



***Environmental Liability:
Moving Goalposts-
Environmental Damage Regulations
RICS Information Paper***

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Environmental Damage Regulations 2009

RICS Information Paper 2009-

A synopsis of the Environmental Damage Regulations 2009:

- Who? Apply to **all operators** of economic activities.*
- What? The Environmental Damage Regulations.*
- Why? To enforce '**polluter pays**' principle of the EC Treaty.*
- Where? All of the UK including coastal incidents.*
- When? Introduced **this last year**.*
- How? Raises the bar for protection and remediation with **new duties for operators** and an **obligation for Authorities to take action** based on a system of **strict liability**.*



Guidance to the EDR written for Chartered Surveyors

- ***Background and legislative context***
- ***Changes introduced explained***
- ***Details and definitions condensed and explained***
- ***Application and exemptions***
- ***Avoiding unwitting offences***
- ***Third party concerns***
- ***Source of information and advice***



Summary of Practical Implications for Surveyors

- The regulations must apply – not voluntary.
- New scope of liability for environmental damage.
- Operator notification duties – also beware “whistle blowing” third parties.
- Operator preventative and remedial duties.
- Strict liability in certain cases – fault based liability in others.
- Onerous remedial standards – primary, compensatory, complementary.
- Third party liability and compensation.
- Insurance implications.
- Valuations.
- Opportunities for Surveyors



Scope of the Environmental Damage Regulations

EDR covers:

- ***Damage to EC protected species or natural habitats or SSSIs.***
- ***Damage to water.***
- ***Damage to land.***
- ***Existing legislation applies where requirements exceed the EDR.***
- ***Not retrospective –damage from start date only ie 2009+***



Damage to protected species or natural habitats or SSSIs

What constitutes environmental damage?

- Environmental **damage** that has a **significant adverse effect on conservation status of species and habitats protected by EU law** from the Birds Directive and Natural Habitats Directive.
- Environmental **damage to SSSIs** that **adversely affects site integrity** (except Regulations for Scotland).
- Includes all species on SSSI citation.





Damage to protected species or natural habitats or SSSIs

What has changed?

- Liable for damage to EU protected species or habitats **wherever encountered** – did not apply previously.
- **Remediation to baseline conditions** and **compensation for interim loss** – only to baseline if possible previously.
- **Duty to notify and take immediate action** – not in all situations previously.
- **Authority must establish whether damage has occurred** where there are reasonable grounds to believe it has and if so, have a **duty to require remediation**.
- **Strict liability** for Schedule 2 – prosecution required previously.





Environmental damage to water

What constitutes environmental damage?

Damage sufficient to lower status according to the Water Framework Directive.

- Biological status.
- Chemical status.
- Physiochemical status.





Environmental damage to water

What has changed?

- ***Remediation to baseline condition*** and ***compensation for interim loss.***
 - previously if reasonably practicable
- ***Duty to notify and take immediate action.***
 - not in all situations previously
- Where reasonable grounds apply, ***authority must establish whether environmental damage has occurred*** and have a ***duty to require remediation.***
 - *powers in previous situations*
 - *may involve prolonged monitoring to establish threshold*



Environmental damage to land

Similar to contaminated land, but What has changed?

- Protection from damage due to organisms or micro-organisms.
- ***Duty to notify and take immediate action.***
 - not in all situations previously
- For 'SPOSH' under Part IIA significant harm applies to serious ailments i.e. death, disease (e.g. cancer, liver dysfunction or extensive skin ailments), serious injury, genetic mutation, birth defects, mental impairment or reproductive impairment

whereas,

'Adverse effects on human health' encompasses wider scope covering gastrointestinal disturbances (e.g. nausea, vomiting, diarrhoea, abdominal pain), respiratory tract effects (e.g. cough, irritation of the respiratory tract, lethargy, drowsiness, decrease in IQ).

