PCA Guidance Note – Legislation and Policy for Invasive Non-native Plant Species including Japanese Knotweed

Background
The management of invasive non-native flora needs to take account of a range of legislation, regulations, policies, British Standards, codes of conduct and guidelines. Those involved with invasive non-native species such as Japanese knotweed need to be aware of these and take them into consideration as part of best practice.
This document makes reference to the Environment Agency's "Knotweed Code of Practice", the Royal Institute of Chartered Surveyors' (RICS) information paper "Japanese knotweed and residential property", and the Property Care Association's (PCA) Code of Practice for Japanese knotweed.

Points to note:

- It is not an offence to have Japanese knotweed or any other species listed on Schedule 9 of the Wildlife and Countryside Act growing on your land (see section on Wildlife and Countryside Act, 1981).
- Unless issued with a Community Protection Notice (see section on Anti-social Behaviour, Crime and Policing Act 2014 and Community Protection Notices) or any other such control order, there is no requirement for you to control or eradicate any of these species growing on your land, though you should give serious thought to dealing with it (them).
- The breadth of legislation impinging on invasive non-native species management is considerable.
- Legislation, policy, British Standards and guidelines change regularly.
- Legislation, policy, British Standards and guidelines vary from one country to another and policy can vary from one local planning authority area to another – be aware of this and, if in doubt, check.

Correct disposal of invasive non-native species plant material is vital in order to avoid the risk of spreading the species beyond the site/location. If in doubt always contact the relevant agency for advice on disposal because there are regulations which cover the composting, burning and burial of plant materials on-site and the transfer and disposal of material including ash to licensed or permitted landfill sites. Large volumes of waste requiring burial on-site may require a licence under the Pollution Prevention and Control Regulations 2002.

Sources of advice are: local planning authority, the Police, Environment Agency, Scottish Environment Protection Agency (SEPA), Natural Resources Wales and the Northern Ireland Environment Agency.

A particularly useful web site for a range of information on these plants is the Non-Native Species Secretariat (https://secure.fera.defra.gov.uk/nonnativespecies/index.cfm?sectionid=12)

Whose responsibility?
The management of non-native invasive weeds is the responsibility of the owner/occupier of the property or site. The nature of this responsibility varies from one country or local planning authority area to another, e.g. the approaches to non-native species management and to the individual species are different from one country to another and the planning implications also differ.

Those dealing with non-native weed management have a responsibility with respect to various aspects including:

- the environment in which you are working;
- the advice you provide, e.g. the invasive weed management plan;
- the actions that you take in managing the weed including such aspects as noise and disturbance;
- the staff you employ to undertake this work; and
- the chemicals and machinery/plant you use or contract to undertake the management.

The Environment Agency, SEPA, Natural Resources Wales or the Northern Ireland Environment Agency are responsible for regulating waste. They:

- grant waste management licenses, register exemptions and can take enforcement action including prosecution if the law is not complied with;
- give approvals under the Control of Pesticides Regulations 1986 for use of pesticides in or near water;
- may take enforcement action under the Environmental Protection Act 1990.

These statutory bodies are not responsible for controlling invasive non-native species, other than those plants growing on their land. Managing such species is the responsibility of the owner/occupier of a site. The statutory agencies do not endorse invasive species management plans, or endorse companies that do this. The Environment Agency in its “Knotweed Code of Practice” advises that “(if) activities (are) in full accordance with this code of practice, and the work meets the waste relevant objectives (described in the code of practice) … then in accordance with our Enforcement and Prosecution Policy we (the Environment Agency) would not normally prosecute for failure to have a waste management licence or permit”.

The Police and local authority also have enforcement powers with respect to Japanese knotweed and other weed species.

Legislation

Wildlife and Countryside Act 1981

For those species listed on Schedule 9, Part II of the Wildlife and Countryside Act 1981 as amended, it is an offence under Section 14 (2) (a) of the Act to "plant or otherwise causes to grow in the wild any plant which is included in Part II of Schedule 9", to do so you would be guilty of an offence." Japanese knotweed is one of the plants listed in the Schedule. Both the Police and local authorities have enforcement functions under the Act. Penalties for a Section 14 offence have been modified by the Countryside and Rights of Way Act 2000 for England and Wales. A magistrates' court can impose a maximum fine of £5,000 or a maximum prison sentence of six months, or both. A Crown Court can impose an unlimited fine or indictment or a maximum prison sentence of two years, or both.

