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6 Attorneys for Petitioner/Plaintiff BYRON-
7 BETHANY IRRIGATION DISTRICT

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949
12 DRAFT CEASE AND DESIST ORDER
REGARDING UNAUTHORIZED
13 DIVERSIONS OR THREATENED
UNAUTHORIZED DIVERSIONS OF WATER
14 FROM OLD RIVER IN SAN JOAQUIN
COUNTY

15 In the Matter of ENFORCEMENT ACTION
16 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
17 UNAUTHORIZED DIVERSION OF WATER
FROM THE INTAKE CHANNEL TO THE
18 BANKS PUMPING PLANT (FORMERLY
ITALIAN SLOUGH) IN CONTRA COSTA
19 COUNTY

SWRCB Enforcement Action
ENF01951 and ENF01949

DECLARATION OF MICHAEL E.
VERGARA IN SUPPORT OF
BYRON-BETHANY IRRIGATION
DISTRICT'S OPPOSITION TO THE
STATE WATER CONTRACTORS'
MOTION TO STRIKE TESTIMONY
OF RICK GILMORE AND MOTION
TO EXCLUDE IRRELEVANT
EVIDENCE

20 I, Michael E. Vergara, declare:

21 1. I am an attorney at law licensed to practice before the courts of the State of
22 California, and a shareholder with Somach Simmons & Dunn. I am the attorney with
23 primary responsibility for this matter in my firm, and am familiar with all pleadings, filings,
24 and correspondence related to it. The following matters are within my personal
25 knowledge and, if called as a witness, I can competently testify thereto.

26 2. In July 2015, the SWRCB issued a Draft Cease and Desist Order to the
27 West Side Irrigation District (WSID), Enforcement Action ENF01949 (CDO), and an
28 Administrative Civil Liability Complaint to BBID, Enforcement Action ENF01951 (ACL).

DECLARATION OF MICHAEL E. VERGARA IN SUPPORT OF BYRON-BETHANY IRRIGATION
DISTRICT'S OPPOSITION TO THE STATE WATER CONTRACTORS' MOTION TO STRIKE
TESTIMONY OF RICK GILMORE AND MOTION TO EXCLUDE IRRELEVANT EVIDENCE

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On March 4, 2016, I served the following document(s):

DECLARATION OF MICHAEL E. VERGARA IN SUPPORT OF BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO THE STATE WATER CONTRACTORS' MOTION TO STRIKE TESTIMONY OF RICK GILMORE AND MOTION TO EXCLUDE IRRELEVANT EVIDENCE

X (via electronic mail) by causing to be delivered a true copy thereof to the person(s) and at the email addresses set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2016, at Sacramento, California.



Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN
A Professional Corporation

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DECLARATION OF MICHAEL E. VERGARA IN SUPPORT OF BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO THE STATE WATER CONTRACTORS' MOTION TO STRIKE TESTIMONY OF RICK GILMORE AND MOTION TO EXCLUDE IRRELEVANT EVIDENCE

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
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**SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING**

<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharringfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p>
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<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com</p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL ngmplcs@pacbell.net dantejr@pacbell.net</p>
<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 vkincaid@olaughlinparis.com</p>
<p>Byron-Bethany Irrigaton District Michael E. Vergara Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dkelly@somachlaw.com</p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p>

EXHIBIT A

2012 – 2015 Delta Salinity Conditions under a Without Project Scenario

PREPARED FOR: Terry Erlewine/SWC
PREPARED BY: Tyler Hatch/CH2M HILL
Chandra Chilmakuri/CH2M HILL
DATE: June 5, 2015

Study Objective

The purpose of this study is to analyze salinity conditions in the south Delta channels under a Without Project scenario using the January 1, 2012 to August 31, 2015 Central Valley rim inflows. 2012 - 2015 historic and projected Sacramento River and San Joaquin River inflows to the Delta were modified to remove the impairments related to the upstream CVP – SWP reservoirs under the Without Project Scenario in addition to zeroing out the Delta exports at the Banks and Jones Pumping Plants and closing the Delta Cross Channel. The 2012 – 2015 study is an extension of a previous study of Without Project conditions for the year 2014. The multi-year timeframe allows understanding Delta salinity conditions under a sequence of differing hydrologic conditions.

Approach

A DSM2 model capable of simulating 2012-2015 historical Delta hydrodynamics and salinity conditions obtained from the DWR was used for representing the With Project scenario in this task. DWR used 2012 – 2015 Delta inflows, exports and salinity as the boundary conditions for the DSM2 model.

For the 2012-2015 Without Project DSM2 model, adjusted daily Delta inflow data at Vernalis and Freeport provided by the SWC were used as boundary conditions. As shown in Figures 1 and 2, Sacramento and San Joaquin Without Project inflows to the Delta are significantly lower (in some cases negative) in the summer and fall months compared to the historical conditions primarily due to the lack of contributions from project reservoir storage. The Without Project Scenario also assumed zero Delta exports from Banks and Jones Pumping Plants. The Without Project DSM2 model also uses historical electrical conductivity estimates for salinity boundary conditions at Freeport consistent with the historical DSM2 model. However, for the San Joaquin River at Vernalis modified electrical conductivity estimates were used to account for the unimpaired conditions under the Without Project scenario. The modified Vernalis EC estimates for the Without Project scenario were computed based on a methodology provided by the SWC, which is outlined in the Appendix A of this memo. For the Without Project conditions, the Delta Cross Channel gates were assumed to be closed for the entire length of the simulation.

Clifton Court Forebay (CCF) gate operations under the historical and Without Project DSM2 simulations were modified to represent Priority 3 gate operations. Under the Without Project simulation, instead of relocating BBID's existing DICU diversion from inside the CCF and closing the CCF gates, the With Project CCF gate operations were assumed to allow for the BBID diversion to continue. Even though the CCF gates are operational under the Without Project scenario, resulting Clifton Court inflow (Figure 3) confirms that inflow to CCF occurs only during the months with BBID diversion.

Sacramento River at Freeport timeseries input into the Without Project DSM2 model used only the positive flows provided. All negative flows were set to zero. Figure 1 below shows a comparison of the historical record, the Without Project timeseries with negative values from SWC, and the timeseries input into DSM2. In the summer months, the demands upstream of the Delta exceed the supply when there is no storage available to supplement the river flows into the Delta.

For the San Joaquin River at Vernalis, the Without Project DSM2 simulation used a 20 cfs base flow, when the Without Project flows from SWC are negative in order to achieve model stability in the channels near the San Joaquin River boundary in the DSM2 model. This base flow was used to keep water in the few channels downstream of Vernalis and was diverted upstream of the Old River (model node 4). Figure 2 shows a comparison between the historical Vernalis flows, the Without Project flows from SWC, and the Without Project flows used in the DSM2 simulation. In addition, the

diversion component of the Delta Island Consumptive Use (DICU) in the channels near the San Joaquin River boundary (at node 1 and 3) were set to zero when the base flow was the only flow assumed in the model at Vernalis. Without curtailing the DICU diversions at model nodes 1 and 3, the base flow would have to be large enough to meet the DICU demand and keep water in the channel.

Based on the modified electrical conductivity at Vernalis under the Without Project conditions, zero or negative flows have zero electrical conductivity. This assumption of zero EC was continued even though 20 cfs base flow was assumed under the Without Project scenario. However, the artificial base flow of 20 cfs with zero EC could therefore dilute salinity in the San Joaquin River near the Vernalis boundary that would otherwise exist in higher concentrations. A sensitivity analysis using the same model and assuming 2014 historical salinity for the 20 cfs base flows shows that the resulting salinity in the San Joaquin River near the Vernalis boundary is somewhat sensitive, but the differences are minimal beyond model node 4. In addition, while the DICU diversion values are set to zero at nodes 1 and 3, the DICU drain flow is continued in the model, which continues to add salt to the Delta channels.

For conditions projected from May 2, 2015 to August 31, 2015, stage and electrical conductivity at the downstream boundary was assumed at 2014 values for both the With Project and Without Project scenarios. For the With Project conditions, 2014 conditions were assumed for May 2, 2015 to August 31, 2015 for all inflows and outflows with the exception of inflows at Freeport and Vernalis and outflows for SWP and DMC. Projected 2015 with project flows at Vernalis were calculated as the sum of New Melones monthly outflows and San Joaquin River above the Stanislaus River flows after removing any contractor deliveries from the forecasted operations provided by the U.S. Bureau of Reclamation to the SWRCB in support of the 2015 TUC petition (http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/inputsheet_april90_upstream_ops.pdf). Projected 2015 With Project flows at Freeport were estimated as the balance of Delta monthly inflows and outflows, and assuming SWP and CVP Delta exports to be zero for May through August 2015. The Without Project simulation used the same boundary inflows and diversions as the With Project simulation for May 2, 2015 to August 31, 2015 period with the exception of Sacramento River at Freeport and San Joaquin River at Vernalis inflows, which were assumed to be zero. Figures 1 and 2 show the assumed inflow boundary conditions for 2015 projected conditions.

Results

Due to a lack of inflow at both Freeport and Vernalis during the summer and fall months under the Without Project scenario, salinity is much higher in the Delta compared to the historical conditions. During these months there is no fresh water to dilute the higher salinity intrusion, and as a result, the tide brings saltier water further into the Delta. In figures 5 to 52, the saltwater-freshwater interface has moved much further inland by the end of June in the Without Project Scenario than the With Project conditions. The Sacramento River inflows tend to be much higher than the San Joaquin River inflows and cause the salt to be in higher concentrations in the south Delta. However, low flows in the Sacramento River allow the salt concentrations to be relatively high in the north Delta as well. By September the flows in the Sacramento River are high enough to push the saltwater interface further to the south. The area around Frank Tract tends to hold higher salinity water late into the year even after the Sacramento and San Joaquin Delta inflows have flushed much of the saltwater back out of the Delta. The contribution of New Melones Reservoir to flows at Vernalis appears to be a major component of the historical flows during the summer and fall months. Contour plots of weekly EC conditions for 2012 - 2015 are provided as electronic attachments to this memorandum.

Martinez EC Sensitivity Simulations

To consider the potential effect of modified NDOI on the Martinez EC boundary condition, a sensitivity analysis was performed of the modeled salinity under the With Project and Without Project cases by using the Martinez salinity boundary condition estimated using the DWR's G-Model, instead of the historical Martinez EC values. Figure 4 compares the daily-average Martinez EC values for the historical conditions, G-model estimates using With Project NDOI, and G-model estimates using Without Project NDOI. The G-Model salinity values are higher on average than the historical salinity used. DSM2 model for both With Project and Without Project cases were simulated with G-model based EC values specified at Martinez. DSM2 results showed that the higher salinity conditions extended further into the Delta under both the With Project and Without Project cases. Since the Martinez tide and the hydrology used remained unchanged under the sensitivity runs, the resulting

hydrodynamics remained consistent with the original simulations. Therefore, using the G-model based EC values resulted in similar durations of salinity as compared to the simulations using historical Martinez EC.

Summary

The results in this memorandum show that without the CVP-SWP project reservoir storage, salinity would be much higher in the Delta during dry years than under the historical (With Project) conditions. There appears to be some pockets of higher salinity that persist late into the fall months in the central/south Delta channels over the multiple dry years simulated. However, due to the higher storm flows into the delta in the Without Project scenario, the driest years still have most of the salinity flushed east of Antioch in the spring months. The high salinity in the summer and fall months would further limit the beneficial use of water from the Delta during years like 2012 through 2015 under the Without Project scenario.

Limitations

Simulation of Delta salinity under With Project conditions and Without Project conditions using DSM2 are subject to limitations of the model and the approach used. DSM2 limitations and uncertainties are well documented in the DWR Annual Reports (<http://baydeltaoffice.water.ca.gov/modeling/deltamodeling/annualreports.cfm>).

Salinity in San Joaquin River upstream of Head of Old River is likely not accurate due to artificial base flows assumed for model stability, and curtailing of the DICU diversions upstream of Head of Old River (at model nodes 1 and 3), under the Without Project scenario. Projections of Delta inflows and exports for May – Aug 2015 are also subject to change.

The salinity contour plots presented in this memorandum were created from point data in the model using kriging. As a result, the zones where the contours are calculated may be influenced by a neighboring channel without direct access to comingled salinity. An example of this is the Sacramento Deep Water Ship Channel and the Sacramento River on September 6, 2014.

FIGURE 1: SACRAMENTO RIVER AT FREEPORT DSM2 MODEL INFLOW FOR 2012 TO 2015

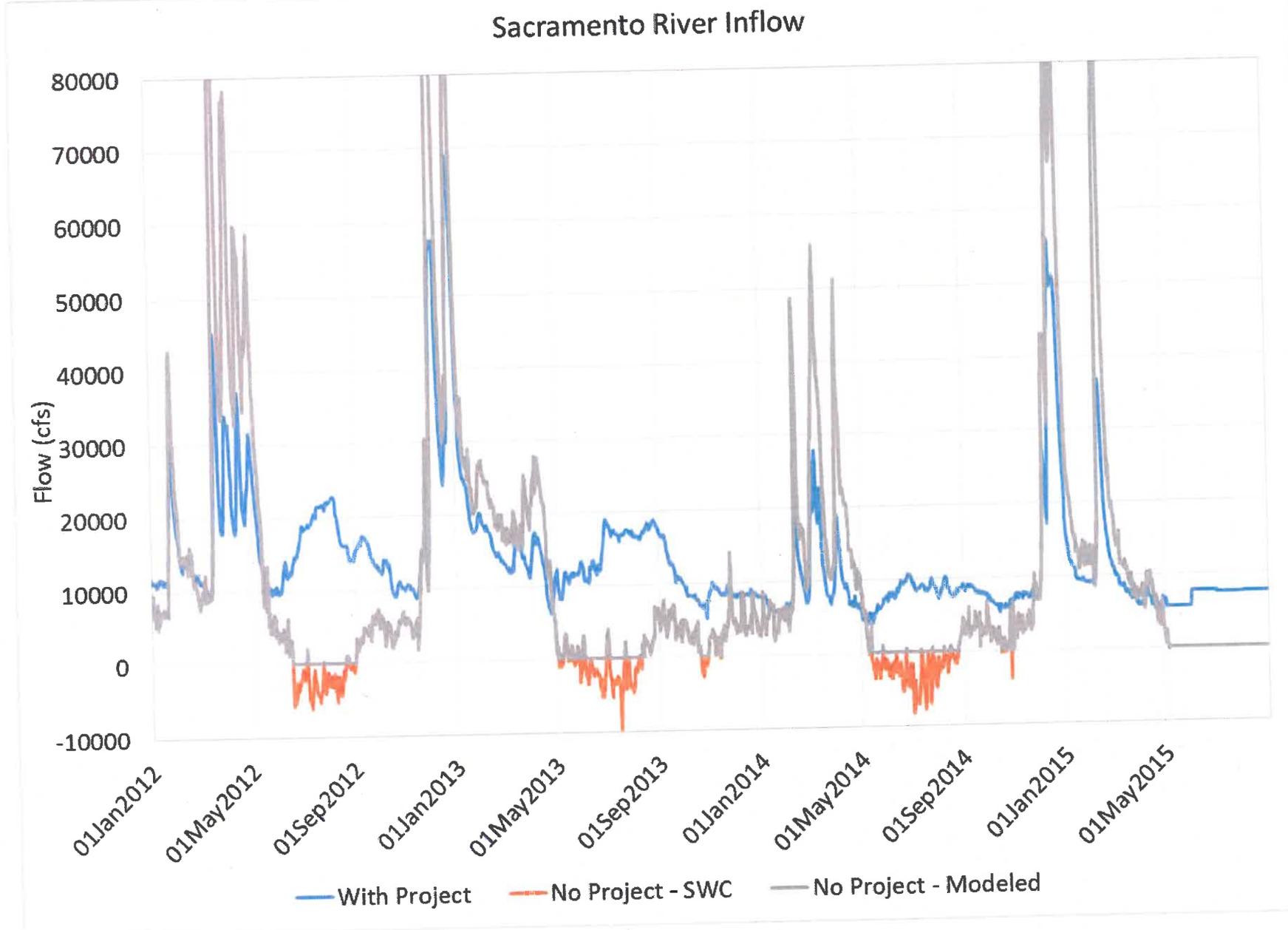


FIGURE 2: SAN JOAQUIN RIVER AT VERNALIS DSM2 MODEL INFLOW FOR 2012 TO 2015

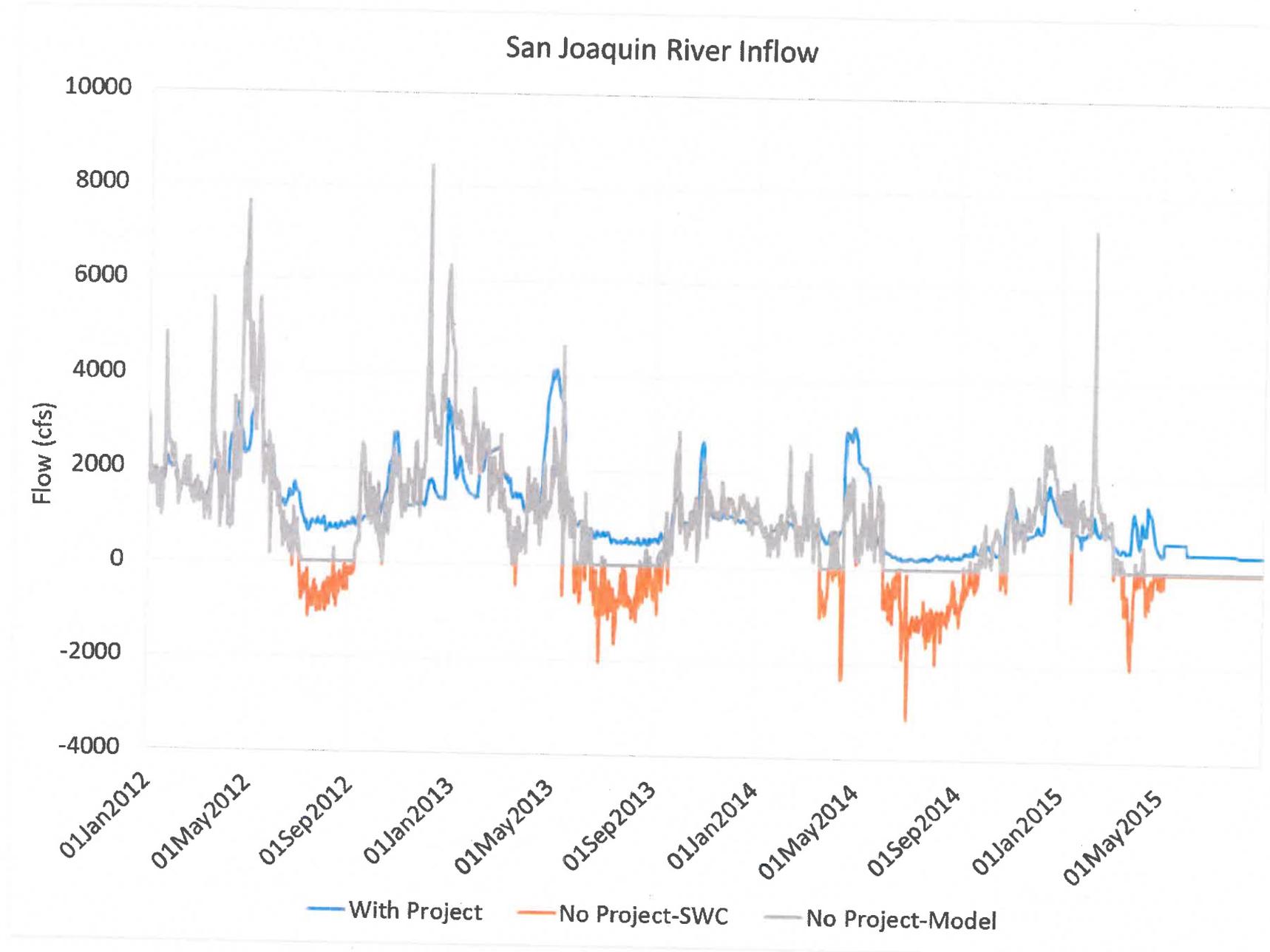


FIGURE 3: ASSUMED BBID DICU DIVERSION, AND DSM2 RESULT OF CLIFTON COURT FOREBAY INFLOW

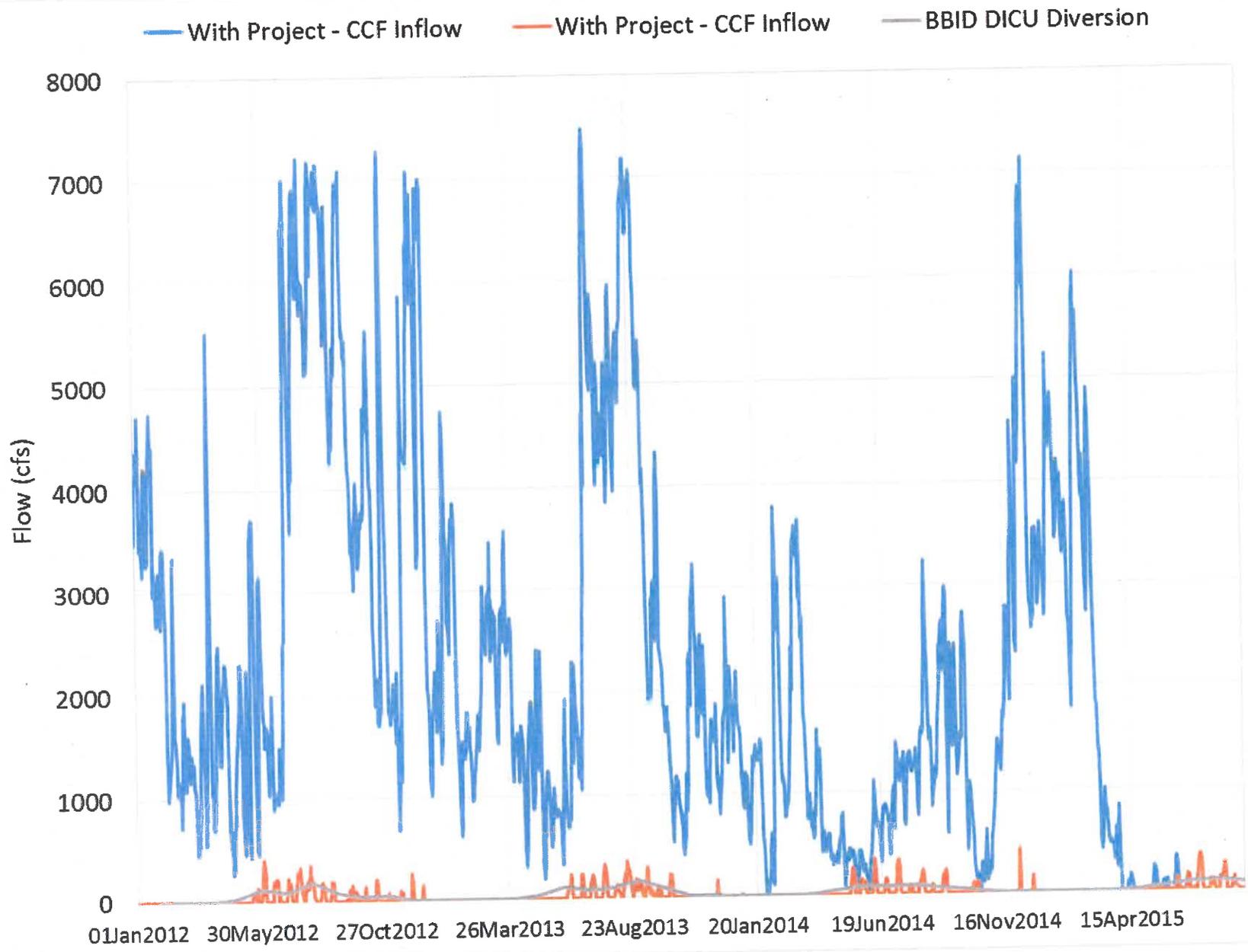
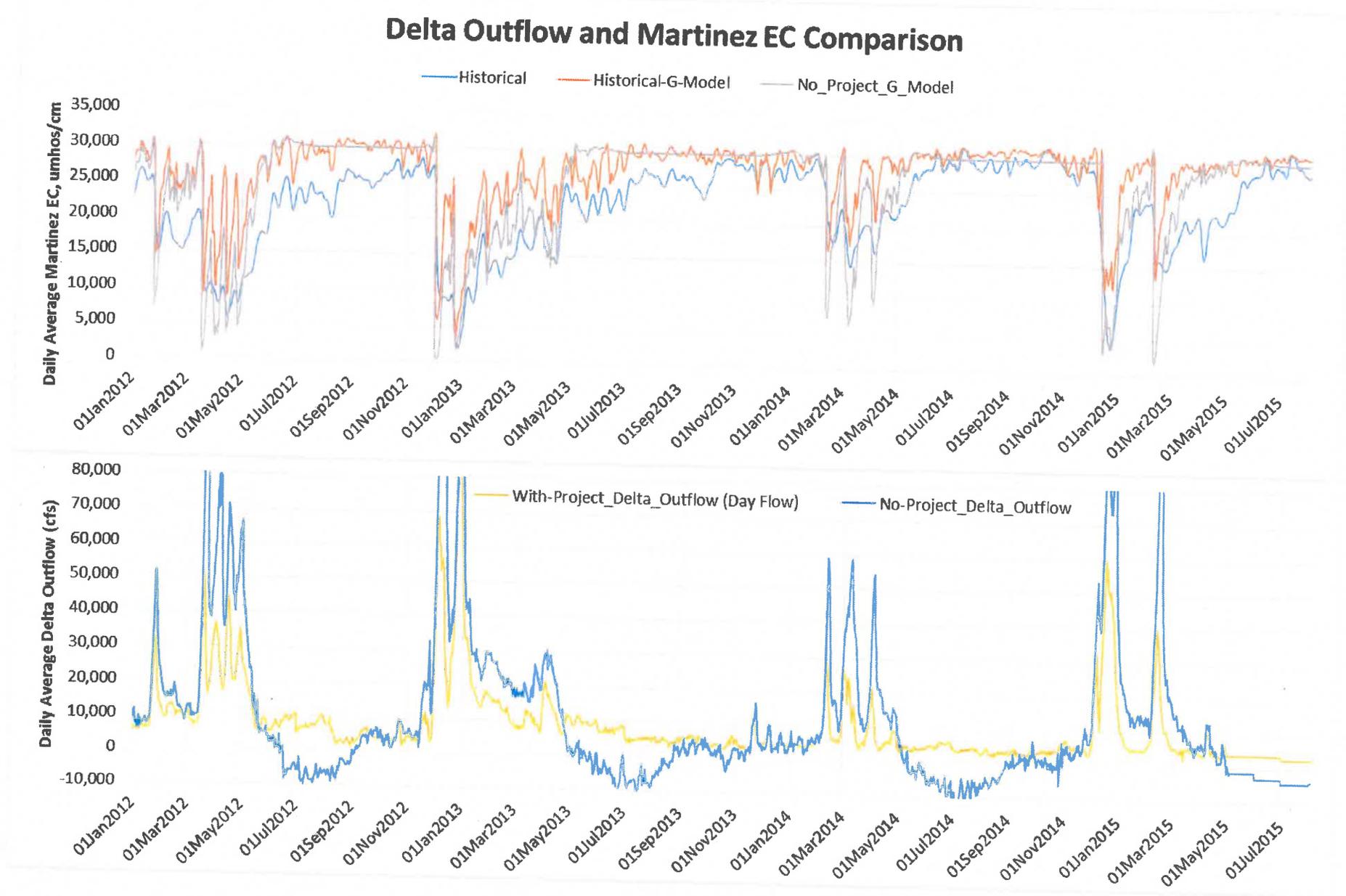
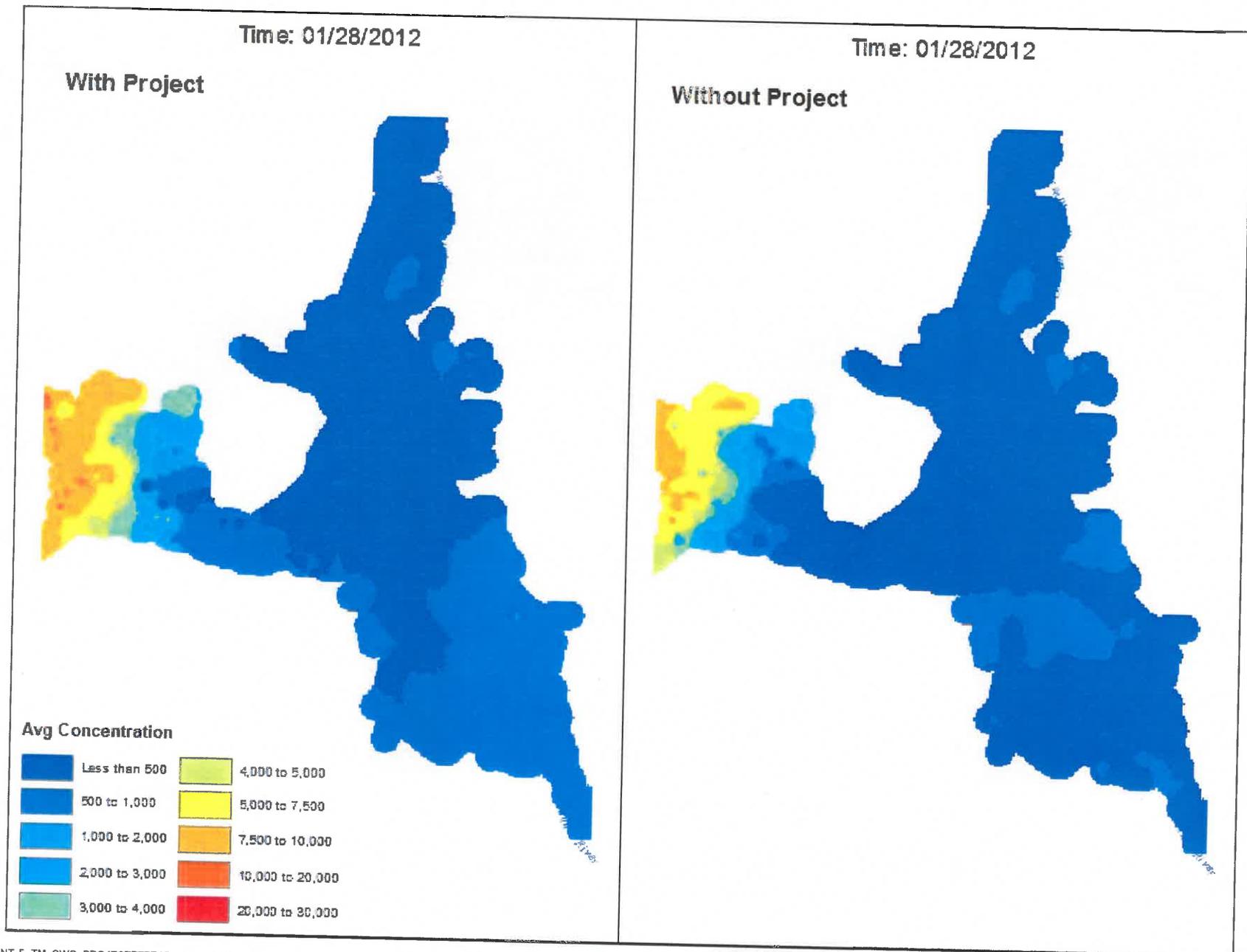


