

PROVINCIAL GOVERNMENT OF THE WESTERN CAPE

DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

No. R #

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National Environmental Management: Integrated Coastal Management Act No 24 of 2008

Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)

I, [insert name] in my capacity as the Minister of the Provincial Government of the Western Cape Province responsible for coastal management, having consulted with the Overberg District Municipality and all local municipalities within the Overberg District and having given interested and affected parties an opportunity to make representations as required by section 26(4) of the National Environmental Management: Integrated Coastal Management Act, 2008 ("the Act") and having taking account of the considerations referred to in section 28(3) of the Act, hereby exercise my powers under sections 25, 26(1)(b), 28 and 84 of the Act to make the regulations in the following Schedule.

Signed

[insert name]

Provincial Minister of Environmental Affairs and Development Planning

Schedule

National Environmental Management: Integrated Coastal Management Act No 24 of 2008

Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)

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CHAPTER 1: INTERPRETATION, OBJECTS AND APPLICATION OF REGULATIONS

Definitions

1. (1) In these Regulations, any word or expression to which a meaning has been assigned in the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) shall have the meaning so assigned and, unless the context indicates otherwise–

“Act” means the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008);

“coastal permit” means an authorisation issued by or on behalf of the Head of the Provincial Department under regulation 10;

“disaster”¹ means a progressive or sudden, widespread or localised, natural or human caused occurrence which:

- (a) caused or threatens to cause:
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources;

“infrastructure” means any temporary or permanent structure made by humans;

“integrated development plan” means the integrated development plan (including the spatial development framework) prepared by the Municipality in accordance with the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

¹ This definition appears in the Disaster Management Act.

“land use authorisation” means any authorisation, consent, permit or exemption granted under the Land Use Planning Ordinance 15 of 1985, a zoning scheme or any other legislation that governs the use of land within the municipal coastal zone;

“limited development line” means the inland boundary of the coastal protection zone referred to in regulation 4(1);

“NEMA” means the National Environmental Management Act, 1998 (Act No. 107 of 1998);

“Overberg District” means the geographical area over which the Overberg District Municipality has jurisdiction;

“permissible activity” means an activity listed in Schedule 2 to these regulations which may be undertaken in the coastal protection zone or seaward of the coastal set back line without a coastal permit;

“Provincial Department” means the Department of Environmental Affairs and Development Planning or any other department within the Provincial Government of the Western Cape to which responsibility for coastal management may be transferred;

“spatial development framework” means a spatial development framework referred to in section 26 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

“utility services” means the provision by the Municipality of basic services in the discharge of its constitutional responsibilities including water, electricity, waste removal, storm water management, municipal public transport and municipal public works².

(2) A reference in these regulations to the limited development line, the coastal protection zone, or to the provision of a law, policy or plan, is a reference to it as it exist at the relevant time (i.e. incorporating any prior amendments), and if the relevant provision has been repealed and replaced with a provision that has a similar effect, the reference in these regulations is deemed to be a reference to the replacement provision.

² These services are referred to in Schedule 4 Part B and Schedule 5 Part B to the Constitution,

Objects of Regulations

2. The objects of these regulations are -

- (a) to determine and adjust the inland boundary of the coastal protection zone in the Overberg District;
- (b) to prohibit, restrict and regulate development within the coastal protection zone in the Overberg District in order to promote effective and integrated coastal management;
- (c) to establish a coastal set-back line within the Overberg District;
- (d) to prevent further development seaward of the coastal set-back line except development that:
 - (i) enhances the coastal environment;
 - (ii) contributes to the fulfilment of a coastal management objective; or
 - (iii) meets an essential need and cannot occur elsewhere;
- (e) to protect and retain the scenic landscapes, sense of place and coastal identity of the coastal zone within the Overberg District; and
- (f) to provide for incidental matters.

Application of regulations

3. (1) These regulations apply to any part of the coastal zone that lies within the area of jurisdiction of the Overberg District Municipality.
- (2) These regulations do not invalidate any land use rights or authorisation that existed when these regulations came into effect.

