

Environmental Liability Regulations



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The Environmental Liability Regulations (ELR)*

S.I. No. 547 of 2008

- in force since April 1st 2009
- put the the majority of Environmental Liability Directive 2004/35/CE into effect
- *Environmental Liability Bill to follow in late 2009
 - GMO aspects
 - Legal defences
 - Bill heads published www.environ.ie

Environmental Liability Directive (ELD) (2004/35/CE)

- **DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage**
(OJ L 143, 30.4.2004, p. 56)
- Article 1: The purpose of this Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage.
- Effective date 1st April 2009 & statute of limitations 30 yrs.
- Hugely significant piece of legislation

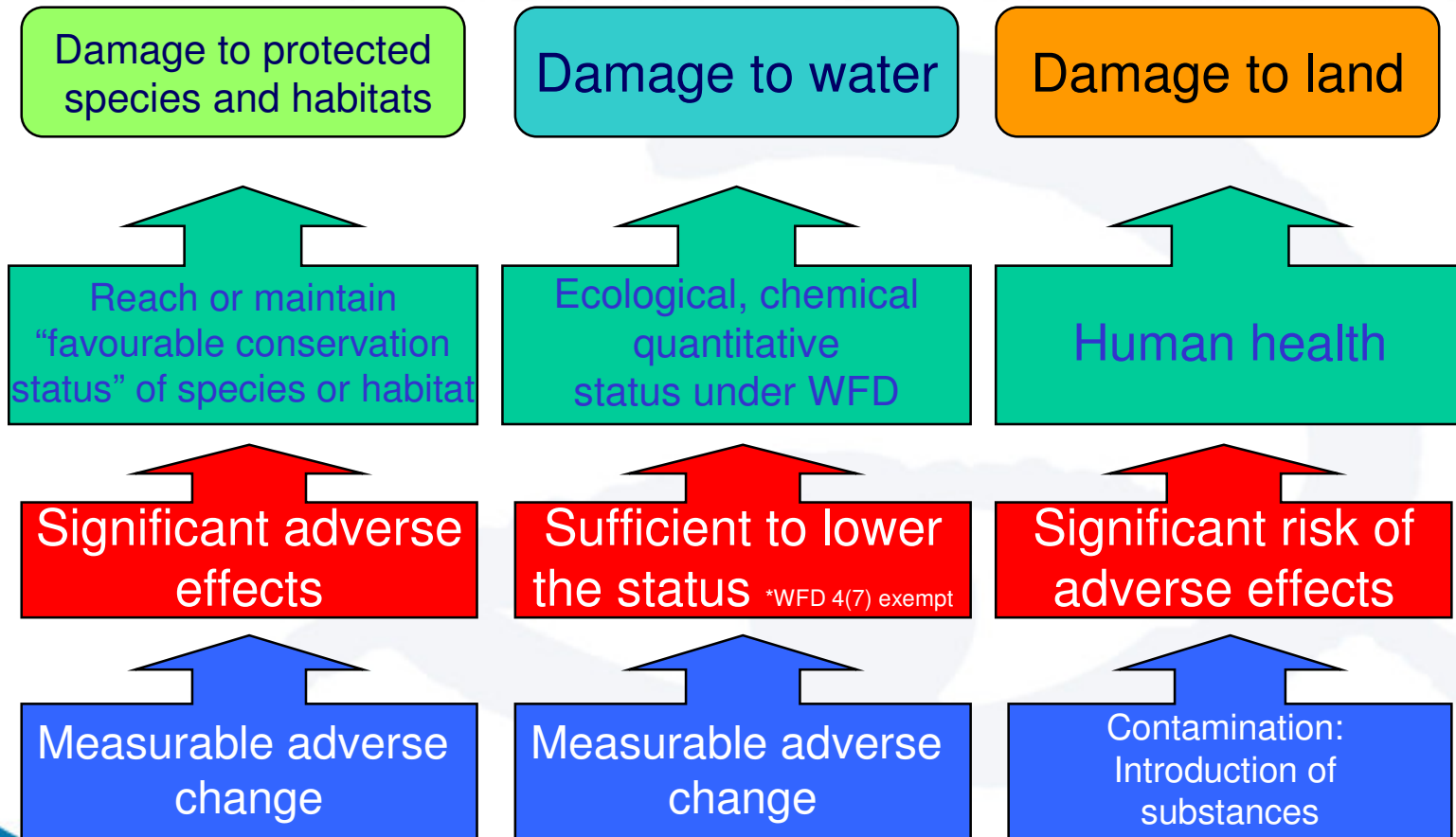
Scheduled Activities under the Environmental Liability Directive / National Regulations

- The legislation applies to environmental damage caused by any of the following occupational activities (Schedule 3 of Regulations):
 - **All waste activities**
 - Waste TFS
 - All IPPC activities
 - All UWWD licensed facilities
 - All licensed surface water discharges (WPA)
 - All authorised groundwater discharges
 - All Air Pollution Act authorised facilities (air not directly covered but may result in indirect ED)
 - Road, rail and vessel transport of dangerous goods
 - Management of extractive waste (mines & quarries)
 - GMO contained use & deliberate release
 - Classification, packaging, labelling of dangerous substances & preparations
 - Authorising & placing on the market of biocidal products

