



COUNTRY REPORT: SPAIN **Norm-Setting and Environment Protection**

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Introduction

The norm-setting activity for environmental protection in Spain has been intense throughout 2011. Various environmental laws have been approved and several European Directives have been transposed, either by laws or by administrative regulations. Also, administrative regulations have been enacted to develop important environmental laws that were approved in 2007.

This period has shown the conflict of powers that exist between the State and the Autonomous Communities in some environmental matters. These conflicts are reflected in Constitutional Court decisions on water and constitutional appeals that have recently been lodged, such as that brought against the *Law on Geologic Storage of Carbon Dioxide*, and conflicts of jurisdiction presented to the Constitutional Court by some autonomous communities on issues of atmospheric protection and biodiversity.

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Intense Norm-Setting Activity by the State

Five New Environmental Laws

In the period covered by this report, five important environmental laws have been enacted: *Law 40/2010* of 29 December, on geologic storage of carbon dioxide; *Law 41/2010* of 29 December, on the protection of the marine environment; *Law 2/2011* of 5 March, on the sustainable economy that introduces reforms to confront the current economic crisis; *Law 12/2011* of 27 May, on civil responsibility for nuclear damages or damages caused by radioactive material; and *Law 22/2011* of 28 July, on waste and contaminated soils.

Law 40/2010 is based on the powers in Articles 149.1.23 ('basic laws on the protection of the environment'), 25 ('general bases of the mining and energy regimes') and 13 ('bases and coordination of the overall planning of the economic activity') of the *Spanish Constitution*. It was approved to incorporate into Spanish law *EU Directive 2009/31/EC* on the geologic storage of carbon dioxide, adapting it to the Spanish industrial, geological and energy context. Its purpose is to establish the legal framework for the geological storage of carbon dioxide (CO₂).

Law 41/2010 incorporates into the Spanish legal order *EU Directive 2008/56/EC* that establishes a framework for action for a policy on the marine environment. Also enacted on the basis of Article 149.1.23 of the *Spanish Constitution*, its purpose is to establish the legal basis for measures to achieve or maintain the marine environment, through planning, conservation, protection and improvement; and to ensure a sustainable use of marine resources, taking into consideration the general interest. The basic tool for this purpose is coherent planning of the activities practiced in the marine environment.

Law 2/2011, the *Law of Sustainable Economy*, is an important part of the *Strategy for Sustainable Economy*, approved by the Council of Ministers in November 2009. The law is very long (over 200 pages in the Official Gazette) and is structured in four titles, preceded by a Preliminary Title. The first is dedicated to improving the economic environment. The second addresses competitiveness and the third, environmental sustainability. The fourth deals with the tools for implementation and evaluation of the Law. The purpose of the Law is to support sustainable economic

development. It contains a number of legislative reforms intended to 'serve a balanced and durable growth, that is, sustainable'. Sustainable is understood in three senses: economically (that is steady growth and improving competitiveness, innovation and training); environmentally (including that sound and rational management of natural resources is pursued to promote new activities and new jobs); and socially (as a promoter and guarantor of equal opportunity and social cohesion). A specific title on environmental sustainability sets out provisions relating to aspects of environmental sustainability, from which some comprehensive reforms in the sectors concerned are addressed. These areas are sustainable energy, reduction of emissions, transport and sustainable mobility, and rehabilitation and housing.

Law 12/2011, on civil liability for nuclear damage or damages caused by radioactive materials nuclear, regulates civil nuclear liability in accordance with the international Convention on Third Party Liability in the Field of Nuclear Energy (1960) and the Brussels Supplementary Convention (1963). It also establishes a regime of civil liability for damage caused by accidents in which radioactive material other than nuclear material is involved.

Finally, the *Law 22/2011, on waste and contaminated soils*, which is largely basic legislation governing the protection of the environment, was passed to incorporate into Spanish law the *EU Directive 2008/98/EC*. The aim of this law is to: regulate the management of waste by improving the efficiency of resources; implement measures that prevent waste from being generated; and mitigate the adverse effects on human health and the environment associated with its generation and management. It also regulates the legal regime governing contaminated soils.

Other Interesting Environmental Regulations

It is worth mentioning the ratification by Spain, in the last year, of the *Protocol on Integrated Management of Mediterranean Coastal Zones (2008)*; the *Statute of the International Renewable Energy Agency (2009)*; and the *Protocol on Persistent Organic Pollutants (1998)* to the *Convention on Long-Range Transboundary Air Pollution (1979)*.

Also, in the period under review, a number of administrative rules have been approved at the state level. Many of them have the nature of basic laws on environmental protection aimed at protecting the atmosphere, water, natural heritage and biodiversity. Some are regulatory developments of previous laws, while others have served to incorporate European Directives.