CHAPTER 2: LIMITED DEVELOPMENT LINE AND COASTAL PROTECTION ZONE

Demarcation of limited development line

4. (1) The line indicated on the [identification of relevant map/ diagram] as the limited development line shall be the inland boundary of the coastal zone within the Overberg District.
- (2) In order to enable the public to determine the position of the limited development line, the Overberg District Municipality and all local municipalities within the Overberg District, must demarcate the limited development line on any map that forms part of its zoning scheme, within 60 days of the commencement of these regulations.³

Implementation of land use legislation within the coastal protection zone

5. (1) When exercising powers or making decisions in terms of legislation that regulates the planning or development of land within the Overberg District, a municipality or other competent organ of state –
- (a) must apply that legislation in a way that gives effect to the purpose for which the coastal protection zone is established as set out in section 17 of the Act, as required by section 62 of the Act;
 - (b) must not authorise land within the coastal protection zone to be used for any activity that may have an adverse effect on the coastal environment without first considering an environmental impact assessment report, as required by section 62 of the Act;
 - (c) must apply the national environmental management principles set out in section 2 of the National Environmental Management Act, 1998 (Act No. 107 of 1998);
 - (d) must take account of whether or not any proposed development within the coastal protection zone:⁴

³ The obligation to delineate adjustments of the inland boundary of the coastal protection zone on such maps is imposed by section 31 of the Act but the Act does not indicate the time-period within which this must be done.

⁴ Section 63 of the Act requires these considerations to be taken into account in deciding whether or not to

- (i) is consistent with the purpose for which the coastal protection zone is established as set out in section 17 of the Act;
 - (ii) is likely to cause irreversible or long-lasting adverse effects to any aspect of the coastal environment that cannot be satisfactorily mitigated;
 - (iii) is likely to be significantly damaged or prejudiced by dynamic coastal processes;⁵
 - (iv) would substantially prejudice the achievement of any coastal management objective;
 - (v) must, by virtue of its very nature, be located within the coastal protection zone;
 - (vi) will provide important services to the public when using coastal public property, the coastal protection zone, coastal access land or a coastal protected areas;
 - (vii) is to occur on a site that is inherently suitable for the intended use; and
 - (viii) is in the interests of the whole community.⁶
- (2) In assessing the desirability or otherwise of a proposed land use, the competent authority must assume until the contrary is proven that it is undesirable⁷

grant an environmental authorisation for a coastal activity but they are repeated here in order to ensure that the same issues are considered when making land-use decisions for developments in the coastal protection zone.

⁵The Act provides that:

“dynamic coastal processes” means all natural processes continually reshaping the shoreline and near shore seabed and includes —

- (a) wind action;
- (b) wave action;
- (c) currents;
- (d) tidal action; and
- (e) river flows;

⁶ The Act provides that: **“interests of the whole community”** means the collective interests of the community determined by —

- (a) prioritising the collective interests in coastal public property of all persons living in the Republic over the interests of a particular group or sector of society;
- (b) adopting a long-term perspective that takes into account the interests of future generations in inheriting coastal public property and a coastal environment characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable; and
- (c) taking into account the interests of other living organisms that are dependent on the coastal environment;

⁷ Section 36(1) of LUPO provides that a decision-maker shall refuse application “solely on the basis of a lack of desirability of the contemplated utilization of land concerned ..” .This paragraph is intended to ensure that

and contrary to the interests of the whole community for any development that may have a significant negative impact on the functioning or integrity of ecosystems or that may significantly alter the physical nature, appearance, or sense of place of the coastal zone, to occur within the coastal protection zone unless the site proposed for the development is inherently suitable for the intended use and that development will -

- (i) enhance the coastal environment;
- (ii) contribute to the fulfilment of a coastal management objective; or
- (iii) meet an essential need and cannot occur elsewhere.

(3) In determining whether any site is suitable for a particular use, the decision-maker -

- (a) must not regard the zoning or past use of a site as proof of its suitability for any use permitted by that zoning or use for which the site was used in the past; and
- (b) must have regard to factors such as:
 - (i) whether or not the development or use could take place outside the coastal protection zone;
 - (ii) whether or not the natural features and location of the site make it demonstrably suitable for that use;
 - (iii) the extent to which the nature or position of the site will cause people or property on the site to be exposed to risks such as erosion, floods, storm surge, or land-slip; and
 - (iv) the difficulty and costs of providing and maintaining utility services to the site.

