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# *Environmental Damage Regulations* *An update*

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## *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 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**.*



## *Summary of Practical Implications*

- **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.**



## ***When do operators need to comply?***

***Now!*** Commencement dates were:

- ***1st March 2009*** for ***England.***

- *Environmental Damage (Prevention and Remediation) Regulations 2009*

- ***6th May 2009*** for ***Wales.***

- *Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009*

- ***24th June 2009*** for ***Scotland.***

- *Environmental Liability (Scotland) Regulations 2009*

- ***24th July 2009*** for ***N Ireland.***

- *Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009*



## ***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+***



# 1 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.





## ***2 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*



## 3 Environmental damage to land

*What constitutes environmental damage to land?*

Regulation 4(5):

***contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health.***

*cf.*

Part IIA Section 78A(2) definition:

*“Contaminated land” is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that—*

- (a) significant harm is being caused or there is a significant possibility of such harm being caused; or*
- (b) pollution of controlled waters is being, or is likely to be, caused;*



## ***Environmental damage to land***

### ***Similar to Contaminated land but.....***

- Protection from damage due to organisms or micro-organisms.
- ***Duty to notify and take immediate action.***
  - not in all situations previously

***‘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***

be ⇒ ***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.



## ***DEFRA 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.**

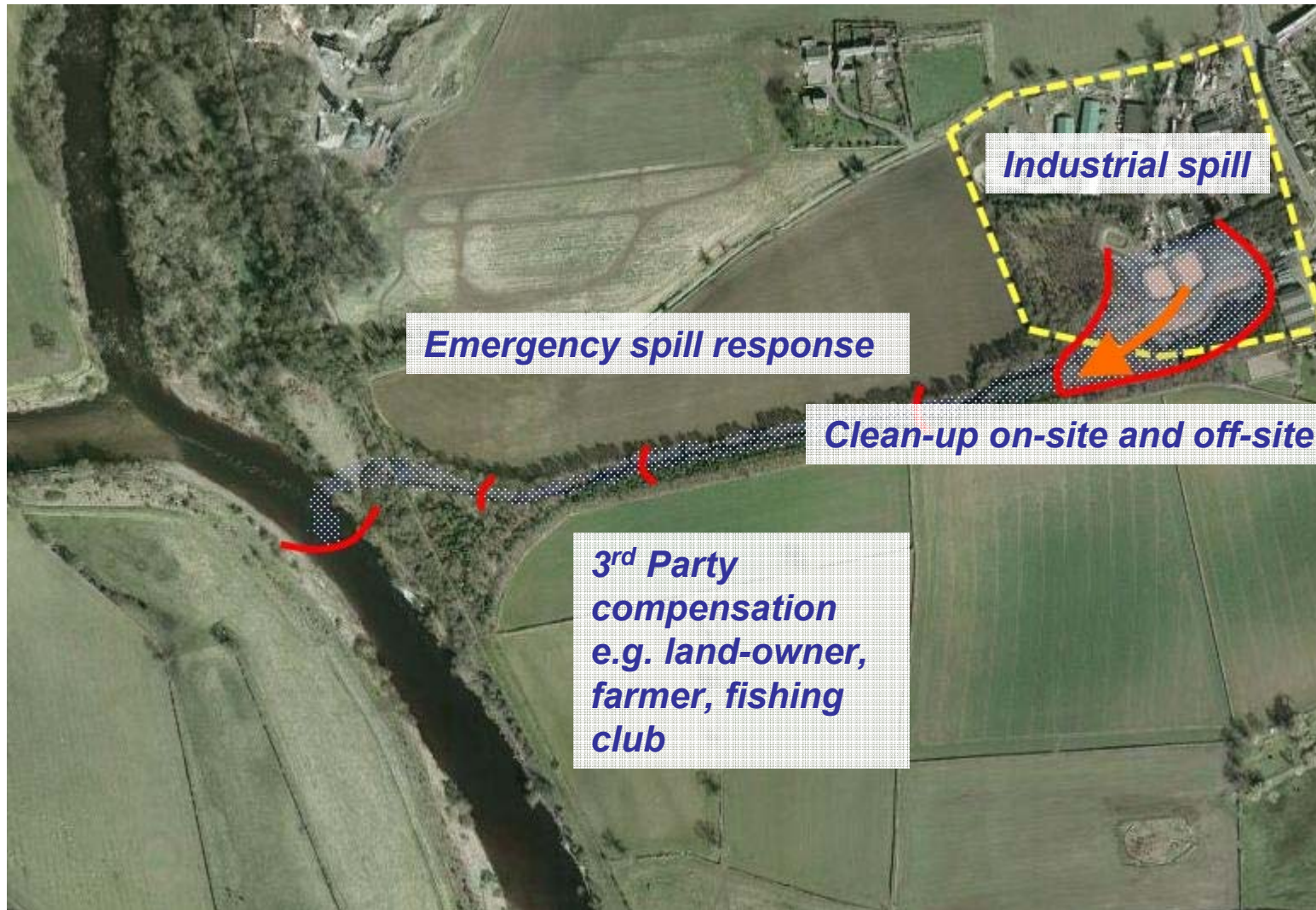


## **Example: Chemical leak at rural industrial site in 2010**

- **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.**

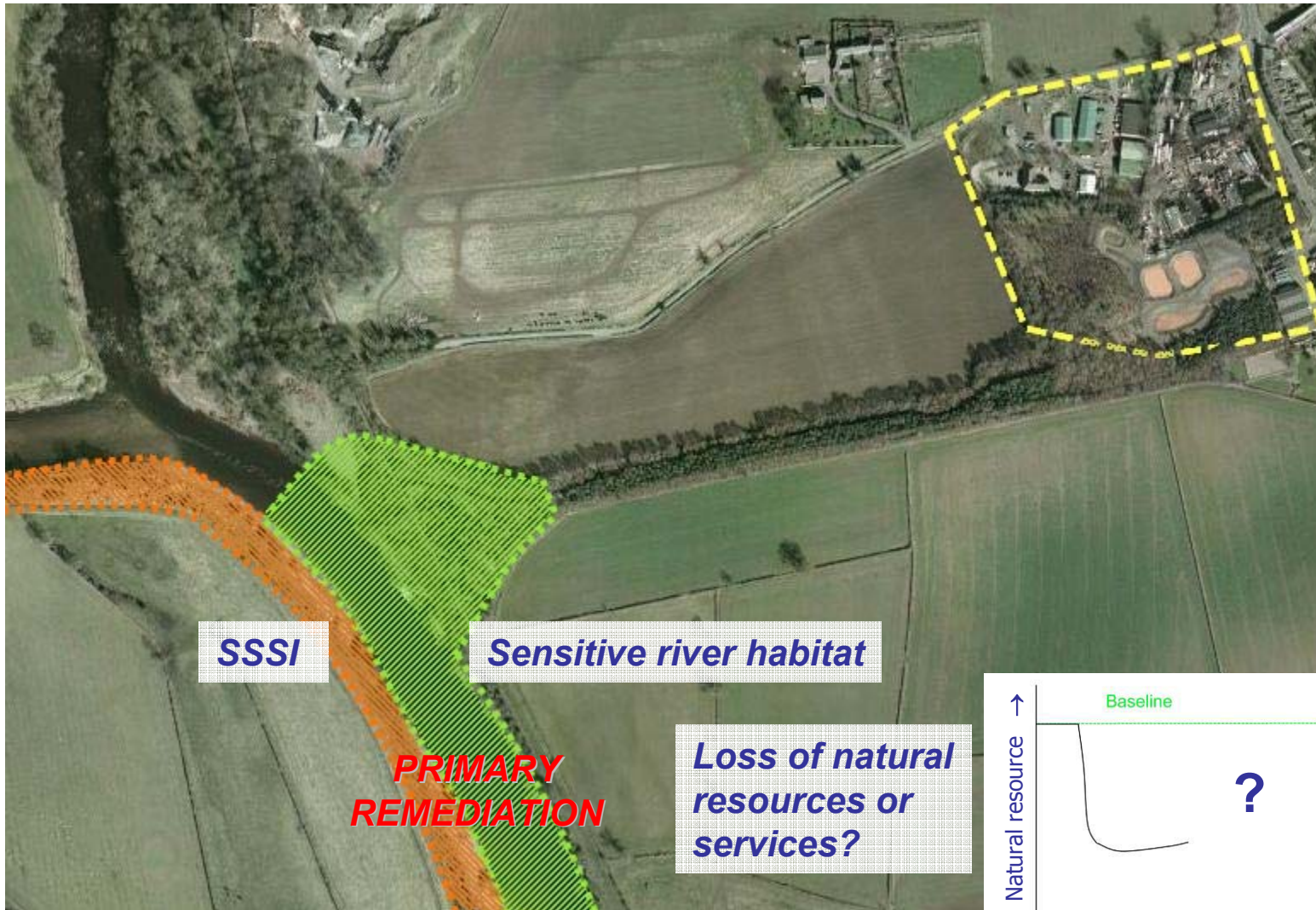


## *Implications: previous liabilities*



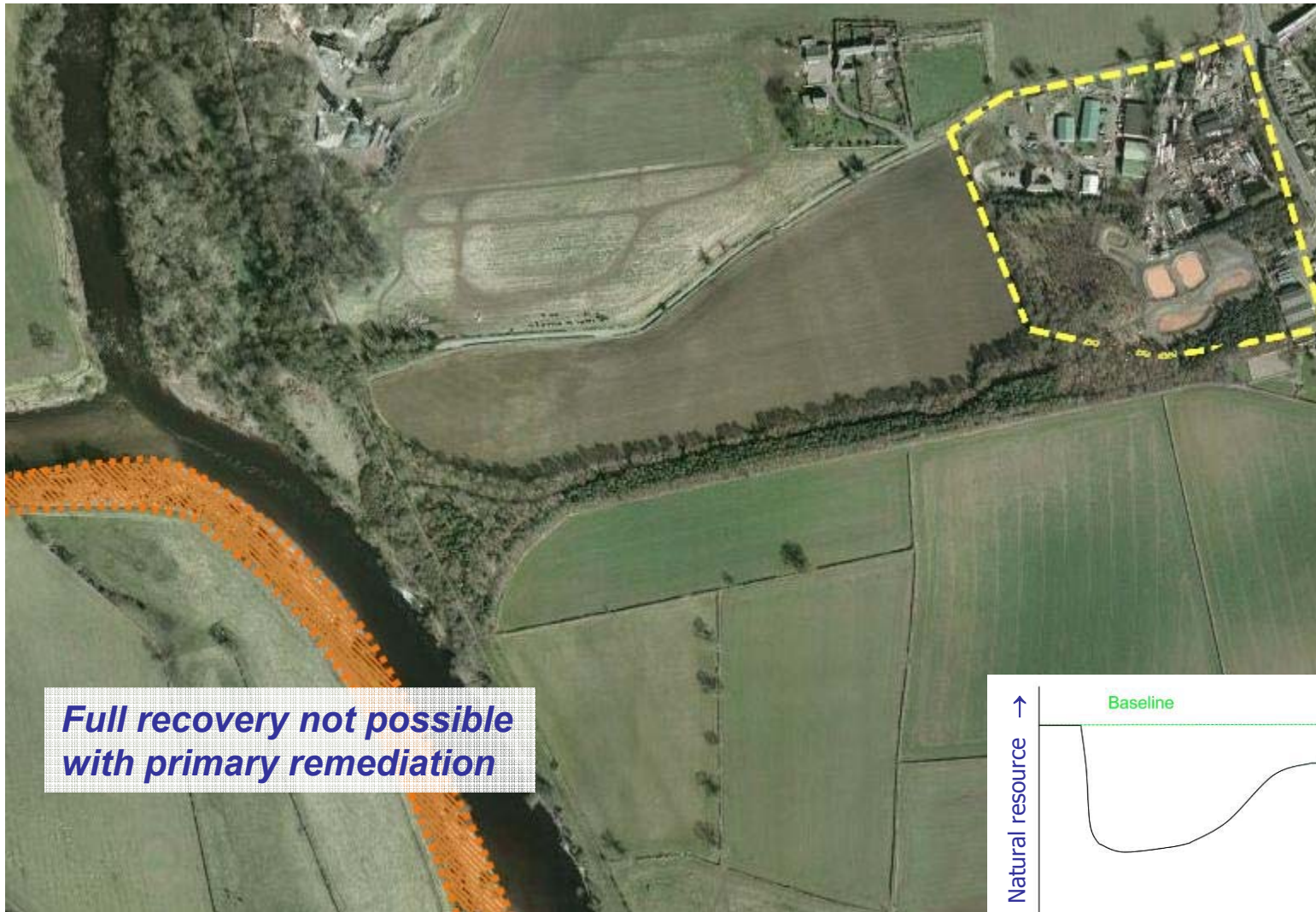


# Implications: New liabilities

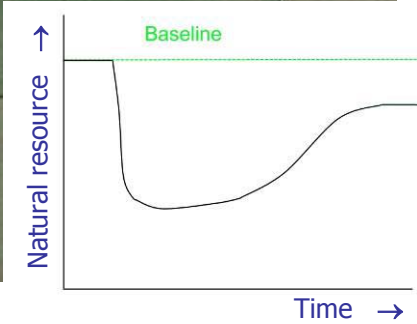




## Implications: New liabilities

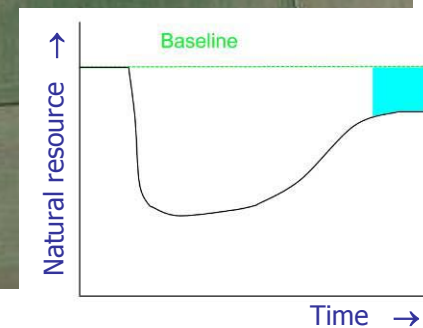
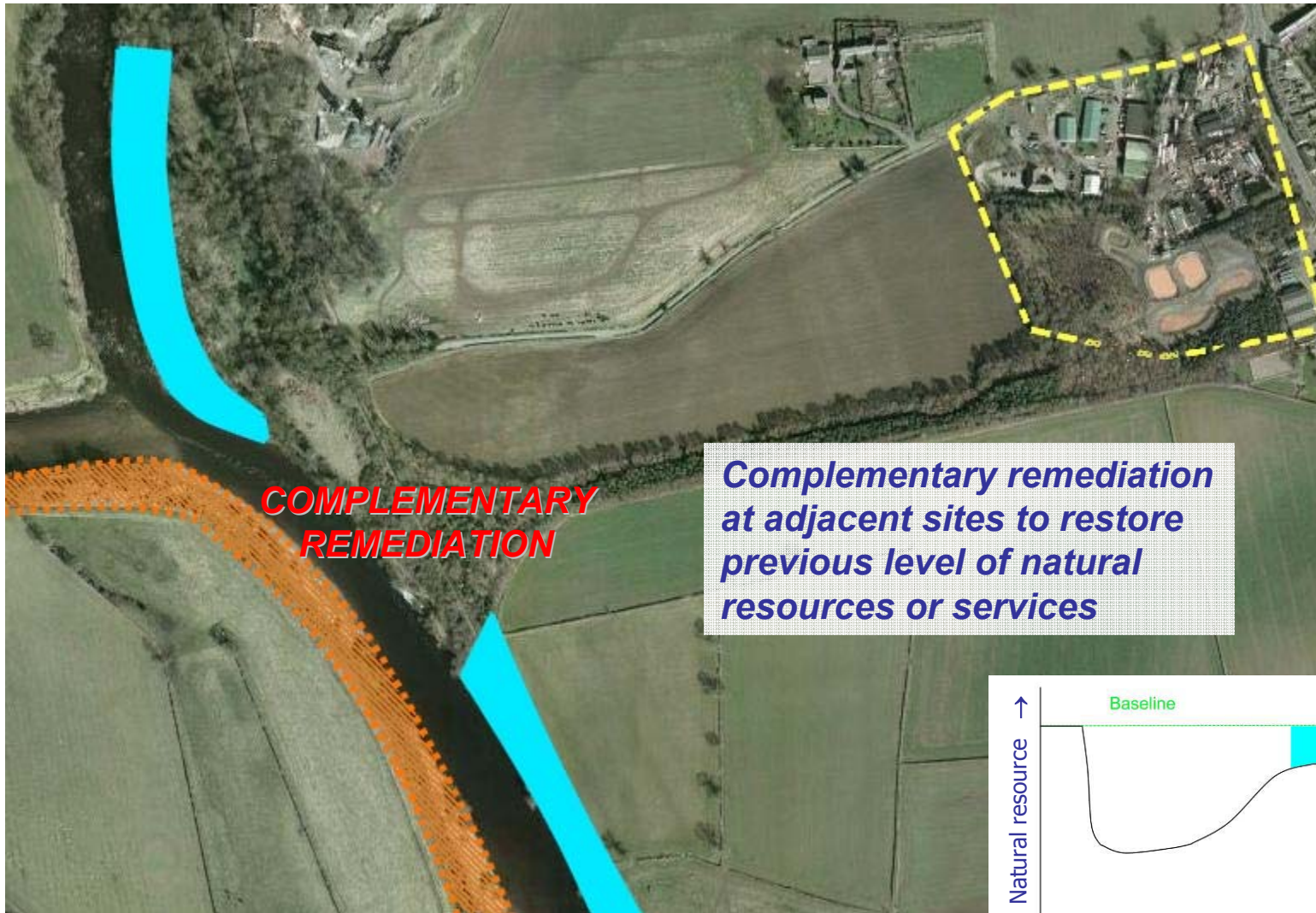