⇒ ***Lower thresholds***

⇒ ***Risk assessment methods devised for Part IIA may not be suitable for EDR***



Higher standards for remediation and mitigation

Water and Protected species or natural habitats or SSSIs

Pre-damage levels of natural resources or services as would have existed before the damage occurred.

+

Remove any significant risk to human health.

PRIMARY

COMPLEMENTARY

COMPENSATORY

Land

Remove any significant risk to human health in the context of current use or use for which planning permission has been granted.



Case Examples:

- 1. Damage to Species and habitats –manure on calcareous grassland.**
- 2. Damage to water- groundwater contamination 2010.**
- 3. Land damage by fuel spill contamination.**
- 4. Damage to habitat of red kite.**

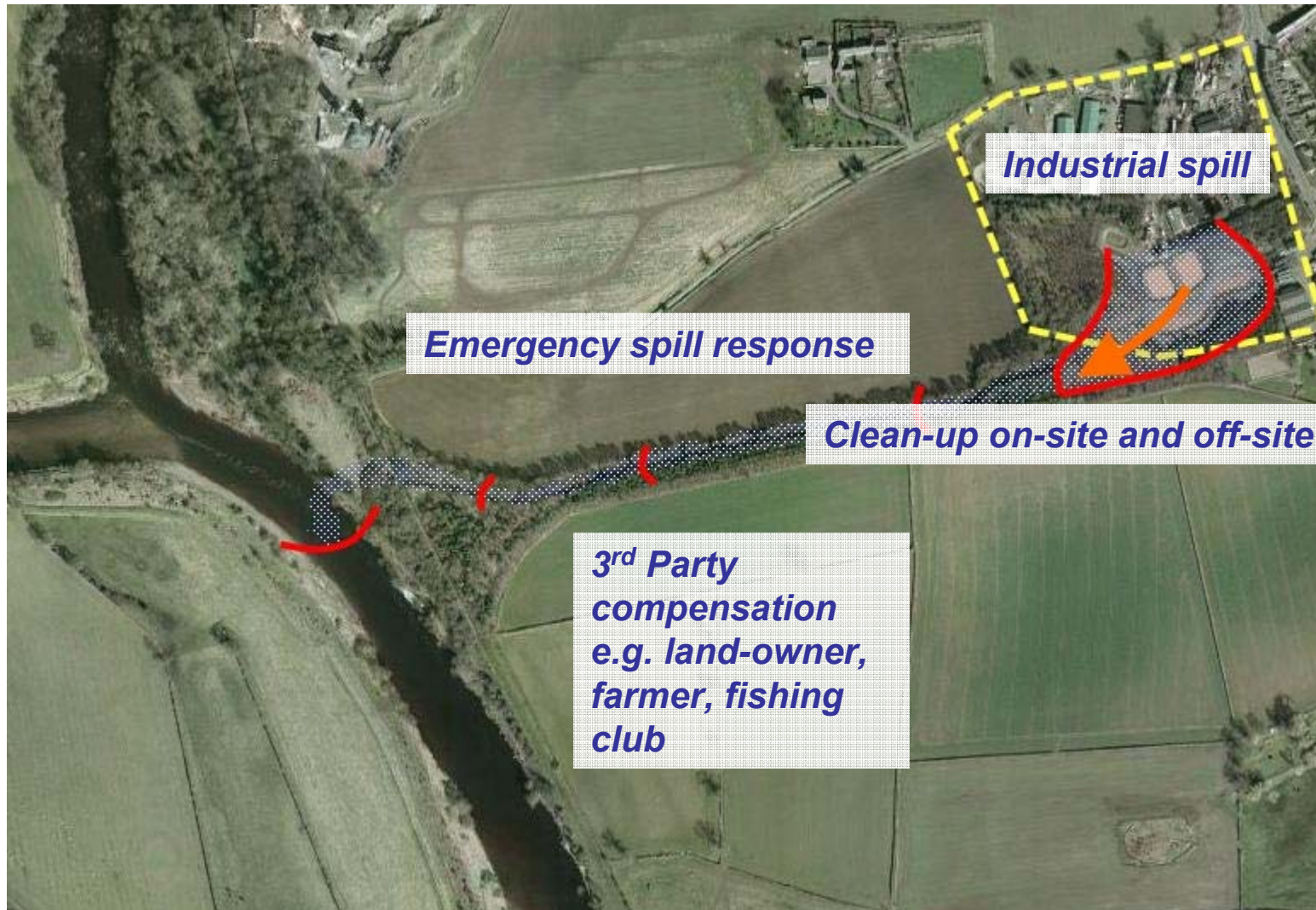


Example: Chemical leak at rural industrial site in 2010

- **Chemical leak at industrial site affecting site, adjacent land and a nearby stream.**
- **Stream is a pathway for contamination of the river and adjacent sensitive riverine habitat.**
- **Industrial site is IPPC and therefore subject to strict liability.**
- **Drop in water quality status considered to represent environmental damage.**
- **Conservation group report damage to nearby SSSI which is investigated by EA and linked to chemical leak.**
