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| To:               | Team Lead Investigations South – Tony SMITH           |
| Cc:               | National Compliance Manager – John WALLWORK           |
| From:             | Marlous HEIJS – Investigator National Compliance Team |
| Date:             | 04/05/2023  |
| Reference Number: | CLE - 4367  |
| Subject:          | Sail GP Lyttleton                                     |

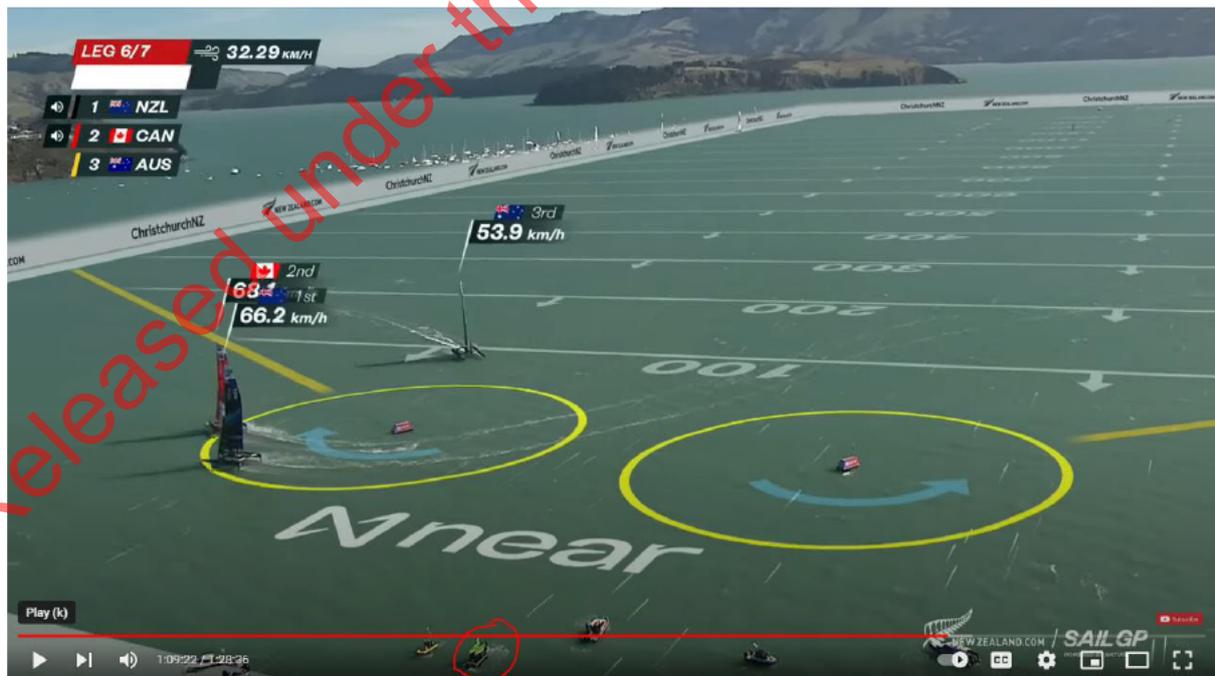
## INTRODUCTION

This report relates to a potential breach of the Marine Mammals Protection Regulations that occurred during the final race of 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 world.

The final race took place at about 1600 on Sunday 19 March 2023. Three F50 catamarans took part in this race; New Zealand, Canada, and Australia.

During the final minutes of this race, the F50s may have travelled at high speed within 300m of two Hector's dolphins. This portion of the race is publicly viewable on <https://www.youtube.com/watch?v=yhVckE3VDU> (time stamp 1:09:01 until 1:09:25). The following screengrab from the footage shows the position of the lead dolphin spotter boat circled in red. According to the marine mammal expert on this boat s.9(2)(a) dolphins were located about 50m Northeast (below) of this boat.



The race controller s.9(2)(a) was informed of the presence of dolphins but did not relay this information onto the skippers of the F50s or give the directive to cease racing. Skippers of individual vessels were not privy to this information and follow the command of race control.

Section 18(l) of the Marine Mammals Regulations 1992 states that “the master of any vessel less than 300 metres from any marine mammal shall use his or her best endeavours to move the vessel at a constant slow speed no faster than the slowest marine mammal in the vicinity, or at idle or no wake speed”.

