

Secretary's Order No.: **2009-F-0015**

RE: Approving Final Regulations Amending
Delaware Tidal Finfish Regulations for 2009:
7 DE Admin. Code 3541: Atlantic Sharks; and
7 DE Admin. Code 3581: Spiny Dogfish

Date of Issuance: May 15, 2009

Effective Date of the Amendment: June 11, 2009

I. Background:

A public hearing was held on Thursday, April 23, 2009, at 6:30 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department") Division of Soil and Water Conservation's Lewes Field Facility, 901 Pilottown Road, Lewes, Delaware to receive comment on proposed amendments to the Delaware Tidal Finfish Regulations for both Atlantic Sharks and Spiny Dogfish. The purposes of the aforementioned proposed amendments are (1) to bring Delaware into compliance with the Atlantic States Marine Fisheries Commission ("ASMFC")'s Interstate Fishery Management Plan for Atlantic Coastal Sharks ("Coastal Sharks Plan"), and (2) to liberalize commercial requirements in concert with the most recent revisions to the ASMFC's Interstate Fishery Management Plan for Spiny Dogfish ("Spiny Dogfish Plan").

The Coastal Sharks Plan mirrors requirements for shark fishing in federal waters by requiring all coastal states from Virginia to New Jersey to prohibit recreational and commercial landings of ten (10) shark species – silky, tiger, blacktip, spinner, bull, lemon, nurse, scalloped hammerheads, great hammerhead, and smooth hammerhead – from May 15 through July 15. Under this Plan, Delaware and all other states must prohibit recreational and commercial landings of sandbar sharks year-round, except for

those commercial fishermen who hold a valid sandbar shark research permit issued by the National Marine Fisheries Service (“NMFS”).

It should be noted that, at the time that the Department first submitted this proposed regulatory amendment promulgation to the Delaware Register of Regulations, smooth dogfish (*Mustelus canus*) was one of the species included as part of the ASMFC Coastal Sharks Plan, and as such was assigned proposed daily harvest limits under the aforementioned federal plan. However, the inclusion of smooth dogfish in this plan was recently re-considered by the ASMFC at their monthly meeting held on May 6, 2009 (at the request of North Carolina). As a result, the ASMFC has proposed an addendum to formally delete this species from its Coastal Shark Plan. Final action on this addendum is expected as early as August 2009. Based upon the ASFMC’s actions in August, the Department may then initiate new regulatory amendment promulgations with regard to the smooth dogfish at that time, so that Delaware’s regulations with regard to this particular species (i.e., daily harvest limits, etc.) will mirror those ASFMC guidelines. Thus, while the Department is going forward with some of the proposed amendments to Delaware Tidal Finfish Regulation 3541 concerning Atlantic Sharks (i.e., to correct minor grammatical errors and add clarifying language to provide a better understanding of this regulation for Delaware anglers), most of the language specifically pertaining to daily harvest limits for smooth dogfish (*Mustelus canus*) is being formally withdrawn by the Department at this time, and will be re-addressed at a later date in a new regulatory promulgation, pending the future actions of the ASMFC as it pertains to this particular species.

The proposed amendments to the spiny dogfish regulation are based on the ASMFC's Addendum II to the Spiny Dogfish Plan. With regard to spiny dogfish, the ASMFC coast-wide commercial quota for this species has been liberalized to twelve (12) million pounds per year, to be allocated among a Northern Region, a Southern Region, and North Carolina. The Southern Region, which includes Delaware, is allocated twenty-six (26) percent of the annual quota. Once the quota in the Southern Region is projected to have been reached, the commercial landing, harvest, and possession of spiny dogfish for commercial purposes will be prohibited for the remainder of the year.