- **Once environmental damage suspected, EA issue prevention notice – triggers site cleanup and installation of pump and treat system with monitoring.**
- **To determine whether environmental damage EA undertakes well installation, plus monitoring and assessment of groundwater and river sediments.**
- **Extensive assessment identifies effects on the river and adjacent riverbank SSSI habitat.**
- **2 years engineering works plus 20+ year recovery period – installation of water treatment plant and enhancement alternative riverbank habitat to be undertaken by the site owner.**

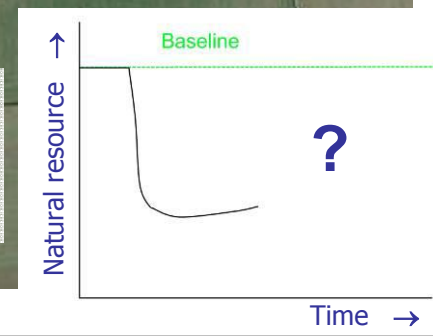
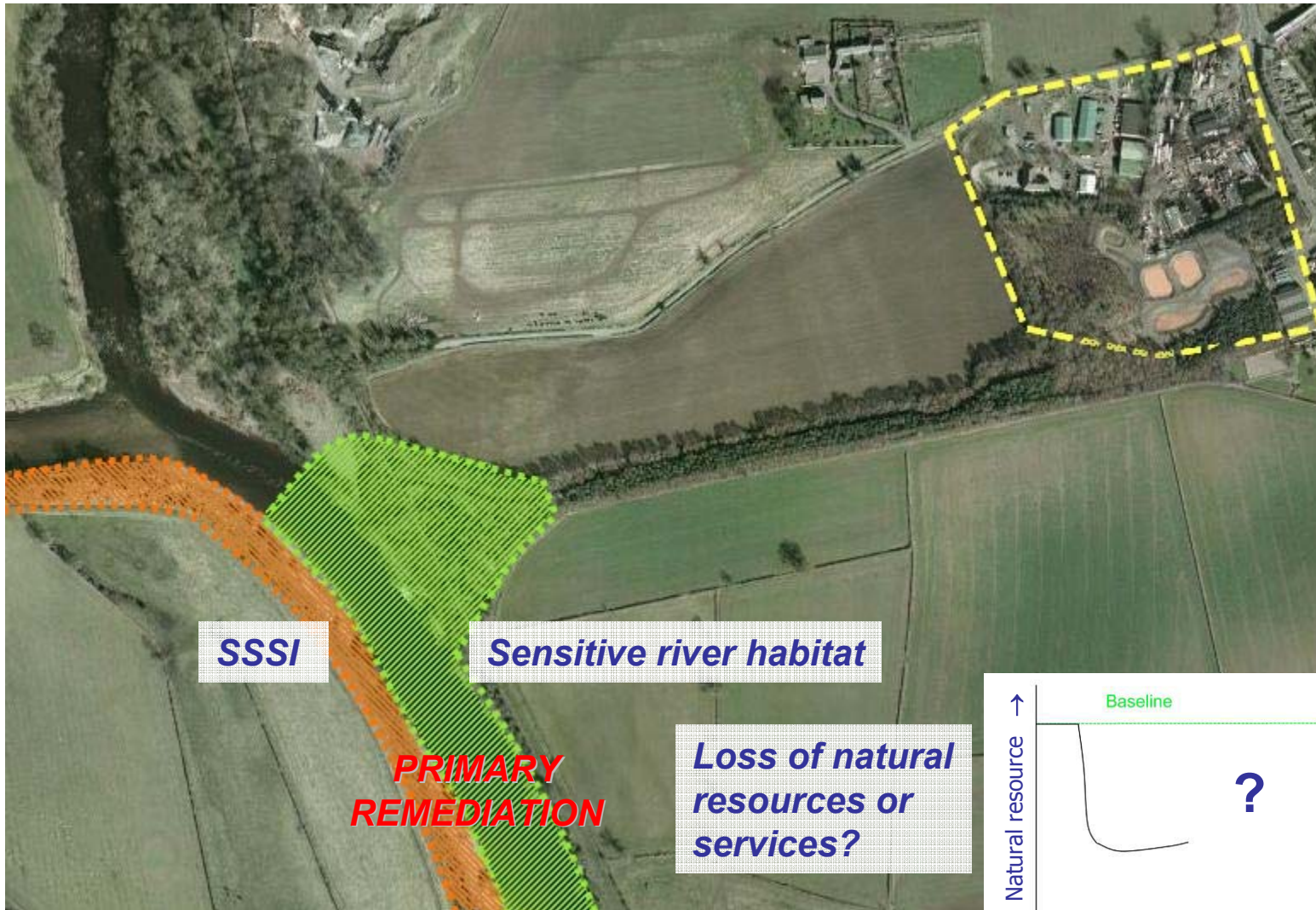


