

# THE PRIMARY ENVIRONMENTAL CONCERNS IN SPANISH CITY PLANNING: A SPECIAL ANALYSIS FOR NGOs' ACCESS TO JUSTICE

Faustino Gudín

Senior Judge

PhD Assistant Professor UAH

# SPANISH CONSTITUTIONAL INSTRUMENTS FOR THE PROTECTION OF THE ENVIRONMENT.

- ▶ Article 45.1 of the Spanish Constitution states that the environment is **A FUNDAMENTAL RIGHT OF THE THIRD LEVEL OF PROTECTION**. Within the Spanish constitutional system, the environment is also considered a public interest, a category that goes beyond a simple collective interest.
- ▶ Article 45. 3. Spanish Constitution: “foresees **penal or administrative sanctions** as applicable, and **they shall be obliged to repair the damage caused**”.
- ▶ Article 125 Spanish **ACTIO POPULARIS**.-
- ▶ Other relevant constitutional provisions dealing with access to justice in environmental matters include:
  - ▶ the fundamental principle of State of Law (article 1.1).
  - ▶ the full submission of public authorities to the law (art.9.1).
  - ▶ the legality and the judicial review (articles 9.3, 103.1 and 106.1)
  - ▶ the principle of effective judicial protection (article 24.1).



# SPANISH LEGAL TOOLS TO PROTECT THE ENVIRONMENT

▶ Title IV of **Law 27/2006** (18 July) transposes to domestic law both the Aarhus Convention and the EU Directives in the matter, focuses on three pillars, including the access to justice.

▶ Article 3.3 b) and 22 of Law 27/2006 recognizes the right to exercise popular action.

▶ **The NGOs should meet the following criteria have the right to bring this public action** against acts or omissions of public administrations relating environmental issues.

- ▶ 1. Their **bylaws** must include as the association's goal the protection of the environment or of any of its elements
- ▶ 2. The association must be legally constituted **at least 2 years before** the date in which the action is initiated; it must remain active in achieving its goals.
- ▶ 3. A **geographical connection** (established in their bylaws) with the area affected by the act or omission

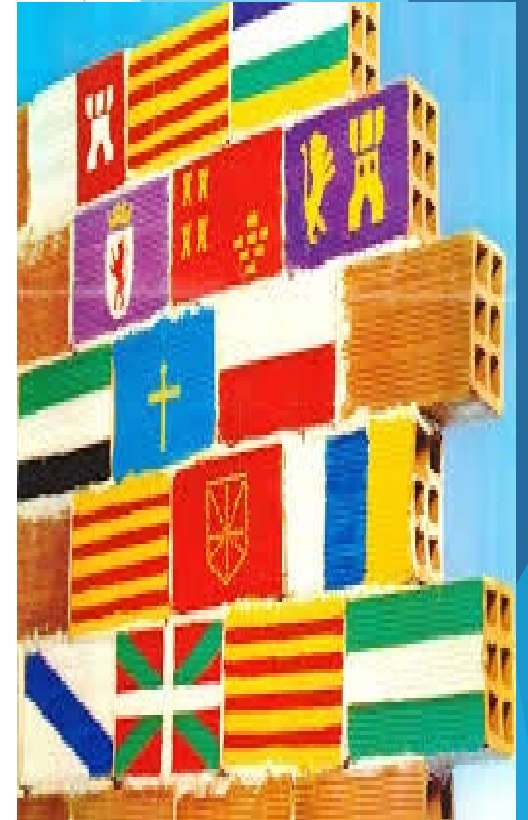
▶ Moreover Environmental public action is specially recognized in some matters:

- ▶ **Coast Protection,**
- ▶ **Conservation of natural spaces and wild flora and fauna.**

