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

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BEFORE THE

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

SWRCB Enforcement Action
ENF01951 and ENF01949

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

DECLARATION OF THERESA C.
BARFIELD IN SUPPORT OF
BYRON-BETHANY IRRIGATION
DISTRICT'S OPPOSITION TO
STATE WATER CONTRACTORS'
MOTION TO QUASH SUBPOENA
DUCES TECUM, OR, IN THE
ALTERNATIVE, MOTION FOR
PROTECTIVE ORDER AND
REQUEST TO CLOSE
DISCOVERY

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1 I, Theresa C. Barfield, declare:

2 1. I am an attorney at law licensed to practice before the courts of the State of
3 California, and an attorney with Somach Simmons & Dunn. I am one of the attorneys
4 with primary responsibility for this matter in my firm, and am familiar with the pleadings,
5 filings, and correspondence related to it. The following matters are within my personal
6 knowledge and, if called as a witness, I can competently testify thereto.

7 2. On June 12, 2015, the State Water Resources Control Board (SWRCB)
8 sent a Notice of Unavailability of Water and Need for Immediate Curtailment (Curtailment
9 Notice) to Byron-Bethany Irrigation District (BBID) and others that purported to curtail
10 appropriate water right with 1903 and later priority dates within the Sacramento and
11 San Joaquin River watersheds, including the Delta.

12 3. The Curtailment Notice directed BBID to "immediately stop diverting" under
13 its pre-1914 water rights, and provided that any further diversions would subject BBID to
14 "administrative penalties, cease and desist orders, or prosecution in court."

15 4. On June 26, 2015, BBID filed suit against the SWRCB, challenging the
16 Curtailment Notice and asserting that the SWRCB conducted a flawed water availability
17 analysis, among other errors.

18 5. On July 20, 2015, the SWRCB issued an Administrative Civil Liability
19 Complaint to BBID, Enforcement Action ENF01951 (ACL), alleging BBID unlawfully
20 diverted water from June 13, 2015 to June 25, 2015.

21 6. In 2015, BBID hired CH2M Hill, Inc. (CH2M Hill) to conduct modeling
22 showing water availability and salinity concentrations in the Delta and sources of water
23 at BBID's point of diversion in 2015.

24 7. Until the beginning of November 2015, Kyle Winslow (Winslow), an
25 engineer with CH2M Hill, worked extensively with upper management and counsel for
26 BBID to produce models addressing questions presented, and underwent several
27 iterations of modeling to address further questions as they arose.

28 8. Winslow's modeling was all in draft form.

1 9. BBID never received a final report.

2 10. A true and correct copy of a letter from Allan Highstreet, Vice President of
3 CH2M Hill, to Rick Gilmore, General Manager of BBID, dated November 5, 2015, is
4 attached as Exhibit A.

5 11. A true and correct copy of relevant excerpts of Paul Hutton's (Hutton)
6 rebuttal testimony and exhibits, dated February 22, 2016, is attached as Exhibit B.

7 12. The draft technical memorandum attached as Exhibit 5 to Hutton's rebuttal
8 testimony included modeling of salinity concentrations in the Delta from January 28,
9 2012 through August 29, 2015 with and without the State Water Project.

10 13. On February 24, 2016, BBID served Subpoenas Duces Tecum on Winslow
11 and Chilmakuri, amended on March 3, 2016.

12 14. A true and correct copy of the Subpoena Duces Tecum for the production
13 of documents served on the Custodian of Records for CH2M Hill on March 3, 2016, is
14 attached as Exhibit C.

15 15. On March 2, 2016, SWC moved to quash the Chilmakuri and Winslow
16 deposition subpoenas. On March 9, 2016, the Hearing Officer issued an order
17 prohibiting the depositions of CH2M Hill engineers and the SWC's rebuttal expert
18 witnesses before the ACL hearing. In so ordering, the SWRCB concluded that the
19 parties could explore the rebuttal testimony of the SWC experts through cross-
20 examination at the hearing. The ACL hearing is set to begin on March 21, 2016.

21 16. A true and correct copy of the SWRCB Ruling on Motions Filed in the
22 Matters of Administrative Civil Liability (ACL) Complaint Against BBID and Draft Cease
23 and Desist Order (CDO) Against the West Side Irrigation District, dated March 9, 2016,
24 is attached as Exhibit D.

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I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 10th day of March 2016 at Sacramento, California.



Theresa C. Barfield

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.

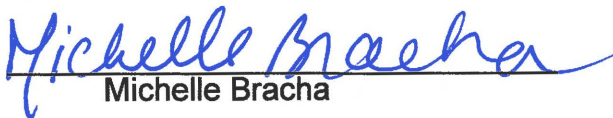
On March 10, 2016, I served the following document(s):

DECLARATION OF THERESA C. BARFIELD IN SUPPORT OF BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO STATE WATER CONTRACTORS' MOTION TO QUASH SUBPOENA DUCES TECUM, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER AND REQUEST TO CLOSE DISCOVERY

(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 10, 2016 at Sacramento, California.


Michelle Bracha

SOMACH SIMMONS & DUNN
A Professional Corporation

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

<p><u>VIA ELECTRONIC MAIL</u></p> <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><u>VIA ELECTRONIC MAIL</u></p> <p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p><u>VIA ELECTRONIC MAIL</u></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><u>VIA ELECTRONIC MAIL</u></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><u>VIA ELECTRONIC MAIL</u></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><u>VIA ELECTRONIC MAIL</u></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 robin.mcgininis@water.ca.gov</p>
<p><u>VIA ELECTRONIC MAIL</u></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com</p>	<p><u>VIA ELECTRONIC MAIL</u></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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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org

**SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING**

<p>1 2 3 4 5 6 7</p>	<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 Haringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharingfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p>
<p>8 9 10 11 12 13</p>	<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann & Girad 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com rakroyd@kmtg.com</p> <p>Phillip Williams of Westlands Water District pwilliams@westlandswater.org</p>
<p>14 15 16 17 18 19</p>	<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherriaw@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>20 21 22</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>23 24 25 26</p>	<p>Byron-Bethany Irrigation District Daniel Kelly 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>

SOMACH SIMMONS & DUNN
A Professional Corporation

EXHIBIT A



CH2M
2485 Natomas Park Drive
Suite 600
Sacramento, CA 95835
O +1 916 286 0204
www.ch2m.com

November 5, 2015

Mr. Rick Gilmore
General Manager
Byron Bethany Irrigation District
7995 Bruns Road
Byron, CA 94514

Subject: Improper Use of State Water Contractors, Inc. data

Dear Rick:

CH2M HILL has been in a contractual relationship with the State Water Contractor's, Inc. (SWC) and Metropolitan Water District of Southern California (MWD) regarding the SWRCB Stored Water Complaint. MWD and SWC recently contacted CH2M HILL regarding the possible use of data prepared for SWC being used for work for BBID. CH2M HILL has reviewed this complaint and found that work done by Kyle Winslow and provided to BBID in draft form was in part based on work done for SWC, which was contractually considered their information and should not have been disclosed.

CH2M HILL improperly provided this information to BBID, and this information cannot be used by BBID. Given the SWC and MWD contractual relationship, CH2M HILL cannot continue to provide support or assistance to BBID on this matter nor provide the final report of our analyses. CH2M HILL will refund the District for any payments for this work.

Sincerely,

CH2M HILL

Allan Highstreet
Vice President

cc: Tom Price
Catherine Lang

EXHIBIT B

1 Thomas M. Berliner (SBN 83256)
2 Jolie-Anne S. Ansley (SBN 221526)
3 **DUANE MORRIS LLP**
4 Spear Tower
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11 Stefanie D. Morris (SBN 239787)
12 State Water Contractors
13 1121 L. St., Suite 1050
14 Sacramento, CA 95814-3974
15 Telephone: +1 916 447 7357
16 Fax: +1 916 447 2734
17 E-mail: smorris@swc.org
18 Attorneys for State Water Contractors

19
20 **BEFORE THE**
21 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

22 ENFORCEMENT ACTION ENF01949 -
23 DRAFT CEASE AND DESIST ORDER
24 REGARDING UNAUTHORIZED OR
25 THREATENED UNAUTHORIZED
26 DIVERSIONS OF WATER FROM OLD RIVER IN
27 SAN JOAQUIN

**REBUTTAL TESTIMONY OF PAUL
HUTTON**

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

1 I, Paul Hutton, declare:

2 1. I submit this written rebuttal testimony on behalf of the State Water Contractors
3 (“SWC”) in the following proceedings: 1) Westside Irrigation District Enforcement Matter No.
4 01949(ENF1949); and 2) Byron-Bethany Irrigation District Enforcement Matter No. 01951
5 (ENF1951).

6 2. If called as a witness, I can and would testify to the following facts, analyses, findings
7 and conclusions stated herein, and to the information contained in Exhibits SWC0002, SWC0003,
8 SWC0004, SWC0005, SWC0006, and WSID0008, pp.198, 200, 202, 205-207, which is incorporated
9 by reference as part of my written testimony.

10 **BACKGROUND AND QUALIFICATIONS**

11 3. I am currently the Principal Engineer for the Bay-Delta Initiatives at Metropolitan
12 Water District of Southern California (“MWD”). In that position, which I have held since 2002, I
13 work collaboratively with interagency and interdisciplinary teams to provide policy-level decision
14 support for MWD’s ongoing water management, regulatory and legal activities in the areas of
15 Sacramento-San Joaquin Delta (“Delta”) hydrodynamics and water quality as well as Central Valley
16 Project (“CVP”) and State Water Project (“SWP”) operations.

17 4. Prior to joining MWD I held several positions at the Department of Water Resources
18 (“DWR”) from 1990 to 2002. My last position with DWR was the supervising engineer and
19 program manager of the Delta Modeling Section with a staff of seventeen engineers responsible for
20 developing and applying various water quality, hydrodynamic and biological models. In addition, I
21 was the program manager responsible for developing actions and studies for implementing
22 CALFED’s Drinking Water Improvement Strategy and managing DWR’s Statewide Planning
23 Program, which involved developing and implementing policies related to the California Water Plan
24 Update (Bulletin 160-98). My previous experience is summarized in my C.V. at exhibit SWC0002.

25 5. I am a registered civil engineer in California and my license number is C040795.

26 6. I have a B.S. in Civil Engineering and graduated with highest honors from the
27 University of Illinois, Urbana in May 1983.

28

1 7. I obtained a M.S. in Environmental Engineering from University of Illinois, Urbana
2 in January of 1985.

3 8. I obtained a Ph.D. in Civil and Environmental Engineering from the University of
4 California, Davis in December 1994.

5 9. I have been working on Delta issues for 25 years. I have published several papers on
6 hydrodynamics and water quality in the Delta. For a complete list of my publications please see
7 exhibit SWC0002.

8 10. In 1994, I received the American Society of Civil Engineers Water Resources
9 Planning and Management Division Outstanding Journal Paper Award.

10 11. In 2006, I received the Hugo B. Fischer Award from the California Water and
11 Environmental Modeling Forum in recognition of model development and application in support of
12 the San Joaquin River Salinity Management Plan.

13 12. My job duties include working with the SWC and directing work on behalf of MWD
14 or in coordination with SWC. As part of my job duties I assisted in the development of an analysis
15 of without project salinity conditions in the Delta (2012-2015). I completed a comparative analysis
16 of Delta outflow and salinity in 1931 (historical scenario) and 2015 (without project scenario). I
17 was also directed to review the technical report by Susan Paulsen (BBID384), the testimony of
18 Susan Paulsen (BBID388), the testimony of Thomas Burke (WSID0123), and the following
19 Department of Public Works Documents: Bulletin 27 (SWC0004) and Bulletin 23 (1931)
20 (WSID0008, pp. 198, 200, 202, 205-207).

21 **SUMMARY OF WORK COMPLETED**

22 13. I assisted in directing a CH2M Hill analysis of salinity conditions; the technical report
23 is attached as exhibit SWC0005. The purpose of this study was to analyze salinity conditions in the
24 south Delta channels under a “without project” scenario based on historical hydrology spanning the
25 period January 1, 2012 to August 31, 2015. The without project scenario modifies the historical
26 hydrology by removing (1) upstream impairments associated with CVP and SWP reservoirs, (2)
27 Delta diversions at the Banks and Jones Pumping Plants, and (3) the Delta Cross Channel facility.
28 The multi-year timeframe allows understanding of Delta salinity conditions under a sequence of

1 differing hydrologic conditions. A complete description of the methods and data used in the analysis
2 are described in the CH2M Hill technical appendix attached as exhibit SWC0005.

3 14. I completed a scenario analysis of irrigation season Delta outflow and salinity
4 comparing 1931 (historical) and 2015 (without project). The attached figure (SWC0003) compares
5 monthly average outflow and salinity (as measured by X2 position) for the two scenarios. The
6 source of the 1931 outflow data is DAYFLOW. The source of the 1931 salinity data is Hutton et al.
7 (2015) "Nine Decades of Salinity Observations in the San Francisco Bay and Delta: Modeling and
8 Trend Evaluation." *J. Water Resour. Plng. Mgmt.*, DOI: 10.1061/(ASCE)WR.1943-5452.0000617
9 (available at: <http://ascelibrary.org/doi/abs/10.1061/%28ASCE%29WR.1943-5452.0000617>). The
10 source of the 2015 scenario outflow and salinity data is described in exhibit SWC0005.

11 15. In the figure "Comparison of Delta Outflow and Salinity," exhibit SWC0003, month
12 is shown on the horizontal axis, Delta outflow (in units of cubic feet per second) is shown on the
13 left-side vertical axis, and X2 position (in units of kilometers) is shown on the right-side vertical
14 axis. In the same figure, the blue and black bars represent April through August Delta outflow in the
15 2015 and 1931 scenarios, respectively. In the same figure, the blue and black lines represent April
16 through August X2 in the 2015 and 1931 scenarios, respectively. X2 is used as an indicator of
17 salinity intrusion into the Delta.

18 16. As part of my work on this matter, I was directed to review the technical report of
19 Susan Paulsen (BBID384), the testimony of Susan Paulsen (BBID388), the testimony of Thomas
20 Burke (WSID0123), and portions of Bulletin 27 (SWC0004) and Bulletin 23 (1931) (WSID0008).

21 Bulletin 27 (SWC0004) is a true and correct copy that was obtained from DWR by the SWC.

22 Bulletin 27 is also available on the internet at

23 http://www.water.ca.gov/waterdatalibrary/docs/historic/Bulletins/Bulletin_27/Bulletin_27_1931.pdf
24 [f](http://www.water.ca.gov/waterdatalibrary/docs/historic/Bulletins/Bulletin_27/Bulletin_27_1931.pdf).

25 **SUMMARY OF FINDINGS**

26 17. The CH2M Hill analysis, as described in exhibit SWC0005, concluded that salinity
27 would typically be much higher in the Delta absent the CVP and SWP relative to historical
28 conditions. The analysis further concluded that, absent the CVP and SWP, salinity (measured as

1 specific conductance) would be above 1.0 mS/cm during the irrigation season of many dry and
2 critically dry years.

3 18. As part of my job duties, I monitor SWP and CVP compliance with the State Water
4 Resources Control Board's ("Water Board") Bay-Delta Water Quality Control Plan ("WQCP")
5 standards. In 2015, DWR and the Bureau of Reclamation ("Reclamation") continued to satisfy
6 WQCP regulatory obligations, including those modified by the Water Board's orders regarding the
7 DWR and Reclamation temporary urgency change petition ("TUCP"). The Water Board's 2015
8 TUCP orders relaxed certain WQCP standards and limited SWP and CVP project pumping during
9 the irrigation season to health and safety levels. Throughout the irrigation season, the SWP and CVP
10 continued to make releases from upstream reservoirs to satisfy WQCP standards. DWR also
11 installed a salinity barrier at West False River from June to September 2015 for the purpose of
12 blocking salinity intrusion into the Delta from the ocean.

13 19. Unauthorized diversions of SWP stored water released for the purpose of satisfying
14 WQCP and other regulatory obligations and/or for diversion by the SWP impact the SWC member
15 agencies as the contractual beneficiaries of the SWP. These unauthorized diversions cause the SWP
16 to make additional stored water releases or to reduce exports to satisfy WQCP and other regulatory
17 requirements, thereby decreasing the stored water supplies of the SWP available to SWC member
18 agencies. In 2014, DWR and Reclamation sent a joint letter stating "Where water quality standards
19 are controlling Water Project Operations, any diversion of stored water by these diverters results in
20 additional releases of stored water or reductions in Project deliveries..." This letter is exhibit
21 SWC0007. This occurred in 2014 as indicated in exhibit SWC0007 and also occurred in 2015.

22 20. My comparison of the 2015 and 1931 scenarios as illustrated in exhibit SWC0003
23 indicate that historical outflow during the irrigation season (April through August) of 1931 is
24 consistently higher than without project outflow during the irrigation season of 2015. Outflow in
25 1931 ranged from approximately -3,000 cfs to 7,500 cfs, whereas without project outflow in 2015
26 ranged from approximately -3,900 cfs to 6,400 cfs.

27 21. As also shown in exhibit SWC0003, historical salinity during the irrigation season
28 (April through August) of 1931 is consistently lower than without project salinity during the

1 irrigation season of 2015. Salinity in 1931 (as measured by X2 position) ranged from approximately
2 76 km to 122 km, whereas without project X2 position in 2015 ranged from approximately 83 km to
3 137 km.

4 22. Although there are similarities between 1931 and 2015 with respect to annual
5 unimpaired runoff conditions and water year type, the Delta conditions of 1931 poorly represent
6 those associated with 2015 absent the CVP and SWP. Due to less upstream development (water use)
7 in 1931, irrigation season outflow was significantly higher and salinity was significantly lower
8 relative to the 2015 without project scenario.

9 23. The 1931 baseline assumption in Susan Paulsen's modeling (BBID384) is
10 inappropriate. The technical report by Susan Paulsen (BBID384) selected the pre-project year 1931
11 as a surrogate for 2015 without project conditions. Her assumption is inappropriate because, as
12 exhibit SWC0003 illustrates, 1931 experienced higher outflows and lower salinity than would have
13 occurred in 2015 absent the CVP and SWP. The primary reason for the differences between 1931
14 and 2015 (without project) is because upstream development was lower in 1931 than in 2015.

15 24. Susan Paulsen's analysis (BBID384) is also inappropriate because she fails to remove
16 SWP and CVP operations and facilities from the modeling of 2015 salinity and flow patterns. To the
17 extent that Susan Paulsen is using her 2015 modeling results to define the quantity and source of
18 water available to WSID and BBID in that year, her baseline is flawed because WSID and BBID do
19 not have a right to stored water supplies based on their senior water rights.

20 25. Susan Paulsen's analysis (BBID384) also fails to acknowledge that the combined
21 effect of all diversions in the Delta is to change flow patterns and to draw Sacramento River water
22 into the south Delta.

23 26. Westside Irrigation District (WSID) references Bulletin 23 (1931) (WSID0008),
24 Table 39, as evidence of the District's diversions in 1931. To the extent diversions occurred in 1931
25 by WSID and others, the same report analyzes the damage that 1931 diversions of high salinity
26 water caused to crops and the soil. The report at p. 198 explains that:

27 Since the beginning of salinity observations in the Sacramento-San
28 Joaquin Delta it has been recognized that in years of deficient Spring

1 and Summer stream flow to the Delta, the resulting extensive
2 encroachment of salinity from San Francisco Bay has caused damaged
3 in the Delta. In 1930, 1924, and 1926, but particularly in 1924, the
4 magnitude of the encroachment was such as to leave no doubt that
5 damage must have been sustained...In the Spring of 1931 it was plainly
6 evident that the stream flow to the Delta would probably be as low if
7 not lower than it was in 1924 and that a salinity encroachment as great
8 if not greater than in that year could be expected.

9 27. Bulletin 23 (WSID0008) quantified the economic impacts resulting from the salinity
10 intrusion into the Delta in 1931. The report at p. 200 describes the reasons for the damage and
11 resulting economic losses, as follows:

12 Under tangible losses is classed [as] the actual loss in production of
13 crops in 1931 due to (1) the curtailment of irrigation when the salinity
14 of the irrigation water became too high, (2) the actual application of
15 irrigation water of too high salinity, and (3) the abandonment of a crop,
16 or plans for it, because of high salinity.

17 28. Bulletin 23 (WSID0008) quantified the economic impacts at p. 202, Table 92, stating
18 that the resulting economic losses caused by salinity encroachment into the Delta during the
19 irrigation season of 1931 totaled \$1,263,716.

20 29. Bulletin 23 (WSID0008) at pp. 205-207 also describes a range of intangible injury to
21 crops caused by salinity encroachment into the Delta during the irrigation season in 1931, injury that
22 included agricultural soils, levees, and native vegetation.

23 30. Bulletin 27 (SWC0004) also describes the salinity conditions that existed in the Delta
24 in 1931 and other dry and critically dry years. Bulletin 27 explains that:

25 Beginning in 1917, there has been an almost unbroken succession of
26 subnormal years of precipitation and stream flow which, in combination
27 with increased irrigation and storage diversions from the upper
28 Sacramento and San Joaquin River system, has resulted in a degree and
extent of saline invasion greater than has occurred ever before as far as
known. These abnormal saline invasions not only have curtailed
irrigation diversions and affected crop production and land values in the
delta also have reduced considerably the diversions of fresh-water
supplies from the lower river and upper bay.... (SWC0004, p. 15.)

And:

1 The greater degree and extent of saline invasion in certain years since
2 1917 have resulted in curtailment of irrigation diversions for a portion
3 of the delta and upland area. (SWC0004, p. 20.)

4 And:

5 During several years in the period 1920 to 1929, the inflow into the delta
6 during the summer months has been insufficient to take care of the
7 consumptive requirements. (SWC0004, p.32.)

8 And:

9 On the other hand, in years when the stream flow into the delta during
10 the summer months was insufficient to meet the consumptive demands
11 in the delta, invasions of saline water of considerable extent and degree
12 have occurred. This was especially true in the dry years of 1924, 1920
13 and 1926, when stream flow was insufficient to meet consumptive
14 demands for a considerable period of time. (SWC0004, p. 36.)

15 CONCLUSION

16 31. Contrary to the conclusion of Susan Paulsen, the 1931 historical scenario poorly
17 represents the 2015 without project scenario. In 1931, salinity conditions would have been more
18 favorable than 2015 (without project), with higher outflow and lower salinity resulting from lesser
19 upstream water development.

20 32. While agricultural diverters in the Delta may have diverted water in 1931, they also
21 experienced crop damage, curtailed diversions and abandoned crops in the field, while also
22 experiencing more intangible salinity damage to agricultural soils (and subsequent crops), levees and
23 native vegetation. The cost of the salinity damage experienced by farmers in the Delta in 1931 was
24 estimated to be \$1,263,716.

25 33. Absent the SWP and CVP, salinity in the south Delta would typically exceed 1.0
26 mS/cm specific conductance during the irrigation season of dry and critically dry years, which is
27 higher than the current irrigation season WQCP agricultural salinity standard of 0.7 mS/cm. This
28 suggests that water quality would be too poor to support agricultural use during summer and fall of
dry and critically dry years if the SWP and CVP did not exist.

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

Executed this 22nd day of February, 2016, in Sacramento, California.



PAUL HUTTON, Ph.D., P.E.

