

I'm A Cecropia, Get Me Out of Here

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This is the text of a talk given at the UKELA Scotland Conference 2011, 'Waste, Recycling & Other Issues', on Thursday 6th October 2011

The Problem

The Royal Botanic Gardens, Edinburgh is a well known attraction, and a highly respected institution. Rather less well known is the fact that the Royal Botanic Gardens runs three Regional Gardens, one of which is Benmore Gardens in the Argyll peninsula. Benmore Gardens was created by James Duncan, Laird of Benmore. Duncan was an extraordinary individual, the epitome of the enterprising Victorian. He was an industrialist, scientist, agriculturalist, arborist, philanthropist, and art collector. He made his fortune at an early age by inventing a new method for refining sugar. He used his wealth to help the poor, giving away 20% of his annual income. He improved the working conditions for his workforce, built churches and schools, provided medical care, and introduced an eight hour working day. He also bought the Benmore estate, where he created one of the world's great private art collections, and was the first Scottish collector to buy Impressionist works of art. Another of his achievements at the Benmore Estate was the landscaping of the grounds in which he planted over six million trees, built a fernery and the largest greenhouses in Scotland. Benmore Gardens' 120 acres contain more than 300 species of rhododendron, plant collections from Bhutan and Chile, and a spectacular avenue of Giant Redwoods. Duncan was not alone in that period in travelling the world, and bringing back to Britain the exotic plants and wildlife they found. In an era when people were debating Charles Darwin's theory of evolution and the concept of the survival of the fittest, there was little thought for, or appreciation of, the potential consequences of taking plants and animals from one part of the world and transplanting them elsewhere.

Given the extent to which the Victorians travelled the world and brought back such vast numbers of 'exotic' creatures, flora and fauna, it is either surprising or fortunate that the problems can arise are not greater than they are. Since then climate change, increased general travel, industrial scale commercial production of food and animal products, globalisation of markets and the supply chain have added to the causes as to why species can be found out of their original natural habitats and become established in new environments. Of course not all non-native species are necessarily harmful. Some may bring benefits. Nor are all alien species necessarily invasive or dominating. But there are a number of species which have become well established in Scotland whose presence is a source of harm to other species in our own environment. However it is these species that I will generally refer to as Invasive Non-Native Species (INNS). The grey squirrel is amongst the best known, as is the North American signal crayfish and the American Mink. Well known problematic plant species include *Rhododendrum ponticum*, Japanese knotweed, wireweed and New Zealand pygmyweed. The Rivers and Fisheries Trusts of Scotland list 29 high impact INNS from the Water Framework Directive alien species list¹. That list was finalised in light of information from individual River Trusts, SNH, SEPA, the Scottish Government and the GB Non Native Species Secretariat.

Nor is the problem confined to species from overseas. Species native to the UK generally, or to Scotland, can cause problems if they are taken from one habitat and introduced at another location where they had no previous presence. An example is the presence of hedgehogs in the Western Isles which have then fed on the eggs of the ground nesting wader bird population. The apparent harm to the wader population led to the hedgehogs being initially culled and then relocated. The culling of the hedgehogs itself led to a significant public outcry. Some 1500 hedgehogs have now been relocated, and between 2003 and 2011 approximately £1.3 million has been spent on protecting the Uists wader populations. It has been reported that up to a further £1 million may require to be spent on this project up until its close in 2015. A 2010 Report by the Centre for Agricultural Bioscience International (CABI) has estimated that the total current annual cost of INNS to the British economy is estimated, when corrected for double counting, at £1,291,461,000 to England, £244,736,000 to Scotland and £125,118,000 to Wales. The total annual cost of INNS to the British economy is estimated at approximately £1.7 billion². As new invasive species continue to arrive, and existing ones spread, these costs can only increase.

Of course this is not a problem which is unique to Scotland or to the UK. It has been said that since the 17th century INNS have contributed to nearly 40% of all worldwide animal extinctions for which the cause is known. Data from (Iceland, Denmark, Norway, Sweden and Finland) records the number of alien species in freshwater, marine and terrestrial environments in the 20th century. These not only show a cumulative increase, but the number of terrestrial alien species doubled between 1950 and 1999, and the number of marine alien species more than doubled over the same period³.

The Present

The main legislative measure to control INNS has been the Wildlife and Countryside Act 1981. The principle method of control was to make it an offence for any person to (i) release or allow to escape into the wild any animal which is of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state or is included in Part I of Schedule 9 to the 1981 Act, or (ii) plant or otherwise cause to grow in the wild any plant which is included in Part II of Schedule 9.