In addition to such penalties, it is possible that you can also be held liable for costs incurred from the spread of Japanese Knotweed into adjacent properties as well as for the disposal of contaminated soil off site during development which leads to the spread of Japanese Knotweed onto another site.

Section 14 "does not impose an explicit obligation to manage Schedule 9 species not introduced onto your land by your own actions. However the law is not entirely clear as to the full scope of the phrase "Cause to grow". For example, case on law involving the offence in section 85(1) of the Water Resources Act 1991 (offence of "causing" or "knowingly permitting" polluted matter to enter controlled waters). Based on certain indications in the case law, it may be possible to argue that a landowner who knowingly allows a Schedule 9 species that he did not introduce, to accumulate on his land and create a problem as it spreads to other areas of the wild and who makes a conscious decision to do nothing about it, is "causing it to grow" (Defra, 2007, amended 2010). However, this interpretation has not been tested as to whether the offence could apply in these circumstances and this would have to be established in the courts. Defra is unable to offer a firm view on circumstances of that nature. The requirements of the defence in section 14(3) of the Wildlife & Countryside Act should be borne in mind.

See also:

- The Wildlife Order (Northern Ireland) 1985, Article 15, Schedule 9, Part II under which "Subject to the provisions of this Part, if any person plants or otherwise causes to grow in the wild any plant which is included in Part II of schedule 9. He shall be guilty of an offence."

The Environmental Protection Act, 1990

Section 33

The Environmental Protection Act, 1990 (EPA 1990) contains a number of legal provisions concerning "controlled waste", which are set out in Part II. Any soil and waste containing propagules of a plant species listed in Schedule 9 of the Wildlife and Countryside Act 1981 (as amended) that you discard, intend to discard or are required to discard are considered to have the potential to cause ecological harm and hence deemed "Controlled Waste‟ or "Directive Waste‟ (Waste Management Licensing Regulations (WMLR) 1994 as amended). The most relevant provisions are in Section 33 (1a) and (1b) which create offences to do with the depositing, treating, keeping or disposing of controlled waste without a licence. Exemptions from licensing are available in some circumstances, and are set out in Schedule 3 to the WMLR 1994. Section 33 (c) makes it an offence to keep, treat or dispose of controlled waste in a manner likely to case pollution of the environment or harm to human health. A magistrates' court can impose a maximum fine of £20,000 or a maximum prison sentence of 6 months, or both. A Crown Court can impose an unlimited fine or a maximum prison sentence of 2 years, or both.

Section 34

Section 34 of the Environmental Protection Act 1990 places a duty of care on any person who imports, produces, carries, keeps, treats or disposes of controlled waste. Their duty is to ensure that:

- no-one else disposes of the waste unlawfully or in a manner likely to cause pollution of the environment or harm to human health;
- waste does not escape; and
- waste is only transported by a carrier that is either registered or exempt from registration by the Controlled Waste (Registration of Carriers and Seizure of Vehicle Regulations) 1991.

A waste transfer note must be completed and signed giving a written description of the waste, which is sufficient to enable the receiver of the waste to handle it in accordance with their own duty of care. The provisions concerning waste transfer notes are set out in the Environmental Protection (Duty of Care) Regulations 1991 (as amended). Failure to comply with these provisions is an offence.

Breach of the duty of care under Section 34 of the Environmental Protection Act 1990 is a criminal offence. The Environment Agency, SEPA, Natural Resources Wales or the Northern Ireland Environment Agency is responsible for enforcement and a person found guilty of an offence under this section is liable to a fine not exceeding £5,000 in the magistrates' court and to a fine in the Crown Court.

