

**Before the Hearings Panel
At Wellington**

Under the Resource Management Act 1991

In the matter of Proposed Natural Resources Plan for the Wellington Region
(Hearing Stream 4)

**Response by legal counsel to the Panel's Minute #45 dated 11 June 2018 on
behalf of Wellington Regional Council**

Date: 19 June 2018



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MAY IT PLEASE THE PANEL

- 1 On 11 June 2018, the Panel released Minute #45 on the relief sought by Wellington Water Limited (**WWL**) in relation to the proposed Plan *Map 27b: Groundwater Drinking Water Supply Protection Areas - Hutt Valley* (**the Map**).
- 2 The Panel requested that it be provided with legal submissions on the issue of scope for the changes sought by WWL from Mr Slyfield, counsel for WWL, and Ms Anderson, Counsel for the Wellington Regional Council (**Council**).
- 3 Determining scope for the changes sought requires a combination of technical and legal assessment. We have asked the Council to provide some technical assessment, but some of the technical assessment will not be completed until after expert conferencing, which we understand is scheduled for the week commencing 18 June. This means that giving a definitive answer to the Panel is difficult at this stage.
- 4 In summary, it is submitted that there is scope for some of the changes sought by WWL to the Map, but further technical evidence is required to fully determine the geographical area where there is scope.

Outcome sought by WWL

- 5 WWL sought an alteration to the Map. The Map shows the groundwater community drinking water supply protection area (**Groundwater Protection Area**) for the Hutt Valley. Within a Groundwater Protection Area various activities are restricted. As set out in Mr Loe's

section 42A Report, these include:

... requiring a resource consent for some discharges to land within a community drinking water supply protection area, that would be a permitted activity outside a protection area, or a higher activity status for some activities that require resource consent in all locations. These discharges are:

At paragraph 90

Agrichemicals to land (Rule R36/R93 – discretionary activity)

Pit latrine (Rule R71/R92 – restricted discretionary activity)

New on-site wastewater systems (Rule R75/Rule R76 – controlled activity)

Biosolids to land (Rule R77 and Rule R78/R92 - restricted discretionary activity)

Treated wastewater from a network (Rule R80 - restricted discretionary activity)

Collected animal effluent to land (Rule R83/Rule R93 – discretionary activity)

Farm Dumps (Rule R89/Rule R92 - restricted discretionary activity)

6 WWL provided a map indicating the spatial extent of the extension sought to the Groundwater Protection Area at the hearing. This map is included as **Appendix 1** to these submissions. We understand that the proposed extension to the Groundwater Protection Area is identified in blue on the map in Appendix 1 (including all of the dark purple 'triangle' which is overlaid with blue).

7 Mr Williams, on behalf of WWL, stated that the section 42A report did not address the significant issue of protection of the Hutt River upstream of the recharge zone for the Lower Hutt aquifer system. At [20]

8 He goes on to state that an extension to the Map was required because in applying its methodology the Council had excluded the Hutt River catchment upstream of the Hutt aquifer recharge zone from the At [22]

surface water protection area. He identified the primary recharge zone for the Waiwhetu aquifer as approximately between Taita Gorge and the Kennedy Good Bridge.

9 Mr Williams stated that:

The area omitted from surface water protection includes metropolitan Upper Hutt and significant tributaries of the Hutt River including the Whakatikei, Akatarawa, Mangaroa and Pakuratahi Rivers.

Evidence of Geoff Williams dated 25 May 2018 at paragraph 23

[emphasis added]

10 However, while Mr Williams refers here to surface water protection areas, for the reasons discussed below, our submission is that only an extension to Groundwater Protection Areas is within scope of the WWL submission.

11 In her evidence, Ms Wratt on behalf of WWL stated that she supports the inclusion of the Hutt River catchment upstream of the Hutt Aquifer recharge zone in the Map. She does not provide any analysis of scope except to state that :

Evidence of Carolyn Wratt dated 25 May 2018 at paragraph 70

WWL's submission sought that Map 27b be amended to extend the Lower Hutt Groundwater Protection zone to cover the Hutt Catchment upstream of the infiltration zone.