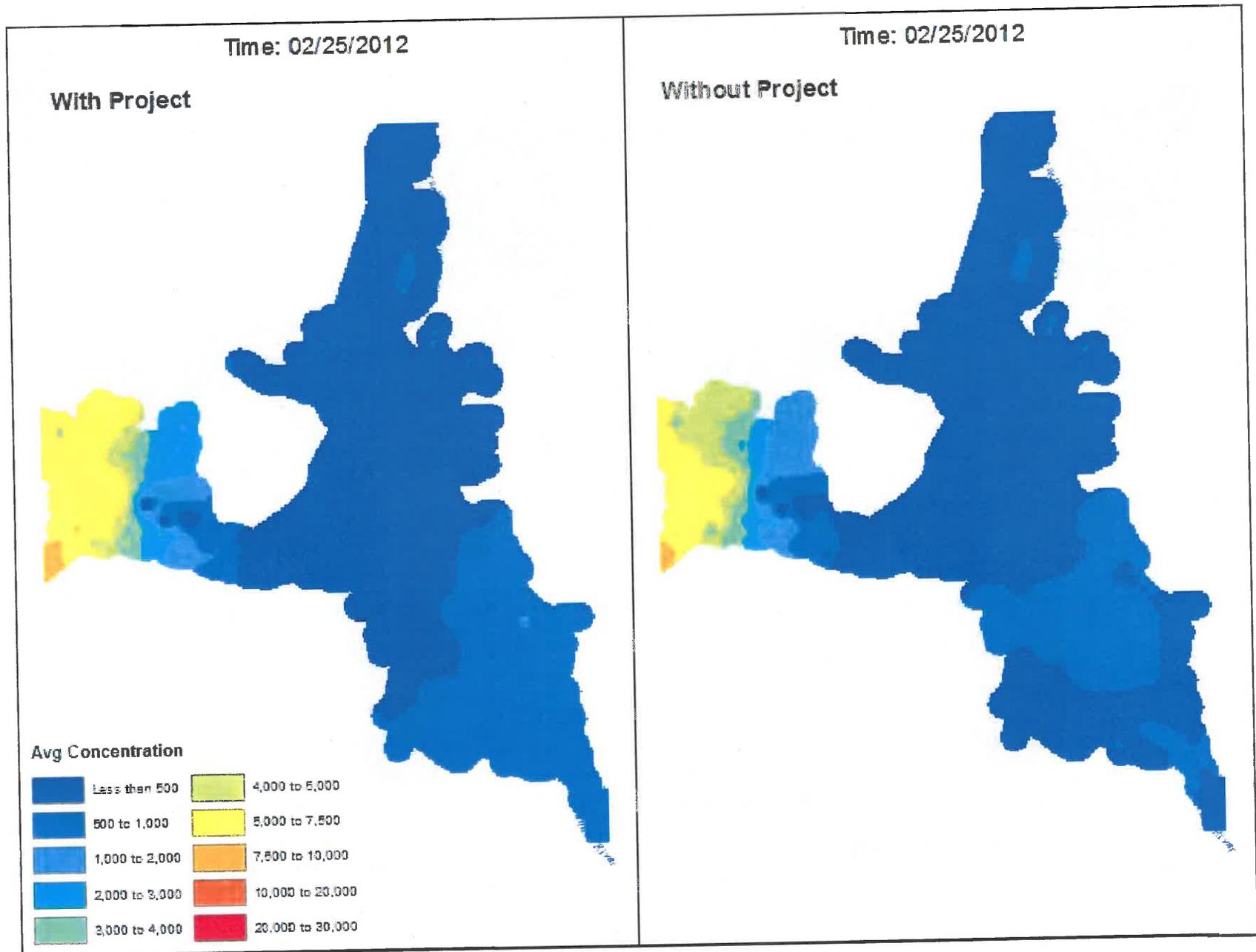
FIGURE 4: DAILY AVERAGED EC AT MARTINEZ FOR 2012 TO 2015

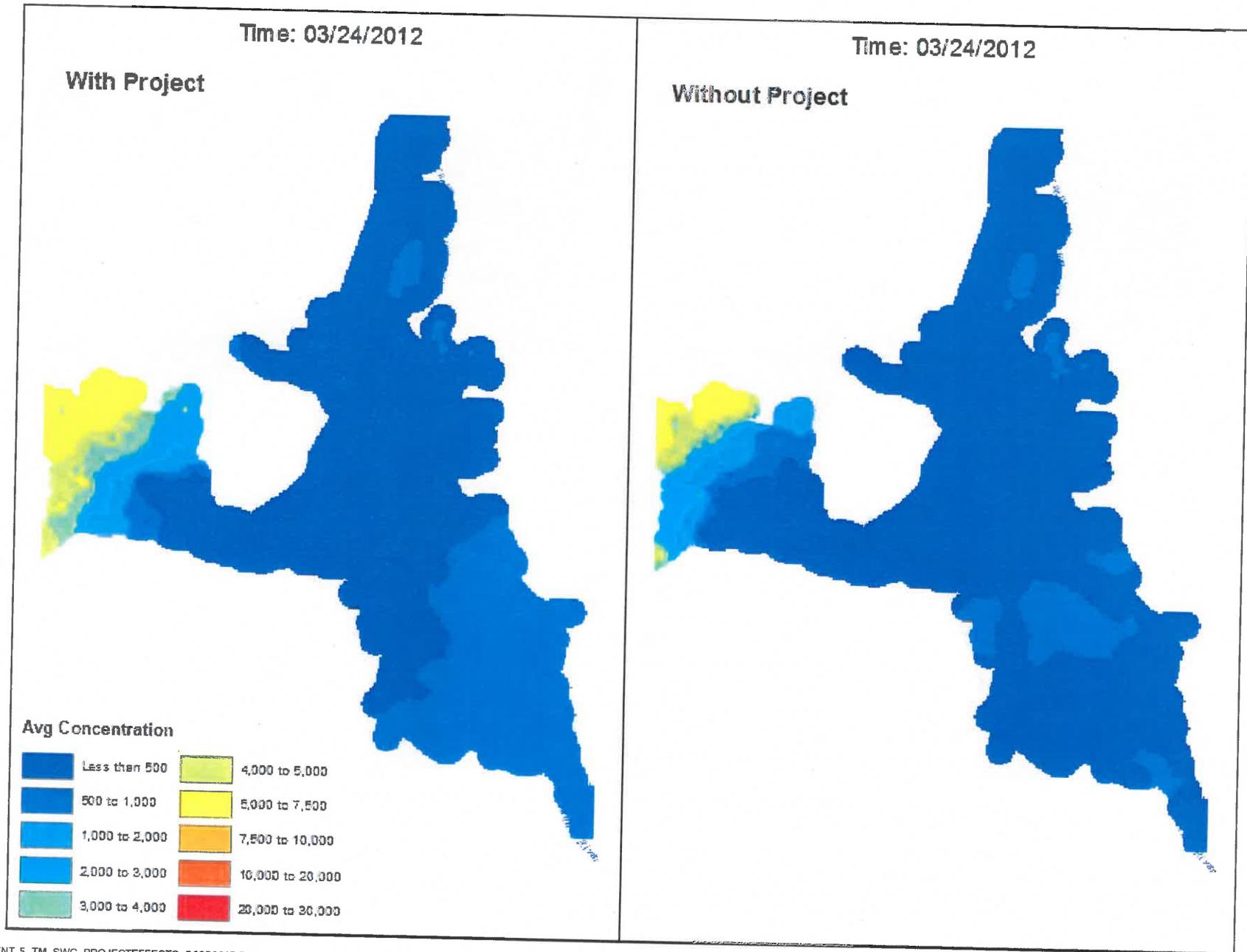


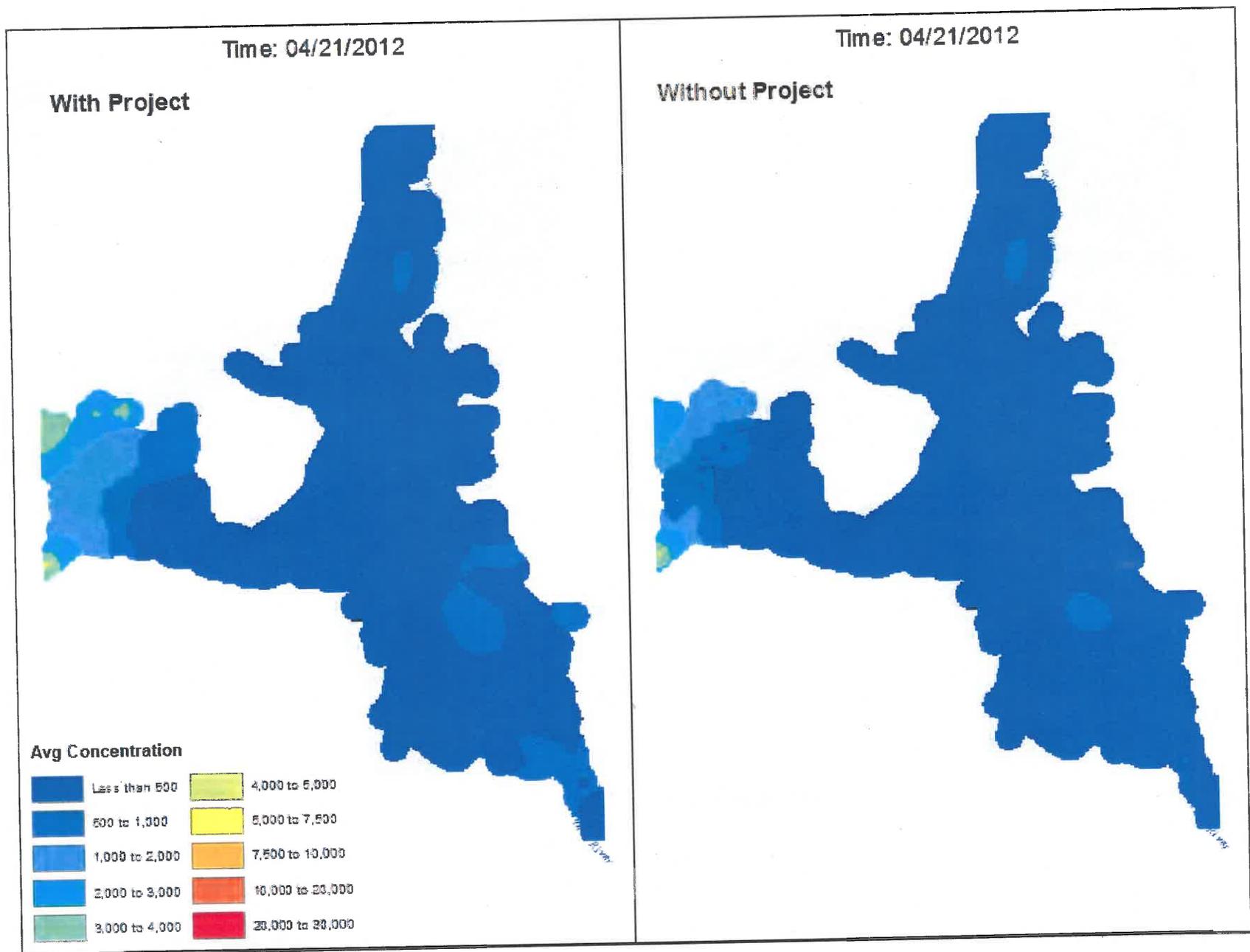
FIGURES 5 TO 52

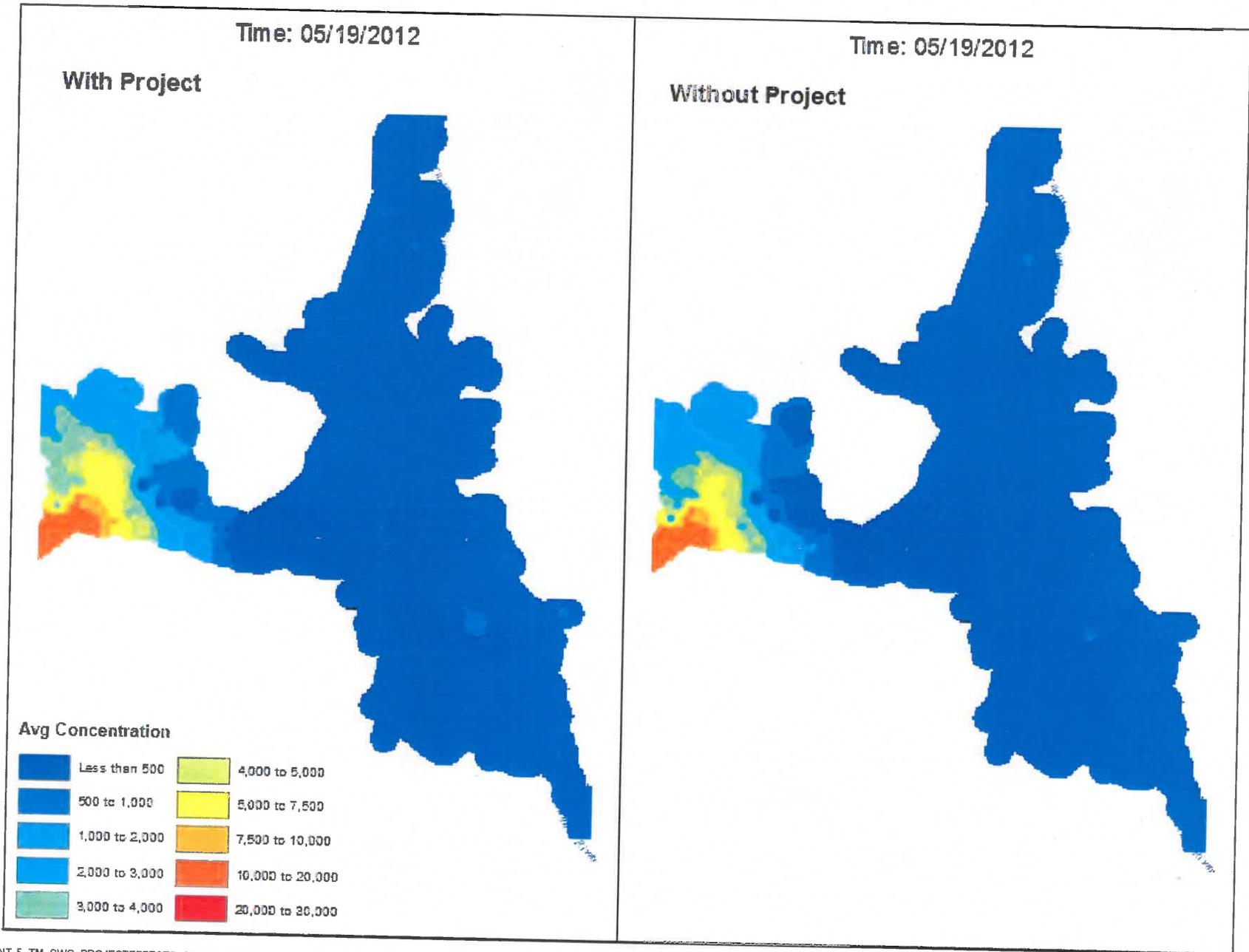
Contour plots of DSM2 electrical conductivity in the Delta on a 4 week timestep for 2011-2015 for With Project conditions (left) and Without Project conditions (right)