Implications: previous liabilities



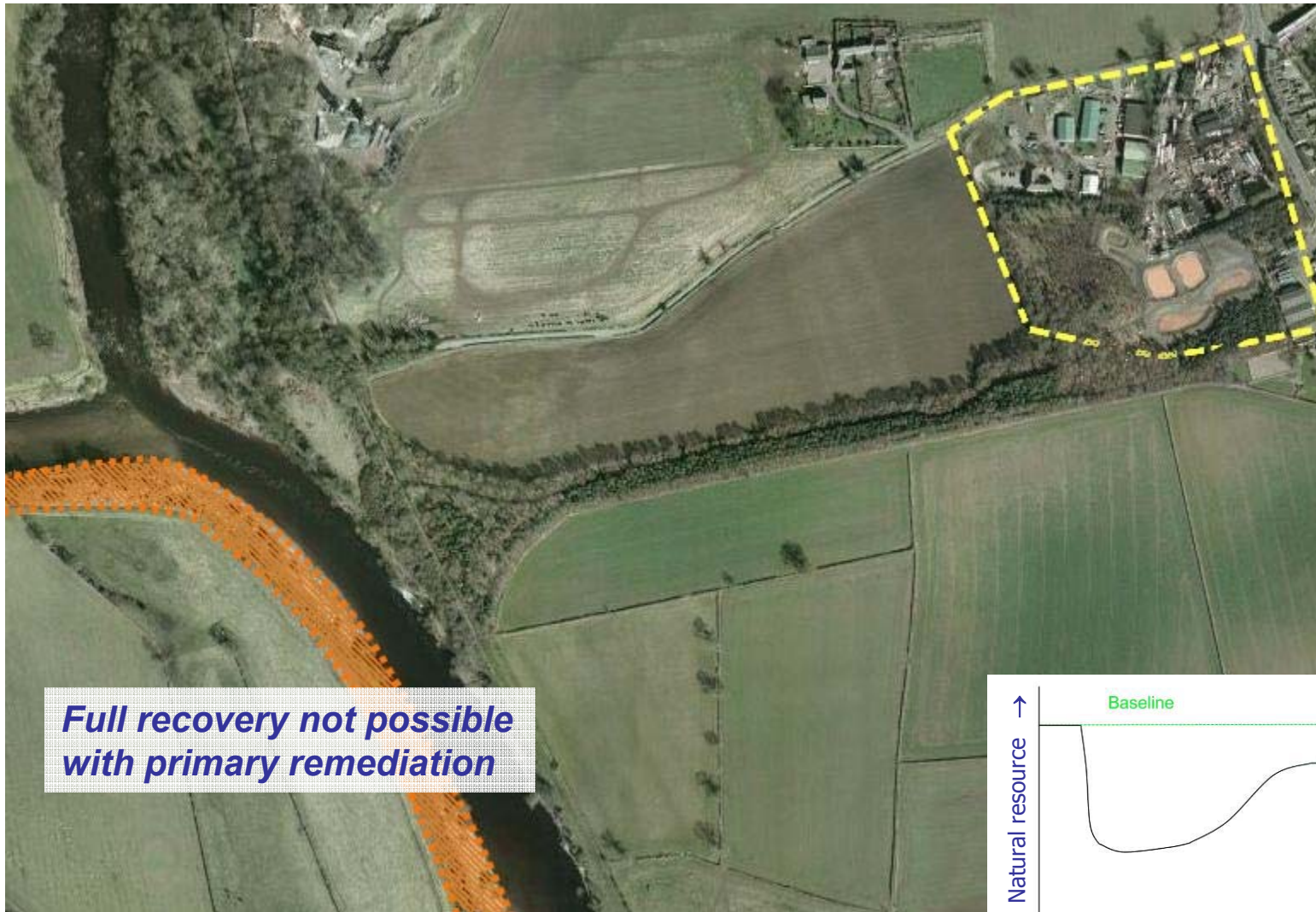


Implications: New liabilities

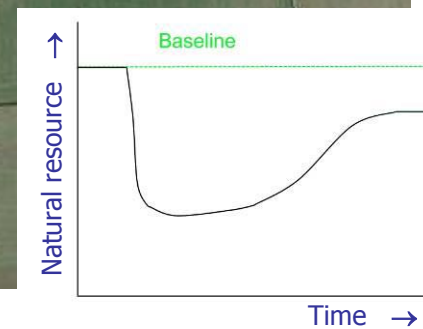