Section 18(m) states that “vessels departing from the vicinity of any marine mammal shall proceed slowly at idle or “no wake” speed until the vessel is at least 300 metres from the nearest marine mammal, except that, in the case of dolphins, vessels may exceed idle or “no wake” speed in order to outdistance the dolphins but must increase speed gradually, and shall not exceed 10 knots within 300 metres of any dolphin”.

A breach of either of these regulations would be an offence against s 23(1A)(a) Marine Mammals Protection Act (MMPA) of the Marine Mammal Protections Act.

### **Parties involved:**

#### **SailGP:**

- s.9(2)(a). He was referred to as a s.9(2)(a) during the Christchurch event, which meant he had overall command of decision making in the control room.
- SailGP founded in 2019 by s.9(2)(a) and s.9(2)(a). It is not a New Zealand registered company.

#### **F50 League NZ Limited:**

- New Zealand registered company responsible for the overall running of this event in New Zealand.
- Company directors: Sir Russell COUTTS and Andrew Paul THOMPSON.
- s.9(2)(a). Referred to as a s.9(2)(a) during the Christchurch event. Contact person for DOC following the event.

#### **Skippers of the three F50 vessels:**

- Team New Zealand: Peter BURLING
- Australia: Tom SLINGSBY
- Canada: Phil ROBERTSON

## **Event Summary**

### **Background:**

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 MMPA 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

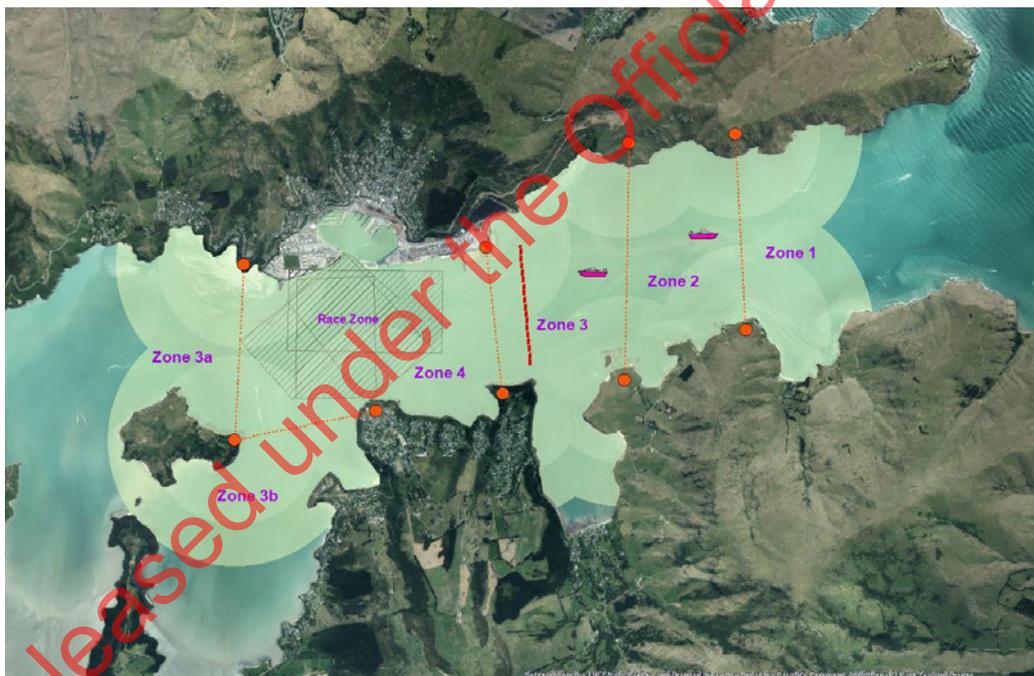
may impose restrictions in respect of the sanctuary". Current restrictions relate to seismic surveying and seabed mining. There was no restriction in place to prohibit SailGP racing, nor was a concession or permit required to hold the event within the marine mammal sanctuary.

### **The Marine Mammal Management Plan (the plan)**

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 it 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.