The daily landing limit for any Delaware commercial foodfishing license holder will be three thousand (3,000) pounds of spiny dogfish, except for those taking spiny dogfish from federal waters or for any Delaware fisherman selling spiny dogfish to a federally-permitted dealer, in which case federal possession and landing limits apply, including federal closures on the possession and landing of spiny dogfish. Any Delaware commercial fisherman in possession of a federal permit must abide by the most restrictive spiny dogfish landing limits, whether they are federal or state. It should be noted that there are no recreational limits on spiny dogfish at this time, as the limits are only applicable to commercial fishermen.

The Department has the statutory basis and legal authority to act with regard to these promulgations, pursuant to 7 Del.C. §§903(e)(2)(a) and 903(f). No other Delaware regulations are affected by these proposals.

A few comments were received by the Department from members of the public regarding these proposed regulatory amendments, both at the time of the public hearing held on April 23, 2009, and during the post-hearing phase of this promulgation.

Department personnel in the Division of Fish and Wildlife provided oral answers to all questions raised by the public in a thorough and timely manner. The Department provided proper notice of the hearing as required by law. Afterwards, Hearing Officer Lisa A. Vest prepared her Hearing Officer's Report dated May 12, 2009, which is attached and expressly incorporated into this Order regarding this matter, and submitted the same to the Secretary for review and consideration.

II. Findings:

The Department has provided a reasoned analysis and a sound basis in the record to support the issuance of the final regulations proposed in this matter. Moreover, the following findings and conclusions are entered at this time:

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 the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a 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 these proposed amendments would bring Delaware into compliance with federal guidelines for the management of both Atlantic sharks and spiny dogfish, consistent with federal management plans and state jurisdiction;

7. Due to the ASMFC having proposed deleting the harvest and possession limits on the smooth dogfish species from their Atlantic Coastal Shark plan on May 6, 2009, all proposed promulgation language specifically pertaining to daily harvest limits for smooth dogfish (*Mustelus canus*) is being formally withdrawn by the Department at this time, and will be re-addressed at a later date in a new regulatory amendment promulgation as needed, pending the future actions of the ASMFC as it pertains to this particular species, so that Delaware's regulations with regard to this particular species will mirror those ASMFC guidelines;
8. Due to the ASMFC having proposed deleting the aforementioned gill net requirements from its Coastal Shark Plan at this time, all proposed language pertaining to the same is being formally withdrawn by the Department at this time, and will be re-addressed at a later date in a new regulatory amendment promulgation as needed, pending the future actions of the ASMFC as it pertains to this issue, so that Delaware's regulations with regard to this matter will mirror those ASMFC guidelines;
9. Promulgation of the remaining proposed amendments to Delaware Tidal Finfish Regulation 3541 concerning Atlantic Sharks will correct minor grammatical errors which currently exist, and will add clarifying language to provide a better understanding of this regulation for Delaware anglers;
10. The Department has reviewed both of 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;

11. The Department's aforementioned proposed amendments to Delaware's regulations concerning both Atlantic sharks and spiny dogfish, as published in the April 1, 2009 *Delaware Register of Regulations* (and as revised as noted herein) and as set forth in Attachment "A" of the aforementioned Hearing Officer's Report, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both 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*;
12. The Department shall submit the proposed regulations (again, as revised as noted herein) as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order; and that
13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated May 12, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments, as revised, to Delaware Tidal Finfish Regulation 3541 for Atlantic Sharks and Regulation 3581 for Spiny Dogfish be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of Delaware Tidal Finfish Regulations for both Atlantic sharks and spiny dogfish will bring Delaware into compliance with federal guidelines for the management of these species, since both come under both federal and state jurisdiction with regard to the harvest management of the same. It is incumbent upon Delaware to be in compliance with the Commission's plan, not only to avoid federal sanctions against Delaware and its fisheries, but to protect these species with these conservation measures to ensure that both Atlantic sharks and spiny dogfish will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §§903(e)(2)(a) and 903(f).