Material containing the propagules of species listed on Schedule 9 must be safely disposed of at an appropriately licensed landfill site in accordance with the Environmental Protection Act 1990 (Duty of Care) Regulations 1991. To ensure safe disposal, contaminated soils and other materials must be treated in an appropriate fashion, e.g. in the case of Japanese knotweed buried to a depth of at least 5 metres. Section 34 of the Environmental Protection Act 1990 also places a duty of care on all waste producers to ensure that a written description of the waste and any specific harmful properties is provided to the site operator. The provisions concerning waste transfer notes are set out in the Environmental Protection (Duty of Care) Regulations 1991 as amended. Failure to comply with these provisions is an offence.

Some further guidance on how to deal with waste of, or containing plant material of a species listed on Schedule 9 can be found.

If you burn waste in an incinerator or other similar plant, you may need an environmental permit (see the guide on Non-hazardous waste: treatment and disposal (https://www.gov.uk/non-hazardous-waste-treatment-and-disposal#disposing-of-plant-material)).

See also:

- The Waste Management Regulations (NI) 2006 under which "It shall be the duty of the occupier of any domestic property to take all such measures available to him as are reasonable in the circumstances to secure that any transfer by him of household waste produced on the property is only to an authorised person or to a person for authorised transport purposes".
- The Controlled Waste (Duty of Care) Regulations (Northern Ireland) 2002. The Duty of Care places a legal responsibility on anyone who produces, imports, stores, transports, treats, recycles or disposes of waste to take the necessary steps to keep it safe and to prevent it from causing harm, especially to the environment or to human health.
- Environment Heritage Service policy on disposal of soils and other material contaminated with Japanese knotweed follows England's Environment Agency's guidelines.

Section 79

In certain circumstances Local Authorities have powers to deal with plants considered to be a statutory nuisance, allowing enforcement action to be taken where, for example the plant is, or is likely to be, prejudicial to health. A statutory nuisance is defined as "any premises in such a state as to be prejudicial to health or a nuisance" as under Part III of the Environmental Protection Act 1990. Hence for a statutory nuisance to exist or to be likely to occur, the nuisance has to be a disease or health related matter, not a physical risk of injury or damage. A species such as Giant Hogweed *Heracleum mantegazzianum* would be considered a statutory nuisance where the plant is growing along pathways or on land which is easily accessible to users or passers-by. However, Japanese knotweed would not be regarded as a statutory nuisance.

These powers are not restricted to plants listed on Schedule 9 of the Wildlife and Countryside Act, for example they might be appropriate for the control of a poisonous plant species such as Thorn-apple *Datura stramonium*

Anti-social Behaviour, Crime and Policing Act 2014 and Community Protection Notices

Under the powers of the Anti-social Behaviour, Crime and Policing Act 2014, local councils and the police have the power to issue Community Protection Notices against "individuals who are acting unreasonably and who persistently or continually act in a way that has a detrimental effect on the quality of life of those in the locality" including invasive non-native species like Japanese knotweed. "This means if an individual or organisation is not controlling Japanese knotweed or other invasive plant and could be reasonably expected to do so, the notice could be used after a mandatory written warning has been served beforehand to get them to stop the anti-social behaviour".
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364846/Japanese_Knotweed_information_note.pdf)
A notice could require an individual or organisation to make reasonable efforts to make good the problems arising as a result of Japanese knotweed within a specified period of time and/or a requirement to take reasonable steps to prevent future occurrence of the problem. Breach of any requirement of a Community Protection Notice, without reasonable excuse, would be a criminal offence, subject to a fixed penalty notice (which attracts a penalty of £100) or prosecution. On summary conviction, an individual would be liable to a level 4 fine. An organisation, such as a company, is liable to a fine not exceeding £20,000.

The inclusion of invasive non-native species under the Act occurred in 2014 and it is as yet unclear how local councils and the police will respond to the legislation.

Waste Management Licensing Regulations 1994

The Waste Management Licensing Regulations 1994 as amended describe 'waste relevant objectives' in paragraph 4 of Schedule 4. These objectives require that waste is recovered or disposed of "without endangering human health and without using processes or methods which could harm the environment and in particular without risk to water, air, soil, plants or animals; or causing nuisance though noise or odours; or adversely affecting the countryside or places of special interest".