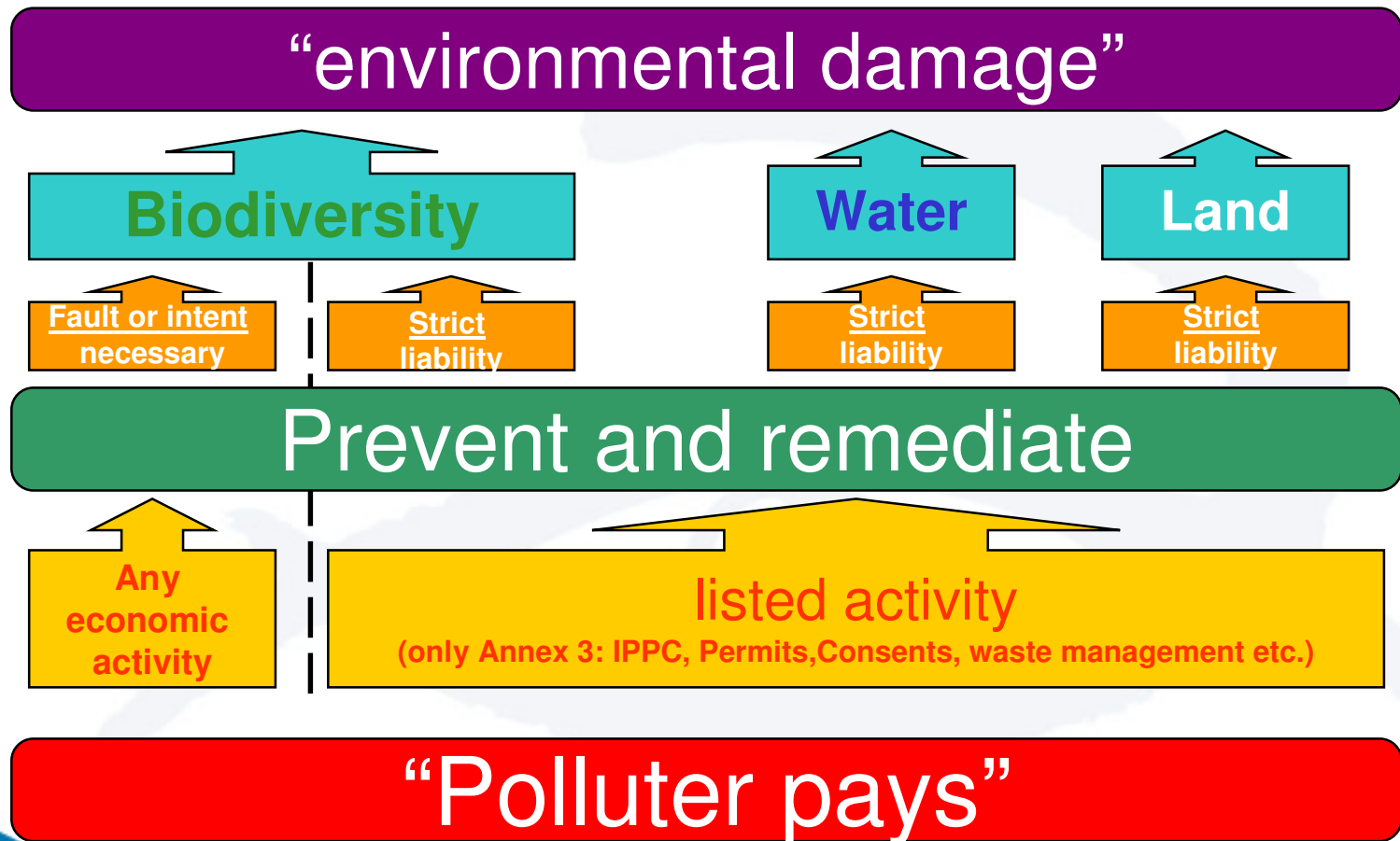
Activities covered by Environmental Liability Directive / National Regulations

- Legislation **also** covers damage to protected species and natural habitats from **any** occupational activity where an operator acts or fails to act and he or she knows or ought to have known that his or her act or failure to act causes or would cause such damage or imminent threat of damage.

Environmental Damage — Species & Habitats, Water and Land



Environmental Damage – When are operators Liable?



Protected Species and Habitats: Designated Areas

The three main types of designation are;

- Special Area of Conservation (SAC)
 - Habitats Directive
- Special Protected Area (SPA)
 - Birds Directive
- Natural Heritage Area (NHA)
 - Wildlife Act, 1976-2000