Evidence of Carolyn Wratt dated 25 May 2018 at paragraph 70

12 Mr Slyfield, on behalf of WWL concludes that the relief sought is within scope of the submission. He states that:

The submission explicitly sought to extend the Protection Zone “to cover the Hutt Catchment upstream of the infiltration zone”.

At [18], [21] - [23]

...

It is submitted that these words fairly and reasonably describe the area of the extension as has been further described in Mr Williams' evidence; and that Mr Williams has done no more than identify

in additional words and images the extent of the area described in the written submission. Significantly, a river catchment is a common and well-understood concept in water management, and refers to an objectively ascertainable area. By referring to the catchment itself (and the concern for contamination anywhere in that catchment) Wellington Water was employing a common and well understood concept to succinctly identify the outer limits of the extension. It matters not whether this was understood by Council officers (or any other person): it is simply the product of examining what the language itself reasonably and fairly raised.

Likewise, the submission's use of the term "upstream" cannot reasonably be said to lack clarity or specificity, as the term is likely to be well understood even from a lay perspective.

The third element of the description is the reference to "the infiltration zone". It is accepted that this may not be as susceptible to common understanding as the references to "upstream" and "catchment", yet the meaning of infiltration zone in this specific context — ie where the relationship between water in the aquifer and water in the river has been explicitly raised — can be readily inferred.

- 13 Whilst we do not disagree with Mr Slyfield's summary of the case law on determining scope, we consider that more detail is required to determine exactly what is 'upstream' of the 'infiltration zone'. This detail is required in order to determine scope.
- 14 In addition, we note that Mr Slyfield has not addressed the fact that the submission only sought amendment to Map 27b and specifically sought that the Groundwater Protection Area be extended. Surface Water Protection Areas are different and are identified on Map 26. WWL did not seek any amendments to Map 26 and while, in the evidence referred to above, WWL seems to be referring to surface water rather than groundwater, that is not the wording used in its submission. As noted in Mr Slyfield's submissions and quoted above ' It

matters not whether this was understood by Council officers (or any other person): it is simply the product of examining what the language itself reasonably and fairly raised.'

15 We set out below our submissions on scope.

Scope

16 We have extensively addressed the Panel on the law on scope in respect of making decisions on the proposed Plan and we do not repeat those submissions here, other than to note that the test is whether any amendment made to the proposed Plan as notified goes beyond what is fairly and reasonably raised in submissions.¹ This requires taking into account the whole relief package detailed in the submission. Accordingly, for an amendment to be within scope, typically there would be a relationship between a submission and an amendment, such that the amendment 'can fairly be said to be a foreseeable consequence of any change directly proposed' in the submission.

Hearing Stream 1 submissions, 20 April 2017 at [105][115], Hearing Stream 4 submissions, 8 December 2017 at [41]-[42]; and the Memorandum of Counsel regarding scope, 22 December 2017 at [5]-[8]

Westfield (New Zealand) Ltd v Hamilton City Council [2004] NZRMA 556 (*Westfield*) at [73] and [74]

17 WWL made a submission (S135) which sought the Map be amended. WWL sought the following in relation to the amendments to the Map:

Extend the Lower Hutt Groundwater Protection zone to cover the Hutt Catchment upstream of the infiltration zone.

WWL S135

Delete Hutt Park Wells and insert Gear Island Wells.

Extend the groundwater supply protection area to include all the valley floor to the foreshore of Wellington Harbour.

¹ *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171.

18 The reasons for the submission were:

Since most of the water supplied to the Lower Hutt Valley Aquifer comes from the Hutt River, contamination anywhere in the Hutt River Catchment could conceivably contaminate the Waterloo wellfield. The Hutt Park wells (R27/1144-1149) are shown on this map. They are no longer used for community drinking water. The Gear island wells are not shown on this map. They are used for community drinking water. To protect the Waiwhetu aquifer water resource, the groundwater supply protection area in the Hutt Valley, shown on Map 27b should be extended to include all the valley floor to the foreshore of Wellington Harbour.

19 We do not understand that there is any other part of the WWL submission that could provide scope for the changes to the Map.

