

To:	National Compliance Manager – John WALLWORK
	Team Lead Investigations South – Tony SMITH
From:	Marlous HEIJS – Investigator National Compliance Team
Date:	21/06/2023
Reference Number:	CLE - 4558
Subject:	SailGP Lyttleton – boat behaviour

Introduction

This memorandum relates to the Sail Grand Prix (SailGP) held in Lyttleton Harbour on 18 and 19 March 2023. SailGP is an international sailing competition using F50 foiling catamarans, where teams compete across a season of multiple grand prix around the worlds.

Background:

Sail Grand Prix (SailGP) was based in Lyttleton Harbour from Thursday 16 March 2023 until Sunday 19 March 2023. Thursday and Friday were reserved as training and rehearsal days, with Saturday and Sunday being the race days.

Lyttleton harbour is located within the boundaries of the Banks Peninsula Marine Mammal Sanctuary. This sanctuary was established in 1988 for the purpose of protecting Hector's dolphins, and it places restrictions on activities within its boundaries for the protection of all marine mammals.

Section 22(3) of the Marine Mammals Protection Act 1978 (the Act) states that: "when defining and declaring a sanctuary under this section, the Minister may specify the activities that may or may not be engaged in within the sanctuary and may impose restrictions in respect of the sanctuary". Current restrictions relate to seismic surveying and seabed mining. There was no restriction in place to prohibit SailGP racing, nor was a concession or permit required to hold the event within the marine mammal sanctuary.

Although there were no relevant restrictions relating to the sanctuary, every person is still subject to the rules and regulations made under the Marine Mammals Protection Act 1978. The purpose of this Act is for "protection, conservation, and management of marine mammals".

Marine Mammal Management Plan (the Plan) and parties involved:

SailGP and Christchurch NZ developed a Marine Mammal Management Plan (the plan) for the event, to minimise any risks to marine mammals. It was possible dolphins could appear on the racecourse and there was potential for an incident such as a boat strike, since it was not known how they would react to this type of event. DOC provided technical advice for this plan but was not responsible for it and did not have a role to sign off/approve it.

As part of the plan, a number of marine mammal experts were hired from around the country to act as Hector's Dolphin Observers (HDO's). Some of these were paid 'expert spotters' and others were volunteers from the local community, including one experienced DOC ranger who was volunteering in his personal capacity.

The harbour was split into zones, with zone 1 being the furthest from the racecourse, and zone 4 containing the racecourse itself. The zones were monitored by the land based HDO's who were positioned at 10 observation stations around the harbour, at each zone boundary. Each station consisted of two observers – one suitably experienced HDO, supported by a trained volunteer observer.

On-water transect surveys were also undertaken by three spotter boats. The lead spotter boat had four people on board, including the marine mammal expert [REDACTED] (who has provided a witness statement relating to CLE-4367).

7.1.5 of the plan states that if a mammal was sighted, the nearest spotter boat would follow the sighted mammal(s) to monitor their location and aid the land-based observers. It also states that SailGP marshal boats will receive training in marine mammal observation so they can serve as additional on-water observers during racing.

7.3 of the plan outlines general protection measures for vessel interaction with Marine Mammals, namely for support and spectator vessels. It states it is an offence to harass, disturb, injure, or kill marine mammals. It also summarises relevant parts of the Marine Mammals Protection Regulations 1992 including “do not circle them, obstruct their path, or cut through any group”.

The plan was written by Enviser Limited. Technical expertise provided by Dr Deanna Clement and Dr Matt Pine. Technical advice was also provided by Department of Conservation, Kristina HILLOCK (technical advisor Marine Species). 3.00 of the plan states it is the responsibility of SailGP to ensure that all employees and subcontractors understand and implement the requirements of this MMMP. Section 4.00 states “SailGP is responsible for the operation implementation of this plan”.

Witness summary:

[REDACTED] was one of the expert marine mammal observers. On 14 April 2023 she sent an email to a DOC ranger who was involved with SailGP. From her email, I identified her primary concern:

“Concerns about how SailGP/the observer boats were allowed to behave around the Hector's dolphins, without a permit to harass marine mammals, or being explicit about using this strategy to deter dolphins in their MMP”.