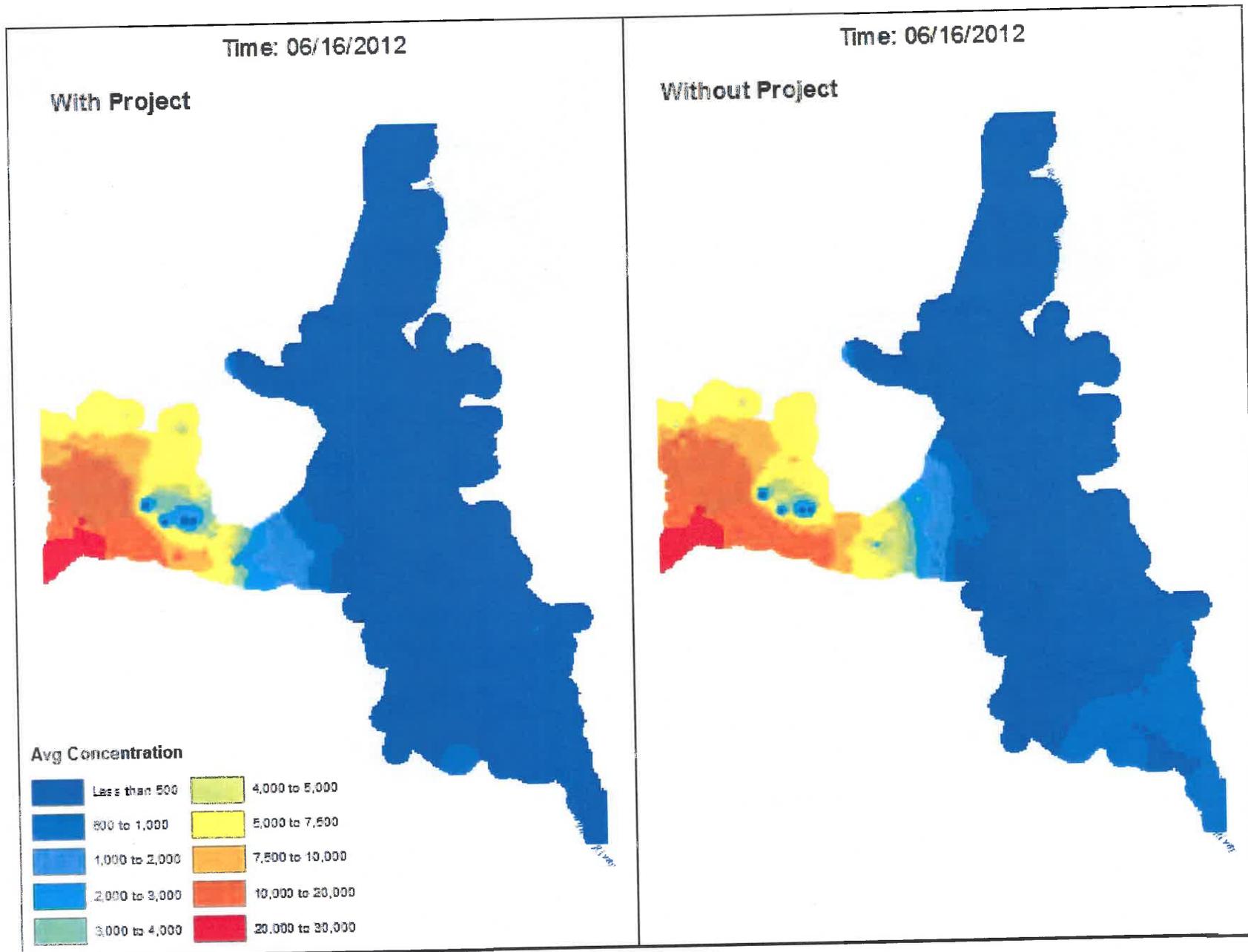


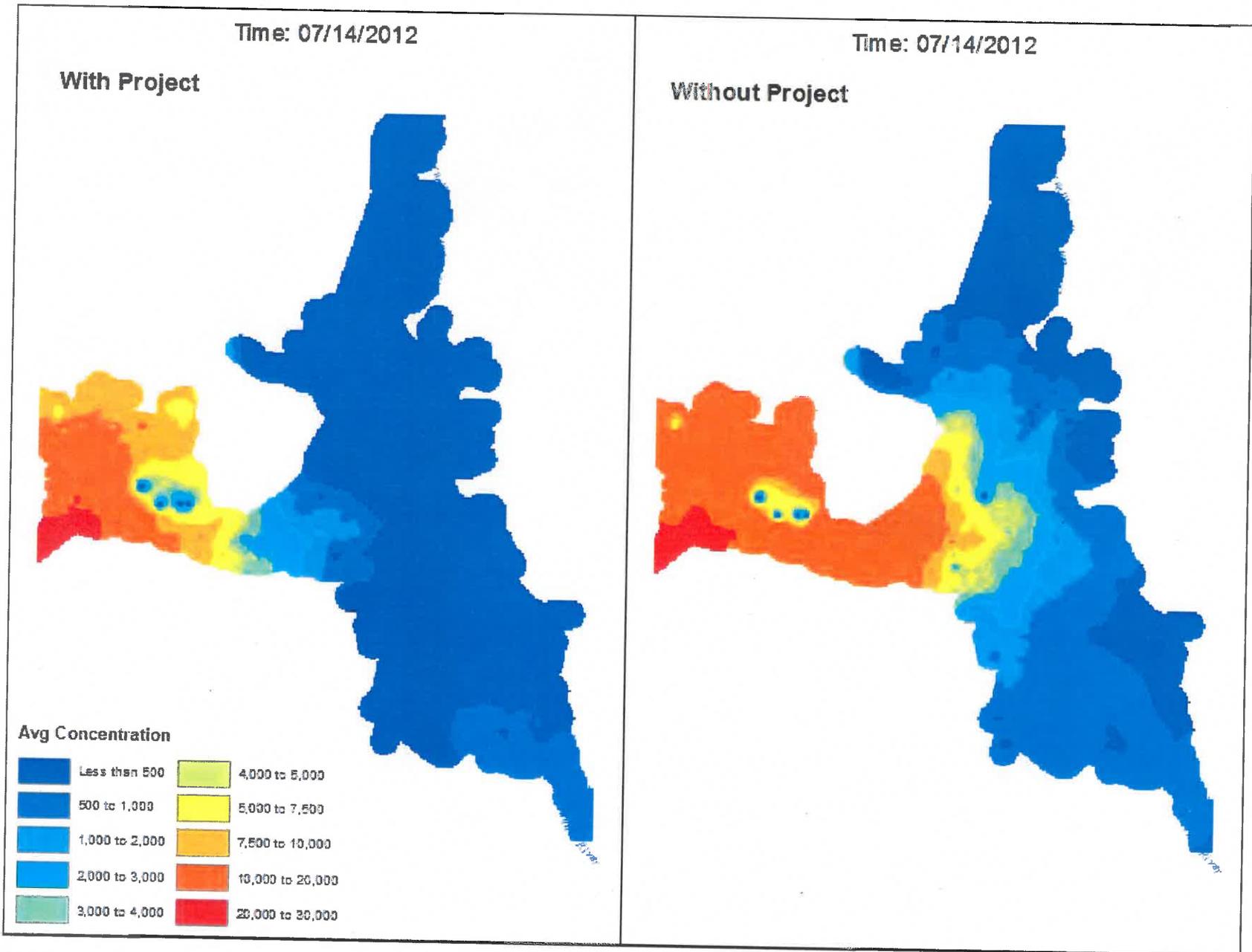


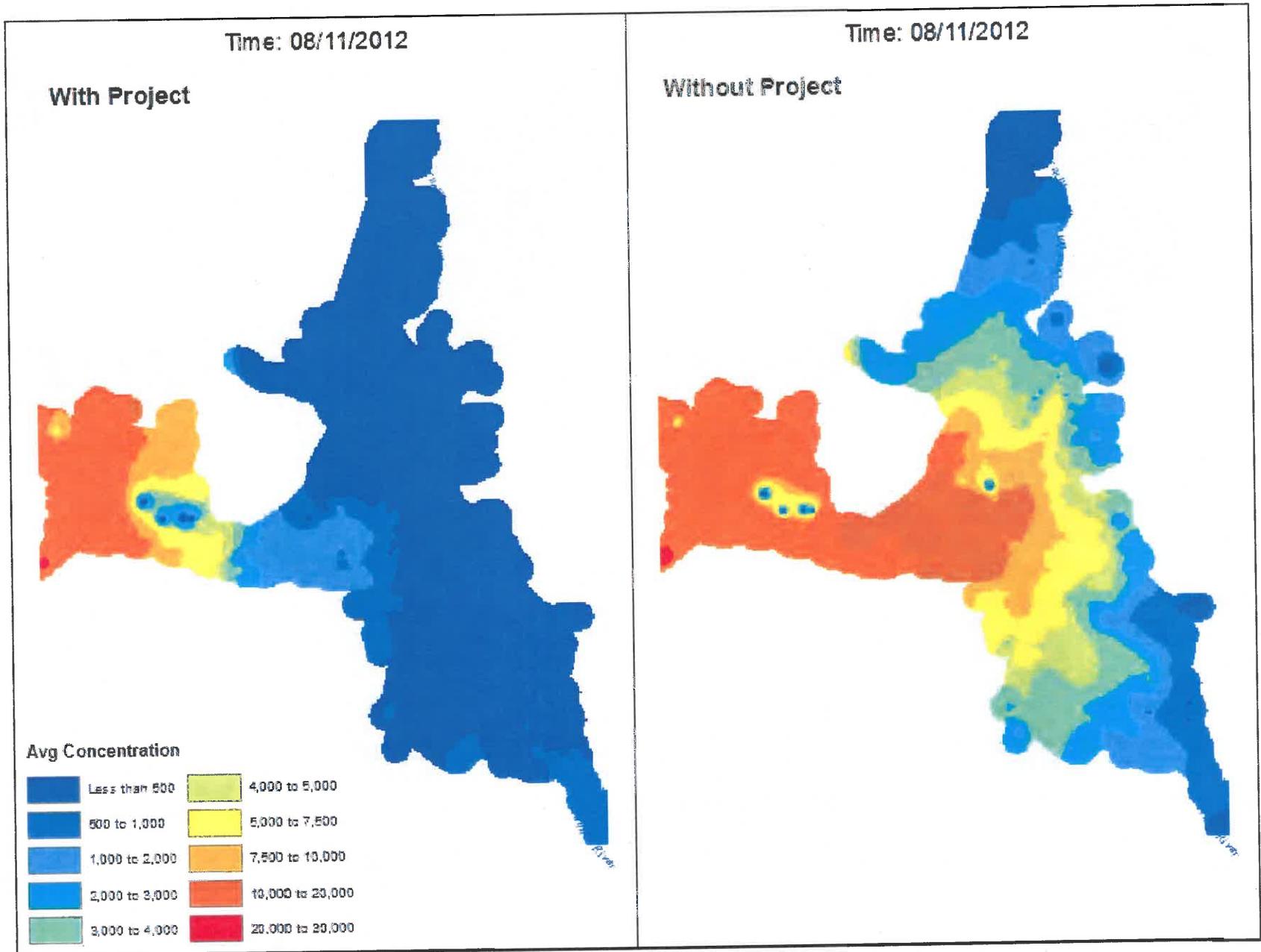


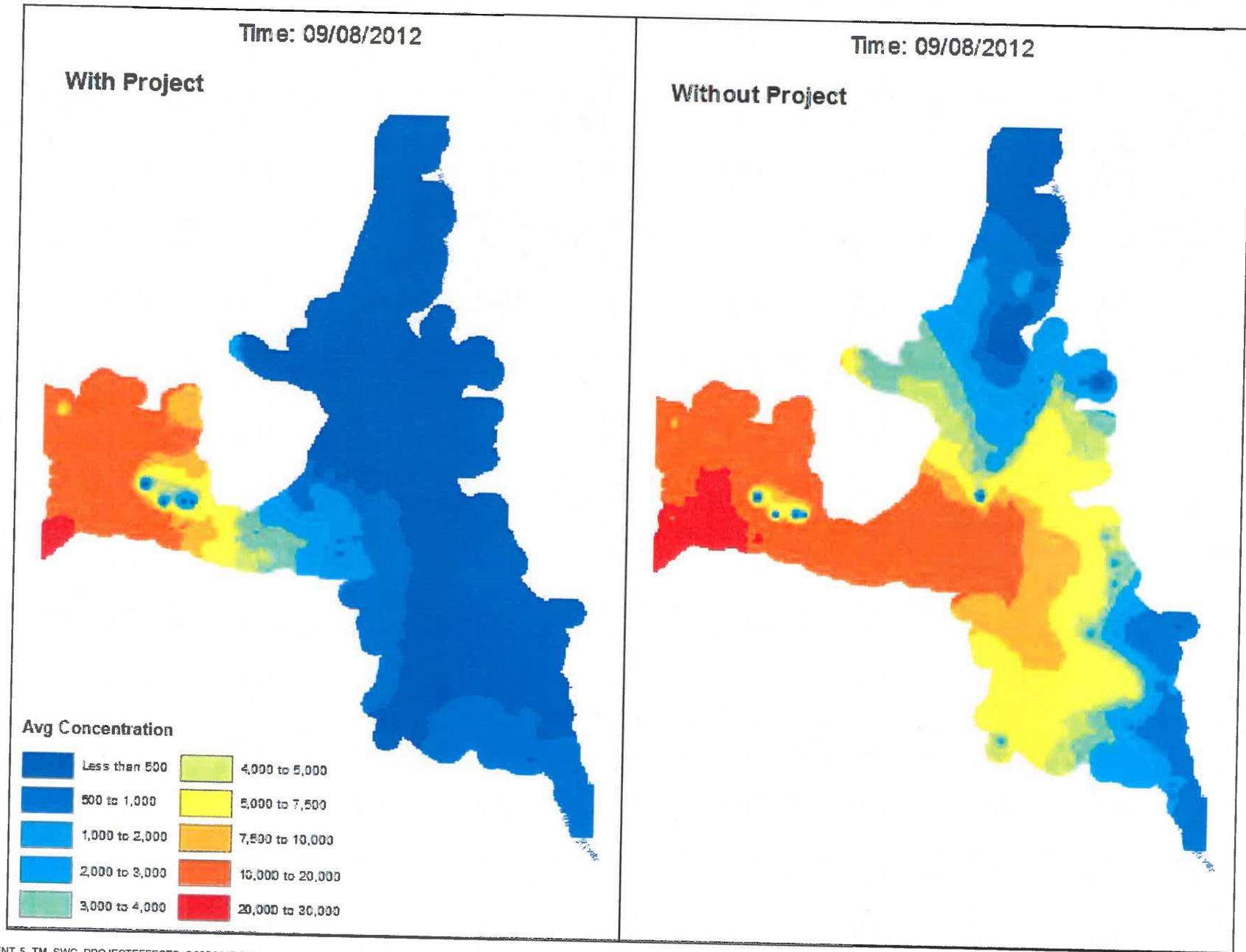


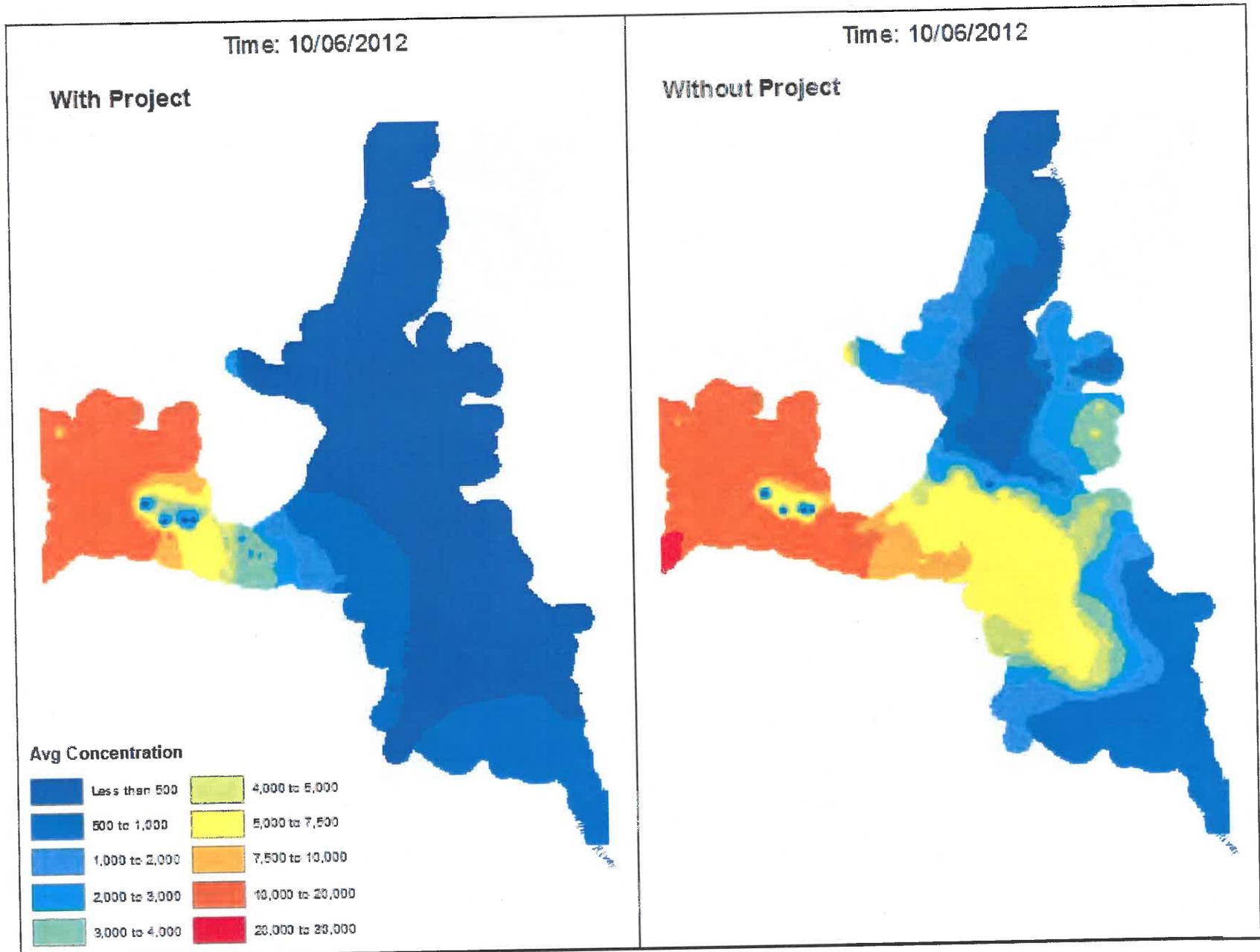


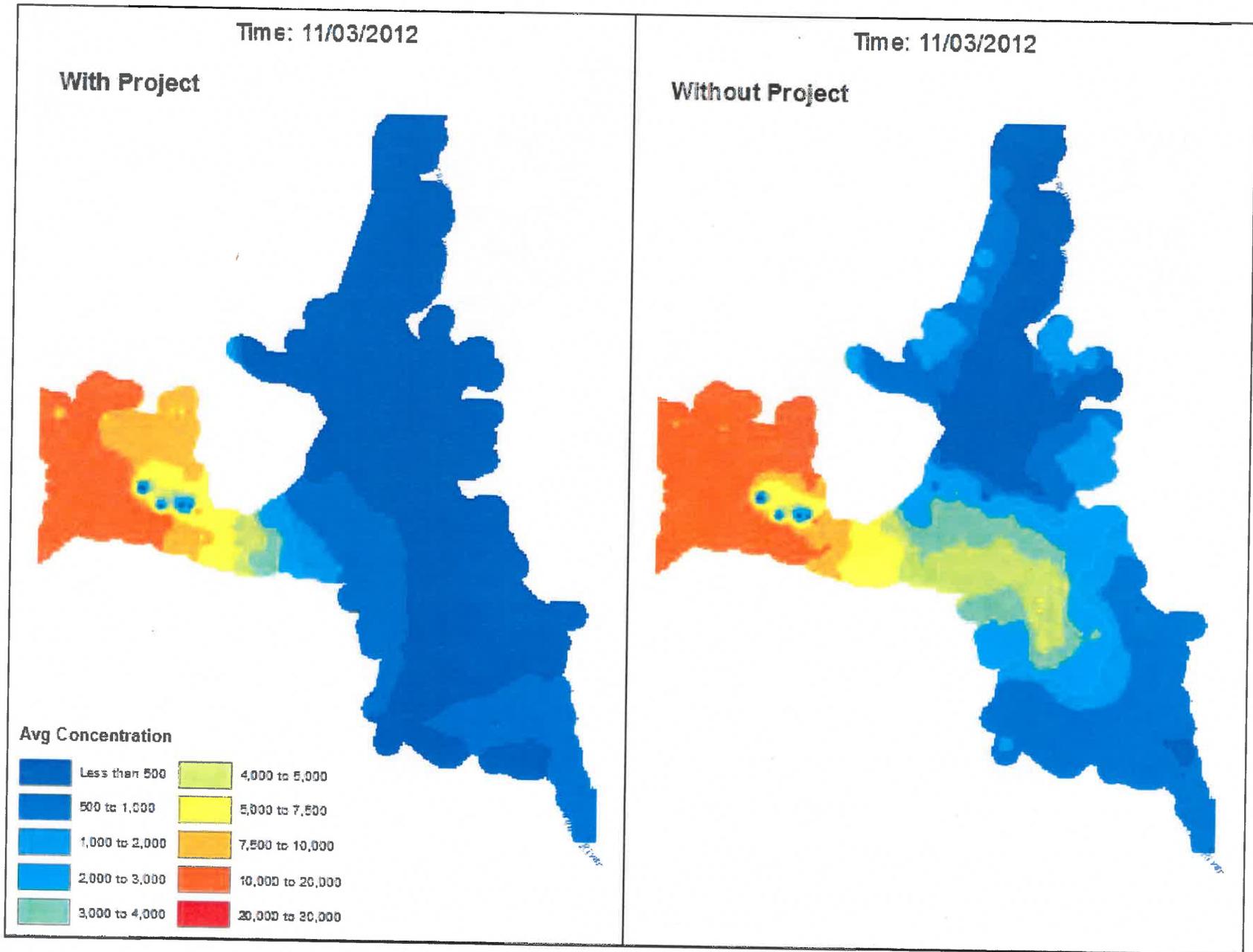


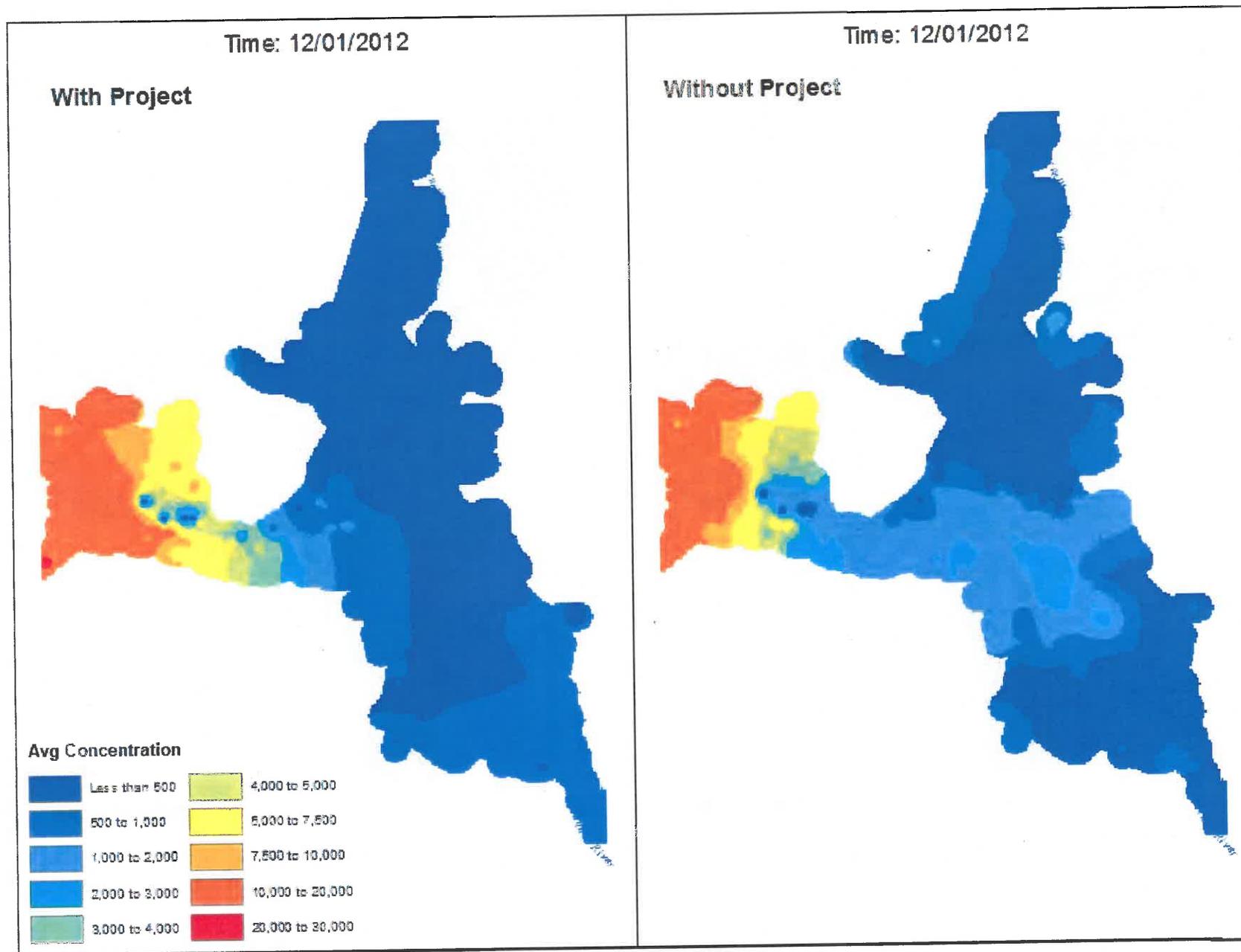


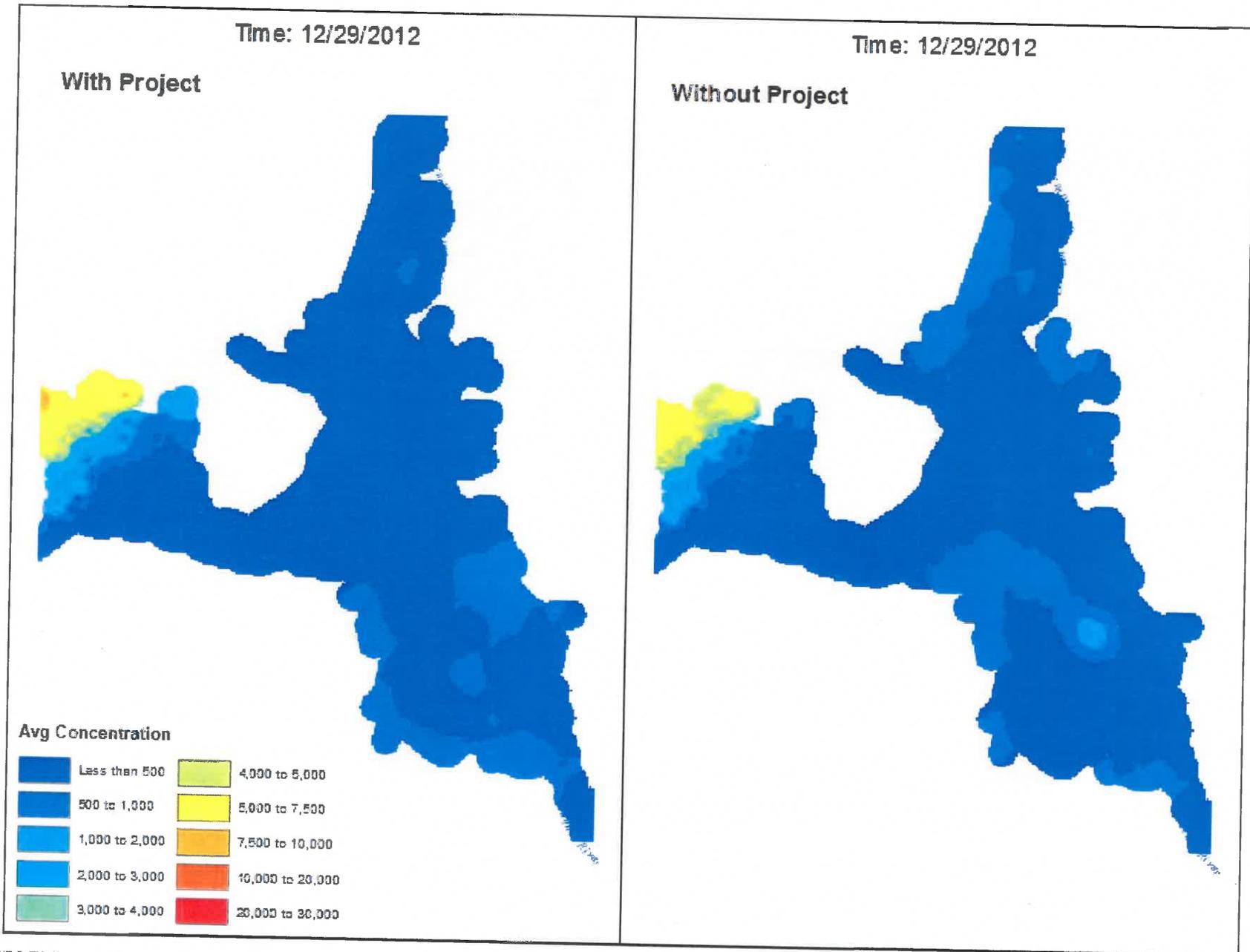


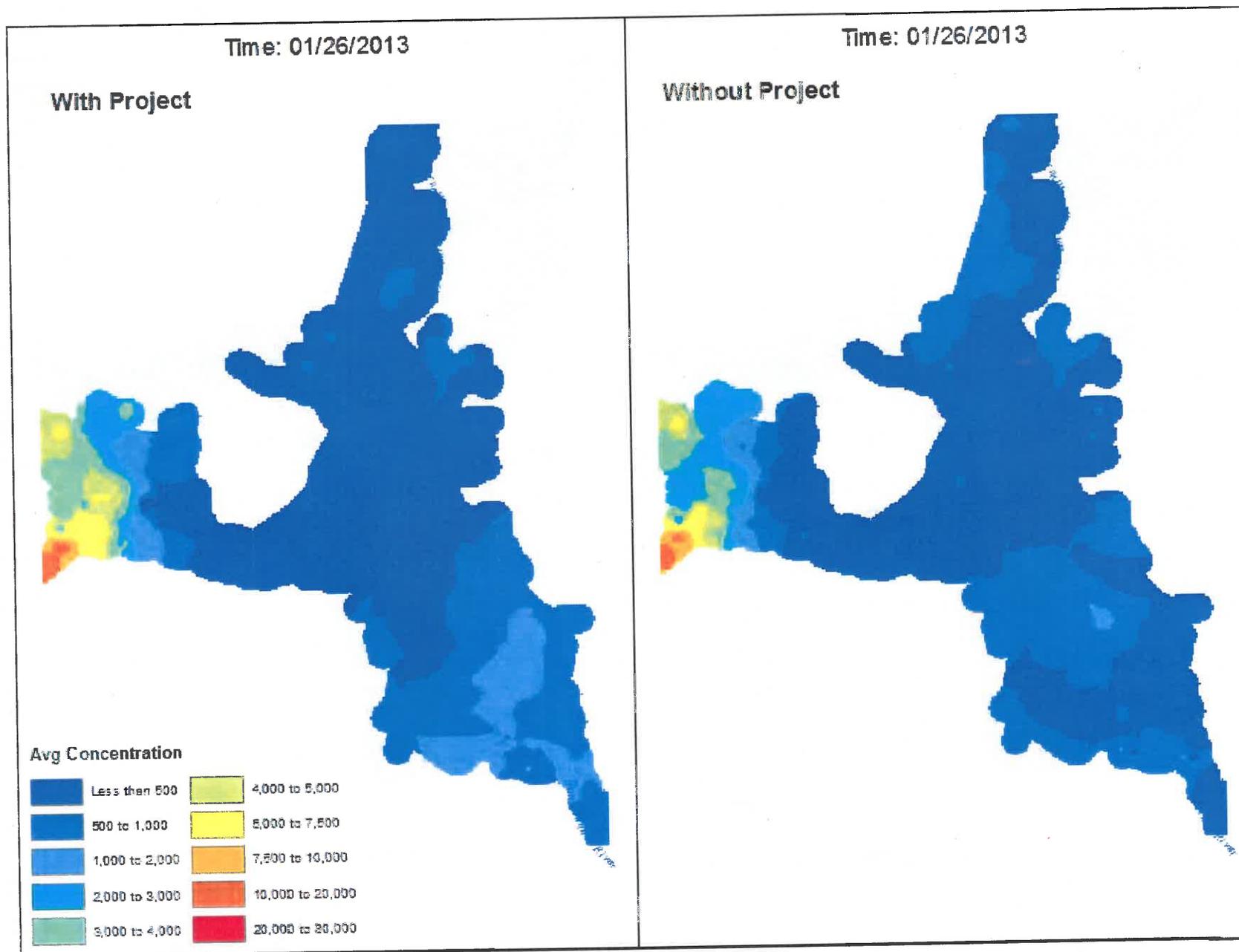


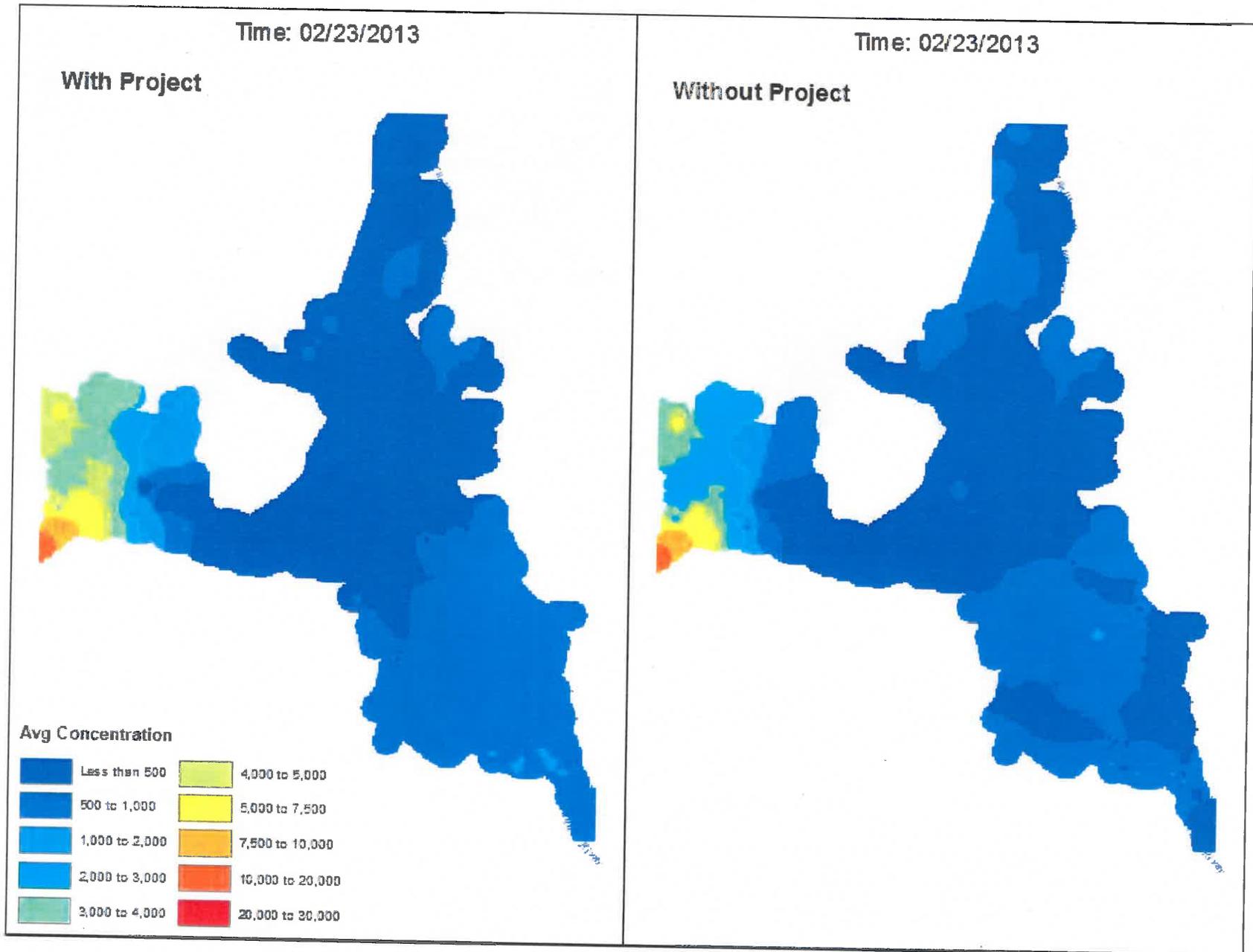


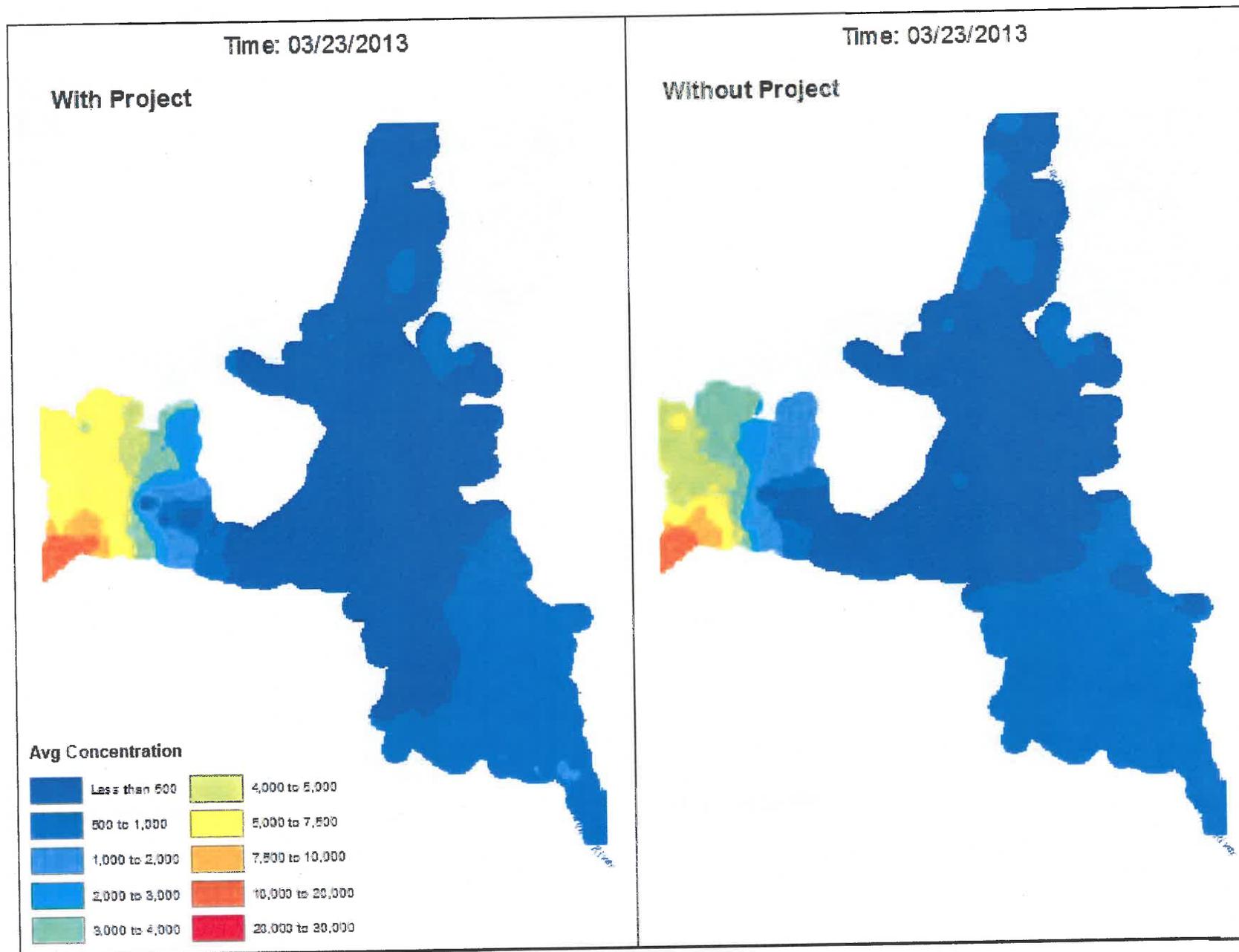


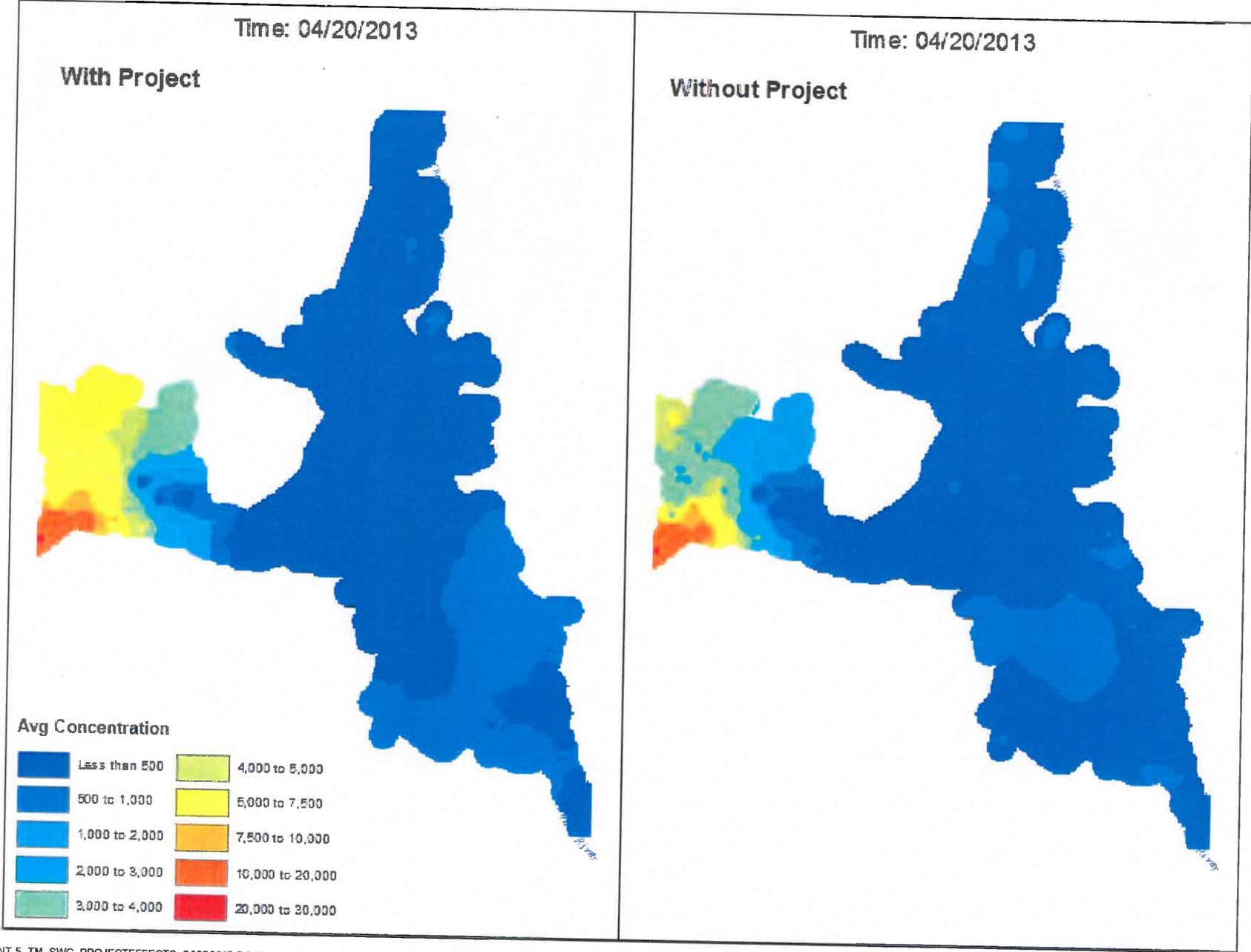


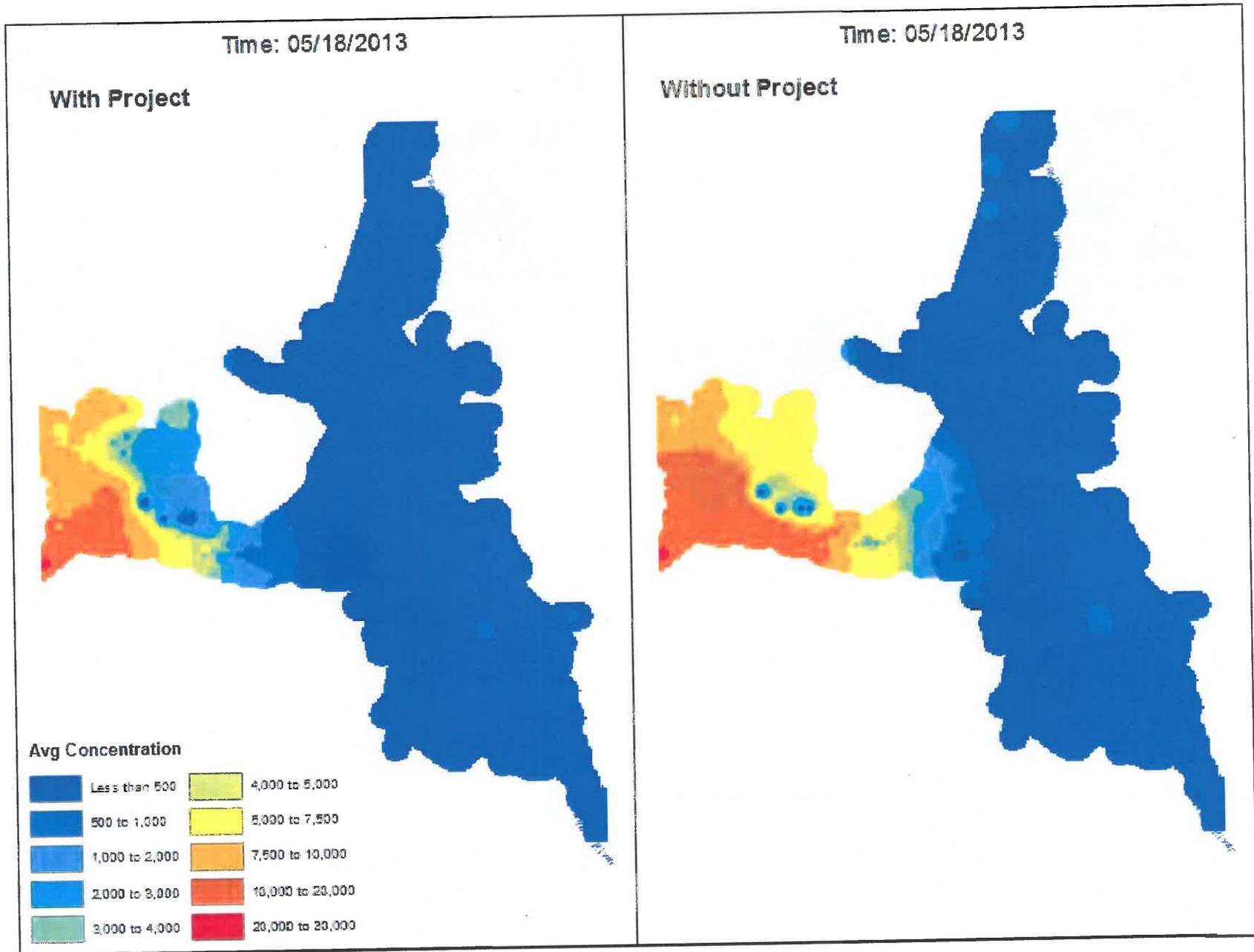


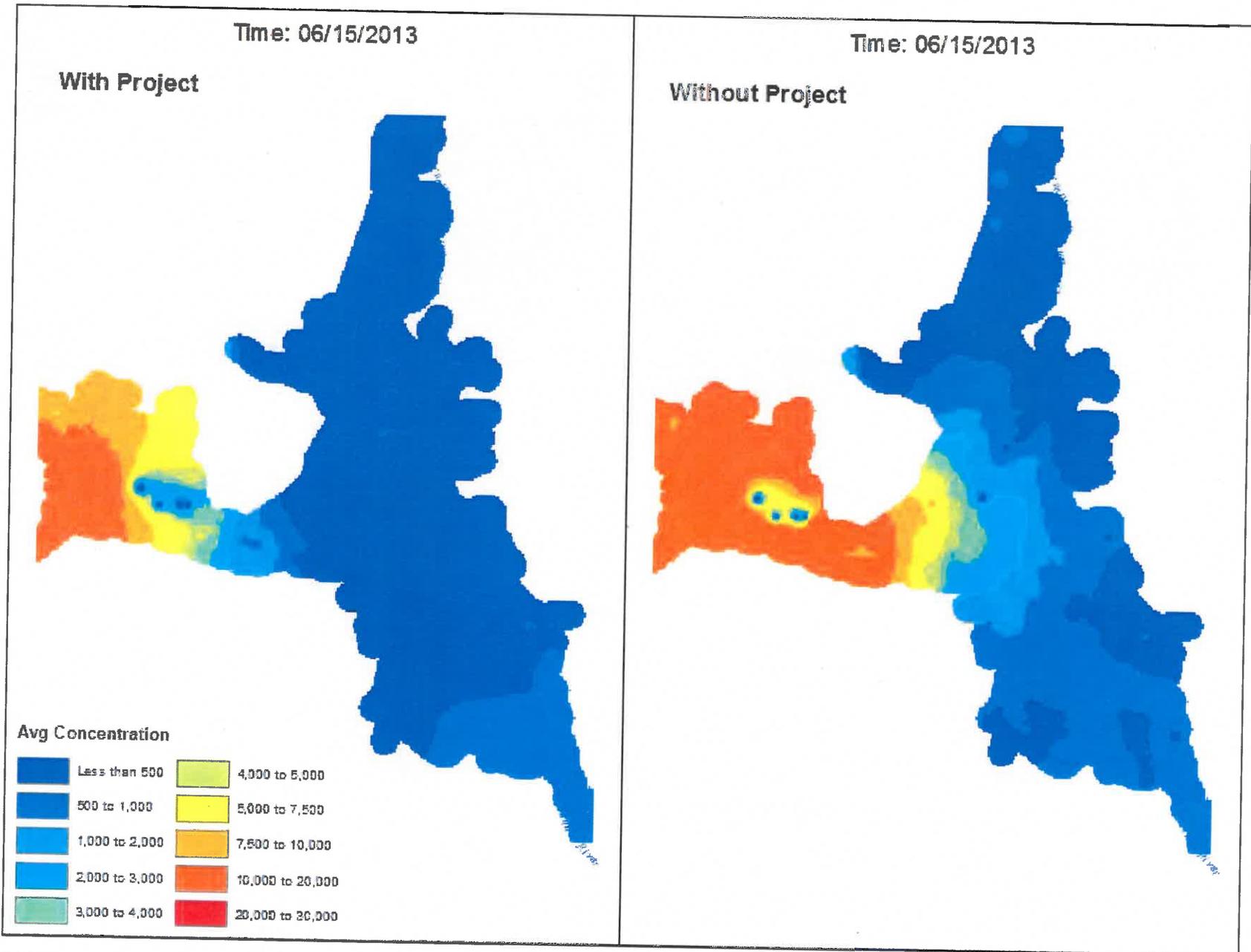


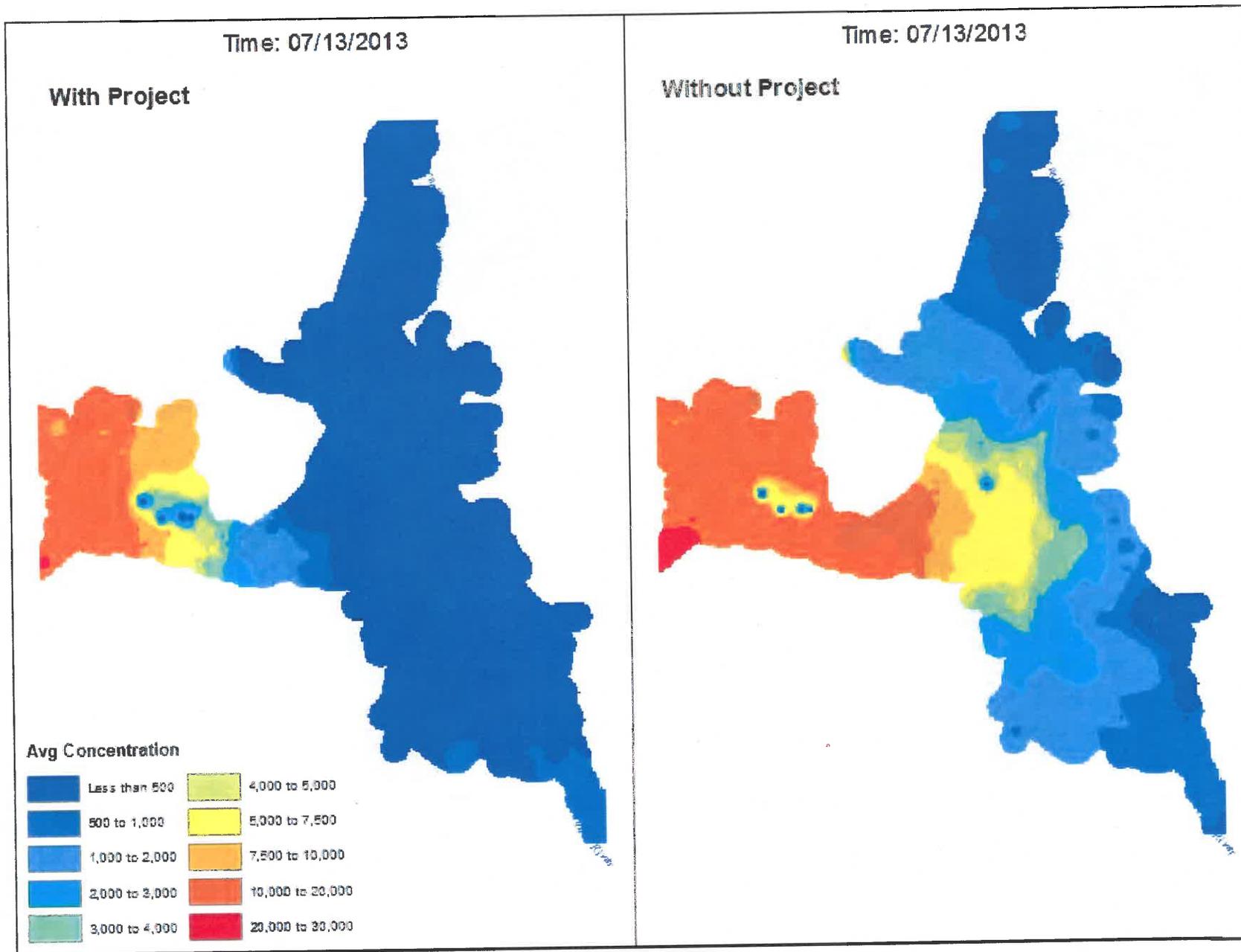


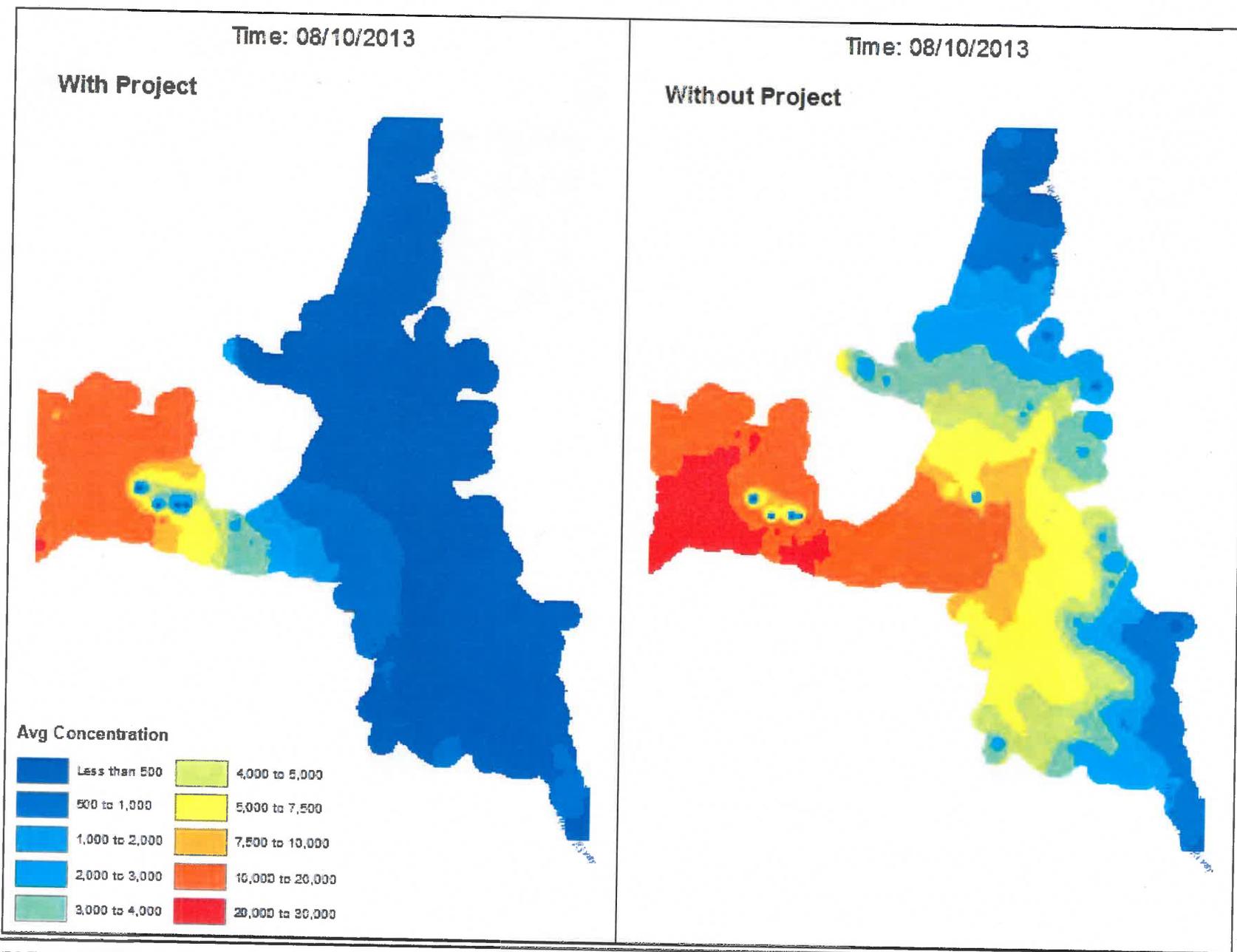


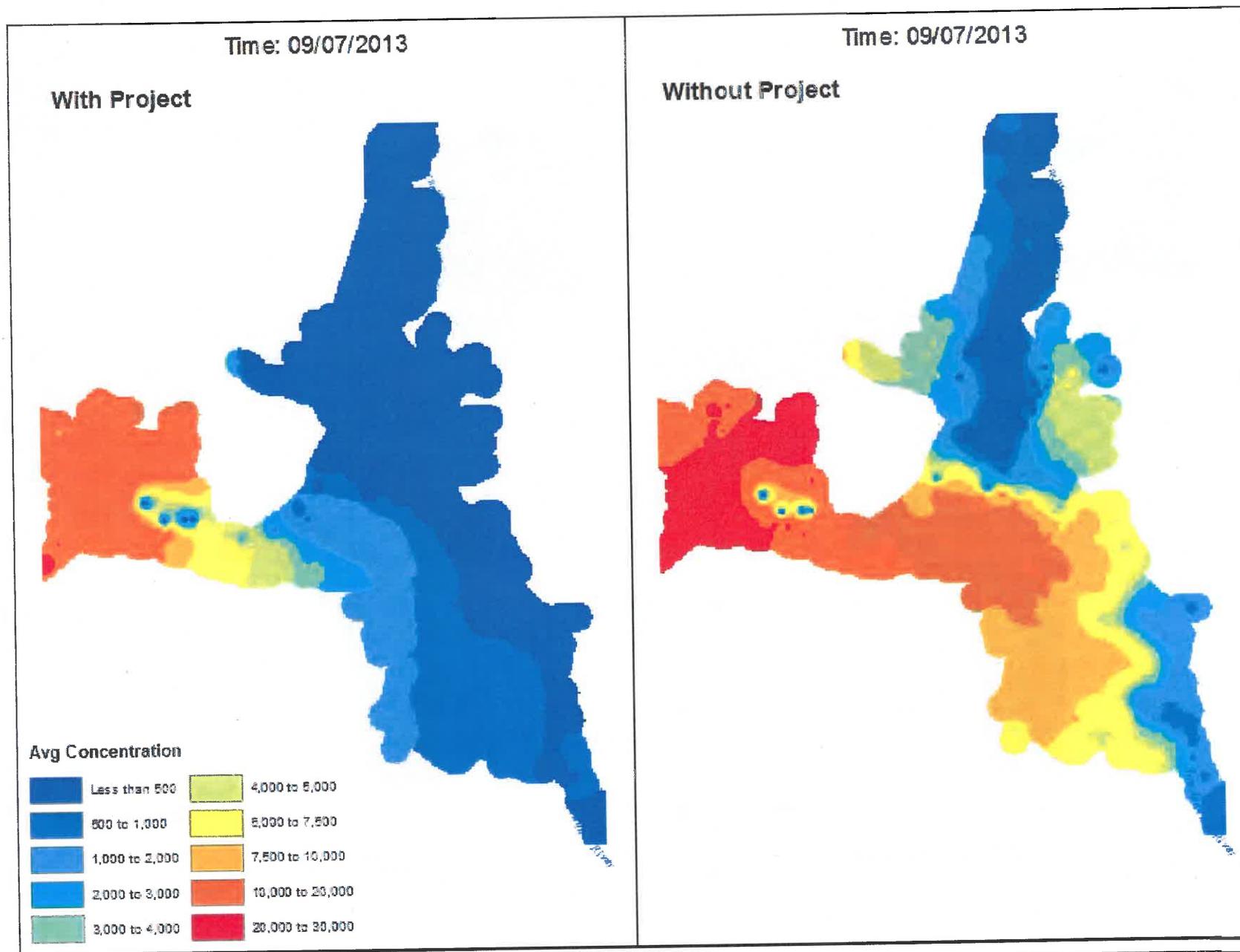


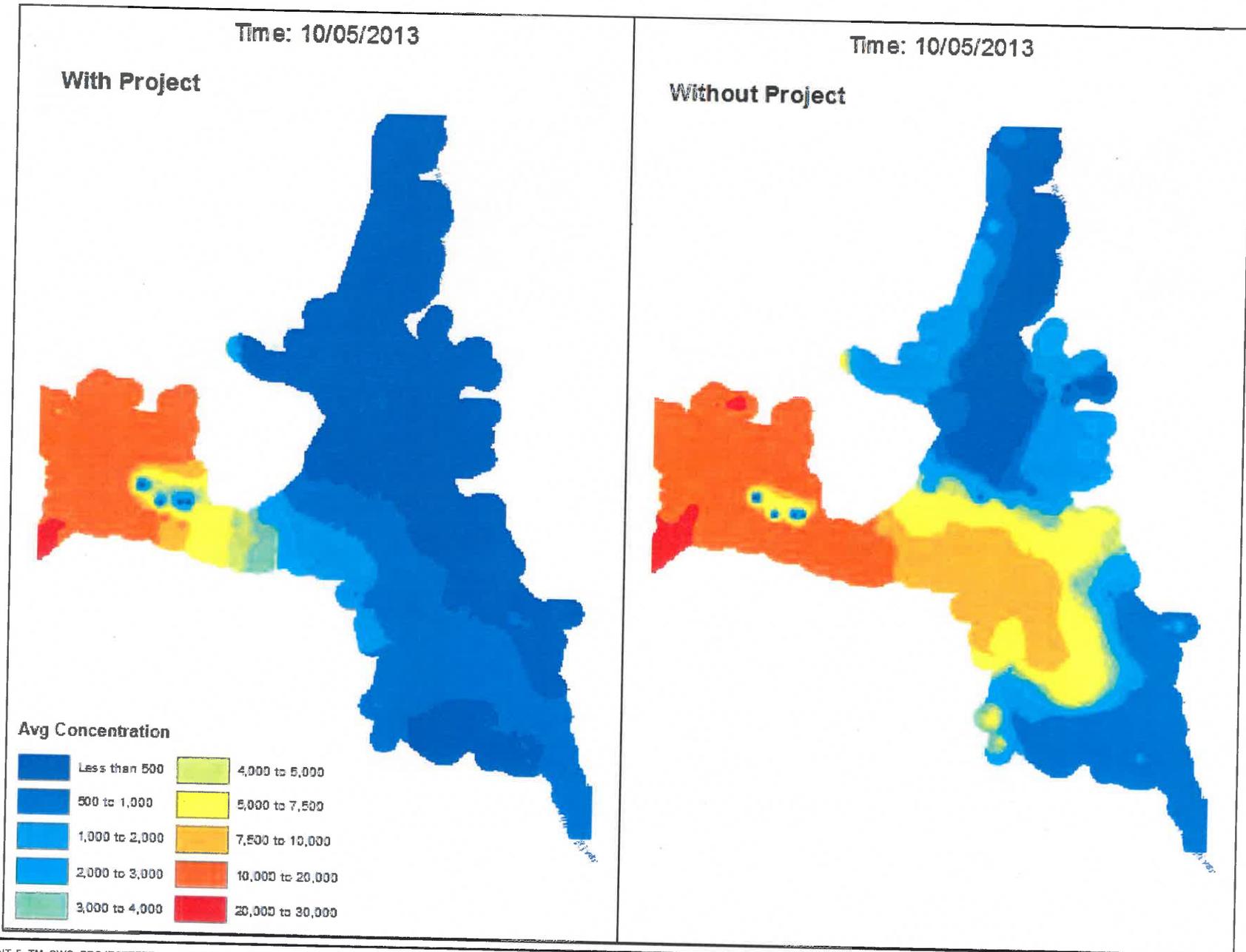


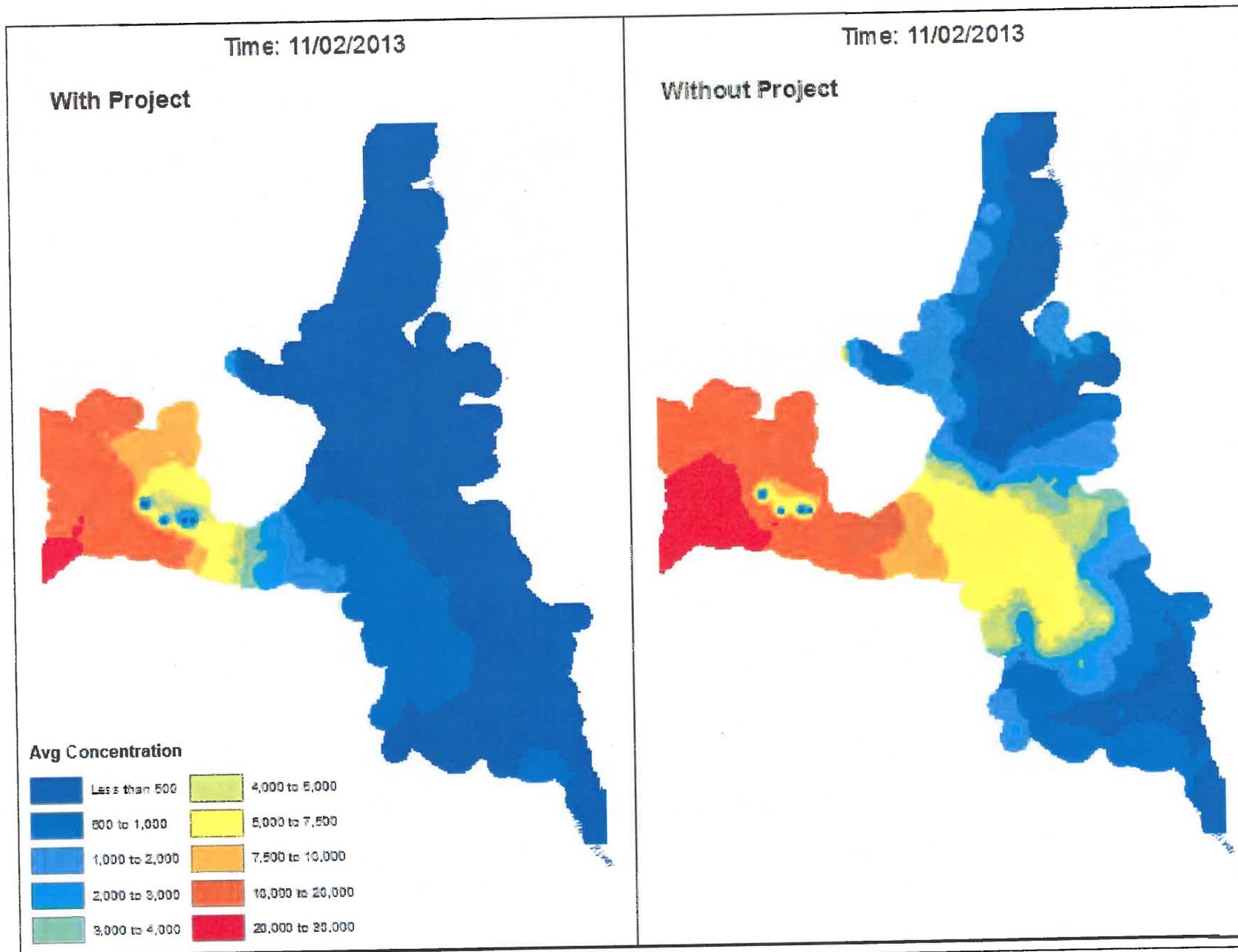


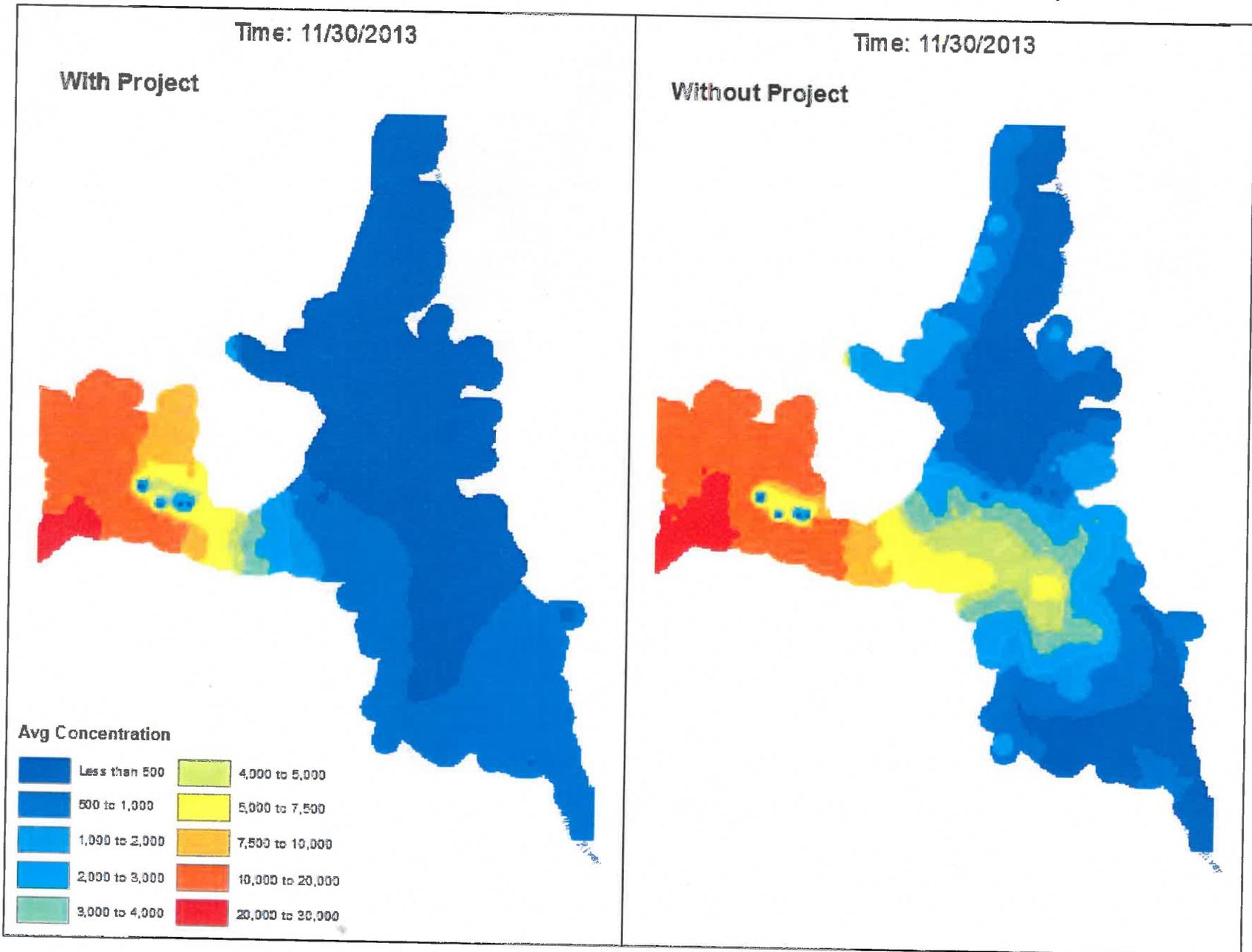


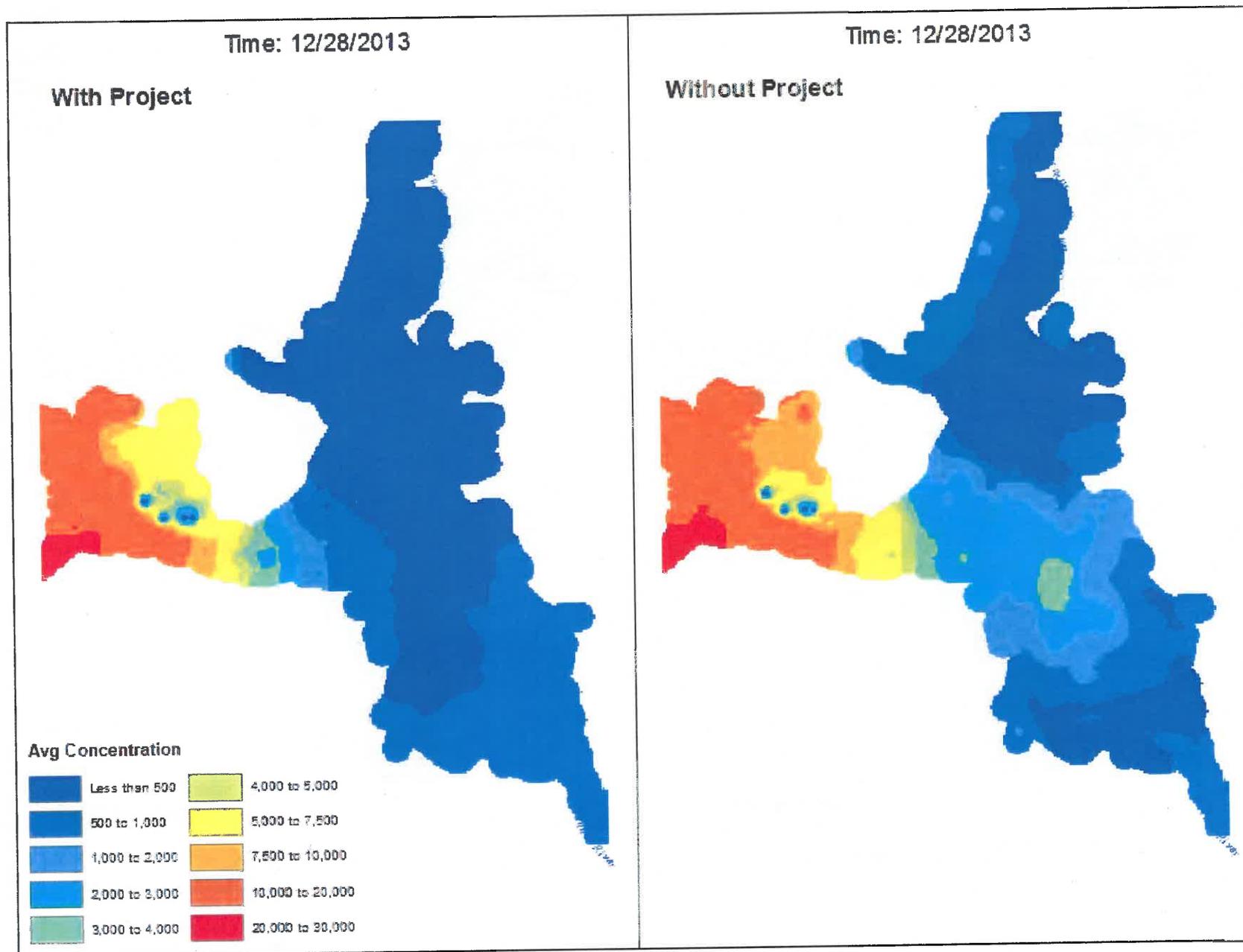


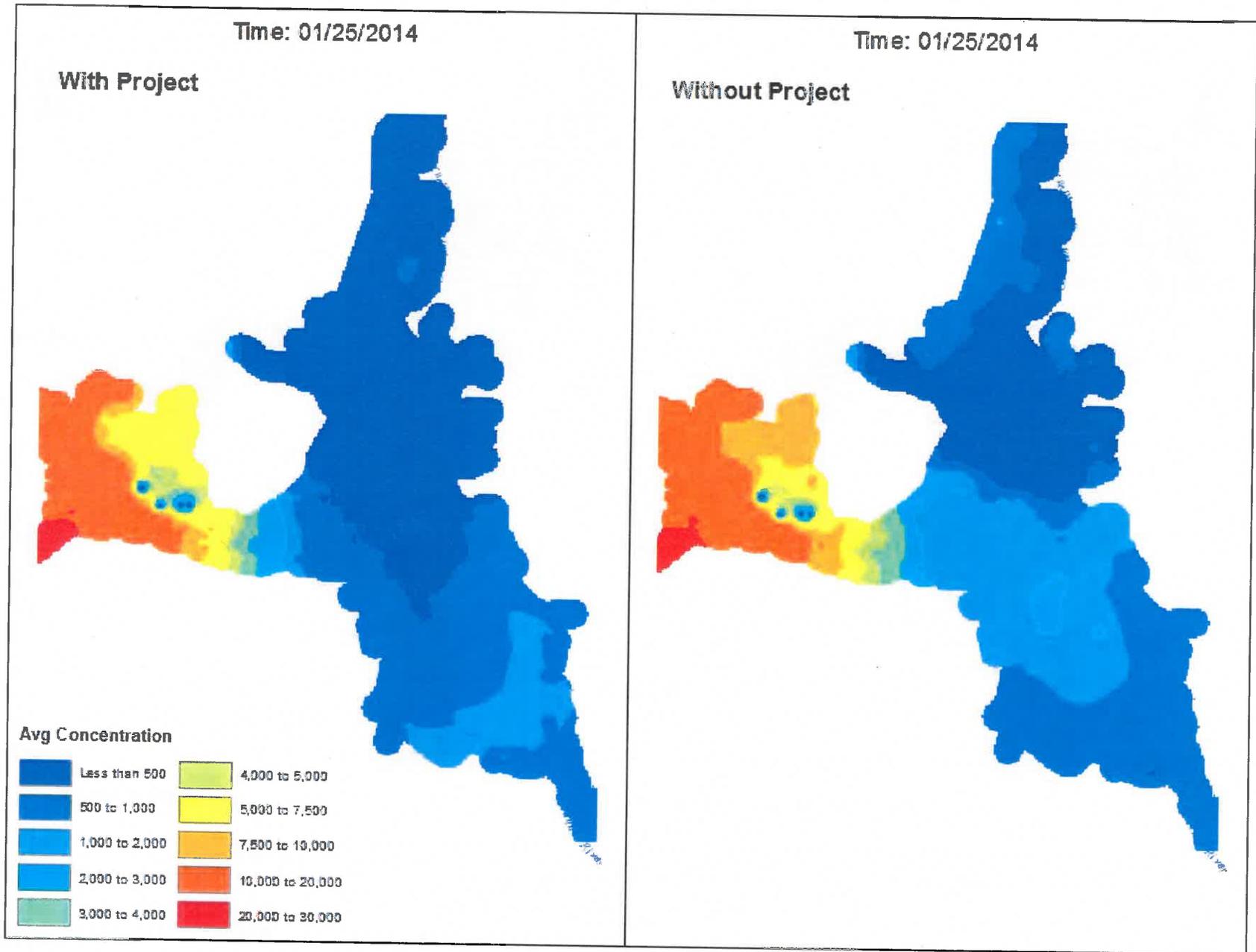


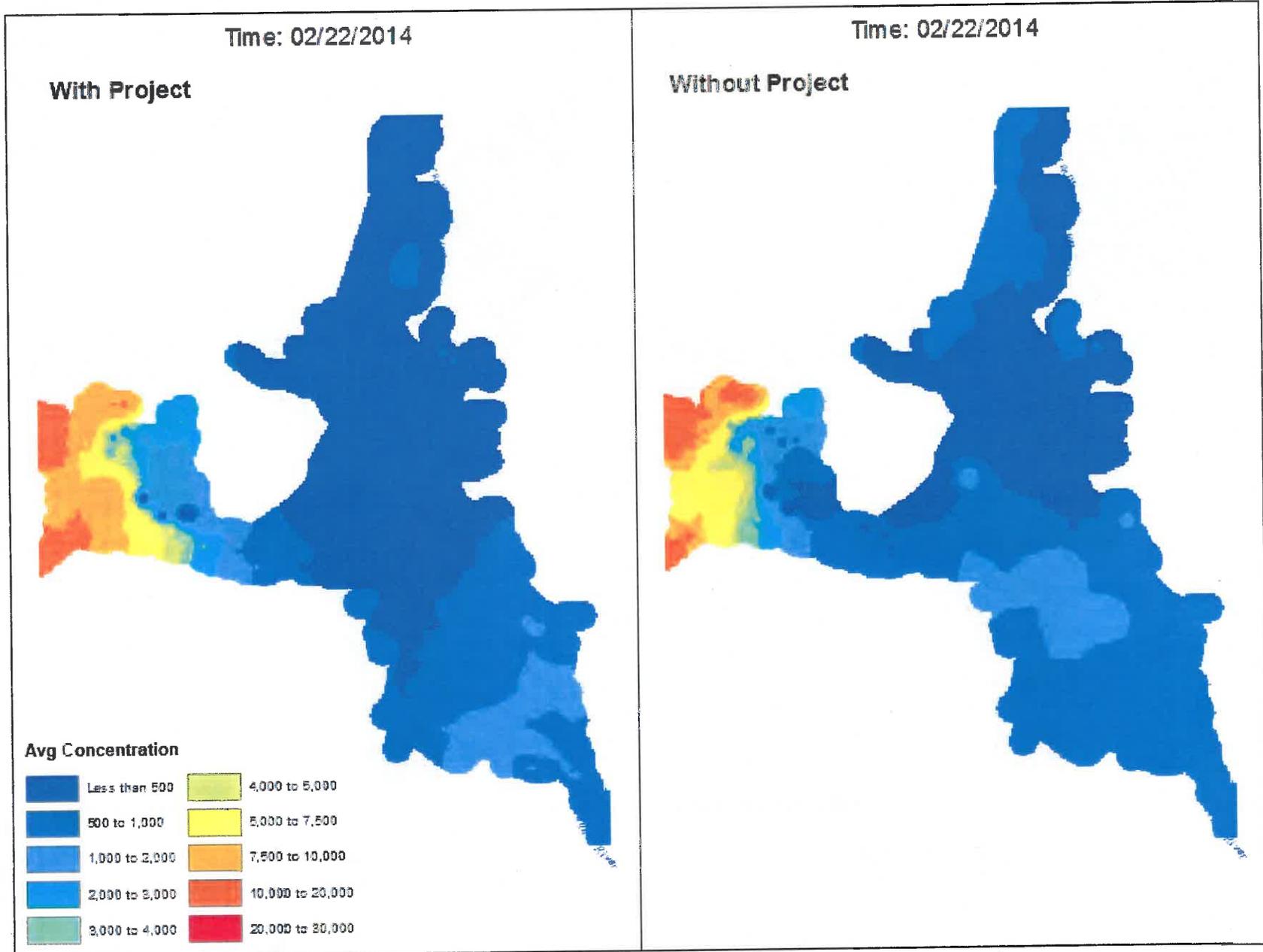


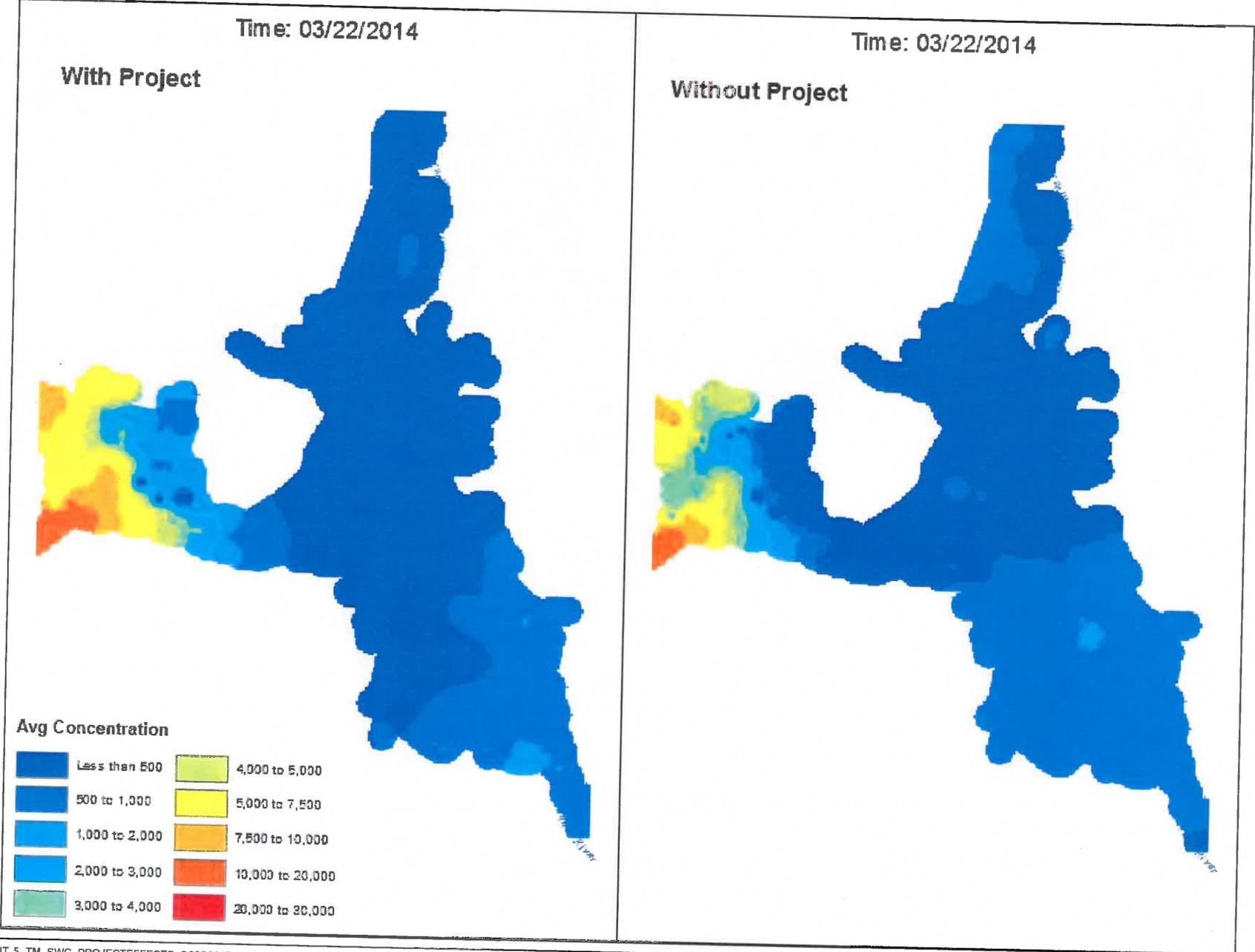


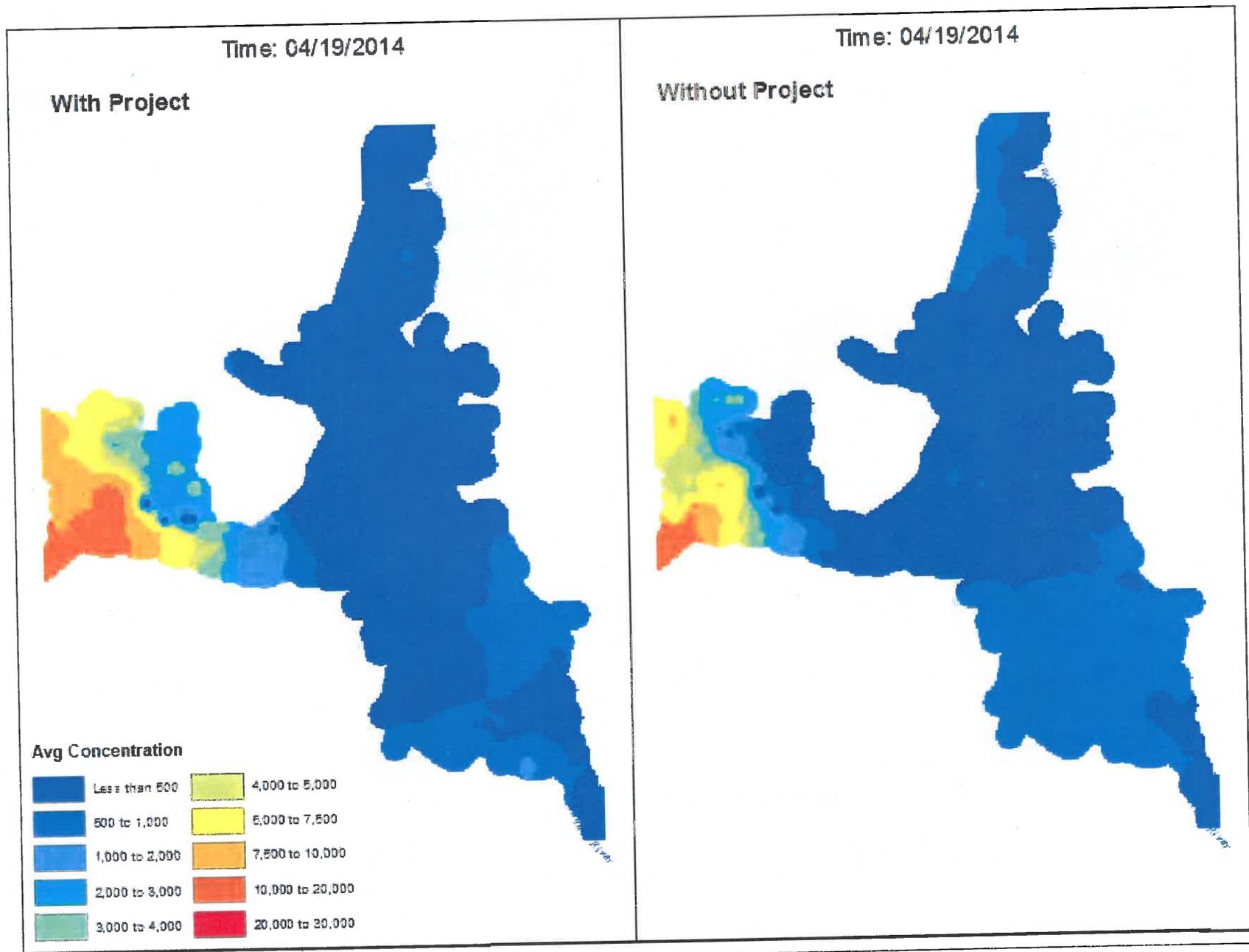


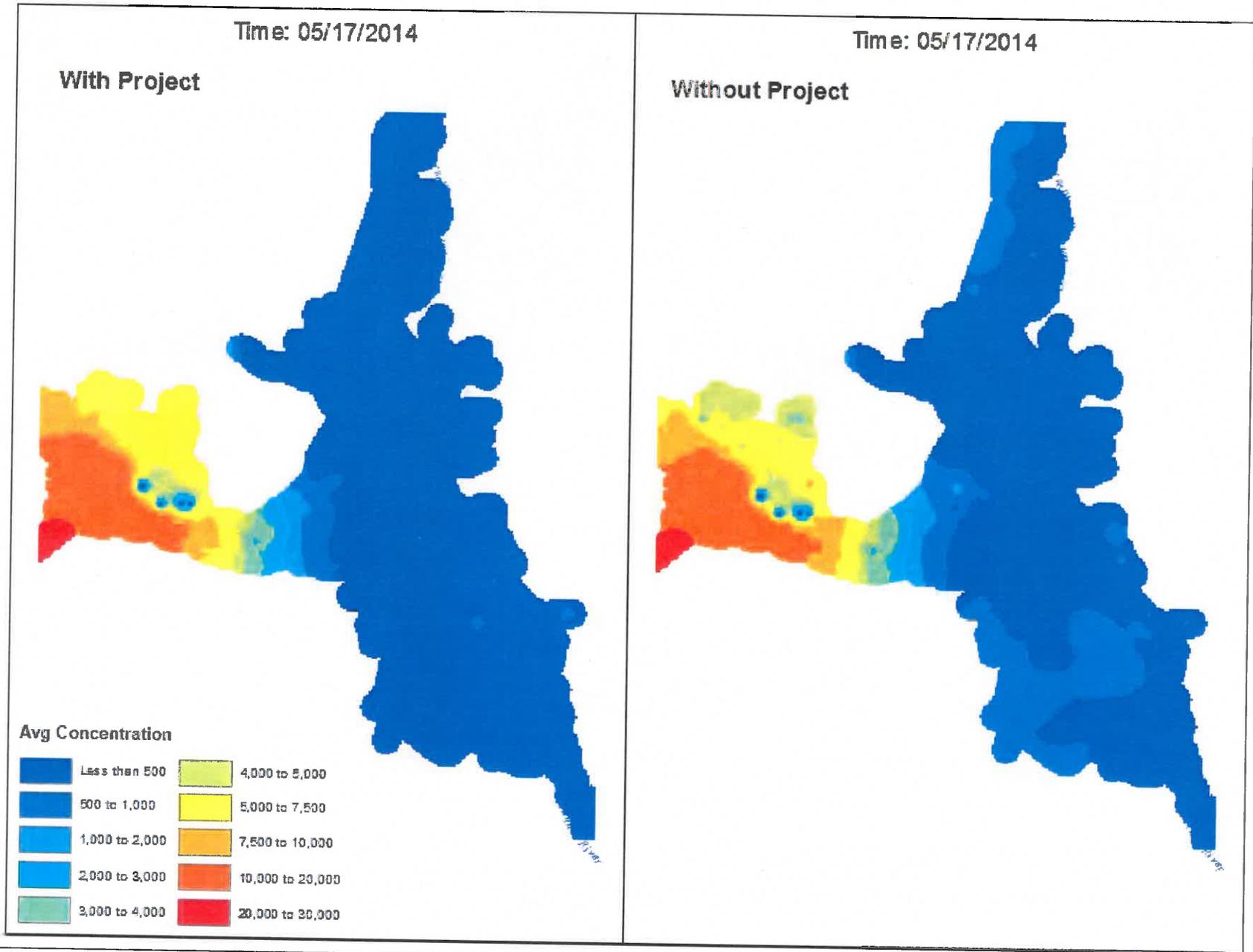


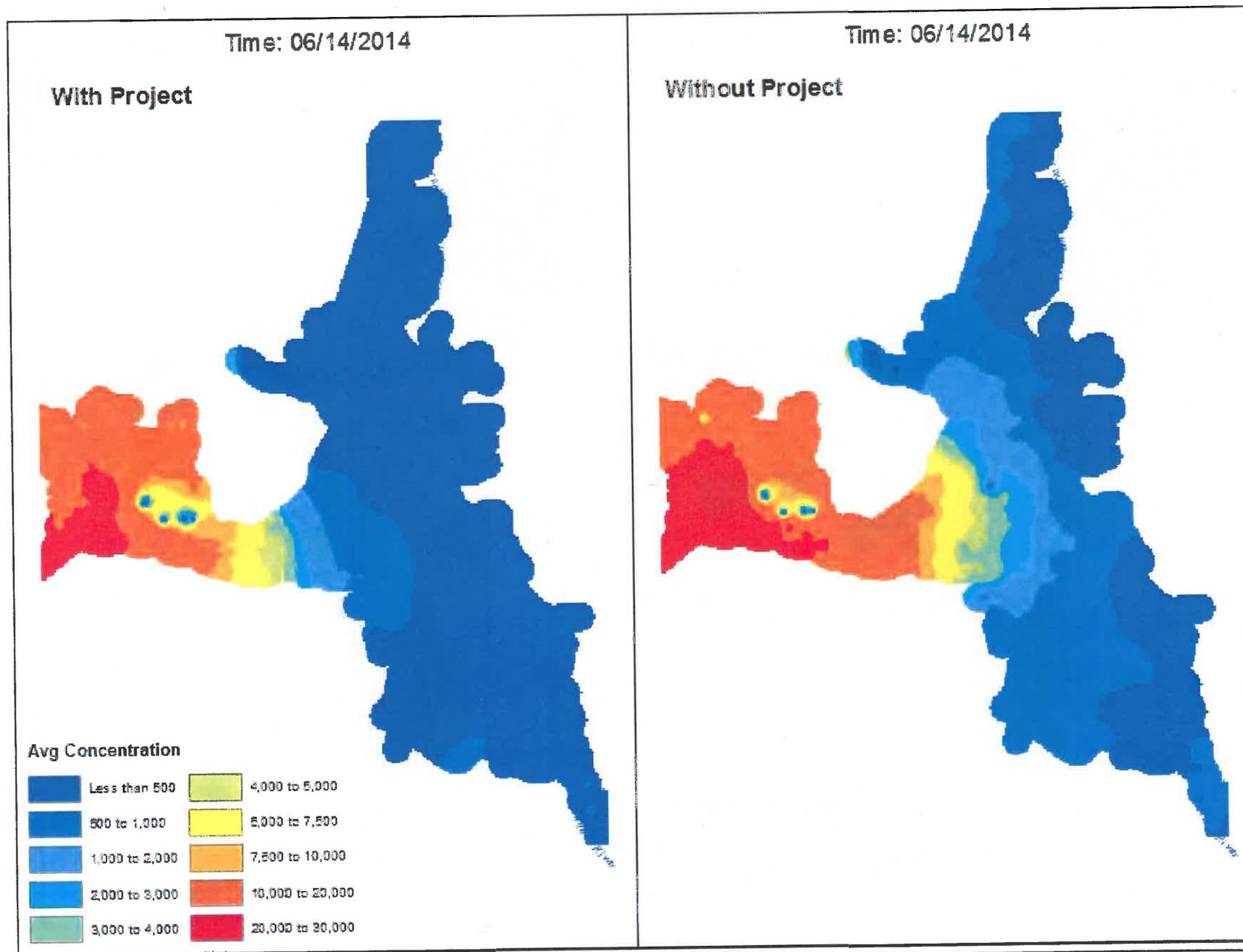


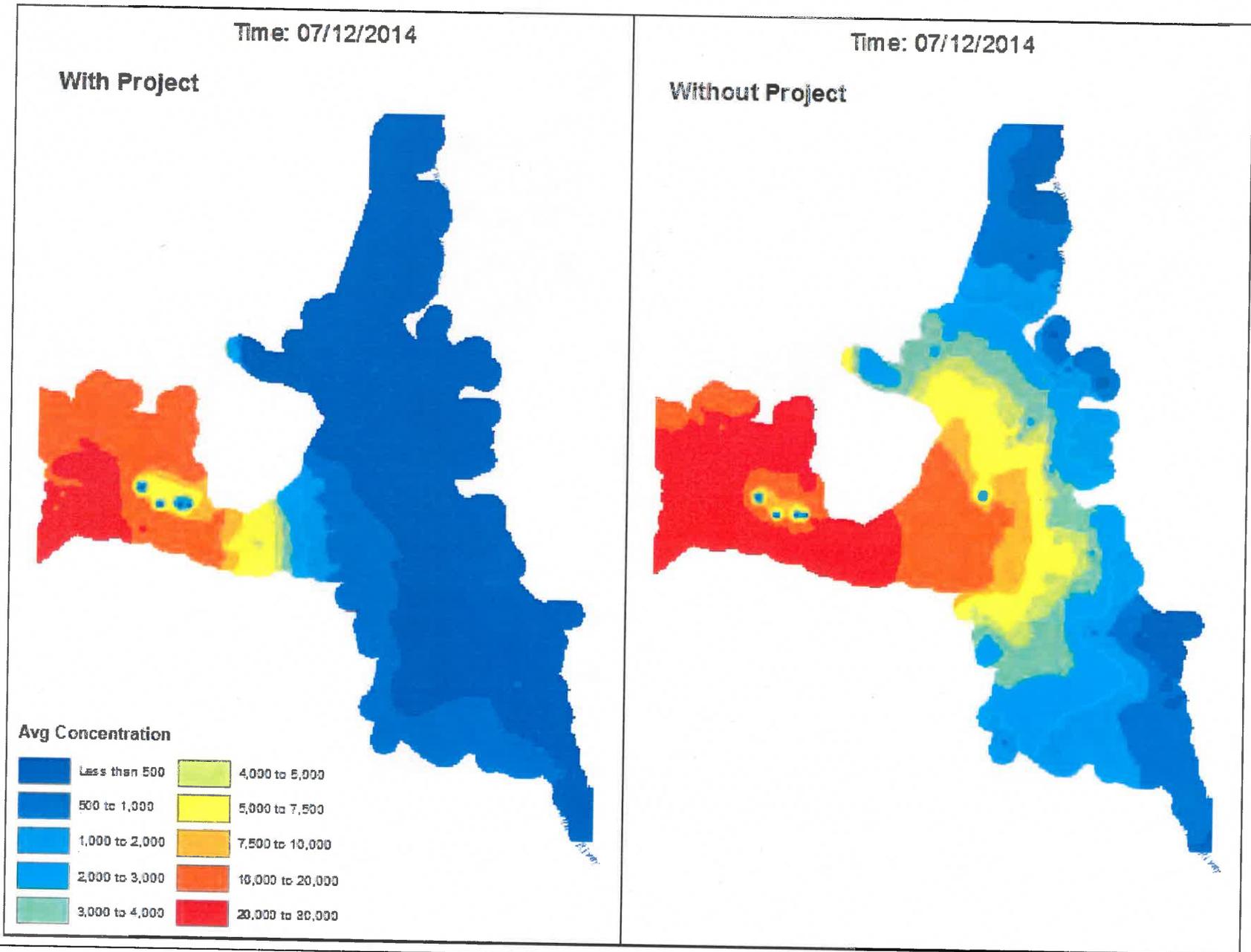


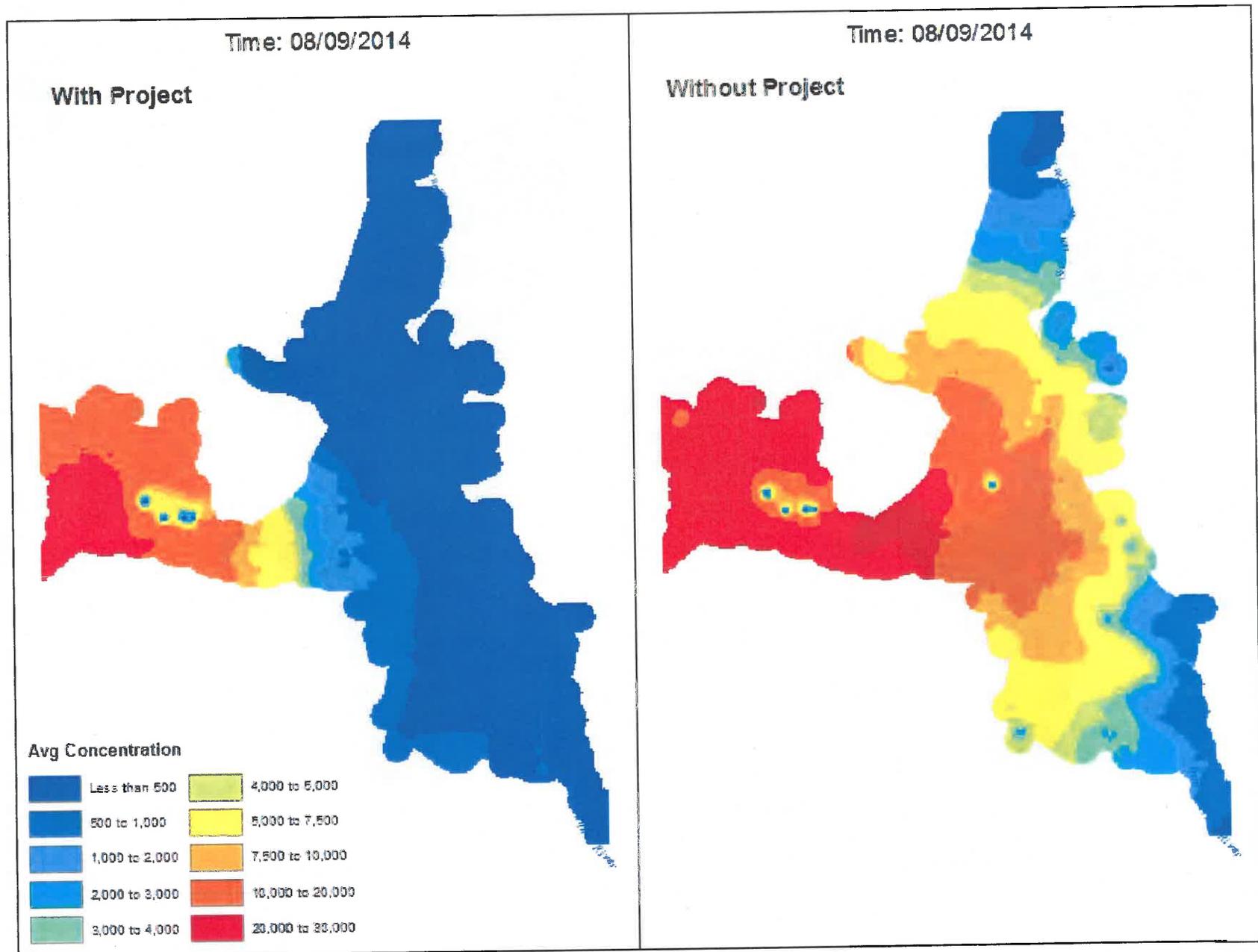


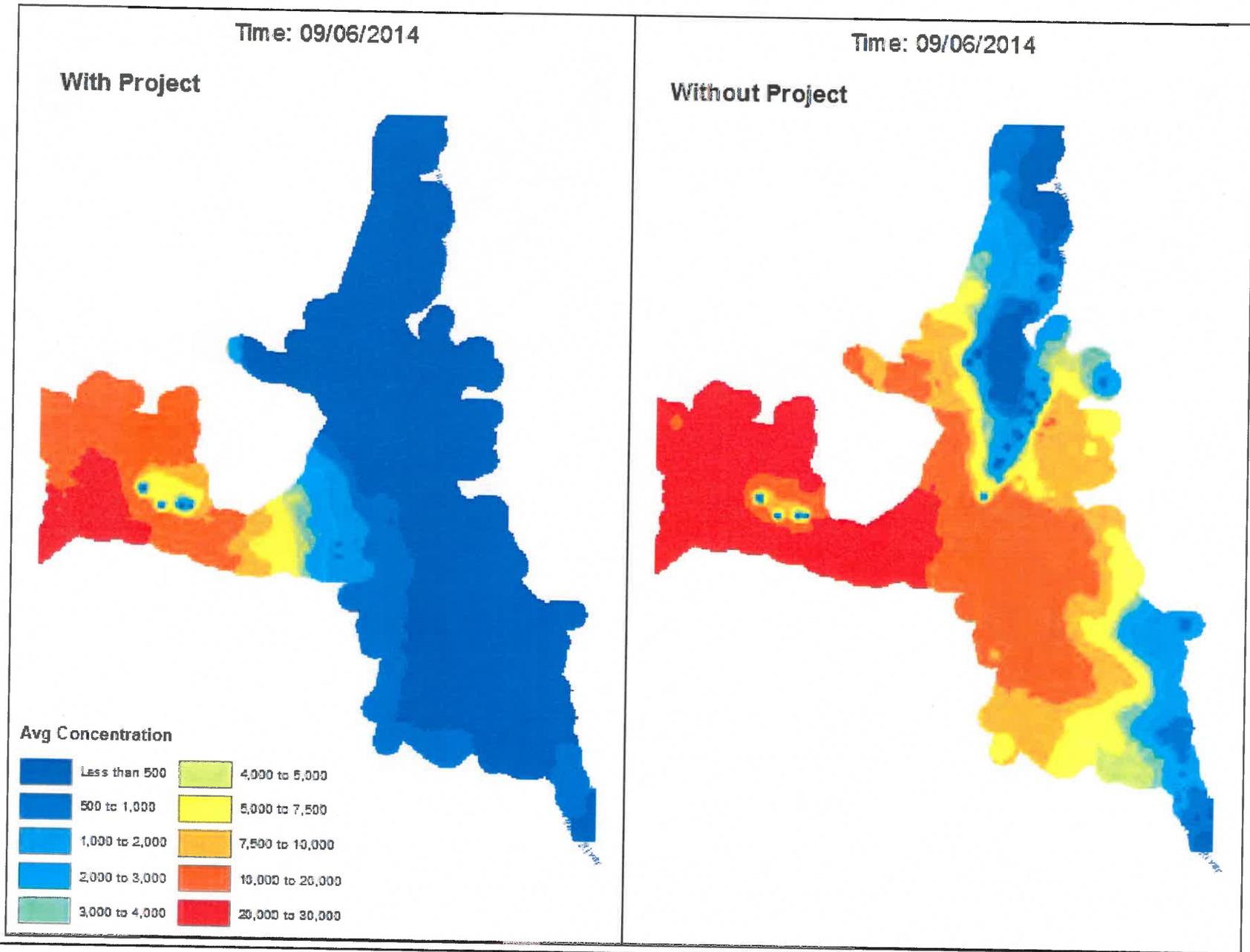


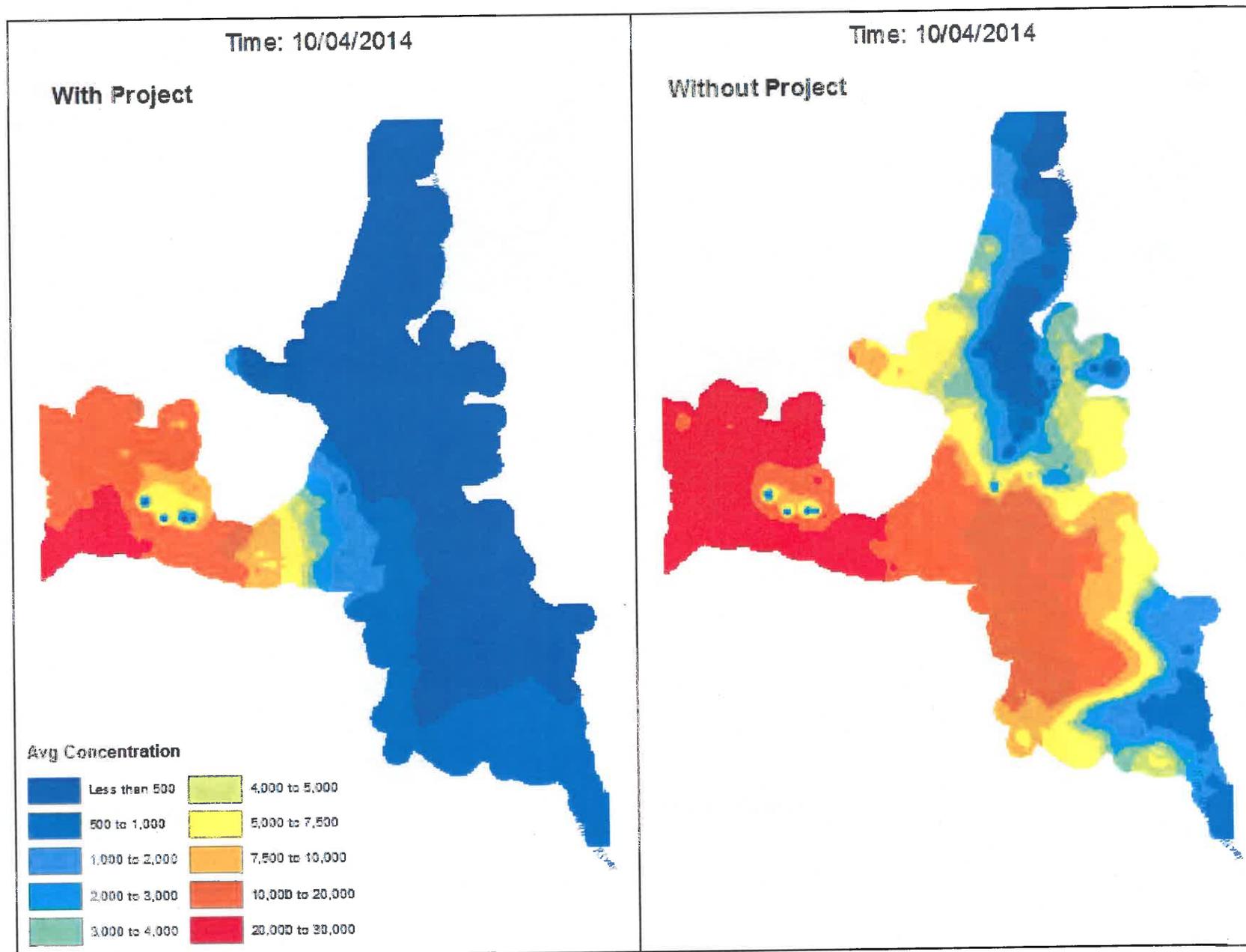


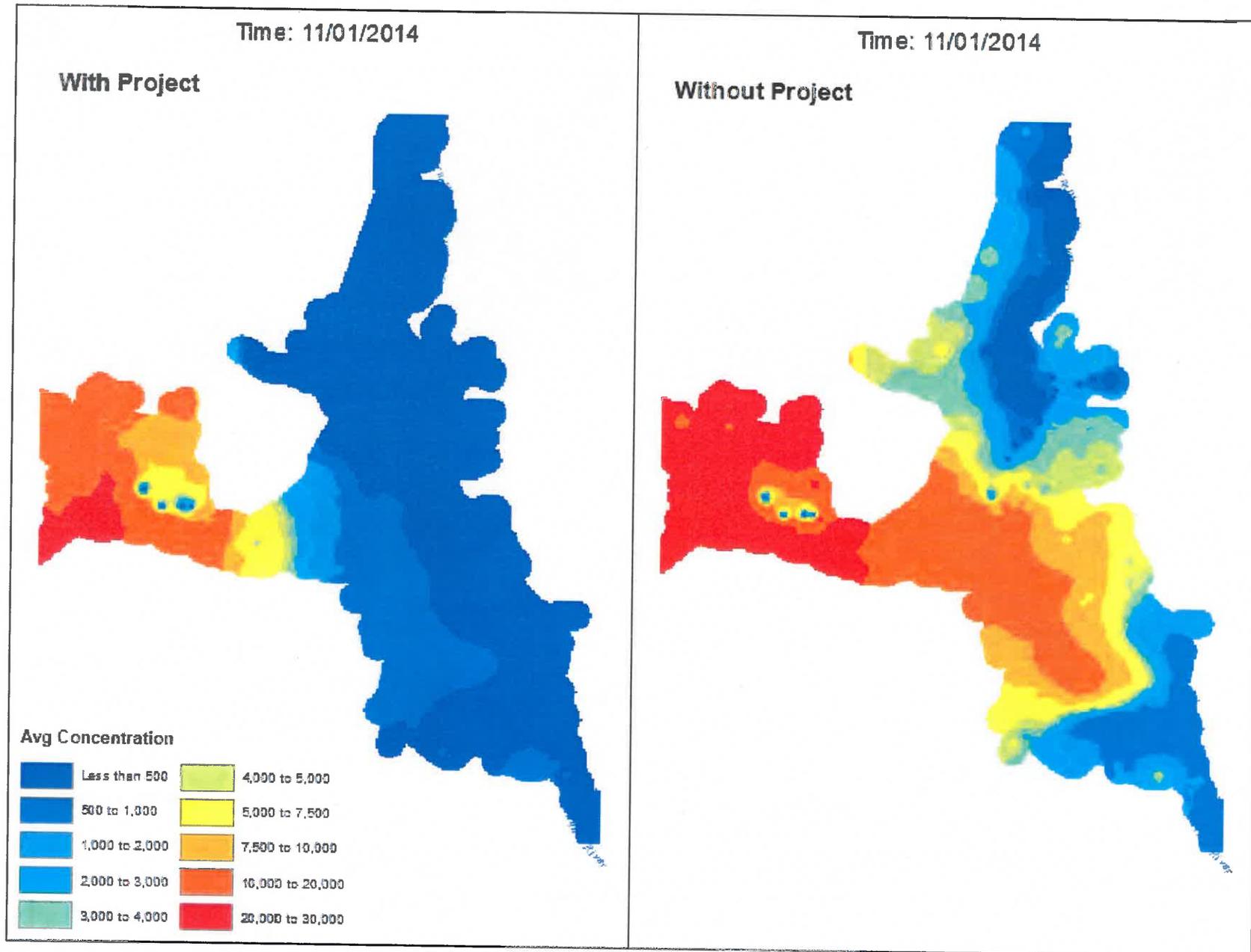


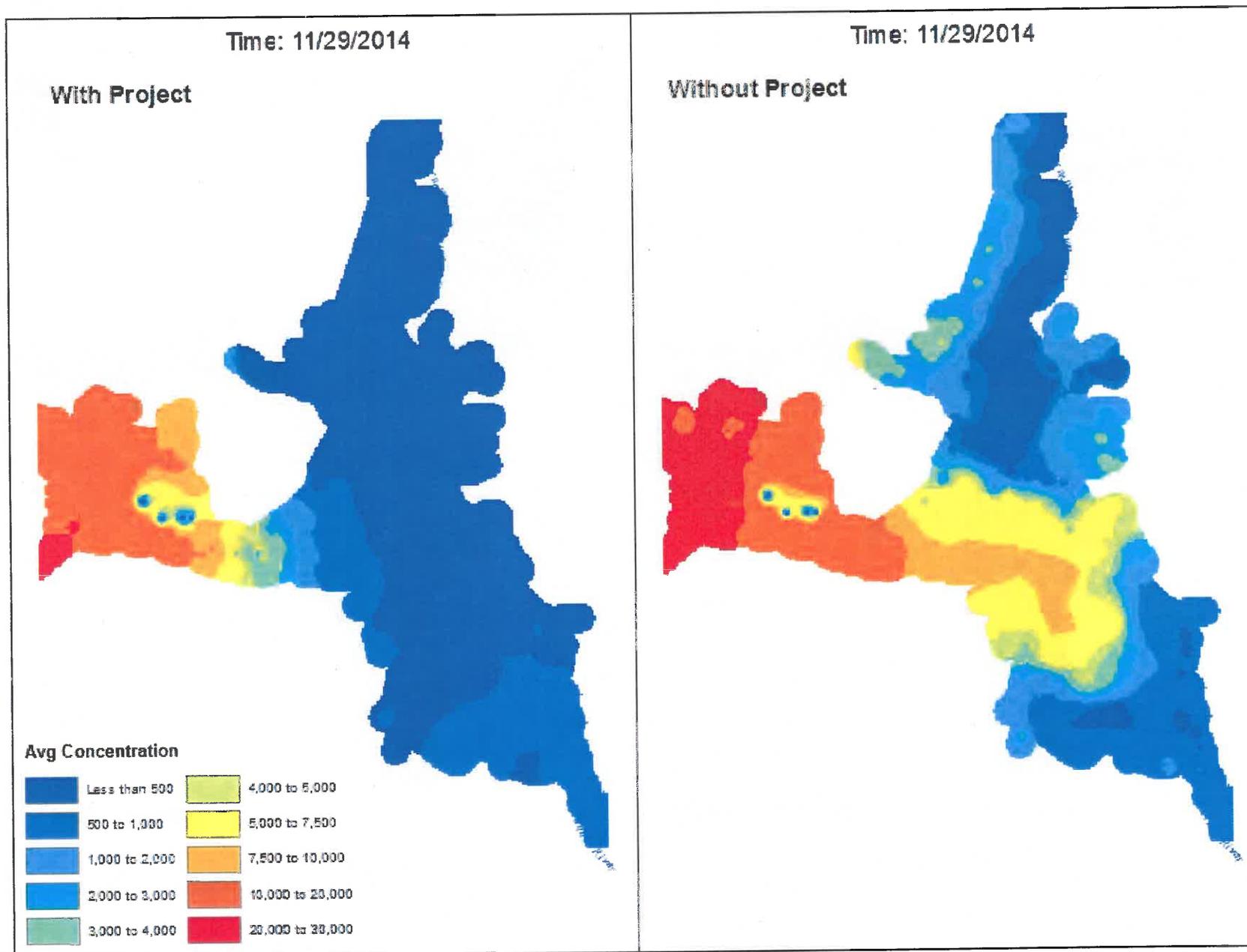


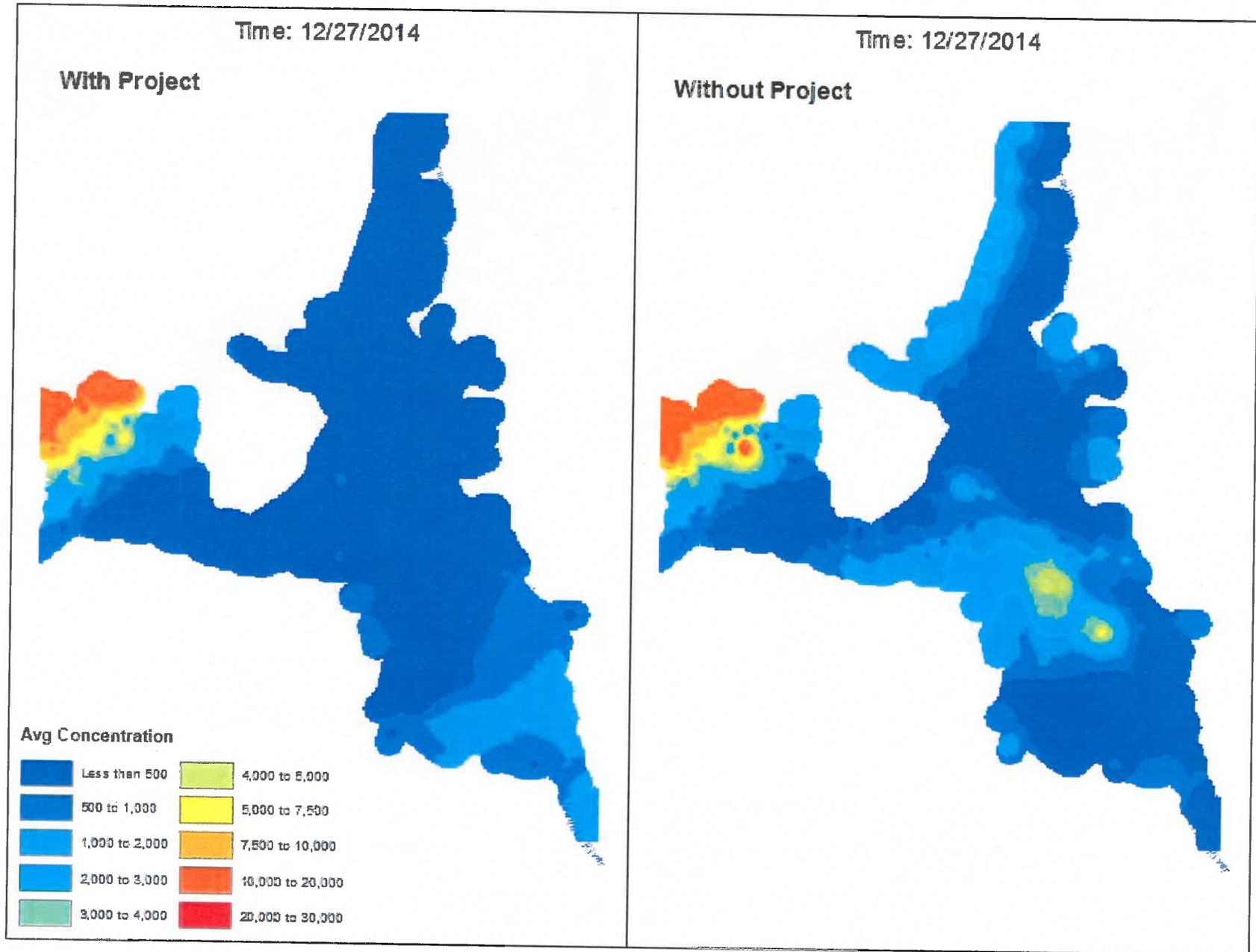


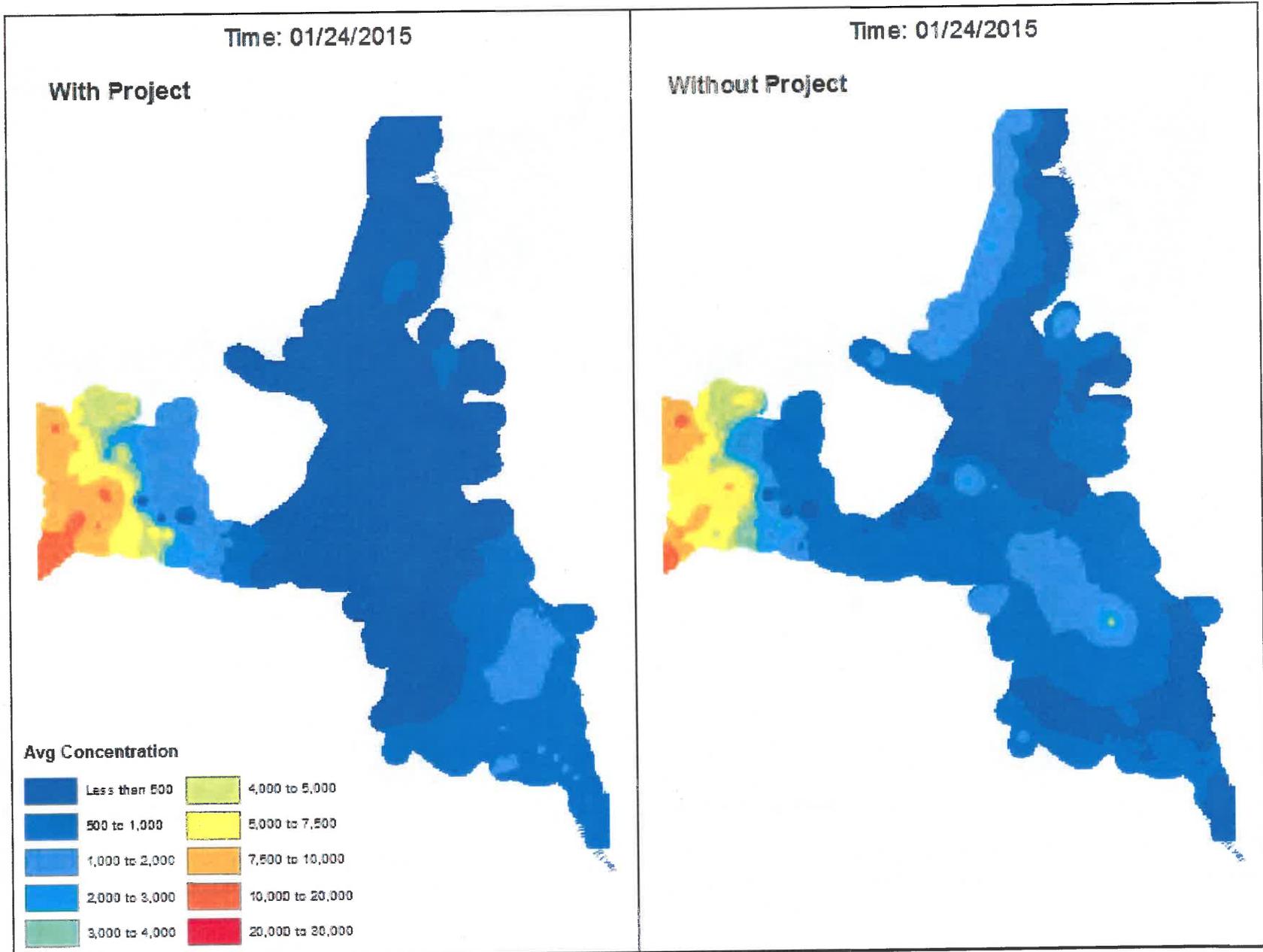


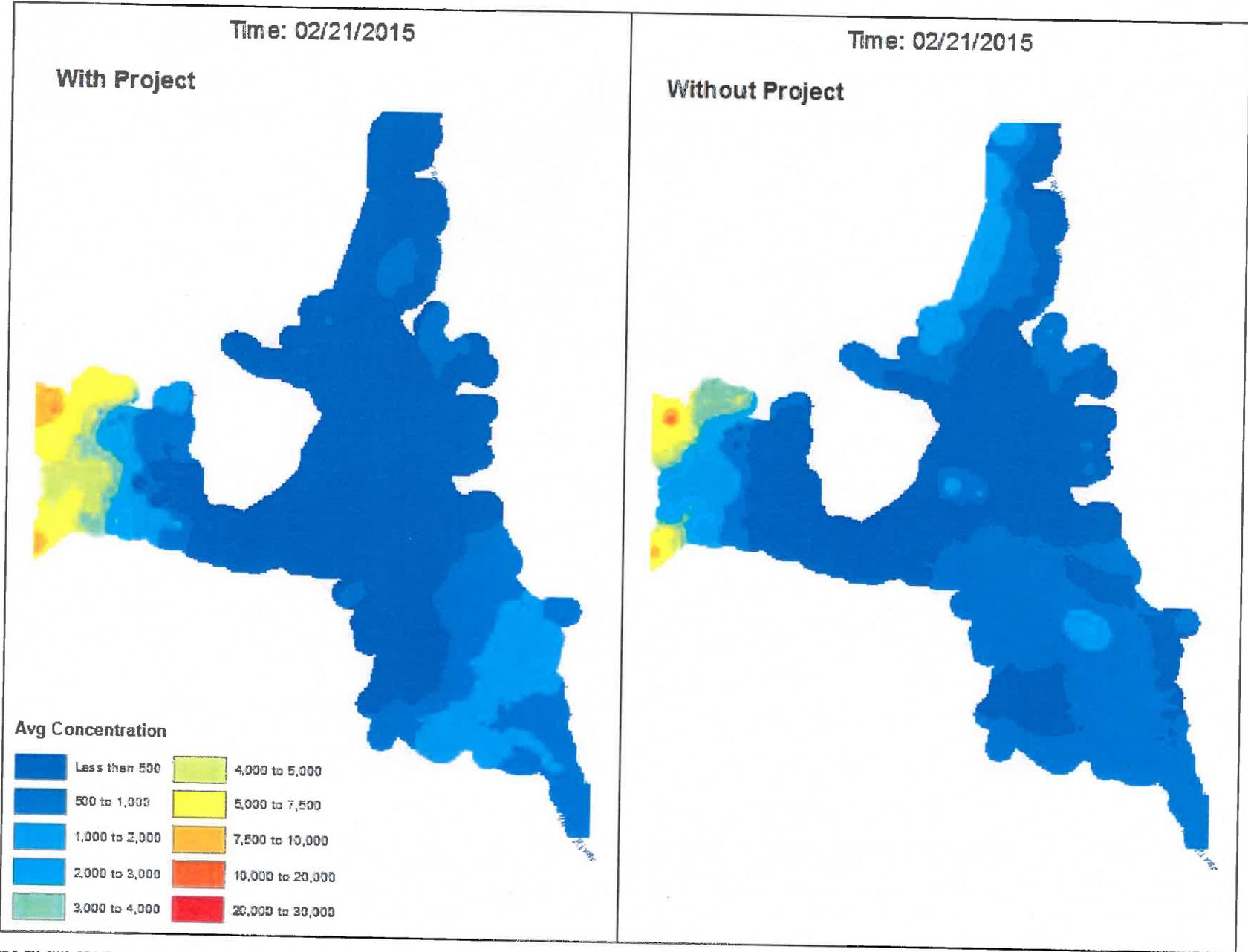


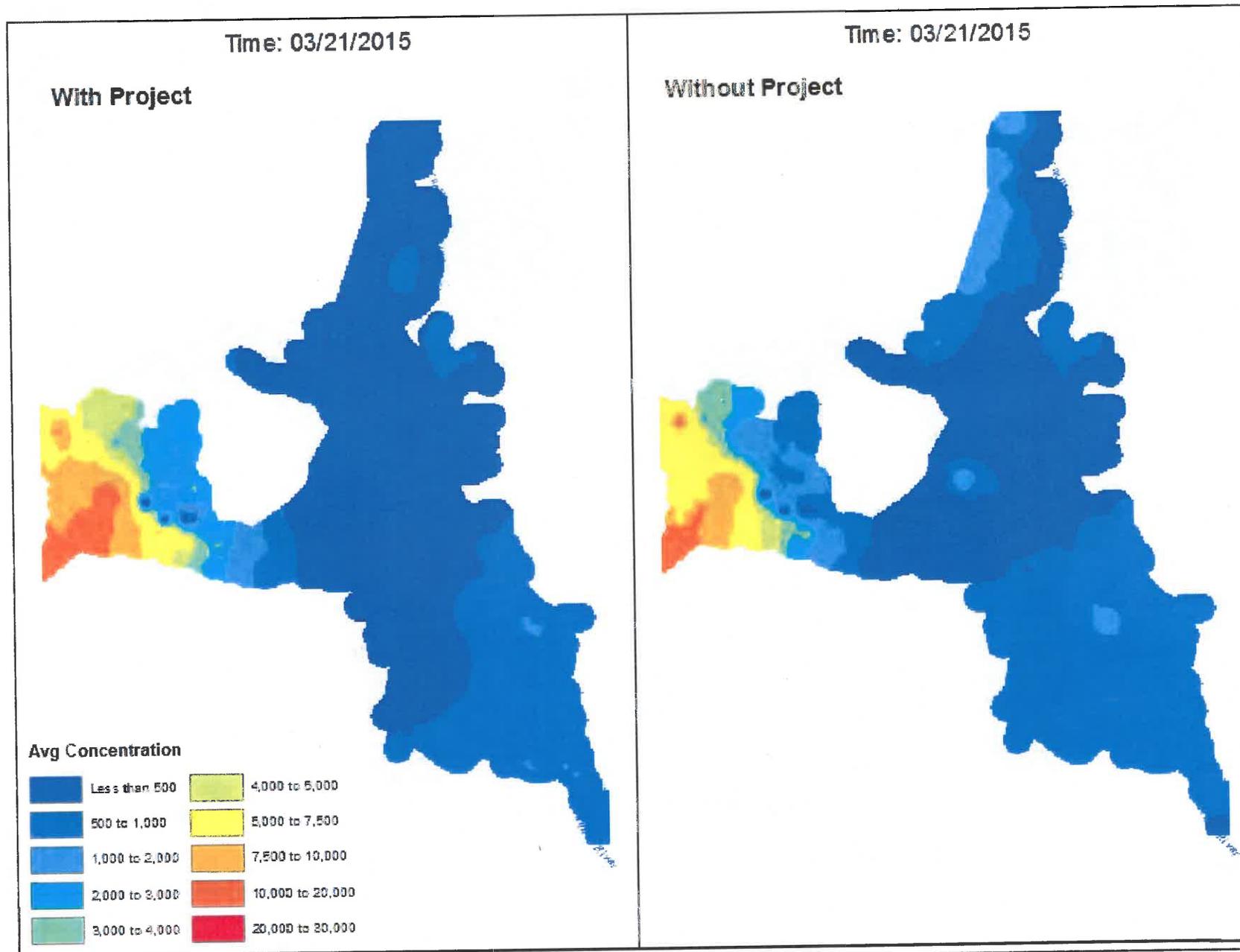


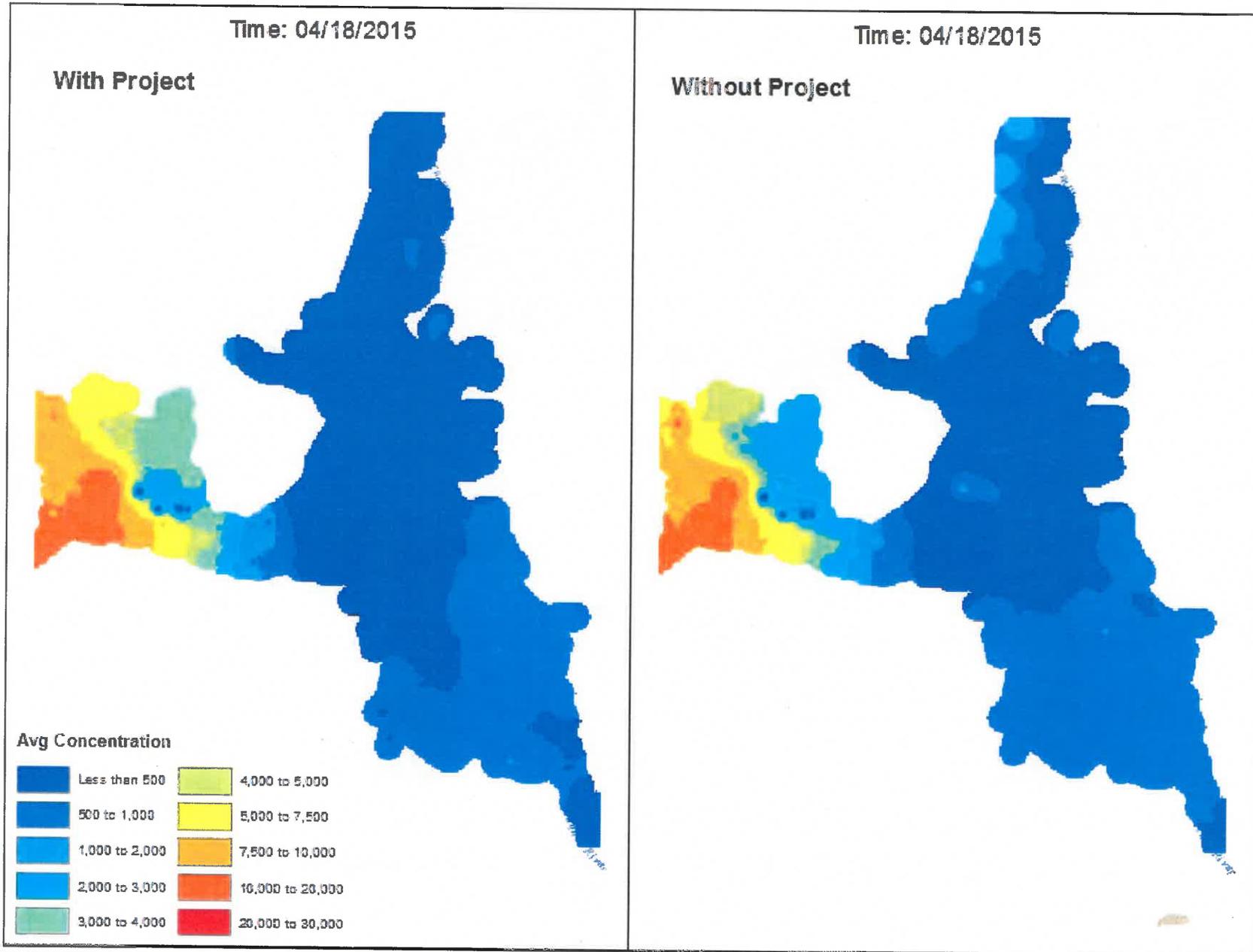


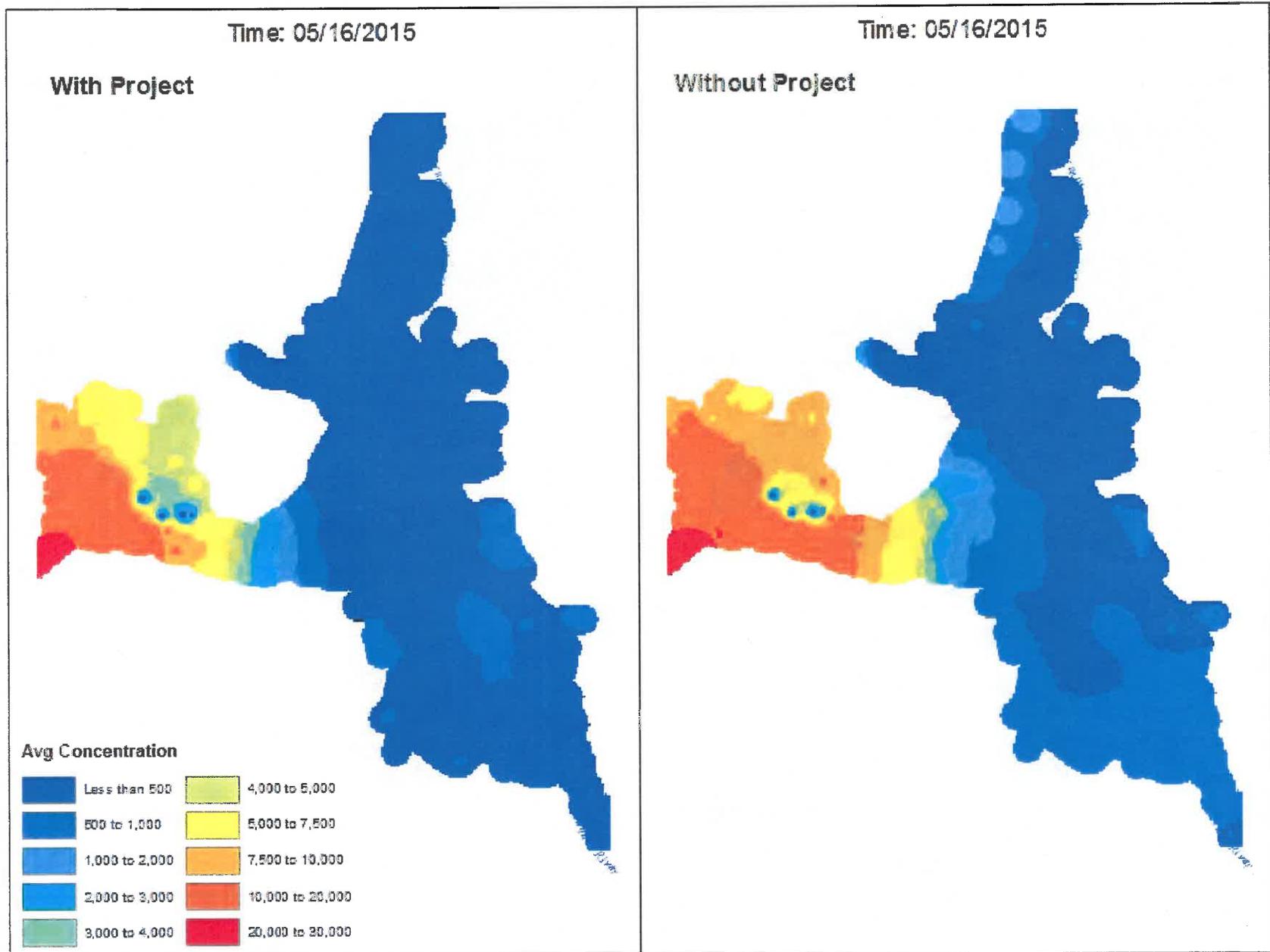


