

# THE NEED TO PROVE THE EXISTENCE OF SUFFICIENT WATER RESOURCES AS A PREREQUISITE FOR THE AUTHORIZATION OF NEW URBAN DEVELOPMENTS: THE SPANISH MODEL

Dr Roberto O. Bustillo Bolado, University of Vigo, Spain

Dr Laura Movilla Pateiro, University of Vigo, Spain

## Abstract

Because of the consequences of unsustainable economic growth in water resources over the last few decades, the requirement of a report on the existence of sufficient water resources has been developed as a prerequisite for the authorization of new urban developments in Spain. The evolution of the legislation together with the judicial criteria have been gradually reinforcing the requirement for the report, and now it is mandatory and binding. An understanding of the Spanish experience, its legislative and judicial evolution and its difficulties may be helpful for other States.

## 1. INTRODUCTION

The goal of this paper is to introduce the Spanish legal developments regarding water resources and urban planning over the last few decades. As a consequence of these developments, it is mandatory nowadays that the competent public authorities report on the existence of sufficient water resources to fulfil projected needs from the expected urban developments (new residential areas, industrial zones, etc.).

For decades Spain suffered and unsustainable economic growth based on the building industry and property speculation. That unsustainable economic growth, together with climate change, led to the overexploitation of aquifers and problems of water supply in some geographic areas.

As a result, in 1999 the legislator introduced the need for the competent territorial authority to provide a report on the existence of sufficient water resources during the process of elaboration of the urban plans. Data and information provided by the engineers and other scientists integrated into the State Public Administration are an essential part of those reports.

Ever since, the combination of the will of the legislator – although with a poor legislative technique - and judicial criteria have been gradually reinforcing the requirement for the report, and now it is mandatory and binding

In this research conclusions have been deduced from the analysis of legislation (2001 Water Act, 2008 Soil Act, and Additional Provision 2.4 of the 13/2003 Act), case law (several judgments until 2015 resolving conflicts in several Spanish basins, especially in the Mediterranean area), and legal-scientific doctrine.

An understanding of the Spanish experience, its legislative and judicial evolution and its difficulties may be helpful for other States. In this way, this study is meant to contribute to the balance between urban planning and the rational use of water resources in the context of sustainable development.

## 2. ORIGIN AND LEGAL EVOLUTION OF THE REPORT ON THE EXISTENCE OF SUFFICIENT WATER RESOURCES

The decentralised legal and political model established by the 1978 Spanish Constitution<sup>1</sup> required a new act superseding the centenary 1879 Water Act<sup>2</sup> and its numerous reforms and complementary legal texts. The preamble of the 1985 Water Act<sup>3</sup> explained itself how the old 1879 Water Act was not able to respond to the requirements of the new territorial organisation of the State. The preamble also states that the new Act should take into account the new decentralised organisation and create a framework of cooperation among all the public administrations in order to achieve a rational and adequate protection of the water resources.

Article 149.1.22<sup>a</sup> of the 1978 Constitution reserved to the State the regulation, planning and licensing of water resources and water uses when the water resources flow between two or more Spanish autonomous regions.<sup>4</sup> That reservation to the State resulted in significant consequences and complexities regarding the allocation of competences on water. Firstly, jurisdiction over water resources was divided between the State and the autonomous regions. The State has competence on the basin shared by two or more autonomous regions –through transboundary basin bodies called *confederaciones hidrográficas*-, and, the autonomous regions, on the basins completely located within its territory. Secondly, the system of allocation of competences designed by the 1978 Constitution gave rise to the coexistence of competences of the State, autonomous regions and local authorities over the territory of basins shared by two or more autonomous regions. Together with the general competence of the State on those basins enshrined in art. 149.1.22<sup>a</sup>, the autonomous regions have jurisdiction in various related fields (territorial planning, urban planning and housing, public works of interest to the autonomous region, forests and forest uses, etc.<sup>5</sup>) and there are also competences assigned to local authorities by virtue of the local autonomy granted by the Constitution (art. 140).

---

<sup>1</sup> The 1978 Constitution was adopted after the end of the Franco Dictatorship and is still the current Spanish Constitution.