The above legal provisions have consequences for a range of people, including anybody involved in the management or disposal of species listed on Schedule 9 of the Wildlife and Countryside Act. For example, Japanese knotweed which is cut down or excavated and removed from a development site must be correctly described and transferred to an authorised person. It must be disposed of appropriately. If you are going to bury Japanese Knotweed or any other species listed on Schedule 9 of Wildlife and Countryside Act on your land or a development site you must consult the Environment Agency, SEPA, Natural Resources Wales or the Northern Ireland Environment Agency to check that you are allowed to do this at your location. The respective agency may want to look at your site and may wish to visit while the works are being undertaken. (The respective agency should also be contacted if any works are planned near a river). It is also essential to make sure that the material does not contain any other contaminant that may affect the quality of groundwater. If you pollute the environment or cause harm to human health you may be prosecuted. Anyone who uses a herbicide must ensure that they do not pollute the water environment and the use of herbicides in or near water requires approval from the Environment Agency, SEPA, Natural Resources Wales or the Northern Ireland Environment Agency. If any waste soil or Japanese Knotweed is sent for landfill either before or after any treatment, it must go to a landfill that is authorised to receive it.

The Environment Agency in its "Knotweed Code of Practice", includes: "Where you rely on the methods of on site (Japanese) knotweed management …, this would normally require you to have a waste management licence or a pollution prevention and control permit. However if you carry out these activities in full accordance with this code of practice, and the work meets the waste relevant objectives described above, then in accordance with our Enforcement and Prosecution Policy we would not normally prosecute for failure to have a waste management licence or permit."

Hazardous Waste England and Wales Regulations 2005
These regulations contain provisions about the handling and movement of hazardous waste which could include materials containing invasive plant species material. Consignment notes must be completed when any hazardous waste is transferred, which include details about the hazardous properties and any special handling requirements. If a consignment note is completed, a waste transfer note is not necessary.

An untreated invasive non-native plant itself is not classed as hazardous waste, but such material which has been treated with certain herbicides that persist in soil for extended periods with the possibility of leaching and causing harm to the surrounding environment, may be classified as hazardous waste. Additionally, invasive plant species material, e.g. excavated Japanese Knotweed waste contaminated with high levels of heavy metals or other hazardous materials, could be categorised as hazardous and must be disposed of at a licensed hazardous waste landfill site.

Control of Pesticides Regulations 1986 and Control of Substances Hazardous to Health Regulations 2002

Treatment of invasive species using pesticides requires that all persons follow the Control of Pesticides Regulations 1986 and comply with Control of Substances Hazardous to Health Regulations 2002. Persons should take all reasonable precautions to protect the health of human beings, creatures and plants, safeguard the environment and, in particular, avoid the pollution of water. Approval from the Environment Agency, SEPA, Natural Resources Wales or the Northern Ireland Environment Agency must be sought before application of pesticides in or near water.

The Food and Environment Protection Act 1985

Statutory powers to control pesticides are contained within Part III of (Food and Environment Protection Act (FEPA). Section 16 of the Act describes the aims of the controls as being to:

- protect the health of human beings, creatures and plants;
- safeguard the environment;
- secure safe, efficient and humane methods of controlling pests; and
- make information about pesticides available to the public.

Under FEPA, a pesticide is any substance, preparation or organism prepared or used, among other uses, to protect plants or wood or other plant products from harmful organisms; to regulate the growth of plants; to give protection against harmful creatures; or to render such creatures harmless. The term has a very broad definition which embraces herbicides, fungicides, insecticides, rodenticides, soil-sterilants, wood preservatives and surface biocides among others.

Anyone who advertises, sells, supplies, stores or uses a pesticide is affected by the legislation, including people who use pesticides in their own homes, gardens and allotments.

