

## **“FEATURES, INNOVATIONS AND SHORTCOMINGS OF THE BILL ON WASTE AND CONTAMINATED SOILS”**

**Author:** José Francisco Alenza García, Professor of Administrative Law of Public University of Navarra

**Translation:** Elena Morcillo de Mercado, Alberto José Molina Hernández, Blanca Muyo Redondo. CIEDA-CIEMAT

### **I. GROUNDS OF THE FUTURE FIFTH SPANISH WASTE ACT**

The Bill on Waste and Contaminated Soils (*Proyecto de Ley de residuos y suelos contaminados*) (hereinafter referred to as the “LRSC Bill”, according to its Spanish abbreviations) has been published in the Spanish Official Gazette of the Parliament nº 114 of 11 March 2011.

Upon approval of the Bill, it will be the fifth Waste Act of our history. The first general Waste Act was Act 19/1975 on residues and solid urban waste (*Ley 19/1975, de desechos y residuos sólidos urbanos*). The reception of the Community *acquis* required to complete the legal framework with the Act/1986 on Toxic and Hazardous Waste (*Ley 20/1986 de Residuos Tóxicos y Peligrosos*). These two acts coexisted and were in force until they were repealed by the current Act 10/1998 of 21 April on Waste (*Ley 10/1998, de 21 de abril, de Residuos*<sup>1</sup>). Shortly before a very specific Waste Act on packing and packing waste had been passed. This

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<sup>1</sup> With regard to the waste legislation, it can be seen: ALENZA GARCÍA, J. F., *El sistema de la gestión de residuos sólidos urbanos en el Derecho español*, INAP-BOE, Madrid, 1997; ALENZA GARCÍA, J. F., «Reflexiones críticas sobre la nueva Ley de Residuos», *Actualidad Administrativa*, number. 11, 1999, p. 275-296 (also in the electronic *Journal on Environmental Law*, number. 3, [www.cica.es/aliens/gimadus](http://www.cica.es/aliens/gimadus)); MARTÍN MATEO, R. y ROSA MORENO, J., *Nuevo ordenamiento de la basura*, Trivium, Madrid, 1998; PEÑALVER CABRÉ, A., *La regulación municipal de los residuos*, Cedecs, Barcelona, 1997; POVEDA GÓMEZ, P., *Comentarios a la Ley 10/1998, de 21 de abril, de Residuos*, Comares, Granada, 1998; SANTAMARÍA ARINAS, R. J., *Administración pública y prevención ambiental. El régimen jurídico de la producción de residuos tóxicos y peligrosos*, IVAP, Oñati, 1996 and SANTAMARÍA ARINAS, R. J., *Régimen jurídico de la producción y gestión de residuos*, ed. Thomson Aranzadi, Cizur Menor, 2007.

Act will be partially repealed (in relation to the sanctioning system) and transformed into statutory legislation as regard other provations<sup>2</sup>.

Except for the first of such acts, all of them were aimed to incorporate the corresponding European Directives into national law. The fifth Spanish Waste Act will have the same target: the incorporation of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 into national law.

Unfortunately, it will be a belated transposal because the deadline for transposition into national law ended on 12 December 2010 (as set out in Article 40 of this Directive).

As already did the current Waste Act, the legal regulation on contaminated soils (which is also incorporated in the title of the act) is also included even if the directive does not deal with them and in spite of the fact that it would be perfectly possible an independent regulation of both sectors.

Transposing a directive later than the indicated deadline explains (but it does not justify) that the Commission on the Environment has been entrusted with its enactment with full legislative power and that the Bill is being processed under urgency procedure<sup>3</sup>.

## **II. FEATURES OF THE BILL**

### **A. Regulatory density**

The LRSC Bill consists of 54 articles, 8 additional provisions, 7 transitional provisions, 5 final provisions and 12 Annexes. The more important normative density compared with the previous Waste Act does not refer only to the increased number of rules but also to their quality or depth. Act 10/1998 was notable for its fundamental and enabling character, leaving many aspects to a regulatory development that has never been carried out. The Bill is much more precise on its

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<sup>2</sup> Section 2 of the unique repealing provision of the Bill of the LRSC.