<sup>2</sup> *Ley de aguas de 13 de junio de 1879.*

<sup>3</sup> *Ley 29/1985, de 2 de agosto, de aguas.*

<sup>4</sup> Since the 1978 Constitution, the Spanish State is formed by seventeen autonomous regions with autonomous capacity of decision in certain legal and political fields, and two autonomous cities.

<sup>5</sup> See articles 148.1.3, 148.1.4 and 148.1.8 of the 1978 Constitution.

Therefore, one of the main challenges of the new legislation was to create mechanisms to reconcile the jurisdiction of the States with that of the autonomous regions and the local authorities in this field.

In this respect, the 46/1999 Act<sup>6</sup> reinforced some of the provisions of the 1985 Water Act. Its article 9 introduced three new paragraphs to the original article 23 of the 1985 Water Act. Specifically, the added fourth paragraph of current article 25 (also modified by the final disposition of the 11/2005 Act<sup>7</sup>) states that the *confederaciones hidrográficas* must issue a preliminary report regarding uses and regulation of water resources in the plans carried out by the Spanish autonomous regions.<sup>8</sup> This article itself seems to leave no doubt about the mandatory but *not* binding nature of the report regarding the existence of sufficient water resources. However, during the last few years, numerous sentences of the Spanish High Court have introduced and reinforced the binding character of that report by also considering the application of other two legal dispositions: article 15.3 of the 2008 Soil Act<sup>9</sup> and paragraph 4 of the Second Additional Disposition to the 13/2003 Act, on the concession of contracts of public works.<sup>10</sup>

Article 15.3 of the 2008 Soil Act establishes the need of getting a report on the existence of sufficient water resources to satisfy the new needs and on the protection of the public water domain; the report must be obtained from the administration in charge of water resources. Plus, this report will be decisive for the content of the environmental report, which will only differ from it in an expressly justified way.<sup>11</sup> For

---

<sup>6</sup> Ley 46/1999, de 13 de diciembre, de modificación de la Ley 29/1985, de 2 de agosto, de Aguas.

<sup>7</sup> Ley 11/2005, de 22 de junio, por la que se modifica la Ley 10/2001, de 5 de julio, del Plan Hidrológico Nacional.

<sup>8</sup> The original disposition states as follows:

*4. Las Confederaciones Hidrográficas emitirán informe previo, en el plazo y supuestos que reglamentariamente se determinen, sobre los actos y planes que las Comunidades Autónomas hayan de aprobar en el ejercicio de sus competencias, entre otras, en materia de medio ambiente, ordenación del territorio y urbanismo, espacios naturales, pesca, montes, regadíos y obras públicas de interés regional, siempre que tales actos y planes afecten al régimen y aprovechamiento de las aguas continentales o a los usos permitidos en terrenos de dominio público hidráulico y en sus zonas de servidumbre y policía, teniendo en cuenta a estos efectos lo previsto en la planificación hidráulica y en las planificaciones sectoriales aprobadas por el Gobierno. Cuando los actos o planes de las Comunidades Autónomas o de las entidades locales comporten nuevas demandas de recursos hídricos, el informe de la Confederación Hidrográfica se pronunciará expresamente sobre la existencia o inexistencia de recursos suficientes para satisfacer tales demandas. El informe se entenderá desfavorable si no se emite en el plazo establecido al efecto. Lo dispuesto en este apartado será también de aplicación a los actos y ordenanzas que aprueben las entidades locales en el ámbito de sus competencias, salvo que se trate de actos dictados en aplicación de instrumentos de planeamiento que hayan sido objeto del correspondiente informe previo de la Confederación Hidrográfica.*

<sup>9</sup> R.D. Legislativo 2/2008, de 20 de junio por el que se aprueba el Texto Refundido de la Ley de Suelo.

<sup>10</sup> Ley 13/2003, de 23 de mayo, reguladora del contrato de concesión de obras públicas.