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

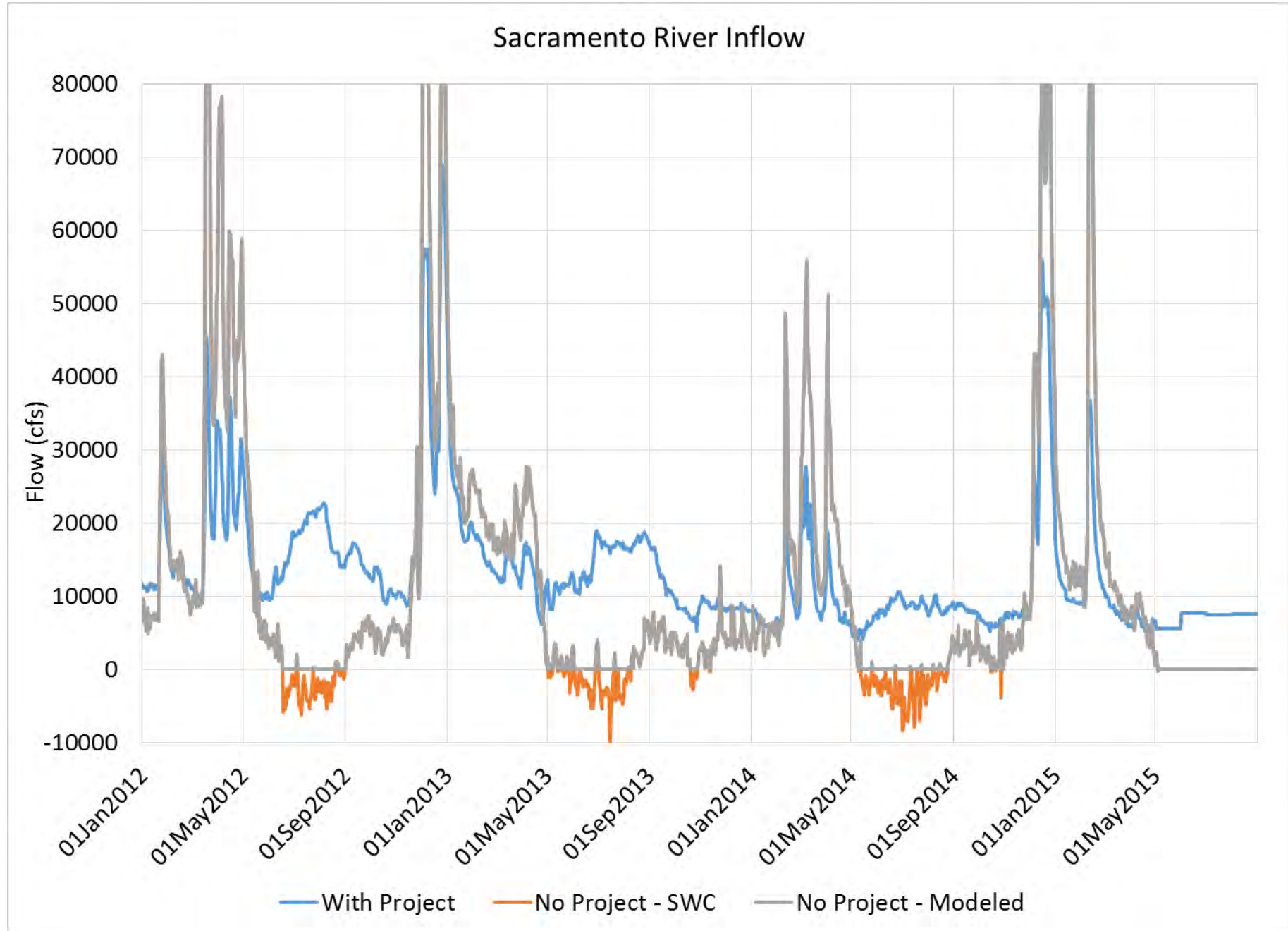


FIGURE 2: SAN JOAQUIN RIVER AT VERNALIS DSM2 MODEL INFLOW FOR 2012 TO 2015

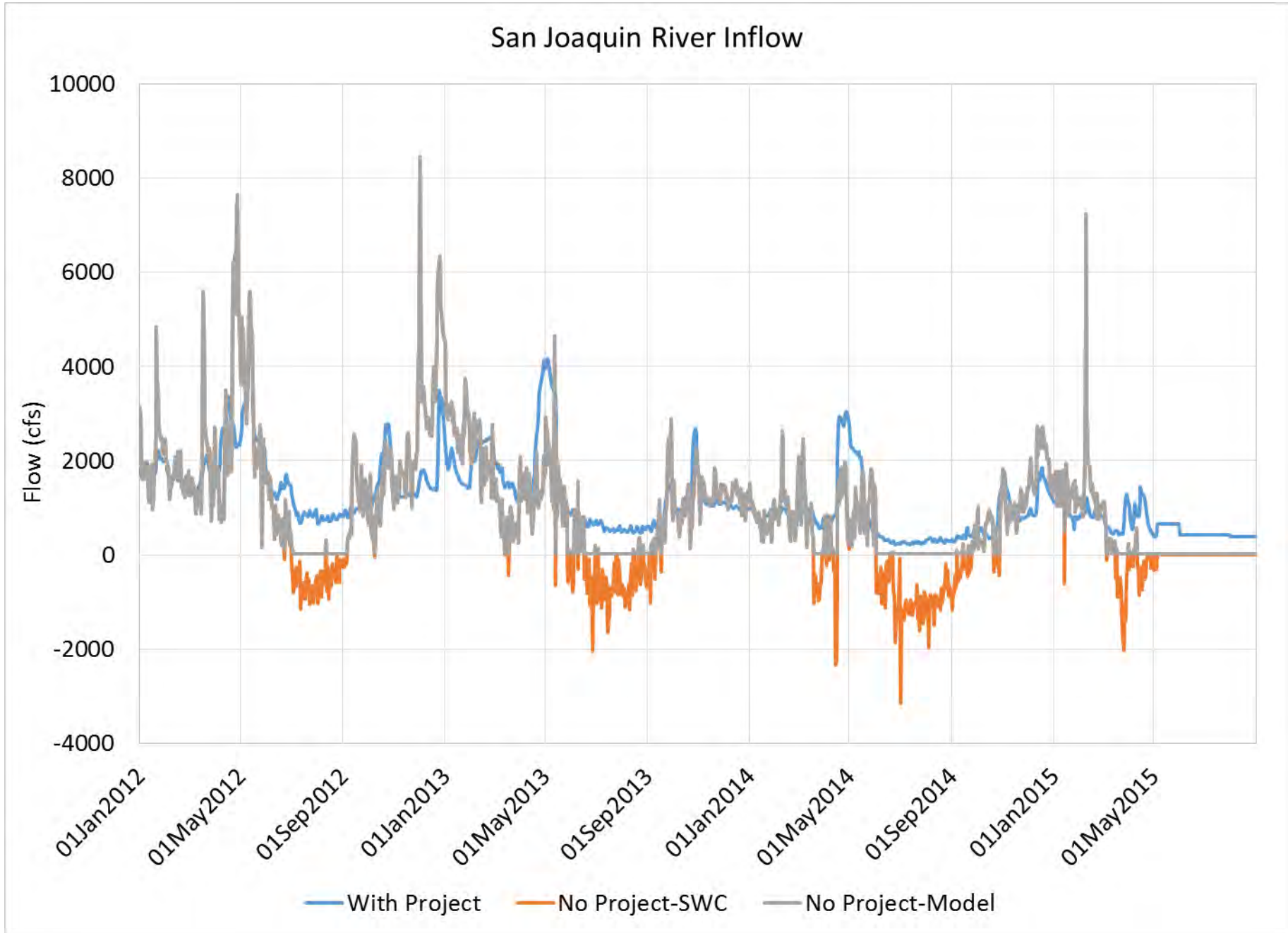


FIGURE 3: ASSUMED BBID DICU DIVERSION, AND DSM2 RESULT OF CLIFTON COURT FOREBAY INFLOW

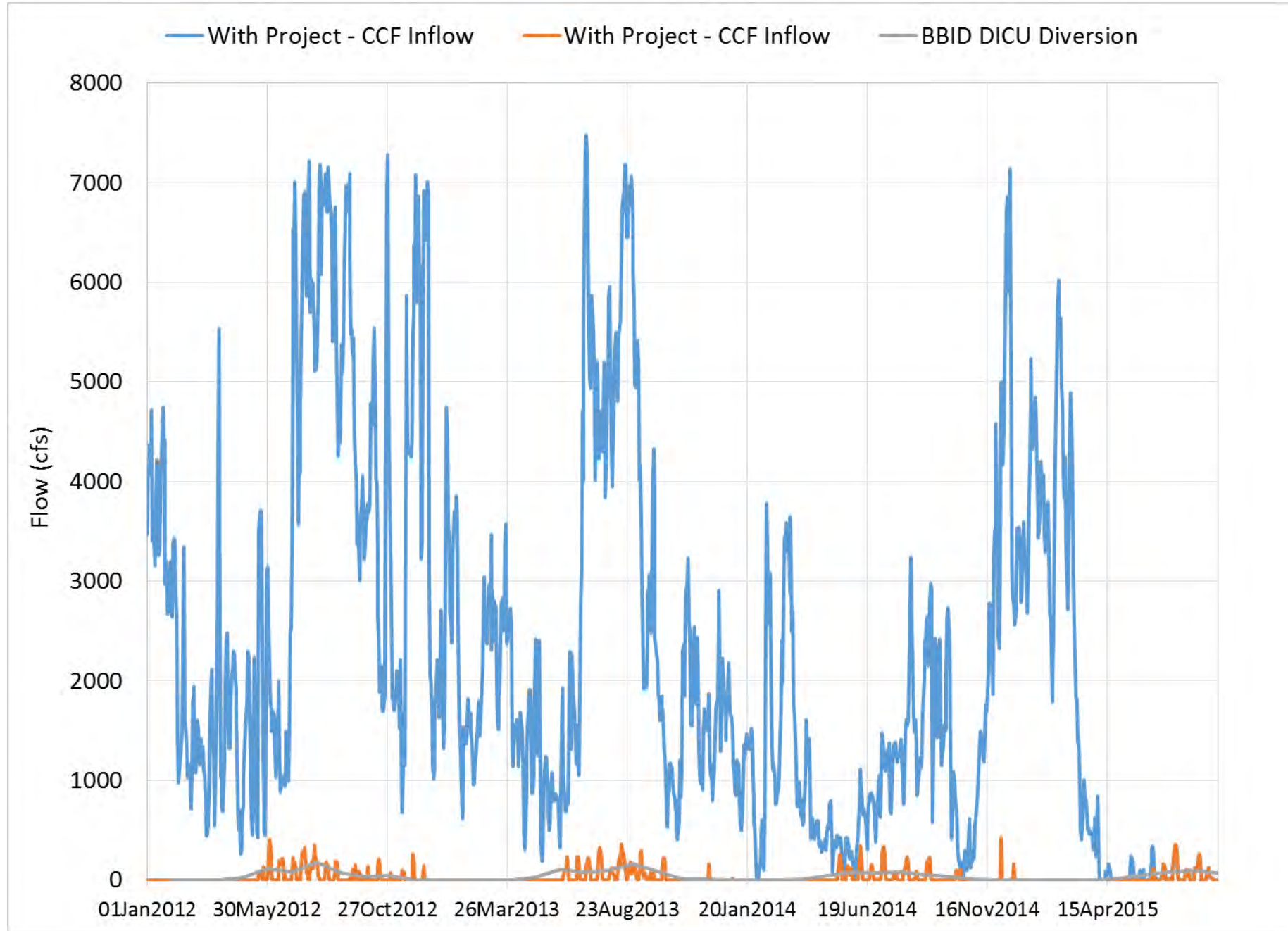
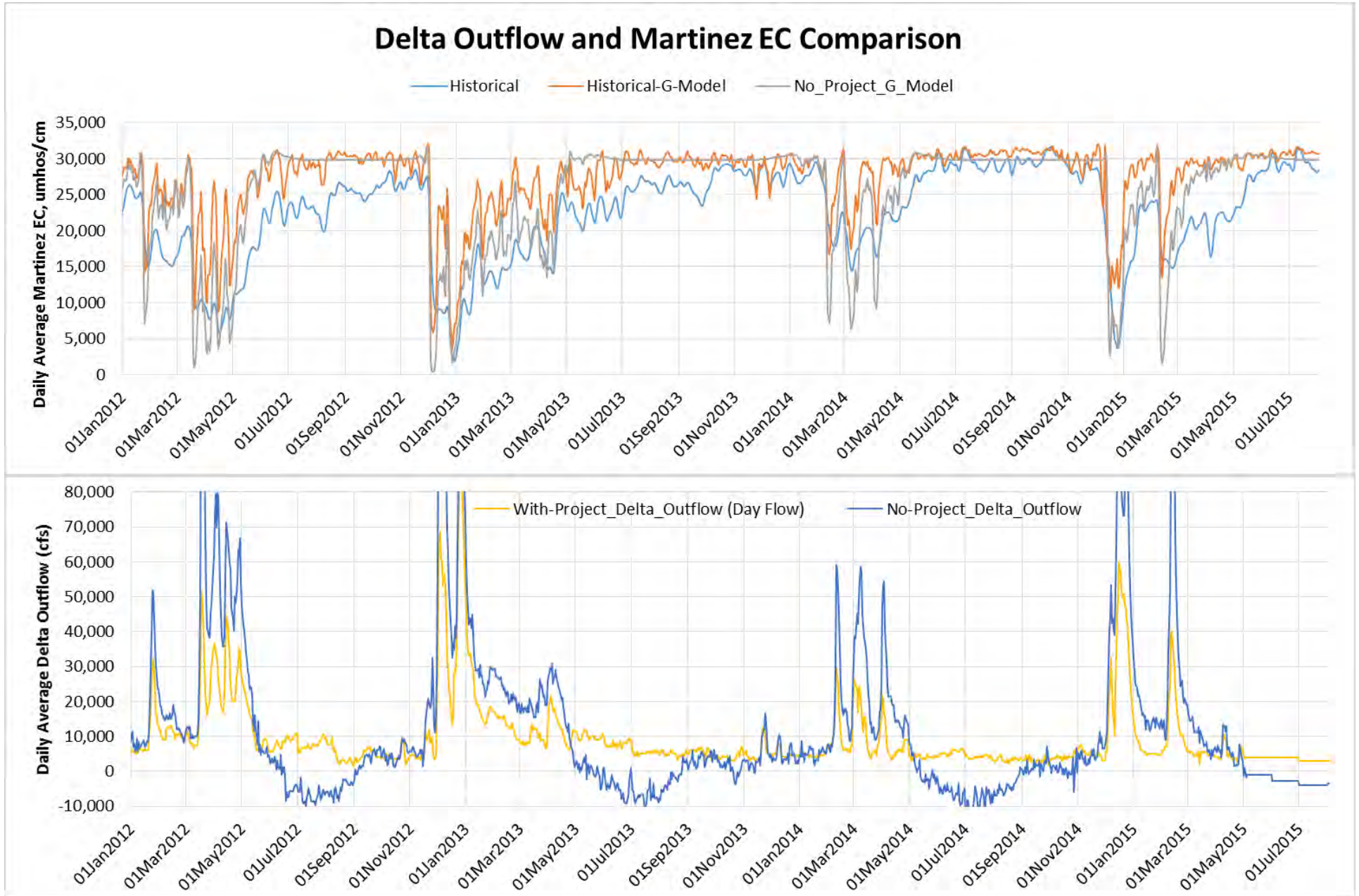
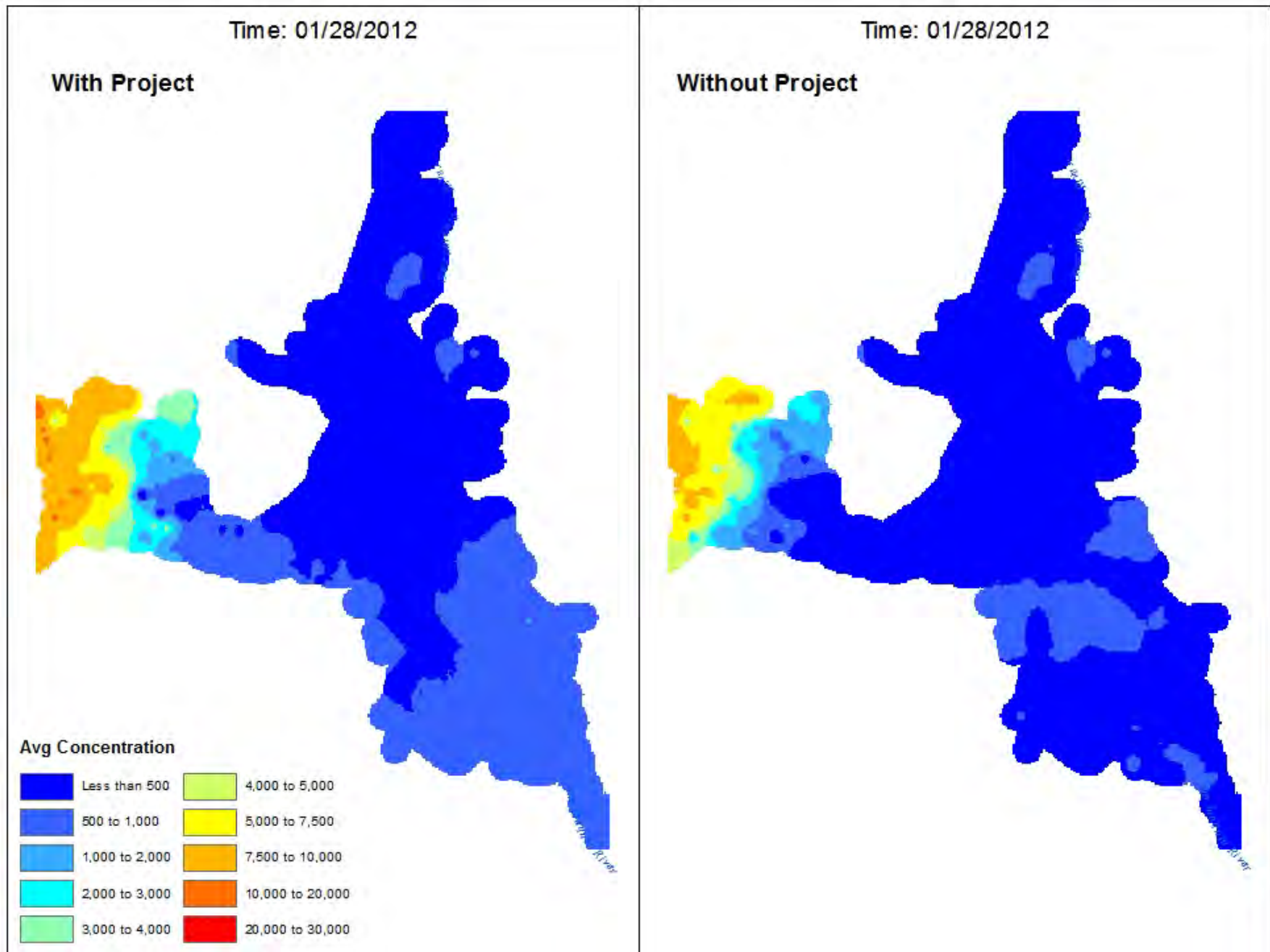


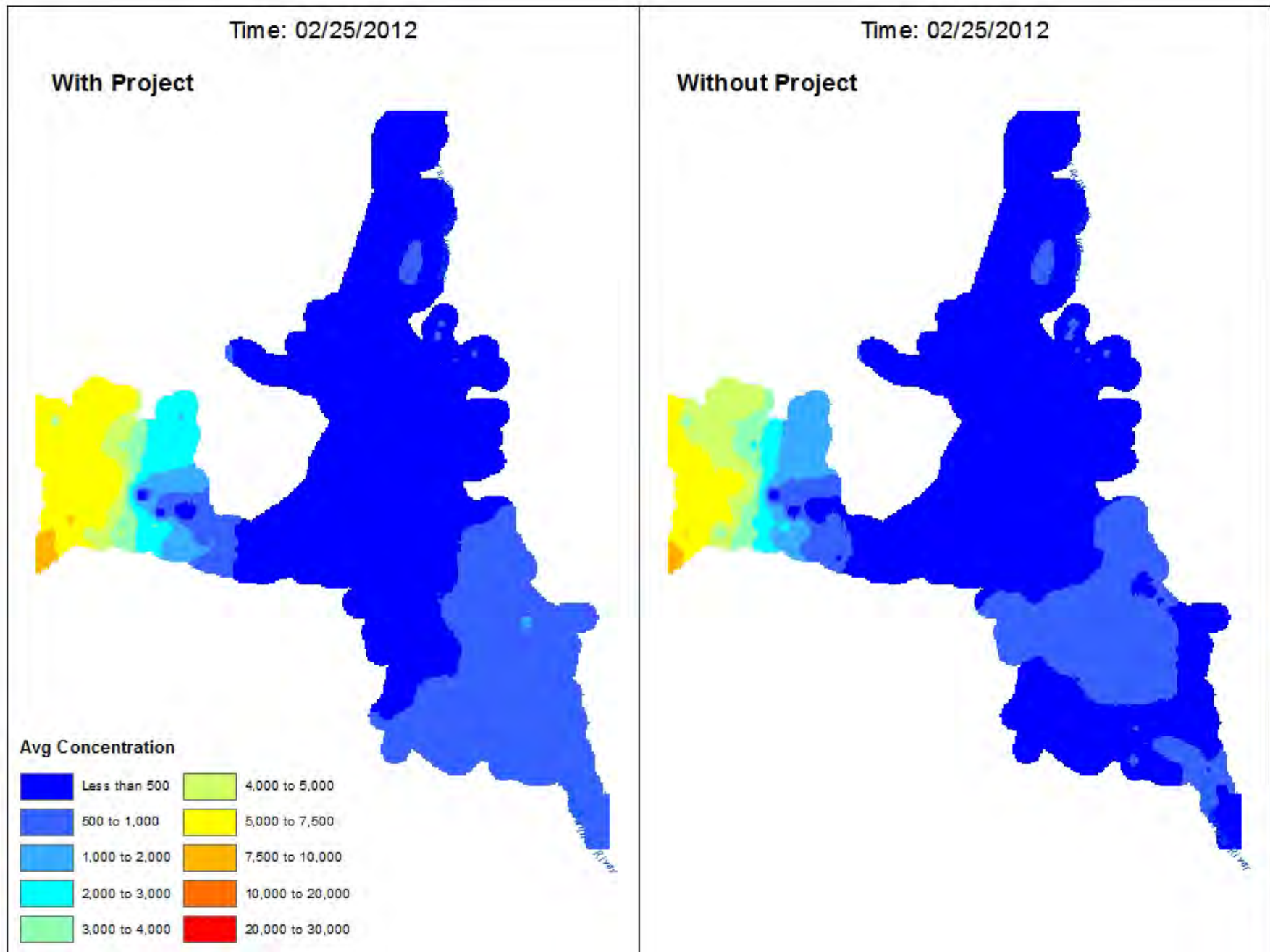
FIGURE 4: DAILY AVERAGED EC AT MARTINEZ FOR 2012 TO 2015

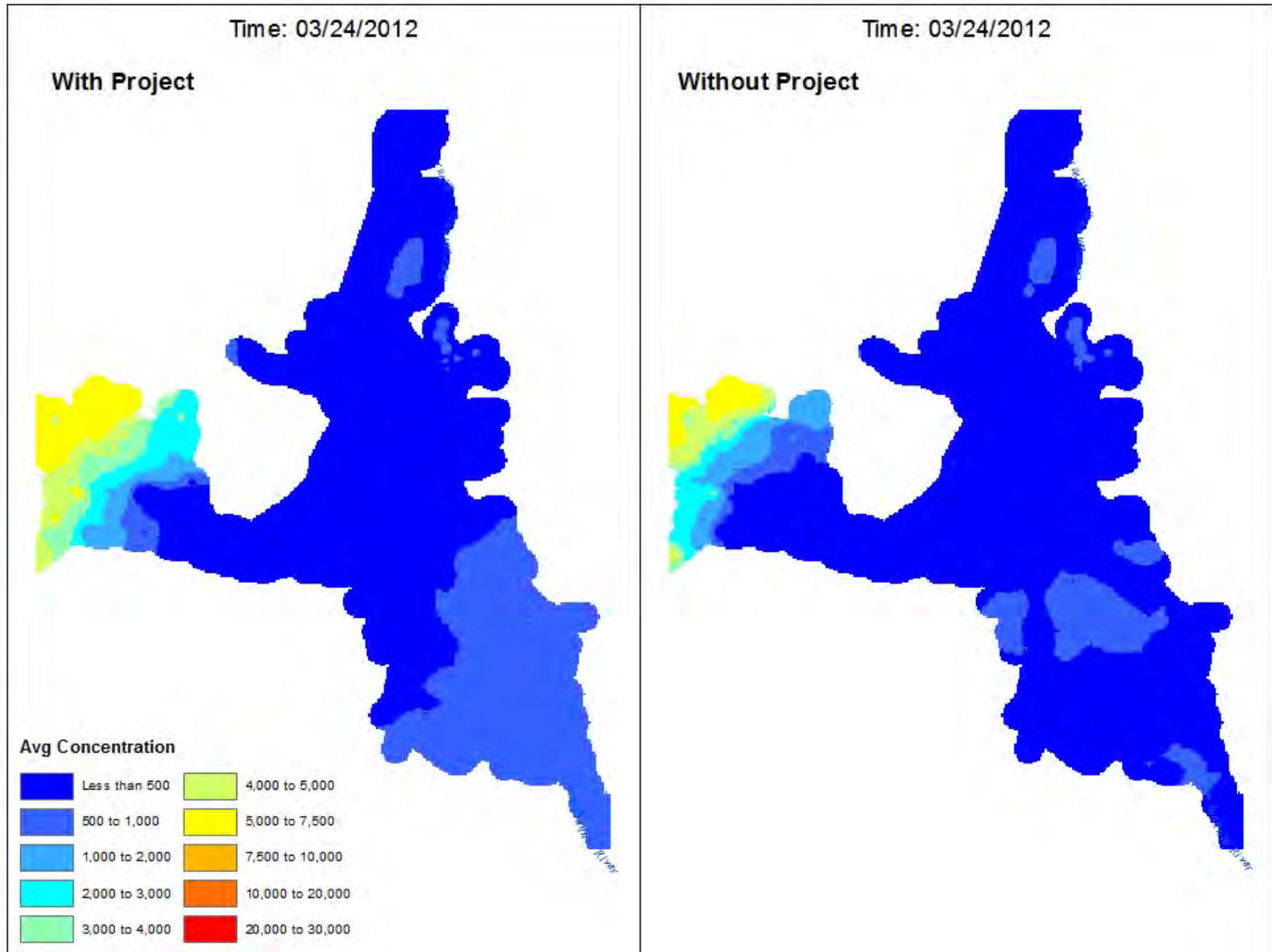


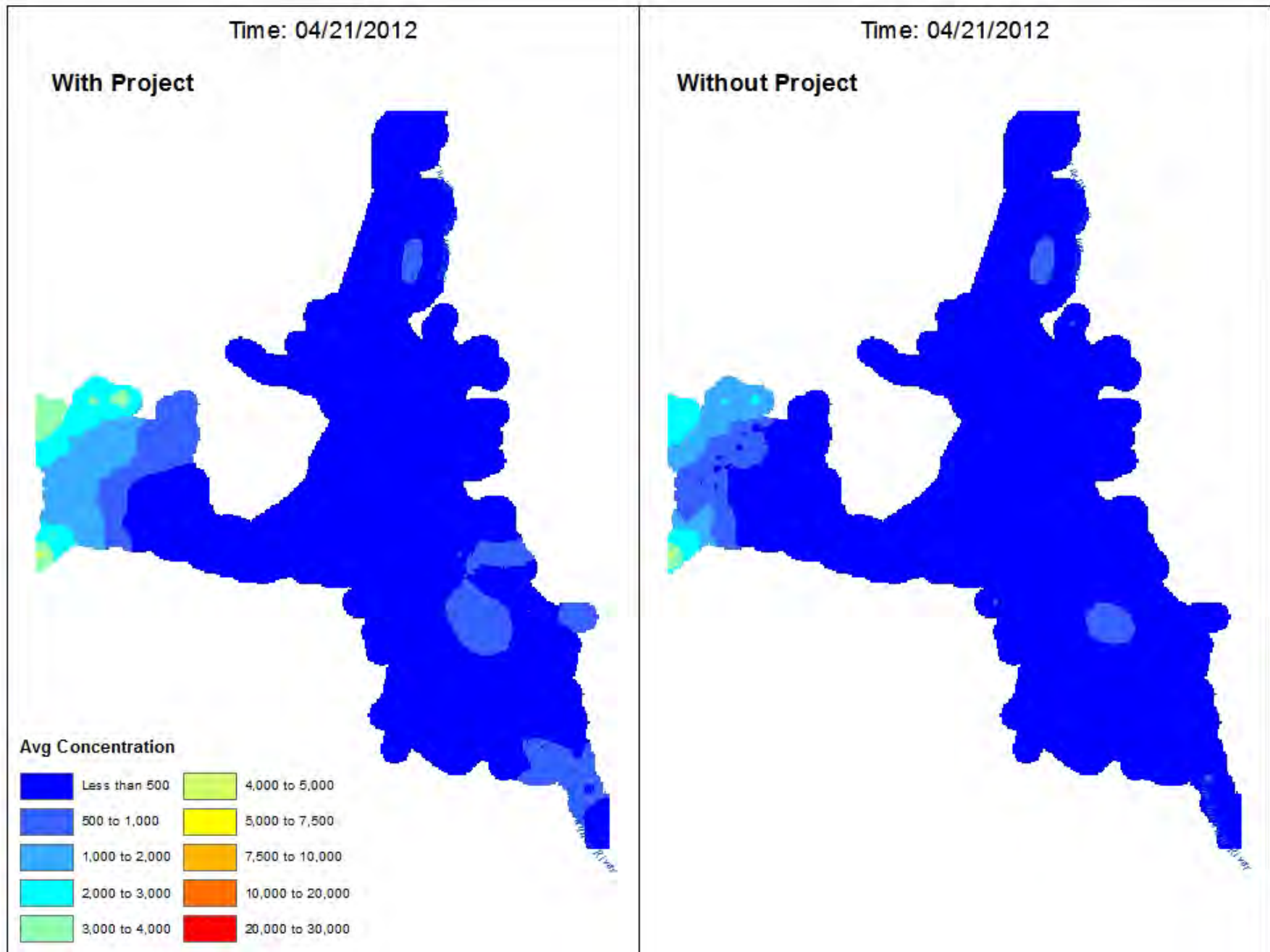
FIGURES 5 TO 52

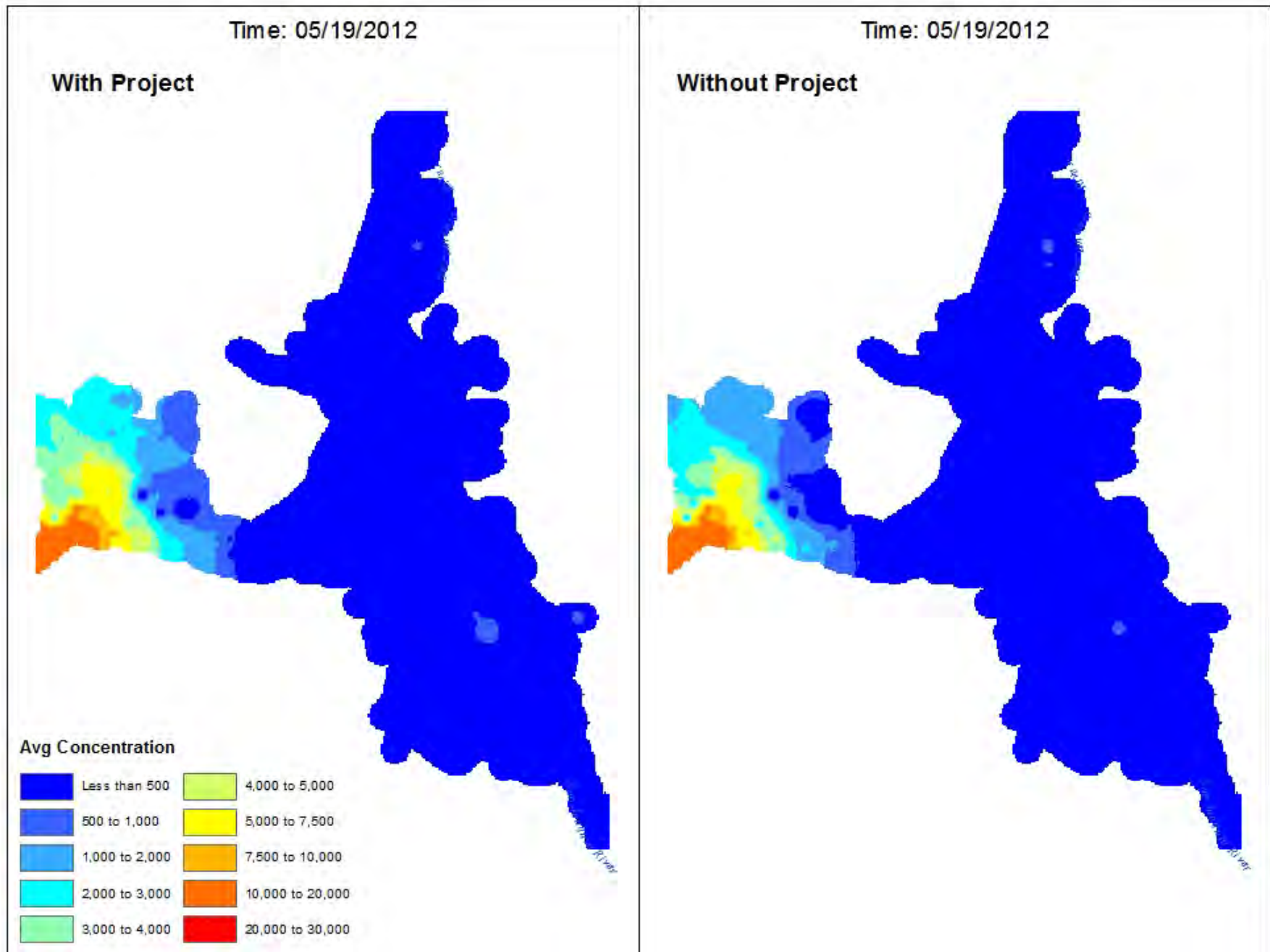
Contour plots of DSM2 electrical conductivity in the Delta on a 4 week timestep for 2011-2015 for With Project conditions (left) and Without Project conditions (right)