Implications: *New liabilities*

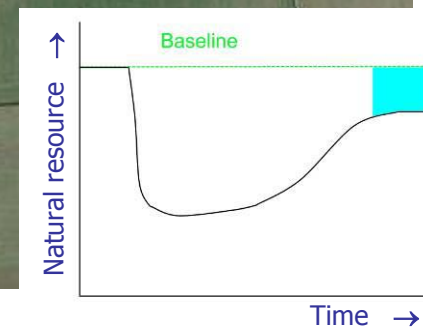
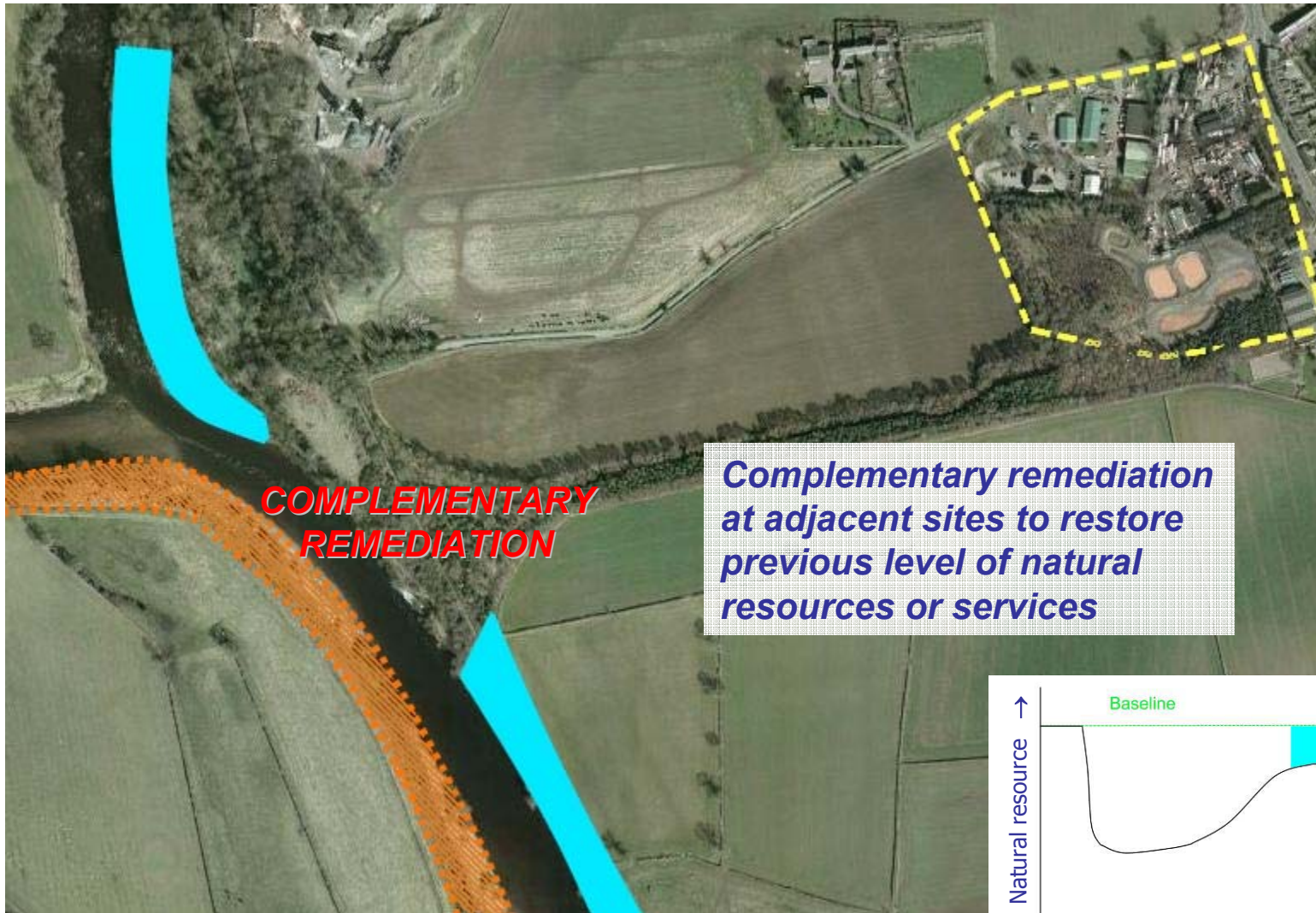