Restrictions on development and activities within the coastal protection zone

6. No person may undertake any activity listed in Part A of Schedule 1 to these regulations, other than a permissible activity, within the coastal protection zone unless that person –

- (a) is authorised to do so in terms of:

decision-makers under LUPO will have to refuse developments that are regarded as undesirable under these regulations.

- (i) an environmental authorisation;
 - (ii) a coastal permit; or
 - (iii) is authorisation given by the Minister under section 67 of the Act;⁸
or
- (b) is taking temporary measures that are reasonably necessary or desirable to respond to an emergency incident or a disaster.

CHAPTER 3: COASTAL SET-BACK LINE

Purpose and demarcation of coastal set-back line

7. (1) The line indicated on the [identification of relevant map/ diagram] as the coastal set-back shall be the coastal set-back line within the Overberg District and must be regarded as a “development setback” for the purposes of regulations made under the NEMA.
- (2) The coastal set-back line is established –
- (a) to protect people, property, and economic activities from risks arising from dynamic coastal processes, climate change and sea-level rise including by:
 - (i) avoiding increasing the effect or severity of natural hazards on the coastline; and
 - (ii) protecting and enhancing natural coastal systems and features that act as protective buffers;
 - (b) to protect and enhance the high ecological, cultural, heritage and economic value of the coastal zone;
 - (c) to protect and enhance the natural character of the coastal zone, including the natural beauty, aesthetic value and sense of place associated with coastal landscapes and seascapes;

⁸ Section 67 of the Act (temporary occupation of land within coastal zone) allows the Minister to authorize the temporary occupation of land, and various activities to be undertaken that would fall within the definition of “development” for the purposes of these regulations.

- (d) to maintain and enhance the diversity, health and productivity of coastal ecosystems and to rehabilitate and restore the integrity and functioning of degraded coastal ecosystems;
- (e) to protect and conserve indigenous species;
- (f) to prevent any development seaward of that coastal set-back line other than development that:
 - (i) enhances the coastal environment;
 - (ii) contributes to the fulfilment of a coastal management objective; or
 - (iii) meets an essential need and cannot occur elsewhere.

Permissible development seaward of the coastal set-back line

8. (1) The activities listed in Schedule 2 to these regulations are permissible activities that may be undertaken seaward of the coastal set-back line without a coastal permit.
- (2) Any person who undertakes a permissible activity must do so in a manner that minimises adverse effects on the environment.
- (3) This regulation does not relieve any person who wishes to undertake a permissible activity from complying with any other legal requirement that may apply to that activity.

Restrictions on development seaward of coastal set-back line

9. No person may undertake any development⁹, other than a permissible activity, on the seaward side of the coastal set-back line unless that person –
- (a) is authorised to do so in terms of:
 - (i) an environmental authorisation;
 - (ii) a coastal permit; or
 - (iii) is authorisation given by the Minister under section 67 of the Act; or

⁹ The Act defines “development” as follows: “**development**”, in relation to a place, means any process initiated by a person to change the use, physical nature or appearance of that place, and includes—

- (a) the construction, erection, alteration, demolition or removal of a structure or building;
- (b) a process to rezone, subdivide or consolidate land;
- (c) changes to the existing or natural topography of the coastal zone; and
- (d) the destruction or removal of indigenous or protected vegetation;

- (b) is taking temporary measures that are reasonably necessary or desirable to respond to an emergency incident or a disaster.

Coastal permits

- 10.** (1) A person who wishes to undertake an activity listed in Schedule 1 to these regulations must apply to the Head of the Provincial Department for a coastal permit.
- (2) A coastal permit is an “authorisation” for the purposes of the Act and may be enforced as such.
- (3) Despite sub-regulation (1), a coastal permit is not required –
- (a) to undertake a permissible activity;
 - (b) to undertake an activity that has been assessed as part of an environmental impact assessment process under the NEMA and which is authorised in terms of an environmental authorisation;
 - (c) to do anything that has been authorised by the Minister under section 67 of the Act;¹⁰
 - (d) to complete the construction of any infrastructure provided that the construction (excluding site preparation activities) had commenced prior to the commencement of these regulations.

