



New South Wales

National Parks and Wildlife Amendment (Marine Mammals) Regulation 2006

under the

National Parks and Wildlife Act 1974

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *National Parks and Wildlife Act 1974*.

BOB DEBUS, M.P.,
Minister for the Environment

Explanatory note

The object of this Regulation is to protect and conserve certain marine mammals of the orders of Cetacea (whales, dolphins and porpoises), Sirenia (dugongs) and Pinnipedia (seals and sea-lions) by prescribing the distances for approaching such marine mammals and regulating various other actions taken in respect of them. The Regulation also provides for the issue of penalty notices in respect of offences under section 112G of the *National Parks and Wildlife Act 1974* and offences created by the Regulation.

This Regulation is made under the *National Parks and Wildlife Act 1974*, including sections 112G, 156 and 160 and section 154 (the general regulation-making power), in particular section 154 (g).

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Clause 1

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1 Name of Regulation

This Regulation is the *National Parks and Wildlife Amendment (Marine Mammals) Regulation 2006*.

2 Amendment of National Parks and Wildlife Regulation 2002

The *National Parks and Wildlife Regulation 2002* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Clause 2)

[1] Part 5, Division 3A

Omit clause 57. Insert instead:

Division 3A Protection of certain marine mammals

57 Definitions

In this Division:

aircraft means any airborne craft, including a fixed wing craft, helicopter, gyrocopter, glider, hang glider, hot air balloon and airship.

calf means a whale or dolphin that is not more than half the length of an adult of the same species.

caution zone for a marine mammal means an area around the mammal of a radius of the following:

- (a) for a dolphin (including a calf)—150 metres,
- (b) for a whale (including a calf)—300 metres.

cetacean means an animal of the order Cetacea.

constant slow speed, in relation to a marine mammal or group of marine mammals that is being approached, means a speed of approach to the marine mammal or group that is constant, slow and leaves negligible wake.

dolphin means an animal of the family Delphinidae or the family Phocoenidae.

operate a vessel includes:

- (a) to determine or exercise control over the course or direction of the vessel or over the means of propulsion of the vessel (whether or not the vessel is underway), and
- (b) to pilot the vessel.

prohibited vessel means a vessel that is a personal motorised water craft (for example, a jet ski), parasail, hovercraft, wing-in-ground effect craft or a motorised diving aid (for example, a motorised underwater scooter) and includes a remotely operated craft (for example, a remote controlled speed boat).

pup means a seal or sea lion that is not more than half the length of an adult of the same species.

swimming includes snorkelling or diving.

vehicle means a motor car, motor carriage, motor cycle, or other apparatus propelled on land wholly or partly by volatile spirit, steam, gas, oil or electricity or a bicycle.

vessel includes a water craft of any description that is used or capable of being used as a means of transportation on water but does not include an aircraft that is capable of landing on water.

whale means a cetacean other than a dolphin.

57A Application of Division

- (1) A person must not be convicted of an offence under this Division if the person proves that the act constituting the offence was:
 - (a) caused solely by a marine mammal approaching the person, or
 - (b) an action taken by the person that was reasonably necessary to prevent a risk to human health or to deal with a serious threat to human life or property, or
 - (c) an action taken by the person as an officer of or person acting on behalf of a law enforcement agency that was reasonably necessary for the purposes of law enforcement, or
 - (d) an action taken by an officer of the Department of Primary Industries who had been appointed as a fisheries officer under the *Fisheries Management Act 1994* that was reasonably necessary for the purposes of exercising a law enforcement function conferred on the officer under that Act, or
 - (e) an action taken by the person that occurred as a result of an unavoidable accident, other than an accident caused by the person's negligent or reckless behaviour, or
 - (f) an action taken by a person that occurred as a result of the person being given a direction by an officer of the Department of Environment and Conservation and that was taken in accordance with that direction.
- (2) A person must not be convicted of an offence under this Division if the person proves that the act constituting the offence was done under and in accordance with or by virtue of the authority conferred by:
 - (a) a general licence under section 120 of the Act, or
 - (b) a scientific licence under section 132C of the Act, or
 - (c) a licence under Part 6 of the *Threatened Species Conservation Act 1995*, or

- (d) a licence, permit or approval under the *Exhibited Animals Protection Act 1986*.
- (3) In this clause:
law enforcement agency means each of the following:
 - (a) NSW Police,
 - (b) the police force of another State or a Territory,
 - (c) the New South Wales Crime Commission,
 - (d) the Australian Federal Police,
 - (e) the Australian Crime Commission,
 - (f) the Waterways Authority,
 - (g) the Australian Quarantine and Inspection Service,
 - (h) the Marine Parks Authority,
 - (i) the Department of Environment and Conservation.