<sup>3</sup> That is what it appears in the Agreement of the Bureau of the Chamber of the Congress of 8 March 2011 (BOCG, Congress, 11 March 2011).

determinations, although it is also backed by specific non-statutory regulations on waste.

B. *Conceptual clarity and systematic improvement*

One of the main targets of the Directive is to enhance the clarity and legibility of the waste legislation. The directive simplified the regulatory landscape when repealing some of the previous directives and defining some concepts that appeared to be problematic. The LRSC Bill also presents this conceptual clarity and improves noticeably the systematic character (for instance, when classifying the obligations of the producers or initial owners of waste, or when grouping and distinguishing the obligations deriving from the different operations of waste management).

Obviously, we can observe that some matters lack of clarity (for instance, regulation of individual and collective system of extended producer responsibility or the regime of commercial waste). But, in general, the Bill improves the system and clarity of its predecessor complying with its guiding, preservationist and power saver functions, characteristic of a main act within a regulatory group—in this case—the waste one.

C. *Broadening of the regulatory approach: from the waste management to the life-cycle of products*

The directive adopts a holistic approach throughout the life-cycle of products and materials. Although the previous act had already included some timid references to the early steps in the generation of waste, this approach is now noticeably widened being focused from then on only waste management but also understanding of earlier steps. The Directive establishes the extended producer responsibility (allowing producer obligation on products design, composition and marketing to be made compulsory). It also determines the quantitative targets of reuse, recycling and valorisation, making legally binding the adoption of waste prevention policies.

D. *Interventionist or liberal?*

It is difficult to label LRSC Bill as interventionist or liberal. The Bill has a simplifying character of the administrative burden and replaces part of its authorizations of the former act through prior communications within a process driven by the Services Directive. This is the case, for

instance, hazardous waste production, withdrawal and transport. But, at the same time, operations that were not formerly subject to any intervention (production of non-hazardous waste, waste brokers and dealers, individual systems of extended producer responsibility) are from now on submitted to preliminary communication. Therefore, burdens of certain management activities are lightened, whereas other activities or subjects related to waste production, exchange and management are brought under control.

5a) Centralizing. It should be noted the introduction in the Bill the following centralizing elements: setting national targets for recycling and valorization; creating a Coordination Commission on waste (reporting, for example, on certain procedures under the authority of autonomous communities); creating a waste production and management Register “that will be unique and shared throughout the national territory” (Article 37.1). I do not object or criticize this feature and I am not going to assess whether they are justified or not. I just affirm that these elements exist and that, for national targets, they do not derive from the Community Directive but they are created by the Spanish ruler.

#### *E. Reinforcing Administrative powers of inspection, sanction and compensation for damages*

The Title VII of the LRSC Bill regulates the administrative powers of surveillance and inspection as well as the sanctioning power that includes the determination of the duty of repairing “all damages caused” (these lean not to be strictly limited to the environmental ones). The Bill establishes as an innovation the possibility to exercise enforcement measures (imposing fines and subsidiary enforcement) when the offenders do not indemnify or compensate for damages.

### **III. DECALOGUE OF KEY AND NOVEL ASPECTS OF THE BILL ON WASTE**

With regard to waste, the content of the LRSC Bill can be summarized in a Decalogue of main aspects that will be useful to point out its principal developments affecting the legislation in force.