Full recovery not possible with primary remediation





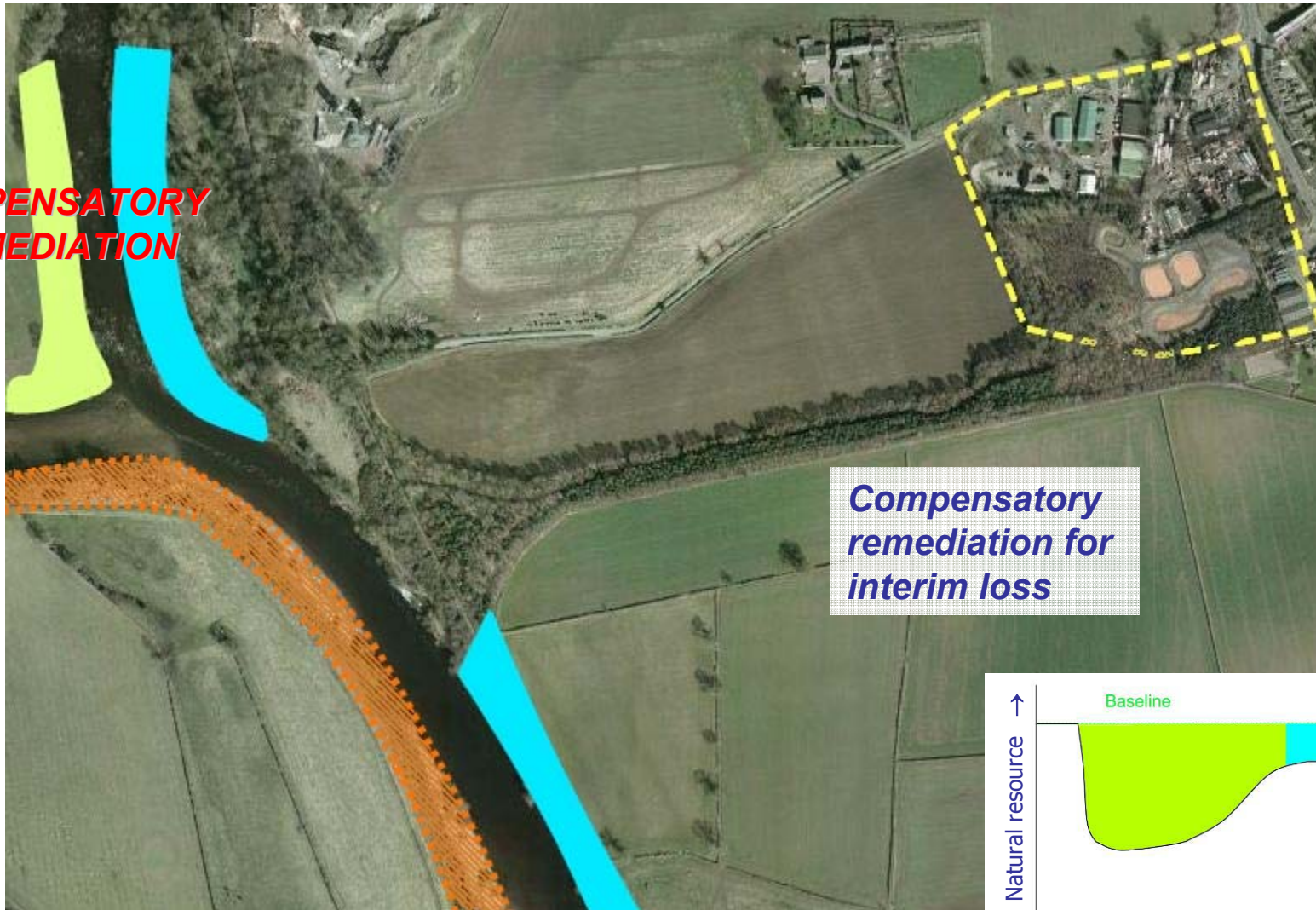
Implications: *New liabilities*



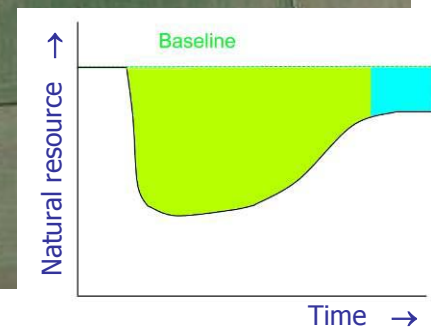


Implications: New liabilities

**COMPENSATORY
REMEDATION**



**Compensatory
remediation for
interim loss**





Strict liability and enforcement

- Operators activities listed in ***Schedule 2*** are strictly liable for preventing or remediating where there is threat of, or actual environmental damage.
⇒ ***do not need to be at fault***
- All other economic activities, operators are liable only in respect of an imminent threat of, or actual, environmental damage to SSSIs and protected species and must be the result of intent or negligence.