The harbour was split into zones (see graphic below). Zone 1 was the furthest from the racecourse, and zone 4 contained the racecourse itself. The zones were monitored by land based HDO's and on water spotter boats. The lead spotter boat was named 'Seacleaners' and had the marine mammal expert s.9(2)(a) on board. Marine mammal sightings and movement were communicated by HDO's via a dedicated VHF radio channel. The s.9(2)(a) coordinated all the observation activities from the control room of the race.



Section 8.2 of the plan states that if a marine mammal is sighted entering Zone 4, the HDO manager is immediately notified. The HDO manager notifies the Event Control Room Manager. The event director shall cease racing and instruct all boats to drop off the foils if racing is underway, support boats shall be instructed to keep below 5 knots.

7.3 of the plan outlines general protection measures for vessel interaction with Marine Mammals and summarises relevant parts of the Marine Mammals Protection Regulations 1992, including:

- Ensure that you travel no faster than idle or 'no wake' speed within 300 metres of any marine mammal.
- Idle slowly away. Speed may be gradually increased to out-distance dolphins and should not exceed 5 knots within 300 metres of any dolphin.

There is some uncertainty over whether the plan itself was breached or not. This revolves around whether the dolphins crossed the revised eastern boundary of zone 4. Regardless of whether the plan was breached, the plan does not supersede the Marine Mammal Protection Act.

The plan references the Act and the Regulations. I believe the onus is on the senior race organisers to be familiar with the plan, the Act and the Regulations, in order to prevent any possible offences being committed by the F50s participating in their event.

Throughout the event, Mahaanui operations manager Andy THOMPSON was based in the control room and was working alongside s.9(2)(a) from Te Hapu o Ngāti Wheke. Abby LAWRENCE, a senior ranger was also in the control room for most of the event. THOMPSON and s.9(2)(a) were there to advocate and provide advice to race organisers around the protection of marine mammals. However, any decisions on pausing or cancelling racing was up to the race organisers.

**Summary of events:**

| Date       | Schedule         | Comments   |
|------------|------------------|--|
| 16/03/2023 | Practice day     | Two F50s (New Zealand and Spain) had time on the water. No incidents.  |
| 17/03/2023 | Rehearsal racing | Cancelled due to high wind forecast. No incidents.   |
| 18/03/2023 | Race day         | Practice racing was delayed due to the presence of dolphins in zone 4.<br>Some practice took place before boats were instructed to come off foils due to dolphins returning to zone 4<br>Race one was delayed due to the presence of dolphins. This impacted the event broadcast.<br>Three races then took place without incident.   |
| 19/03/2023 | Race day         | Practice racing was unable to take place due to presence of dolphins in zone 4.<br>Two races took place without incident.<br>Race three (the final) began at 1600. <ul style="list-style-type: none"> <li>• Around this time two dolphins were being tracked heading towards the racecourse.</li> <li>• The dolphins continued towards zone four, travelling towards the windward gate, at the same time that the three F50s were heading towards this same gate.</li> <li>• The dolphins came inside the original zone four boundary, then crossed where the revised zone 4 boundary was believed to be.</li> <li>• The revised boundary was not physically marked or visible on any electronic maps, so whether the dolphins crossed the revised boundary or not remains uncertain.</li> </ul> |

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|  |  | <ul style="list-style-type: none"> <li>• [REDACTED] s.9(2)(a) called out that dolphins had crossed into zone 4 and that the F50s needed to come off their foils. He directed this at the [REDACTED] who was seated beside him. He repeated this a second time much louder.</li> <li>• DOC operations manager THOMPSON then spoke up and said the F50s should be off their foils. He called out a second time much louder and stated that SailGP was breaching their marine mammal plan.</li> <li>• The race continued and the F50s rounded the windward gate before completing the final leg of the race. No dolphins were struck.</li> <li>• It appeared the F50's were within 300m of dolphins when they rounded the windward mark travelling between 30-50km/h.</li> </ul> |
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**Data held by SailGP:**

- GPS data held by SailGP is required in order to establish whether the F50s were within 300m of dolphins when rounding the windward gate.
- During the planning phases SailGP indicated that if there was a compliance incident, they would cooperate with any investigation and provide relevant data to DOC investigators.
- During planning, Sail GP indicated they hold the following types of information:
  - Telemetry from boats
  - Access to crews/skippers
  - Data ex control room – maps, recorded radio transmissions, full logs of event etc
- Given the scale of the SailGP event and prize giving that was occurring, it was unlikely that senior race officials and skippers would have had the capacity to assist with these enquiries immediately after the event. A decision was made not to attempt this at the time however an informal verbal request for data was made by Andy THOMPSON.
- A formal request for information was emailed to [REDACTED] s.9(2)(a) on 30/03/23. Response received on 01/05/23. Of note, this does not include specific GPS coordinates or vessel tracks.
- Jobsheet from MHEIJS further outlines enquiries made in relation to RFI including specific information that was requested.