In 2004 the legislation was amended in Scotland by the Nature Conservation (Scotland) Act 2004 so as to also include hybrid animals and plants within Section 14. The 2004 Act also tightened up the degree of control by making it an offence to allow a Schedule 9 animal to be released or allowed to escape from captivity. It also introduced new Sections 14A and 14B into the 1981 Act.

Section 14A makes it an offence to sell⁴, offer or expose for sale, possess or transport any animal covered by Section 14 or any type of plant which does not ordinarily grow in Great Britain in a wild state or which is a hybrid of such a plant or is covered by Section 14, and which animal or plant is specified in an order made by the Scottish Ministers. Section 14B allows the Scottish Ministers to issue or approve guidance regarding any type of animal of covered by Section 14, or any type of plant covered by Section 14 or specified by an order under Section 14A. Failure to comply with the guidance is not an offence in itself, but failure to comply with the guidance or take adequate account of it could form part of the prosecution evidence to determine whether an offence had taken place.

Sections 14 and 14A of the 1981 Act do not apply to anything which is done under the terms of licence granted by the Secretary of State.

One of the problems with the 1981 Act up to now is that it has tended to be reactive. The main measure of control is the listing of species in Schedule 9. This happens after the event, so that the Schedule becomes out of date and requires periodic review. A further limitation on the effectiveness of the 1981 Act has been that it has not applied to native species which are moved from their natural habitat to a different habitat where they may cause harm to existing species in that habitat.

The 1981 Act has not been the only means of trying to control INNS. Under the Water Environment and Water Services (Scotland) Act 2003, River Basin Management Plans are required to address the presence of INNS and to take action to remove them. The policy aim is that all water bodies should be classified as at least 'good'. In a number of cases the presence of North American signal crayfish means that catchment areas are only classified as 'moderate'. Another example is the Rural Development Contracts (Rural Priorities) (Scotland) Regulations 2008⁵ which contains provisions concerning the control of certain INNS as one of the Rural Priorities Options in Schedule 2 (payments for eradication of Japanese knotweed, Himalayan balsam, giant hogweed, rhododendron and the control of grey squirrels).

As well as legislative control under the 1991 Act, there are non-legislative measures being taken by Government. The Invasive Non-native Species Framework Strategy for Great Britain⁶ is a UK wide response which seeks to prevent the introduction of harmful species by making people more aware of the risks involved, to detect and respond more quickly to problems, and to develop longer term controls. SNH developed a Species Action Framework in 2007 which sets out four areas where species management is required and a focuss of effort and resources are thought to make the most difference. The Framework covers conservation, conflict of interest, sustainable use as well as INNS. The Framework targets the six INNS species where it is felt that such action would make the most difference to biodiversity.

The Future

The Scottish Government first consulted in 2006 on proposals to amend the Wildlife and Countryside Act 1981⁷. The final result is to be found in the Wildlife and Natural Environment (Scotland) Act 2011 was granted Royal Assent on 7 April 2011. The 2011 Act deals with far more than INNS, dealing with the taking, killing, sale and possession of all wild birds and certain specified animals and plants, regulates the use of snares, makes new provisions for the control of deer and amends the law affecting Sites of Special Scientific Interest.

Its provisions as regards INNS are a significant stepping up of the control over INNS. The existing Section 14 of the 1981 Act is re-cast so that it becomes an offence to release or allow to escape from captivity (i) any animal to a place outwith its native range or (ii) any animal of a type specified by an Order of the Scottish Ministers. It will also be an offence to cause any animal outwith the control of any person to be at a place outwith its native range. This not only broadens the range of conduct which is caught, but it applies the legislation to animals which are native to Great Britain as well as from overseas. The power to specify by Order

any type of animal will allow the Scottish Ministers to control the release of animals within their native range as well as INNS. The Explanatory Notes to the Bill gave as an example the release of a raptor within its native range so as to prevent harm to the existing wild population from increased competition for food.

An express exception to general provisions of Section 14(1) is made for the common pheasant and red-legged partridge which are released for shooting⁸. The planting or otherwise causing to grow plants outwith their native range is also an offence. Scottish Ministers have the power to specify by order other animals and also plants which will not be covered by the new Section 14(1) and (2) provisions, and to disapply these provisions in respect of certain persons or in respect of certain conduct. The purpose of these provisions is to allow the Scottish Ministers to licence the release of non-native species. One anticipated use of the power will be to allow Scottish Ministers to re-introduce the European beaver to parts of Scotland.

A new Section 14ZC also makes it an offence to keep, possess, or control any invasive animal or plant specified by an Order of the Scottish Ministers. If it is intended as a defence to such an offence to say that the commission of the offence was due to an act or omission of another person it will be necessary to give at least 7 days notice of that before the court hearing. There is also a provision allowing the Scottish Ministers to provide for compensation to any person affected by such an Order.