A formal statement was taken from [REDACTED] on 9 May 2023 during which she described the following issues:

- SailGP MMO Online Training PowerPoint – authored by Enviser. P12 states boat transects to “attract any undetected groups” and “potentially lead away from inner zones”.
- During training the facilitator stated the plan was to attract dolphins to spotter boats, taking advantage of boat attraction (their natural behaviour), and then lead them away from zone 4 where most of the race activity took place. This implied intention to change dolphin behaviour.
- Radio communication throughout the event frequently referred to using boats to herd and encourage the dolphins away from the race zone. This is supported by Whatsapp messages.
- The above points are contrary to what was outlined in the MMP, which did not include manipulation of natural behaviour of dolphins as part of the protection plan. The intention of the plan was to track dolphins and for F50s to come off their foils if dolphins entered zone 4. There was no mention of deterring dolphins from entering zone 4.

- Clear landmarks were in place to denote zone 4 boundary and observers had trained with these. Moving the boundary 100m west meant there was no longer any clarity about where these boundaries were, making large parts of the plan difficult to implement.

Despite this, [REDACTED] states she was impressed with the entire team and believes they all had the animal's welfare in mind. She does not necessarily believe the event led to any long-term impacts on the Hector population but believes that "if harassment will be used to deter dolphins from the race area, it should be explicit, consulted on (including on ways to minimise harm, like having trained vessel operators), and permitted".

Possible offence and public interest considerations:

Section 23(2)(b) of the Marine Mammal Protection Act states:

"Every person commits an offence against this Act who uses any vehicle, vessel, aircraft, or hovercraft to herd or harass any marine mammal."

However, pursuing enforcement action for this offence could be extremely challenging. A vessel strike from an F50 catamaran travelling at speeds of 50 knots with extremely sharp foils underwater was almost certain to be fatal. Furthermore, these catamarans make very little sound compared to general vessels, so it was uncertain how dolphins would react to them. Therefore, if spotter boats herded or contained the dolphins, it is likely this was done for the purpose of protecting the dolphins from possible boat strike. This makes the actions of the spotter boats and their skippers consistent with the conservation and protection purposes of the MMPA.

It is important to note that only one person has come forward with concerns about boat behaviour. Alleged behaviour took place in public view however no members of the public have come forward with complaints or concerns. There were DOC staff present in the control room, on the water and a DOC employee on the spotter program. None of these staff observed any behaviour that warranted intervention. The operations manager in the control room was aware that there were six boats being used to track dolphins in the last race. He weighed up the risks and made the decision not to intervene given enabling better tracking in the difficult spotting conditions was in the best interest of protecting the dolphins – in line with the conservation and protection purposes of the MMPA.

A list of 34 key personnel involved in implementation of the Marine Mammal Management Plan is attached on Appendix A. As a starting point, all of these would require interviews. Further to this, support vessel staff, unofficial observers, and members of the public in the vicinity of alleged offending would also require identification and interviewing, as well as analysis of all media footage. Several key SailGP staff who are based overseas would also require formal interviews.

Following assessment of [REDACTED] statement and supporting information, preliminary legal advice was sought. This advice was sought around our ability to meet the solicitor general guidelines for prosecution. I had concerns about our ability to meet the public interest test given the purpose of the Act is for "protection, conservation, and management of marine mammals" and the complainant herself believed that all those involved had the animal's welfare in mind. Formal legal advice was sought prior to commencing a full investigation, given the amount of time and resources that would be required to launch a full investigation.

Several factors in DOC's [prosecution policy](#) are also relevant to this decision, namely;

- Resources available to DOC relative to public interest.
- Solicitor general prosecution guidelines.

- Purpose of the legislation which DOC is seeking to enforce.

A [legal memorandum](#) was provided by Mike BODIE on 08/06/2023.

A meeting was held between investigators, and the National Compliance Manager on 16/06/2023 to discuss legal advice and decisions for next steps.

The question is not whether or not we can prove that an offence occurred (which would require a full investigation), but whether we would ever be able to meet the solicitor general guidelines to take enforcement action, namely the public interest test. It is important to note that all enforcement options, including a formal warning, require the same threshold of evidence and thus the same level of resources and investigation.

Recommendations:

Based on the legal memorandum, internal NCT meeting, and DOC's enforcement and prosecution policies, all parties agreed it is not in the public interest to pursue a full investigation, and that it would be more effective to dedicate resources towards other outcomes. Ultimately, no matter how extensive the investigation, it would not change our ability to meet the public interest test and thus we would not be taking enforcement action. There are many effective tools DOC can use outside of compliance/enforcement to address the events that occurred during the SailGP Lyttleton regatta and ensure the conservation and protection of Hector's dolphins for future events.