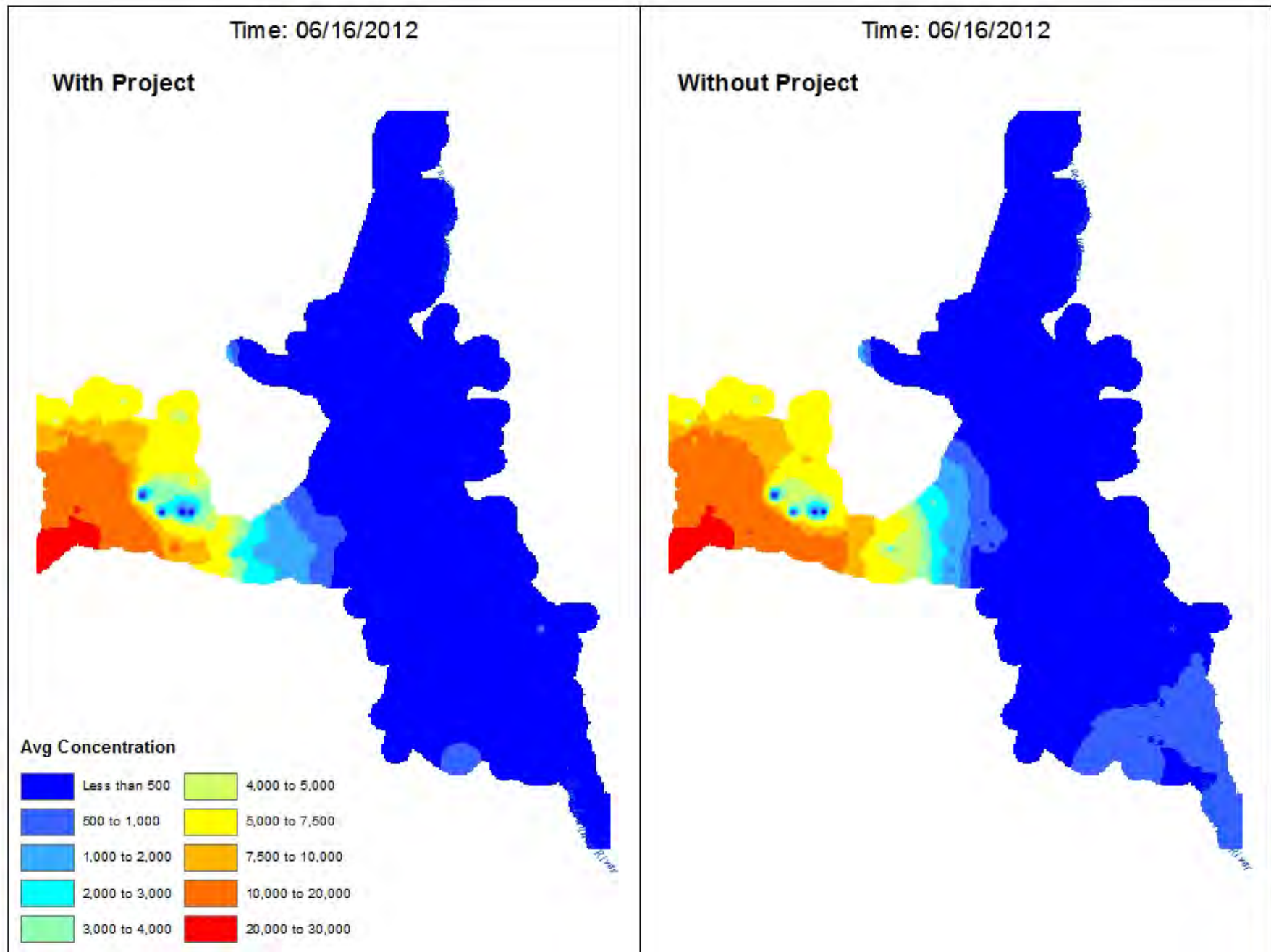


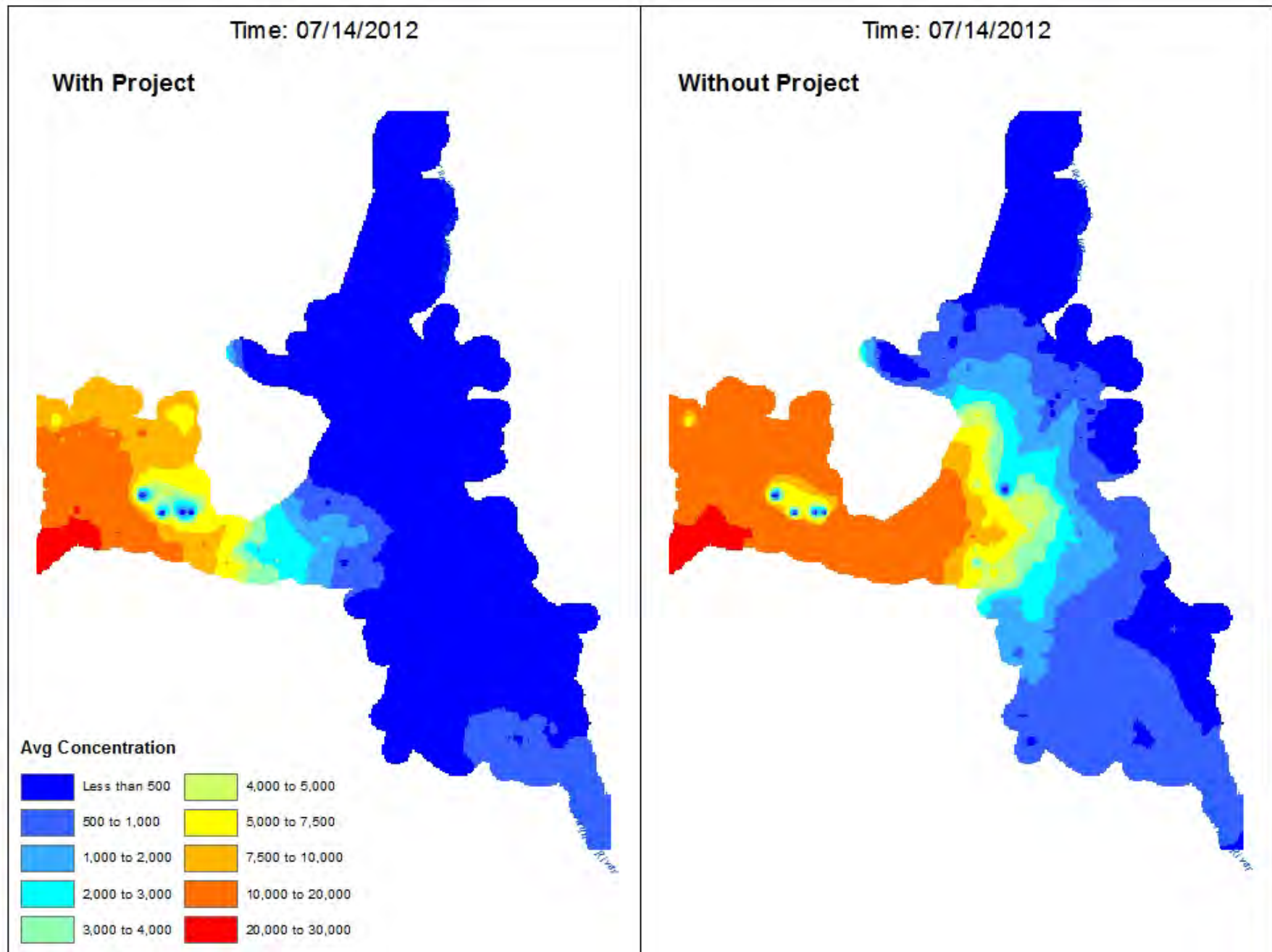


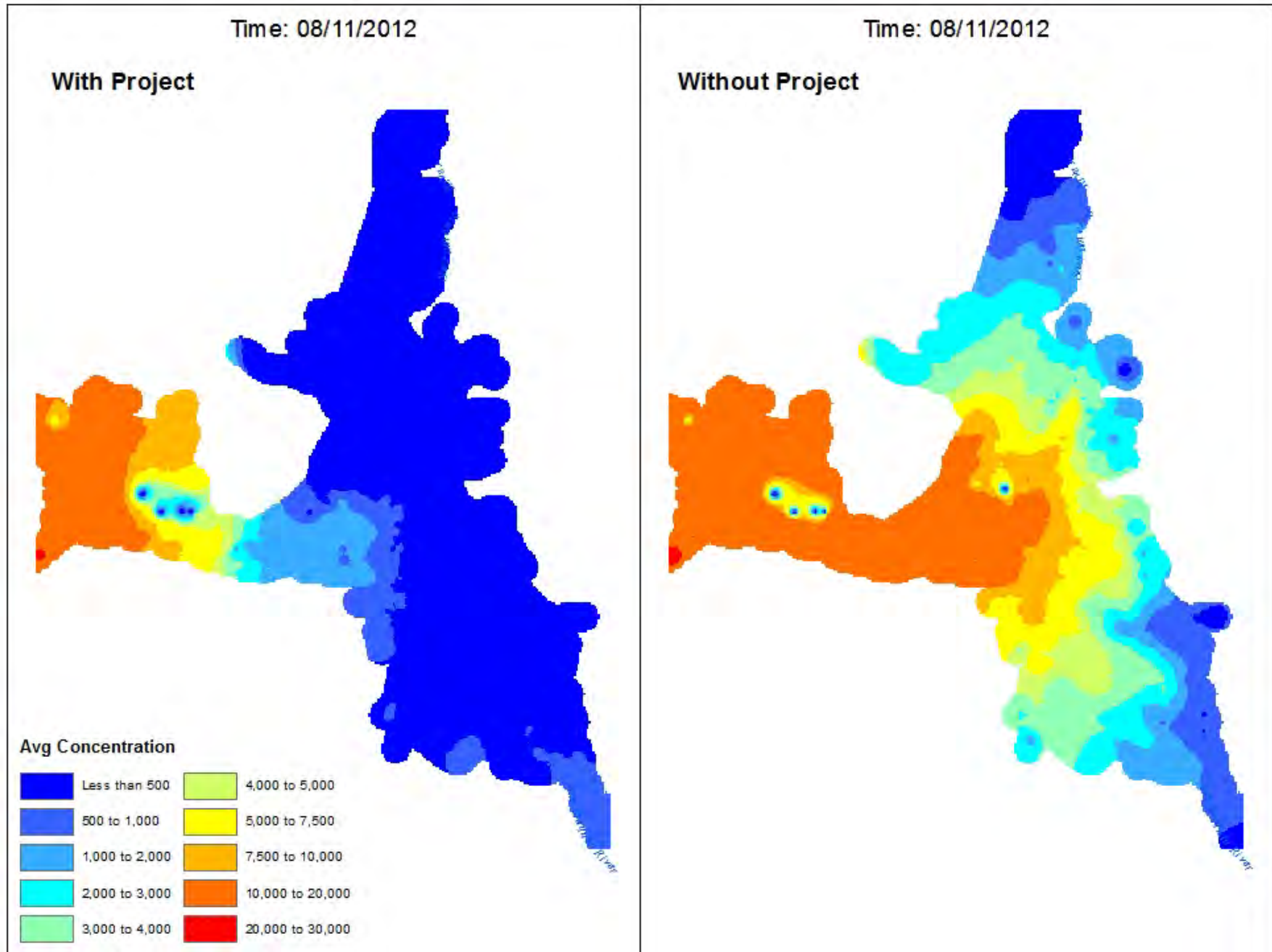


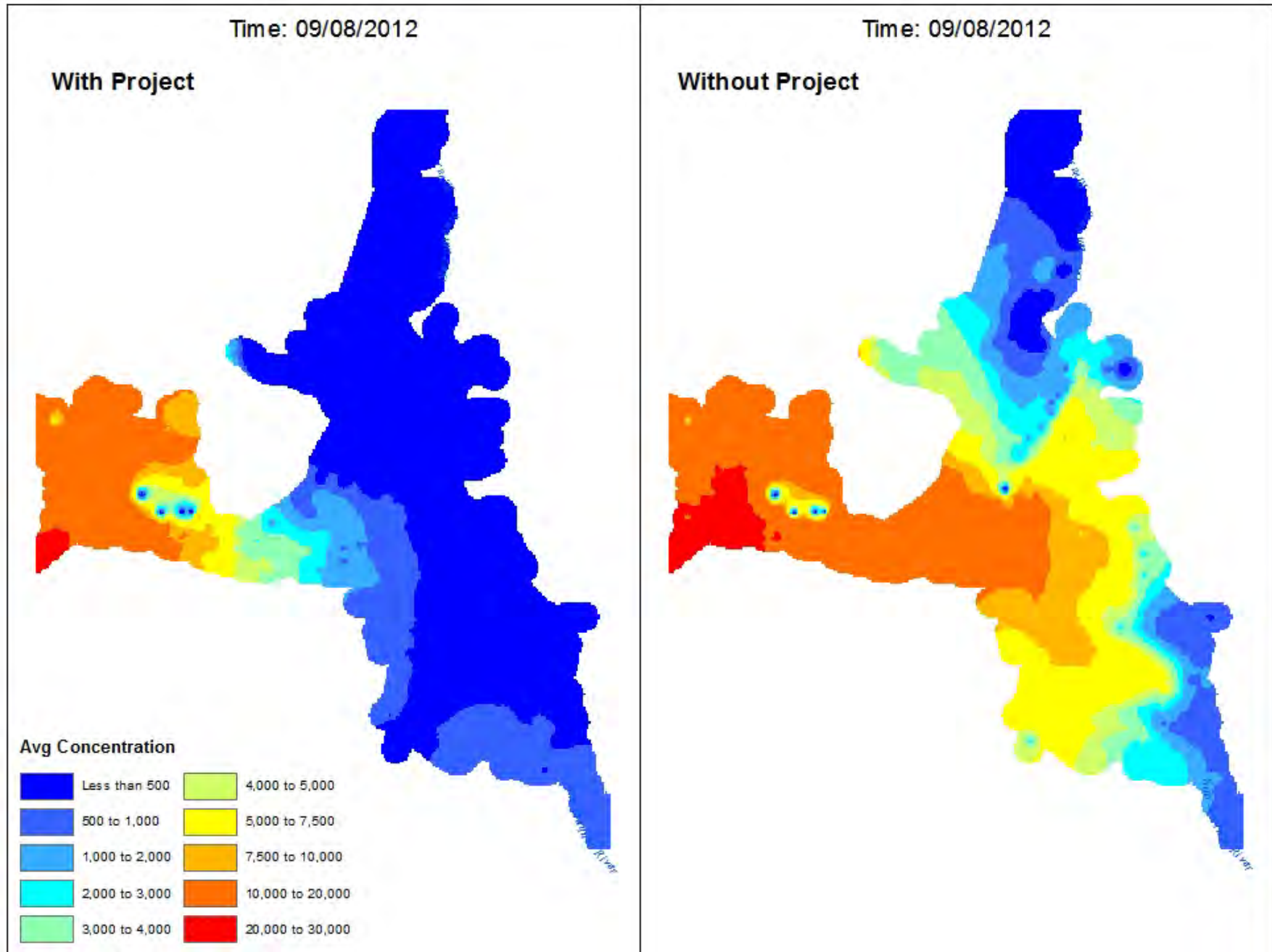


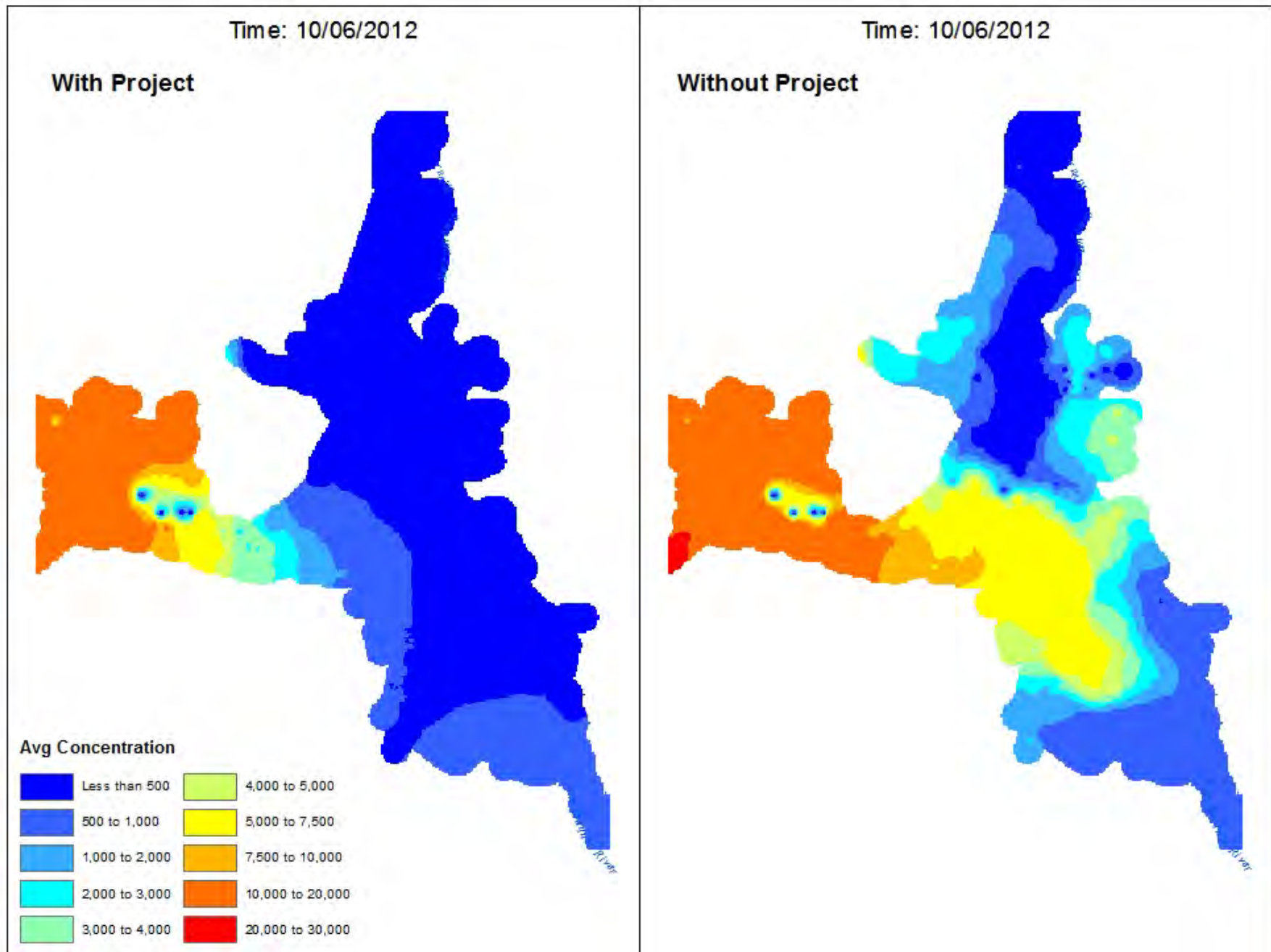


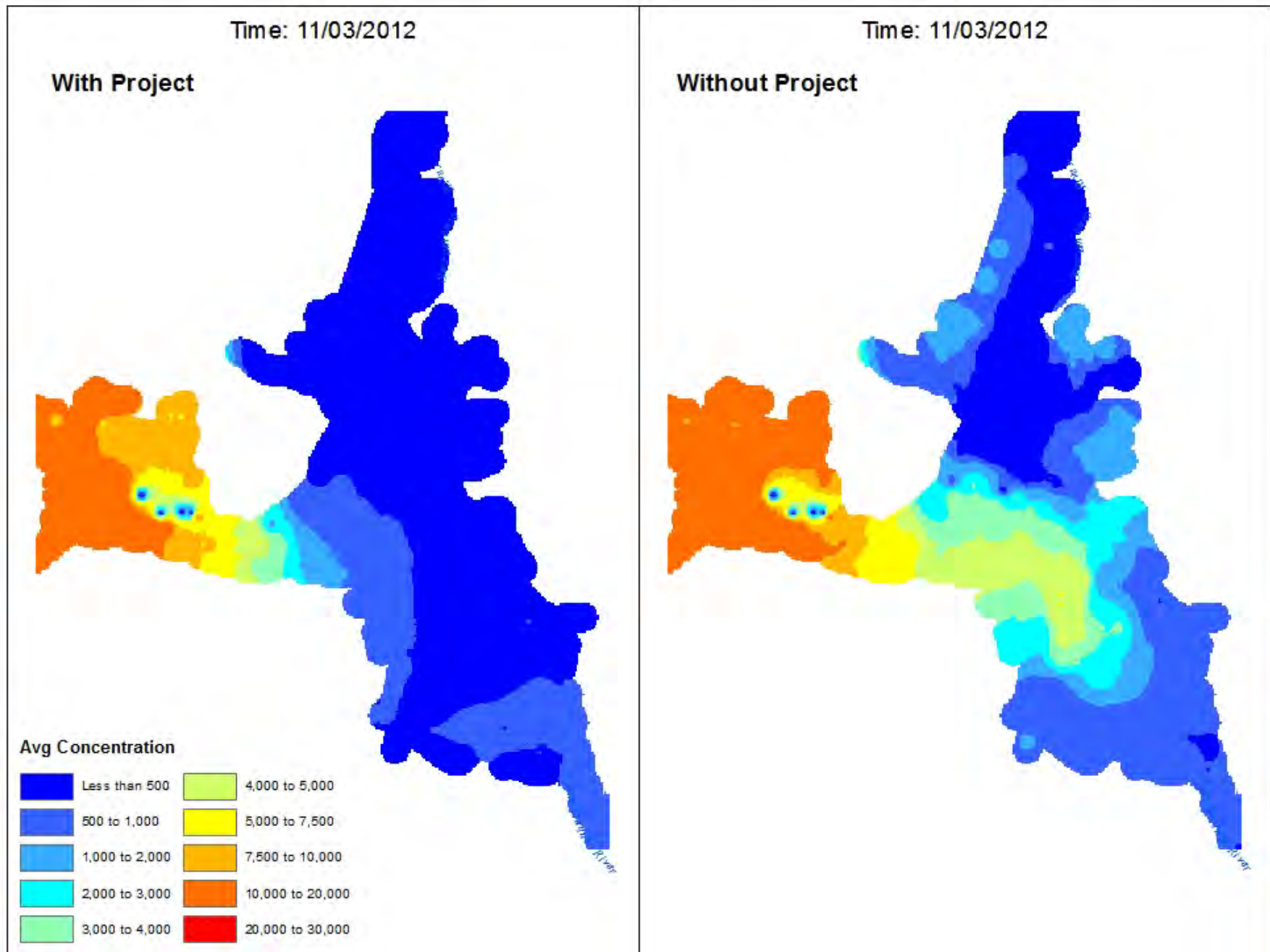


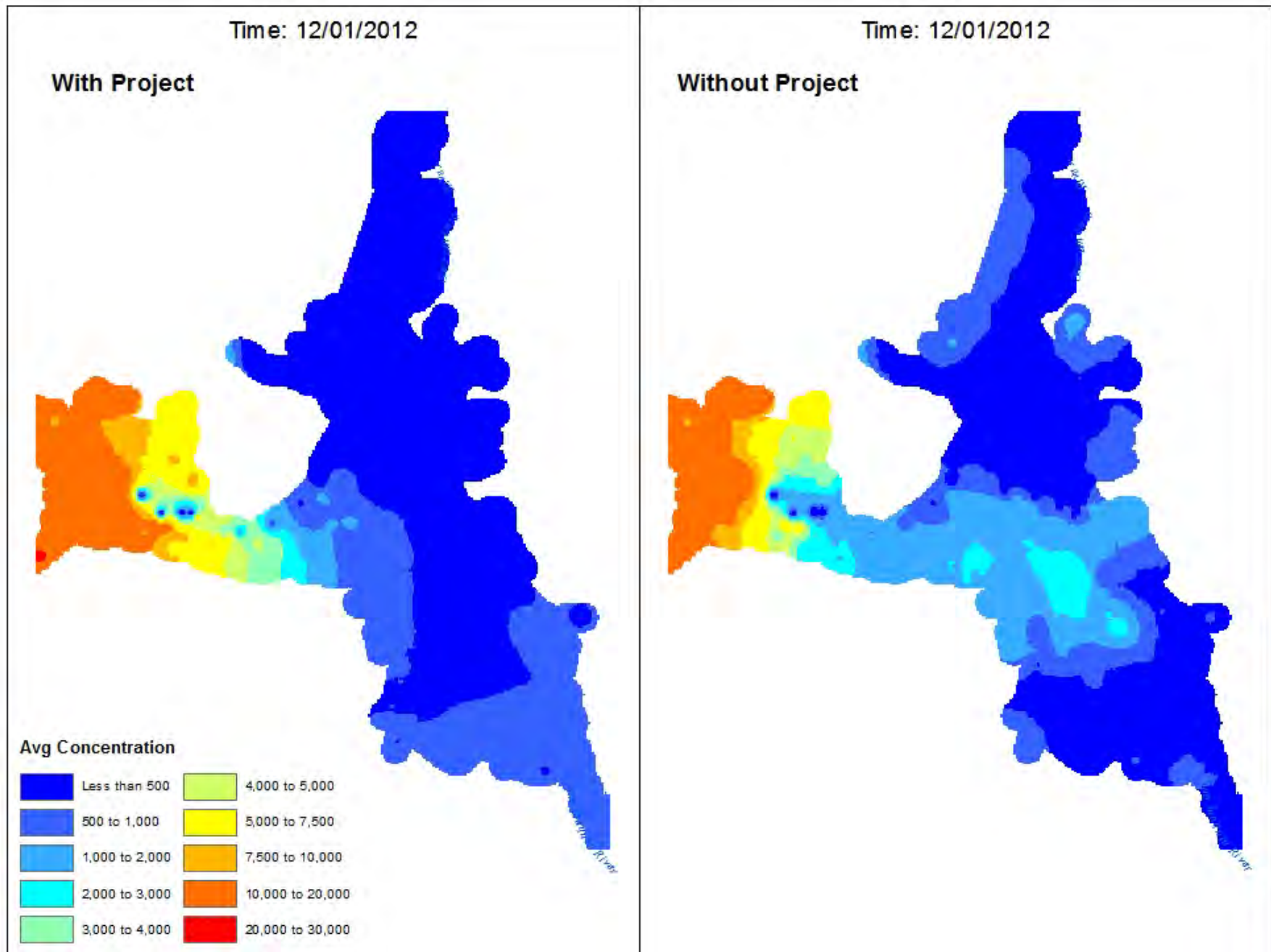


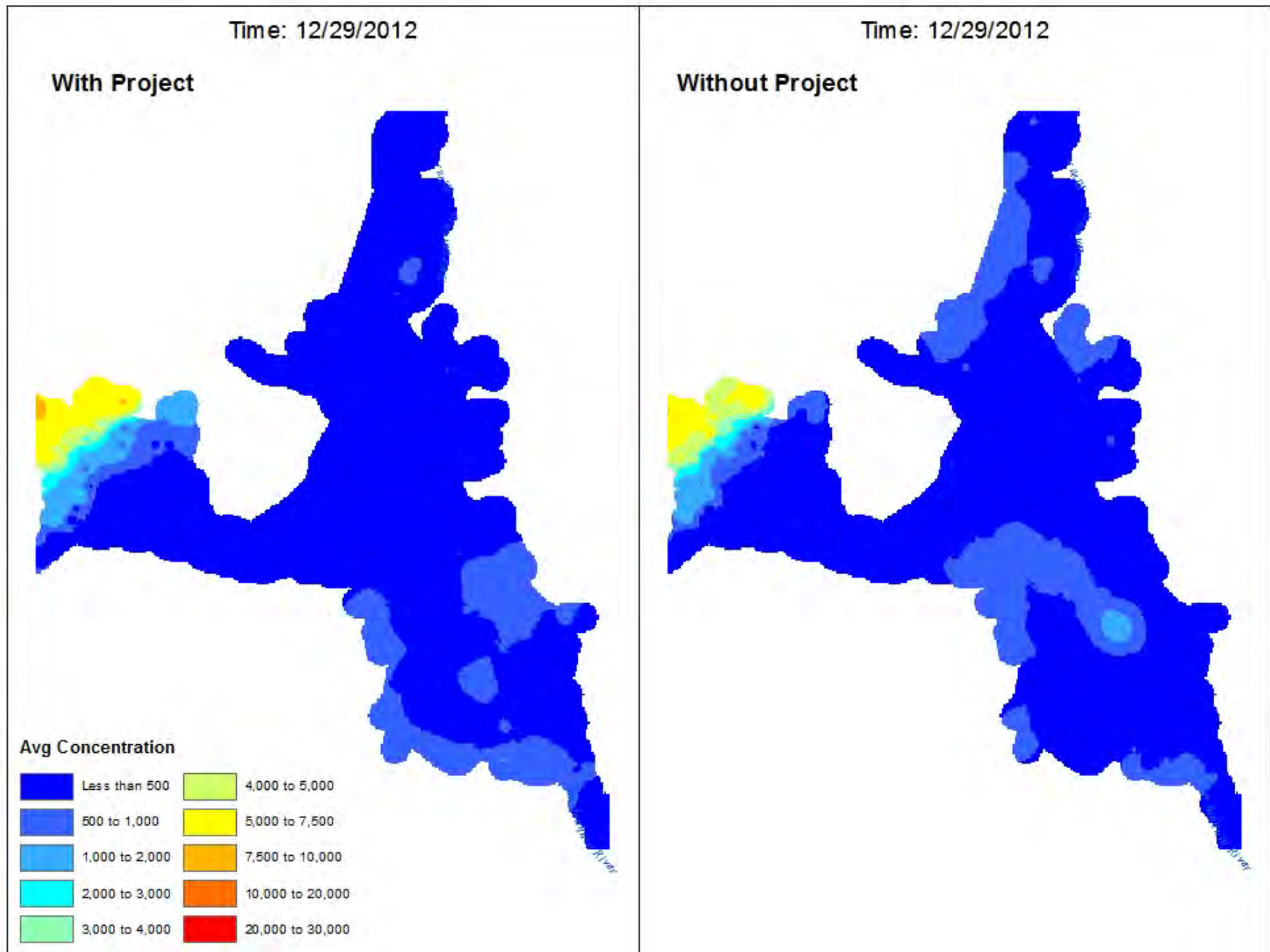


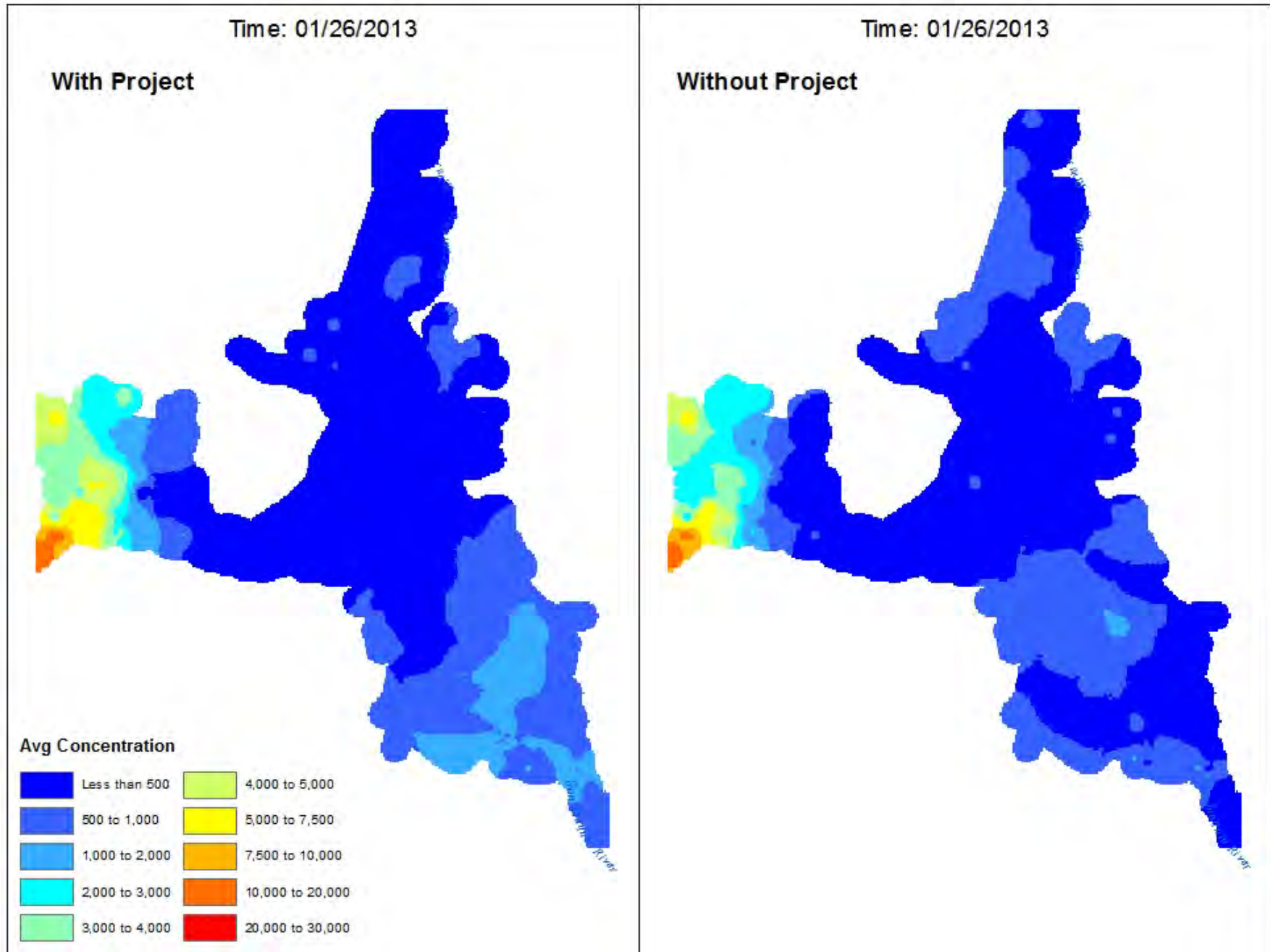


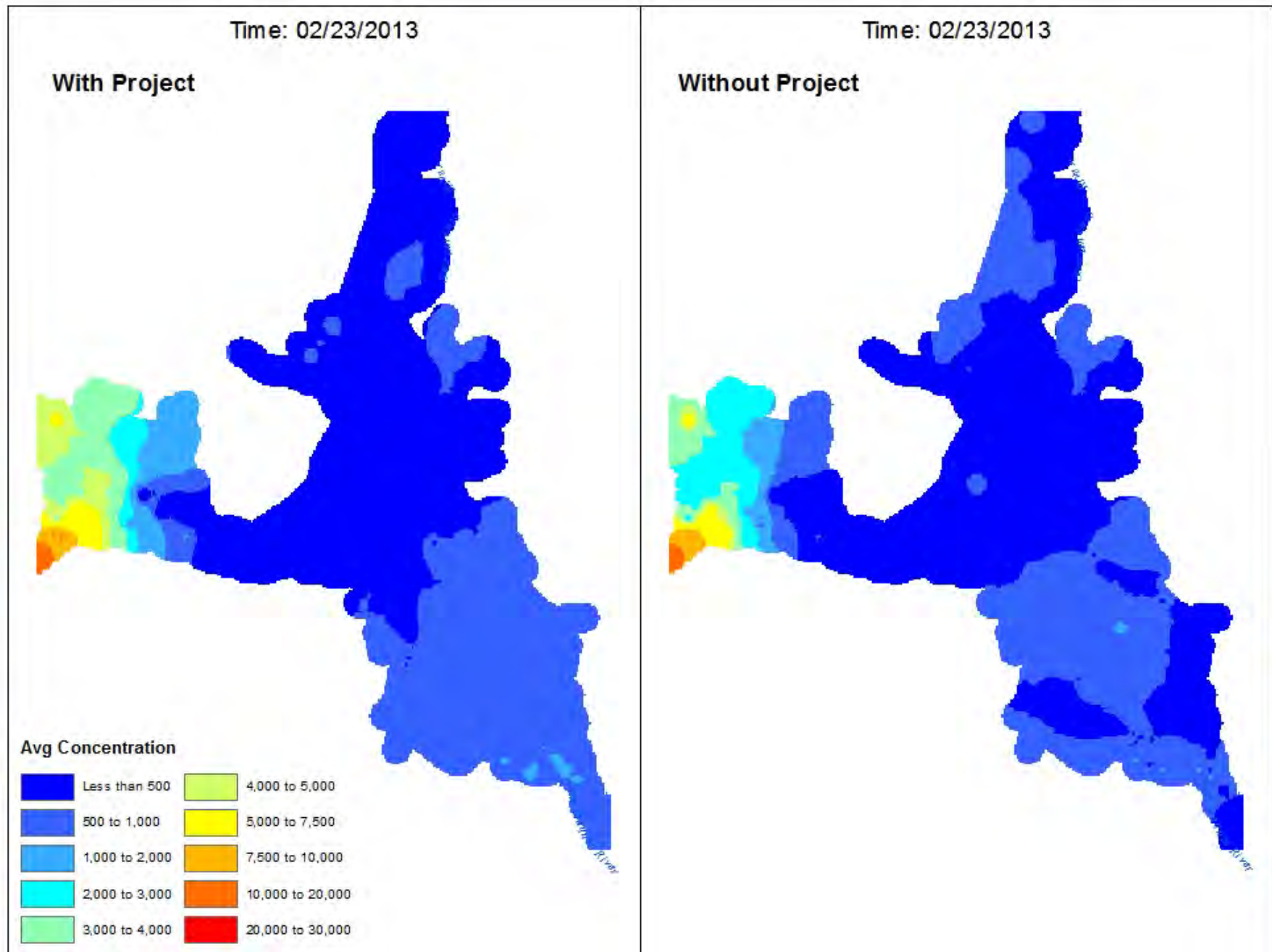


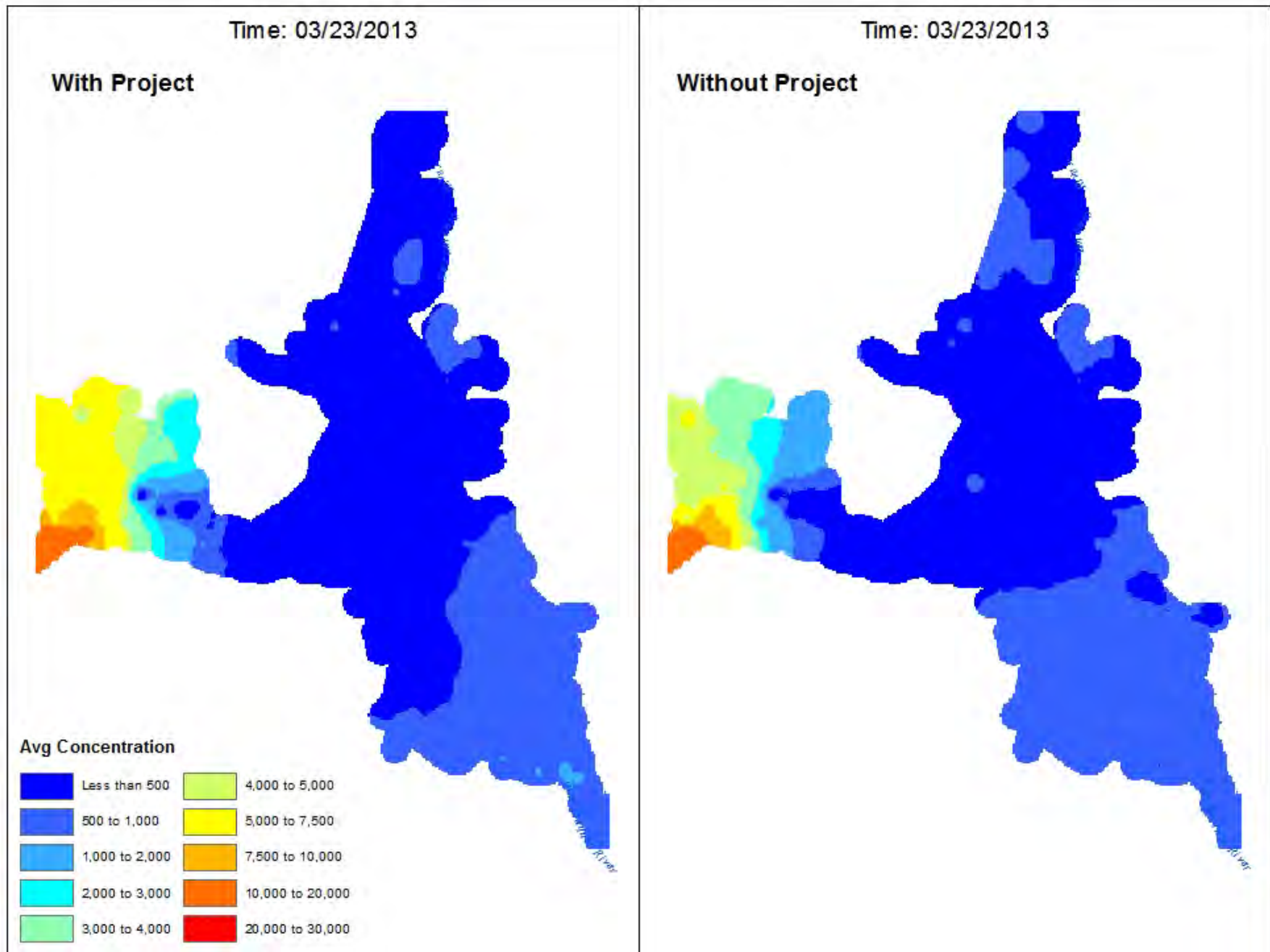


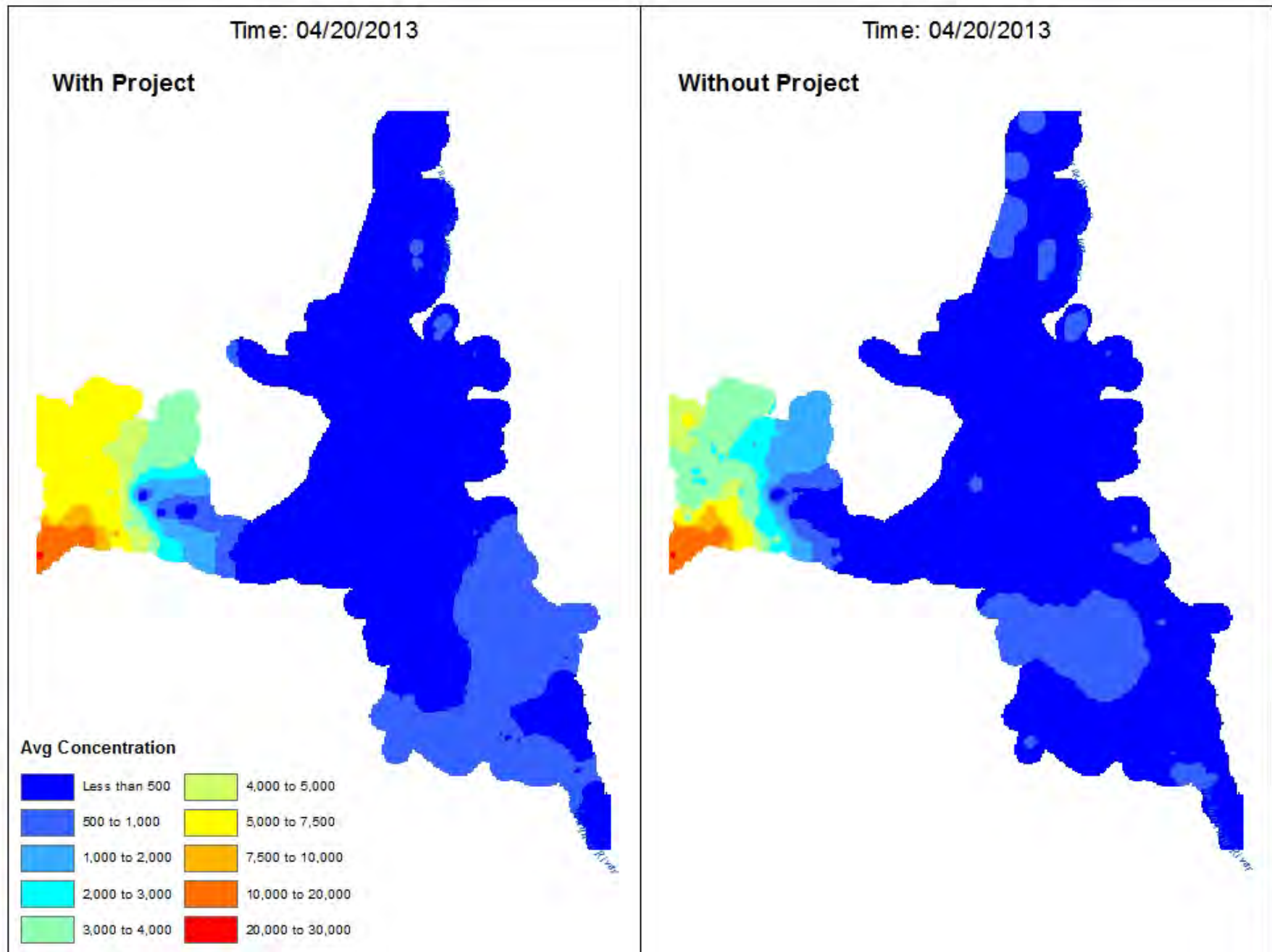


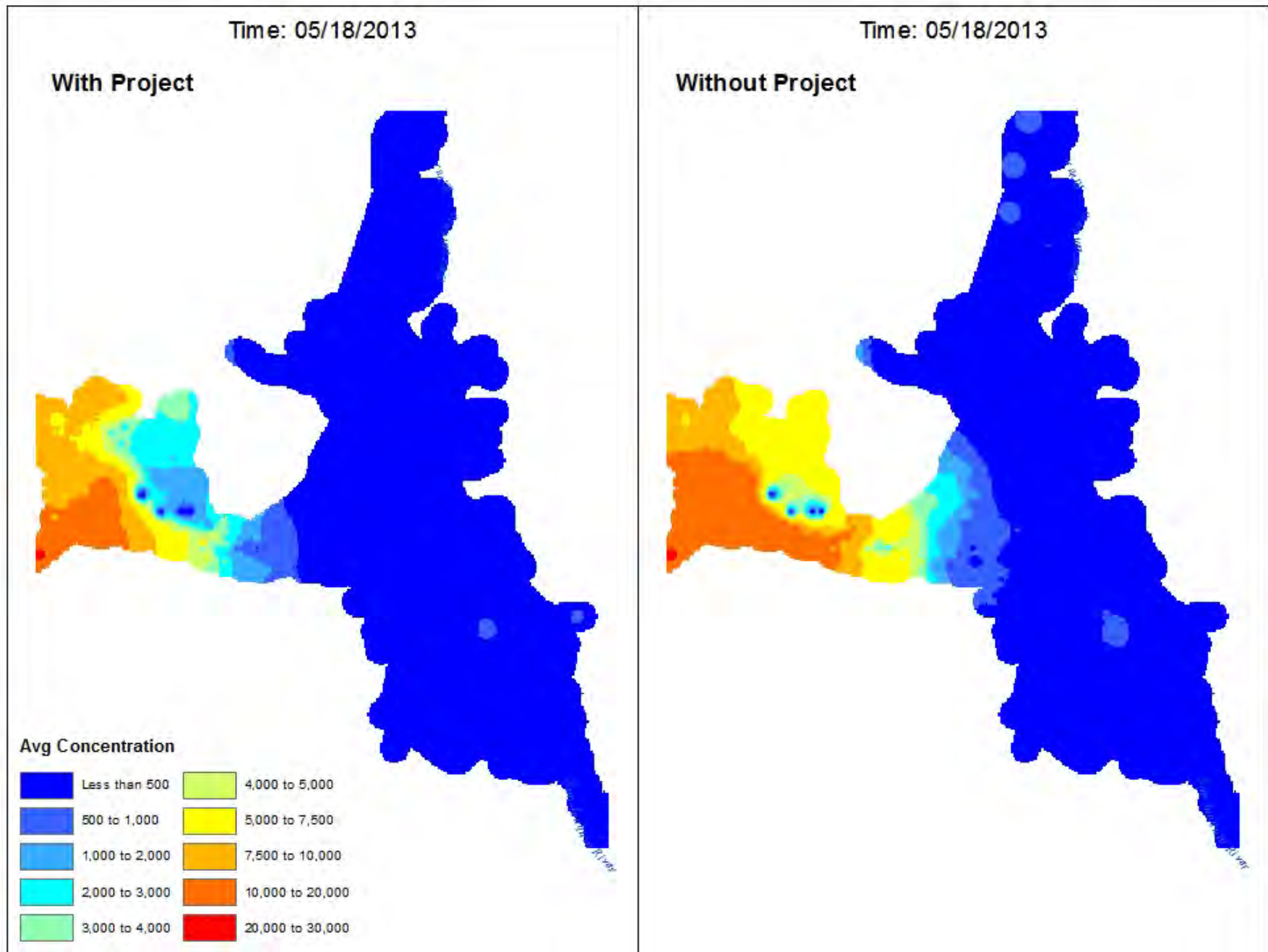


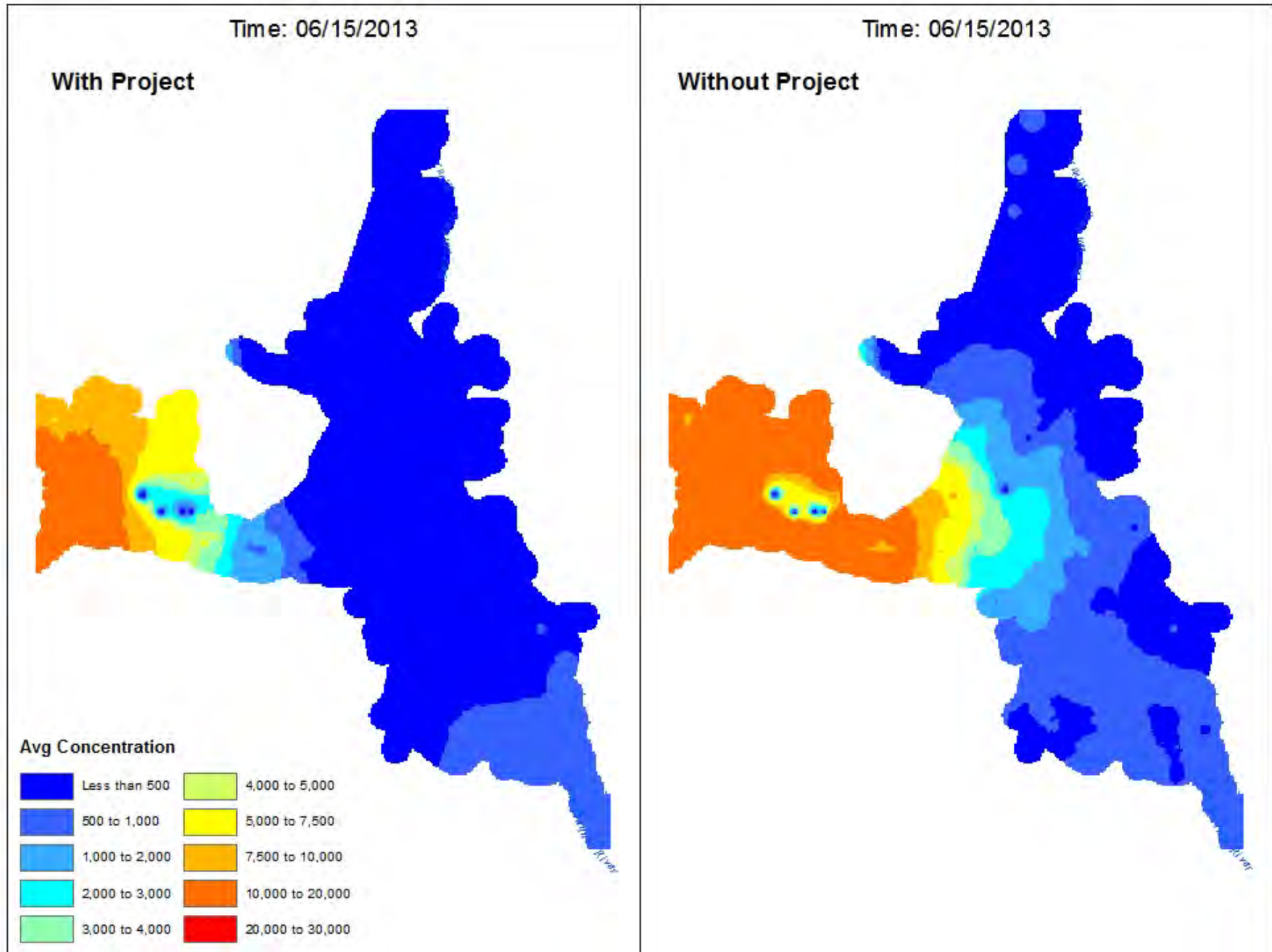


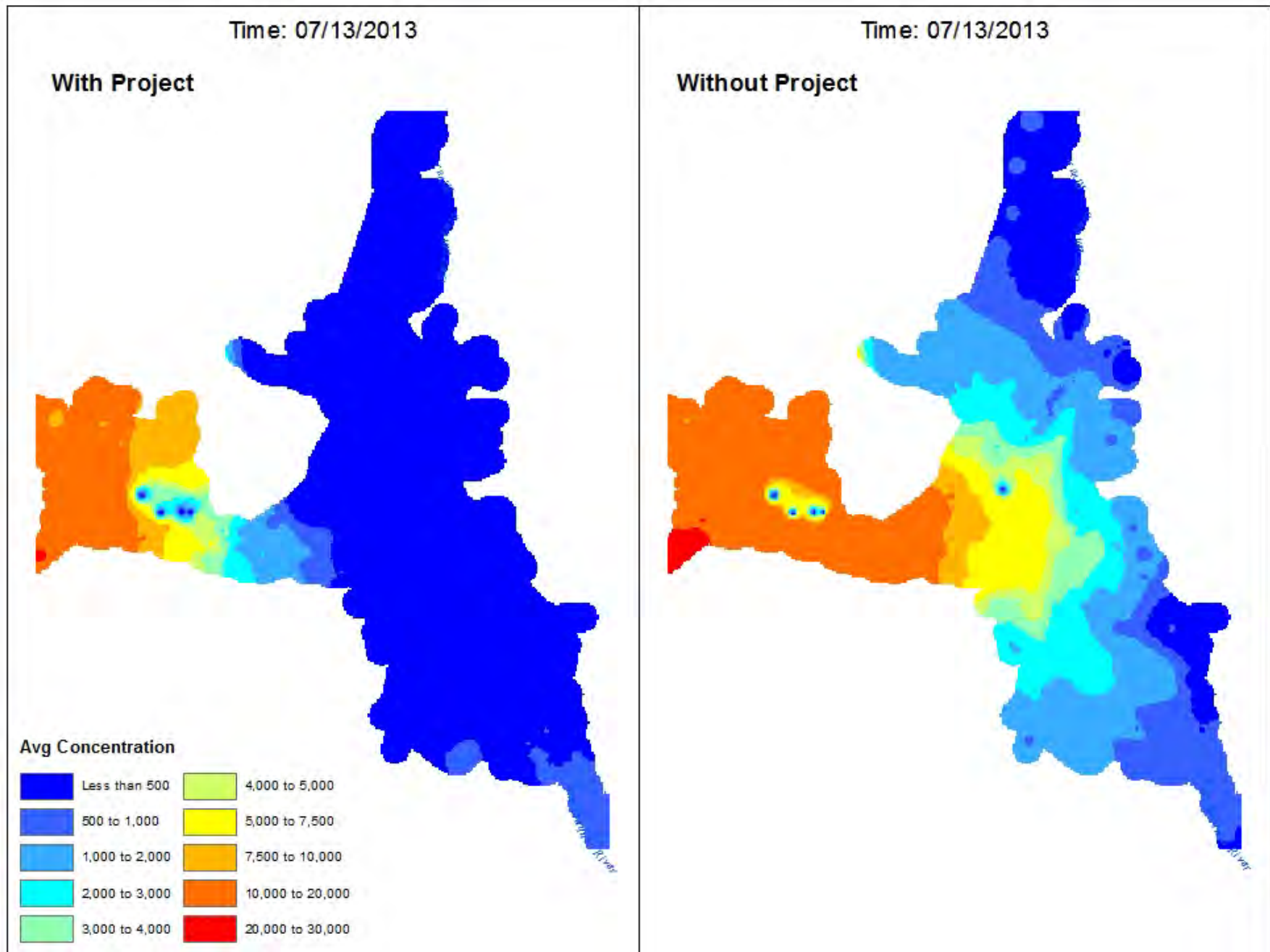


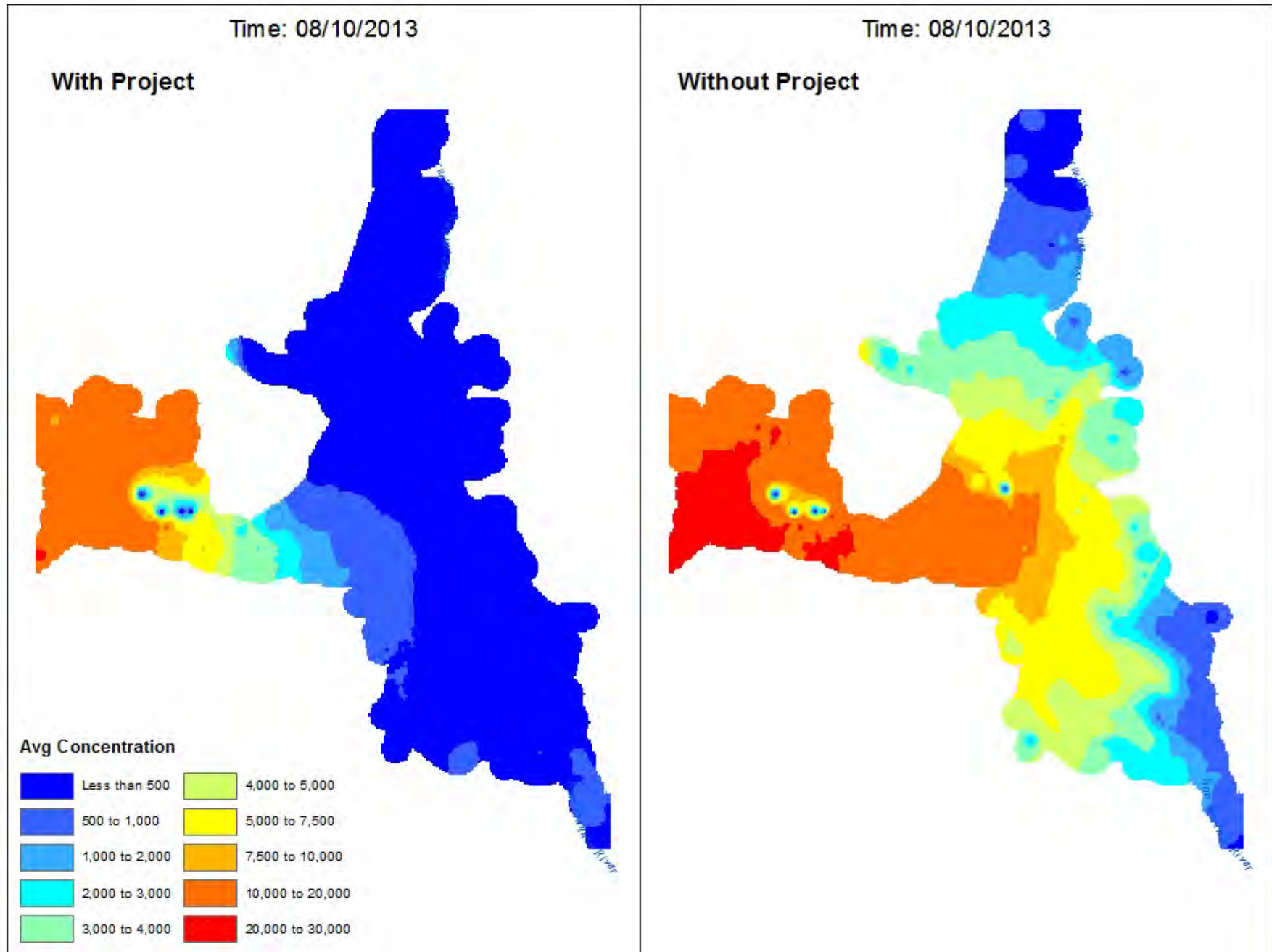


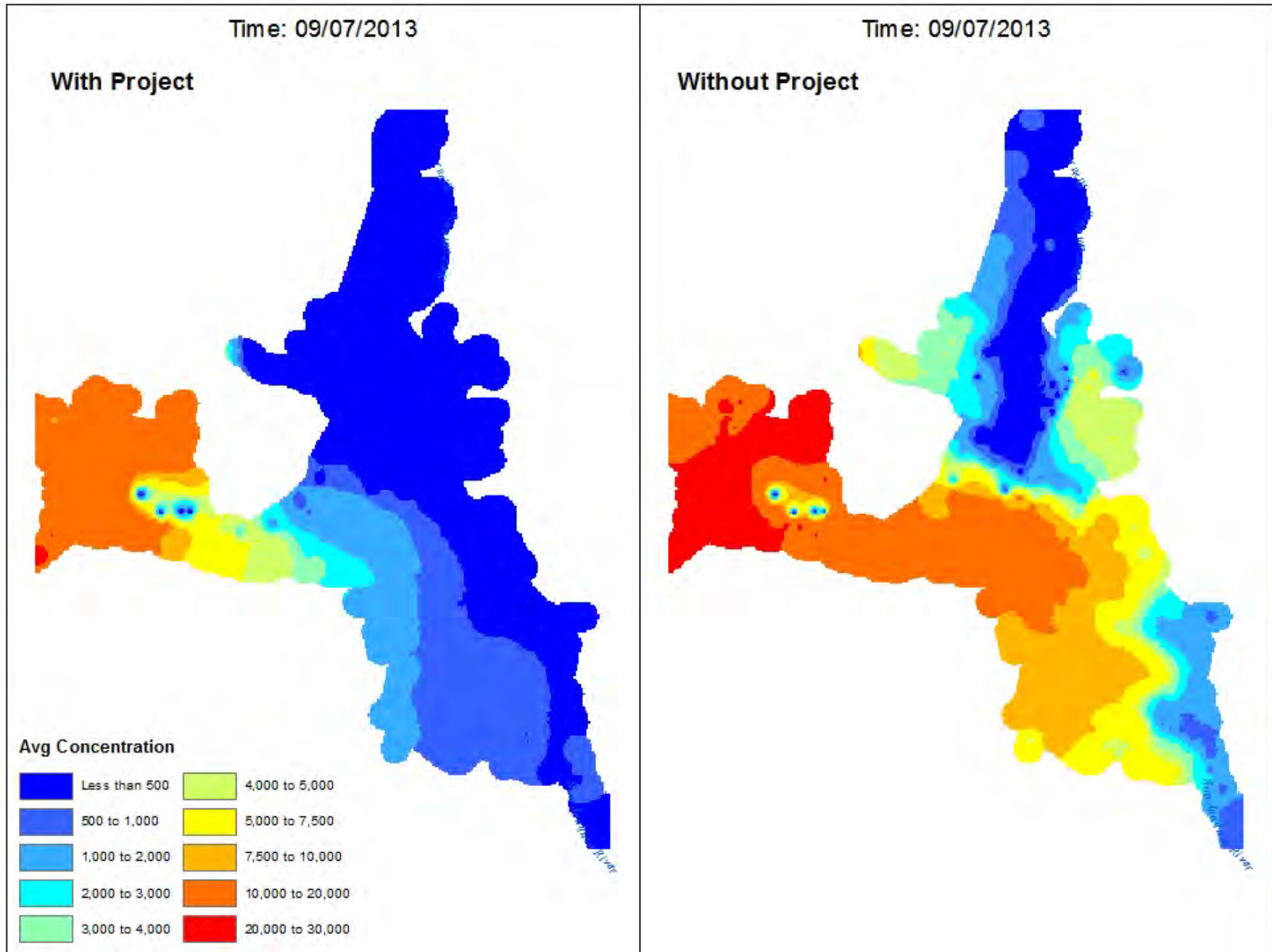


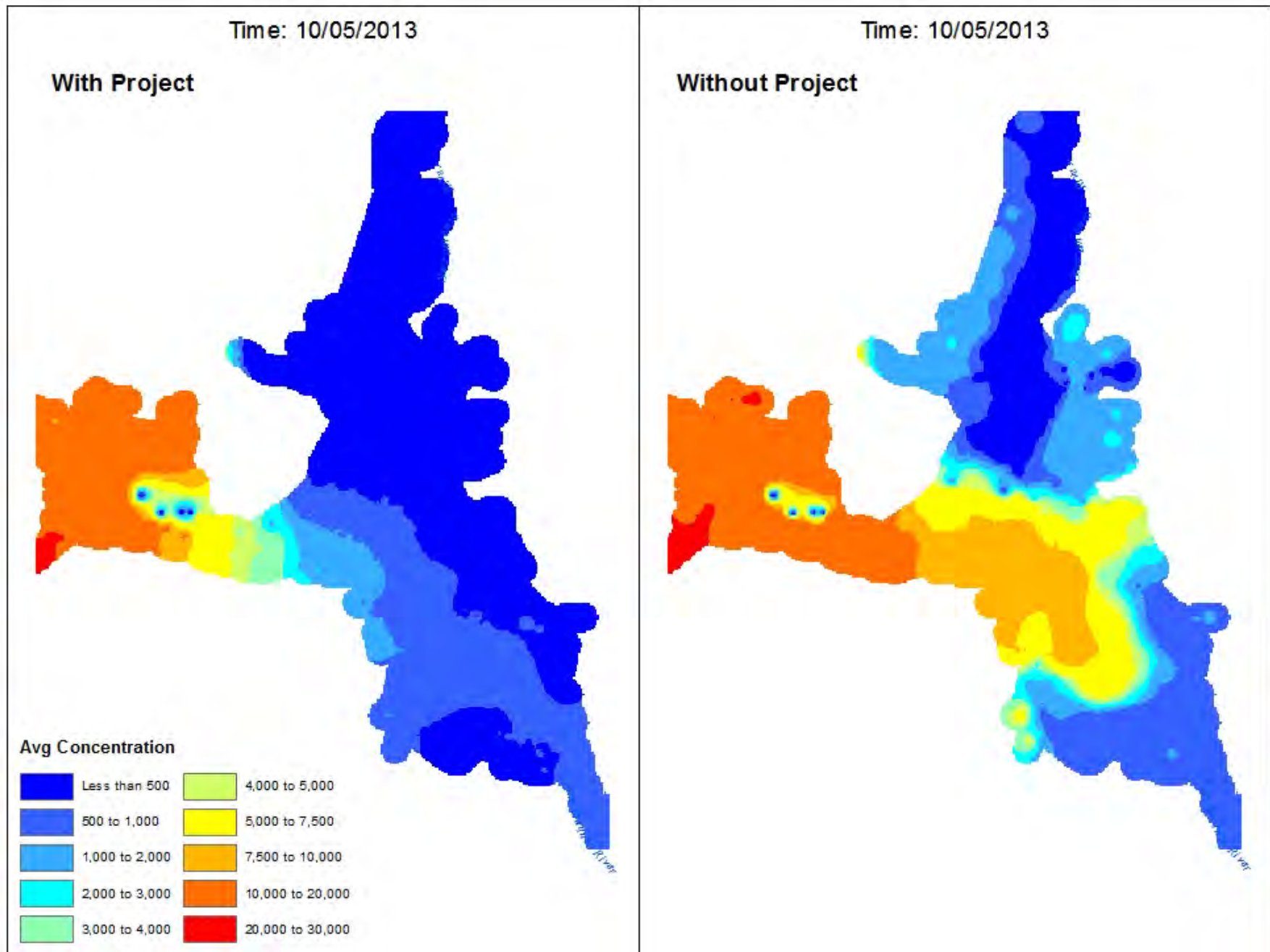


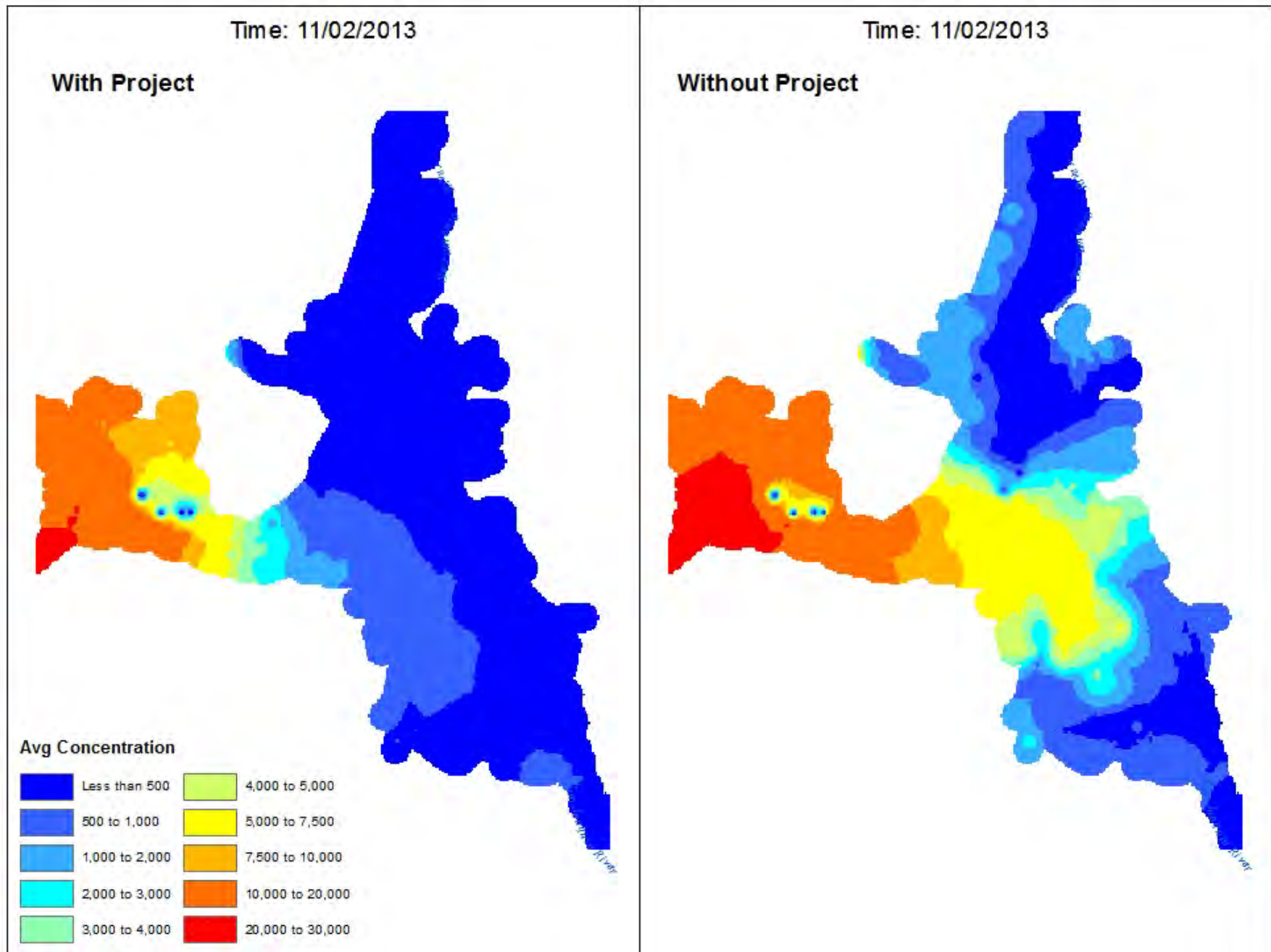


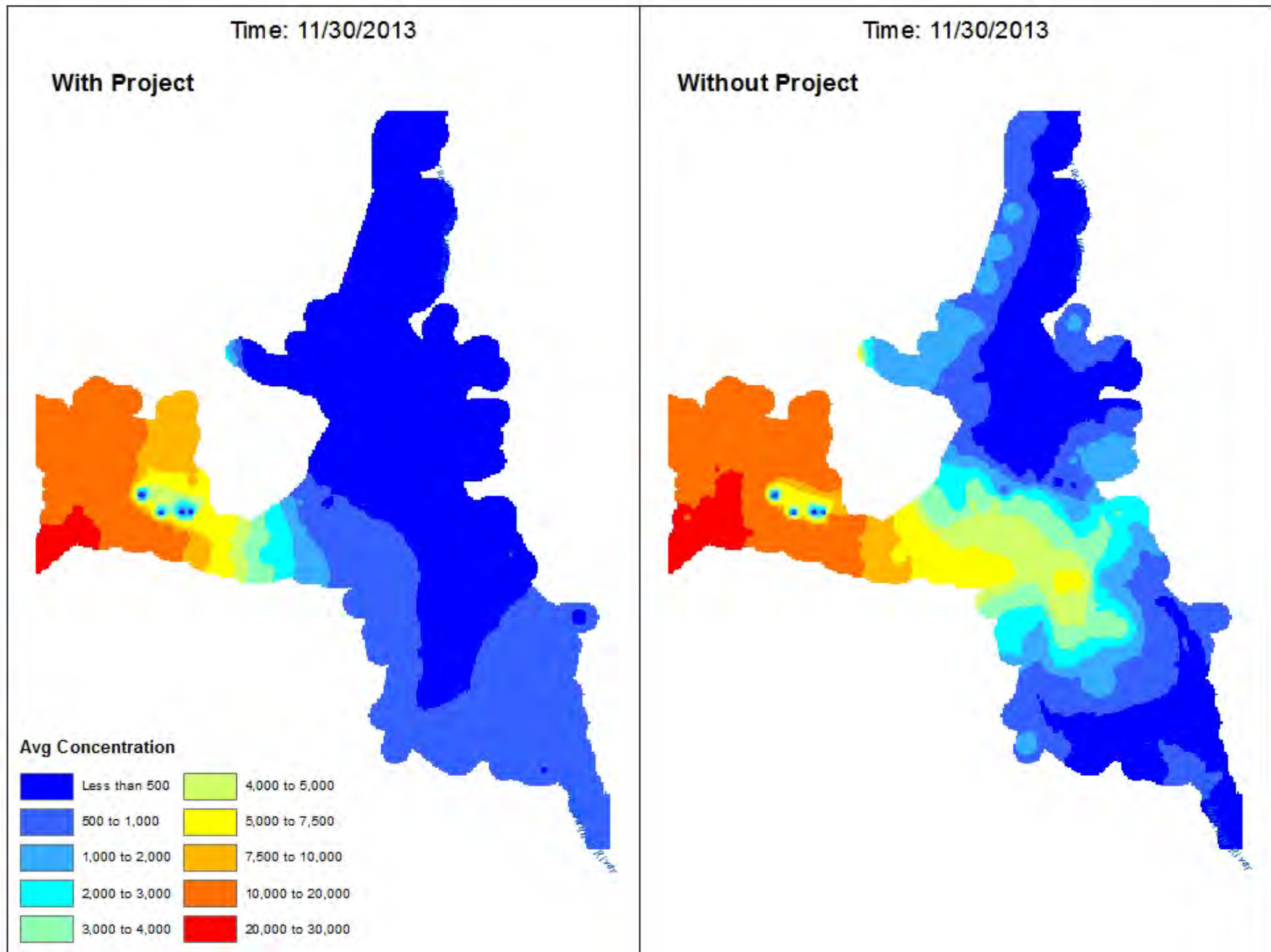


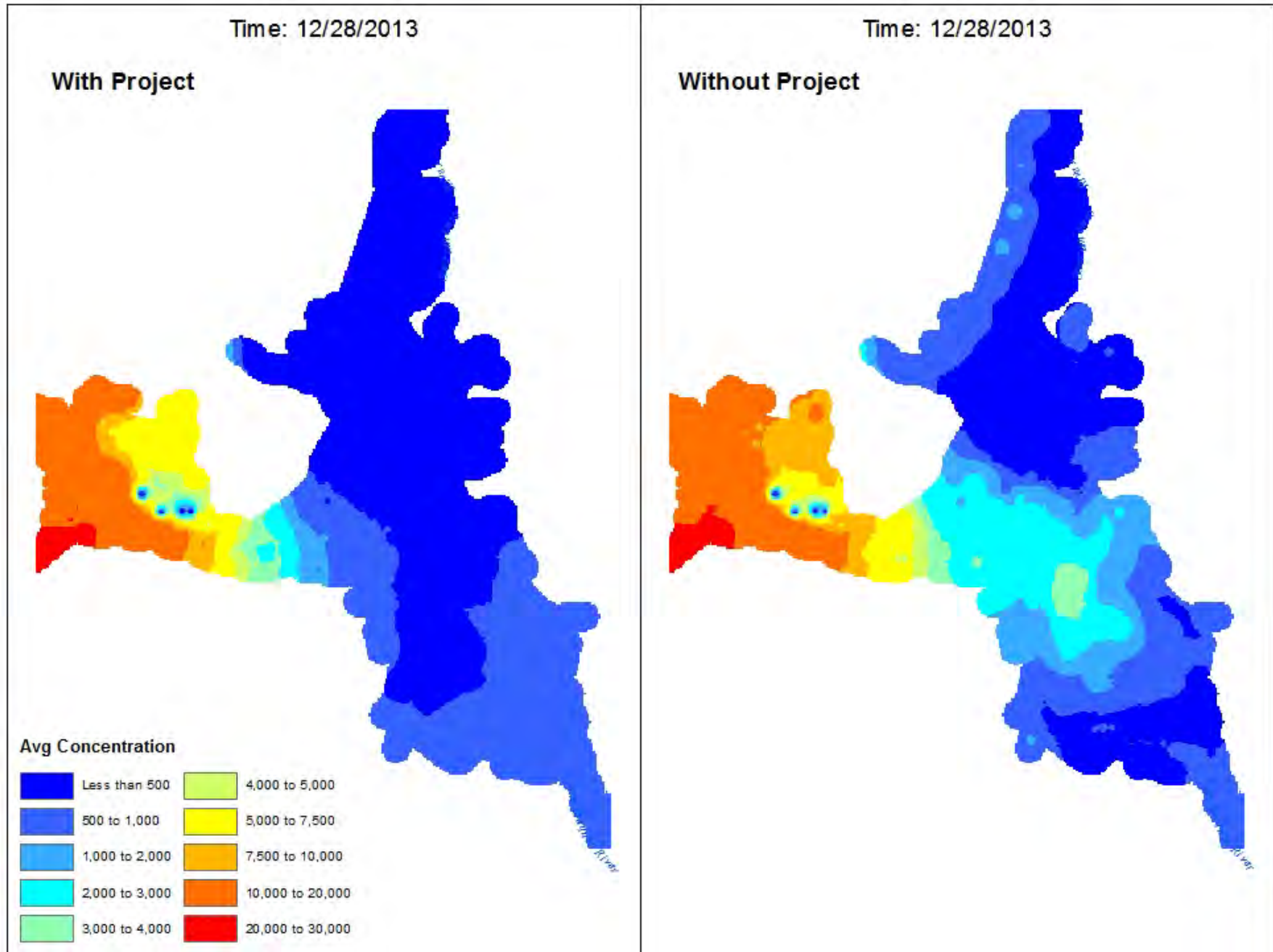


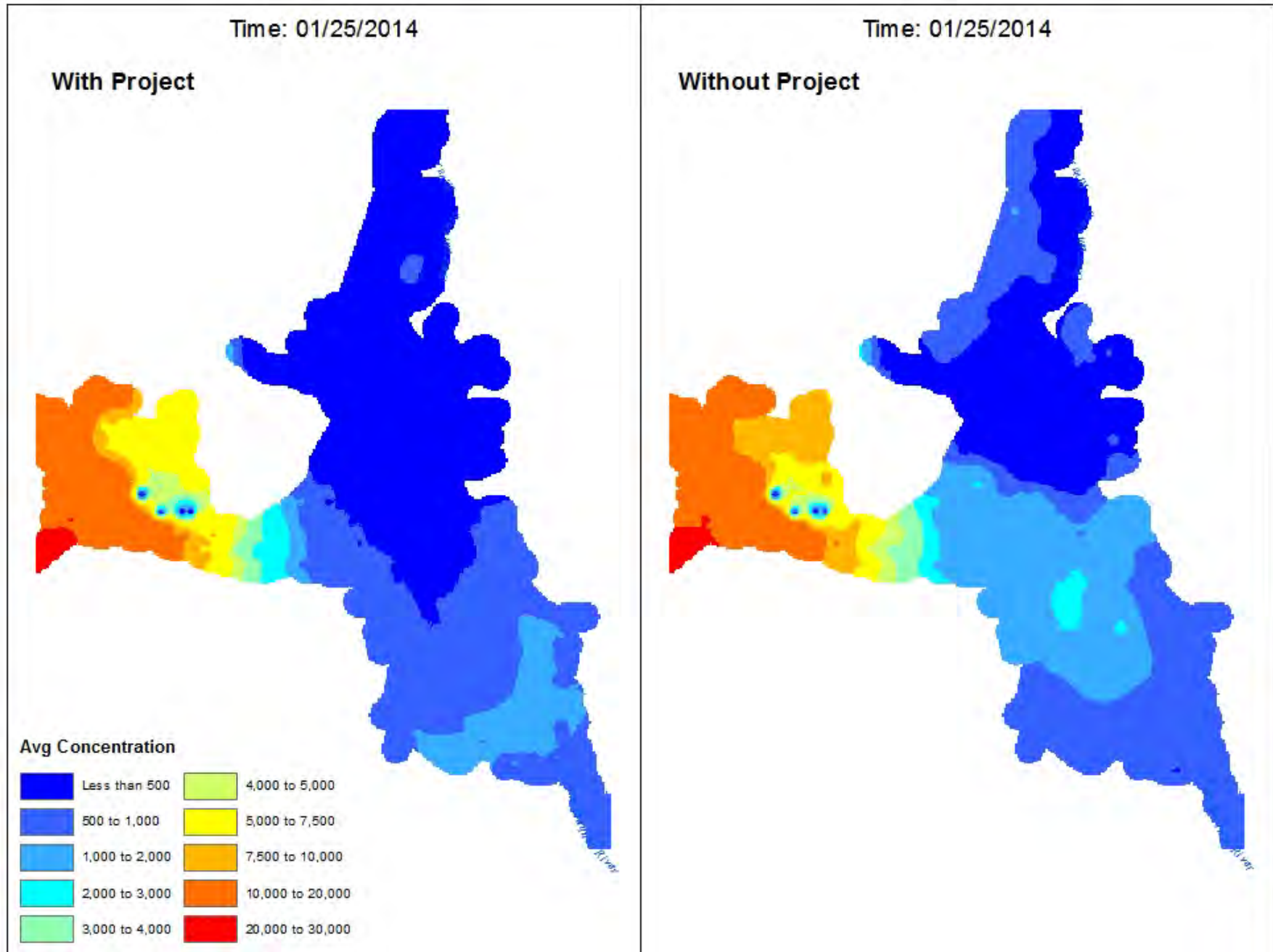


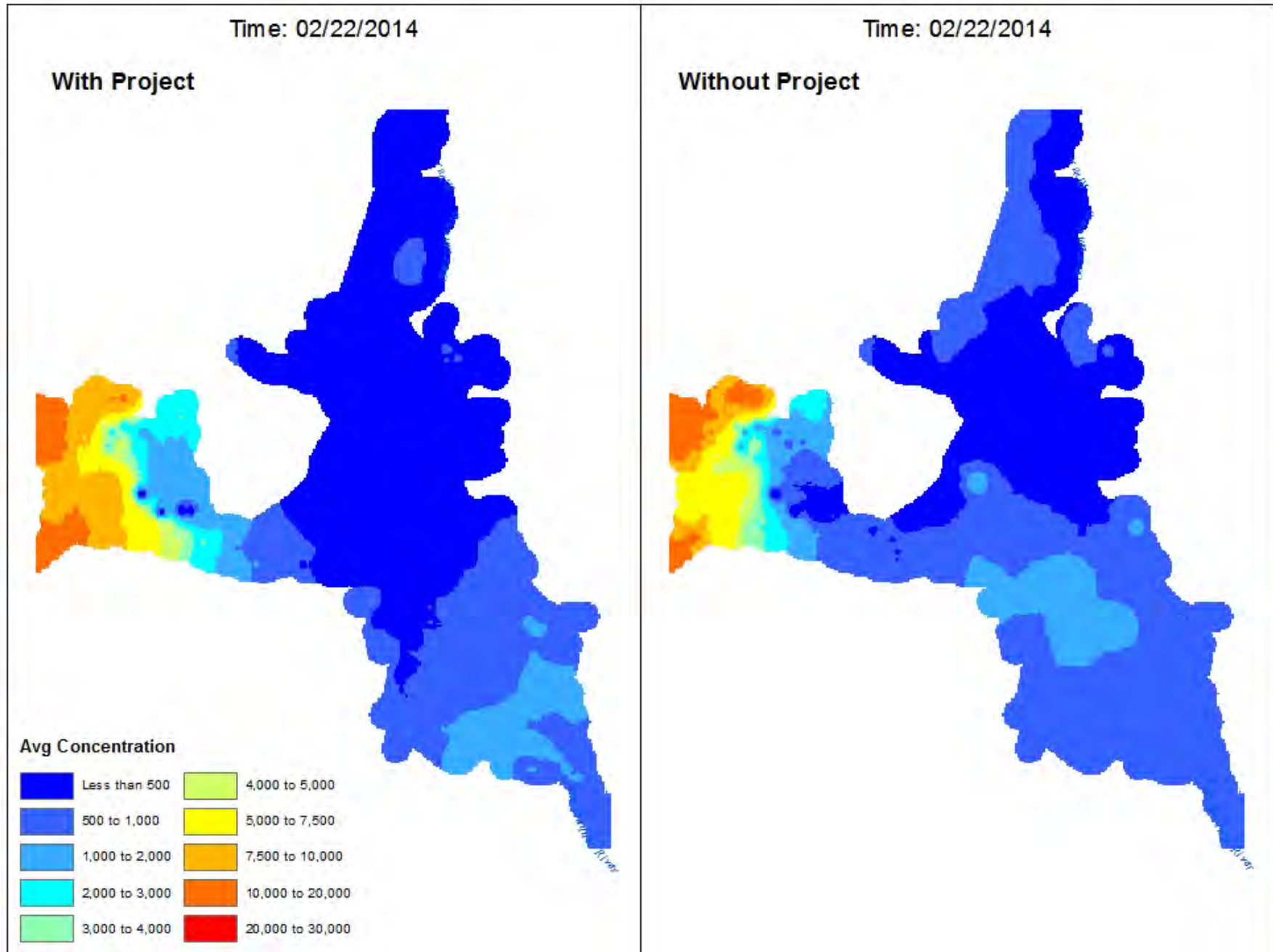


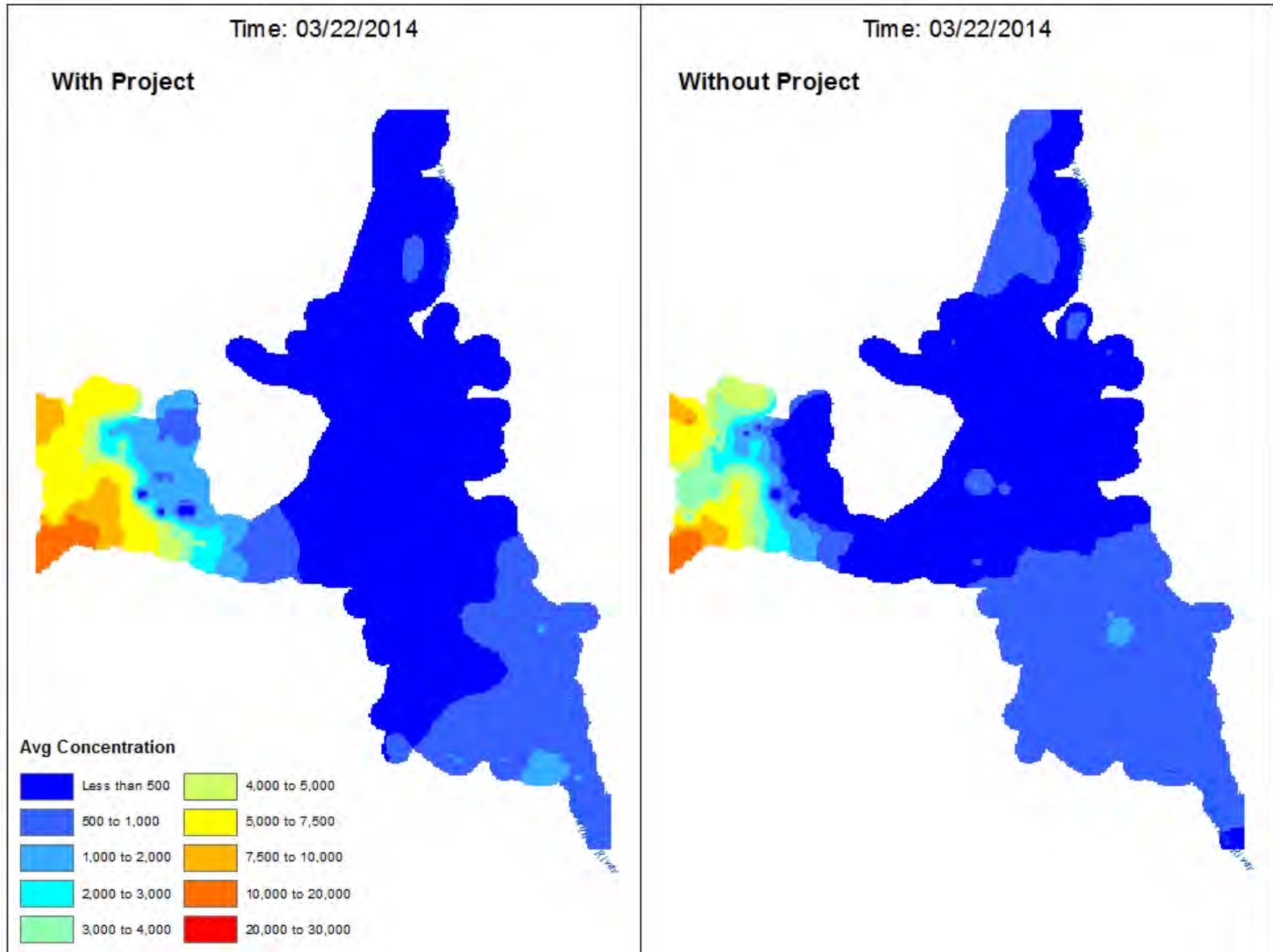


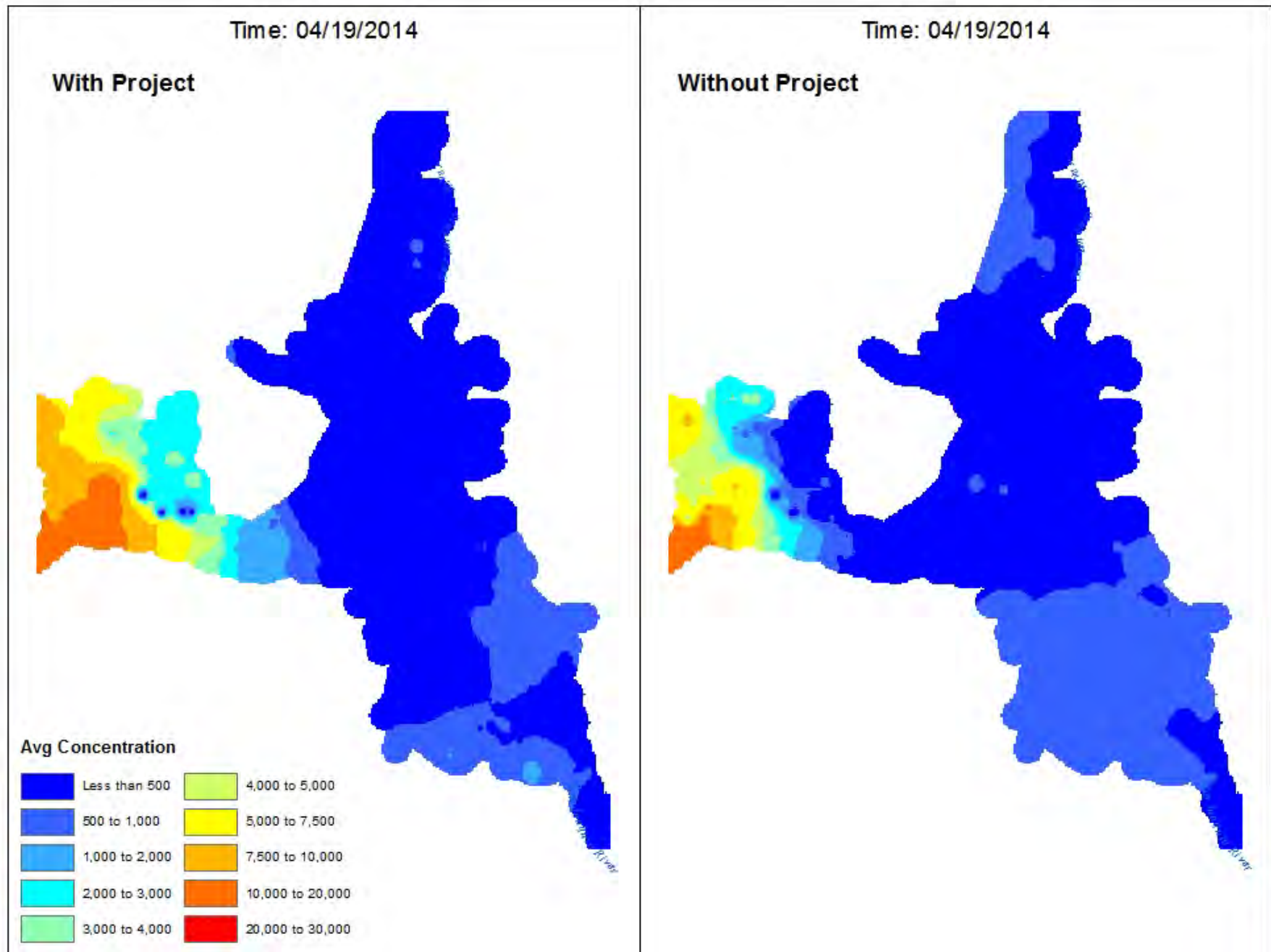


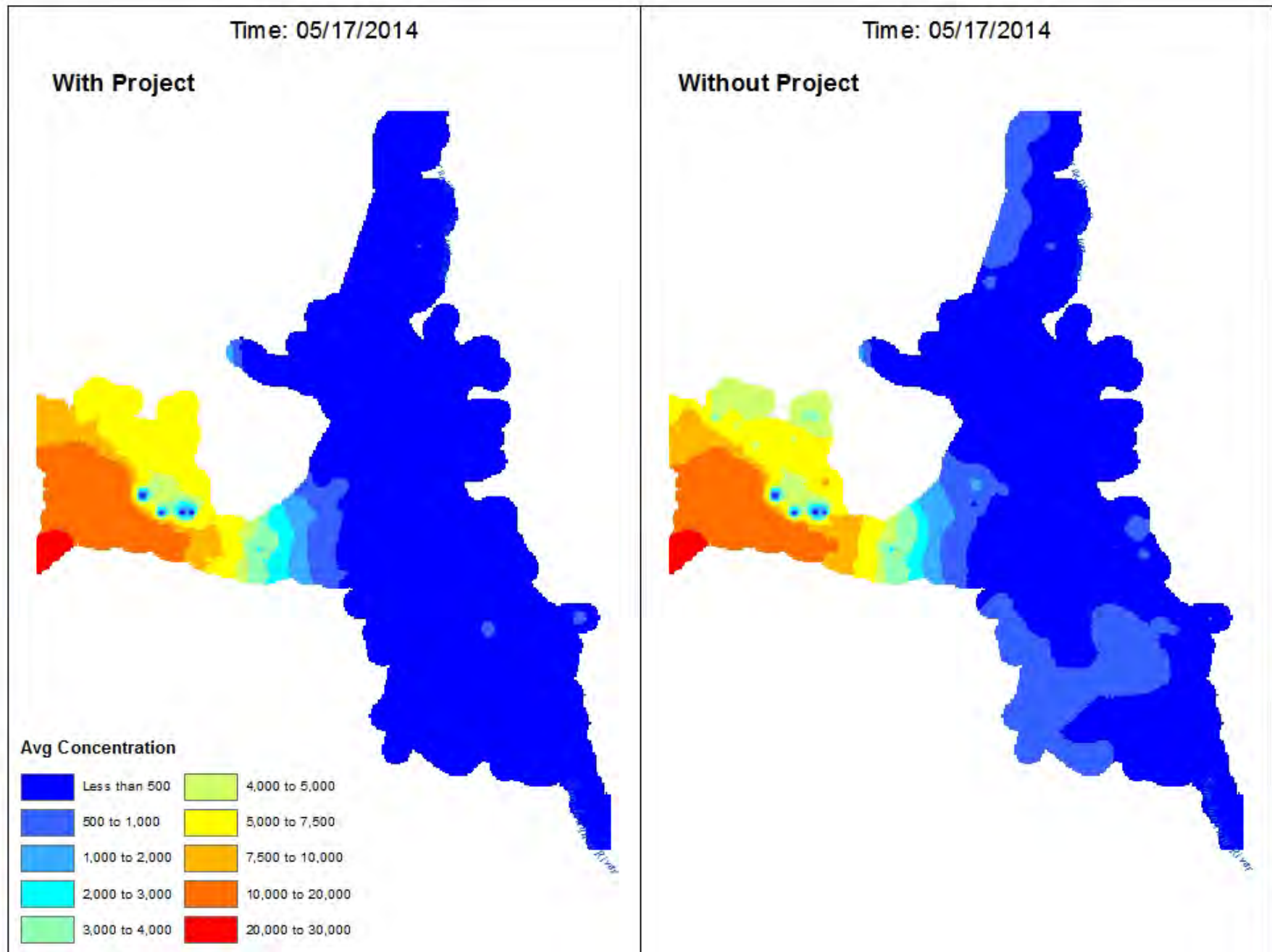


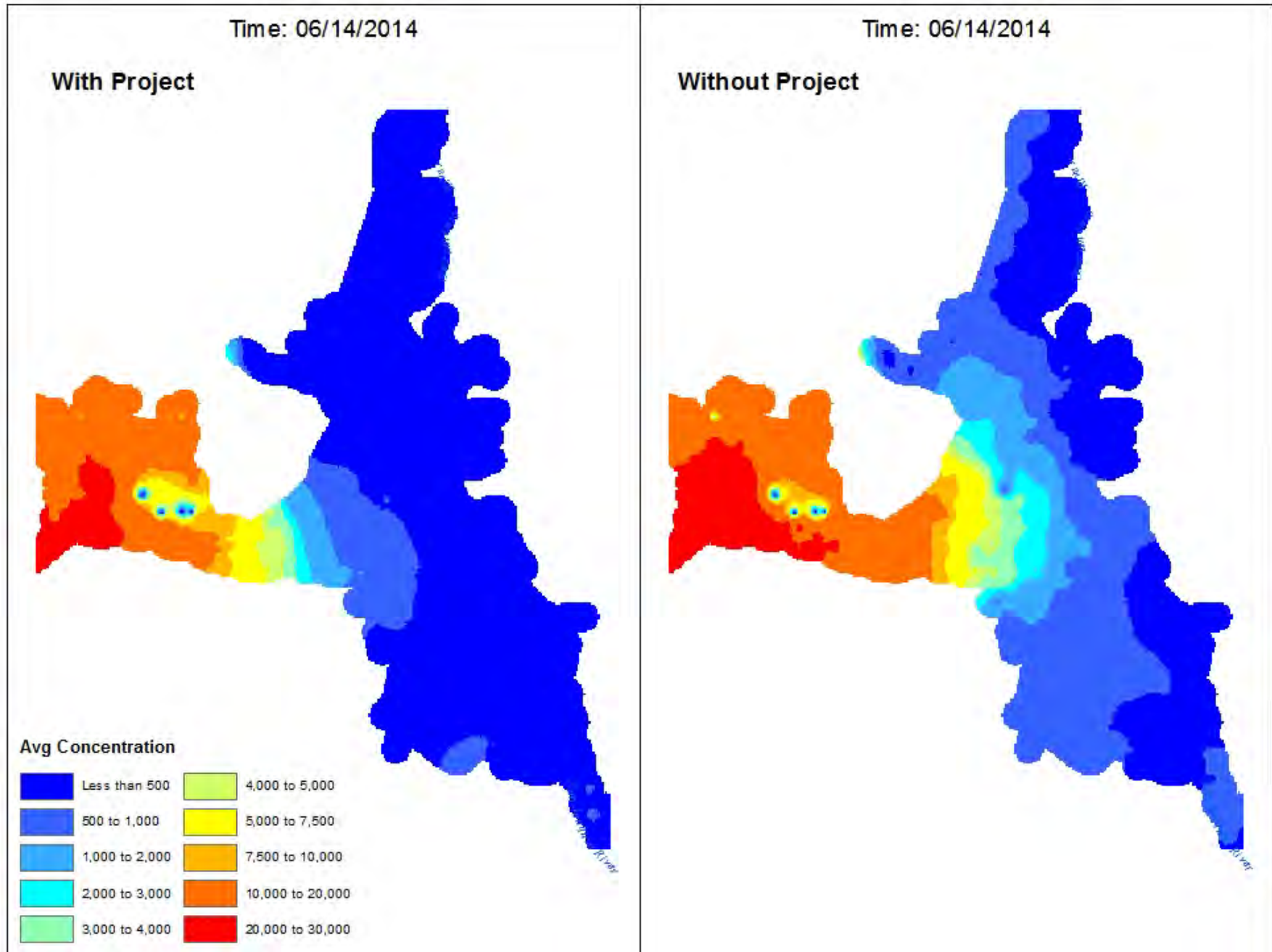


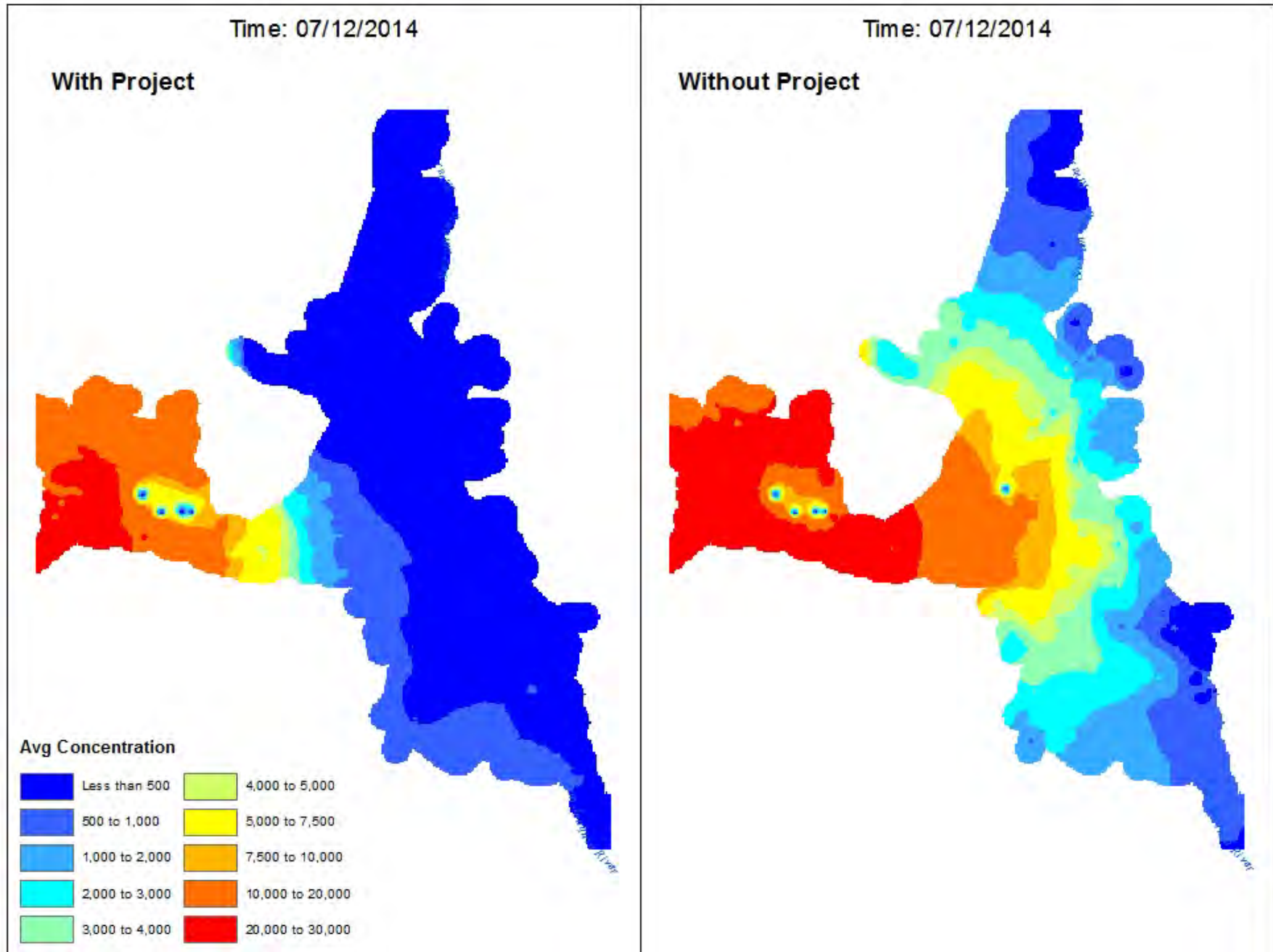


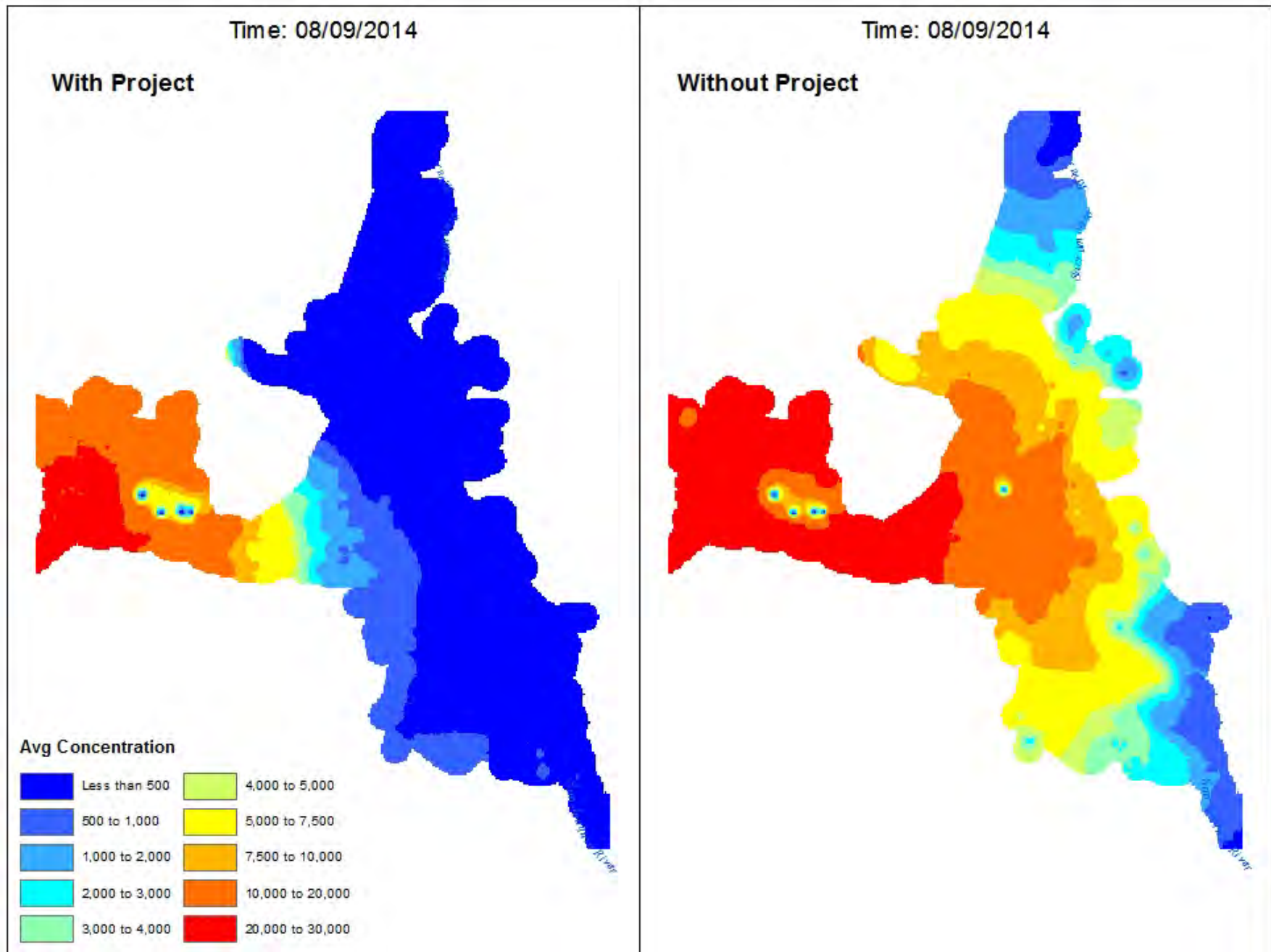


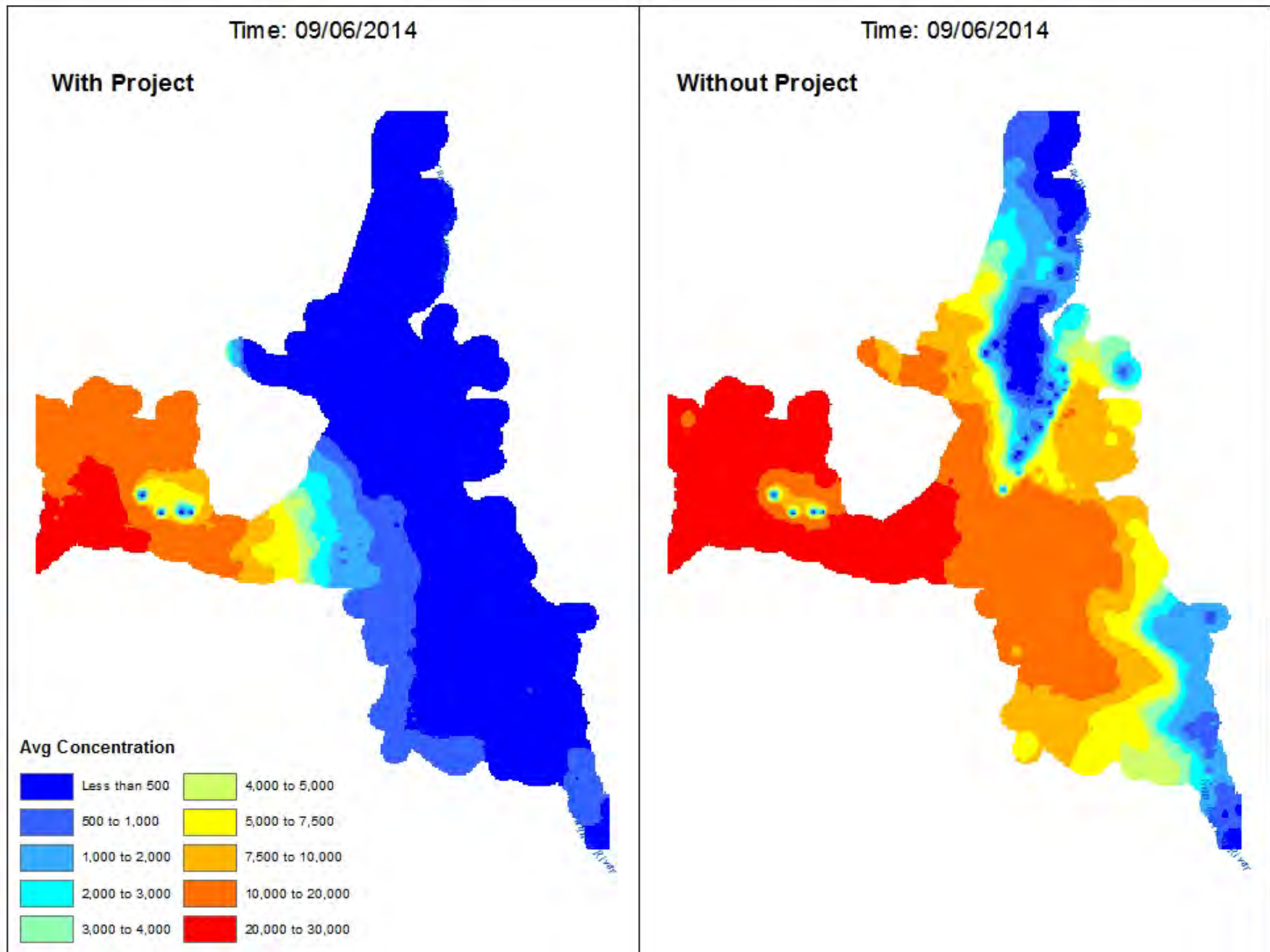


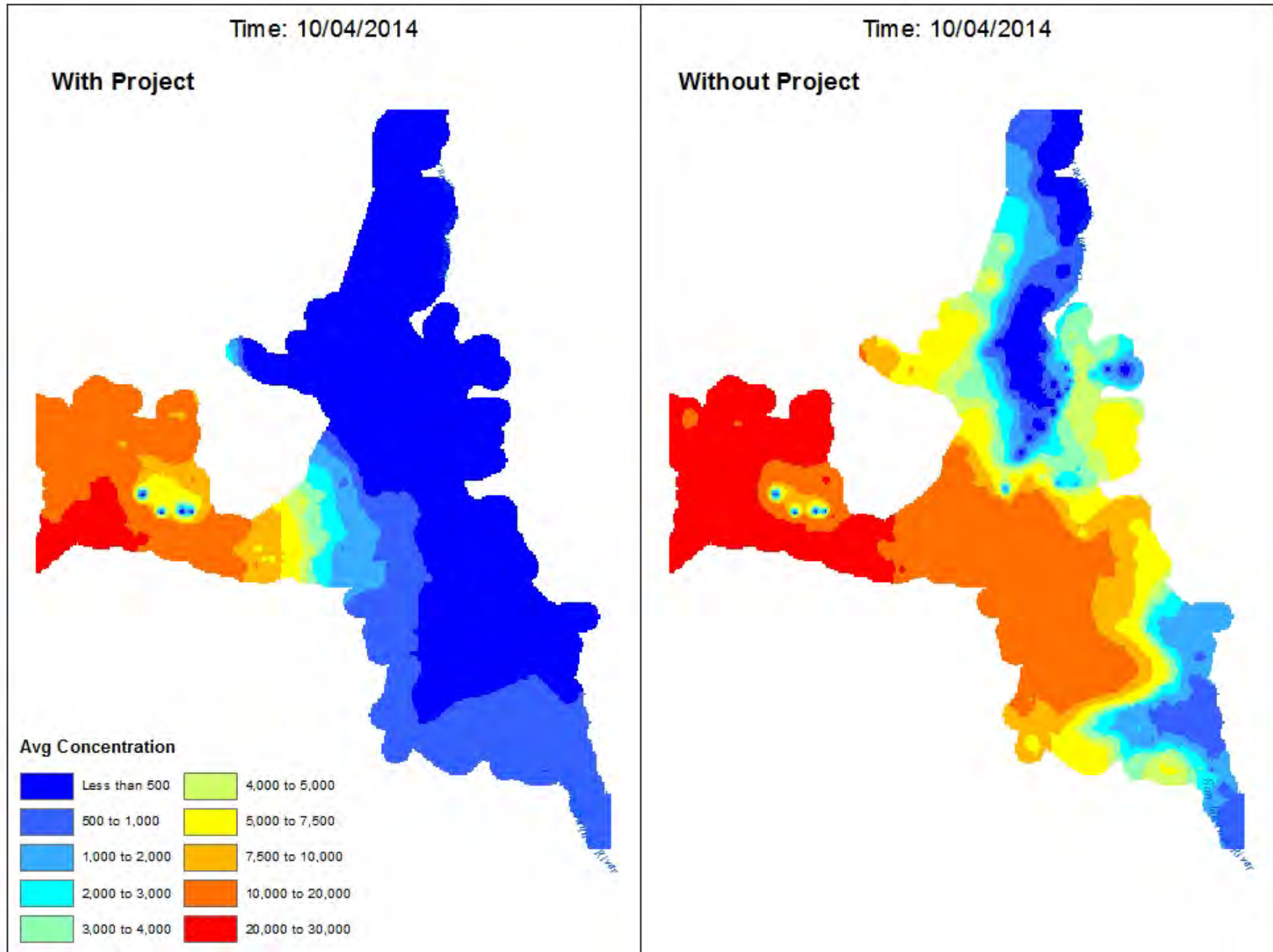


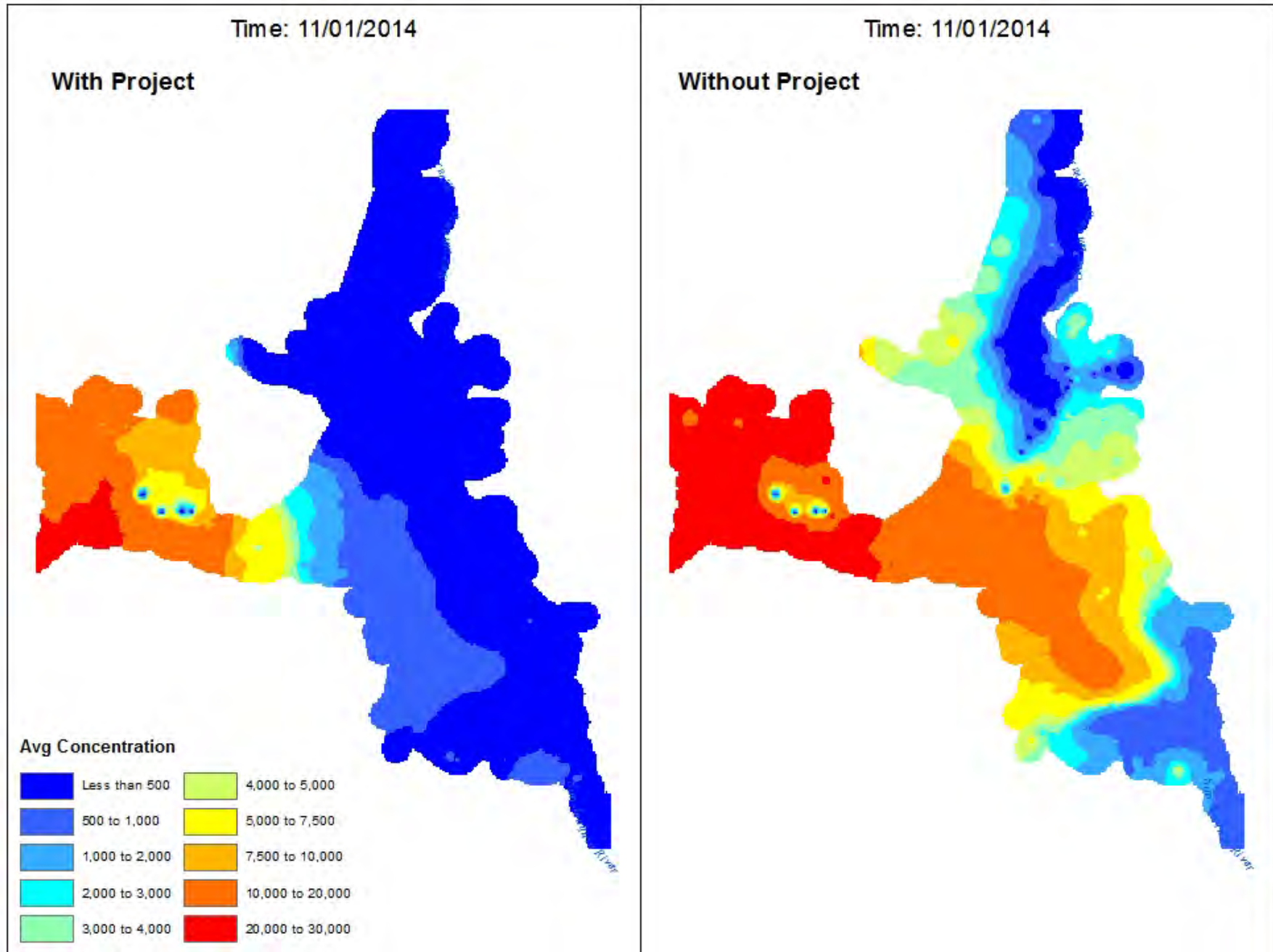


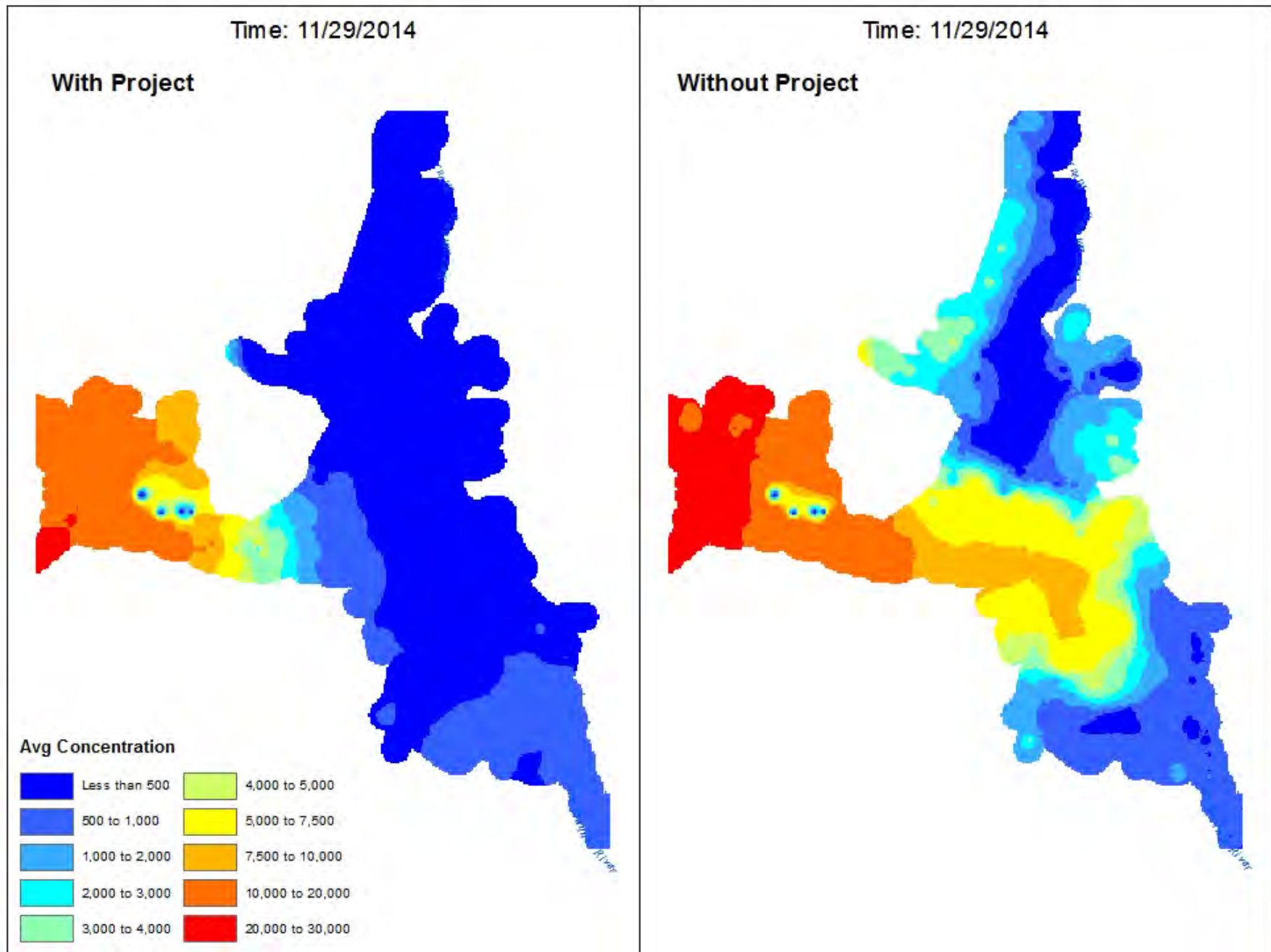


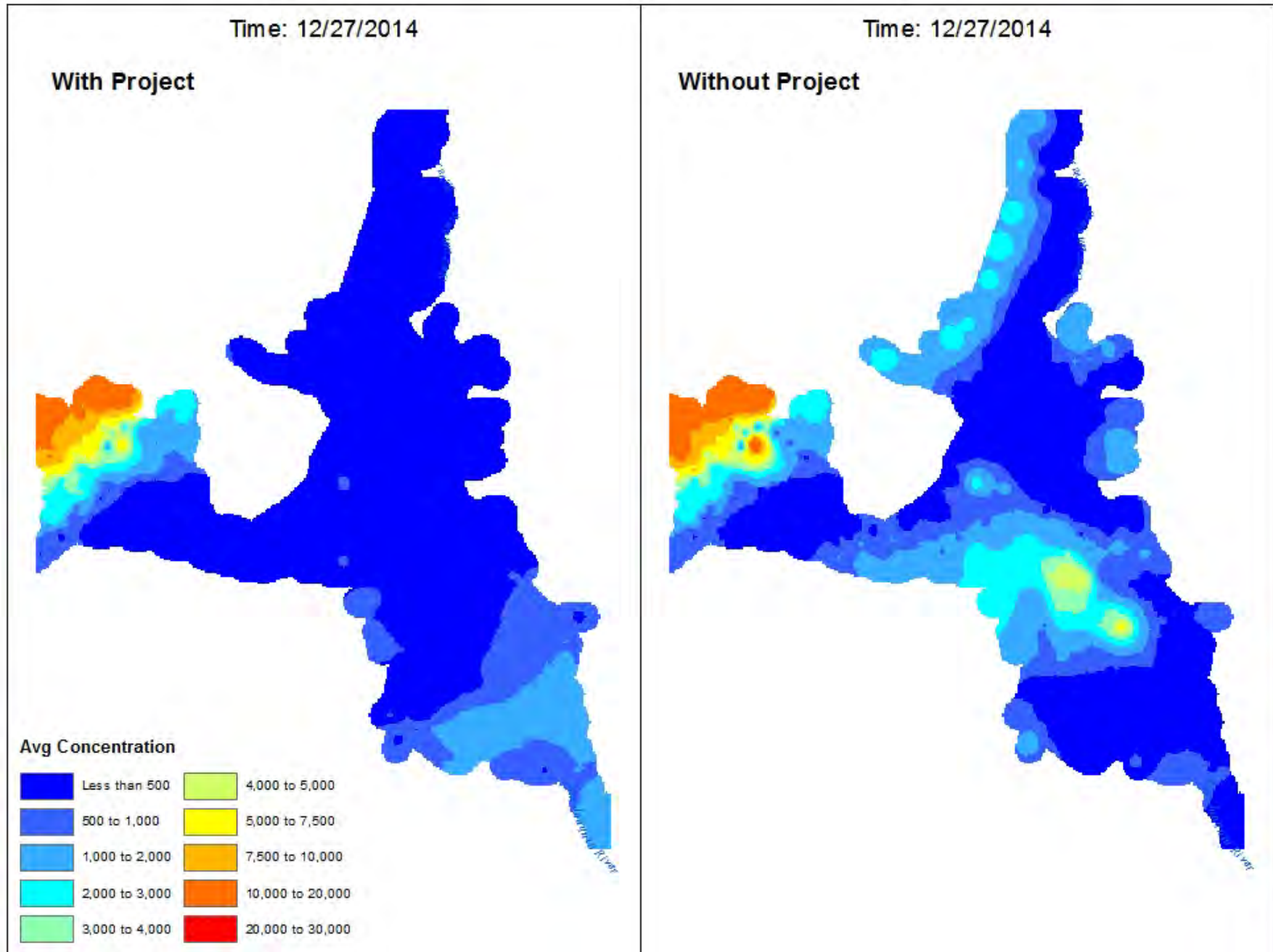


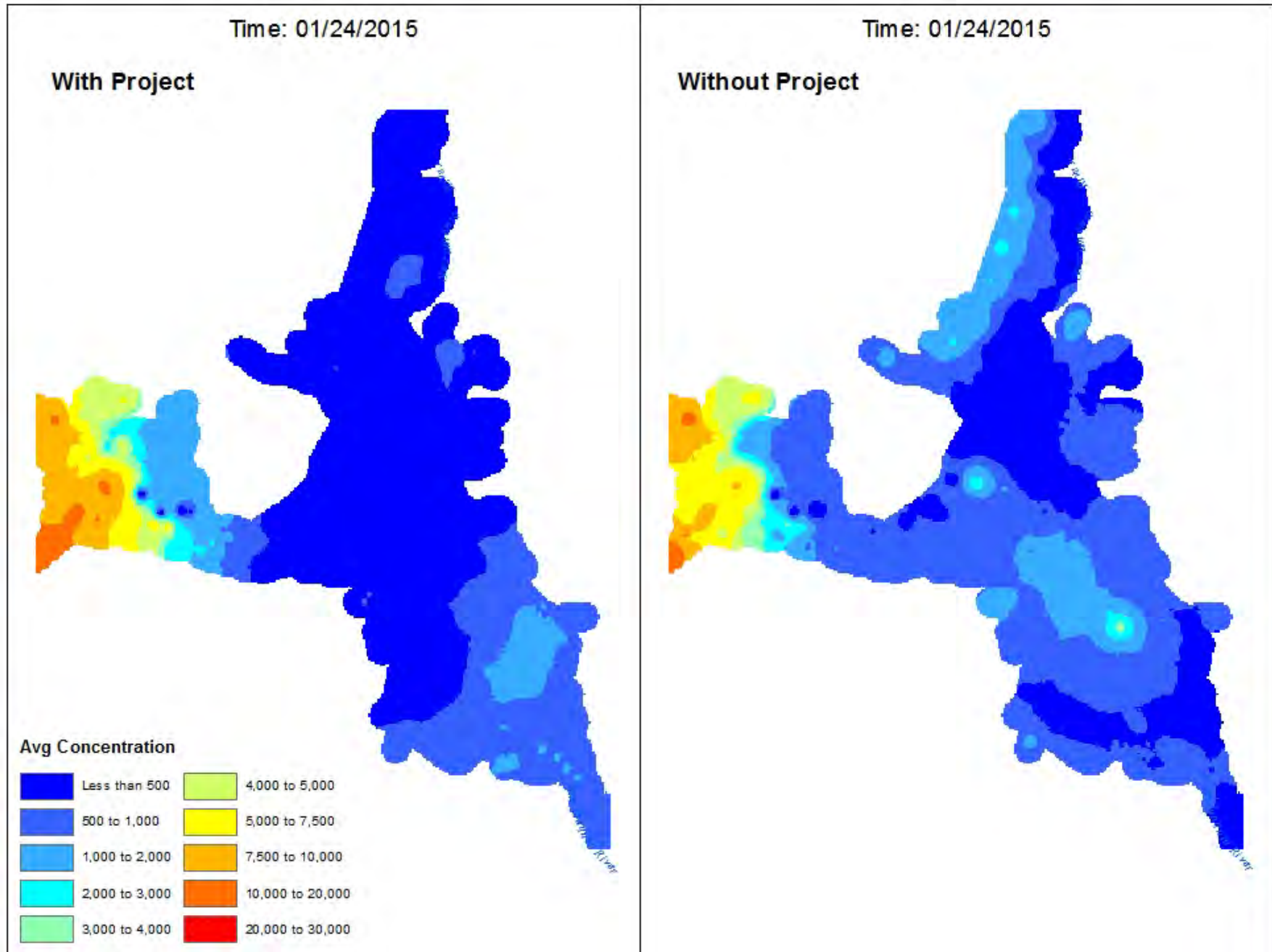


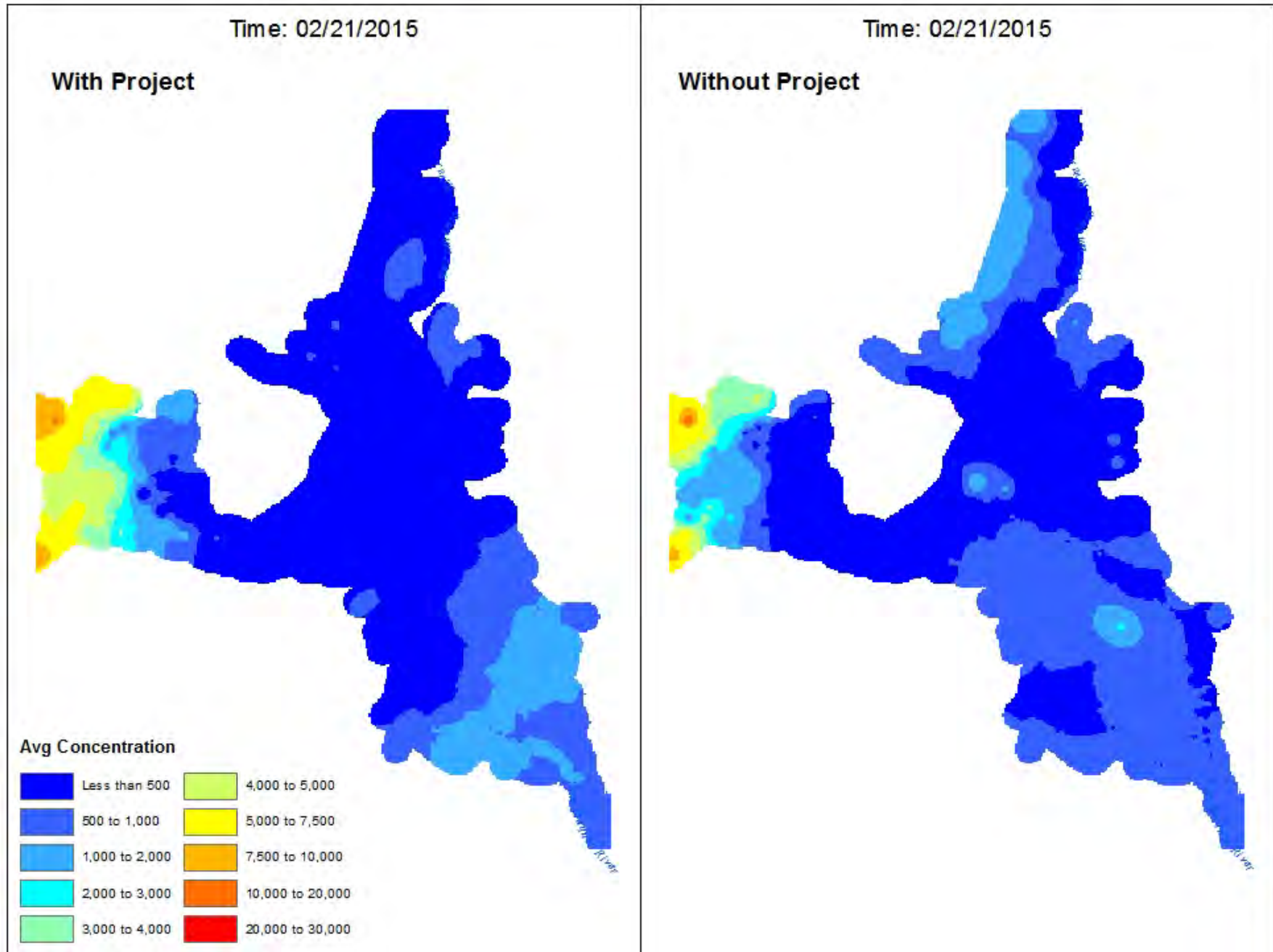


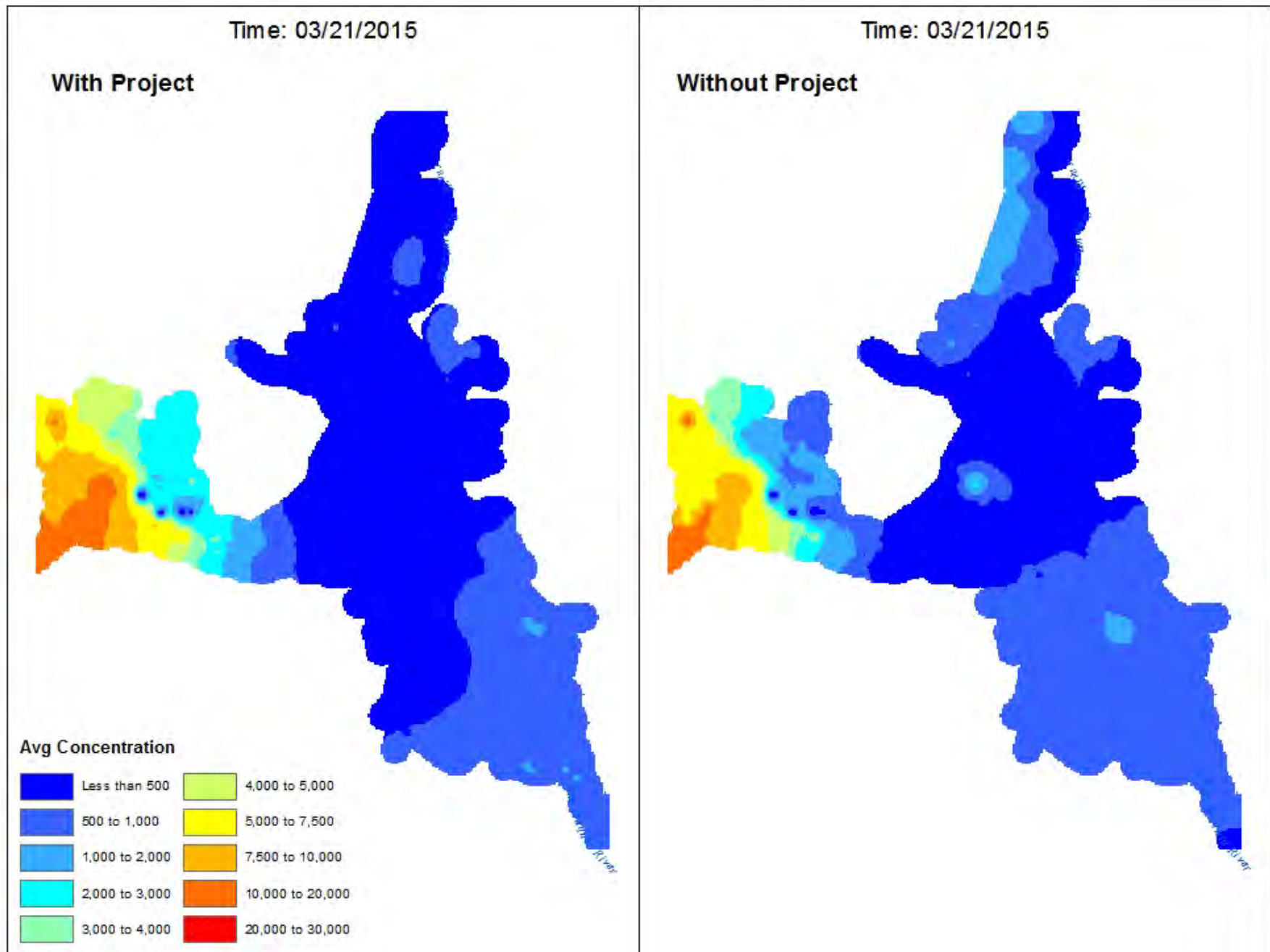


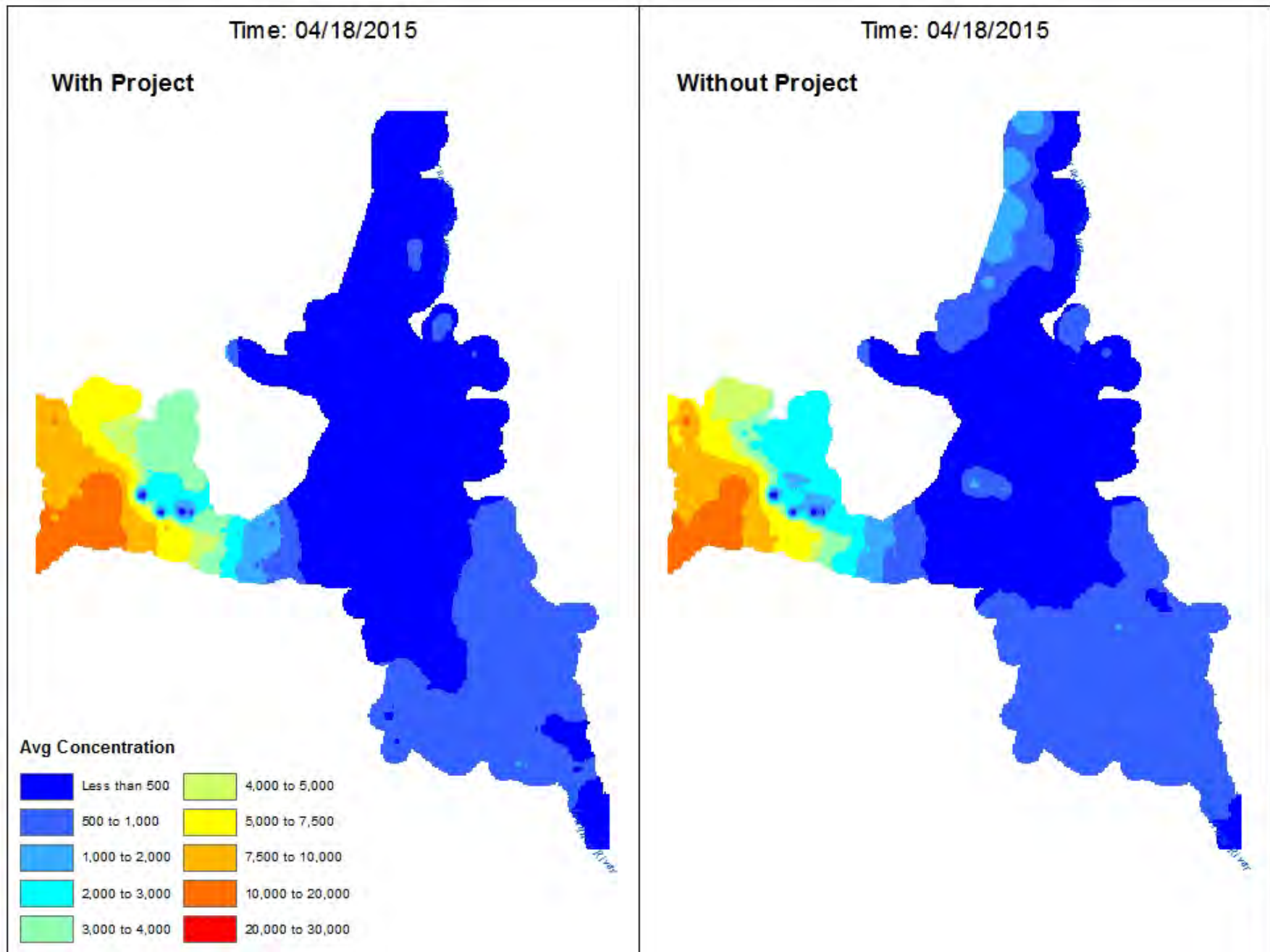


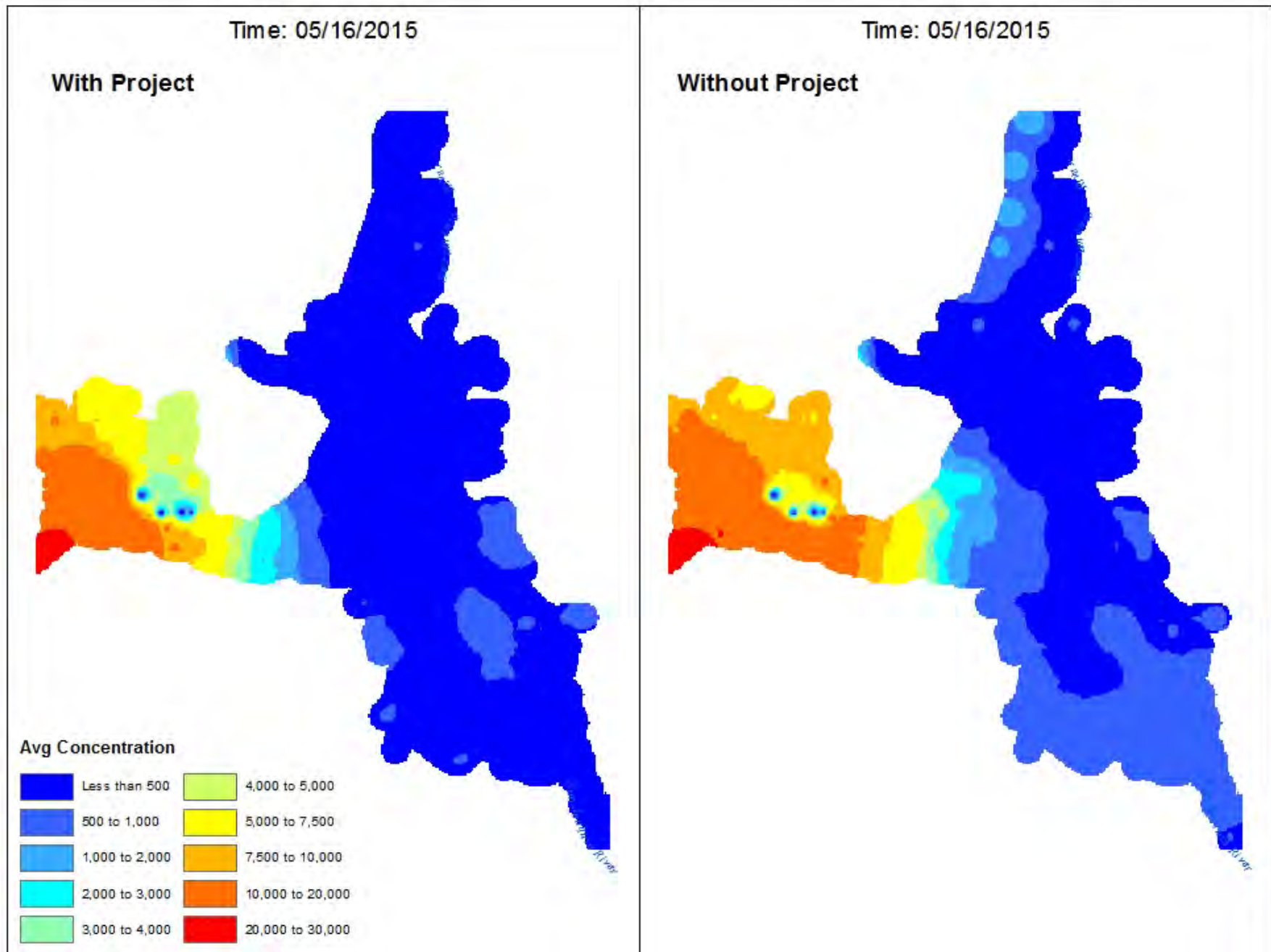


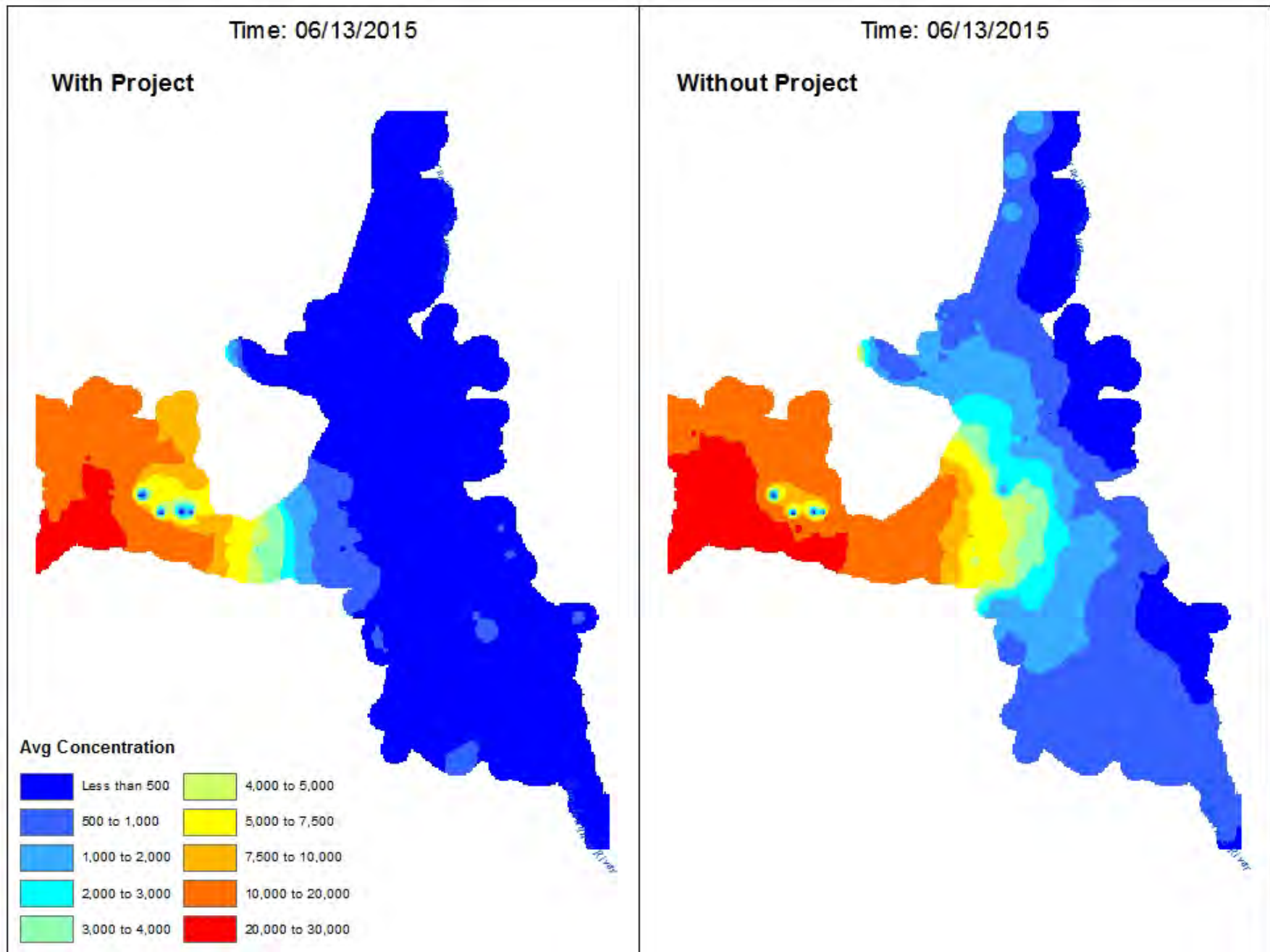


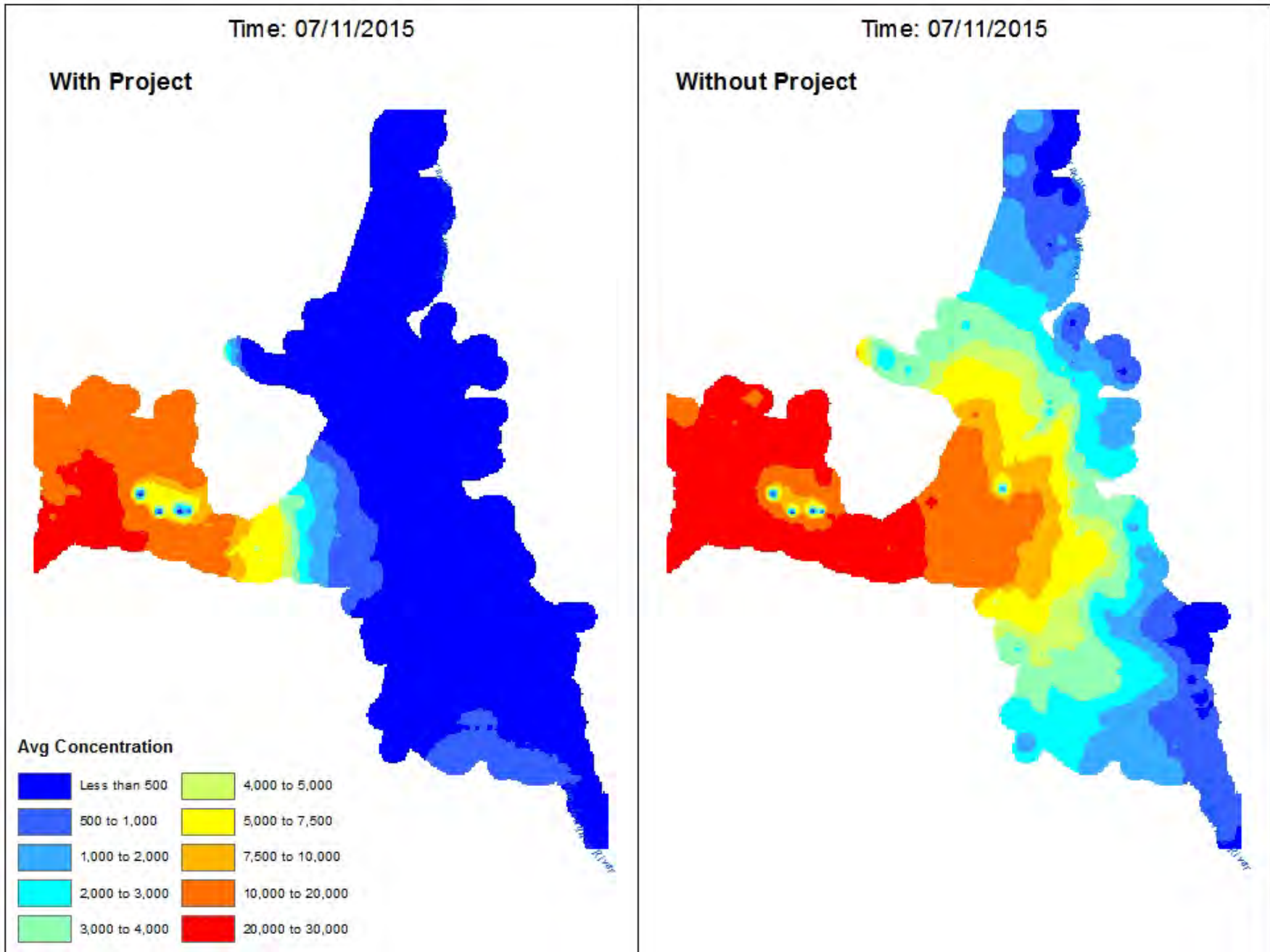


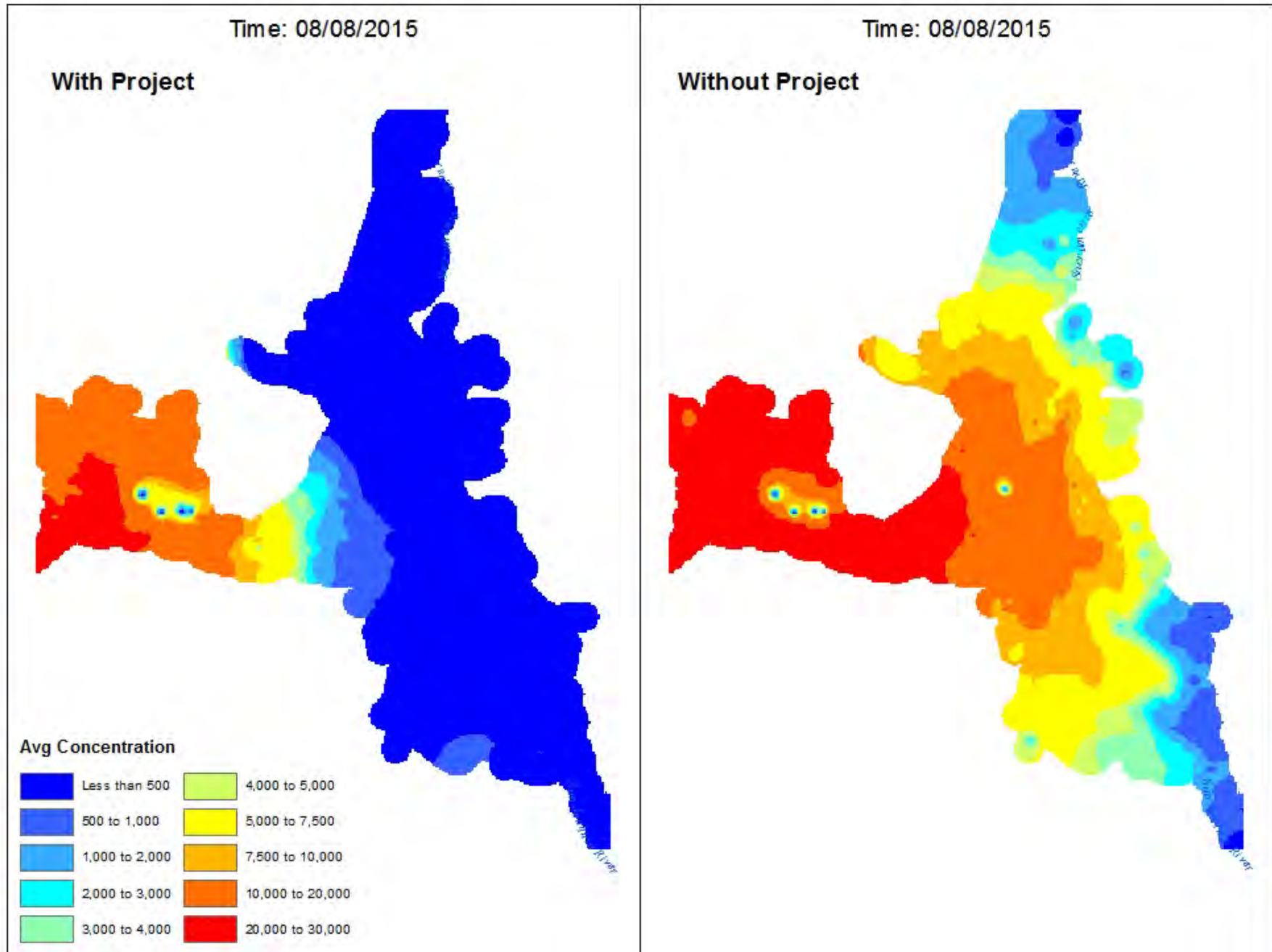












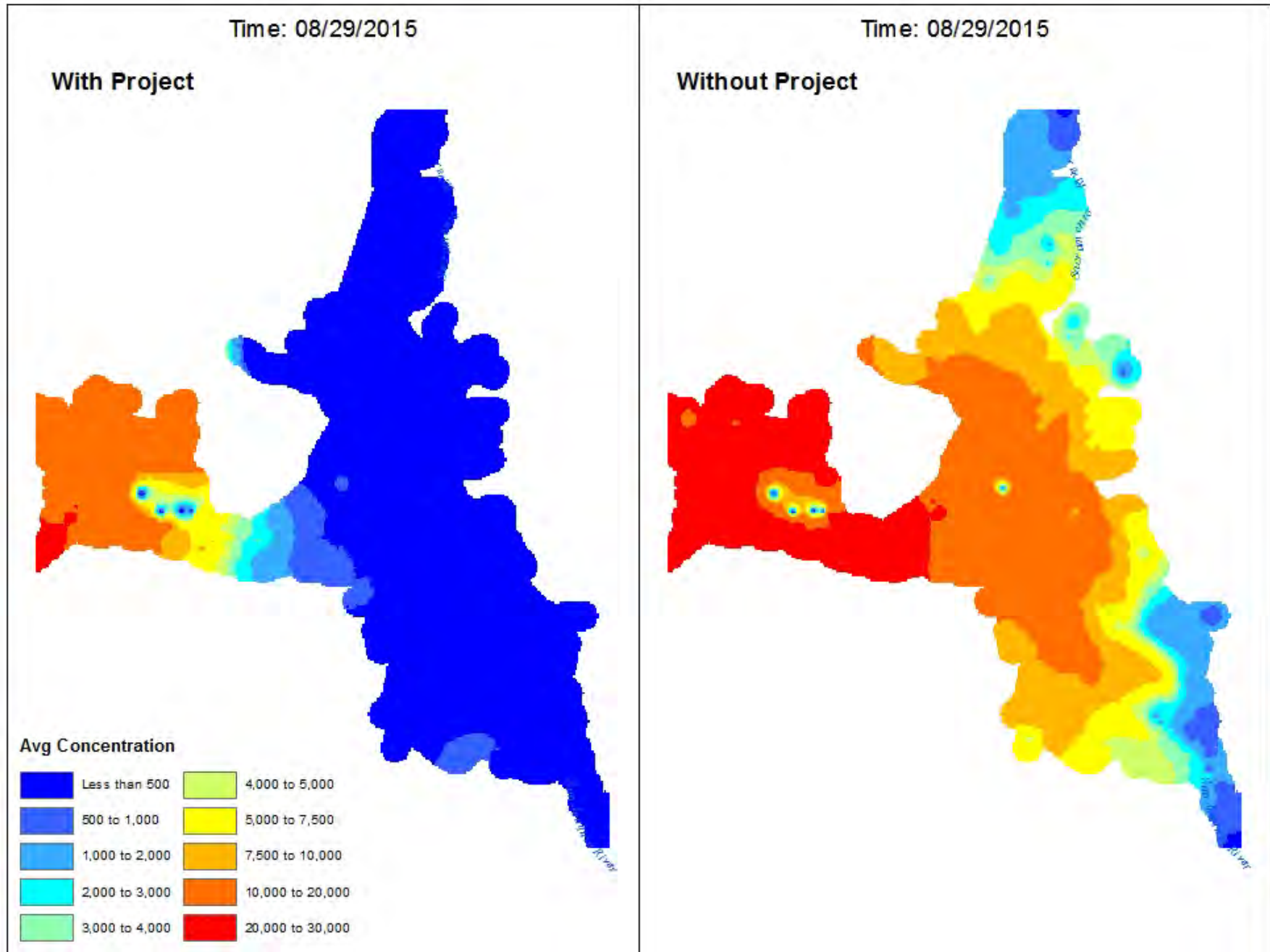


EXHIBIT C

BEFORE THE STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF CALIFORNIA

ATTORNEY OR PARTY WITHOUT ATTORNEY REQUESTING SUBPOENA (name, address, and telephone no.): Daniel Kelly (SBN 215051) Michael Vergara (SBN 137689) Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814	FOR STATE WATER BOARD USE ONLY
REPRESENTING: Byron-Bethany Irrigation District	
TITLE OF THE PROCEEDING: <i>In the Matter of Enforcement Action ENF01951 Before the State Water Resources Control Board</i>	
<input type="checkbox"/> SUBPOENA <input checked="" type="checkbox"/> SUBPOENA DUCES TECUM	<input type="checkbox"/> RE HEARING <input type="checkbox"/> RE DEPOSITION

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name): **Custodian of Records for CH2M Hill**