Applications for coastal permits

- 11.** (1) Any person who wishes to undertake an activity for which a coastal permit is required must apply in writing to the Head of the Provincial Department.
- (2) An application for a coastal permit must -
- (a) describe the activity for which permission is sought and the environmental and socio-economic impacts which it will or may have;
 - (b) describe the measures taken to inform interested and affected parties of the application;

¹⁰ Section 67 of the Act (temporary occupation of land within coastal zone) allows the Minister to authorize the temporary occupation of land, and various activities to be undertaken that would fall within the definition of “development” for the purposes of these regulations.

- (c) indicate the extent to which activity for which permission is sought is either consistent or inconsistent with the objects of the Act and these regulations, and with any applicable coastal management programme;
 - (d) explain why granting the application would be in the interests of the whole community; and
 - (e) include any relevant supporting documents or information, including sufficient verifiable evidence to satisfy the decision-maker that the site in question is inherently suitable for the intended use.
- (3) If the Head of the Provincial Department is not satisfied that the application contains sufficient information to make a properly informed decision or that further public participation is desirable, he or she may direct the applicant to conduct an environmental impact assessment procedure as if the activity were a listed activity for the purposes of the NEMA and the provisions of the NEMA and the Environmental Impact Assessment Regulations, 2010 shall apply, with the necessary modifications, to that process.

Decision-making in relation to coastal permits

- 12.** (1) In deciding whether or not to grant a coastal permit the Head of the Provincial Department must:
- (a) consult with the Overberg District Municipality and with any local municipality within whose area of jurisdiction the site of the proposed activity is situated;
 - (b) take account of:
 - (i) the objects of the Act as set out in section 2 of the Act and of the objects of these regulations as set out in regulation 2;
 - (ii) any relevant national, provincial or municipal coastal management programme; and
 - (iii) the factors which must be taken into account by a competent authority when deciding whether or not to grant an environmental authorisation in respect of a coastal activity as set out in section 24O of NEMA and in section 63(1) of the Act; and

- (c) apply the national environmental management principles set out in section 2 of the NEMA.
- (2) The Head of the Provincial Department must not issue a coastal permit unless he or she is satisfied that the proposed development or activity –
 - (a) will only alter the physical nature, appearance, or sense of place of the coastal zone to the extent necessary to further the objects of the Act and these regulations or to achieve a coastal management objective; and
 - (b) will be undertaken at a site that is suitable for the intended use as determined in accordance with regulation 5(3); and
 - (c) is in the interests of the whole community.
- (3) Without limiting the generality of sub-regulation (2)(c), in the absence of evidence to the contrary a proposed development or activity will be presumed to further the objects of the Act and of these regulations if it -
 - (a) is necessary to reduce risks to human health or safety, to property or to the environment and will not have a significant adverse effect on the environment; or
 - (b) will enhance the integrity and functioning of dynamic coastal processes, ecosystems or the coastal environment; or
 - (c) will enhance the appearance, or sense of place of any place within the coastal zone; or
 - (d) will enhance access to, or the use and enjoyment of, coastal public property by the public without having a significant adverse effect on the environment; or
 - (e) is necessary to provide essential services or to meet an essential need and it is not feasible to undertake it outside the coastal protection area.

Content of coastal permits

- 13.** (1) A coastal permit must specify -
- (a) the area to which it relates;
 - (b) the person to whom it is issued;

- (c) the activity or activities authorised by the coastal permit including the nature and location of the activity;
 - (d) the conditions subject to which it is issued; and
 - (e) the period of its duration.
- (2) The Department must issue a coastal permit subject to whatever conditions it considers appropriate to further the objects of the Act and of these regulations.

Amendment, revocation, suspension, cancellation coastal permits

14. A coastal permit is an “authorisation” for the purposes of the Act and may be amended, revoked, suspended, or cancelled in accordance with section 68 of the Act.