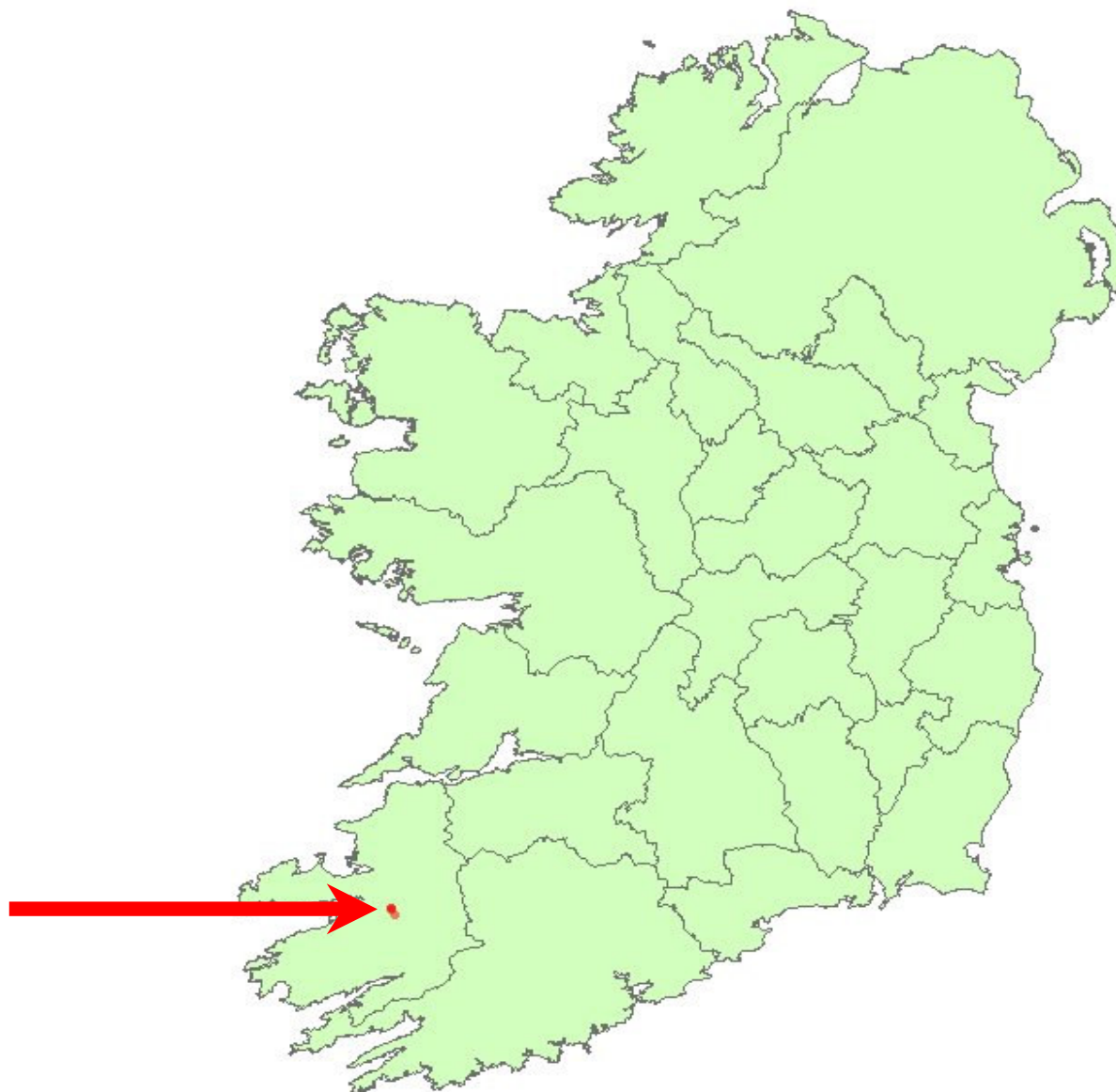


Other Designations

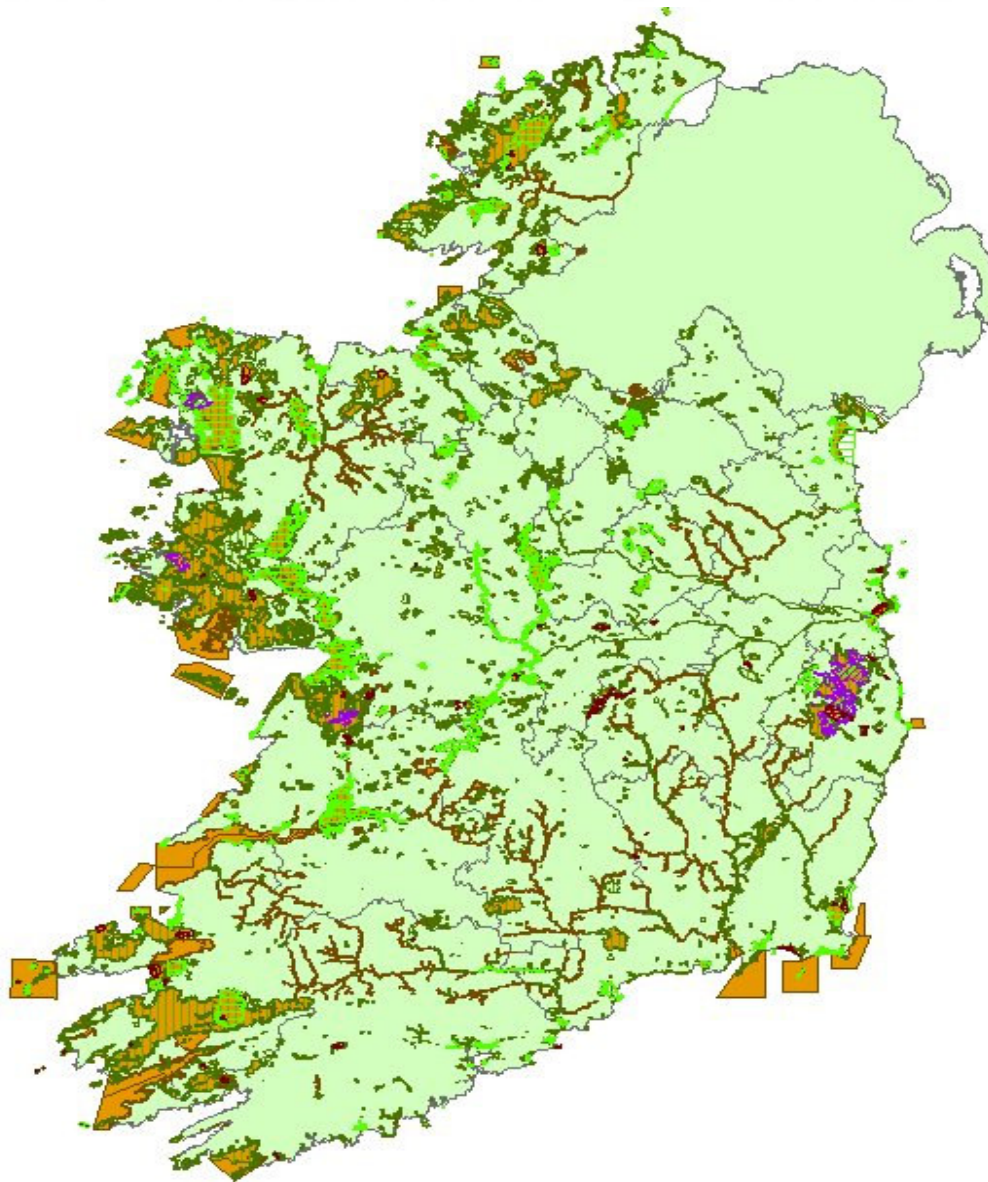
- Nature Reserve
- National Parks
- Refuge for Fauna or Flora
- Wildfowl Sanctuaries
- Management Agreements



Designated Sites in Ireland in 1970



Designated Sites in Ireland - 2007



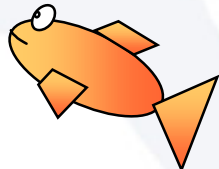

Environmental Damage: Principal Regulatory/Legal Provisions

- IPPC & Waste Licensing (Directives & EPA Acts & Waste Mgt. Acts)
 - Prevent, Limit & Remedy consequences of accidents
- SEVESO Directive & national Regulations
 - Limit Consequences & 'alleviate the medium and long-term effects' of any accident
- Habitats Directive, Regulations & International Convention on Biodiversity
 - protect & restore damage to habitats/biodiversity
- National Major Emergency Management protocol
 - see www.emergencyplanning.ie
- Environmental Liability Directive & national Regulations
 - Prevent damage & remedy damage

Existing legislation ...

- is unchanged
- but supplemented
- *Environmental Protection Agency Act 1992, The Protection of the Environment Act 2003; Water Pollution Act 1977; the Waste Management Act, the Wildlife Act etc ...all still in use*
- can be used to deliver the aims of the directive
- can be used in parallel with ELD to achieve remediation aims