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this proceeding as follows unless you make special agreement with the person named in item 3:

a. Date: March 12, 2016	Time: 5:00pm
b. Address: 500 Capitol Mall, Suite 1000, Sacramento, CA 95814	

2. AND YOU ARE:

- a. Ordered to appear in person. (Wat. Code, § 1080; Gov. Code, § 11450.10; Cal. Code Regs., tit. 23, § 649.6(a).)
- b. Not required to appear in person if you produce the records described in the accompanying affidavit in compliance with Evidence Code sections 1560 and 1561. (Wat. Code, § 1080; Gov. Code, § 11450.10(b); Cal. Code Regs., tit. 23, § 649.6(a).)
- c. Ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena. (Wat. Code, § 1080; Gov. Code, § 11450.10; Cal. Code Regs., tit. 23, § 649.6(a).)

3. IF YOU HAVE ANY QUESTIONS ABOUT WITNESS FEES OR THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name: Michael Vergara	b. Telephone number: 916-446-7979
---------------------------------	--

(Gov. Code, § 11450.20(a); Code Civ. Proc., § 1985.2.)

4. **WITNESS FEES:** You are entitled to witness fees and mileage actually traveled, both ways, as provided by law. Request them from the person who serves this subpoena or from the person named in item 3. (Wat. Code, §§ 1081, 1083, 1084; Gov. Code, §§ 11450.40, 68070 et seq.; Code Civ. Proc., §§ 1986.5, 2065.)

5. If you object to the terms of this subpoena, you may file a motion for a protective order including a motion to quash with the hearing officer assigned to your case. Motions must be made within a reasonable period after receipt of the subpoena, and shall be made with written notice to all parties, with proof of service upon all parties attached. In response to your motion, the hearing officer may make an order quashing the subpoena entirely, modifying it, or directing compliance with it, or may make any order needed to protect the parties or witnesses from unreasonable or oppressive demands, including unreasonable violations of the right to privacy. (Gov. Code, § 11450.30.) (Send motions to: The State Water Resources Control Board, Office of Chief Counsel, P.O. Box 100, Sacramento, CA 95812-0100.)

DISOBEDIENCE OF THIS SUBPOENA MAY CAUSE YOU TO BE LIABLE FOR CONTEMPT AND OTHER PENALTIES PROVIDED BY LAW
(Wat. Code, §§ 1090-1097; Gov. Code, §§ 11450.20(b), 11455.10-11455.20.)

Dated: March 2, 2016



[Handwritten Signature]

(signature)
Name: Michael Vergara
Title: Attorney

Unless issued by an attorney pursuant to Code of Civil Procedure, Section 1985, subdivision (c), the original subpoena is embossed with this seal.

(See reverse for Endorsement on Subpoena, if used, and Proof of Service)

PROOF OF SERVICE OF SUBPOENA