20 Maps 27a, b and c deal with Groundwater Protection Areas. Map 27b specifically depicts 'groundwater community drinking water supply protection areas' in the Hutt Valley, incorporating Schedule M2. Schedule M2 sets out the groundwater community drinking water supply abstraction points.

21 Map 26 depicts surface water community drinking water supply protection areas, incorporating Schedule M1. Schedule M1 lists the surface water community drinking water supply abstraction points.

22 The work undertaken to establish a surface water protection area versus a Groundwater Protection Area is quite different. As stated in Mr Loe's section 42A Report, for surface water:

The extent of each surface water sourced CDWSPA is based on estimating contaminant travel time from source to water supply abstraction point, with a critical travel time of 8 hours at median stream flow. This distance is

Section 42A Report
of Mr Barry Loe at
[61]

used to define the upper extent of the Groundwater Protection Area, with the lateral extent determined by applying a 100 metre-wide strip (Thompson 2015).

- 23 Groundwater Protection Areas are determined differently. As stated in Mr Loe's report:

The Groundwater Protection Area for each groundwater-sourced CDWS in the Wellington Region was identified through modelling undertaken and reported by GNS Science (Toews and Donath 2015). This report delineates groundwater 'capture zones', being the area on the land surface where water may potentially travel from the ground surface to each CDWS well within the region's three major groundwater areas of Hutt Valley, Kāpiti Coast and the Wairarapa Valley.

Section 42A Report
of Mr Barry Loe at
[62]

- 24 WWL's submission only seeks a change to the Groundwater Protection Area, and therefore its submission only provides scope to extend a Groundwater Protection Area. The purpose of identification of the Groundwater Protection Area is to restrict some discharges of contaminants to land and some land use activities which could result in the contamination of groundwater drinking supplies. The area of land where activities need to be restricted in order to protect groundwater-drinking supplies is a technical matter to be determined by experts and the Panel. However, for the purpose of scope it is important to state that WWL only sought the extension of the Groundwater Protection Area, not the surface water Protection Area.

- 25 From a legal perspective, it is clear that an extension to the Groundwater Protection Area on the Map was sought to ensure that the quality of groundwater taking for drinking supply was appropriate. The only question is what is the extent of the additional area that was fairly and reasonably raised in the WWL submission?

- 26 If you break down the WWL submission, what was sought was:
- 26.1 An extension of the Groundwater Protection Area to include all of the valley floor - to the foreshore of Wellington Harbour.
 - 26.2 An extension of the Groundwater Protection Area to include the Hutt Catchment, upstream of the infiltration zone.
 - 26.3 The addition of the Gear Wells (which by implication means the Groundwater Protection Area should cover the wells).
- 27 To understand what was reasonably and fairly raised, the Panel needs to determine what is the 'valley floor', what is the 'infiltration zone', what is 'upstream of the infiltration zone', what is the Hutt Catchment and where are the Gear Wells. To understand this, we have asked the Council officers and experts to put together plans. These three plans are attached as **Appendix 2**, specifically referenced as **Plan 1, Plan 2** and **Plan 3**. Plan 1 shows the broader position. Plan 2 and 3 provide more detail, and also identify the section 42A groundwater protection area, which is not shown on Plan 1.
- 28 The Plans identify the following:
- 28.1 Gear Island community supply bores,
 - 28.2 Notified surface water Groundwater Protection Area,
 - 28.3 Notified Groundwater Protection Area,

- 28.4 Lower Hutt valley floor,
- 28.5 Upper Hutt valley floor,
- 28.6 Hutt River surface water catchment,
- 28.7 Infiltration zone, and
- 28.8 Section 42A groundwater protection area
(Plans 2 and 3 only).