1) *More and better definitions:* The Bill contains more definitions than the former law or this Directive. In Article 3 of Waste Act there are 18 definitions against 26 in the LRSC. Of all of them, 20 come from the

Directive but the other 6 definitions<sup>4</sup> are original contributions of the Bill. The positive fact is this quantitative increase but also the improvement that means the clarification of some key concepts (for example, subproduct, end-of-waste criteria after a valorization operation, prevention, treatment, energy valorization, etc.).<sup>5</sup>

2) *Distribution of competences and organization:* Article 11 of the LRSC Bill sets out in detail the competences of the three territorial Administrations (national, regional and locals).<sup>6</sup> There are no significant innovations except for the framework of mandatory local services. The major innovation is the creation of a Coordination Commission on waste, with a heterogeneous composition and the participation of the General Government Administration, of all the Autonomous Communities and of the representatives of the local entities and with important functions not only of a consultative nature but also decision-making (as regards, for example, in the authorizations of collective systems of extended producer responsibility).

3) *Urban waste suppression of its relative replacement by household waste:* The LRSC Bill suppresses a category of waste that was traditional in the Spanish legal system: urban waste. For a long time, urban solid waste constituted the common law waste category (it included all those waste

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<sup>4</sup> These “autochthonous” definitions refer to the following concepts: household waste, commercial waste, industrial waste, waste manager, contaminated soils and compost.

<sup>5</sup> With regard to these conceptual difficulties, it can be seen: PERNAS GARCÍA, J.J., «Doctrina del Tribunal de Justicia de las Comunidades Europeas sobre el concepto comunitario de residuo. Comentario a la Sentencia de 18 de abril de 2002», *RVAP*, number. 64, 2002, pp. 319–338; SANTAMARÍA ARINAS, R. J., «A vueltas (todavía) con los conceptos jurídicos de residuo y residuos peligroso», *Revista Aragonesa de Administración Pública*, number. 21, 2002, pp. 177-206 and SERRANO PAREDES, O., «La Directiva 2006/12/CE, de 5 de abril, relativa a los residuos. Algunas cuestiones controvertidas: los conceptos de residuo, valorización y eliminación», *Revista Aranzadi de Derecho Ambiental*, núm. 11, 2007, pp. 65-88.

<sup>6</sup>With regard to the competences on waste, it can be seen, apart from the works in the footnote 1: ALENZA GARCÍA, J. F., *Concorrencia competencial en materia de residuos sólidos urbanos*, EGAP, Santiago de Compostela, 1995; ORTEGA BERNARDO, J., *Estado, Comunidades Autónomas y Corporaciones Locales ante la gestión de los residuos urbanos*, Marcial Pons, Madrid, 2003; and the collective work *Competencias y coordinación en la gestión de residuos por las distintas Administraciones públicas* (dirs.: MENÉNDEZ REXACH, A. y ORTEGA BERNARDO, J.), ed. Consejo Económico y Social de España, Madrid, 2010.

that had not a specific regime).<sup>7</sup> With the Waste Act, they are come to be called “urban or municipal waste” and the different types of waste included on such concept were reduced because not all the non-hazardous waste belonged to it but only those that, because of their nature or composition, were assimilable to the waste generated in households, stores, offices and services. Moreover, (although they were not assimilable in the way described) other wastes were included in this category by legal mandate (those generated from street cleaning, dead pets, pieces of furniture, household equipment, abandoned vehicles, waste from minor building works and home reparation).<sup>8</sup>

In the LRSC Bill, urban residues are not mentioned; instead they are replaced by household waste. It is not a mere terminological change but a new restriction of waste included in this category. The definitions of household waste lack of clarity and structure of its urban residues concept. Household wastes are defined as “waste generated in homes as a consequence of domestic activities. Similar waste generated in services and industries are also considered household waste”. We can appreciate that now the core of this category is household waste unlike the Waste Act in which the central point was constituted by household, commercial, offices and services waste. Other waste generated in households that are specifically mentioned are also included (perhaps because they are not considered to be characteristic of household activities?) Finally, household waste are considered “those that are from the street cleaning, green areas, recreational areas and beaches, dead domestic animals and abandoned vehicles”. It is clear that the denomination of urban waste was much more appropriate to these wastes- non assimilable to the household ones.

On the other hand, the LRSC Bill defines industrial waste and commercial waste. These types of waste- traditionally urban waste- are not included in the scope of household waste, under the authority of local entities. In this way, they will be managed by producers, kept out from local waste management services, except when local entities make compulsory, in a well-grounded and motivated manner, the management of this waste by local services.