(Gov. Code, § 11440.20; Code Civ. Proc., §§ 1987, 1987.5, 1988, 1989, 2015.3, 2015.5.)

1. I served this subpoena subpoena duces tecum and supporting affidavit by:

personally delivering a copy to the person served as follows:

a. Person served (name):	b. Date of delivery:
c. Address where served:	d. Time of delivery:
e. Witness fees and mileage both ways (check one): (1) <input type="checkbox"/> were paid. Amount: \$ _____ (2) <input type="checkbox"/> were not paid. (3) <input type="checkbox"/> were tendered to the witness's public entity employer as required by Government Code § 68097.2. The amount tendered was \$ _____	f. Fees for service. Amount: \$ _____

delivering true copies thereof by certified mail, return receipt requested, to the address as shown below.
 delivering true copies thereof enclosed in a sealed envelope to a messenger for immediate personal delivery to the address as shown below.

Address where served: _____

2. I certify that I received this subpoena subpoena duces tecum for service on _____ Date

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on:

Date	at (place)	Signature
	, California	

(For California sheriff, marshal, or constable use only)
 I certify that the foregoing is true and correct and that this certificate is executed on:

Date	at (place)	Signature
	, California	

NOTE: IF THIS SUBPOENA IS ISSUED IN CONNECTION WITH A HEARING IN AN ADJUDICATIVE PROCEEDING UNDER GOVERNMENT CODE § 11400 ET SEQ., THE ATTORNEY OR PARTY WITHOUT AN ATTORNEY REQUESTING THIS SUBPOENA MUST PROVIDE A COPY OF THE SUBPOENA TO EVERY PARTY IN THE HEARING, AND FILE A COPY WITH THE STATE WATER RESOURCES CONTROL BOARD. THE COPY PROVIDED TO THE STATE WATER RESOURCES CONTROL BOARD MUST BE ACCOMPANIED BY A CERTIFICATE OF SERVICE LISTING THE NAMES AND ADDRESSES OF PARTIES WHO WERE PROVIDED COPIES IN ACCORDANCE WITH GOVERNMENT CODE § 11440.20. (Gov. Code, § 11440.20; Cal. Code Regs., tit. 23, § 648.4(c).) (Send to: The State Water Resources Control Board, Office of Chief Counsel, P.O. Box 100, Sacramento, CA 95812-0100.)

**ENDORSEMENT ON SUBPOENA IN A PROCEEDING
OTHER THAN AN ADJUDICATIVE PROCEEDING**

Pursuant to Water Code §1086 and upon affidavit of _____ (copy attached) showing that the testimony of the witness ordered by the subpoena to appear is material and necessary to this proceeding, it is required that said witness attend this proceeding.

Dated: _____

(signature)

Name: _____

Title: _____
State Water Resources Control Board