<sup>11</sup> The original article states as follows:

*En la fase de consultas sobre los instrumentos de ordenación de actuaciones de urbanización, deberán recabarse al menos los siguientes informes, cuando sean preceptivos y no hubieran sido ya emitidos e incorporados al expediente ni deban emitirse en una fase posterior del procedimiento de conformidad con su legislación reguladora:*

- a) *El de la Administración hidrológica sobre la existencia de recursos hídricos necesarios para satisfacer las nuevas demandas y sobre la protección del dominio público hidráulico (...).*

*Los informes a que se refiere este apartado serán determinantes para el contenido de la memoria ambiental, que solo podrá disentir de ellos de forma expresamente motivada.*

its part, the Second Additional Disposition to the 13/2003 Act highlights the binding force of that report.<sup>12</sup>

On numerous occasions, the parties injured by the report have looked for the non-application of the referred legal norms in the courts, and their arguments have been soundly rejected by the Spanish High Court.<sup>13</sup>

### 3. CASE-LAW REQUIREMENTS OF THE REPORT

Today there is abundant and mostly consistent case-law from the third chamber of the Spanish High Court regarding the reports issued by the *Confederaciones Hidrográficas*. They refer to urban and territorial planning instruments according to the above-mentioned article 25 of the 1985 Water Act, article 15.3 of the 2008 Soil Act, and paragraph 4 of the Second Additional Disposition to the 13/2003 Public Works Act.

A summary of this case law is presented below:

a) Regarding the character of the report:

1. The report is mandatory in any case, without being subject to the need to prove an impact of the plan on water utilisation. It is for the *confederación hidrográfica* concerned to decide on the existence or not of that impact.<sup>14</sup>
2. The report is mandatory only with regard to the scope of competences of the *conferenciones hidrográficas*, which is sufficient water resources and the protection of the public water domain. There is nothing to prevent a *Confederación Hidrográfica* to make a statement on other related legal issues, but the report will not be binding on those aspects. From this perspective, the *binding* character of the report stated by the paragraph 4 of

---

<sup>12</sup> The original article states as follows:

*La Administración General del Estado, en el ejercicio de sus competencias, emitirá informe en la instrucción de los procedimientos de aprobación, modificación o revisión de los instrumentos de planificación territorial y urbanística que puedan afectar al ejercicio de las competencias estatales. Estos informes tendrán carácter vinculante, en lo que se refiere a la preservación de las competencias del Estado, y serán evacuados, tras, en su caso, los intentos que procedan de encontrar una solución negociada, en el plazo máximo de dos meses, transcurrido el cual se entenderán emitidos con carácter favorable y podrá continuarse con la tramitación del procedimiento de aprobación, salvo que afecte al dominio o al servicio públicos de titularidad estatal. A falta de solicitud del preceptivo informe, así como en el supuesto de disconformidad emitida por el órgano competente por razón de la materia o en los casos de silencio citados en los que no opera la presunción del carácter favorable del informe, no podrá aprobarse el correspondiente instrumento de planificación territorial o urbanística en aquello que afecte a las competencias estatales.*

<sup>13</sup> See, regarding article art. 25. 4 of the 1985 Water Act, inter alia, the judgments of the Spanish High Court of 17 June 2015 (appeal number 2555/2013; F.J. 6º), 14 November 2014 (appeal number 2419/2012; F.J. 6º); 25 September 2012 (appeal number 3135/2009; legal base 6); or 24 April 2012 (appeal number 2263/2009; legal base 7).

<sup>14</sup> Judgment of the Spanish High Court of 15 July 2015 (appeal number 3492/2013; legal base 2).

the Second Additional Disposition to the 13/2003 Act matches with the *decisive* character of the report established by the 2008 Soil Act.<sup>15</sup>

3. The final adoption of a legal instrument adopting or implementing urban or territorial planning without that report or against its binding content will be null.<sup>16</sup>

b) Regarding the content of the report:

4. The report must analyse the use and availability of the water resources, including both physical (e.g., sufficiency) and legal aspects. The contributions of qualified technical staff (scientists and engineers) are of crucial importance in the analysis and evaluation of the water resources.<sup>17</sup>
5. It is not only the future possibility of adequate water resources that matters. It is even more important that sufficiency of the resource is guaranteed at the moment of the adoption of the planning. That is to say, for instance, that if there is not enough water at present, a favourable report cannot be given even if the planning foresees the actions needed to obtain those resources in the future.<sup>18</sup> Obviously, a favourable report cannot be given if those future actions have been declared null by a final judgement.<sup>19</sup>
6. In order to be favourable, the report needs to be precise and clear. Ambiguities and inaccuracies are not admissible. The sufficiency of water resources must be directly ensured or, at least, that the planned actions do not imply an increase in water demand.<sup>20</sup>

c) Regarding the legislation of the Spanish Autonomous Regions:

7. Within the field of competence of the State – transboundary basins shared by two or more Spanish autonomous regions - the regional legislation cannot replace the report by the *Confederaciones Hidrográficas* with the report of

---

<sup>15</sup> Judgments of the Spanish High Court of 20 July 2015 (appeal number 17/2014; legal base 10), and of 14 November 2014 (appeal number 2419/2012; legal base 7). According to these judgements, the legislator describe the report as *decisive* because he wants to give it a binding character.