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<sup>7</sup> ALENZA GARCÍA, El sistema de la gestión de los residuos sólidos urbanos..., cit., p. 138 y ss.

<sup>8</sup> ALENZA GARCÍA, J. F., «Reflexiones críticas sobre la nueva Ley de Residuos», *Actualidad Administrativa*, núm. 11, 1999, p. 288 y ss.

4) *New authorization regime:* Among the most important developments of the LRSC Bill we can highlight the establishment of a new authorization system. The confused and unclear former system is clarified in the Bill when distinguishing the compliance with an authorization not only for waste treatment facilities but also to everyone responsible for these operations. Nevertheless, the Bill sets out that a unique authorization could be granted if the person that manages the wastes is the owner of the facilities (Article 26.3). Apart from the objective and subjective frame of the authorizations, the LRSC Bill includes developments both of substance and of form. This way, the LRSC is much more precise than the current Waste Act because it specifies the content of applications and authorizations. It also demands a preliminary inspection because of granting any authorizations. With regard to the procedure, it extends the deadline of decision to 10 months and sets out expressly –the Waste Act does not- the negative or rejection sense of the lack of official response.

The parliamentary procedure leading to the approval of the Bill is whether the IPPC Act is modified or not. Section 7 of Article 26 sets out the introduction into the authorization of the waste treatment facilities in the integrated environmental authorization. However, according to the IPPC Act, not all the waste treatment facilities are submitted to integrated environmental authorization. Probably, the Government has no intention to modify the IPPC Act but it should clarify that the waste authorization will be only included in the integrated environmental authorizations when the facilities are submitted to integrated environmental authorization according to the thresholds set out in the IPPC Act.

5) *Introduction of preliminary communications as a way of intervention:* In the Waste Act, some of the waste management activities were not submitted to authorization, but to mere notification to be registered in the corresponding regional register, allowing the autonomic legislation to submit them to authorization (Article 15). Nowadays, the LRSC Bill established the prior communications for these activities not submitted to authorization (Article 28). Specifically, the following activities are from now on submitted to prior communication: waste withdrawal and transport; activities related to the disposal or valorization that would have been declared exempt from authorization (disposal of non-hazardous waste in the production or non-hazardous waste valorization place); and the production of hazardous waste (formerly submitted to authorization) or the production of more than 1000 tones per year of non-hazardous waste.

6) *Provisions on the integral cycle of products:* The Community Directive is very ambitious because one of its targets is to convert the European Union into a recycling society, increasing the economic value of waste and its use as resource. The LRSC Bill is not so categorial in its targets although it obviously includes all the provisions laid down the Directive for that purpose. The most important provisions are those aimed to establish quantitative targets of reuse, recycling and valorization (Article 21). Other measures are the imposition of obligations to public Administrations to adopt Programs of waste prevention (Article 14) and adopt policies on public procurement and purchase reusable and easily recycling materials (Article 15.2) as well as measures to encourage the selective waste withdrawal and elaboration for reuse (Article 20), recycling and valorization and, finally, the extended producer responsibility, as it will be explained thereafter.

7) *Extended producer responsibility:* In the Waste Act, it was stipulated the possibility of imposing on the people responsible for placing on the market waste generating products some obligations related to waste management and the production and marketing of such products. Title IV of the LRSC Bill covers the so-called “Extended producer responsibility”. The bill lists and systematizes the possible obligations and, naturally, transfers the determination of the concerned producers to the Council of Ministers that must exert this authority by means of passing a Royal-Decree. In order to ensure the compliance with such obligations, the LRSC Bill allows two methods: collective (created by the association of several producers and distributors) and individual systems. Collective systems are equivalent to the former “integrated management systems” and are submitted to authorization, being necessary a prior report of the Coordination Commission on waste. Individual systems are submitted only to prior communication. The authorization regime of collective systems is regulated in a rather confusing way. In order not go in too much detail, I will refer only to two aspects. On the one hand, the nature of the Coordination Commission Report is not clear: it is not specified whether the Report is binding or facultative. In any case, it is specifically set out that the authorization will be granted “according to the content of the Report” (Article 31.3 paragraph 4). Moreover, it is established a kind of “positive answer in case of lack of official response” to the authorizations requested to operate in other Autonomous Communities. On the other hand, compared with the Waste Law, the organized framework is duplicated because the Bill obliges the producers to constitute associations in order to access to this system and, at the same time, it is admitted that a non-profit administrative entity with own legal entity be constituted to organize waste management. It is probable and -desirable- that in the parliamentary procedure leading to the approval of