/s/ David S. Small
David S. Small
Acting Secretary

HEARING OFFICER'S REPORT

TO: David S. Small, Acting 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 Amendments to Delaware Tidal Finfish Regulations for 2009:
7 DE Admin. Code 3541: Atlantic Sharks; and
7 DE Admin. Code 3581: Spiny Dogfish

DATE: May 12, 2009

I. Background:

A public hearing was held on Thursday, April 23, 2009, at 6:30 p.m. at the DNREC Division of Soil and Water Conservation's Lewes Field Facility, 901 Pilottown Road, Lewes, Delaware to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulations for both Atlantic Sharks and Spiny Dogfish. The purpose of the aforementioned proposed amendments is (1) to bring Delaware into compliance with the Atlantic States Marine Fisheries Commission ("ASMFC")'s Interstate Fishery Management Plan for Atlantic Coastal Sharks ("Coastal Sharks Plan"), and (2) to liberalize commercial requirements in concert with the most recent revisions to the ASMFC's Interstate Fishery Management Plan for Spiny Dogfish ("Spiny Dogfish Plan").

The Coastal Sharks Plan mirrors requirements for shark fishing in federal waters by requiring all states from Virginia to New Jersey to prohibit recreational and commercial landings of ten (10) shark species – silky, tiger, blacktip, spinner, bull, lemon, nurse, scalloped hammerheads, great hammerhead, and smooth hammerhead –

from May 15 through July 15. Delaware and all other states must prohibit recreational and commercial landings of sandbar sharks year-round, except for those commercial fishermen who hold a valid sandbar shark research permit issued by the National Marine Fisheries Service (“NMFS”). Additional revisions to the coastal sharks’ plan will be detailed below within this Hearing Officer’s Report.

It should be noted that, at the time that the Department first submitted this proposed regulatory amendment promulgation to the Delaware Register of Regulations, smooth dogfish (*Mustelus canus*) was one of the species included as part of the ASMFC Coastal Shark plan, and as such was assigned proposed daily harvest limits under the aforementioned federal plan. However, the inclusion of smooth dogfish in this plan was recently re-considered by the ASMFC at their monthly meeting held on May 6, 2009 (at the request of North Carolina). As a result, the ASMFC has proposed an addendum to formally delete this species from their Coastal Shark plan. Final action on this addendum is expected as early as August 2009. Based upon the ASFMC’s actions in August, the Department may then initiate new regulatory amendment promulgations with regard to the smooth dogfish at that time, so that Delaware’s regulations with regard to this particular species (i.e., daily harvest limits, etc.) will mirror the ASFMC guidelines and be consistent with the same at that time. Thus, while the Department is going forward with some of the proposed amendments to Delaware Tidal Finfish Regulation 3541 concerning Atlantic Sharks (i.e., to correct minor grammatical errors and add clarifying language to provide a better understanding of this regulation for Delaware anglers), most of the language specifically pertaining to daily harvest limits for smooth dogfish (*Mustelus canus*) is being formally withdrawn by the Department at this time, and will be

re-addressed at a later date in a new regulatory promulgation, pending the future actions of the ASMFC as it pertains to this particular species.

With regard to spiny dogfish, the ASMFC coast-wide commercial quota for this species has been liberalized to twelve (12) million pounds per year, to be allocated among a Northern Region, a Southern Region, and North Carolina. The Southern Region, which includes Delaware, is allocated twenty-six (26) percent of the annual quota. When the quota in the Southern Region is projected to be reached, the commercial landing, harvest, and possession of spiny dogfish for commercial purposes will be prohibited for the remainder of the year.

The daily landing limit for any Delaware commercial foodfishing license holder will be three thousand (3,000) pounds of spiny dogfish, except for those taking spiny dogfish from federal waters or for any Delaware fisherman selling spiny dogfish to a federally-permitted dealer, in which case federal possession and landing limits apply, including federal closures on the possession and landing of spiny dogfish. Any Delaware commercial fisherman in possession of a federal permit will have to abide by the most restrictive spiny dogfish landing limits, whether they are federal or state. It should be noted that there are no recreational limits on spiny dogfish at this time, as the limits are only applicable to commercial fishermen.