<sup>16</sup> See, inter alia, the judgments of the Spanish High Court of 2 September 2015 (appeal number 35/2014; legal base 12); 20 July 2015 (appeal number 17/2014; legal base 14), and of 19 December 2013 (appeal number 1032/2011; legal base 7).

<sup>17</sup> See, inter alia, the judgments of the Spanish High Court of 17 June 2015 (appeal number: 2555/2013; legal base 6); 14 November 2014 (appeal number 2419/2012; legal bases 6 and 9), or 18 March 2014 (appeal number 3310/2011; legal base 8).

<sup>18</sup> See, inter alia, the judgments of the Spanish High Court of 12 June 2015 (appeal number 1558/2014; legal base 9.E), 11-junio-2015 (appeal number 2926/2013; legal base 9.E) or 10 April 2014 (appeal number 5467/2011; legal base 6).

<sup>19</sup> See, the judgment of the Spanish High Court of 8-noviembre 2016 (appeal number 2628/2015; legal base 6).

<sup>20</sup> See, inter alia, the judgments of the Spanish High Court of 17 July 2015 (appeal number 2555/2013, legal base 7) or 12 June 2015 (appeal number 1558/2014; legal base 10).



other public or private bodies (since 2009 there is a change from the previous case law).<sup>21</sup>

8. Within the field of competence of the Spanish autonomous regions – basins located entirely within the territory of one autonomous region - the Spanish High Court has understood that a report from the public water administration concerned is also needed. The legislation of each autonomous region will determine the specific competent regional body. However, the autonomous region cannot eliminate the requirement for the report or render it meaningless.<sup>22</sup>

d) Regarding the administrative interim judicial protection:

9. If an instrument of urban or territorial planning that does not have a favourable report from the *Confederación Hidrográfica* is involved in a contentious matter in the administrative courts, a provisional measure that suspends the enforceability of the contested planning measure may be adopted.<sup>23</sup>

#### 4. HOW TO LEGALLY REACT TO A DEFECTIVE REPORT

What are the legal means available for natural and public and private legal persons – interested or competent- to respond to a report by a *Confederación Hidrográfica* that might be detrimental to their interests?

In the first place, if a local or regional competent public administration approves an urban or territorial planning measure that goes against the report, that resolution will be null. Regardless of the argument used by the competent public administration, the report is binding.

Secondly and also on the basis of the binding force of the report, a non-favorable report serves as a decision on the merits. Therefore, the Spanish administrative procedural regulations (art. 112.1. of the 39/2015 Act<sup>24</sup> and art. 25 of the 29/1998 Act<sup>25</sup>) allow parties to contest directly the legality of the report in court. However, in our opinion, if the report is favourable, it does not decide the case on the merits. The planning might

---

<sup>21</sup> See, inter alia, the judgments of the Spanish High Court of 17 June 2015 (appeal number 2555/2013; legal base 7); and of 14 November 2014 (appeal number 2419/2012; legal base 8).

<sup>22</sup> See, inter alia, the judgment of the Spanish High Court of 12 July 2015 (appeal number 1558/2014; legal base 5). Although this case-law has a positive effect on the protection of the water resources, in our opinion, the need of that report by the public water administration concerned should be expressly enshrined in binding legal regulations. See also in this regard: Pallarés (2015, 503-505).

<sup>23</sup> See, inter alia, the judgments of the Spanish High Court of 11 November 2011 (appeal number 361/2011), 9 February 2010 (appeal number 2161/2008), 1 February 2010 (appeal number 5018/2008), and 25 February 2009 (RJ 872/2008).