 - Prosecute under licence
 - Clean-up managed under ELR

Desired outcome of all this legislation

- encourage operators not to cause environmental damage ... 
- makes an operator liable for preventing and remedying environmental damage 

What is Environmental Damage I

- Type of Damage?
 - How widespread?
 - How significant in national/local/catchment/species context
 - How long will it last?
 - What's the “baseline”?
 - Who did it?
-Investigate to determine all these

What is Environmental Damage II

- EPA will have to investigate each case of Environmental Damage or imminent threat of Environmental Damage notified to it either by operators or third parties
- What qualifies as Environmental Damage can seem counterintuitive
- Examples

2008 Buncefield, UK Oil Refinery disaster not an ELD event

No:

Water Damage

Land Damage

Species/Habitat Damage



Small gorse fire next to national park in Co.
Kerry could be an ELD event



Wipe out a colony of Killarney Fern (*Trichomanes speciosum*)
Species Damage due to negligence

Environmental Damage & Remediation

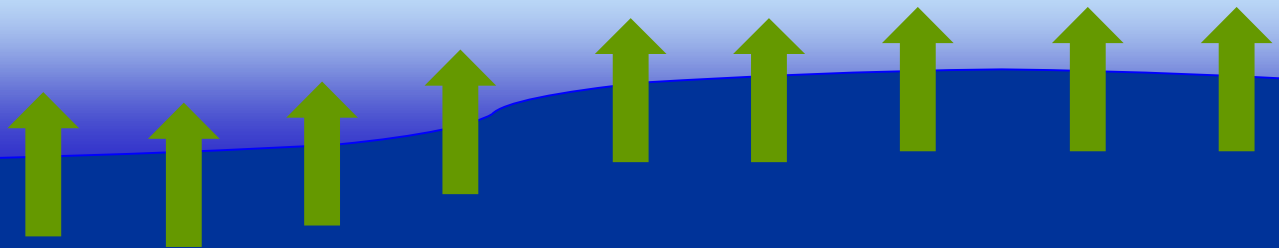
■ Example of Water Damage

- Assessed based on Water Framework Directive designations
- Significant adverse effect
- Failure to achieve or lowering of status