NOTE: This ENDORSEMENT is required if the subpoena is in connection with a proceeding other than a hearing under Government Code § 11400 and the witness is being compelled to testify at a location that is both out of the witness's county of residence and 150 miles or more from the witness's place of residence. (Wat. Code, § 1086; Cal. Code Regs., tit. 23, § 649.6(c).)

1 SOMACH SIMMONS & DUNN
A Professional Corporation
2 DANIEL KELLY, ESQ. (SBN 215051)
MICHAEL E. VERGARA, ESQ. (SBN 137689)
3 THERESA C. BARFIELD, ESQ. (SBN 185568)
M. ELI UNDERWOOD (SBN 267665)
4 500 Capitol Mall, Suite 1000
Sacramento, California 95814-2403
5 Telephone: (916) 446-7979
Facsimile: (916) 446-8199

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

8

9

BEFORE THE

10

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11

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

SWRCB Enforcement Action
ENF01951 and ENF01949

AFFIDAVIT

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

20

21 I, Michael E. Vergara, declare as follows:

22 1. I am an attorney admitted to practice law in the State of California. I am a
23 shareholder at the law firm of Somach Simmons & Dunn. I am one of the attorneys of
24 record for Byron-Bethany Irrigation District (BBID). The following matters are within my
25 personal knowledge, and if called as a witness, I could competently testify thereto.

26 2. On June 12, 2015, the State Water Resources Control Board's (SWRCB)
27 sent a curtailment notice to BBID, which purports to curtail a pre-1914 appropriative
28 water right of BBID and others with 1903 and later priority dates within the entire

1 Sacramento and San Joaquin River watersheds, including the California Delta
2 (Curtailment Notice). The Curtailment Notice directed BBID to “immediately stop
3 diverting” under its pre-1914 water rights, and provided that any further diversions would
4 subject BBID to “administrative penalties, cease and desist orders, or prosecution in
5 court.”

6 3. In response, BBID filed suit against the SWRCB on June 26, 2015,
7 challenging the Curtailment Notice, and asserting that the SWRCB exceeded its
8 jurisdiction, violated due process, and conducted a flawed water availability analysis.
9 Multiple other water right holders similarly situated to BBID, including the West Side
10 Irrigation District (WSID), also sued the SWRCB to challenge the Curtailment Notice.

11 4. On July 20, 2015, the SWRCB issued the Administrative Civil Liability
12 (ACL) Complaint, alleging that BBID unlawfully diverted water from June 13, 2015 to
13 June 25, 2015.

14 5. Good cause exists for the production of documents described in the
15 Subpoena Duces Tecum and Addendum, as the requested documents are narrowly
16 tailored and relevant to BBID’s investigation of the claims and defenses at issue in this