The Control of Pesticides Regulations 1986

The mechanism by which the aims of the Food and Environment Protection Act are achieved is set out in regulations made under the Act. The Control of Pesticides Regulations (COPR) 1986 (SI 1986/1510);

- define in detail those types of pesticides which are subject to control and those which are excluded;
- prescribe the approvals required before any pesticide may be sold, stored, supplied, used or advertised; and
- allow for general conditions on sale, supply, storage, advertisement, and use, including aerial application of pesticides.

The 1986 Regulations were updated by the COPR (Amendment) Regulations 1997 (SI 1997/188).

COPR has largely been overtaken by EU legislation regulating plant protection products (pesticides to protect plants/crops), and only survives to regulate a few commodity substances and products used to generate ethylene (for fruit ripening) in the UK, which fall outside the scope of the EU regime.

The Weeds Act 1959

This Act concerns the control of several injurious native weed species throughout the UK and aims to prevent the spread of the Broad Leaved Dock, Common Ragwort, Creeping Thistle, Curled Dock and the Spear Thistle. It allows the Secretary of State, or any person acting on their behalf or the Secretary of State for Environment, Food and Rural Affairs, to use measures of enforcement to prevent the spread of weeds on private land, which, if not adhered to by the owner of said land can lead to a fine up to £1,000 and further punishment. This Act is amended by the Ragwort Control Act 2003. The Weeds Act is only concerned with species as listed and does not cover invasive non-native species.

The Ragwort Control Act 2003

This Act provides for the publication of a Code of Practice on Ragwort Control. The Code aims to define the situations in which there is a likelihood of Common Ragwort spreading to neighbouring land where it will then present an identifiable risk of ingestion by vulnerable animals, and to provide guidance on the most appropriate means of control, taking into account both animal welfare and environmental considerations. The Ragwort Control Act 2003 gives this Code evidential status in any proceedings taken under the Weeds Act 1959. This means that a failure to follow this Code is not an offence but non-compliance may be used as evidence in any legal action. Equally, owners/occupiers should be able to establish a defence if they can demonstrate that they have adopted control measures that comply with this Code's guidance. The provisions of the Weeds Act only apply to Common Ragwort and do not apply to other ragwort species, at least two of which are non-native species. Other species of ragwort may be equally toxic to horses or other livestock, but are less common or relatively rare. In some situations they may need to be controlled. Some species, such as Fen Ragwort, are protected. It is important to make correct identification of Common Ragwort before considering any control measures. Obligations and restrictions under SSSI designations or other land management agreements must also be considered and discussed with the appropriate authorities.

Town and Country Planning Act 1990 and Town and Country Planning Act (Scotland) 1992

Although these Acts do not make specific reference to specific weeds, Section 215 of the England and Wales Act and Section 63 of the Scottish Act provide local authorities with power to serve notices on owners or occupiers of land to control weeds that may be harming the amenity of the surrounding area. If the owners and occupiers fail to remedy the situation, they may be liable to a fine or have to repay the costs of action taken by the local authority to control the weeds.

Private Nuisance

The common law of private nuisance defines nuisance as the “unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it” [Read v Lyons and Co. Ltd, (1945) K.B.216]. This principle allows landowners or tenants of leasehold properties who have a right to the land affected to bring an action against the person responsible. In addition, the rule of Rylands v Fletcher (1868) relates to strict liability for foreseeable damage caused by escapes resulting from non-natural uses of land.

Nuisance is usually caused by a person doing something on their own land which causes damage, or interference with the “enjoyment” of the neighbour's land. This covers the ability to exercise right, pleasure, the use of funds or occupancy of property. The nuisance must be substantial or unreasonable. It can arise from a single incident or a "state of affairs", i.e. the circumstances at a particular place and time.

The “remedies” can include damages or an injunction or both. Where there is actual damage to neighbouring property, the damages could be substantial.

Legislation relating to trees
See PCA Guidance Note on Invasive Weed Management: Dealing with Trees.

Policies
A number of local authorities have policies relating to invasive non-native species and Japanese knotweed in particular. For example, in the City and County of Swansea. Not all local authorities have such policies and for those that do, there are usually differences between them.