57B Prescribed approach distances to marine mammals

- (1) For the purposes of section 112G of the Act, the following distances are prescribed:
 - (a) 300 metres, if the person is approaching a cetacean and is on, or using, a prohibited vessel,
 - (b) 100 metres, if the person is approaching a whale and is on, or using, a vessel other than a prohibited vessel,
 - (c) 50 metres, if the person is approaching a dolphin and is on, or using, a vessel other than a prohibited vessel,
 - (d) 30 metres, if the person is approaching a cetacean and is swimming,
 - (e) a height lower than 300 metres within a horizontal radius of 300 metres, if the person is operating an aircraft (other than a helicopter or gyrocopter),
 - (f) a height lower than 500 metres within a horizontal radius of 500 metres, if the person is operating a helicopter or gyrocopter,
 - (g) 10 metres, if the person is approaching a seal or sea lion (other than a pup) that is in the water and the person is in, or on, a vessel,
 - (h) 10 metres, if the person is approaching a seal or sea lion (other than a pup) that is in the water and the person is swimming or is a pedestrian,

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(i) 40 metres, if the person is approaching a seal or sea lion (other than a pup) that is hauled out on land and the person is swimming, operating a vessel or vehicle or is a pedestrian,

(j) 80 metres, if the person is approaching a pup.

Note. A person who approaches a marine mammal any closer than the distances prescribed above is guilty of an offence under section 112G of the Act that is punishable by a maximum penalty of 1,000 penalty units or imprisonment for 2 years, or both.

(2) The prescription of a distance under this clause does not apply to a person approaching a marine mammal in the following circumstances:

(a) the person is approaching in the course of taking action that is reasonably necessary to prevent a risk to human health or to deal with a serious threat to human life or property, or

(b) the person is approaching in the course of taking action in the person's capacity as an officer of or person acting on behalf of a law enforcement agency and the action is reasonably necessary for the purposes of law enforcement, or

(c) the person is approaching in the course of taking an action in the person's capacity as an officer of the Department of Primary Industries who has been appointed as a fisheries officer under the *Fisheries Management Act 1994* and the action is reasonably necessary for the purposes of exercising a law enforcement function conferred on the officer under that Act, or

(d) the person is approaching in the course of taking action that is a result of an unavoidable accident, other than an accident caused by the person's negligent or reckless behaviour, or

(e) the person is approaching in the course of taking any action as a result of the person being given a direction by an officer of the Department of Environment and Conservation and that is being taken in accordance with that direction.

57C Operation of prohibited vessels

(1) A prohibited vessel that is being approached by a cetacean must be moved away from the cetacean at a constant slow speed so that the vessel remains at least 300 metres away from the cetacean.

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- (2) A person who operates a prohibited vessel in a way that contravenes subclause (1) is guilty of an offence.
Maximum penalty: 50 penalty units.

57D Operation of vessels that are not prohibited vessels

- (1) Within the caution zone for a cetacean (other than a calf), a person operating a vessel that is not a prohibited vessel:
- (a) must operate the vessel at a constant slow speed and in a manner that consistently minimises noise, and
 - (b) must make sure that the vessel does not drift closer to the cetacean than:
 - (i) for a dolphin—50 metres, or
 - (ii) for a whale—100 metres, and
 - (c) if the cetacean shows signs of being disturbed—must immediately withdraw the vessel from the caution zone at a constant slow speed, and
- Note.** Signs of being disturbed include regular changes in direction or speed of swimming, hasty dives, changes in breathing patterns, changes in acoustic behaviour or aggressive behaviour such as tail slashing and trumpet blows.
- (d) if there is more than one person on the vessel—must post a lookout for cetaceans, and
 - (e) without limiting paragraph (b), must approach a cetacean only:
 - (i) from the rear, at an angle of no closer than 30 degrees to its observed direction of travel, or
 - (ii) by positioning the vessel ahead of the cetacean at more than 30 degrees from its observed direction of travel, and
 - (f) must make sure the vessel does not restrict the path of the cetacean, and
 - (g) must make sure the vessel is not used to pursue the cetacean.
- (2) A person operating a vessel that is not a prohibited vessel must not allow the vessel to enter the caution zone of a calf.
- (3) If a calf brings a vessel that is not a prohibited vessel within the caution zone of the calf by appearing within the area in which the vessel is being operated, the person operating the vessel:
- (a) must immediately stop the vessel, and