17 proceeding and/or reasonably calculated to lead to the discovery of admissible evidence.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct. Executed this 2nd day of March 2016 in Sacramento,
20 California.

21
22 By:



Michael E. Vergara
Attorney for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT

SOMACH SIMMONS & DUNN
A Professional Corporation

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5 Telephone: (916) 446-7979
Facsimile: (916) 446-8199

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

SWRCB Enforcement Action
ENF01951 and ENF01949

ADDENDUM TO SUBPOENA
DUCES TECUM

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
COUNTY

California Water Code § 1080;
California Government Code §
11450.10; Cal. Code Regs., tit. 23 §
6496(a); Code of Civil Procedure §§
2020.410 et seq.

19 To: Custodian of Records of CH2M Hill
20 2485 Natomas Park Drive, #600
Sacramento, CA 95833

21 () You are served as an individual.

22 () You are served as (or on behalf of) the person
23 doing business under the fictitious name
of

24 (X) You are served on behalf of CH2M and/or CH2M HILL (collectively
25 CH2M).

1 TO all parties and their attorneys of record in this proceeding:
2 PLEASE TAKE NOTICE that Petitioner/ Plaintiff Byron-Bethany Irrigation District
3 (BBID) demands that **CH2M**, doing business at 2485 Natomas Park Drive #600,
4 Sacramento, CA 95833, and 402 West Broadway, Suite 1450, San Diego, California
5 92101, produce the documents described herein below in CH2M's possession, custody
6 and/or control on **March 12, 2016, by 5:00 p.m.**, in accordance with Code of Civil
7 Procedure sections 2020.410 et seq., Water Code section 1080, Government Code
8 section 11450.10, California Code of Regulations, title 23, section 649.6, subdivision
9 (a), and as set forth in Section (1)(a-b) of the accompanying Amended Subpoena Duces
10 Tecum.

11 Please send the documents to: Michael E. Vergara, Somach, Simmons & Dunn,
12 500 Capitol Mall, Suite 1000, Sacramento, California 95814. You may email electronic
13 records to mvergara@somachlaw.com, or deliver all records via mail or courier on a
14 suitable electronic storage device, or make electronic records available to download via
15 the Internet.

16 NOTICE IS GIVEN THAT CH2M may seek the advice of an attorney in any
17 matter connected with this subpoena, and should consult its attorney promptly so that
18 any problems concerning the production of documents may be resolved within the time
19 required by this Subpoena. Failure to comply with the commands of this Subpoena will
20 subject CH2M to the proceedings and penalties provided by law.