Conclusion

- 29 What is not shown on the plan in Appendix 2 is what is 'upstream' of the infiltration zone, or the Hutt River groundwater catchment. The bounds of both of these areas will be the subject of technical discussion during conferencing, and are not able to be confirmed at this stage.
- 30 For the purposes of scope, all of the extension to the Groundwater Protection Area which is within the Hutt catchment and 'upstream' of the infiltration zone is within scope of the WWL submission, if it impacts on the quality of groundwater being taken for drinking supplies. This was clearly stated in the submission, and is a foreseeable outcome of the submission.
- 31 However, at this stage further technical evidence is required to confirm the exact geographic area that this applies to.
- 32 In addition, the extension of the Groundwater Protection Area along the valley floor area to the foreshore of the Harbour is also a foreseeable consequence of the WWL submission, if it impacts on

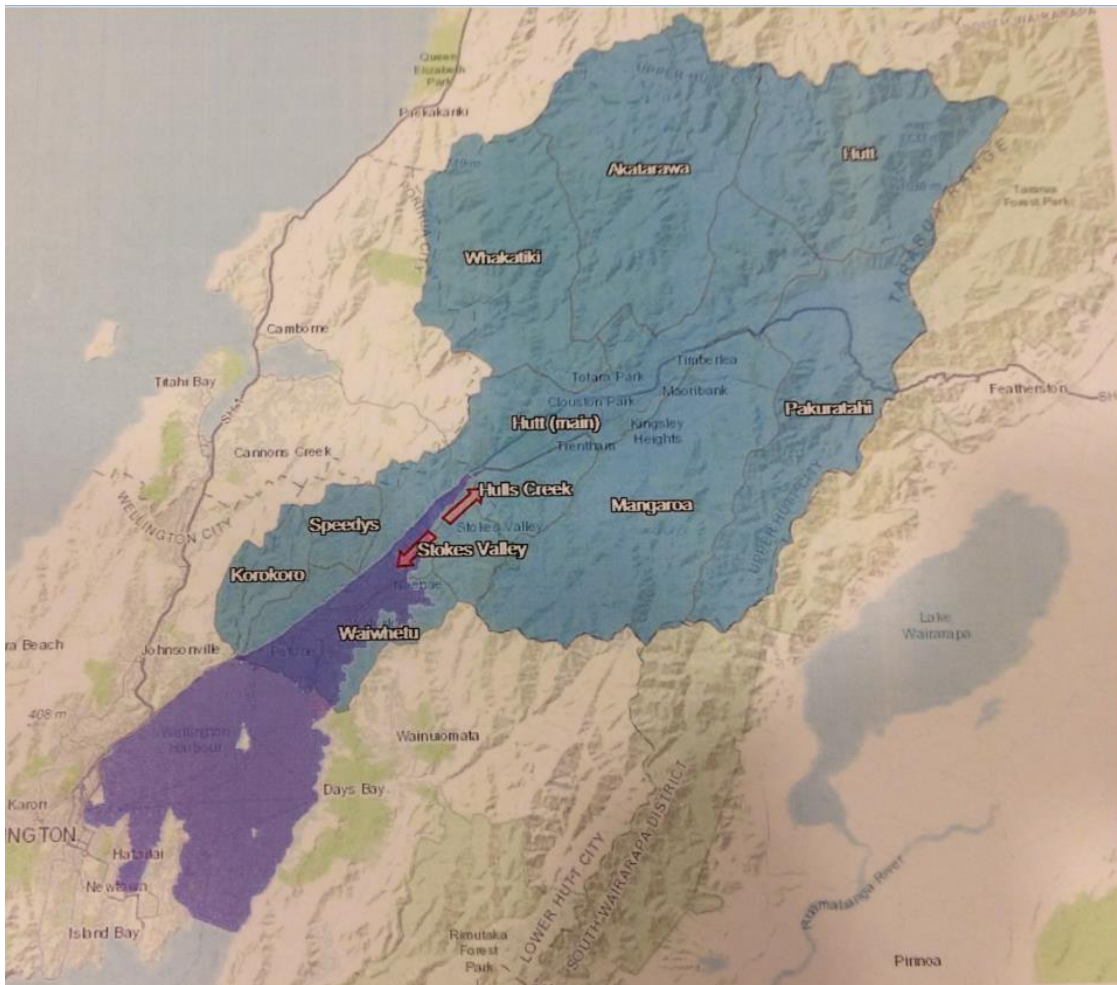
the quality of groundwater being taken for drinking supplies. Again, further technical evidence is required to determine what that means in relation to groundwater.