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- (b) must:
 - (i) turn off the vessel's engines, or
 - (ii) disengage the vessel's gears, or
 - (iii) withdraw the vessel from the caution zone at a constant slow speed.
- (4) A person operating a vessel that is not a prohibited vessel must not enter the caution zone of a cetacean if there are more than 2 vessels in the caution zone.
- (5) If a whale (other than a calf) approaches a vessel that is not a prohibited vessel or comes within the limits mentioned in subclause (1) (b), the person operating the vessel must:
 - (a) disengage the vessel's gears and let the whale approach, or
 - (b) reduce the speed of the vessel and continue on a course away from the whale.
- (6) If a dolphin (other than a calf) approaches a vessel that is not a prohibited vessel or comes within the limits mentioned in subclause (1) (b), the person operating the vessel must not change the course or speed of the vessel suddenly.
Maximum penalty: 50 penalty units.

57E Operation of aircraft in vicinity of marine mammals

- (1) A person must not operate any aircraft so as to approach a marine mammal from head on for the purpose of observing a marine mammal.
- (2) A person must not land an aircraft on water for the purpose of observing a marine mammal.
Maximum penalty: 50 penalty units.

57F Feeding marine mammals

- (1) A person must not intentionally feed or attempt to feed a marine mammal that is in its natural environment.
Maximum penalty: 50 penalty units.
- (2) Subclause (1) does not apply to the routine discarding of bycatch by a commercial fisher within the meaning of the *Fisheries Management Act 1994* if he or she makes reasonable efforts to avoid discarding bycatch near a marine mammal.
- (3) In this clause:
feed a marine mammal includes throwing food or rubbish in the water near a marine mammal.

57G Swimming with cetaceans

- (1) A person must not enter water within 100 metres of a whale or within 50 metres of a dolphin.
- (2) If any cetacean comes within 30 metres of a person who is in the water, the person:
 - (a) must move slowly to avoid startling it, and
 - (b) must not touch the cetacean or move towards it.Maximum penalty: 50 penalty units.

57H Approaching special interest marine mammals

- (1) The Minister may by order:
 - (a) declare a marine mammal or group of marine mammals described in the order to be a marine mammal or group of marine mammals to which this clause applies, and
 - (b) specify the approach distance for that marine mammal or group of marine mammals for the purposes of this clause (the *special protection approach distance*), and
 - (c) describe the area of the State to which this clause applies.
- (2) The Minister may make an order under this clause only if:
 - (a) the marine mammal is, or the group is a group that is or includes, any of the following:
 - (i) a dugong or other rarely sighted species of marine mammal,
 - (ii) a morphological or colour-variant marine mammal,
 - (iii) a female marine mammal that has recently given, or is about to give, birth,
 - (iv) a calf separated from a mother or group of marine mammals,
 - (v) a sick or injured marine mammal, or
 - (b) the Minister is satisfied that the marine mammal or group of marine mammals is at risk of harassment, injury or death.
- (3) As soon as practicable after making an order under this section, the Minister is:
 - (a) to cause notice of the order to be broadcast by a television or radio station transmitting to the area of the State concerned and to be published in a newspaper circulating in that area, and
 - (b) to cause a copy of the order to be published in the Gazette.

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- (4) An order under this clause has effect for a period of 6 months on and from the day on which notice of it is first published as referred to in subclause (3) (a).
- (5) A person must not, without reasonable excuse or the Minister's written permission or the permission of an authorised officer, approach a marine mammal or group of marine mammals to which this clause applies in an area to which this clause applies at any distance that is closer than the special protection approach distance for the marine mammal or group of marine mammals.
Maximum penalty: 50 penalty units.

[2] Schedule 2 Penalty notice offences

Insert in appropriate order in Columns 1 and 2, respectively, under the heading "**Offences under National Parks and Wildlife Regulation 2002**":

Clause 57C (2)	300
Clause 57D (1)	300
Clause 57D (2)	300
Clause 57D (3)	300
Clause 57D (4)	300
Clause 57D (5)	300
Clause 57D (6)	300
Clause 57E (1)	300
Clause 57E (2)	300
Clause 57F (1)	300
Clause 57G (1)	300
Clause 57G (2)	300
Clause 57H (5)	300

[3] Schedule 2

Insert after the matter relating to section 111 in Columns 1 and 2, respectively, under the heading "**Offences under National Parks and Wildlife Act 1974**":

Section 112G (1)	300
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BY AUTHORITY
