Wildlife and Countryside LINK

Tackling Invasive Non-native Species: A new enforcement regime

Consultation response from Wildlife and Countryside Link
April 2018

Wildlife and Countryside Link (Link) brings together 48 environment and animal protection organisations to advocate for the conservation and protection of wildlife, countryside and the marine environment. Link is the biggest coalition of environmental and animal protection organisations in England.

Our members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together we have the support of over eight million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following organisations:

- A Rocha UK
- Amphibian and Reptile Conservation
- Angling Trust
- Buglife
- Plantlife
- Rivers Trust
- RSPB
- RSPCA
- Salmon and Trout Conservation
- Woodland Trust

Introduction

We welcome the opportunity to respond to this consultation on a new enforcement regime for the EU Invasive Alien Species Regulation 1143/2014 in England and Wales. We value the opportunity to comment on how best to implement an effective, proportionate and dissuasive enforcement regime as required under Article 30 of the Regulation.

Provided below are answers to the questions specified within the consultation document. However, it is important to note that enforcement does not merely encompass specifying appropriate penalties and sanctions. Effective and appropriately resourced structures must be in place to both monitor for breaches of the law and to enact appropriate proceedings when such breaches occur. We seek clarification over which Government department(s) and/or agency(ies) have responsibility for enforcing these restrictions in terrestrial, freshwater and marine environments. Ensuring the restrictions are complied with and enforced will require additional resources and training. We seek clarity over what additional resources the relevant body(ies) will receive to undertake these new tasks and what training will be provided to individuals across Government and agencies to monitor for breaches.

Transparency of Government action is essential if citizens and organisations are to trust that Government is faithfully and appropriately fulfilling its duties as mandated by law. As such, we seek clarification over what reporting structures will be implemented to document any

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identified breaches to the legislation and, where applicable, the civil or criminal enforcement action that was subsequently undertaken.

Finally, when applying sanctions to illegal activity, judgement is always needed to assess whether to apply civil or criminal sanctions and to which severity. Given the complex, heterogenous nature of the EU IAS Regulation (i.e. its applicability to a variety of taxa in a variety of different environments with significant variance in potential environmental harm, economic cost and illegal economic gain across the taxa and environments) we seek clarification over what best practice guidance will be produced to allow citizens, stakeholders, regulators and defendants to understand what sanctions are likely to be most appropriate in which circumstances.

Q1. Where a species of Union concern is already subject to control through an existing framework, do you consider that it should continue to be managed under that framework for restrictions that are covered by the Regulation? Please explain your reasons.

Although we appreciate that the duplicating of control may be unhelpful, there are differences between existing frameworks and the Regulation which need to be addressed. For example the Import of Live Fish Act (1980) has a lower maximum criminal conviction to that under section 14 or 14ZA of the Wildlife and Countryside Act 1981 (a fine not exceeding level 4 (£2,500) on the standard scale) and there is no ability for custodial sentences under this Act.

We welcome the provision for high fines, for example in the Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015[1] and the removal of an upper limit on fines entirely for some Magistrates' Court convictions (see section 85(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012)[2], they cannot, in our view, replicate the deterrent of a custodial sentence. As the consultation document highlights "A requirement of the Regulation is that the penalties must be **effective, proportionate and dissuasive**" (emphasis added). Following the introduction of custodial sentences for egg collecting in 2001 the reduction in the number of offences is clear, highlighting the deterrent that such punishment brings.

1 regulation 14 contains provision for fines up to £50,000 for any offences arising out of a breach of those regulations

2 section 85(1) states "Where, on the commencement day, a relevant offence would, apart from this subsection, be punishable on summary conviction by a fine or maximum fine of £5,000 or more (however expressed), the offence is punishable on summary conviction on or after that day by a fine of any amount."