Date: 19 June 2018

A handwritten signature in blue ink, appearing to be 'K Anderson' or 'K H Rogers', with a stylized flourish extending to the right.

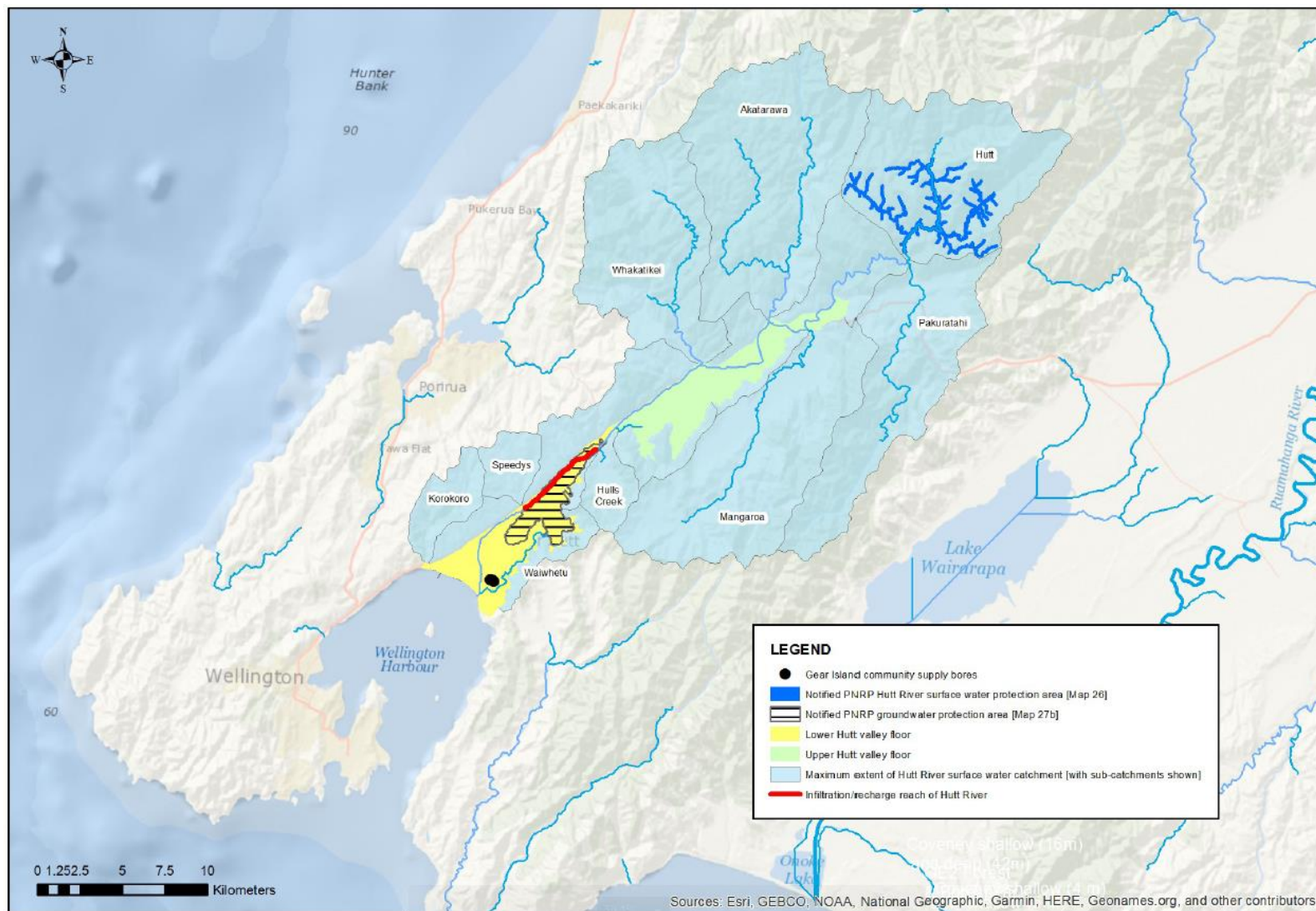
.....
K Anderson/K H Rogers
Counsel for Greater Wellington
Regional Council