The Section 14A provisions of the 1981 Act making it an offence to sell, offer or expose for sale, possess or transport certain species are broadened out so as to apply to any invasive animal or plant specified by an order of the Scottish Ministers. A new Section 14P defines a number of the new terms to be found. References to 'native range' means the locality to which the animal or plant is indigenous and not the locality to which it has been imported, and the native range of a hybrid animal or plant is any locality within the native range of both parents of the hybrid animal or plant. An invasive animal or plant is one which is 'of a type which if not under the control of any person, would be likely to have a significant adverse impact on – (a) biodiversity; (b) other environmental interests; or (c) social or economic interests'⁹. The Scottish Ministers, or a body delegated by them, may grant a licence permitting an activity which is otherwise prohibited by Section 14 or Section 14A¹⁰.

The existing Section 14B of the 1981 (providing for Guidance by the Scottish Ministers) is replaced by an entirely new Section 14B entitling the Scottish Ministers to require that certain persons or types of person as specified by the Order to notify them of the presence of an invasive animal or plant, and in what circumstances, to whom, how and when this must be done. Failure to make such notification without reasonable excuse shall be an offence. It is expected that any such Order will only be directed on towards officials and professionals who have sufficient knowledge to be able to identify an invasive plant or animal species, rather than merely being a landowner or a member of the public.

A new Section 14C allows the Scottish Ministers to make a Code of Practice. The Code of Practice can cover every aspect of the new legislation on non-native species (along with powers to revoke, replace or revise the Code of Practice). The Code of Practice will be subject to the negative resolution procedure of the Scottish Parliament. Failure to comply with the Code is not an offence in itself, but failure to comply with the Code may be taken into account in determining any question in those proceedings. In respect of offences under

Sections 14, 14ZC, 14A, 14B or 14K, a failure to comply with a relevant provision the Code of Practice may be relied upon as tending to establish liability; and compliance with a relevant provision of the Code may be relied upon as tending to negative liability¹¹. The scope of the Code means that it will play an essential part in setting out best practice, and what would be acceptable or not acceptable actions.

A new method for controlling invasive species is set out in Sections 14D to 14O of the 1981 Act. This new method is a species control order, the meaning of which is set out in Section 14F. These orders may either specify what operations are to be carried out for the purpose of controlling or eradicating a specified invasive animal or plant, or what operations may not be carried out, and who is to pay for the work. Species control orders may be made by a 'relevant body', namely the Scottish Ministers, SNH, SEPA or the Forestry Commissions. Before making a species control order the relevant body concerned must give the owner or occupier of the premises against whom such a proposed order would be served at least 42 days to enter into an agreement to control or eradicate the species. There are also provisions for giving notice of a species control order to the owner or occupier of the specified premises (Section 14G).

In the case of 'urgent necessity' a relevant body can make an order without agreement. In such cases an emergency species control order has effect immediately upon giving notice of the order, and lasts for 49 days after it is made. An emergency control order has effect as soon as notice of the order is given under Section 14G. An ordinary species control order has effect after 28 days from the giving of notice, unless that notice is appealed, or that appeal is withdrawn or finally determined. It is an offence to fail without reasonable excuse to fail to carry out an operation required by a species control order, or to carry out a prohibited operation, or to obstruct a person carrying out required operations (Section 14K). The penalties on conviction are either 12 months imprisonment or a £40,000 fine (or both) on summary conviction, or 2 years imprisonment or a fine (or both) on conviction on indictment. In addition there is power to forfeit the species¹². Rights of appeal against the making of an order are dealt with in Section 14H. There are also provisions concerning the review of a species control order (Section 14J), the carrying out of any operation required by a species control order by a relevant body and to recover the costs of doing so (Section 14L), and extensive powers to obtain entry to premises (Sections 14M, 14N and 14O),

Border Raiders

Until 2004 the provisions of the Wildlife and Countryside Act 1981 regarding INNS applied in exactly the same way in Scotland as they did in England and Wales. That situation changed when the Scottish Parliament passed the Nature Conservation (Scotland) Act 2004.

In England the original Section 14 continued to apply until the Natural Environment and Rural Communities Act 2006 inserted Section 14ZA and 14ZB into the 1981 Act. These provisions have effect only in England and Wales. Section 14ZA made it an offence to sell live animals or plants within Section 14(1) or (14(2) which are included in an Order by the Secretary of State, or to sell anything from which such an animal or plant can be reproduced or propagated. The publication of an advertisement concerning the selling or buying of any such animal, plant or anything for the reproduction or propagation of the same is also an offence. Section 14ZB allows the Secretary of State to issue or approve a Code of Practice

relating to animals which are not ordinarily resident or regular visitors to Great Britain in a wild state, to Schedule 9 animals or plants, or any description of such animals or plants.