Codes of Practice
In addition to existing legislation, there are codes of practice which provide guidance concerning Japanese knotweed. Designed to encourage people to act responsibly, such guidelines are not statute and are not directly binding but they are referred to in the legislation. If this guidance is followed, particularly during development, then any prosecution is far less likely and the relevant statutory agency will take this into account.

The **Environment Agency's** “Knotweed Code of Practice” is aimed at providing advice for managing knotweed on development sites. This sets out a framework for managing Japanese knotweed, avoiding excessive costs, avoiding prosecution and damage to property/environment.

SEPA provides guidance on its web page “Control of invasive non-native species - Japanese knotweed“ (http://www.scotland.gov.uk/Topics/farmingrural/SRDP/RuralPriorities/Options/Controlofinvasivenon-nati/Japaneseknotwood) (NB It is “knotwood” at the end of this url) and it’s Technical Guidance Note “On-site management of Japanese Knotweed and associated contaminated soils”.

The Northern Ireland Environment Agency has produced a short document: Japanese Knotweed *Fallopia japonica* – Commonly Asked Questions (http://www.doeni.gov.uk/niea/japanese_knotweed-commonly_asked_questions__2_.pdf%E2%80%83).

Check the **Natural Resources Wales** web site for any guidance.

RICS provides guidance on Japanese knotweed and residential property (see bibliography) and the **PCA**, too, has a Code of Practice for the Management of Japanese Knotweed and other Guidance Notes relevant to the management of invasive non-native species.

Summary

What does the legislation actually mean in practice?

- Identification is a critical starting point
- Preventative measures should be taken to avoid the spread of the plant and such actions recorded
- An Invasive Species Management Plan should be produced which recognises the constraints resulting from legislation and follows guidance provided
- The Plan should be implemented with due regard to a range of legislation from the use of herbicides to safeguarding trees
- A record should be kept of the plan and how it was implemented
- If in doubt at any stage, advice should be sought to ensure the response is compliant and follows current guidance.

Bibliography

Defra (2007, amended 2010) Guidance on section 14 of the Wildlife and Countryside Act, 1981. Defra, London.

Defra (2013) Japanese knotweed, giant hogweed and other invasive plants. Defra, London.

Environment Agency (2007) Guidance for the control of non-native weeds in or near fresh water.

Environment Agency (2013) The Knotweed Code of Practice: managing Japanese knotweed on development sites. Environment Agency.

Invasive Species and Biosecurity Programme website (Scotland)

Kelly, J., Maguire, C.M. and Cosgrove, P.J. (2008). Best Practice Management Guidelines Himalayan balsam. Prepared for NIEA and NPWS as part of Invasive Species Ireland.

Kelly, J., Maguire, C.M. and Cosgrove, P.J. (2008). Best Practice Management Guidelines Japanese knotweed. Prepared for NIEA and NPWS as part of Invasive Species Ireland.

Maguire, C.M., Cosgrove, P.J. and Kelly, J. (2008). Best Practice Management Guidelines: Giant Hogweed. Prepared for NIEA and NPWS as part of Invasive Species Ireland.

NetRegs (2008) Legal implications of invasive weeds. Guidance on what procedures to follow and the legal implications of dealing with Japanese knotweed, giant hogweed and Himalayan balsam

NetRegs (2008) Japanese knotweed, giant hogweed and other invasive weeds. Further guidance on the control and disposal of Japanese knotweed, Himalayan balsam and giant hogweed available at:

Non-Native Species Secretariat Website

Parnham, P. (2012) Japanese Knotweed and residential property. RICS Information Paper IP 27/2012. 17pp. RICS, London.

Property Care Association. (2013) PCA Guidance Note on Invasive Weed Management: Managing Japanese Knotweed. Property Care Association, Huntingdon.

Property Care Association. (2014) PCA Guidance Note on Invasive Weed Management: Use of Herbicides. Property Care Association, Huntingdon.

Property Care Association. (2015) PCA Guidance Note on Invasive Weed Management: Dealing with Trees. Property Care Association, Huntingdon.

Protected Trees: A guide to tree preservation procedures (www.gov.uk).

SEPA (2008) On-site management of Japanese knotweed and associated Contaminated Soils

Max Wade

October 2014