Appeals in relation to coastal permits

15. (1) Any person who is dissatisfied by a decision of the Head of the Provincial Department to issue, refuse, amend, suspend or cancel a coastal permit or by the terms or conditions imposed in a coastal permit may appeal in writing to the Provincial Minister.
- (2) Appeals in respect of coastal permits shall be dealt with in the same manner as appeals in respect of a coastal protection notice or a coastal access notice and sections 74 to 78 of the Act shall apply, with the necessary modifications, to appeals in respect of coastal permits.

CHAPTER 5: COASTAL LAND USE PLANNING AND DECISION MAKING

Land use plans to be consistent with these regulations

16. A municipality within the Overberg District must not –
- (a) adopt an integrated development plan, or any spatial planning instrument (including a spatial development framework, urban structure plan, zoning scheme, land use policy or land use plan) that is inconsistent with these regulations; or
 - (b) amend its integrated development plan or any such spatial planning instrument in a manner that makes it inconsistent with these regulations.

Municipal Coastal Management Programmes and By-laws

17. (1) Each municipality within the Overberg District must ensure that any coastal management programme adopted by a municipality in accordance with sections 48 and 49 of the Act must give effect to -
- (a) the purpose for which the coastal protection zone is established as set out in section 17 of the Act; and
 - (b) the purposes for which the coastal set-back line has been established as set out in regulation 7(2).
- (2) A municipality with the Overberg District that makes by-laws under section 50 of the Act for the implementation, administration and enforcement of its coastal management programme may impose, implement and enforce additional restrictions consistent with the Act on activities within the coastal protection zone or seaward of the coastal set-back line.

CHAPTER 7: ENFORCEMENT

Enforcement notices

18. (1) These regulations may be enforced by –
- (a) the Head of the Provincial Department issuing a repair or removal notice contemplated in section 60 of the Act;¹¹ or
 - (b) an environmental management inspector issuing a compliance notice in terms of section 31L of the NEMA.
- (2) The municipal manager of the Overberg District Municipality or of a local municipality within the Overberg District may exercise the powers granted to the MEC under section 60 of the Act to issue repair or removal notices in respect of structures that are constructed or erected in the coastal protection zone or seaward of the coastal set-back line in contravention of these regulations.

¹¹ Unless the national Minister delegates the power to issue a coastal protection notice to the Provincial Minister as envisaged by section 59(3) of the Act, this power may not be used by the province or delegated to a municipality.

(3) The provisions of the Act shall apply, with the necessary modifications, to a repair or removal notice issued by a municipal manager under this regulation.

Offences

19. (1) A person who undertakes any development or activity, other than a permissible activity, within the coastal protection zone or seaward of the coastal set-back line in contravention of regulations 6 or 8 is guilty of a category one offence.¹²

(2) A holder of a coastal permit who fails to comply with the terms or conditions of a coastal permit is guilty of a category two offence.¹³

Powers of the court

20. (1) In addition to imposing a fine or imprisonment, a court may order any person convicted of an offence under this by-law -

- (a) to remedy any harm to the environment or private property that occurred as consequence of the commission of the offence;
- (b) to compensate any person for any damage or loss suffered by that person as a consequence of the commission of the offence;
- (c) to reimburse any organ of state or person for the reasonable costs incurred by it in investigating and prosecuting the person convicted or in taking action to prevent further harm, or to remedy harm arising from the commission of the offence;
- (d) to pay an amount equivalent to the costs that an organ of state or other person is reasonably like to incur in future in taking action to prevent further harm, or to remedy harm arising from the commission of the offence.

(2) If the court, in the exercise of its powers under subsection (1), orders a convicted person to pay a sum of money to an organ of state or any other person, that order shall have the same effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

¹² See section 79(1) and 80(1) of the Act which allows for a maximum fine of R 5 million and/or imprisonment for ten years for category one offences.

¹³ See section 79(2) and 80(2) of the Act which allows for a maximum fine of R 500,000 and/or imprisonment or community service for five years for the first commission of a category two offence.