the law, the drafting and regulation of these systems be improved by making clear its legal regime and by simplifying it as far as possible.

8) *Records and files:* The Waste Act establishes the existence of administrative registers for those management activities not submitted to administrative authorization (Article 14.2 and 15). The LRSC Bill also provides for a national Registry of waste production and management that will be unique and shared in the whole national territory, where all communications and authorizations will be registered (Article 37). In addition, the registered companies are required to carry out chronological records of waste quantity, nature, origin, destination and treatment method (Article 38). In the case of companies submitted to authorization, they will be required to send an annual report with the summary of the contained on the chronological records (Article 39).

9) *Powers for the reestablishment of the environmental legality:* The LRSC Bill places on to the authorized Administrations new powers for the reestablishment of the environmental legality. Thanks to the these powers, they can close down the premises, cease the activity or suspend it temporally when the mandatory authorizations, declarations or registers are not available or when the activities do not fit to described below or to the conditions set in the authorization. It is specifically noticed that these measures do not have sanctioning nature (Article 29), so they can be imposed independently from sanctions, strictly speaking.

10) *Inspection and penalty system:* The Directive obliges to regulate some aspects of the inspection activity of waste production and management (Article 42) and to establish a sanctioning regime. Nevertheless, the regulation of these matters does not present in the LRSC Bill any significant developments compared to the currently in force Waste Act. The assumptions of solidary responsibility have not been modified, the infractions are similar as well as the sanctions (having been increased the amount of fines). Only some of the collateral aspects are subject to a more precise regulation (prescription, requirements for the adoption of provisional measures, enforcement of the obligation of repairing the damages caused by the infraction).

#### **IV.SOME SHORTCOMINGS OF THE BILL ON WASTE AND CONTAMINATED SOILS**

In order to carry out a critic analysis of a normative text, I think it is necessary a thorough study but nowadays I am not in the position to do it. Apart from the above-mentioned, it would be ill-timed to set criticisms, reservations or objections to a bill that has just started its parliamentary course. Prudence advises to postpone this thorough study until the Bill covers its entire parliamentary course and is approved and published in the BOE (Spanish Official Gazette).

However, what I can disclose is that I miss certain aspects in the LRSC Bill that will be difficulty incorporated or amended in the Parliament.

Firstly, in my opinion certain regulations constituting regulatory developments of acts that are no longer in force<sup>9</sup> should be specifically repealed as far as legibility and clarity at targets of the Directive and- by extension, of the transposing Act.

Secondly, it is relevant the lack of references to the most urgent environmental problem: climate change. This was a common criticism in the first parliament debate on the LRSC Bill. It is true that meeting the targets of reduction and valorization set in the future legal framework will benefit positively the relief of the climate change<sup>10</sup>. It is also certain that, taking onto consideration the general nature of such an act, technical specifications about concrete methods of valorization or disposal for greenhouse gas emission reduction cannot be included. However, I miss some express mention or even links between the targets of the waste policy and the measures to fight against climate change (biomass use, reduction or valorization of methane from landfills), flexibility mechanisms of the Kyoto Protocol (projects of waste valorization in other