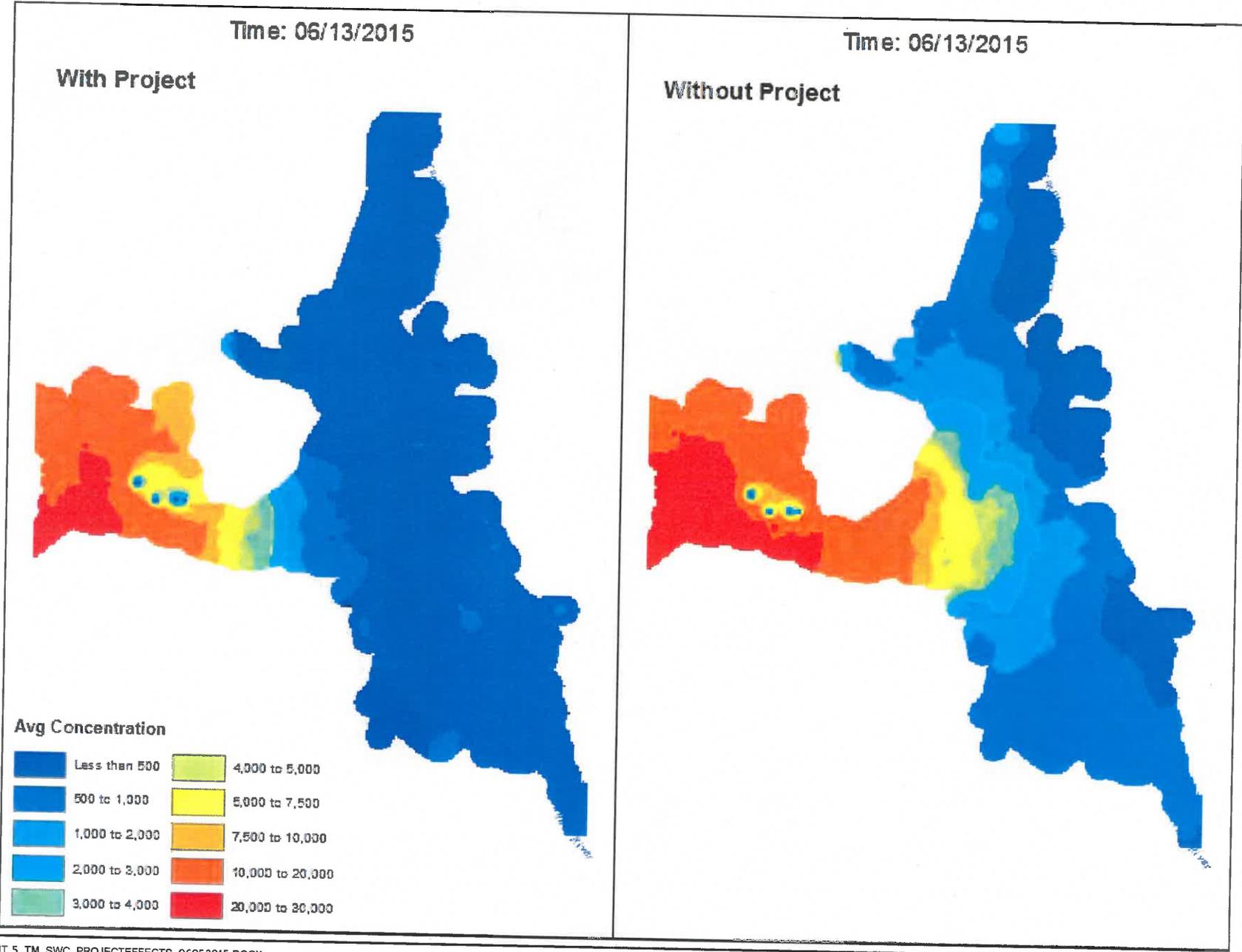


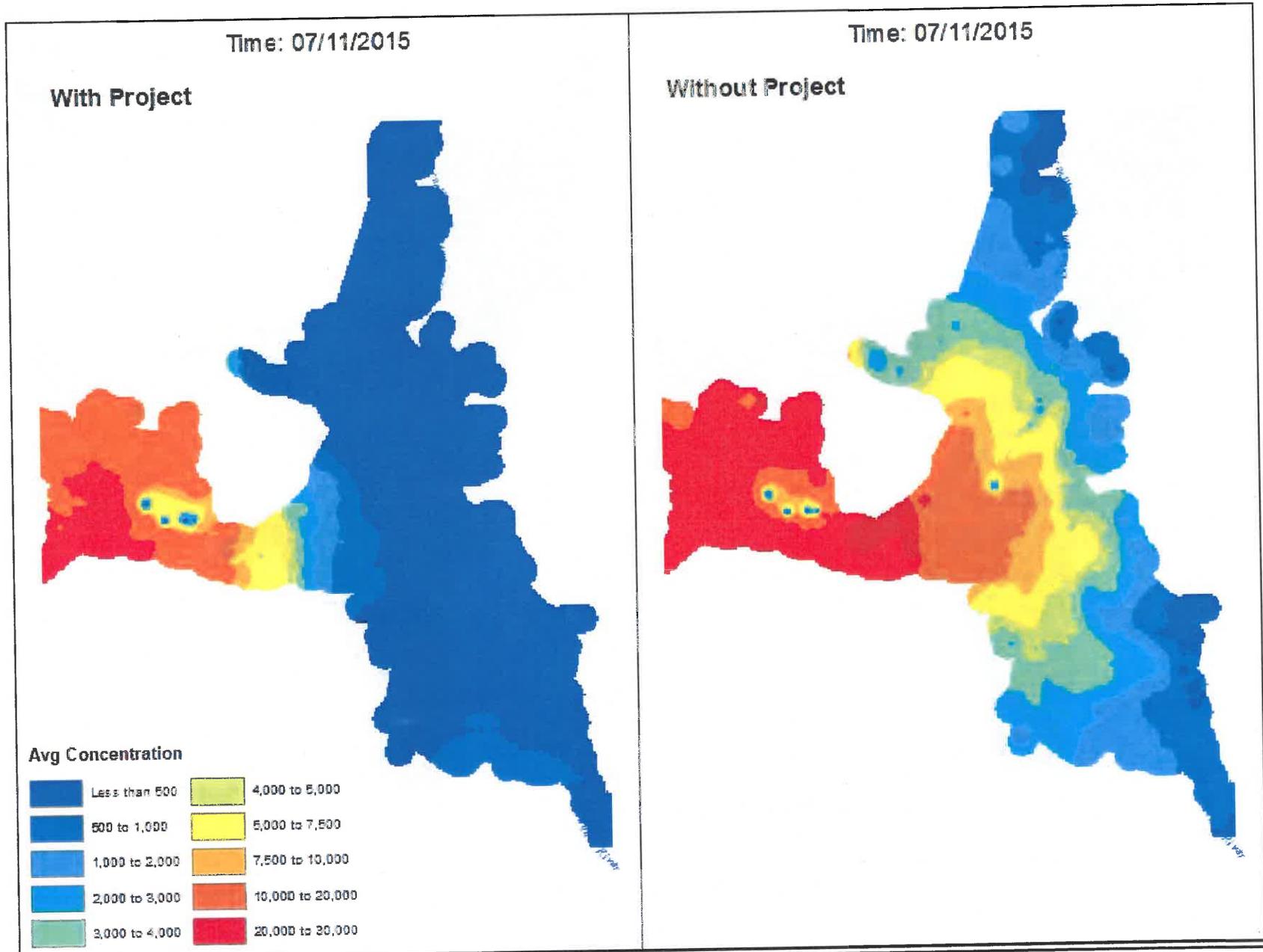


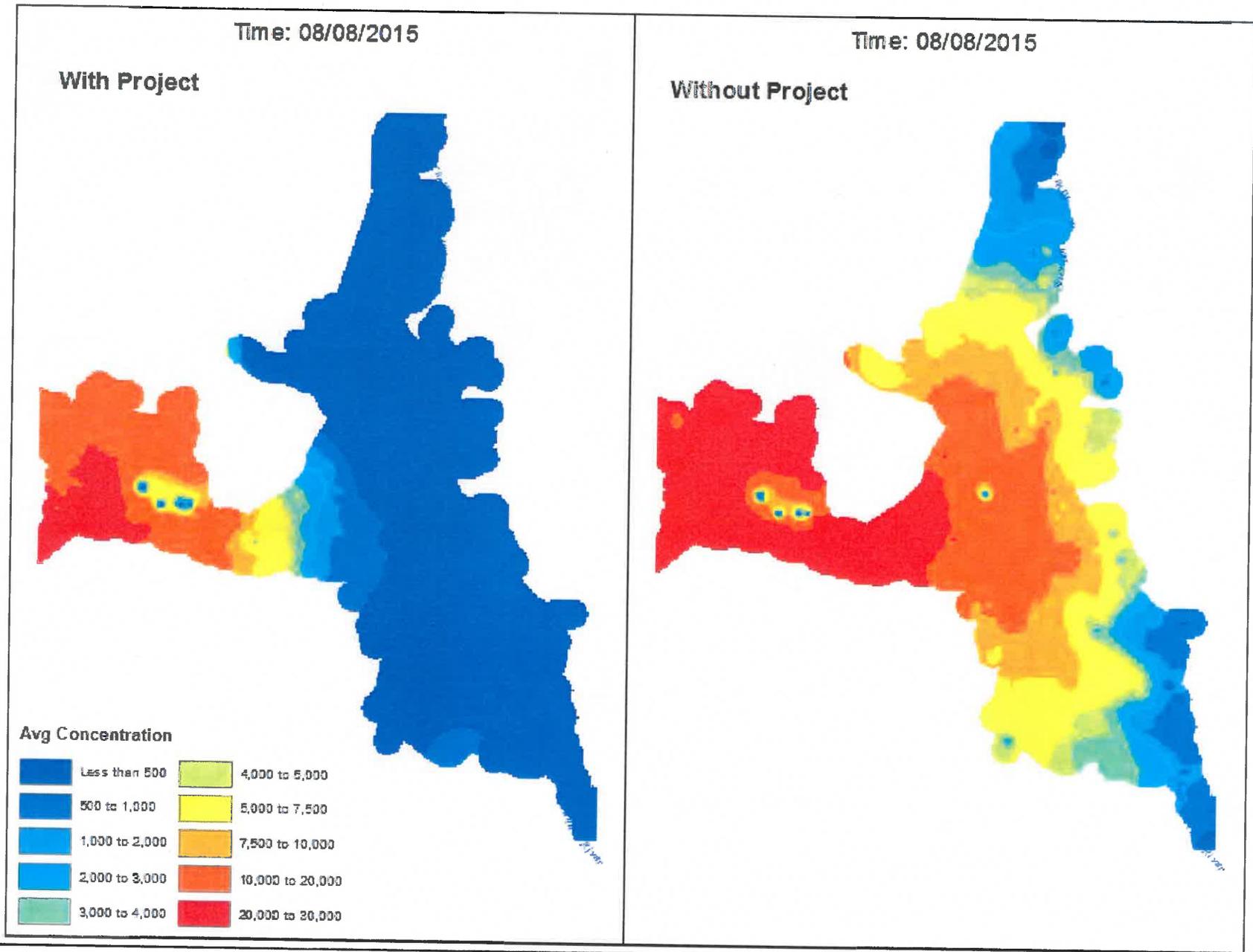


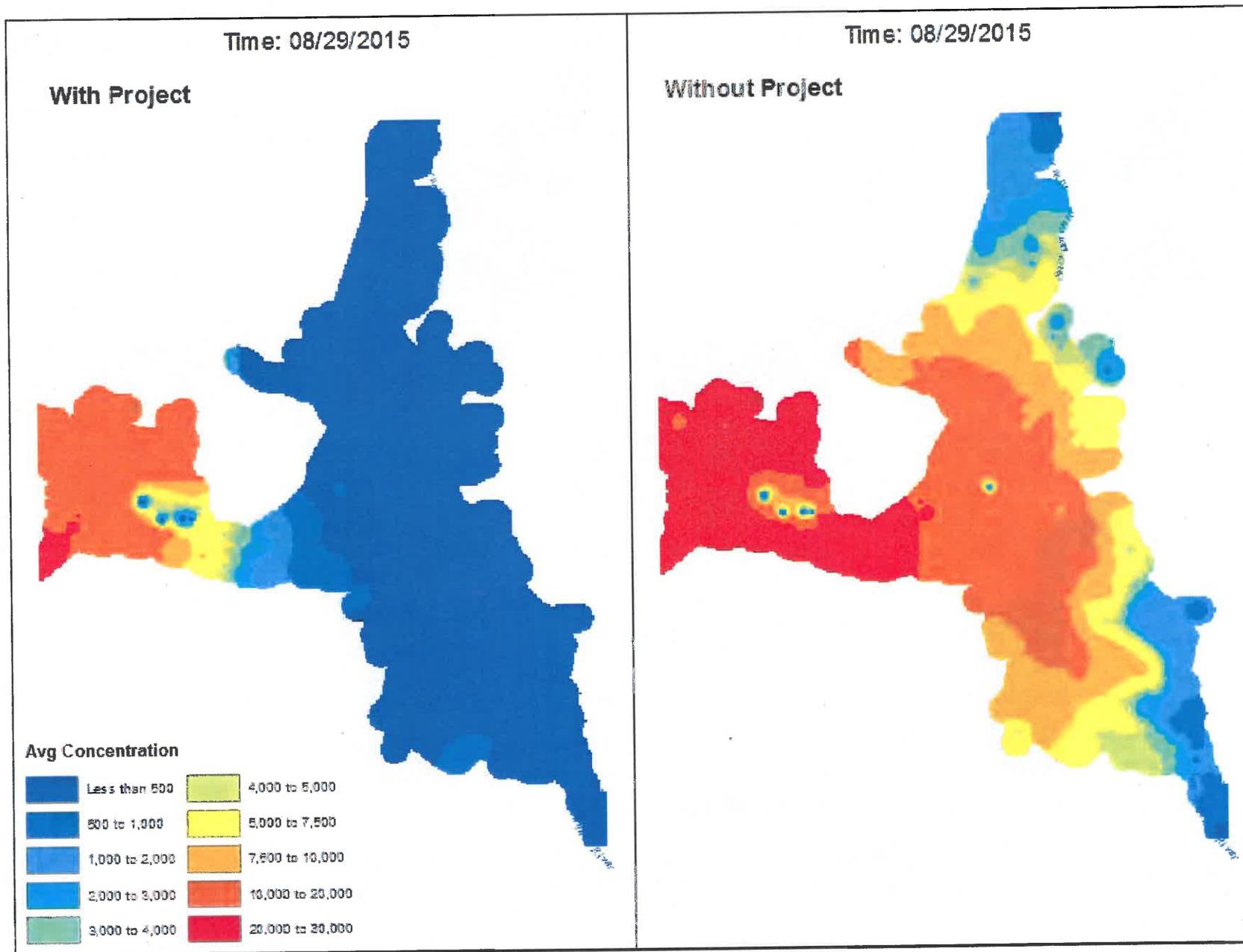












Appendix A: Methodology to Estimate Vernalis Salinity Under Without Project Conditions (from USBR & SDWA 1980) – provided by SWC

Calculate Salt Load Based on Flow (Table VI-7, page 89)

TABLE VI - 7
CHLORIDE LOAD VS. FLOW COEFFICIENTS AT VERNALIS
1930 - 1950

MONTH	C1	C2	# OF PAIRS*	R
OCTOBER	.3416451758E+03	.7238303788	7	.993
NOVEMBER	.3393044927E+03	.6880766404	6	.987
DECEMBER	.3639052910E+03	.6787756342	7	.972
JANUARY	.3926349175E+03	.6231583178	10	.965
FEBRUARY	.5368474514E+03	.5675747831	9	.914
MARCH	.4968879101E+03	.6035477710	10	.951
APRIL	.3866605718E+03	.5624873484	9	.942
MAY	.3805863844E+03	.5399998219	9	.920
JUNE	.6355065225E+03	.5175446121	9	.849
JULY	.6038656134E+03	.6219848451	8	.900
AUGUST	.3874538954E+03	.7410226741	8	.991
SEPTEMBER	.3500905302E+03	.7524035817	8	.989

* # OF PAIRS DOES NOT INCLUDE RESTRICTION POINT (.5,200)

$$y = C1 \cdot (X)^{C2}$$

Convert Salt Load to Chloride Concentration (page 110)

$$p/m = \frac{\text{Load}}{\text{Flow} \times 1.36}$$

where,

p/m = parts per million Cl⁻
Load = chloride load in tons
Flow = 1,000's of acre-feet

Calculate Specific Conductance EC from Chloride Concentration (page 86)

$$\text{Cl}^- = 0.15 \text{ EC} - 5.0 \quad (2a)$$

$$0 < \text{EC} < 500$$

$$\text{Cl}^- = 0.202 \text{ EC} - 31.0 \quad (2b)$$

$$500 < \text{EC} < 2000$$

Rearranging the equations to solve for EC yields:

$$\text{EC} = (\text{Cl}^- + 5.0) / 0.15 \quad 0 < \text{EC} < 500$$

$$\text{EC} = (\text{Cl}^- + 31.0) / 0.202 \quad 500 < \text{EC} < 2000$$