Water Framework Directive

Managed
abstractions

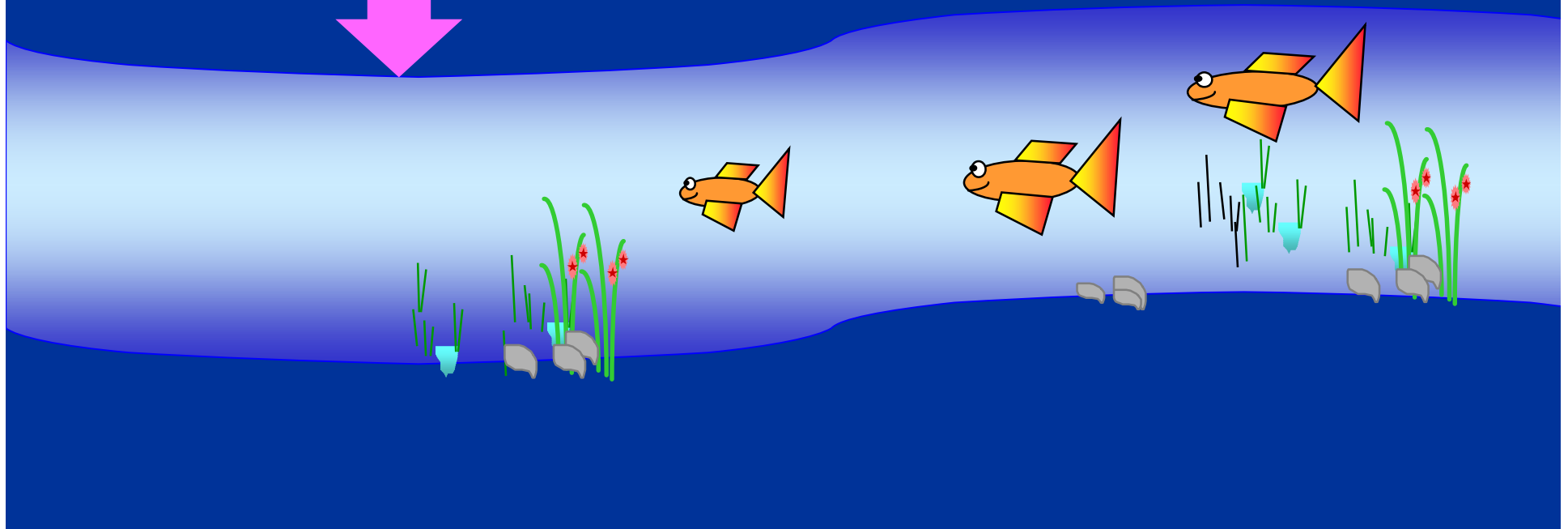
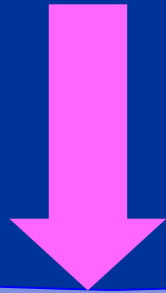
Managed
Point discharges



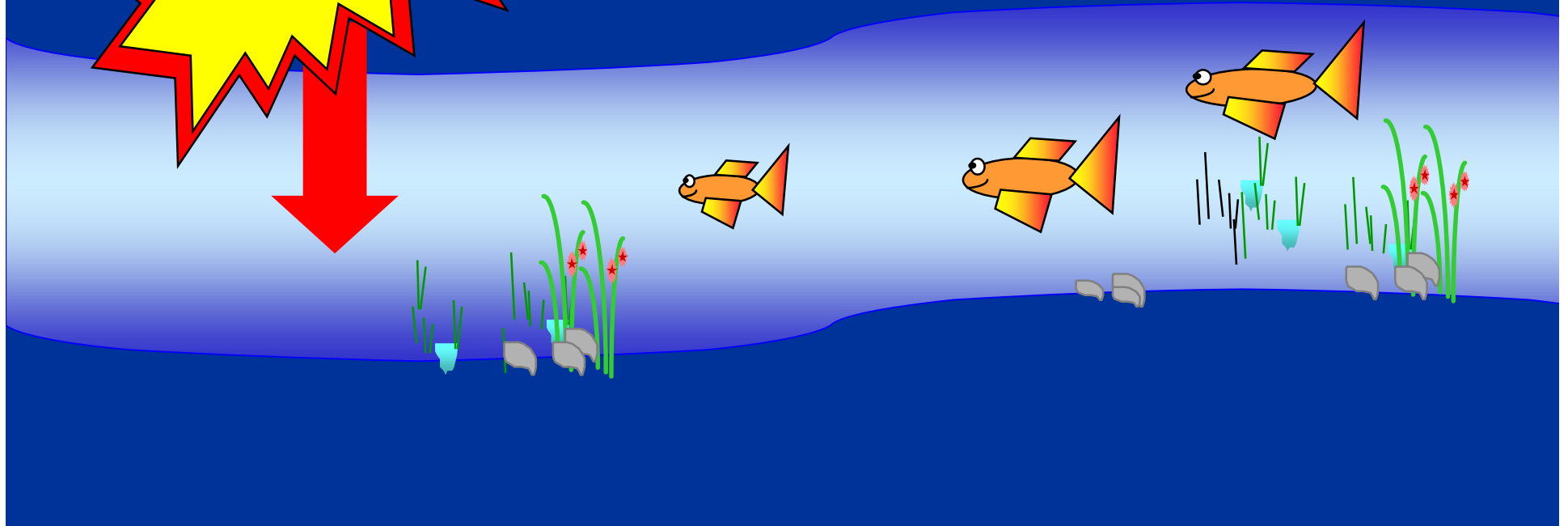
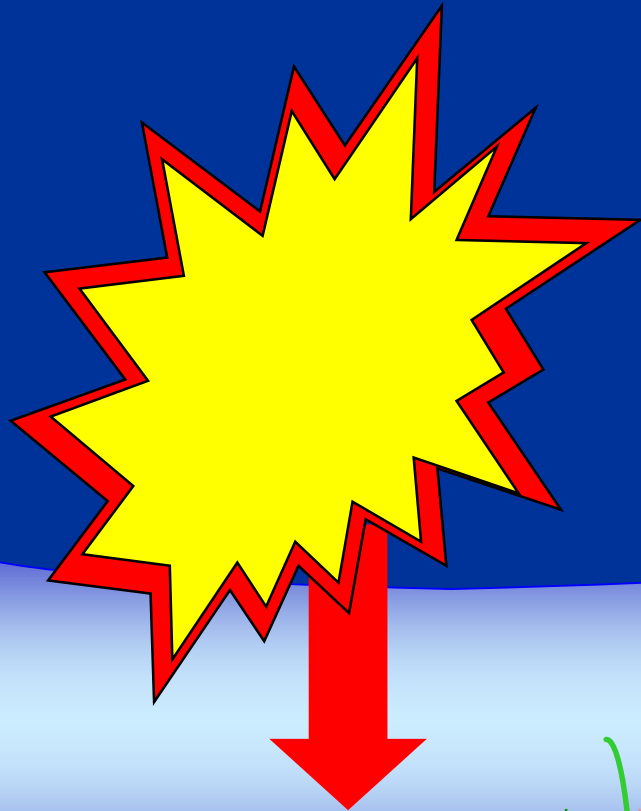
Diffuse pollution