I make the following recommendations:

- The investigation is closed. No further witness or suspect statements are sought.
 - Inform the complainant [REDACTED] and other parties involved (Enviser/SailGP) of this outcome.
 - Consider education letter to Enviser/SailGP
- Internal DOC debrief to discuss learnings from regatta.
- Interagency debrief with Ngāti Wheke, SailGP, and Enviser to discuss our findings and recommendations. Given the time delay is already three months, it will be prudent to arrange these debriefs as soon as practicable. To be led by the district and supported by the National Compliance Team (NCT).
- I recommend DOC considers the application of section 22(3) of the MMPA to impose restrictions in respect of the Marine Mammal sanctuary in order to protect Hector's dolphins during events like SailGP.

Recommendations for future events if SailGP returns to Lyttleton – this will be determined by use of 22(3) and whether this is successful:

- More involvement from DOC in planning stages to ensure effective prevention methods and race protocols are in place, and that all those involved in the event have better knowledge of the Act and Regulations.
- Input into the marine mammal management plan by DOC was only from a marine species technical advisor. I recommend that for any future events, advice is also sought from NCT to ensure event planning complies with all legislation and there is no scenario in which the plan can accidentally allow for offending.
- Earlier planning input from NCT into future events to advise on suitable education/prevention methods to guarantee compliance with legislation by all vessels

(including support and spectator craft) – ensure that recommendations are followed through on.

- As the complainant herself recommended, “if tracking/herding will be used to deter dolphins from the race area, it should be explicit, consulted on (including on ways to minimise harm, like having trained vessel operators), and permitted”. This would make the activity and limitations of the spotter boats authorised and transparent.
- Enhanced and immediate compliance response including issues being dealt with before participants disperse or leave New Zealand.

For your approval and direction

A handwritten signature in black ink, appearing to read 'M. Hays', with a horizontal line extending to the right.

21/06/2023

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Appendix A – personnel involved in implementation of Marine Mammal Management plan

Key personnel and roles:

Personnel	Role	Contact
[REDACTED]	[REDACTED]	[REDACTED]

Observer Teams and designated location

Location	Experienced MMO	Volunteer	Transport
S1	[REDACTED]	[REDACTED]	[REDACTED]
S2	[REDACTED]	[REDACTED]	[REDACTED]
S3	[REDACTED]	[REDACTED]	[REDACTED]
W1	[REDACTED]	[REDACTED]	[REDACTED]
W2	[REDACTED]	[REDACTED]	[REDACTED]
W3	[REDACTED]	[REDACTED]	[REDACTED]
N1	[REDACTED]	[REDACTED]	[REDACTED]
N2	[REDACTED]	[REDACTED]	[REDACTED]
N3	[REDACTED]	[REDACTED]	[REDACTED]
Boat 1	[REDACTED]	[REDACTED]	[REDACTED]
Boat 2	[REDACTED]	[REDACTED]	[REDACTED]
Boat 3	[REDACTED]	[REDACTED]	[REDACTED]

Location	Coordinates
N1 Livingstone Bay	172.772383, -43.59664457
N2 Gollans Bay (junction of upper and lower quarry access roads)	172.74775674, -43.59773174
N3 LPC reclamation	172.73482651, -43.60925702
S1 Camp Bay Road	172.7718773, -43.61816861
S2 Ripapa Island	172.75455302, -43.61974215
S3 Diamond Harbour	172.73668867, -43.62285556
W1 Church Bay Coastal Walkway	172.71968638, -43.62457727
W2 Ōtamahua/Quail Island	VP1: 172.69735928, -43.62797569 VP2a: 172.69318222, -43.62607887
W3 Park Terrace Reserve	VP2b: 172.69236352, -43.62405495 172.70115496, -43.61039429

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Marlous Heijs

From: John Wallwork
Sent: Thursday, 22 June 2023 3:16 pm
To: Marlous Heijs
Subject: RE: SailGP 2 - investigation memorandum -

Follow Up Flag: Follow up
Flag Status: Flagged

Afternoon Marlous

I have read your memo and the attached reports and I support the recommendation not to proceed with a prosecution. Prosecution resources are not limitless, and I agree that it is not in the public interest to pursue a full investigation.

As highlighted in the memo no dolphins were harmed which is the main factor, any action we take must be proportionate to that, and our decisions are reasonable in the circumstances.

This decision is in line with DOC's Prosecution decision guidelines that states, a prosecution will be initiated only if:

- The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction; and
- Prosecution is required in the public interest.

This is further clarified in the legal advice supplied by DOC's legal team.

The Solicitor General's guidelines also state, 'it is not the rule that all offences for which there is sufficient evidence must be prosecuted, Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest'.

I agree that further investigations into this matter would require a large amount of resourcing and costs, and that it is highly likely that the matter would still not meet the public interest test to prosecute.

Thanks

John

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Department of
Conservation
Te Papa Atawhai