EXHIBIT B



NOTICE OF INTENT TO APPEAR

Byron-Bethany Irrigation District plans to participate in the water right hearing regarding (name of party or participant)

Administrative Civil Liability
against
Byron-Bethany Irrigation District

scheduled to commence
**Wednesday, October 28, 2015 and continue, if necessary,
on October 29 and 30, 2015
at 9:00 a.m.**

1) Check only one (1) of the following:

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
See Attached			

(If more space is required, please add additional pages or use reverse side.)

2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:

Name (Print): Daniel Kelly

Mailing Address: 500 Capitol Mall, Suite 1000, Sacramento, CA 95814

Phone Number: (916) 446-7979 Fax Number: (916) 446-8199

E-mail: dkelly@somachlaw.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/2/2015

Name	Subject of Proposed Testimony	Estimated Length of Direct Testimony	Expert Witness (Yes/No)
Rick Gilmore	Water diversions and related issues	1 hour	No
TBD	Water availability	2 hours	Yes
TBD	SWRCB water availability analysis	1 hour	Yes
TDB	SWRCB water demand database	1 hour	Yes
TBD	SWRCB water supply data	1 hour	Yes
Mountain House Community Services District	Mountain House demand and use	1 hour	No
Mariposa Energy Project	MEP use	20 minutes	No
Contra Costa Airport	Airport use	20 minutes	No
Tom Howard	Curtailments, water supply, and related matters	1 hour	No
John O'Hagan	Curtailments, water supply, and related matters	4 hours	No
Kathy Mrowka	Curtailments, water supply, and related matters	2 hours	No
Michael George	Curtailments, water supply, and related matters	1 hour	
TBD	Criteria in Water Code section 1055.3	4 hours	Yes