**Evidence provided in response to RFI:**

- An Excel spreadsheet, containing:
  - Relative positions of the F50s and other boats around the racecourse in a "A Yachbot Tracker" for the final race which started at 16:00 on 19 March 2023. In the screenshots, the black lines represent the course boundaries, and the orange line represents the Exclusion zone. It is also important to note that because of the presence of dolphins in the harbour, the racecourse boundaries were adjusted slightly to the west ahead of the final race to move the race further away from the dolphins. This would, in turn, mean that boundary of zone 4 was adjusted slightly in position to the west.
  - Contemporaneous notes made by the team in the SailGP Event Control Room (ECR) entitled "Event Log - Written notes".
  - Event overview notes.
- The ECR log from 15:05 to 16:11 on 19 March 2023.

Of note, the GPS coordinates themselves have not been provided. Based on the maps provided we cannot conclusively establish the distance that F50s were from the dolphin spotter boats. I sent a further request for this specific information and received the following response:

*We are currently determining whether we can obtain GPS co-ordinates for each F50 as requested and will supply this to you if possible. However, it is important to note that this information was not available to the people in the ECR making decisions on the day.*

#### **Interviews:**

No formal interviews were conducted however the following explanation was offered in response to my RFI:

*"The attached information is all the information which the race management team had in the Event Control Room at the time of the race on 19 March 2023. Reports from the MMO vessels were received over the radio and were then manually relayed into the logs.*

*To provide overall context, at no point did SailGP have any GPS co-ordinates for any dolphins or know the geo-locations of the dolphins relative to the MMO vessels. SailGP only has the positional information for the F50s and MMOs, and the comms from the MMOs as to relative positions of the dolphins. A representative from DOC was present in the ECR during the race with the race management team.*

*The decision-making on the day was taking place in a very fast-moving environment with limited (often ambiguous) information. For example, in the 'Event Log - Written notes' the entry at 16:08:38 states "2 Dolphins on the race course by east boundary". However, the ECR Log entry for the same time says "2 x dolphins on race course boundary east of windward gate boundary".*

*However, what is clear from the logs is that the MMOs continuously supplied the ECR with information that the dolphins were somewhere 'east' of the location of the MMOs - and therefore at all times between the MMOs and the F50s. Consequently, there was no danger of the F50s being in close contact with dolphins. Our MMP and comprehensive spotter programme could give SailGP comfort in that regard. And at the time the dolphins seemed to be nearest to the F50s (at around 16:09), the F50s were turning away from the dolphins (with the MMO boats in between) for the last leg of the race.*

*Finally, we would like to mention that SailGP went to great lengths to protect Hector's dolphins at the Christchurch event, including compromising our practice times and altering our broadcast to allow for dolphins to move away from danger zones. As you know, we developed and implemented a comprehensive MMP (at great expense and compromise to SailGP).*

I received the following answers in response to additional questions I had sent s.9(2)(a):

*Q. Did the skippers personally see dolphins when rounding the top mark during the final on Sunday 19 March 2023?*

*A. We have not asked each skipper, but SailGP's view is that it is very unlikely any of the skippers would have seen dolphins. They would have been fully focussed on racing and, given the position of the dolphins on the far side of the MMOs and BYOB section compared to the F50s, it is very unlikely that they would have seen and identified dolphins at distance in the heat of racing in that context.*

Q. Was the skipper advised of the presence of dolphins over radio/coms channels?

A. No.

Q. Was the GPS tracking information for the dolphin spotter boats visible to the skippers during the race?

A. No.

Lastly, I received the following statement regarding potential inconsistencies and next steps:

*In the course of reviewing these materials to respond to your request, SailGP identified some aspects of the MMP which could be interpreted as being inconsistent with the Regulations. For example:*