CHAPTER 8: MISCELLANEOUS

Expropriation

21. Any person who can prove that his or her property has been expropriated in terms of any provision of these regulations may claim compensation from the Provincial Government of the Western Cape.¹⁴

Delegation by Head of Provincial Department

22. The Head of the Provincial Department may delegate any the powers granted to him or her under these regulations to any other official in the Provincial Department.

Short title

23. These regulations are called the “Coastal Protection Zone and Set-back Regulations (Overberg District), 2011”.

Commencement

24. These regulations commence on the date on which they are published in the *Gazette*.

¹⁴ In our view, although these regulations impose restrictions on the exercise of some land use rights they do not have the effect of expropriating any rights. This provision does not create a right to compensation (which is determined by the Constitution) and in our opinion, in the unlikely event that it could be proved that an expropriation has taken place, that expropriate would be constitutionally permissible and the amount or compensation payable is likely to be modest because the owner is not being deprived of all ownership rights. The purpose of including a provision that deals explicitly with expropriation is to make it difficult to challenge these regulations on the basis that it has the effect of expropriating property rights without compensation.

SCHEDULE 1: ACTIVITIES FOR WHICH A COASTAL PERMIT IS REQUIRED

PART A: ACTIVITIES THAT MAY NOT BE UNDERTAKEN WITHIN THE COASTAL PROTECTION ZONE WITHOUT A COASTAL PERMIT

1. The construction or erection of any infrastructure that prevents or impedes access to coastal public property via coastal access land, coastal walkways or paths, or boat launching sites.
2. Any activity for which an environmental authorisation would have been required prior to the demarcation of the coastal set-back line.

3. [insert other activities]

PART B ACTIVITIES THAT MAY NOT BE UNDERTAKEN SEAWARD OF THE COASTAL SET-BACK LINE WITHOUT A COASTAL PERMIT

4. Any activity that changes the topography, vegetation, physical nature, appearance or sense of place of the place affected, including the erection of any permanent or non-permanent structure; and the undertaking of gardening or landscaping activities.
5. Any activity that significantly interferes with, impedes or restricts a dynamic coastal process.
6. The collection, harvesting, harassing, or harming of any indigenous species by any person who is not in possession of a valid authorisation to do so issued by an organ of state in the national or provincial sphere of government.
7. The removal of sand, shells, stones or rocks unless done by:
 - a. an individual collecting shells or stones for personal use only (“beach-combing”); or

- b. by a person in possession of a valid authorisation to do so issued by a competent authority an organ of state.
- 8. Any activity that causes pollution of the environment that has not been authorised in writing by an organ of state that is competent to do so.

**SCHEDULE 2: PERMISSIBLE ACTIVITIES THAT MAY BE UNDERTAKEN WITHIN THE
COASTAL PROTECTION ZONE OR SEAWARD OF THE COASTAL SET-BACK
LINE WITHOUT A COASTAL PERMIT**

1. The construction, erection, alteration, demolition or removal of a temporary structure or temporary building for films and events which is done in accordance with an authorisation granted by a municipality with jurisdiction over the area in question.

2. Any activity undertaken by a municipality or other organ of state in order to respond to a disaster or emergency including, but not limited to:
 - (a) the stranding of a vessel;
 - (b) spills of oil or other polluting or hazardous substances;
 - (c) strandings of large marine animals; and
 - (d) operations to rescue people or animals.

3. Any act undertaken by a municipality or by a person rendering services to a municipality -
 - (a) that is reasonably necessary to implement a municipal coastal management programme, management policy, guideline, operational procedure or protocol that has been approved by the municipality;
 - (b) to deliver or supply utility services that cannot conveniently be provided inland of the coastal set-back line or the limited development line, as the case may be;
 - (c) to clear alien vegetation, including by controlled burns;
 - (d) to upgrade and maintain existing municipal amenities and coastal resorts;
 - (e) to manage and remove wind-blown beach sand that has accumulated on, or impedes or threatens infrastructure;
 - (f) to manage, rehabilitate and clean beaches and rocky shores;
 - (g) to provide coastal safety measures that reduce risks to the health and safety of users of the coastal zone;

- (h) to modify estuary mouths; or
- (i) to construct or repair infrastructure that is required to reduce or mitigate the risks of coastal erosion, storm surge events and sea level rise.