the Department responded fully and thoroughly to all questions from the public regarding this proposed promulgation.

In the summer of 2010, the Department became aware of increased fishing activities directed at catching large coastal sharks off of Delaware's beaches classified by the Atlantic States Marine Fisheries Commission ("ASMFC") as Prohibited Species, including sand tigers (*Odontaspis Taurus*), which are also listed as a Species of Concern by the National Oceanic and Atmospheric Administration/National Marine Fisheries

Service. Studies have shown sand tigers suffer significant injury and occasionally die as a result of being caught by hook and line fishermen, even when circle-hooks are used. While it is sometimes difficult to ascertain fishing intent or what species are actually being sought, these large sharks are being targeted using large baits and large hooks from Delaware's beaches where sand tigers are known to occur. After being hooked and landed, the sharks are dragged up on the beach and handled inappropriately, and for an extended period, before being hauled back into the surf. Some sand tiger mortalities have been reported, and thus State and Federal agencies responsible for the protection and conservation of this species are concerned.

The Department is proposing to amend Tidal Finfish Regulation 3541 concerning Atlantic Sharks in order to minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water, and to require their immediate release. The adoption and enforcement of this regulation would reduce some of the handling-related trauma and may discourage targeting these Prohibited Species.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated May 9, 2011 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

### **Findings and Discussion**

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will (1) minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water and require their immediate release; and (2) would reduce some of the handling-related trauma, and may discourage targeting this species.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;

2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on March 25, 2011;

3.) The Department held a public hearing on March 25, 2011 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water and require their immediate release; and (2) would reduce some of the handling-related trauma, and may discourage targeting this species.; and, lastly, because (3) the amendments are well supported by documents in the record;

6.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

/s/ Collin P. O'Mara  
Collin P. O'Mara  
Secretary

## HEARING OFFICER'S REPORT

**TO:** The Honorable Collin P. O'Mara  
Cabinet Secretary, Department of Natural Resources and Environmental  
Control

**FROM:** Lisa A. Vest  
Public Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

**RE:** **Proposed Regulations Amendments to 7 DE Admin. Code 3541,  
*Atlantic Sharks***

**DATE:** May 9, 2011

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Friday, March 25, 2011, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments ("amendments") to 7 DE Admin. Code 3541, *Atlantic Sharks*. The Department is proposing revisions to Delaware Tidal Finfish Regulation No. 3541 in order to minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water, and to require their immediate release. The adoption and enforcement of this regulation would reduce some of the handling-related trauma and mortality, and may discourage targeting these Prohibited Species.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3541, pursuant to 7 Del. C. §§901(e)3. Public comment was received by the Department during all phases of this promulgation (pre-hearing, post-hearing and at that time of the public hearing), and the Department

responded fully and thoroughly to all questions from the public regarding this proposed promulgation. Proper notice of the hearing was provided as required by law.

**II. SUMMARY OF THE PUBLIC HEARING RECORD:**

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) nine documents introduced at the public hearing held on March 25, 2011, and marked by this Hearing Officer accordingly as Department Exhibits 1 through 9; and (3) five sets of documents introduced at the aforementioned public hearing and marked by this Hearing Officer accordingly as Fox Exhibits 1 through 5. The Department's persons primarily responsible for the drafting and overall promulgation of these proposed amendments, Scott Newlin and Craig Shirey, developed the record with the relevant documents in the Department's files. Following the submission of the Department's exhibits into the record at the aforementioned public hearing, DNREC Environmental Scientist Scott Newlin proceeded to offer a brief summary as to the Department's proposed actions in this matter.