The list of animals and plants in the current Schedule 9 differ, so that there are a number of species which appear in the lists applicable to Scotland, which are not on the lists for England and Wales, and vice versa. That is not surprising as there will be species which are present in one of these jurisdictions, but not in the other. However it does appear that the updating of Schedule 9 in Scotland has fallen behind in anticipation of the new measures for control of plants or animals outwith their native range. The Schedule was last modified with effect to England with effect from 6 April 2010¹³. The last variation of the Schedule as it applies to Scotland was in 2005 as regards plants listed in Part II of the Schedule¹⁴, and 1999 in relation to animals in Part I of the Schedule¹⁵. Schedule 9 listing will no longer be relevant in Scotland as it is replaced by a broader prohibition directed against plants or animals outwith their native range or specified in an Order made by the Scottish Ministers.

The systems and procedures for the control of INNS in Scotland and in England have grown apart, and once the provisions of the 2011 Act are brought into force will be quite distinct from each other. It might have been thought that given the substantially different approaches being taken that it would have been appropriate to remove the regime for the control of INNS from the Wildlife and Countryside Act 1981, and that this would have been a good time to set these provisions in a distinctly Scottish Act. It might also have been helpful if the different strands of law relating to wildlife and the natural environment were brought together into a single legislative code. No doubt there were a number of pressures on the legislative timetable, and a need to be seen to do something sooner than later, which made this a practical option. It will no doubt be some time before there is any consolidation of the legislation as the development of the Code of Guidance is in itself a major initiative, and time will be needed to evaluate how it operates, and how well the procedures for co-ordinating activities between Scotland and England and Wales work.

As for the Cecropia which features in the title of this talk, a search of the GB Non Native Species Secretariat website¹⁶ produced no hits. There are two species of cecropia which feature in the ISSG Global Invasive Species Database. Both are neotropical species. One of these is a bush, and the other a tree (the *Cecropia peltata*) which is described as '*a fast-growing, short-lived tree It is light-demanding and rapidly invades disturbed areas, such as forest canopy gaps, roadsides, lava flows, agricultural sites, urban locations, and other disturbed areas. It naturally occurs in tropical Central and South America, as well as some Caribbean islands and has been introduced to Malaysia, Africa, and Pacific Islands. It may be replacing, or competing with, other native pioneer species in some locations.*' It may not be a threat to the UK, and any suggestion that I just used the name because it was the closest I could find to the title of a well-known TV show I wanted to paraphrase would, of course, be widely off the mark.

¹ http://www.invasivespeciesscotland.org.uk/biosecurity_programme/invasive_non_native_species.asp.

² *The Economic Cost of Invasive Non-Native Species on Great Britain*, CABI (November 2010).

³ Secretariat of the Convention on Biological Diversity (2006) *Global Biodiversity Outlook 2*. Montreal, pp 35-36, Fig. 2.17.

⁴ Section 27(1) of the Wildlife and Countryside Act 1981 defines 'sale' as 'including hire, barter and exchange'.

⁵ SSI 2008/100.

⁶ DEFRA, Welsh Assembly, Scottish Government, (2008).

⁷ *Consultation on proposals to amend Schedule 9 and the use of an order made under Section 14A of the Wildlife and Countryside Act 1981*, (Scottish Executive, 2006).

⁸ Section 14(2A) of the Wildlife and Countryside Act 1981, as inserted by Section 14(2) of the Wildlife and Natural Environment (Scotland) Act 2011.

⁹ Section 14P(4) of the Wildlife and Countryside Act 1981, as inserted by Section 16 of the Wildlife and Natural Environment (Scotland) Act 2011.

¹⁰ Section 16 and Section 16A of the Wildlife and Countryside Act 1981 (with effect from 29 June 2011).

¹¹ Section 14C of the Wildlife and Countryside Act 1981, as inserted by Section 15 of the Wildlife and Natural Environment (Scotland) Act 2011.

¹² Section 21 of the Wildlife and Countryside Act 1981, as amended by Section 17 of the Wildlife and Natural Environment (Scotland) Act 2011.

¹³ Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England and Wales) Order 2010/609.

¹⁴ Wildlife and Countryside Act 1981 (Variation of Schedule) (Scotland) Order 2005.

¹⁵ Wildlife and Countryside Act 1981 (Variation of Schedule 9) Order 1999 (which lapsed on 1 October 2004 on the repeal of Section 22 (5) of the 1981 Act by the Nature Conservation (Scotland) Act 2004, Sch.6 para.20(c)).

¹⁶ <https://secure.fera.defra.gov.uk/nonnativespecies/home/index.cfm>.