Clean up discharges, set permits, invest in infrastructure and achieve Good Status

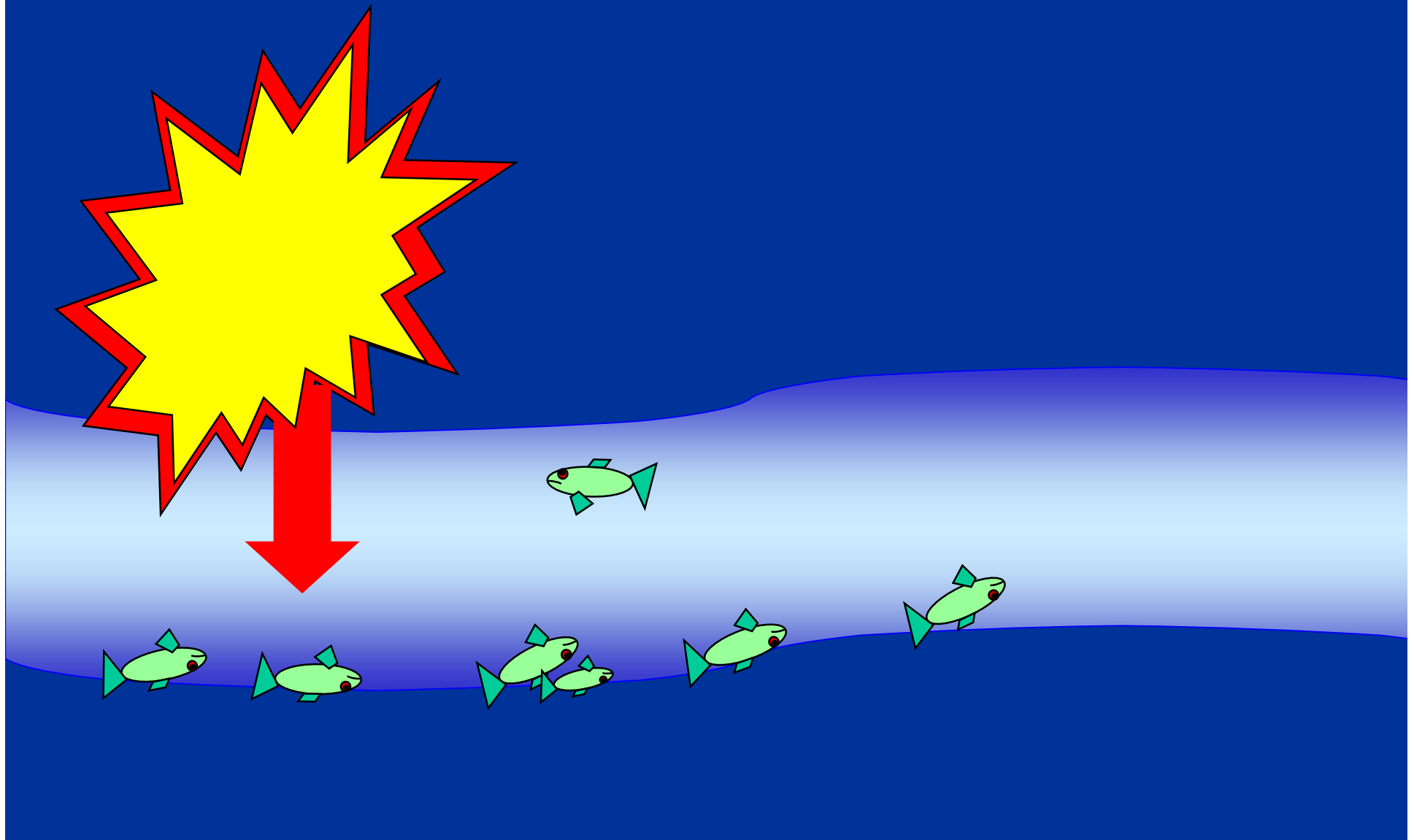
€20 million investment



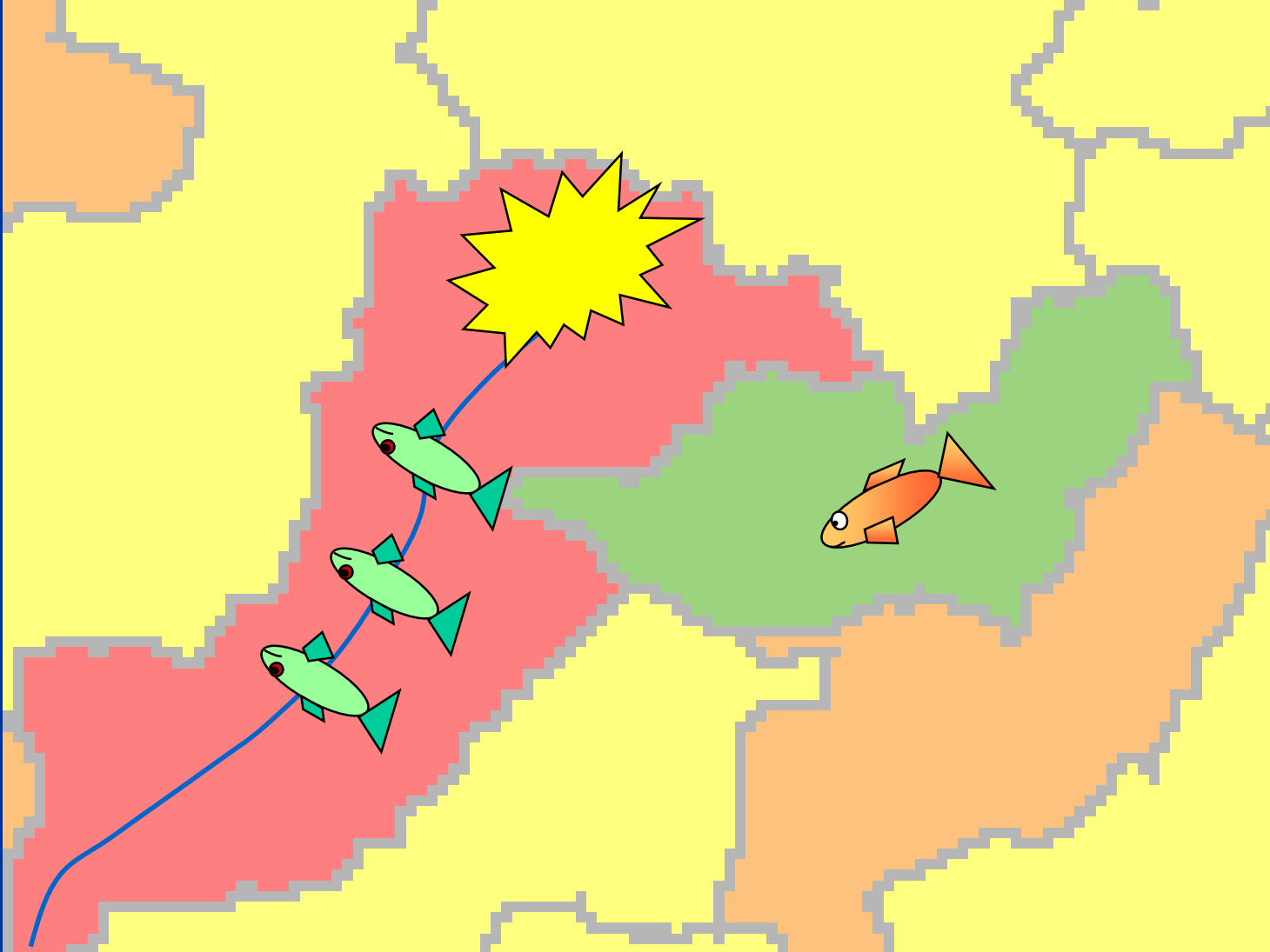
Incident!