Mr. Newlin began his presentation by explaining that, in the summer of 2010, the Department became aware of increased fishing activities directed at catching large coastal sharks off of Delaware's beaches classified by the Atlantic States Marine Fisheries Commission ("ASMFC") as Prohibited Species, including sand tigers (*Odontaspis Taurus*), which are also listed as a Species of Concern by the National Oceanic and Atmospheric Administration/National Marine Fisheries Service. Studies have shown sand tigers suffer significant injury and occasionally die as a result of being caught by hook and line fishermen, even when circle-hooks are used. While it is sometimes difficult to ascertain fishing intent or what species are actually being sought,

these large sharks are being targeted using large baits and large hooks from Delaware's beaches where sand tigers are known to occur. After being hooked, the sharks are dragged up on the beach and handled inappropriately, and for an extended period, before being hauled back into the surf. Some sand tiger mortalities have been reported, and thus State and Federal agencies responsible for the protection of this species are concerned.

As noted above, the Department is proposing to amend Tidal Finfish Regulation 3541 concerning Atlantic Sharks in order to minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water, and to require their immediate release. The adoption and enforcement of this regulation would reduce some of the handling-related trauma and may discourage targeting these Prohibited Species.

Public comment was received by the Department during all phases of this promulgation (pre-hearing, post-hearing and at that time of the public hearing), and the Department responded fully and thoroughly to all questions from the public regarding this proposed promulgation. One of the basic questions asked of the Department by the public was how an angler can release a shark without removing them from the water. In response to this very question being asked at the public hearing by Ed Dillon, Mr. Newlin offered that there are a number of long release tools that are available to anglers, and it is the Department's hope that fishermen add such tools to their tackle box if they have not already done so. Mr. Newlin further offered that a lot of the trauma that occurs in this species is from actually bringing the shark up on the beach, and so this amendment is being proposed to reduce the same from happening. Moreover, Mr. Newlin advised that if the hook is embedded deep into the fish, the best practice would be to cut that leader,

and that can (and should) be done with the fish in the water. In the case of surf fishing, the angler should still make sure that the fish has water coming over him. The Department understands that there is going to be interaction with fishermen and this species, and that it is possible that this species might be unintentionally caught. Mr. Newlin advised that, in such a situation, the Department is asking that the angler release the shark immediately, therein providing the species with the maximum probability of survival.

In response to other questions concerning post-release mortality studies on this species (such as the one asked at the time of the hearing by Josh Fiedler), Mr. Newlin noted that the sand tiger shark's feeding habits are such that it swallows the bait whole. As a result, with tools such as a circle-hook, there is a high likelihood of deep-gutting the fish. Additionally, the circle-hook does a lot of internal damage when the fish swallows it whole, causing significant damage such as occlusion and perforation of the esophagus and stomach, and lacerations to the pericardium, heart and liver. One study cited by Mr. Newlin indicated that 94% of such sharks were hooked mainly in internal organs. So, again, the Department is hopeful that promulgation of these regulation amendments will minimize such potential injury to these protected and prohibited species.

Also at the public hearing on March 25, 2011 was Dewayne Fox, Ph.D., a faculty member of Delaware State University and chair of the Tidal Finfish Advisory Council. Dr. Fox stated that he is also actively working on sand tiger conservation in a contract with the State of Delaware. As a citizen of the State of Delaware, Dr. Fox supports the Department's efforts to promulgate this regulation, and noted that, while the State cannot stop people from targeting sand tigers, it may be able to help increase the

survivability of this species. He further commented that Delaware serves as one of the critical habitats along the entire East Coast for these species, and if both the sand tiger and sandbar sharks are to recover, efforts must be taken now to start conservation.

It should be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

### **III. RECOMMENDED FINDINGS AND CONCLUSIONS:**

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to 7 DE Admin. Code 3541, *Atlantic Sharks*, as noted above. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3541, *Atlantic Sharks*, will minimize potential injury to these protected and prohibited species by making it unlawful to remove them from the water, and

to require their immediate release. Furthermore, the adoption and enforcement of this regulation would reduce some of the handling-related trauma and may discourage targeting these Prohibited Species;

7. The Department has reviewed these proposed regulatory amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
8. The Department's aforementioned proposed regulatory amendments concerning *Delaware Tidal Finfish Regulation 3541*, as published in the March 1, 2011 *Delaware Register of Regulations* and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
9. The Department shall submit the proposed *revised* regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.

/s/ Lisa A. Vest.  
LISA A. VEST  
Public Hearing Officer

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