Byron-Bethany Irrigation District reserves the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list.

BBID anticipates that it will not have written testimony to submit for Tom Howard, John O'Hagan, Kathy Mrowka, or Michael George. BBID intends on deposing these witnesses and may be able to rely, at least in part, on the deposition transcripts of each witness in place of written testimony. If so, the estimated times for direct testimony will likely be substantially less than provided above.

EXHIBIT C

October 22, 2015

Via Electronic Mail

Tam M. Doduc, Hearing Officer
State Water Resources Control Board
Division of Water Rights
1001 I Street, 2nd Floor
Sacramento, CA 95814

Re: **BBID ACL HEARING (ENF01951)**
Revised Witness List and List of Legal Issues

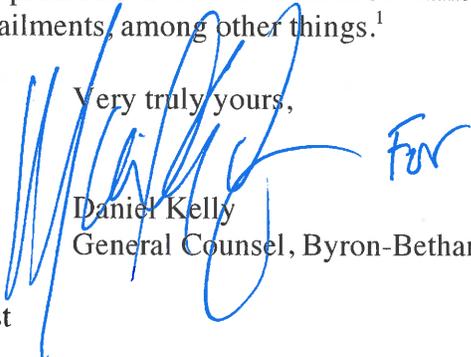
Dear Hearing Officer Doduc:

As requested by your October 2, 2015 letter following the pre-hearing conference in the ENF01951, attached please find BBID's revised witness list for the hearing in ENF01951. In addition, BBID provides the following list of legal issues that should be briefed and ruled upon prior to the hearing in ENF01951:

- Whether the State Water Resources Control Board has the authority to curtail pre-1914 appropriative water rights.
- Whether Water Code section 1052 applies to water diverted under pre-1914 appropriative and/or riparian water rights.

The determination of these issues may obviate the need to continue with the evidentiary hearing in ENF01951. BBID will also file a Motion to Dismiss the proceedings in ENF01951 based on numerous grounds, including the failure to maintain required separation between the prosecution team and decision makers on water availability and water right curtailments, among other things.¹