River critical to WFD assessment impacted



Water body can no longer maintain good status
Water Damage has occurred



Remediation

- How do we make good the Environmental Damage
- Remediation framework enshrined in the ELD

Remediation Framework

■ Primary

- Possible to get back to baseline?

■ Complementary

- Not possible to get back to baseline
- Remediate somewhere/something else instead

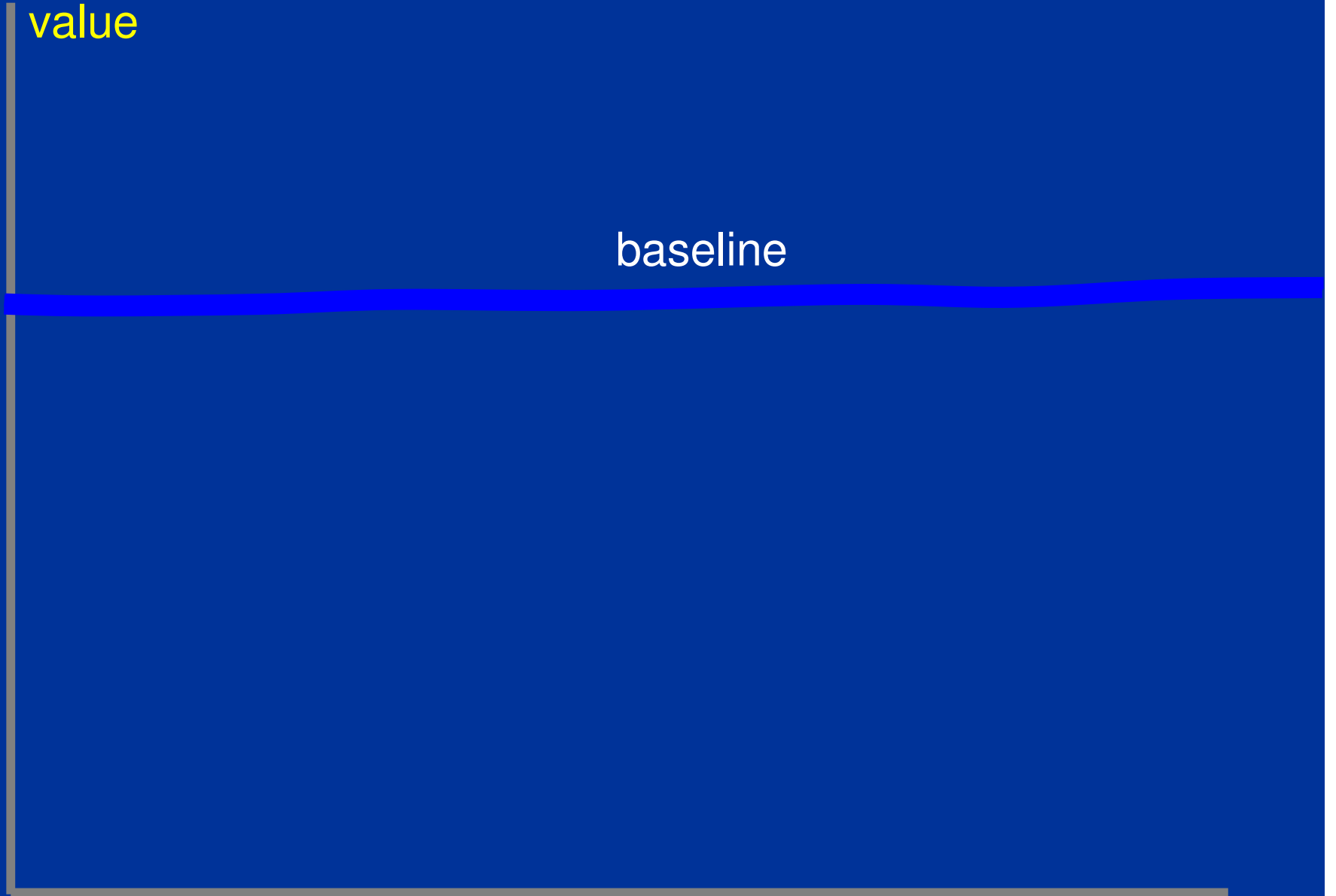
■ Compensatory

- Make up for the loss of use of resource while remediation is ongoing

value

baseline

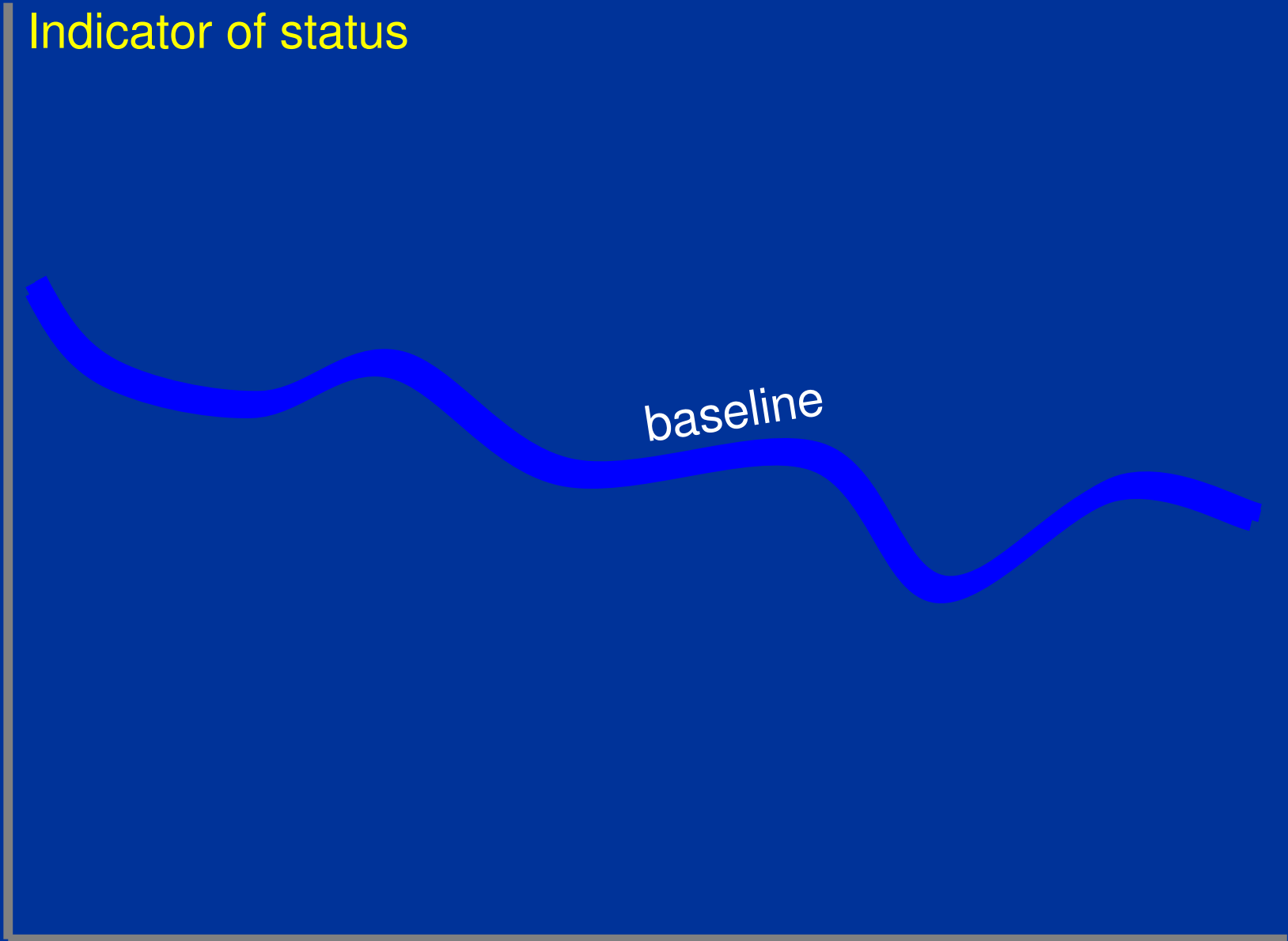
time



Indicator of status

baseline

years



Indicator of status

baseline

damage



The graph illustrates the concept of 'natural recovery' following a 'damage' event. The vertical axis is labeled 'Indicator of status' and the horizontal axis is labeled 'time'. A blue wavy line represents the 'baseline' status over time. A sharp drop in the status is labeled 'damage', shown as a red solid line. Following the damage, the status begins to recover, shown as a green dashed line labeled 'natural recovery'. The recovery line starts at the bottom of the damage drop and trends upwards, approaching the baseline level.