Strict liability: Schedule 2 activities

- ***Operators with an Environmental Permit.***
- ***Waste management operations, landfill sites and incinerators.***
- ***Management of mining waste.***
- ***Authorised discharges to surface water or groundwater, or authorised extraction and impoundment.***
- ***Operators involved in the manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances; dangerous preparations; plant protection products; or biocidal products.***
- ***Transport operators/operations.***
- Operators that are involved with GMOs including genetically modified micro-organisms.
- Operators involved in the transboundary shipment of waste.



Legal Duty to prevent and inform

Where activities cause ***imminent threat*** of, or ***actual damage*** where there are reasonable grounds to believe it will become environmental damage:

- ***DUTY to*** take all practicable steps to ***prevent the damage***.
- ***DUTY to notify enforcing authority*** if measures do not eliminate the threat.
(previously only for PPC sites and some waste & protected sites)
- ***Third parties – whistle blowers can start the process.***
- Enforcing ***Authority*** have ***powers to serve a notice to prevent*** environmental damage (e.g. reported by third party) and carry out the work and recover costs where the operator cannot be found, fails to comply or in an emergency.

⇒ ***No appeal process***



Liability to take emergency remedial measures

An operator of an activity that has ***caused environmental damage***, or damage where there are reasonable grounds to believe will become environmental damage ***must immediately***:

- ***Take all practical steps to prevent further damage.***
- ***Notify the enforcing authority.***
- Again, Enforcing Authority can carry out the work and recover costs where the operator cannot be found, fails to comply or in an emergency.

⇒ ***Authorities likely to take precautionary approach***

⇒ ***No appeal process***



Remediation notices

- The relevant ***Enforcing Authority has a duty*** to establish whether damage is environmental damage.
- ***A notice of liability to remediate*** can then be served which includes request for remediation proposals, e.g. ‘permit’ or ‘state of the art’ defences.
- ***The operator can appeal this stage of the process.***
- ***Remediation notice*** can then be served specifying the measures to be taken with the opportunity to appeal the requirements of the notice.



New cost recovery provision for authorities

- Introduces duties for Enforcing Authorities ***with far reaching powers of cost recovery:***
 - £ Work carried out on operator's behalf
 - £ Assessment costs
 - £ Administration costs
 - £ Establishing a remediation strategy
 - £ Consultation costs
 - £ Monitoring during and after
- Can be recovered up to 5 years after completion of remediation or identification of the responsible operator.
- Costs and interests are a ***charge on the operator's premises.***



Opportunities for Surveyors:

- Raising client awareness for example:
 - » Operators
 - » Land owners
 - » Potentially liable 3rd parties – land managers? Farmers?
 - » Self executing provisions of the EDR ⇒ prevention and reporting
- Assessing exposure and involvement:
 - » Audit of potential environmental threats
 - » Initial assessments of damage
- Advising on extent of exposure and risk minimisation measures:
 - » Managing environmental assessments & claims
 - » Scientific assessments after events



Summary of the Environmental Damage Regulations

Operator awareness

- Applies to ***many operators and RICS clients***.
- ***Self-executing duties*** to prevent environmental damage and take emergency remedial action.
- ***Duty to remediate***.
- ***Higher standards of remediation*** apply.
- ***Not insured*** by most pre-existing policies.

Authority powers

- Can serve ***prevention notices without appeal***.
- ***New powers to take action*** and ***recover costs***.
- ***Duty to determine*** whether EDR apply ***and serve remediation notices***.

Third Parties

- ***Whistle blowing by 3rd parties*** with interest e.g. conservation groups.



Thank you for your attention

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