21 SUBPOENA FOR RECORDS AND DOCUMENTS

22 **CUSTODIAN OF RECORDS (CUSTODIAN) for CH2M IS COMMANDED** to
23 produce the papers, books, records, and documents that are in CUSTODIAN and/or
24 CH2M's possession custody and/or control as follows:

25 A. DEFINITIONS

26 The capitalized terms listed below, as used in this Addendum to Subpoena duces
27 tecum, are defined as follows:
28

1 1. The terms "YOU," "YOUR," or "CH2M" means CH2M, CH2M Hill, doing
2 business at 2485 Natomas Park Drive #600, Sacramento, CA 95833, and 402 West
3 Broadway, Suite 1450, San Diego, California 92101, and each PERSON acting or
4 purporting to act on its behalf, including but not limited to, its former or present officers,
5 employees, agents, contractors, consultants, and representatives (CH2M).

6 2. The term "CUSTODIAN" means Custodian of Records for CH2M, and any
7 partners or shareholders or attorneys of CH2M, Sacramento, California.

8 3. The terms "YOU" or "YOUR" mean "CUSTODIAN" and/or CH2M.

9 4. The terms "COMMUNICATION" or "COMMUNICATIONS" mean any
10 occurrence whereby data, expressions, facts, opinions, thoughts, or other information of
11 any kind is transmitted in any form including, but not limited to, any conversation,
12 correspondence, discussion, electronic mail, meeting, memorandum, message, note, or
13 posting or other display on the Internet or the World Wide Web. These terms include,
14 but are not limited to, COMMUNICATIONS which may contain attorney-client
15 communications and/or attorney work product.

16 5. The terms "RELATING TO" or "RELATE TO" shall be construed in the
17 broadest possible sense and shall mean, without limitation, pertaining to, regarding,
18 concerning, comprising, constituting, in connection with, reflecting, respecting, referring
19 to, stating, describing, recording, noting, embodying, containing, mentioning, studying,
20 analyzing, discussing or evaluating.

21 6. The terms "DOCUMENT" or "DOCUMENTS" encompass all documents,
22 things, property and/or electronic materials within the scope of section 2031.010 of the
23 California Code of Civil Procedure, and includes all writings as defined in section 250 of
24 the California Evidence Code, and shall include, but not be limited to, any kind of
25 written, graphic or recorded matter, however produced or reproduced, of any kind or
26 description, whether sent or received or neither, including originals, copies and drafts
27 and both sides thereof, and including but not limited to paper, books, letters,
28

1 photographs, posters, objects, tangible things, correspondence, telegrams, cables,
2 facsimiles, telex messages, confirmations, account statements, receipts, billing
3 statements, memoranda, legal memoranda, notes, notations, work papers, transcripts,
4 minutes, reports, and recordings of telephone or other conversations, or other
5 conversations, or in conferences or other meetings, affidavits, statements, opinions,
6 reports, studies, analysis, evaluations, financial statements, prospectuses, circulars,
7 certificates, press releases, annual reports, quarterly reports, magazine or newspaper
8 articles, manuals, contracts, agreements, statistical records, journals, desk calendars,
9 appointment books, diaries, lists, tabulations, summaries, sound recordings, computer
10 printouts, data processing input and output, electronic mail, all records of
11 communications recorded or encoded onto magnetic or computer disks, diskettes, audio
12 and video tapes or any other media, all records kept by electronic, photographic, or
13 mechanical means, and things similar to any of the foregoing, however denominated,
14 dated, produced, generated or received. These terms include, but are not limited to,
15 DOCUMENTS which may contain attorney-client communications and/or attorney work
16 product.

17 7. The terms "BYRON-BETHANY IRRIGATION DISTRICT" and "BBID"
18 mean The Byron-Bethany Irrigation District, an Irrigation District formed pursuant to
19 Division 11 of the California Water Code, and anyone working on its behalf, including
20 but not limited to, its officers, employees, agents, contractors, consultant, and
21 representatives.

22 8. The term "DRAFT TECHNICAL MEMORANDUM" means the Draft
23 Technical Memorandum, 2012– 2015 Delta Salinity Conditions under a Without Project
24 Scenario, Prepared For: Terry Erlewine/SWC, Prepared By: Tyler Hatch/CH2M HILL /
25 Chandra Chilmakuri/CH2M HILL, Dated: June 5, 2015.

26 9. Definitions for industry or trade terms contained herein are to be construed
27 broadly. Where the industry or trade definition set forth herein does not coincide
28

1 precisely with YOUR definition, the question, inquiry or production request should be
2 responded to or answered by using the definition that YOU apply and/or recognize in
3 YOUR usage of the term, and YOUR should further document YOUR definition in the
4 response. Non-industry or non-trade definitions should be applied as defined herein.

5 B. INSTRUCTIONS

6 1. Unless otherwise indicated, the time period covered by this subpoena is
7 from January 1, 2013 to the present. Any documents RELATING TO this time period
8 are to be produced, regardless of whether the documents came into existence before or
9 during this period.

10 2. YOUR response to the subpoena should include a declaration or affidavit.
11 It should state that a diligent search for all requested DOCUMENTS has been
12 conducted and that the affiant or declarant was in charge of the search or otherwise
13 monitored and reviewed the search sufficiently to be able to represent under oath that
14 such a search was conducted. It should be signed under oath by the person most
15 knowledgeable about the DOCUMENTS and YOUR efforts to comply with the
16 subpoena. If different people are the most knowledgeable about portions of the search
17 (e.g., one person is most knowledgeable about DOCUMENTS contained in computer
18 media and a different person is most knowledge about DOCUMENTS contained on
19 paper) each should sign an affidavit or declaration identifying the category in the
20 request for DOCUMENTS for which that person is the most knowledgeable.

21 3. Unless otherwise indicated, for any DOCUMENT stored in a computer,
22 including all electronic mail messages, YOU should produce the DOCUMENT in the
23 original electronic file format in which it was created (e.g., Microsoft email should be
24 provided in its original format, which would have the .pst suffix, not in a tif file;
25 spreadsheets should be in their original file form, such as an Excel file and word-
26 processed DOCUMENTS should be in their original file format, such as a Word or
27 WordPerfect file), together with instructions and all other materials necessary to use or
28

1 interpret the data. Electronic mail messages should be provided, even if only available
2 on backup or archive tapes or disks. Computer media should be accompanied by (a) an
3 identification of the generally available software needed to open and view the
4 DOCUMENTS or (b) a copy of the software needed to open and view the DOCUMENT.
5 Note, however, that if a print- out from a computer DOCUMENT is a non-identical copy
6 of the electronic form in which it was created (non-identical by way of example but not
7 limitation, because it has a signature, handwritten notation, or other mark or attachment
8 not included in the computer DOCUMENT), both the electronic form in which the
9 DOCUMENT was created and the original print-out should be produced.

10 4. For each DOCUMENT contained in an audio or video medium, YOU
11 should provide the tape, disk, or other device from which the audio or video can be
12 played and the transcript of the DOCUMENT.

13 5. For all DOCUMENTS for which YOU do not produce in the original, as
14 defined in Evidence Code section 255, YOU may submit copies (black and white copies
15 if the original was in black and white, color copies if the original was in color, and, if the
16 original was in electronic format, in the same electronic medium as the original) in lieu of
17 original DOCUMENTS provided that such copies are accompanied by an affidavit of an
18 officer of SWC stating that the copies of all types DOCUMENTS are true, correct, and
19 complete copies of the original DOCUMENTS. If there is in YOUR possession, custody
20 or control no original, but only a copy or photographic record thereof, then YOU should
21 produce a true and legible copy of each such DOCUMENT. The accompanying affidavit
22 should state that the DOCUMENT is only a copy or photographic record and not the
23 original.

24 6. If a DOCUMENT is responsive to this subpoena and is in YOUR control,
25 but is not in YOUR possession or custody, in addition to obtaining and producing the
26 DOCUMENT, identify the person who had possession or custody of the DOCUMENT,
27 their telephone number and current business and residence addresses.

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1 7. If any DOCUMENT subpoenaed is no longer in YOUR possession,
2 custody, control, or care, YOU should provide a written statement identifying the
3 DOCUMENT with specificity, stating whether it is lost or missing, has been destroyed;
4 has been transferred to others, or has otherwise been disposed of. The written
5 statement should also identify the person who disposed of the DOCUMENT, explain the
6 circumstances and authorization for the disposition and the approximate date of the
7 disposition of the DOCUMENT. If there are no DOCUMENTS responsive to a
8 document request, as to each such document request, YOU should include a statement
9 to that effect in the accompanying declaration or affidavit.

10 8. DOCUMENTS provided in response to this subpoena should be complete
11 and unredacted, submitted as found in YOUR files (e.g., DOCUMENTS that in their
12 original condition were stapled, clipped, attached as a "post-it," or otherwise fastened
13 together shall be produced in the same form).

14 9. Each DOCUMENT produced pursuant to this subpoena should be
15 identified according to the category in the subpoena to which it is responsive. In lieu of
16 indicating on each DOCUMENT the category to which it is responsive, on the date set
17 for production, YOU may instead provide an index if YOU provide it in both paper and in
18 electronic form (such as a computerized spreadsheet in Excel or a Word or WordPerfect
19 document set up in a table format) of all DOCUMENTS YOU produce, as long as this
20 index shows by document control number the request(s) to which each DOCUMENT or
21 group of DOCUMENTS is responsive. Responsive DOCUMENTS from each person's
22 files should be produced together, in one box or in consecutive boxes, or on one disk or
23 consecutive disks. Mark each page of a paper DOCUMENT and each tangible thing
24 containing audio, video, computer, or other electronic DOCUMENTS (e.g. cassette,
25 disk, tape or CD) with corporate identification and consecutive document control
26 numbers (e.g., S.L . 00001, S.I. CD 001, S.I. audio tape 001). Number each box of
27 DOCUMENTS produced and mark each with the name(s) of the person(s) whose files
28

1 are-contained therein, the requests(s) to which they are responsive, and the document
2 control numbers contained therein.

3 10 For data produced in spreadsheets or tables, include in the declaration or
4 affidavit the identification of the fields and codes and a description of the information
5 contained in each coded field.

6 11. The document requests contained in this subpoena shall be deemed to
7 include a request for all relevant DOCUMENTS in the personal files, including but not
8 limited to files contained on laptops, handheld devices, home computers and home files
9 of all YOUR officers, employees, accountants, agents and representatives, including
10 sales agents who are independent contractors, and attorneys.

11 12. YOU are required to produce all DOCUMENTS responsive to this
12 Subpoena duces tecum, regardless of any claim of attorney-client communication
13 and/or attorney work product privilege.

14 13. Whenever necessary to bring within the scope of this subpoena
15 DOCUMENTS that might otherwise be construed as outside its scope, the use of the
16 verb in any tense shall be construed, as the use of that verb in all other tenses, and the
17 singular shall include the plural, and vice versa, so as to make this subpoena broadly
18 inclusive.

19 C. DOCUMENTS TO BE PRODUCED

20 1. All DOCUMENTS in CH2M's CONTROL RELATED TO the DRAFT
21 TECHNICAL MEMORANDUM.

22 2. All DOCUMENTS in CH2M's CONTROL RELATED TO modeling work
23 conducted by CH2M for BBID.

24 3. All DOCUMENTS in CH2M's CONTROL RELATED TO
25 COMMUNICATIONS between CH2M and the State Water Contractors regarding the
26 DRAFT TECHNICAL MEMORANDUM.

1 4. All DOCUMENTS in CH2M's CONTROL RELATED TO
2 COMMUNICATIONS between CH2M and the Metropolitan Water District of Southern
3 California regarding the DRAFT TECHNICAL MEMORANDUM.

4 5. All DOCUMENTS in CH2M's CONTROL RELATED TO
5 COMMUNICATIONS between CH2M and the State Water Contractors regarding BBID.

6 6. All DOCUMENTS in CH2M's CONTROL RELATED TO
7 COMMUNICATIONS between CH2M and the Metropolitan Water District of Southern
8 California regarding BBID.

9 7. All DOCUMENTS in CH2M's CONTROL RELATED TO
10 COMMUNICATIONS between CH2M and the State Water Contractors regarding
11 modeling work conducted by CH2M for BBID.

12 8. All DOCUMENTS in CH2M's CONTROL RELATED TO
13 COMMUNICATIONS between CH2M and the Metropolitan Water District of Southern
14 California regarding modeling work conducted by CH2M for BBID.

15 If any document is withheld under a claim of privilege or other protection, please
16 provide a privilege log containing the following information with respect to such
17 documents: (a) an identification of the document with reasonable specificity and
18 particularity, including its nature (memorandum, letter, etc.), title and date; (b) the
19 parties, individuals, and entities that the communication is between or references; (c)
20 the exact nature of the privilege asserted; and (d) all of the facts upon which your claim
21 of privilege is based or which supports said claim of privilege.

22 Dated: March 2, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

By: 

Michael E. Vergara
Attorneys for Petitioner/Plaintiff
BYRON-BETHANY IRRIGATION DISTRICT

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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.

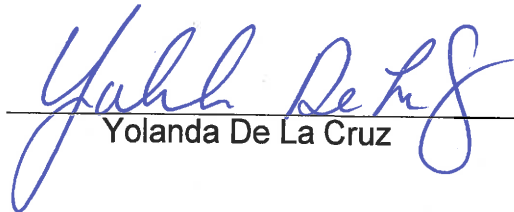
On March 2, 2016, I served the following document(s):

**SUBPOENA DUCES TECUM TO CUSTODIAN OF RECORDS;
AFFIDAVIT; AND
ADDENDUM TO SUBPOENA DUCES TECUM**

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 2, 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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<p><u>VIA ELECTRONIC MAIL</u></p> <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><u>VIA ELECTRONIC MAIL</u></p> <p>Byron-Bethany Irrigation District Daniel Vergara Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dVergara@somachlaw.com</p>
<p><u>VIA ELECTRONIC MAIL</u></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 izolezzi@herumcrabtree.com</p>	<p><u>VIA ELECTRONIC MAIL</u></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><u>VIA ELECTRONIC MAIL</u></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><u>VIA ELECTRONIC MAIL</u></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 robin.mcgininis@water.ca.gov</p>
<p><u>VIA ELECTRONIC MAIL</u></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com</p>	<p><u>VIA ELECTRONIC MAIL</u></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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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org

**SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING**

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EXHIBIT D



EDMUND G. BROWN, JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

March 9, 2016

VIA ELECTRONIC MAIL

TO: ENCLOSED REVISED SERVICE LIST OF PARTICIPANTS

RULING ON THE FOLLOWING MOTIONS FILED IN THE MATTERS OF ADMINISTRATIVE CIVIL LIABILITY (ACL) COMPLAINT AGAINST BYRON-BETHANY IRRIGATION DISTRICT AND DRAFT CEASE AND DESIST ORDER (CDO) AGAINST THE WEST SIDE IRRIGATION DISTRICT:

1. **MOTION FOR PROTECTIVE ORDER BY STATE WATER CONTRACTORS.**
2. **MOTION FOR PROTECTIVE ORDER BY CALIFORNIA DEPARTMENT OF WATER RESOURCES.**
3. **MOTION TO QUASH SUBPOENA DUCES TECUM, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER BY STATE WATER CONTRACTORS.**
4. **MOTION TO QUASH SUBPOENA DUCES TECUM, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER BY CH2M HILL ENGINEERS, INC., MR. CHANDRA CHILMAKURI, AND MR. KYLE WINSLOW.**
5. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY CENTRAL DELTA WATER AGENCY AND BANTA-CARBONA IRRIGATION DISTRICT.**
6. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY THE WEST SIDE IRRIGATION DISTRICT AND PATTERSON IRRIGATION DISTRICT.**
7. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY BYRON-BETHANY IRRIGATION DISTRICT AND SOUTH DELTA WATER AGENCY.**

Procedural Background

On February 22, 2016, State Water Contractors submitted written rebuttal testimony by Mr. Paul Hutton relevant to the consolidated Phase 1 of the hearings in the matters of the ACL Complaint against Byron-Bethany Irrigation District (BBID) and the Draft CDO against The West Side Irrigation District (WSID). On February 23, 2016, Central Delta Water Agency and South Delta Water Agency served a notice of deposition on Mr. Paul Hutton. On February 24, 2016, BBID also served a notice of deposition on Mr. Hutton. Both notices include a request for production of documents. On February 26, 2016, State Water Contractors filed a motion for protective order prohibiting the deposition of Mr. Hutton and shielding the requested documents from production.

California Department of Water Resources (DWR) first identified Mr. Paul Marshall as a witness in their Notice of Intent to Appear in the hearings on the ACL Complaint against BBID and Draft CDO against WSID. BBID, Central Delta Water Agency, and WSID served notices of deposition

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on Mr. Marshall, setting and re-setting his deposition for November 24, 2015, then December 30, 2015, and then February 2, 2016. On December 7, 2015, DWR produced documents in response to requests for production included in the original notices of deposition.

On January 19, 2016, DWR submitted an amended Notice of Intent to Appear indicating that it would participate in the hearings by cross-examination and rebuttal only. On January 28, 2016, BBID, Central Delta Water Agency, and WSID notified DWR that they did not intend to depose Mr. Marshall "at this point." (Exhibit J to DWR's Motion for Protective Order.) On February 22, 2016, DWR submitted written rebuttal testimony by Mr. Marshall. On February 23, 2016, Central Delta Water Agency served a notice of deposition on Mr. Marshall. On February 24, 2016, BBID also served a notice of deposition on Mr. Marshall. Both notices include a request for production of documents that differ in scope from the request to which DWR responded on December 7, 2015. On February 29, 2016, DWR filed a motion for protective order prohibiting the deposition of Mr. Hutton and relieving DWR of any obligation to produce additional documents.

On February 29, 2016, Central Delta Water Agency and Banta-Carbona Irrigation District, WSID and Patterson Irrigation District, and BBID and South Delta Water Agency, each filed motions in limine. These motions include requests to exclude testimony by Mr. Hutton and Mr. Marshall as untimely case-in-chief expert testimony. On March 4, 2016, State Water Contractors and DWR filed responses to the parties' motions in limine related to the testimony of Mr. Hutton and Mr. Marshall.

On February 24, 2016, BBID served subpoenas duces tecum on Mr. Kyle Winslow and Mr. Chandra Chilmakuri. On March 2, 2016, State Water Contractors filed a motion to quash the subpoenas. On March 3, 2016, BBID served amended subpoenas duces tecum on Mr. Winslow, Mr. Chilmakuri, and the custodian of records for CH2M Hill. In addition to other documents, BBID seeks the production of documents and communications related to a technical report prepared by Mr. Chilmakuri titled "2012 – 2015 Delta Salinity Conditions under a Without Project Scenario" (Technical Report). On March 4, 2016, CH2M Hill Engineers, Inc., Mr. Winslow, and Mr. Chilmakuri filed a motion to quash, or in the alternative, a motion for protective order with respect to the subpoenas. On March 8, 2016, BBID filed a consolidated opposition to the motions to quash filed by State Water Contractors, Mr. Winslow, Mr. Chilmakuri, and CH2M Hill.

Motion to Quash and Motions for Protective Orders

Any party to a proceeding before the State Water Resources Control Board (Board) may take the deposition of witnesses in the manner described by title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure. (Wat. Code, § 1100.) The attorney of record for a party may issue a subpoena or subpoena duces tecum to compel attendance of a witness or production of documents. (Gov. Code, § 11450.10.) The Code of Civil Procedure allows parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Civ. Code Proc., § 2017.010.) The scope of discovery shall be limited if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood of discovering admissible evidence. (Civ. Code Proc., § 2017.020.) The use of depositions may be restricted if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. (*Id.*, § 2019.030, subs. (a)(1)-(2).) The Administrative Procedure Act authorizes the presiding officer in an adjudicative

proceeding to issue an order that is appropriate to protect the parties or witness from unreasonable or oppressive demands. (Gov. Code, § 11450.30.) A party seeking a protective order bears the burden of demonstrating good cause for the order sought. (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 318.)

The deadlines for submission of evidence in support of the parties' cases-in-chief and rebuttal passed on January 19, 2016, and February 22, 2016, respectively. Because the parties to these proceedings may not submit any additional evidence – absent compelling circumstances – the only proper purpose for the depositions and requests for documents, including the subpoenas directed to CH2M Hill and its employees, are to aide in the cross-examination of witnesses. The cross-examinations of Mr. Hutton and Mr. Marshall will be limited to the scope of their rebuttal testimony. As a result, any questioning or production of documents beyond the scope of their rebuttal testimony is not reasonably calculated to lead to the discovery of admissible evidence.

State Water Contractors and DWR have already produced the exhibits in support of Mr. Hutton's and Mr. Marshall's testimony. The opposing parties have also requested and received documents from DWR on December 7, 2015, related to Mr. Marshall's testimony.

If allowed to proceed, the depositions would have to be scheduled very shortly before the start of the hearing. The requests for documents are also broad enough that significant time and expensive will be required to gather, review, and produce the responsive documents. The burden on all of the parties and non-parties of responding to discovery at this point in the proceedings and on such short deadlines is substantial. The time and cost to conduct discovery will impact the parties' ability to prepare for the hearing, and it is likely that we would be unable to address any new discovery or evidentiary disputes before the hearing begins. There is also a serious risk of prejudicing the parties if we were to re-open the deadline for submission of evidence at this late date. A less burdensome and less costly means of obtaining relevant information is by cross-examination of Mr. Hutton and Mr. Marshall at the time scheduled for this purpose during the hearing. The parties will have the opportunity to question both witnesses and examine the bases for their testimony.

The opposing parties object that cross-examination is not a sufficient opportunity to explore the underlying assumptions of the model runs on which Mr. Hutton and Mr. Marshall rely in their testimony. These model runs were not disclosed in these proceedings by State Water Contractors or DWR until the submission of rebuttal evidence. As discussed later in this ruling, we find that the appropriate remedy is to discount the weight of this evidence if we find that these model runs cannot be sufficiently explored and understood through cross-examination. The same is true of the Technical Report prepared by CH2M Hill. If State Water Contractors is unable to lay a proper foundation to demonstrate the reliability of the information contained in the Technical Report, then we will discount the weight of this evidence accordingly, as well as any portion of Mr. Hutton's testimony that relies upon it.

For these reasons, we hereby **vacate** the notices of deposition and requests for production of documents served on Mr. Hutton by Central Delta Water Agency, South Delta Water Agency, and BBID, dated February 23, 2016, and February 24, 2016; the notices of deposition and requests for production of documents served on Mr. Marshall by Central Delta Water Agency and BBID, dated February 23, 2016, and February 24, 2016; and the subpoenas served on Mr. Winslow, Mr. Chilmakuri, and CH2M Hill dated February 24, 2016.

Motions in Limine

When conducting an evidentiary hearing, the Board is not bound by the technical rules relating to evidence and witnesses. (See Gov. Code § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence is admissible as long as it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code § 11513, subd. (c).) Though the Board typically does not require the designation of rebuttal witnesses in advance, the Board does limit the scope of rebuttal; “[r]ebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party’s case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence.” (See Hearing Notices dated August 19, 2015, and February 18, 2016.) Rebuttal may not be used to delay submission of evidence that is properly part of a party’s case-in-chief.

In distinguishing whether the testimony of Mr. Hutton and Mr. Marshall is properly characterized as rebuttal evidence, we find instructive Federal Rule of Civil Procedure 26 and associated case law. Rule 26 defines rebuttal expert testimony as “evidence [] intended solely to contradict or rebut evidence on the same subject matter identified by another party....” (Fed.R.Civ.P. 26(a)(2)(D)(ii).) Rebuttal expert testimony “permits the litigant to counter new unforeseen facts brought out in the other side’s case.” (*Blake v. Securitas Sec. Servs., Inc.* (D.D.C. 2013) 292 F.R.D. 15, 17-18 [quoting *Faigin v. Kelly*, (1st Cir. 1999) 184 F.3d 67, 85.]) “Rebuttal expert reports are not the proper place for presenting new arguments. (*R&O Const. Co. v. Rox Pro Intn’l Group, Ltd.* (D.Nev., July 18, 2011) 2011 WL 2923703, *2.) “If the purpose of expert testimony is to ‘contradict an expected and anticipated portion of the other party’s case-in-chief, then the witness is not a rebuttal witness” (*Amos v. Makita, U.S.A., Inc.* (D.Nev., Jan. 6, 2011.) 2011 WL 43092 at *2 [quoting *In re Apex Oil Co.* (8th Cir. 1992) 958 F.3d 243, 245.]) “The plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case (as distinct from an affirmative defense) must put in his evidence on the issue as part of his case in chief.” (*Braun v. Lorillard, Inc.* (7th Cir. 1996) 84 F.3d 230, 237.)

The testimony by Mr. Hutton that relies on model runs described in the Technical Report is both “true rebuttal” and “new theory.” (*Adams v. United States* (D. Idaho, April 9, 2009) 2009 WL 982034, *3 [citing Wright and Gold, *Federal Practice & Procedure*, § 6164 at p. 383 (1993).]) Mr. Hutton’s testimony raises arguments to challenge the conclusion by Ms. Susan Paulsen that 1931 presented similar hydrologic conditions in the Delta as did conditions in 2015. These arguments are rebuttal arguments. They are based in part, however, on model runs conducted in a study undertaken by CH2M Hill and memorialized in the Technical Report, of salinity conditions in south Delta channels under a “without project” scenario, using hydrology from January 1, 2012 to August 31, 2015. The Technical Report includes model runs not previously disclosed in these proceedings by State Water Contractors. The opposing parties object that Mr. Hutton’s modeling is not in the public domain and includes modeling parameter modifications that are unavailable for review.

Part X of Mr. Marshall’s testimony is also based on DSM2 model runs, which show the progression of salinity intrusion under various conditions. The opposing parties raise the same objection that the testimony describes model run results that are not in the public domain or otherwise available for review. BBID and South Delta Water Agency assert that “[t]he modeling and data analyses relied on by both [Mr. Hutton and Mr. Marshall] are simply too complex to be dealt with in such a short period of time, particularly given the other tasks to be completed between now and the hearing.” (Motion in Limine by BBID and South Delta Water Agency.)

The DSM2 model is in the public domain. Ms. Paulsen and Mr. Burke, BBID and WSID's experts, used the DSM2 model to develop their own expert testimony. According to Ms. Paulsen, "modeling tools such as the DSM2 have been available and in widespread use for decades...." (BBID-384, Report of Ms. Susan Paulsen, p. 73.) Ms. Paulsen helpfully explains the process for using the DSM2 model, as follows:

"DSM2 users must specify a series of input parameters to operate the model, including inflows from the Sacramento River, San Joaquin River, Cosumnes River, Mokelumne River, and Calaveras River; the stage at Martinez, DICU flows and electrical conductivity; conductivity at Martinez and Freeport; and conductivity of the east-side streams and the San Joaquin River. Diversions and exports must also be specified in the model. Model inputs can be taken either from measured data (e.g., stage at Martinez, river inflows, salinity at model boundaries, measured diversions, and exports) or from synthetic data sets (e.g., data from Dayflow, a computer program maintained by DWR that uses daily river inflows, water exports, rainfall, and agricultural depletions to estimate daily average Delta outflow)."

(BBID-384, Report of Ms. Susan Paulsen, p. 75.)

The Technical Report appears to include enough information about the inputs used to create the specific model runs that the underlying assumptions can be understood and, if appropriate, challenged by the opposing parties. We also recognize that the rebuttal disclosure date is not the first time that most of the parties have seen the Technical Report. In fact, the Technical Report was submitted by BBID as an exhibit with its case-in-chief. BBID submitted a copy of a complaint letter sent by State Water Contractors to the Board in June 2015, to which the Technical Report was attached. BBID and the other parties were aware of, or should have been aware of, the Technical Report since at least the deadline for submittal of case-in-chief evidence. State Water Contractors' attorney also testifies that the Technical Report was sent to the attorneys for BBID, South Delta Water Agency, and Central Delta Water Agency in June 2015, and has been publicly available on the Board's website.

It appears to us that the parties have the ability to analyze and understand the model runs described in the Technical Report and the parties will be able to conduct a thorough examination of the bases for Mr. Hutton's testimony through his cross-examination. To the extent that certain information is not available, or could not be understood and analyzed by the parties in preparation for Mr. Hutton's cross-examination, we will take that into account when assessing the relative weight and reliability of Mr. Hutton's testimony.

Based on our understanding of DSM2 parameters, it also appears that the parties have the information necessary to re-create and understand the model runs included by Mr. Marshall in Part X of his report, even though his description of those model runs is brief. To the extent that certain information is not available, or could not be understood and analyzed by the parties in preparation for Mr. Marshall's cross-examination, we will take that into account when assessing the relative weight and reliability of Mr. Marshall's testimony.

The following discussion addresses specific portions of Mr. Hutton and Mr. Marshall's testimony to which the opposing parties objected:

1. Mr. Hutton's Testimony, Paragraph 17, Paragraphs 20 and 21.

Opposing parties object that Paragraphs 17, 20, and 21 of Mr. Hutton's testimony presents new opinions on Delta salinity based on his modelling work. We find that his testimony is appropriately submitted in rebuttal to challenge the claim by Ms. Paulsen that 1931 presented similar hydrologic conditions in the Delta as did conditions in 2015, and that water of suitable quality for irrigation would have been available for diversion absent Project operations.

2. Mr. Hutton's Testimony, Paragraphs 18 and 19.

Opposing parties object that Paragraphs 18 and 19 of Mr. Hutton's testimony includes new non-expert testimony on DWR's attempts to satisfy Bay-Delta Water Quality Control Plan obligations in 2015. Paragraph 18 of Mr. Hutton's testimony addresses conditions that may have affected the quality of water available to BBID and WSID in 2015 at their points of diversion, rebutting BBID and WSID's claims that water of suitable quality would have been available absent operation of the Projects. This testimony is rebuttal testimony. Paragraph 19 appears to describe injury caused by the allegedly unauthorized diversions. This testimony should have been submitted as part of State Water Contractor's case-in-chief. The issue of injury was identified as a key issue in these proceedings, and is not a matter that can be deferred until rebuttal. To the extent the testimony relates solely to injury caused by the allegedly unauthorized diversions, it is excluded.

3. Mr. Hutton's Testimony, Paragraphs 26 through 33.

Opposing parties object that Paragraphs 26 through 33 of Mr. Hutton's testimony include new opinion testimony on Delta salinity, crop damage, costs of salinity damage, and water quality. Paragraphs 26 through 30 of Mr. Hutton's testimony address the quality of water in the Delta for irrigation prior to the development of the Projects. This testimony appears to rebut evidence and testimony presented by the opposing parties that water would have been available and of a suitable quality for irrigation absent Project operations. Therefore, we find that it is timely submitted rebuttal evidence.

Paragraphs 30 through 33 of Mr. Hutton's testimony merely summarize his prior testimony. To the extent the testimony relates solely to injury caused by the allegedly unauthorized diversions, it is excluded.

4. Mr. Marshall's Testimony, Parts I through VI.

Opposing parties object that Parts I through VI of Mr. Marshall's testimony improperly includes new testimony summarizing State Water Project and Central Valley Project operations, Delta water quality standards, and BBID historical diversions. Any portion of this testimony that DWR does not demonstrate is in response to another party's previously submitted evidence may be excluded or stricken from the record as improper rebuttal evidence. We note, however, that some of this testimony summarizes information of which we may take administrative notice, such as the holding of D-1641.

To the extent that Mr. Marshall's testimony addresses the injury caused by the allegedly unauthorized diversions, the testimony should have been submitted as part of DWR's case-in-chief. The issue of injury was identified as a key issue in these proceedings, and is not a matter that can be deferred until rebuttal. We will exclude testimony relating solely to injury caused by the allegedly unauthorized diversions.

5. Mr. Marshall's Testimony, Part VII.

Opposing parties object that Part VII of Mr. Marshall's testimony only tangentially addresses the testimony of Ms. Paulsen and Mr. Burke, and relies on hearsay memoranda. This portion of Mr. Marshall's testimony purports to address the acceptability of certain salinity levels for irrigation, rebutting testimony by Ms. Paulsen that "water was of suitable quality for use." (BBID-384, Report of Ms. Susan Paulsen, pp. 8 & 62.) Therefore, it is proper rebuttal testimony.

In our administrative proceedings, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d).) The rules of evidence also allow an expert to testify based on otherwise inadmissible evidence if the evidence is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.) We will take into account when weighing Mr. Marshall's testimony whether DWR has demonstrated that these reports and analyses are of the type reasonably relied upon by experts in the field.

6. Mr. Marshall's Testimony, Part X.

Opposing parties object that Part X of Mr. Marshall's testimony is new expert testimony that should have been included in DWR's case-in-chief. Mr. Marshall's testimony in Part X consists of plots of DSM2 model runs showing the progression of salinity intrusion under various conditions. In addition to assessing the reliability of Mr. Marshall's testimony based on the ability of the opposing parties to adequately elicit the underlying assumptions and inputs of the model runs through cross-examination, any portion of Mr. Marshall's testimony that does not respond to another party's previously submitted evidence will be excluded or stricken from the record.

Sincerely,



Frances Spivy-Weber, Vice-Chair
WSID Hearing Officer



Tam M. Doduc, Board Member
BBID Hearing Officer

Enclosures: Revised Service Lists

**SERVICE LIST OF PARTICIPANTS
THE WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING
(October 8, 2015, Revised 12/18/15)**

Parties	
THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
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**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15)

<p align="center">PARTIES</p> <p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
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