**Full recovery not possible with primary remediation**





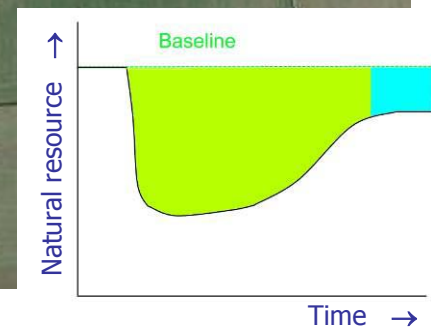
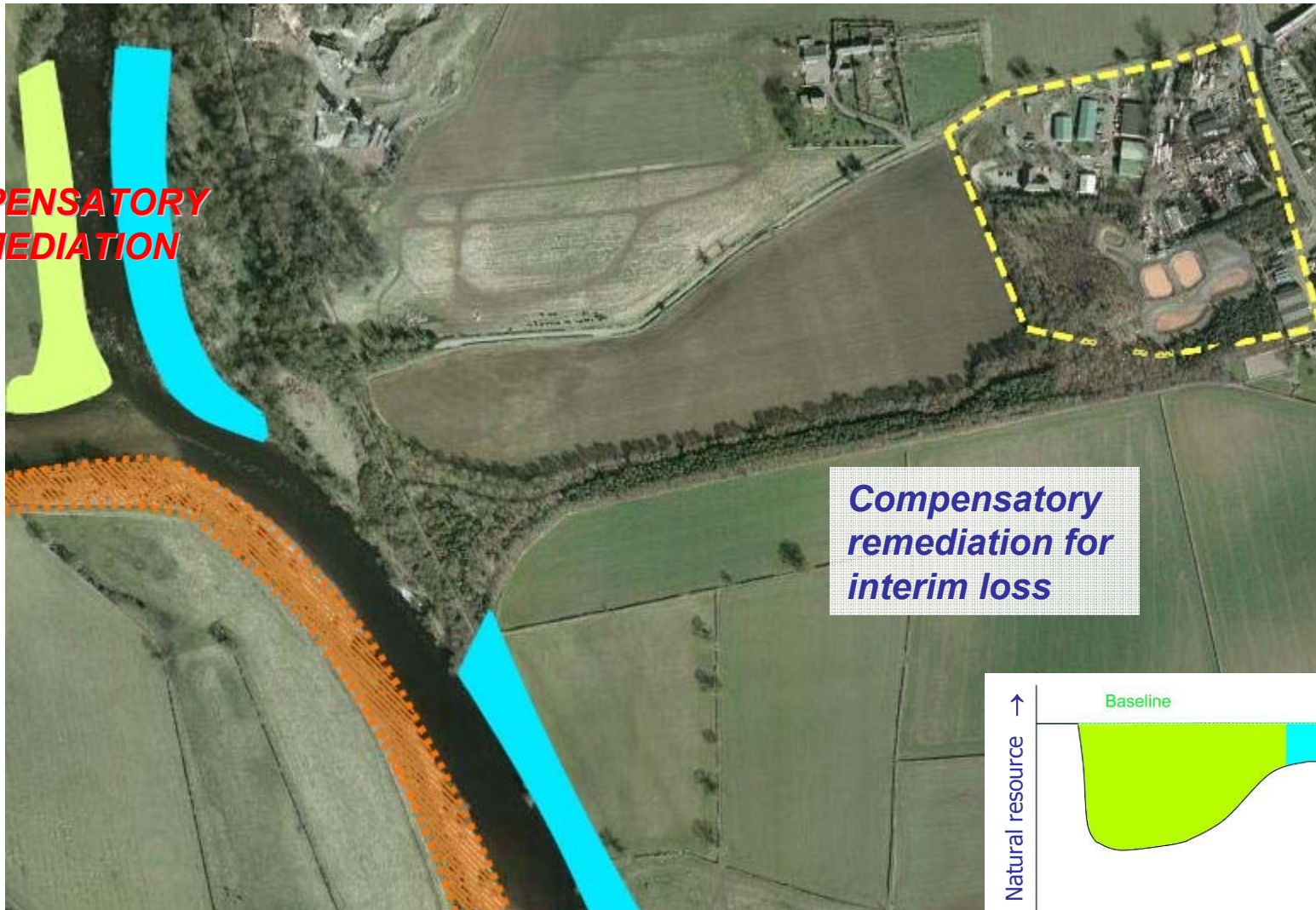
## Implications: *New liabilities*





## Implications: New liabilities

**COMPENSATORY  
REMEDATION**





## ***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.***



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## *Experience So Far*

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- *DEFRA Incident data returns.*
- *DEFRA Guidance autumn 2009*
- *Recent ECJ Case – 2007 is active date*

*Other experience:*

*Harbour incident –adjacent SSSI- notified*

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*Thank you for your attention*

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