Many new laws address protection of the atmosphere. Some were enacted to implement the *Law 34/2007* of 15 November, on air quality and atmospheric protection, and to incorporate a European Directive. In this group we find: (a) *Royal Decree 100/2011* of 28 January, which updates the list of activities that are potential air polluters and sets the basic rules for its implementation; (b) *Royal Decree 102/2011* of 28 January, on air quality improvement that integrates into Spanish law *EU Directive 2008/50/EC* on Ambient Air Quality and a Cleaner Atmosphere in Europe, and simplifies national legislation concerning air quality; (c) *Royal Decree 687/2011* of 13 May, which amends *Royal Decree 430/2004* of 12 March, and corrects the incomplete transposition of the *EU Directive 2001/80/EC* into the Spanish legal system; and (d) *Royal Decree 430/2004* of 12 March, by which new rules on the limitation of air emission of certain pollutants from large combustion plants are established, and conditions for the control of air emissions from oil refineries are laid down, with the purpose of compensating for the incomplete incorporation of *EU Directive 2001/80/EC* into Spanish Law. Also relevant are detailed administrative rules to govern the greenhouse gas emission allowance trading scheme, among which is *Royal Decree 101/2011* of 28 January, adopted to implement *Law 13/2010* of 5 July.

Several important rules have also seen the light in the context of water, regulating bottle water, river basins, water quality and the regulation of public water resources. *Royal Decree 1798/2010* of 30 December regulates the exploitation and marketing of natural mineral waters and bottled spring waters for human consumption. *Royal Decree 1799/2010* of 30 December regulates the process of developing and marketing bottled prepared water for human consumption. These norms, issued largely under article 149.1.16 of the Spanish Constitution (which gives the State the exclusive power for managing issues of human health), were passed with the intention of separating into two the regulation of natural mineral waters and spring waters on the one hand, and prepared water on the other. Prior to this, both were regulated in terms of a single law, which led to some uncertainty and confusion.

Royal Decree 29/2011 of 14 January amends *Royal Decree 125/2007* of 2 February (which fixes the territorial area of river basins) and *Royal Decree 650/1987* of 8 May (which defines the territorial scope of basin organizations and water management plans).

Royal Decree 60/2011 of 21 January, on environmental quality standards in the field of water policy, has been enacted to transpose into Spanish law two directives: *EU Directive 2008/105/EC* on quality standards (EQS) in the field of water policy; and *EC Directive 2009/90/CE* which lays down, pursuant to the Water Framework Directive, the technical specifications for chemical analysis and monitoring of water quality. Finally, by means of *Royal Decree-Law 12/2001* of 26 August, the autonomous communities have been required to envisage in their Statutes of Autonomy the executive jurisdiction of policing powers over public water resources within its territory. *Order ARM/2656/2008* of 10 September, which adopts water-planning instructions, has also been modified through *Order ARM/1195/2011* of 11 May. Mention should also be made of the delay that has occurred in approving the new water plans and the lack of compliance with the *Water Framework Directive* on this point. To date, the only plan to have been passed is the one governing the management of the river basin district of Catalonia (*Royal Decree 1219/2011*).

In the context of natural heritage and biodiversity, mention should be made of the approval of three regulations implementing and/or applying *Law 42/2007*, of 13 December 2007, on Natural Heritage and Biodiversity. These regulations have the character of basic legislation on environmental protection. First, *Royal Decree 139/2011* of 4 February, provides for the development of the List of Wildlife in Special Protection Scheme and the Spanish Catalogue of Endangered Species, which develops some of the contents of Chapters I and II of Title III of *Law 42/2007*. Secondly, *Royal Decree 556/2011* of 20 April, for the development of the Spanish Inventory of Natural Heritage and Biodiversity, develops Chapter I of Title I of the *Law 42/2007*. Thirdly, *Royal Decree 1274/2011* of 16 September, approves the *Strategic Plan for Natural Heritage and Biodiversity 2011–2017*. The *Plan* is designed to guide the action that the general administration of the State will take on this issue. Its aim is to define the objectives, actions and criteria to promote conservation, the sustainable use and restoration of natural heritage, natural land and sea resources, biodiversity and geo-diversity.

It should also be pointed out that *Royal Decree* 1336/2011 of 3 October (issued under article 149.1.13 EC) has regulated the territorial contract as an instrument to promote the sustainable development of the rural environment and this concept has been introduced into Spanish law.

Also relevant is the Law 8/2011 of 28 April, laying down measures for the protection of critical infrastructure (developed by *Royal Decree* 704/2011 of 20 May). Among critical infrastructure located within the territorial scope of the law are, those related to the strategic sectors of water, energy and nuclear industry. The purpose of this law is to establish appropriate strategies and structures that will allow administrative bodies to manage and coordinate their actions, in order to improve Spain's prevention, preparedness and responses to terrorist attacks or other threats. The law also aims to regulate the obligations of public bodies and other operators in charge of critical infrastructure.

Of great importance is *Royal Decree-Law* 8/2011 of 1 July. Despite not being an environmental norm, it contains stipulations in relation to administrative silence and permits. It amends various environmental laws (pertaining to water, integrated prevention and control of the atmosphere, and natural heritage and biodiversity) with the purpose of withdrawing some of the competencies of the local authorities, although these may be substituted in other ways by which the administration can intervene in the activity of citizens.