*Clauses 7.1.5, 8.1.2 and 8.2.2 anticipate survey boats (including an Animal Response Boat) following sighted marine mammals to monitor their location and direction of movement and to aid the land-based observers. These provisions do not put in place restrictions on speed and following distance, but encourages them to “maintain close and constant watch” of mammal/mammals to monitor direction of movement. It is therefore possible that survey vessels could breach the Regulations by tracking marine mammals at too great a speed or too small a distance, but would have been complying with the MMP.*

*The shutdown procedure in clause 8.2 of the MMP is triggered by a marine mammal entering Zone 4. Parts of the boundary of Zone 4 may have been within 300 metres of the race zone. This makes it possible that marine mammals can approach within 300 metres of the racing area (and potentially within 300 metres of moving vessels) without triggering the shutdown procedure.*

*SailGP has taken comprehensive and extensive steps to protect marine mammals during the events in March 2023 (please see “MM\_ChCh\_Final” file, on tab 3 (event overview) for details). It engaged with DOC prior to finalising its plan to procure DOC’s approval, which was granted. SailGP is concerned that the MMP (which was signed off by DOC) could potentially permit activities which were not consistent with the Regulations.*

*SailGP is committed to working with DOC on future events to ensure that marine mammals are protected. Therefore, SailGP would welcome the opportunity to meet with DOC to consider this response and the MMP further - and ensure that future SailGP events comply with best practice requirements to protect marine mammals.*

**Summary of witnesses and exhibits:**

| Witnesses     | Role  | Evidence  |
|---------------|---|---|
| Andy THOMPSON | DOC Mahaanui Operations manager. Based in Control room.                           | <ul style="list-style-type: none"><li>Initial statement which was written via email on 19/03/23 - prior to going on annual leave for a week</li><li>Formal written statement taken 29/03/23</li></ul> |
| s.9(2)(a)     | Representative of Te Hapu o Ngāti Wheke working alongside DOC in the control room | <ul style="list-style-type: none"><li>Nil. However, indicated that THONW would support any process required.</li></ul>  |

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| Abby LAWRENCE  | Senior Ranger Mahaanui - present in the control room for the majority of the event. | <ul style="list-style-type: none"> <li>Informal notes made during and after event (word document)</li> </ul>  |
| Marlous HEIJS  | Investigating Officer Present on DOC vessel throughout event.                       | <ul style="list-style-type: none"> <li>Notebook entry 19/03/23</li> <li>Jobsheet – re RFI enquiries</li> <li>2 x screenshots taken from race footage on YouTube</li> </ul>  |
| Graeme SCOTT   | Principal Investigating Officer Present on DOC vessel throughout event.             | <ul style="list-style-type: none"> <li>Notebook entry 19/03/23</li> <li>Notes and jobsheet re. interaction with Deanna CLEMENT 19/03/23.</li> <li>Notes and jobsheet re. interaction with [REDACTED] on 22/03/23</li> </ul> |
| s.9(2)(a)  | Hectors Dolphin Observer and s.9(2)(a)  | <ul style="list-style-type: none"> <li>Formal written statement</li> </ul>  |
| <p><b>Other exhibits:</b></p> <ul style="list-style-type: none"> <li>Race footage</li> <li>Marine Mammal Management Plan</li> <li>Data supplied by SailGP</li> </ul> |   |   |

**Other relevant information:**

During my compliance planning, I identified the following:

*Section 40 Conservation Act – Powers of warranted officers, (3) Any warranted officer may summarily interfere to prevent any offence against this Act and may require any person found offending to desist from the offence.*

I sought legal advice around this section, 9(2)(h)

9(2)(h)

I note that my original question was very broad given we didn't know which part of the Act/Regs might be breached. If there was a future event in Lyttleton harbour, I would seek further clarification around this power. I believe it could be considered if racing continues within 300m of dolphins since this would constitute an ongoing offence – which a warranted officer could require a person found offending to desist from.

## Relevant Offences and Evidential Sufficiency

The relevant offence is under s 23(1A) (a) Marine Mammals Protection Act (MMPA), which states:

(1A) Every person commits an offence who—

- (a) acts in contravention of or fails to comply in any respect with any notice, direction, restriction, requirement, or condition given, made, or imposed under any regulations made under this Act.