Very truly yours,

 For
Daniel Kelly
General Counsel, Byron-Bethany Irrigation District

DJK:yd

cc: See attached Service List

¹This motion is consistent with the argument by the SWRCB before the Court, where it argued: "Additionally, as previously discussed, petitioners have adequate alternative remedies, such as moving the Board to disqualify members of the prosecution or hearing team, or moving to recuse any allegedly biased Board member." (SWRCB's Amended Consolidated Opposition to Ex Parte Applications, filed September 17, 2015, at p. 7.) As the SWRCB has taken the position that such a motion is an administrative remedy, BBID intends to seek such relief.

Name	Subject of Proposed Testimony	Estimated Length of Direct Testimony	Expert Witness (Yes/No)
Rick Gilmore	Key Issues 1 and 2 Water Availability BBID operations, diversion, and use	1 hour	No
Nicholas Bonsignore, P.E.	Water Availability Key Issues 1&2	1 hour	Yes
Robert Wagner, P.E.	Water Availability Key Issues 1&2	1 hour	Yes
Greg Young, P.E.	Water Availability Key Issues 1&2	1 hour	Yes
Susan Paulsen, Ph.D., P.E.	Water Availability Delta Hydrodynamics	1 hour	Yes
Edwin Pattison	Community of Mountain House	0.5 hours	No
Tom Howard	Curtailments, water supply, and related matters	1 hour	No
John O'Hagan	Curtailments, water supply, and related matters	1 hour	No
Kathy Mrowka	Curtailments, water supply, and related matters	1 hour	No
Michael George	Curtailments, water supply, and related matters	1 hour	No

Byron-Bethany Irrigation District reserves the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list.