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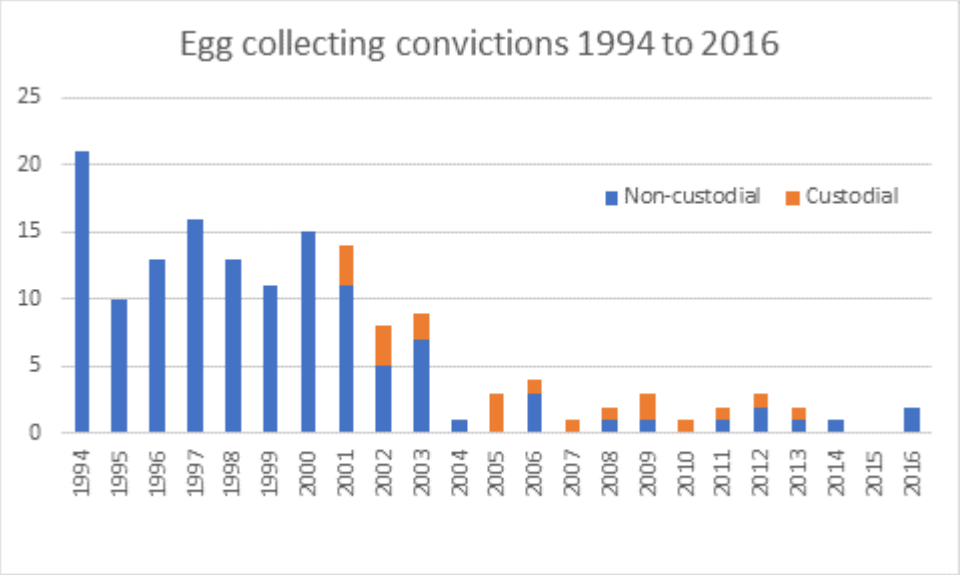

Data Source: the RSPB

We, therefore recommend that the sanctions and penalties should be the same across all restrictions and all species and be truly dissuasive by including custodial sentences.

Q2. Are you content with the proposed civil penalties regime including the levels for fixed monetary penalties and standards of proof? What, if any, changes would you propose? Please explain your reasons.

We support the proposed civil penalties regime, including the levels for fixed and variable monetary penalties, and the specified standards of proof. However, it is important that civil sanctions are used to effectively stop the illegal activity and to undertake and pay for any corrective action needed. Where serious and sustained illegal activities occur, the use of criminal sanctions in the first instance should always be considered as routine. Similarly, reoffending shows that previous civil sanctions have not been truly effective and therefore any further offences should be subject to criminal sanctions.

There is a tendency for civil sanctions to 'de-criminalise' an offence as they impart no criminal record, unlike successful criminal prosecution. In certain instances a civil sanction such as stop notices would be appropriate and proportionate; however, civil sanctions need to be fully enforced in order for them to be effective deterrents. Therefore we would like to see a system in place to monitor and enforce the application of civil sanctions.

Q3. Do you consider that breaches of these restrictions merit the creation of new criminal offences or should we rely on civil penalties and existing criminal offences? Please explain the reasons for your answer.

Yes, breaches of these restrictions do merit the creation of new criminal offences.

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We support the amendment of Schedule 9 to the Wildlife and Countryside Act 1981 in England and Wales to include reference to species of Union concern which are not already included on it. We also support amendment to cover all species of Union concern under section 14ZA of the Wildlife and Countryside Act 1981 (ban on sale).

We recognise the beneficial role that civil sanctions can have in improving compliance with environmental regulation. However, in cases of serious and/or organised illegal activity, or where reoffending has occurred, we consider it appropriate that regulators have the option of resorting to criminal sanctions.

Therefore we consider it woefully inadequate that criminal sanctions can be applied to only three of the 15 restrictions specified in Annex B. We believe the unbalanced focus on civil sanctions is neither proportionate nor dissuasive and therefore the proposed enforcement regime cannot be considered effective in the manner specified by Article 30 of the IAS Regulation.

It is our understanding that the civil sanctions regimes should complement and not replace criminal sanctions regimes. Unfortunately, in this instance it appears the criminal sanctions have been largely dismissed and replaced by civil sanctions. We believe this sends a poor signal to potential offenders and does not ensure coherence in enforcement regimes across environmental legislation. Similarly, criminal sanctions are fully available for other pieces of biosecurity legislation so we consider it inconsistent for this significant piece of biosecurity legislation to be treated differently.

Currently standards of proof for section 14 of the Wildlife and Countryside Act make it almost impossible to enforce the restriction against release into the wild. Therefore it is important to ensure that other restrictions are effectively enforced to avoid reaching a stage where releases into the wild occur. As such all the restrictions should have the same sanctions and penalties. This puts all the restrictions on a level playing field and ensures that they are equally dissuasive.