The following table outlines the relevant regulation.

| Element  | Application of facts to elements  |
|--|---|
| Marine Mammals Protection Regulations 1992 18(l)<br>Every commercial operation, and every person coming into contact with any class of marine mammal, shall comply with the following conditions |   |
| Subject to paragraph (m)   | Not applicable - F50s were travelling at speed towards the marine mammals before turning and leaving their vicinity |
| The master of any vessel   | Skippers of the three F50s  |
| Less than 300m from any marine mammal  | Unable to prove this beyond reasonable doubt without actual GPS coordinates.  |
| Shall use his or her best endeavours   | No evidence to prove this element.<br>9(2)(h)   |
| To move the vessel at a constant slow speed no faster than the slowest marine mammal in the vicinity, or at idle or "no wake" speed  | Race footage shows F50s travelling between about 30-50km/h when rounding the windward gate                          |

The statute of limitations in relation for this offence is 12 months.

The penalty for this offence is listed in section 23(3)(b) of the Marine Mammals Protection Act and is \$10,000. There is also the option of a \$600 infringement fee.

There are additional penalties listed in 23A of the Act, if the offence was committed for the purpose of commercial gain or reward. In the case of an individual, this would be imprisonment for a term not exceeding 5 years or a fine not exceeding \$300,000, or both.

The decision to allow F50s to keep racing in the vicinity of dolphins, was made by the s.9(2)(a) decision maker s.9(2)(a). s.9(2)(a) is the s.9(2)(a) for SailGP. SailGP is not a registered company in New Zealand. F50 New Zealand Limited is the New Zealand company responsible for hosting the event but was not party to the decision made by s.9(2)(a)

**Defences and mitigating factors:**

- There is no evidence to indicate the skippers of the three F50s had any knowledge that they were within 300m of dolphins.
- There is insufficient evidence to prove beyond reasonable doubt that the dolphins were within 300m of the F50s.
- Neither SailGP nor the skippers wilfully endangered any marine mammals.
- Loss or harm was minor – no marine mammals were injured or killed.
- Offence is unlikely to be repeated.
- Court is likely to impose a small or nominal penalty.
- The parties involved have no previous history of non-compliance with DOC.

**Legal advice:**

Legal advice has been provided in the form of a legal memorandum by DOC solicitor Mike BODIE. In summary, 9(2)(h)

9(2)(h)

9(2)(h)

However, we would still be unable to prove beyond reasonable doubt that the dolphins were within 300m of the F50s.

## The Public Interest Test

'Public Interest' in accordance with the Solicitor General's Prosecution Guidelines is a matter for the Prosecutor during their legal review of the file. The public interest test is only considered when the evidential test is met. As we are unable to meet the evidential test there is no need to consider the public interest test.

## Recommendations:

There is no evidence to indicate that the individual skippers were aware of dolphins being within 300m of their vessels. Nor can we prove beyond reasonable doubt that the F50s were within 300m of the dolphins.

As a result I believe we can conclude that no offence has taken place.

Accordingly, it may be more worthwhile to deploy resources into ensuring enhanced race protocols with DOC for future regattas, race officials have a better knowledge of the Act and Regulations, and a clear undertaking that yachts will slow down, or racing stop, if dolphins approach the course.

A formal education letter could be sent in relation to the 19 March incident in Lyttleton Harbour.

Furthermore, 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.

## Other relevant matters

Another incident was referred to DOC on 14/04/2023 regarding concerns about how the SailGP spotter boats were behaving around Hector's dolphins. This is recorded in CLE-4558 and is still under investigation.

## TL and NCM Review

|                                   |  |
|-----------------------------------|--|
| TL Comments                       | Given the high public interest in this matter, it may be prudent for the decisions and recommendations to be reviewed by legal or other appropriate decision makers. |
| TL or PCO Support for Prosecution | I SUPPORT the recommendations within this Investigation Report   |
| TL Signature & Date               |   |

|  |                           |
|--|---------------------------|
|  | Tony Smith<br>05 May 2023 |
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|                      |   |
|----------------------|---|
| NCM Comments         |   |
| Prosecution Decision | I APPROVE/DECLINE <i>(NCM to delete as applicable)</i> the recommendations within this Investigation Report |
| NCM Signature & Date |   |

Released under the Official Information Act