Other regulations, concerning both environmental matters and other areas directly or indirectly related to the environment, have been enacted. We cannot list all of them, although we can mention some, such as: *Royal Decree* 1439/2010 of 5 November, amending the regulation on health protection against ionizing radiation, approved by the *Royal Decree* 783/2001 of 6 July; *Royal Decree* 1440/2010 of 5 November, which approves a new statute for the Nuclear Security Council; *Royal Decree* 187/2011 of 18 February, which establishes eco-design requirements for energy-related products; *Royal Decree* 459/2011 of 1 April, which sets mandatory targets for biofuels for 2011, 2012 and 2013; *Royal Decree* 13087/2011 of 26 September, on the physical protection of nuclear installations, materials and radioactive sources; and *Order* ARM/1783/2011 of 22 June (issued under article 149.1.23 EC) pertaining to environmental responsibility, which is of considerable importance for the

implementation of the requirement for a compulsory financial guarantee for environmental risks.

Environmental Case Law

Three judgments of the Constitutional Court on water are the most salient for this period. A major conflict of jurisdiction between the State and the Autonomous Communities is unfolding. Several Autonomous Communities have taken the opportunity to introduce provisions that increase their power over this resource, especially for intercommunity basins. Some statutes authorize the respective Autonomous Communities to assume powers that violate the traditional principle of unity of basin management. They reformulate the criteria so far established by Spanish water legislation, under which the State has jurisdiction over intercommunity basins and the Autonomous Communities over intra-community basins. Article 51 of the Statute of Andalucía and Article 75 of the Statute of Castile and León are good examples. These provisions grant these communities exclusive jurisdiction over the waters of inter-community basins that pass through their territory.

This has raised an interesting debate about how to balance water management in the territory and the processes of territorial demarcation. The Constitutional Court in two rulings has recently addressed this: the *Decision* 30/2011 of 16 March and the *Decision* 32/2011 of 17 March. The Constitutional Court has declared Article 51 of the *Statute of Autonomy of Andalucía* and Article 75 of the *Statute of Autonomy of Castile and Leon* unconstitutional. The Court confirmed the pre-eminence of the criterion that waters belonging to the same basin have to be managed as a whole and in a homogeneous way, affirming the power of the State over intercommunity basins.

More recently, the Constitutional Court issued the *Ruling* 110/2011 of 22 June 2011 on the new *Statute of Aragon*, which contained some controversial stipulations on water. The Court upheld the constitutionality of: Article 19, which deals with water rights and establishes a criterion to avoid non-sustainable transfers of water to other basins; and Article 72, which deals with the jurisdiction of this community on water issues. With regard to the controversial fifth provision, which established a reserve of water of 6,550 hm³ for the exclusive use of the Aragonese, the Constitutional Court considered it to be constitutional as long as it was not interpreted as being binding for

the State, which in the exercise of its exclusive jurisdiction under article 149.1.22 can decide on the appropriate volumes of water.

The Constitutional Court also issued *Ruling 150/2011* of 29 September 2011, which rejected the appeal for legal protection presented by a citizen against a ruling of the High Court of Justice of the Community of Valencia. The latter court had rejected his claim that the Valencia City Council should pay damages for the noise pollution in his home. He alleged that his rights to physical and moral integrity, privacy and the inviolability of the home, determined in Articles 15 and 18 of the EC, had been infringed. The Court rejected the claim owing to a lack of evidence that the noise had had any real effect on the claimant's health or home, although there was a dissenting vote from one of the three judges. Paradoxically, the European Court of Human Rights did recognize that there was an infringement of Article 81 of the *European Convention on Human Rights* (the right to respect for his private and family life, his home and his correspondence), in a case of noise pollution in the *Ruling Martínez Martínez vs. Spain*, dated 18 October 2011. Despite the fact that the Constitutional Court had previously rejected the appeal for legal protection because of a lack of constitutional content, the ruling ordered Spain to pay the claimant 15,000 Euros because he had been putting up with the noise of a discothèque just a few metres from his home

Considering the Recent Developments

Environmental norm setting carried out during the reporting period has been marked by several key trends. Firstly, it was marked by the economic crisis in Spain (with considerable budget cuts) and the incorporation of standards of environmental sustainability in the economic field. This situation justifies the adoption of a macro law, the *Sustainable Economy Law*, aimed at creating suitable conditions for sustainable economic development whilst accelerating the development of a more competitive and innovative economy.

Secondly, the influence of *EU Directive 2006/123/EC* on services in the internal market continues to be fundamental. It allows for the prior authorization or licence to be substituted by other more flexible mechanisms of intervention such as communication or statements of responsibility. The amendment of several sectoral environmental laws in recent months are along these lines and eliminate the

traditional local licences, although they can still be substituted by other forms of verification and administrative control.

Thirdly, some of the trends highlighted in previous country reports remain. Many of the rules that been introduced in recent months have their origin in EU law, as outlined in the preceding pages. Spanish environmental law continues to largely trail EU law, which is one of the main drivers of innovation for Spanish environmental legislation. The trend of approving basic regulations as administrative regulations keeps spreading, even though the Spanish legal system, in accordance with constitutional jurisprudence, accepts that it is only exceptionally that basic standards are adopted in the form of administrative regulations. Many of the administrative regulations adopted are considered basic legislation.