natural recovery

time

Indicator of status

baseline

damage

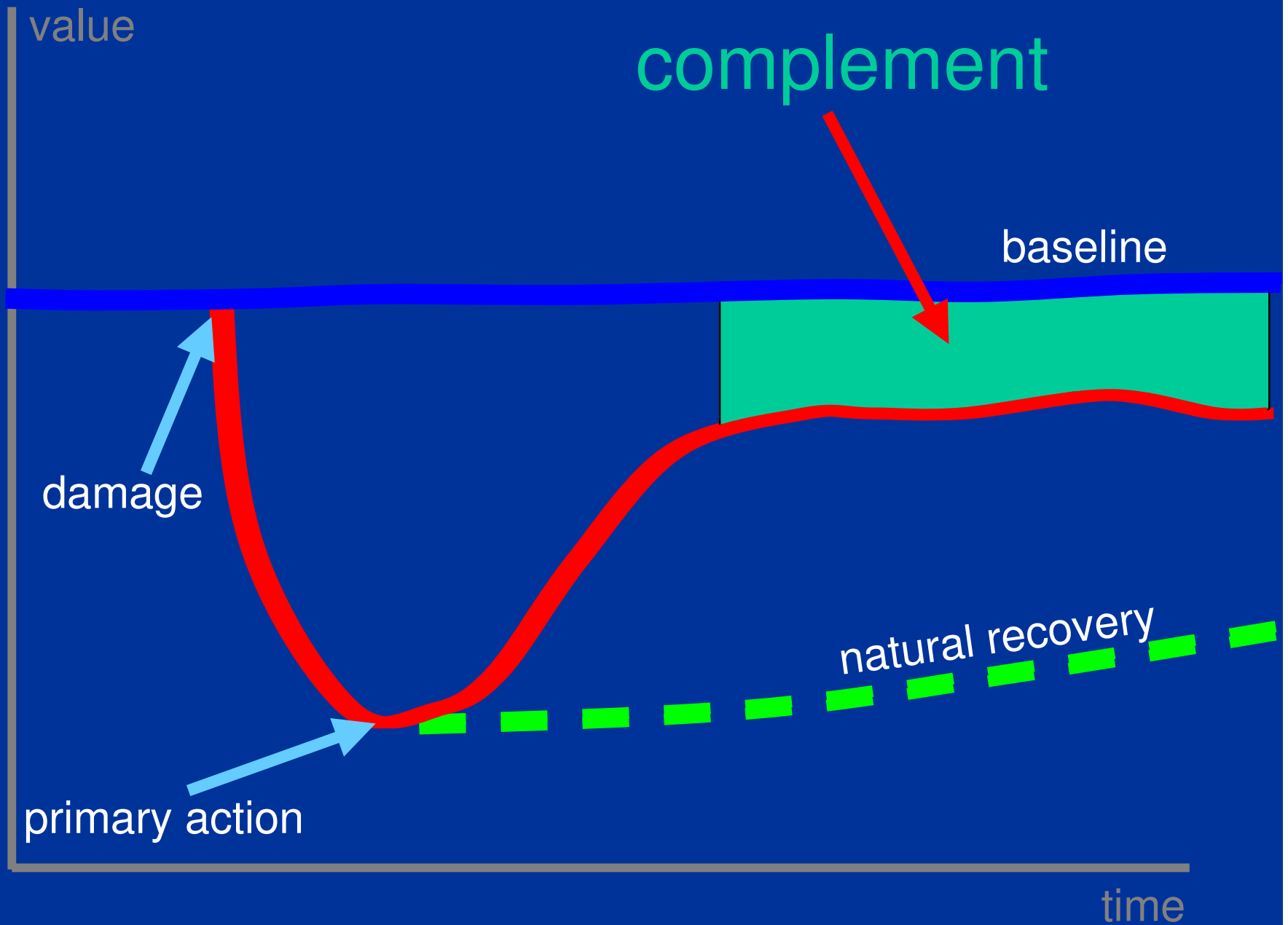


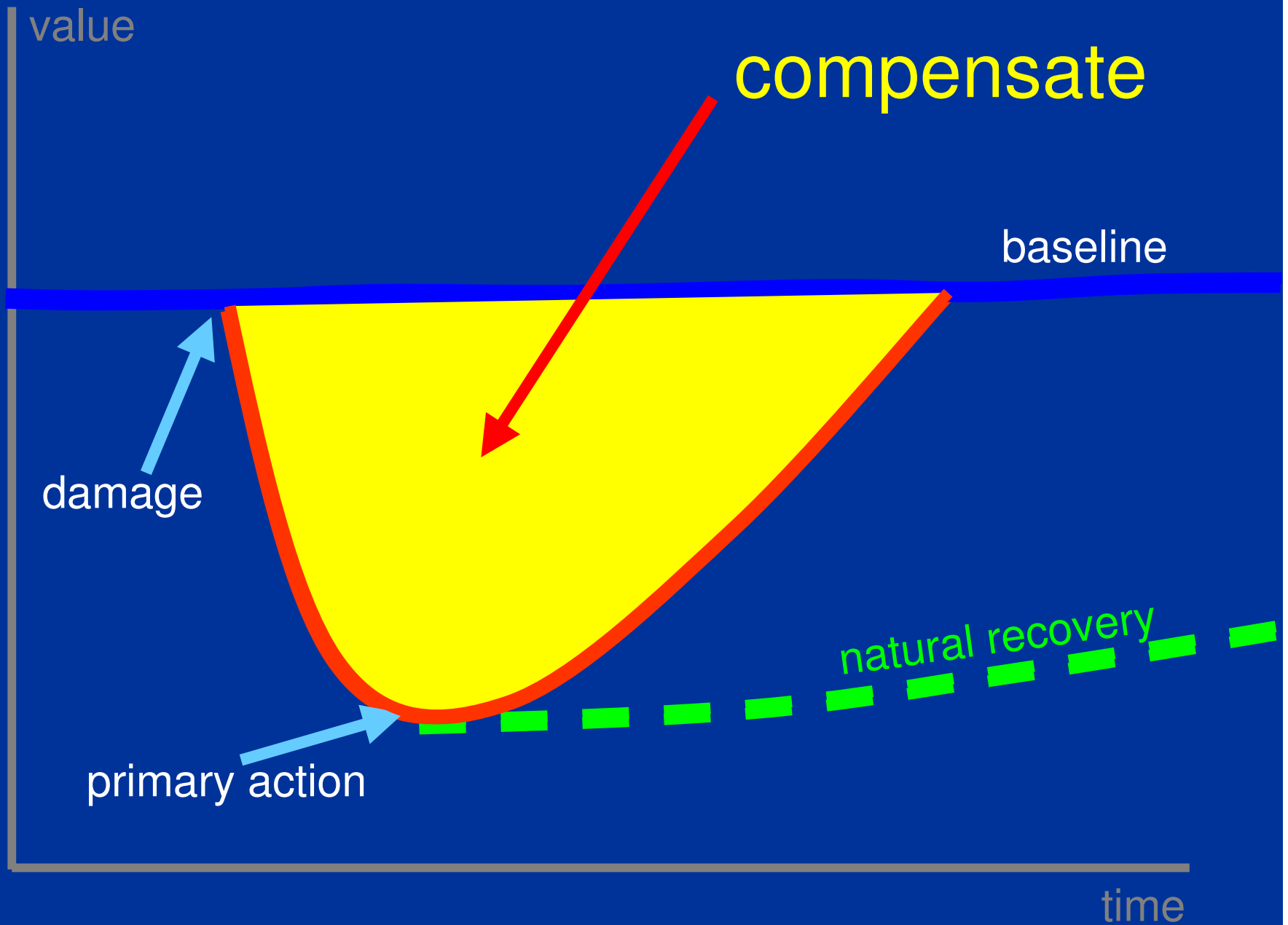
The graph illustrates the impact of a disturbance on a system's status over time. The vertical axis represents the 'Indicator of status' and the horizontal axis represents 'time'. The 'baseline' is shown as a blue wavy line. A 'damage' event causes a sharp drop in the status, represented by a red solid line. The recovery of the status is shown by a red solid line that rises back towards the baseline. A green dashed line represents the 'natural recovery' path, which is slower than the active recovery. A blue arrow points to the start of the red line, indicating when 'the clean up starts'.

the clean up starts

natural recovery

time





The EPA's role

- Competent Authority for all aspects of the ELD in Ireland
- Assess possible Environmental Damage has occurred/imminent threat of occurring
- Issue directions to operator(s) to eliminate imminent threat of Environmental Damage
- Where Environmental Damage has occurred determine remedial measures and issue directions to operator(s) responsible
- Recover all costs associated with the Environmental Damage or imminent threat
- Prosecute as necessary any failure to comply with directions issued or failure to pay costs

Impact of ELD on operators I

- Duties of operators under the regulations:
 - Take preventive measures
 - Inform EPA of possible Environmental Damage or Imminent Threat
 - Comply with directions issued by the Agency
 - Pay for any costs billed by the Agency under Cost Recovery powers
- Potential for very high costs/liabilities in the event an operator is responsible for Environmental Damage
- Possible high legal/consultancy fees should operator choose to appeal directions issued by the Agency

Impact of ELD on operators II

- Financial Provision required under most licences/permits – CRAMPs/ELRAs
- EPA ELRA guidance outlines the impact of the ELD
 - Potential ELD event may change the projected costings
- ELD or National Regulations do not require specific financial provision
- How operators choose to manage the possible financial risks of Environmental Damage is a matter for them:
 - Most *public liability* or *general environmental insurance* will not cover an ELD event. **Check your policy now**
 - Key aim of the Directive is to stimulate development of new insurance products
 - Financial guarantees/Bonds/Bank guarantees/Parental guarantees
 - ELD insurance products are available (both for private and public bodies)

Impact of ELD on operators III

- Potentially higher insurance costs based on the inherent risk your operation poses and the sensitivity of the receiving environment
 - High low/risk industry – Haz/Non-Haz Landfill vs Dry Recyclables
 - Close to an SAC/SPA - *Habitats & Species Damage*
 - Sensitive receiving waters – *Water Damage*
 - Close to dwellings/recreation areas – *Land Damage*
- Compliant operators who pose lower risks will have lower Financial Provision/Premium costs
 - Possible increase in insurance industry site audits
 - Compliance history for operators now freely available to public/insurers
 - Environmental Management System = lower risk (the Spanish method)
- Report by the Commission in 2010 on availability of financial guarantee/insurance products their costs etc. – amend directive?
 - EPA will report to Commission on status in Ireland in early 2010

Impact of ELD on operators IV

- Creates a level playing field across the EU member states in terms of Environmental Liability and what operators can expect.
- Encourage robust corporate environmental policies for all operators – level playing field within sectors
- Promote innovation in the field of cleaner/greener production = lower the risks of ED = lower the risk management costs
- Will encourage operators to undertake more robust site selection to lower risks of Environmental Damage
- Clear framework for putting things right when they go wrong

Environmental Liability Unit

Thank you

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