<sup>24</sup> *Ley 39/2015, de 1 de octubre, del procedimiento administrativo común de las Administraciones Públicas.*

<sup>25</sup> *Ley 29/1998, reguladora de la Jurisdicción Contencioso-administrativa.*

be not approved by other circumstances that bear no relation to the report. Therefore, according to the Spanish legal system, the only path is to contest later the legality of the resolution that approves the planning itself, by claiming the illegality of the report.

## 5. CONCLUSIONS

Four main conclusions can be drawn from this analysis:

*First.* Today no urban plan can be lawfully passed in Spain without an official report that ensures the existence of sufficient water resources.

*Second.* Qualified technical staff (scientists, engineers) must participate in the elaboration of those reports together with legal staff.

*Third.* There is still some reluctance among some operators, public authorities included, to consider that report as binding and mandatory. However, the Spanish Supreme Court has firmly supported the binding and mandatory nature of the report.

*Fourth.* The joint confluence of several factors is needed to try to prevent violation of the legal protection of the water:

- a) Social awareness and education on sustainable development.
- b) Public authorities that serve objectively the general interest and provide a high level of technical preparation through highly-skilled engineers and scientists who can transmit that knowledge to other people (e.g. judges) lacking that technical preparation.
- c) Independent judicial bodies that take into account the constitutional principle of sustainable development when interpreting and applying the law.
- d) The existence of a popular action, so that anyone can access judicial processes.
- e) Clear and precise legislation.

## REFERENCES

Agudo González, J. (2013) Procedimiento administrativo y suspensión cautelar de planes urbanísticos (Reflexiones a la vista de los conflictos sobre existencia y disponibilidad de recursos hídricos). *Revista de Derecho Urbanístico y Medio Ambiente*. 280, 45-102.

Alegre Ávila, J. M. (2016) El urbanismo de Santander se queda seco. Available from: <http://www.aepda.es/AEPDAPublicaciones-1628-Publicaciones-de-los-miembros-Otras-publicaciones-El-urbanismo-de-Santander-se-queda-seco.aspx> [Accessed 31st January 2017].

Blanes Climent, M. A. (2011) La acreditación de suficiencia de recursos hídricos en los desarrollos urbanísticos". *Revista de Derecho urbanístico y Medio Ambiente*. 265, 32-56.

Bustillo Bolado, R. O. (2016) Los informes emitidos por las Confederaciones Hidrográficas en caso de aprobación, modificación o revisión de instrumentos de planificación territorial y urbanística. In: Navarro Caballero, T. M. (Edit.) *Desafíos del derecho de aguas: variables jurídicas, ambientales y de derecho comparado*, Navarra, Aranzadi, pp. 309-320.

Cantó López, M. T. (2013) La garantía de disponibilidad de recursos hídricos en la aprobación definitiva de los planes urbanísticos. *Actualidad Jurídica Ambiental*. 3, 1-22.

Crespo Pérez, M. A. (2016) El informe de las confederaciones hidrográficas sobre suficiencia y disponibilidad de agua y los planes urbanísticos". *Revista de Derecho, Agua y Sostenibilidad (REDAS)*, 0. Available from: <http://redas.webs.uvigo.es> [Accessed 31st January 2017].

Escrivá Chordá, R. (2013) Los informes de las confederaciones hidrográficas para la aprobación de planeamientos urbanísticos que impliquen incrementos de demanda de agua. *Consultor de los Ayuntamientos y de los Juzgados* 24, 2364-2375.

Pallarés Serrano, A. (2015) La coordinación de los planes que ordenan el medio físico: el papel de la Planificación Hidrológica. In: Embid Irujo, A. (Edit.) *El segundo ciclo de Planificación Hidrológica en España (2010-2014)*, Navarra, Aranzadi, pp. 477-509.

Tardío Pato, J. A. (2012) Suficiencia y disponibilidad de agua para los desarrollos urbanísticos y la ineludible coordinación entre la planificación hidrológica y la planificación del territorio. *Revista Aranzadi de Derecho Ambiental*. 22, 21-63.

Tardío Pato, J. A. (2016) La mayor precisión de la última jurisprudencia del TS sobre el informe vinculante de la Administración Hidrológica acerca de la suficiencia y disponibilidad de recursos hídricos para las actuaciones urbanísticas. In: Navarro Caballero, T. M. (Edit.) *Desafíos del derecho de aguas: variables jurídicas, ambientales y de derecho comparado*, Navarra, Aranzadi, pp.359-374.