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<sup>9</sup> This is the case, for example, of the Royal-Decree 833/1988 of 20 July, approving the Regulations for the Implementation of Act 20/1986 of 14 May, on Basic Toxic and Hazardous Waste. The applicability of the Ministerial Order of 13 October 1989 on toxic and hazardous waste characterization is also problematic. This Ministerial Order is not formally repealed but, in my judgment, the concept and characterization of hazardous waste have been displaced and implicitly repealed by the community legislation (Commission Decision 2000/532/EC of 3 May, establishing a new List of Wastes) and by the national legislation that incorporated that into national law (Order from the Ministry of Environment 304/2002 of 8 February, publishing waste valorization and disposal operations and the new European Waste Catalogue)

<sup>10</sup> With regard to this matter, see CONDE ANTEQUERA, J., “Residuos y cambio climático”, *Revista de la Facultad de Derecho de la Universidad de Granada*, núm. 12, 2009, pp. 301-334.

countries) and adaption strategies to climate change (allocation of the valorization and disposal facilities, “climate-proofing” construction, etc.).

Thirdly and finally, although the LRSC Bill declares to pretend taking advantage of the experience in the application of the Waste Act, the fact is that it has not reached this objective yet. Or at least, the Bill has not taken advantage to solve certain problems that the application of the law currently in force has raised, having mentioned these problems in other works.<sup>11</sup>

On the one hand, local authorities discretionality on the admission of urban waste in waste management local services should have been reduced. According to the Waste Act, town councils can require the owners of urban waste to present special features for their prior treatment or deposit in a specific form and place, and to manage urban waste by their own means excluding them from the waste management municipal services (Article 20). These decisions can be adopted by town councils at its own full discretion. Neither special procedural (neither audience of owners nor mandatory reports) nor technical requirements are required. That is the reason why, it constitutes a mostly unlimited power without specific limits or requirements. It is sufficient the mere appreciation of the special features in order to come to a local decision on the compulsory prior treatment or the treatment of local service exclusion. This fact has caused some clearly unfair situations that, only occasionally, have been corrected by the courts through the enforcement of proportionality and legitimate expectations<sup>12</sup>. The LRSC Bill sets also this discretionary power of the local entities (Article 11.5, c).

On the other hand, it would have been necessary, to the sanctioning purposes, to distinguish between the waste uncontrolled abandonment and the incorrect storage. The Waste Act forbids “the uncontrolled waste abandonment, dumping or disposal throughout the national territory and the mixture or dilution of waste that make its management difficult” (Article 12.2). The inobservance of such prohibition is considered as a very serious infringement (Article 34.2 of the Waste Act). The problem arises due to the fact the temporal waste

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<sup>11</sup> ALENZA GARCÍA, J. F., «De vertederos municipales y del almacenamiento in situ de residuos (a la luz de las aportaciones jurisprudenciales)», *Revista Aranzadi de Derecho Ambiental*, núm. 11, 2007, pp. 17-37

<sup>12</sup> I referred to this matter in ALENZA GARCÍA, J. F., «De vertederos municipales y del almacenamiento in situ de residuos (a la luz de las aportaciones jurisprudenciales)», *Revista Aranzadi de Derecho Ambiental*, núm. 11, cit., pp. 17-37.

storage or dumpling can be put on the level with uncontrolled disposal. Such circumstance can happen in two ways: an incorrect storage (even in the own production centers) equivalent to its uncontrolled abandonment; or excessive time storage directly equivalent to an uncontrolled disposal *ex lege*. This comparison is obviously illogical and clearly disproportionate, especially because mostly for the determination of the concept of waste abandonment certain case law has focused exclusively on the legal situation in which waste are (having or not the compulsory administrative authorization), without taking into account the factual conditions of the storage and the owners' intention. This situation could be modified if some criteria that allows predicting the abandonment *iuris tantum* would be categorized (as already done for example with abandoned vehicles).

The LRSC Bill has continued with the same type of offender and has not introduced any modification in the features of abandonment or incorrect storage (as for example, the security conditions or the real factual situation of waste) that are put on the level with the uncontrolled dumpling or disposal [letters b) and c) of the sections 2 and 4 of Article 44].

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