The Department has the statutory basis and legal authority to act with regard to these promulgations, pursuant to 7 Del.C. §§903(e)(2)(a) and 903(f). No other Delaware regulations are affected by these proposals.

A few comments were received by the Department from members of the public regarding these proposed regulatory amendments, both at the time of the public hearing

held on April 23, 2009, and during the post-hearing phase of this promulgation. The Department's personnel provided answers to the public's comments in a thorough and timely manner. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

A. Department Presentation/Public Comment:

At the hearing on April 23, 2009, Roy Miller, Administrator of Fisheries with the Department's Division of Fish and Wildlife, offered a brief explanation with regard to the salient points of the proposed amendments to these regulations. Mr. Miller began the Department's presentation by explaining that the purpose of this action is to come into compliance with the Interstate Fishery Management Plan for Atlantic Coastal Sharks as approved by the ASMFC, and to liberalize the spiny dogfish (*Squalus acanthias*) commercial fishery in accordance with the ASMFC's Interstate Fishery Management Plan for Spiny Dogfish, as amended in October 2008.

As noted previously, the Coastal Shark Plan specifies that all states from Virginia through New Jersey, including Delaware, must close recreational and commercial landings of silky, tiger, blacktip, spinner, bull, lemon, nurse, scalloped hammerhead, great hammerhead, and smooth hammerhead from May 15 through July 15. In addition, because their stocks have been declared overfished (and overfishing is occurring), no sandbar sharks (*Carcharhinus plumbeus*) may be harvested or possessed by either recreational or commercial fishermen at any time, except for commercial fishermen who are in possession of a valid research permit for possession of sandbar sharks issued by the National Marine Fisheries Service. Shore-bound recreational anglers may harvest one

shark not otherwise prohibited¹. In addition, each recreational angler fishing from a vessel may harvest and possess one bonnethead and one Atlantic sharpnose. All sharks possessed by recreational fishermen must have the heads, tails, and fins attached naturally to the carcass prior to landing on shore, but all other body parts may be discarded.

If the National Marine Fisheries Service (“NMFS”) closes the commercial fishery for any species of shark, then the commercial landing, harvest, and possession of that species will be prohibited in Delaware waters until NMFS reopens the fishery. In general, the minimum recreational size limit for the species of shark remains 54 inches from the tip of the nose to the fork in the tail²

It should be noted that, at the time the Department first submitted these proposed regulatory amendments to the Delaware Register of Regulations on April 1, 2009, the ASMFC plan required that any gill net from which sharks are caught and retained not exceed 2,735 yards in length. ASMFC further required that such nets must be tended at least every two hours, provided that the mesh size of that net equals or exceeds five inches. However, as is the case with the initial proposed regulatory language concerning the smooth dogfish, the ASMFC has proposed an addendum to formally delete the aforementioned gill net requirements from their Coastal shark plan at this time. Again, based upon the ASMFC’s actions which may be taken at their upcoming meeting in August of this year, the Department may need to initiate new regulatory amendment promulgations with regard to these gill net requirements at that time, so that Delaware’s

¹ Sharks that may be retained by recreational and commercial anglers when the appropriate season is otherwise open include the following: shortfin mako, porbeagle, blue, oceanic whitetip, tiger, thresher, nurse, silky, lemon, blacktip, spinner, bull, finetooth, blacknose, Atlantic sharpnose, scalloped hammerhead, great hammerhead, smooth hammerhead, bonnethead, and smooth dogfish. Spiny dogfish are regulated separately.

² Again, spiny dogfish are regulated separately, and are not included in the aforementioned daily size and harvest limits.

regulations with regard to this issue will mirror the ASMFC guidelines and be consistent with the same.

Since it has been determined that overfishing of the spiny dogfish stock is no longer taking place, and that there is appreciable biomass of spiny dogfish available for harvest, states, including Delaware, may liberalize their fisheries. Thus, the Department is, at this time, proposing new daily catch limits and seasonal harvest limits that are in compliance with the Addendum II to the Interstate Fishery Management Plan for spiny dogfish.