In addition, the restrictions under the Customs and Excise Management Act (1979) do not offer an equivalent or dissuasive penalty (£1,000 maximum fine). Given that preventing the entry of INNS into the country is the most cost-effective approach to management, it is important that sanctions and penalties are severe enough that the importation of these species does not continue through illegal methods. As such, the import of INNS should be subject to the same level of criminal sanctions as under section 14 and 14ZA of the Wildlife and Countryside Act. (We would also like confirmation that the penalties applied through the Customs and Excise Management Act (1979) will apply to all the restrictions in the form that it is brought over into domestic legislation post Brexit.)

The creation of new offences regarding the keeping, breeding, transporting, use and/or exchange and permitting to reproduce, grow or cultivate these species is necessary from an animal welfare perspective. We do not see why possible ‘loopholes’ should be created for people who continue to keep species listed under the legislation – species that we feel should not be kept as pets or used in petting zoos.

The keeping of some of these species used to be regulated; the raccoon, for example, through the Dangerous Wild Animals Act until 2007, following which there has been an increase in interest keeping this species as a pet. We have also been working with Defra on

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a new suite of regulations under the Animal Welfare Act regarding the sale of many species, the breeding of others and their exhibition. Some of the activities prohibited under the new regulations may be included here, but there should be a review to confirm that this is the case. For instance, we know that some of the species listed in the legislation are currently used by mobile zoo exhibits and this perpetuates the idea that they can be kept as pets by members of the public.

By defining these activities in the legislation, greater clarity can be provided regarding the rehoming of animals that may be included under the regulations. We are aware that, as yet, we do not have a definition of a rescue centre. We have been told that animals cannot be rehomed, but can be passed to a rescue centre to live out their lives. However, without the definition of a rescue centre, animals could be rehomed to private individuals who offer themselves out as a sanctuary, with no controls over numbers, species or quality of care.

Sanctions should at a minimum equal those proposed for the Animal Welfare Act, with possible imprisonment of up to five years, as without proper regulation, these offences lead to the unnecessary suffering of animals.

Q.4 Do you consider that breaches relating to the permitting scheme merit the creation of new criminal offences or should we rely solely on civil penalties? Please explain the reasons for your answer.

As we note under Question 3, civil sanctions should complement and not replace criminal sanctions. The failure to have the option of criminal sanctions for breaching permit requirements is neither dissuasive nor proportional to the potential environmental and economic harm. Consequently, the creation of new criminal offences for breach of permit is essential if compliance with permits is to be achieved.

Additionally, there should be consistency across the enforcement of the EU IAS Regulation. If a permit holder breaches their permit then they potentially risk allowing the spread and establishment of damaging INNS. As such, they should be subject to the same penalties and sanctions as if they did not have a permit in the first place.

Q.5 If new criminal offences are created, do you think that the penalties should be set at the same level as those for offences under section 14 or 14ZA of the Wildlife and Countryside Act 1981? Please explain the reasons for your answer.

All offences under the EU IAS Regulation should have the same level of penalty to ensure that people are dissuaded from committing an offence. Schedule 9 of the Wildlife and Countryside Act carries a maximum penalty (level 5), which has no statutory maximum. We propose the maximum penalty level 5 should apply to all other restrictions in line with the Wildlife and Countryside Act.

However, we disagree with the application of a maximum imprisonment term. We propose that offences should be trial-able either way, so that larger cases can be heard in the Crown Court rather than the Magistrates' Court since the maximum prison term limit applicable in the Magistrates' Court may not act as a constraint. This provides a fair system where the sanction will be proportionate to the crime.

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With no sanction limit it could be left to the magistrate to apply an appropriate sanction for the crime committed. Sanctions should be applied at a level which deters the potential perpetrator and relates to the severity of the crime, for example a heavy penalty should be imposed for the intentional release of a breeding population of a species into the wild. It is crucial that those issuing sanctions have the flexibility to apply sanctions that are proportionate and appropriate to the offence, and this requires that the full range of sentencing options and fines be available. It would not lead to any additional bureaucracy or resources.

This should also allow penalties for aggregated offences to be proportionate to the combined crime and not to a single fine/prison term limit.

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