APPENDIX 1

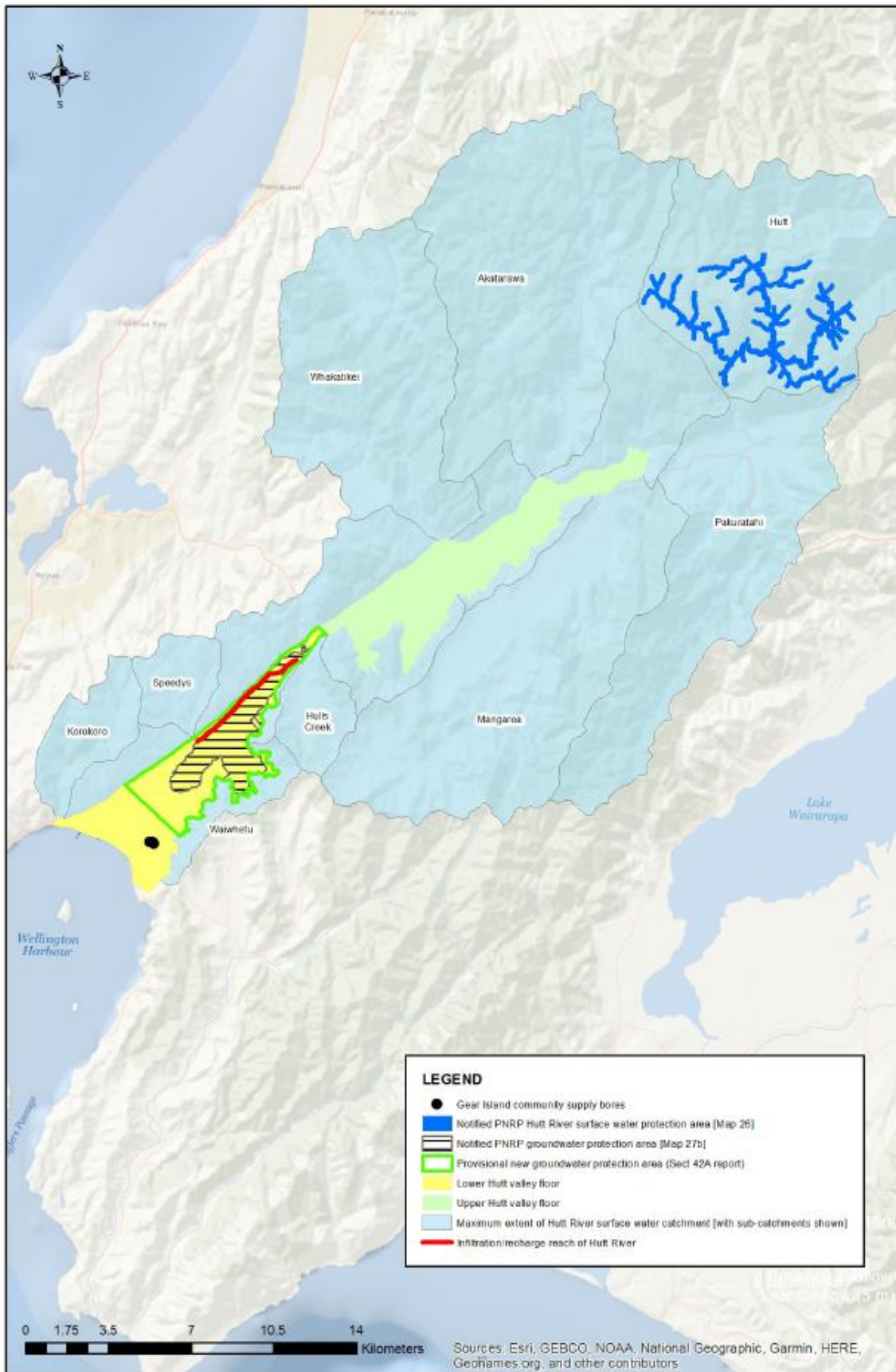


APPENDIX 2

Plan 1



Plan 2



Plan 3