BBID anticipates that it will not have written testimony to submit for Tom Howard, John O'Hagan, Kathy Mrowka, or Michael George. BBID intends on deposing these witnesses and may be able to rely, at least in part, on the deposition transcripts of each witness in place of written testimony. If so, the estimated times for direct testimony will likely be substantially less than provided above.

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

(Revised 9/2/15; Revised: 9/11/15)

<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p>	<p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p>
<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL 235 East Weber Avenue Stockton, CA 95202 ngmplcs@pacbell.net dantejr@pacbell.net</p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Boc 942836 Sacramento, CA 94236-0001 robin.mcginis@water.ca.gov</p>
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com</p>	<p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 towater@olaughlinparis.com vkincaid@olaughlinparis.com</p>

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EXHIBIT D

1 SOMACH SIMMONS & DUNN
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2 DANIEL KELLY, ESQ. (SBN 215051)
MICHAEL E. VERGARA, ESQ. (SBN 137689)
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)
500 Capitol Mall, Suite 1000
4 Sacramento, California 95814-2403
Telephone: (916) 446-7979
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT
7

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of ENFORCEMENT ACTION
12 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
13 UNAUTHORIZED DIVERSION OF WATER
FROM THE INTAKE CHANNEL TO THE
14 BANKS PUMPING PLANT (FORMERLY
ITALIAN SLOUGH) IN CONTRA COSTA
15 COUNTY

SWRCB Enforcement Action ENF01951
WRITTEN TESTIMONY OF RICK
GILMORE

16
17 I, Rick Gilmore, declare:

18 My name is Rick Gilmore. I currently serve as the General Manager for the Byron-
19 Bethany Irrigation District (BBID), a multi-county special district serving portions of Alameda,
20 Contra Costa, and San Joaquin Counties. BBID provides agricultural and municipal-industrial
21 (M&I) water throughout seven service areas to over 30,000 acres over 47 miles, including serving
22 as a wholesaler to the City of Tracy; providing raw water to Mountain House, a community of
23 15,000 residents in San Joaquin County; providing raw untreated water to two energy plants,
24 AltaGas San Joaquin Energy Inc. in San Joaquin County and Mariposa Energy, LLC in Alameda
25 County; providing water to municipal entities such as G3 Enterprises (Gallo), Costco, Safeway,
26 and Prologis International, LLC, to name just a few; and providing fire suppression water to the
27 eastern portion of Contra Costa County including the airport in Byron. I have been with BBID
28 for over 33 years and have been the General Manager for nearly 24 years, since 1993. Prior to

1 serving as BBID's General Manager, I worked in BBID's water operations department, and then
2 as Superintendent.

3 In addition to serving as the General Manager for BBID, I also serve on the Association of
4 California Water Agencies' (ACWA) State Legislative and Federal Affairs Committees. I am a
5 board member on the National Water Resources Association and also serve as Director on the San
6 Luis & Delta-Mendota Water Authority, a joint powers authority established in 1992 comprised
7 of 29 member agencies representing approximately 2,100,000 acres within the western San
8 Joaquin Valley, in San Benito and Santa Clara counties. Additionally, I serve on the East County
9 Water Management Association.

10 I am a current Board member and past President of California Utility Executive
11 Management Association. I am past President of ACWA / Health Benefits Authority, a joint
12 powers authority providing health benefits to approximately 350 member agencies with
13 approximately 10,000 plan participants, which has recently merged with the ACWA Joint Powers
14 Insurance Authority. In addition to serving on numerous ACWA committees, I served on the
15 Board of Directors of ACWA, a consortium of 450 member agencies, from 2008-2011. I
16 formerly served on Power Water Resources Pooling Authority and am a former Commissioner of
17 the San Joaquin County Water Advisory Commission.

18 I served as General Manager of the Plain View Water District (PVWD), a position in
19 which I guided the consolidation of PVWD with BBID in 2004. I serve as General Manager of
20 the Byron Sanitary District and as Executive Director of the Byron-Bethany Joint Powers
21 Authority and the Byron-Bethany Public Finance Authority.

22 In my various roles, including my more than 33 years with BBID, I am familiar with the
23 history of water operations in the Delta region and with water availability as it relates to BBID. As
24 part of more than three decades of involvement in water operations in the Delta, I have read many
25 volumes of materials related to the use of Delta water, including use and availability in dry years.
26 My review of materials over the years has included review of Department of Water Resources
27 (DWR) publications from the 1920s and 1930s, including DWR's Bulletin 23-29 through Bulletin
28 23-35; Bulletin 21-1929; many of the documents from the litigation DWR initiated against BBID

1 from the 1976-77 drought, including the deposition of Harvey O. Banks (Exhibit BBID294); and
2 others. In 2014, with the ongoing drought conditions and the threat of curtailments, I
3 commissioned the District's Consulting Engineer, CH2M, to study water availability in the Delta
4 as it relates to BBID. CH2M served as BBID's consulting engineer since 1964, and represented
5 BBID in litigation brought by DWR against BBID and others resulting from water use during the
6 1976-77 drought. (Exhibit BBID336.) My experience and study of the historical water use along
7 with the information from our engineers helped inform my decisions in 2015.

8 I believed the State Water Resources Control Board's (SWRCB) June 12 directive to
9 cease diversions was inappropriate because water has always been available to BBID during the
10 month of June, and the SWRCB's analysis ignored the presence of water in the Delta that exists
11 even when flows into the Delta subside. Heading into the spring and summer of 2015, I referred
12 back to the historical use of water by BBID, specifically in 1931, which of course was pre-
13 project. In 1931, BBID diverted water present in the Delta channels through October. BBID has
14 always diverted throughout the summer months, even when flows dropped to near zero and
15 salinity was high. With the work done in 2014 and 2015 by the District's Consulting Engineer, all
16 this information confirmed that BBID had water available. To my knowledge, BBID has never
17 been part of any proceeding before the SWRCB or the courts that would have altered the scope of
18 BBID's water rights or otherwise deprive BBID of its right to the use of water as established in
19 the early 1900s. Even in the litigation brought by DWR against BBID in the 1970s, the dispute
20 was not on the availability of water. The SWRCB's attempt to redefine the availability of water
21 in the Delta through this enforcement proceeding is a threat to BBID's established rights.

22 A. GENERAL BACKGROUND OF BBID

23 1. **History of the District**

24 1.1. Formation

25 BBID was formed on December 22, 1919, and succeeded to all of the works of the old
26 Byron-Bethany Irrigation Company on March 5, 1921.

27 1.2. Water Rights

28 BBID's water rights date back to 1914, by virtue of a Notice of Appropriation of Water

1 dated May 18, 1914 (Notice of Appropriation), filed by the Byron-Bethany Irrigation Company.
2 A copy of the Notice of Appropriation is Exhibit BBID202. The original Notice of Appropriation
3 claimed 40,000 miner inches of water measured under four-inch pressure from “water flowing in
4 Old River[.]”

5 1.3. Consolidation with Plain View Water District

6 In 2004, PVWD was consolidated with BBID. PVWD’s Central Valley Project (CVP)
7 Water Service Contract was assigned to BBID. The Water Service Contract provides an
8 entitlement of 20,600 acre-feet of CVP water for irrigation and M&I purposes. A copy of the
9 District’s boundary map is Exhibit BBID203.

10 **2. BBID’s Point of Diversion**

11 2.1. Original Location – Italian Slough

12 BBID’s original point of diversion was located 41 miles upstream from Antioch on Old
13 River at the end of Italian Slough, not far from the Southern Pacific Railroad tracks, which still
14 exist today. A copy of the Bethany Quadrangle map from 1911, showing the location of Italian
15 Slough in relation to the railroad tracks, is Exhibit BBID204. Pictures of BBID’s original intake
16 structure and pumps are Exhibit BBID205. In Exhibit BBID205, you can see the railroad tracks
17 behind the original pump house. The photos are dated February 17, 1918.

18 2.2. Current Location - Milepost (MP) 1.83 on the Intake Channel to the Harvey O. Banks
19 Pumping Plant (see Exhibit BBID211)

20 2.2.1. Construction of the State Water Project (SWP) necessitated the relocation of
21 BBID’s original point of diversion. In 1963, the State commenced construction of the Clifton
22 Court facilities, which included Clifton Court Forebay, the Harvey O. Banks Pumping Plant, and
23 the intake channel connecting Clifton Court Forebay to the Harvey O. Banks Pumping Plant.
24 BBID’s pumping facilities were constructed on the intake channel under an agreement with DWR
25 executed in 1964. A copy of the 1964 Agreement between BBID and the State of California,
26 acting by and through its Department of Water Resources (1964 Agreement), is Exhibit
27 BBID206.

28 The 1964 Agreement provided for, among other things, the relocation of BBID’s pumping

1 plants and points of diversion to the SWP intake channel. (1964 Agreement, ¶4.) Through the
2 1964 Agreement, the State of California also consented to the “permanent and perpetual use by
3 [BBID], without cost, of State’s facilities and of that portion of its right of way required for the
4 construction, operation, and maintenance of [BBID’s] permanent facilities . . .” (1964
5 Agreement, ¶7.) Pursuant to the 1964 Agreement, BBID relocated its pumping facilities to their
6 current location and has operated those facilities since that time. (Exhibit BBID336.)

7 2.2.2. Pursuant to the 1964 Agreement, BBID operates two pumping plants off the Intake
8 Channel to the Harvey O. Banks Pumping Plant. The location of the BBID and DWR pumping
9 facilities are Exhibit BBID211. Pictures of the relocated pumping facilities (Pump Station 1-
10 North and Pump Station 1-South) are Exhibit BBID214. Pumping Plant 1-North (Exhibit
11 BBID215), with a pumping capacity of 100 cubic feet per second (cfs), provides water for
12 agricultural and M&I uses to lands within eastern Contra Costa County. The original portion of
13 Pumping Plant 1-South (Exhibit BBID216) has a capacity of 100 cfs and provides water for
14 agricultural and M&I uses to the eastern portions of Contra Costa and Alameda Counties. In
15 2000, Pumping Plant 1-South was expanded to include pumping and conveyance facilities, with a
16 pumping capacity of 30 cfs, in order to provide water to the new community of Mountain House.
17 The pumping plants are operated remotely via supervisory controls at the BBID Headquarters.
18 The Mountain House water treatment plant operator controls the Mountain House pumping
19 facilities at Pumping Plant 1-South via remote flow selection.

20 2.2.3. Clifton Court Forebay Operations

21 Clifton Court Forebay acts as a regulating reservoir for both the State Water Project and
22 for BBID’s pumping facilities. The gates at Clifton Court Forebay are operated on schedules set
23 by DWR, and BBID has no control over the gate operation schedule. However, BBID pumps
24 water from MP 1.83 at the Intake Channel to the Harvey O. Banks Pumping Plant, irrespective of
25 whether the gates are in the open or closed position.

26 At times, the gates of Clifton Court Forebay are closed for extended periods of time.
27 During those times, BBID continues to divert from the water stored in Clifton Court Forebay. It
28 is BBID’s position that the 1964 Agreement with DWR allows BBID to use those facilities.

1 2.2.4. Other DWR Agreements

2 2.2.4.1. In 1993, BBID and DWR entered into another agreement (1993
3 Agreement) for the purpose of facilitating an exchange of water with DWR that would have
4 provided, among other things, that DWR would divert some of BBID's pre-1914 water during the
5 summer months and that BBID would divert some of DWR's water during the winter months.
6 The 1993 Agreement is Exhibit BBID207. The purpose of the 1993 Agreement was to
7 supplement BBID's water rights in order to provide year-round water in anticipation of the
8 development of the community of Mountain House.

9 The exchange contemplated by the 1993 Agreement never happened and DWR and
10 BBID instead entered into another Agreement in 2003 (2003 Agreement).

11 2.2.4.2. The 2003 Agreement is Exhibit BBID208. Through the 2003 Agreement,
12 DWR and BBID agreed that BBID had the right to up to 50,000 acre-feet of water in each year,
13 which could be diverted year-round, for agricultural, municipal, and industrial purposes. (Exhibit
14 BBID208, ¶ 9.) The 2003 Agreement recognized and supplanted the 1993 Agreement. In
15 BBID's view, the 2003 Agreement provides for the continued diversion of water by BBID, up to
16 50,000 acre-feet, year round. In a September 23, 2014 letter to the SWRCB, DWR confirmed
17 that under the 2003 Agreement, DWR provides BBID with up to 50,000 acre-feet per year of
18 water. A copy of that letter is Exhibit BBID217. DWR agreed not to challenge BBID's year-
19 round use of up to 50,000 acre-feet of water for agricultural, municipal, and industrial uses.

20 **3. Uses of Water**

21 Water diverted by BBID is used for agricultural and M&I purposes. BBID provides M&I
22 water to the 15,000 residents of Mountain House. In addition to residential use, a portion of that
23 water goes to schools and fire suppression throughout the community. BBID also provides water
24 to the Mariposa Energy Plant (MEP) and the Contra Costa County "Byron" airport. Cal Fire and
25 local fire agencies in the tri-county region rely on BBID's water system for water supplies for fire
26 suppression.

1 B. WATER AVAILABILITY

2 1. **Water Availability**

3 My understanding, as General Manager of BBID, of water availability in the Delta is what
4 I understand to be a universally held concept in the Delta. Water availability in the Delta is never
5 a question of quantity, it is only a question of quality for its intended use. (Exhibit BBID336.)
6 That definition of water availability as it relates to the Delta is on page 27 of DWR Bulletin 76
7 (1978), which states:

8 Because the Delta is open to the San Francisco Bay complex and Pacific Ocean
9 and its channels are below sea level, *it never has a shortage of water*. If the inflow
10 from the Central Valley is insufficient to meet the consumptive needs of the
11 Delta, saline water from the bay fills the Delta from the west. *Thus, the local
12 water supply problem in the Delta becomes one of poor water quality, not
13 insufficient quantity*. Today degradation by agricultural, municipal, and industrial
14 waste discharges in the San Francisco-Bay Delta area compounds the
15 problem.....During the 24-year period from 1920 to 1944, there were 7 years of
16 severe salinity intrusion in the interior Delta. As the use of water upstream and
17 export from the Delta increased, average annual Delta outflow has been steadily
18 reduced... (Exhibit BBID209 (emphasis added).)

15 The North Delta Water Agency (NDWA) has a contract with DWR, which I have
16 frequently reviewed and am familiar with. That contract is Exhibit BBID229. Recital (e) of that
17 contract provides:

18 Water problems within the Delta are unique within the State of California. As a
19 result of the geographical location of the lands of the Delta and tidal influences,
20 *there is no physical shortage of water*. Intrusion of saline ocean water and
21 municipal, industrial and agricultural discharges and return flows, tend, however,
22 to deteriorate the quality. (Exhibit BBID229 (emphasis added).)

21 East Contra Costa Irrigation District (ECCID) also has a “water quality” contract with
22 DWR that guarantees the maintenance of water quality at ECCID’s point of diversion. (Exhibit
23 BBID278.)

24 Even the Opinion and Order of the SWRCB’s Division of Water Rights, Decision No.
25 1462, 1477, 1478, 1479, 1480, 1481, 1482, 1938, 1964, 2099, 2408, 2409, 2410, 2534, 2535,
26 2997, 3348, 3469, 4228, 4229, 4737, 4768, D-100, Decided April 17, 1926, explains that “the
27 [D]elta channels form a vast reservoir[.]” (Exhibit WSID0097, p. 11.)
28

1 DWR's repeated reference to unlimited quantities of water in the Delta and the DWR
2 contracts with NDWA and ECCID establish the universally understood concept of the constant
3 availability of water in the Delta, the sole issue being water quality for its intended purpose.
4 Accordingly, water has been, and always is "available" for BBID to divert when it is of sufficient
5 quality for the uses within BBID.

6 **2. Water Availability in June 2015**

7 As I explained above, my understanding of water availability in the Delta is that there is
8 always water available, and it is only a question of quality for its intended use. In the history of
9 operations at BBID, BBID has never experienced poor water quality where we could not divert
10 water for beneficial purposes anytime during the summer. If ever water quality degraded to the
11 level that it impaired crop production, it was only in late August or parts of the fall, and that was
12 only in one or two years since the early 1900s.

13 Although BBID diverted water during the month of June of every year since 1920, as part
14 of BBID's effort to understand if water of sufficient quality would be available for BBID this
15 year, BBID again directed CH2M to review water quality at BBID's diversion. With the
16 restrictions being placed on the CVP's ability to release water from Shasta and move water to
17 Jones Pumping Plant, water quality in the Delta might be a factor as we got into the late summer
18 of 2015. To that end, CH2M began looking at cropping within BBID to model what kind of
19 water quality BBID might expect given possibility of water quality degradation. As we moved
20 into June 2015, CH2M's work evolved from simply looking at water quality, to looking at full
21 natural flow and other water availability issues. Shortly thereafter, the State Water Contractors
22 (SWC) filed their complaint against Delta diverters and CH2M's work for BBID focused on
23 examining the allegations and modeling in the SWC complaint.

24 CH2M's preliminary work for BBID in this regard revealed that, even with the very
25 conservative information used in the modeling behind the SWC complaint, there would be water
26 of sufficient quality for BBID to divert for at least the entire month of June 2015. This modeling
27 was conducted in a "without project" condition, removing any effects the SWP and CVP would
28 have in improving Delta water quality in 2015. A copy of the SWC complaint is Exhibit

1 BBID218.

2 While, as General Manager of BBID, I dispute the assumptions contained in the inputs
3 used by the SWC, I thought it was fine to use these overly-restrictive values, including cutting off
4 Delta inflows early every year, as they still resulted in water of sufficient quality being available
5 to BBID for the entire month of June 2015 – the only time period at issue in this enforcement
6 proceeding. At my direction, CH2M then conducted a fingerprinting analysis to track the various
7 sources of water that contributed to the water supply near BBID’s point of diversion throughout
8 the year. CH2M ran the fingerprinting model not just for 2015, but also for 1931 to see whether
9 the model could reasonably replicate what happened in 1931. We determined that 1931 would be
10 an appropriate year to examine as it was at the end of a multi-year drought. CH2M’s preliminary
11 findings confirmed that water of sufficient quality was available to BBID for the entire period
12 covered by the Administrative Civil Liability (ACL) Complaint.

13 As BBID prepared its Notice of Intent to Appear in the enforcement proceeding, BBID
14 intended on identifying CH2M as an expert witness to present the water quality and other
15 modeling work and findings to the SWRCB. My understanding is, because of a supposed conflict
16 with the SWC, CH2M informed BBID that it would no longer assist BBID with this effort.

17 **3. June 12, 2015 Curtailment Notice**

18 BBID received the Curtailment Notice via certified mail on June 15, 2015. (Exhibit
19 BBID219.) I, along with other managers, understood that the 7-day certification period contained
20 in the Curtailment Notice meant that all diversions had to cease by the end of that certification
21 period. This 7-day timeframe to cease diversions was also noted in one of the region’s local
22 newspapers, the Stockton Record. (Exhibit BBID212.) With this 7-day period widely discussed
23 and understood by water managers and noted in the press, with no clarification or public
24 disagreement by the SWRCB, I understood it to be correct. I later learned that the SWRCB knew
25 of the understanding that there were 7 days to wind down diversions. (Exhibit BBID213.) As
26 such, and because many growers within BBID had truck crops planted and near ready for harvest,
27 BBID used the 7-day wind-down period to get the last irrigation to those crops and to get the soil
28 profile of permanent crops saturated as BBID continued to search for alternate water supplies.

1 C. WHAT DID BBID DO THIS YEAR IN ANTICIPATION THAT WATER QUALITY
2 COULD DEGRADE?

3 **1. CVP Service Area**

4 BBID received a 0% allocation from the Bureau of Reclamation for agricultural water.
5 For M&I uses, BBID received an allocation equal to 50% of its historical use, approximately 500
6 acre-feet.

7 BBID participated as a member of the San Luis & Delta-Mendota Water Authority's 2015
8 North of Delta Water Transfer Program. BBID and other Authority member agencies were
9 concerned that water being backed up in Shasta would be held in Shasta by the Bureau of
10 Reclamation throughout the summer as a result of issues related to temperature on the
11 Sacramento River and SWRCB cold water pool mandates. Because of these restrictions, and
12 other restrictions related to pumping at Jones Pumping Plant, BBID and other CVP contractors
13 lying between the Delta and San Luis Reservoir agreed to a "Pump Back Project," whereby
14 pumps would be installed at various locations in the Delta Mendota Canal, and water that was in
15 the San Luis Reservoir would be pumped up the Delta-Mendota Canal to those districts. (Exhibit
16 BBID210, BBID335.)

17 **2. Pre-1914 Service Area**

18 2.1. Talks with DWR

19 As summer 2015 approached, and while BBID disagreed with the SWRCB's
20 planned/proposed curtailments of pre-1914 water rights, BBID went to great lengths to try to find
21 alternate water supplies in order to avoid legal conflicts over curtailments.

22 Because of BBID's long relationship with DWR, and because BBID's point of diversion
23 is on the intake channel to the SWP, I started with DWR. I had occasion to talk with Laura King
24 Moon at the ACWA Conference in Sacramento on May 6, 2015. Laura and I briefly discussed
25 trying to find a backup water supply for BBID to avoid litigation over curtailments. We set up a
26 meeting for the next day at DWR's offices and I met with Laura and Jerry Johns to see if there
27 was a way to work out a back up water supply. A copy of the email exchanges setting up the
28 meeting is Exhibit BBID220. We met the afternoon of May 7, 2015 at Laura's office and Laura

1 expressed interest in trying to help avoid a complete cutoff in supplies to BBID and assured me
2 that she would talk with others at DWR and see what she could do.

3 We picked up our discussions a week or so later and began providing crop data to DWR to
4 demonstrate the need and minimal supplies that would get BBID through the summer. A copy of
5 the email exchange with the crop data is Exhibit BBID221. At one point, BBID proposed to cut
6 back its own water use and allow DWR to pick up the conserved water under BBID's pre-1914
7 water right. This would have acted as an exchange of sorts. A copy of the email showing this
8 proposal is Exhibit BBID222. Jerry Johns responded that, given his discussions with SWRCB
9 staff, that curtailments might be imposed sooner, which would prevent DWR from being able to
10 take advantage of the earlier proposal. BBID agreed to keep working on trying to find a creative
11 solution that would still avoid litigation. The email exchange is Exhibit BBID223.

12 DWR initially expressed continued interest in a short-term exchange by which DWR
13 would pump some of BBID's pre-1914 water to "buy" BBID a couple of weeks of additional
14 water in order to get some truck crops to harvest. A copy of that email exchange is Exhibit
15 BBID224.

16 BBID followed up with a formal proposal to DWR for the exchange we had discussed
17 earlier. My May 23, 2015 letter to DWR with that proposal is Exhibit BBID225. I discussed this
18 proposal with Laura and Jerry, and I decided it was appropriate to modify the proposal to DWR.
19 To that end, on May 29, 2015, I sent a revised proposal to DWR that would have provided for an
20 exchange for the remainder of the irrigation season with a "payback" through conservation and
21 fallowing in 2016. The email exchange and a copy of the new proposal sent to DWR is Exhibit
22 BBID226.

23 Subsequent to sending the May 29, 2015 proposal, we had discussions with various staff
24 at DWR and concluded DWR was unlikely to agree to the proposal. Via letter dated June 3, 2015
25 from Laura King Moon, DWR conveyed its conclusion that it could not agree to the proposed
26 exchange. A copy of the email and letter from DWR is Exhibit BBID227.

27 2.2. Talks with Zone 7 Water Agency

28 With the proposal to DWR meeting resistance, I turned my focus to other possible short-

1 term solutions to get BBID through the irrigation season. BBID has a long and good relationship
2 with the Zone 7 Water Agency (Zone 7). BBID had transferred water to Zone 7 in years past.

3 On June 10, 2015, Zone 7 submitted a Proposal for Water Exchange between Zone 7 and
4 BBID to DWR's State Water Project Analysis Office (SWPAO). (Exhibit BBID230.) Under the
5 exchange, Zone 7 would provide BBID with 3,000 acre-feet of its Table A allocation. BBID
6 would then return the water, plus an additional 1,500 acre-feet, within three years, depending on
7 hydrologic and water supply conditions. (Exhibit BBID231.)

8 DWR responded that the water could not be sold to BBID, that any water BBID would
9 repay would be "through DWR's Settlement Agreement [2003 Agreement] with BBID" and that
10 conservation would need to be consistent with the "Water Transfer White Paper." (Exhibit
11 BBID232.) DWR required a "letter of support" from the SWC to allow Zone 7 to do the
12 exchange. (Exhibit BBID232.) Notwithstanding the fact that Zone 7 was willing to assume the
13 risk of the fallowing/conservation transfer, DWR then requested additional information on the
14 crops grown within BBID "to estimate the capacity of BBID to complete the exchange in future
15 years." (Exhibit BBID232.) Zone 7 questioned the need for that information given the short time
16 frames and critical need for the water, asking whether DWR was also mandating the same
17 information from others proposing transfers in 2015. Nonetheless, I sent DWR the requested
18 crop data and questioned the need to hold up this critical transfer over crops approved in the draft
19 White Paper. On June 17, 2015, Rob Cooke, at DWR, informed me that the transfer was rejected
20 by certain SWC and that they would not allow Zone 7 to do an exchange with BBID. The
21 exchange of correspondence regarding these issues is Exhibit BBID232.

22 That same day, Zone 7 submitted a Modified Letter Agreement to SWPAO suggesting an
23 exchange of non-SWP water that Zone 7 had stored in Del Valle Reservoir. (Exhibit BBID233.)
24 BBID tried to work through that transfer as well, but it required DWR approval because the
25 "exchange" would require BBID repayment water to move through SWP facilities to get back to
26 Zone 7. DWR made that transfer so onerous by adding administrative charges and other
27 substantive mandates that the transfer would have been impossible. The last straw was when
28 DWR mandated that BBID make concessions regarding the interpretation of the 2003 Agreement

1 in the transfer agreement. DWR refused to complete the transfer agreements unless BBID was
2 willing to make those concessions on a disputed interpretation of the 2003 Agreement. As a
3 result, the transfer was never finalized. On August 13, 2015, BBID advised Zone 7 that BBID
4 was withdrawing its request for a water exchange. (Exhibit BBID234.)

5 2.3. Talks Regarding Yuba Water (State Water Contractors)

6 As part of BBID's discussion with DWR, staff at DWR suggested that BBID might be
7 able to purchase some water that was part of the Yuba transfer to the SWC. BBID inquired about
8 the possibility, but the SWC declined to allow BBID to participate.

9 2.4. Transfer from Contra Costa Water District

10 On May 12, 2015, BBID and the Contra Costa Water District executed Amendment No. 2
11 to the Cooperative Agreement for the Use of Los Vaqueros Reservoir for a One-Time Storage and
12 Exchange Demonstration Project providing for the transfer of 500 acre-feet. (Exhibit BBID235.)

13 The SWRCB approved the Transfer Petition on June 22, 2015 and the Bureau of
14 Reclamation approved the transfer on July 16, 2015. BBID began taking delivery of the water on
15 or about July 30, 2015. (Exhibit BBID236.)

16 2.5. Transfer from Carmichael Water District

17 BBID was successful in negotiating a water transfer with the Carmichael Water District.
18 Carmichael purchases treated groundwater discharges from Aerojet. Carmichael, in turn, sells all
19 groundwater it does not need to BBID. That water is transferred to BBID pursuant to Water Code
20 section 7075 after being discharged to the American River. A copy of the Carmichael / BBID
21 Agreement is attached as Exhibit BBID237.

22 2.6. Local Groundwater Transfers

23 Landowners in and around BBID scrambled to develop groundwater for their own use.
24 Some of these landowners had more than they needed for their crops and agreed to sell the excess
25 to BBID. A copy of a sample groundwater purchase agreement is Exhibit BBID238.

26 **3. Attempt to Develop 25% Voluntary Reduction Program with South Delta Diverters**

27 BBID proposed to the SWRCB and Delta Watermaster a voluntary reduction program
28 whereby BBID would voluntarily cutback on diversions and use of water ahead of curtailments in

1 exchange for some regulatory certainty of no curtailments later in the season. The SWRCB
2 rejected the proposal. The exchange of communications regarding this attempt is Exhibit
3 BBID239.

4 **4. Attempt to Appropriate Mountain House Community Services District Discharges**

5 BBID initiated discussions with the SWRCB regarding BBID's appropriation of
6 wastewater discharges by the community of Mountain House. The SWRCB informed BBID that
7 it would not process an application to allow BBID to appropriate those discharges. The email
8 exchange with the SWRCB regarding this issue is Exhibit BBID240.

9 **5. Attempt to Purchase Sacramento Regional County Sanitation District Discharges**

10 BBID reached out to the Sacramento Regional County Sanitation District (SRCSD) in an
11 attempt to purchase portions of SRCSD's discharges. SRCSD declined to consummate such an
12 agreement this year. The letter exchange is Exhibit BBID241.

13 **6. Administrative Civil Liability Amount**

14 BBID believes an ACL should not be issued and no fine should be imposed because,
15 among other things, BBID did not commit a trespass. To the extent the SWRCB determines that
16 BBID did commit a trespass, BBID believes the financial penalty should be substantially smaller
17 than that proposed by the prosecution team. First, BBID believed, as did many other water
18 managers, that it had 7 days to wind down diversions under the June 12, 2015 curtailment notice.
19 Second, when I met with Tom Howard and Kathy Mrowka on June 1, 2015 to discuss Mountain
20 House and the MEP, Tom Howard assured me that, given the need to continue to get water to the
21 community of Mountain House and the MEP, the SWRCB would not issue an enforcement action
22 related to the provision of water for those uses. Notwithstanding that assurance, water diverted
23 for Mountain House and MEP is included in the proposed fine.

24 The ACL proposes an amount of fine based upon BBID's receipt of the June 12, 2015
25 Curtailment Notice. (Exhibit BBID277, ¶¶ 25, 26, 28, & 33.) However, the SWRCB has taken
26 the position in and made representations to the Courts of this State that:

27 [The curtailment] notice has nothing to do with the amount of time that's going to
28 be found in violation for illegal diversions. If there were a future enforcement

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proceeding, *the notice would in no way be evidence of anything regarding the violation for illegal diversion . . . [i]t doesn't start any type of clock.* (Exhibit BBID276, p. 37:10-18 (emphasis added).)

While BBID disagrees that the July 15, 2015 "Rescission and Clarification" cured any due process violations contained in the June 12, 2015 Curtailment Notice, at a minimum, penalties should not accrue any time prior to July 15, 2015, the date the SWRCB attempted to cure the due process violations in the June 12, 2015 Curtailment Notice. (Exhibit BBID277, ¶ 29.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 17th day of January 2016, at Sacramento, California.



Rick Gilmore