The total coast-wide commercial quota of twelve (12) million pounds per year has been allocated to the Northern Region (58% of the annual quota), the Southern Region, including Delaware (26% of the annual quota), and to North Carolina (16% of the annual quota). When the quota in any one region is projected to be reached, the commercial landing, harvest, and possession of spiny dogfish for commercial purposes from any state in that region will be prohibited for the remainder of the year. The daily landing limit for any Delaware commercial foodfishing license holder shall be 3,000 pounds per day of spiny dogfish. The spiny dogfish limits shall apply to state waters.

Under federal law, any vessel taking spiny dogfish from federal waters would need a federal permit, and any Delaware dealer purchasing spiny dogfish taken from federal waters needs a federal dealer permit. Federal limits apply to the taking of spiny dogfish in federal waters. When these limits are more restrictive than those allowed in state waters, Delaware fishermen in possession of a federal permit would have to abide by the more restrictive of Delaware or federal regulations governing the take and harvest

of spiny dogfish, regardless of whether he or she is fishing in Delaware waters or federal waters. No recreational harvest limits are being proposed for spiny dogfish at this time.

Following the Department's presentation, the public hearing was opened up for public comment. Only three members of the public were in attendance at this hearing. Captain Bill Baker expressed some concerns about the proposed closure of sport and commercial fisheries for sandbar sharks, since that species is an important component in Delaware's local sport fisheries. The remaining concerns voiced at this hearing, however, were centered around the smooth dogfish, which, as noted above, were formally withdrawn from the Department's proposed amendments in this matter following the ASMFC's meeting held on May 6, 2009.

For the Secretary's review, Delaware's proposed amendments recommended to be adopted as final regulations are expressly incorporated into this report and attached hereto as Attachment "A". It should also be noted that the Department has reviewed these proposed 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.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to Delaware's Tidal Finfish Regulation 3541 (concerning Atlantic sharks) and 3581 (concerning spiny dogfish), and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter. Accordingly, I

recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

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 the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a 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 these proposed amendments would bring Delaware into compliance with federal guidelines for the management of both Atlantic sharks and spiny dogfish, since these species come under both federal and state jurisdiction;
7. Due to the ASMFC having proposed deleting the harvest and possession limits on the smooth dogfish species from their Atlantic Coastal Shark plan on May 6, 2009, all proposed promulgation language specifically pertaining to daily harvest limits for smooth dogfish (*Mustelus canus*) is being formally withdrawn by the Department at this time, and will be re-addressed at a later date in a new regulatory amendment promulgation as needed, pending the future actions of the ASMFC as it pertains to this particular species, so that

Delaware's regulations with regard to this particular species will mirror the ASMFC guidelines and be consistent with the same at that time;

8. Due to the ASMFC having proposed deleting the aforementioned gill net requirements from their Coastal shark plan at this time, all proposed language pertaining to the same is being formally withdrawn by the Department at this time, and will be re-addressed at a later date in a new regulatory amendment promulgation as needed, pending the future actions of the ASMFC as it pertains to this issue, so that Delaware's regulations with regard to this matter will mirror the ASMFC guidelines and be consistent with the same;
9. Promulgation of the proposed amendments to Delaware Tidal Finfish Regulation 3541 concerning Atlantic Sharks will correct minor grammatical errors which currently exist, and will add clarifying language to provide a better understanding of this regulation for Delaware anglers;
10. The Department has reviewed both of 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;
11. The Department's aforementioned proposed amendments to Delaware's regulations concerning both Atlantic sharks and spiny dogfish, as published in the April 1, 2009 *Delaware Register of Regulations* (and as revised as noted herein with regard to smooth dogfish) and as set forth in Attachment "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both

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 that

12. The Department shall submit the proposed regulations (again, as revised as noted herein) as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

/s/ Lisa A. Vest .

LISA A. VEST
Hearing Officer