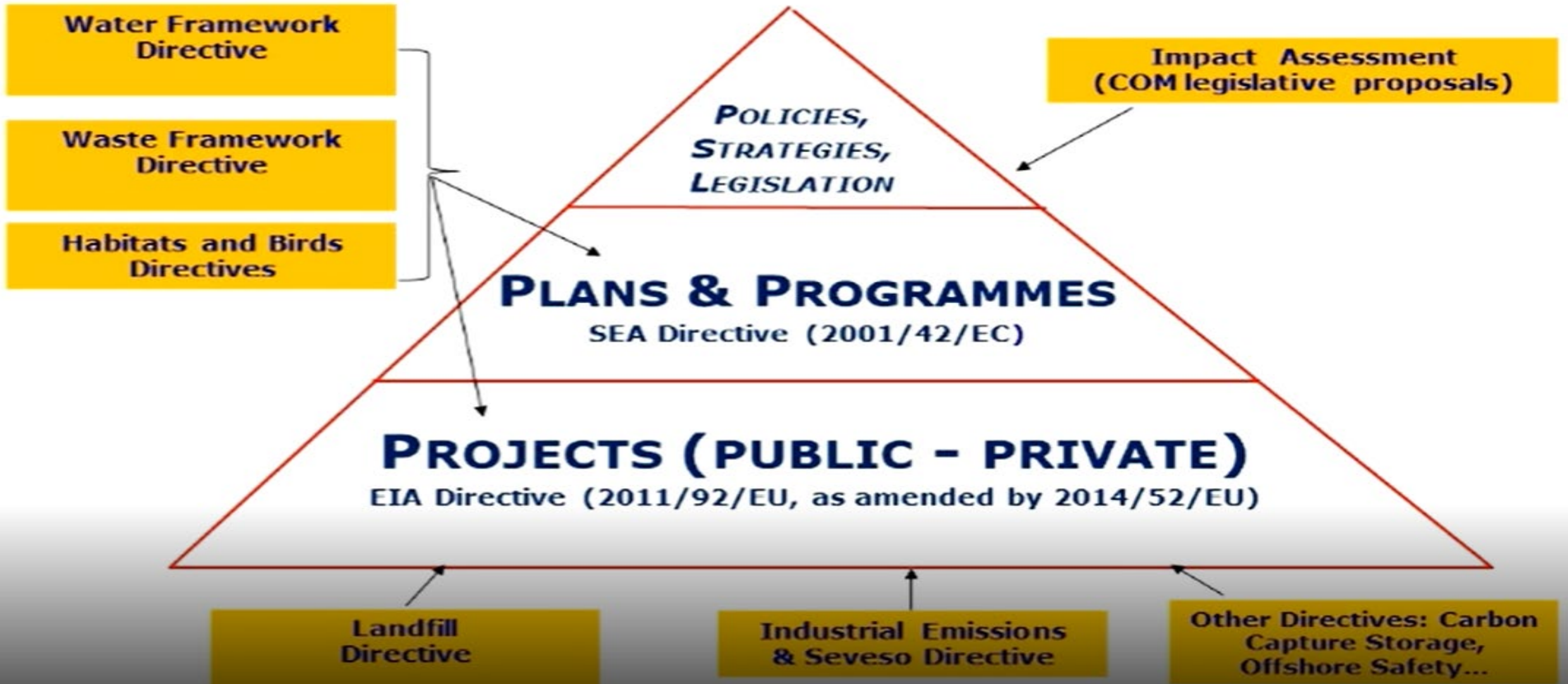


# COMPETENCES IN URBANISM IN SPAIN

- ▶ Spain has basically been organised into three instances, it's not a federal state but its structure is really very closed:
  - ▶ **National**, the central legislative power does have minimal legislative competences
  - ▶ **Regional**, as a rule, has legislative powers on urban development and spatial planning are, like housing
  - ▶ **Local**. Planning is a competence of the Local Entities
- ▶ General plan, the municipal plan prefigures the uses, intensities of use, design of the communications system, etc. Throughout the district. It also classified the land as urban, developable and non-developable.
- ▶ Since in many cases the municipal plan is not framed or coordinated by any spatial planning, sometimes this situation produces a high level discoordination among the different plans.



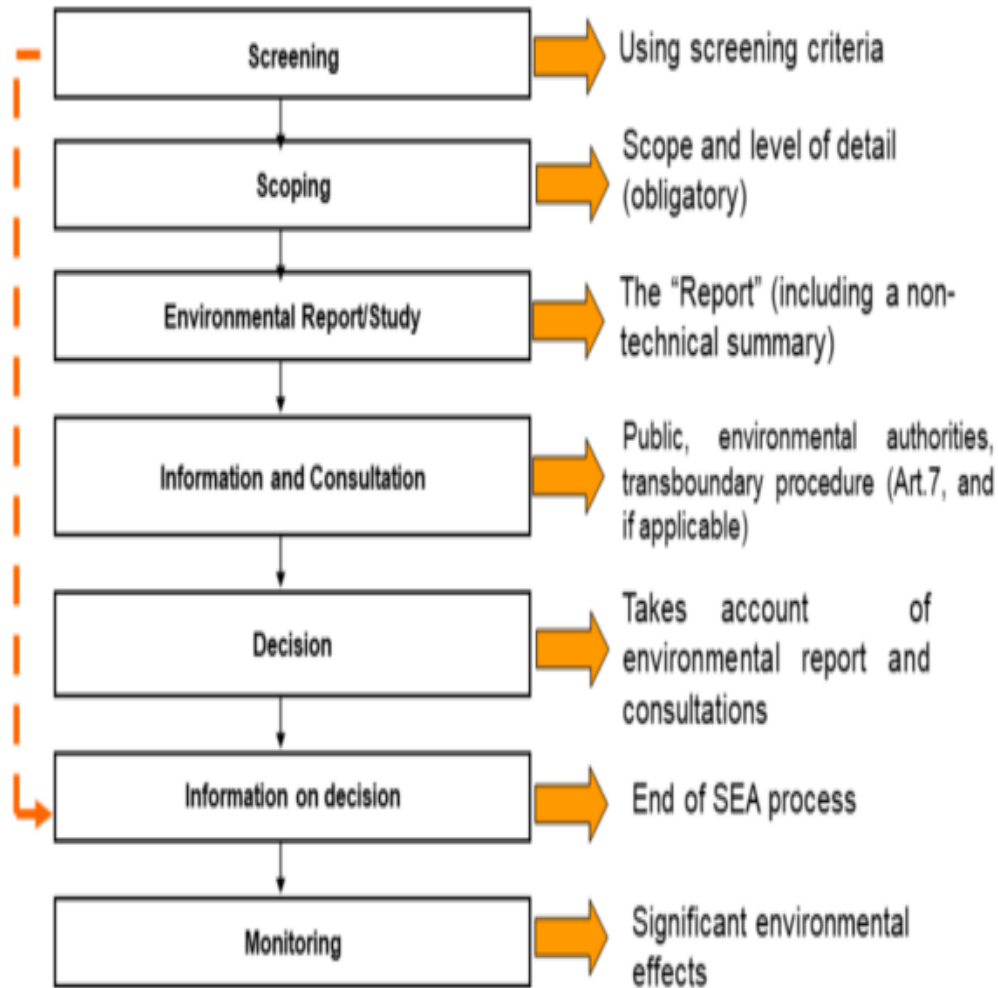
# Environmental Assessments at EU level





European Commission

## The SEA procedure



## Spanish transposition of the SEA/EIA Directive

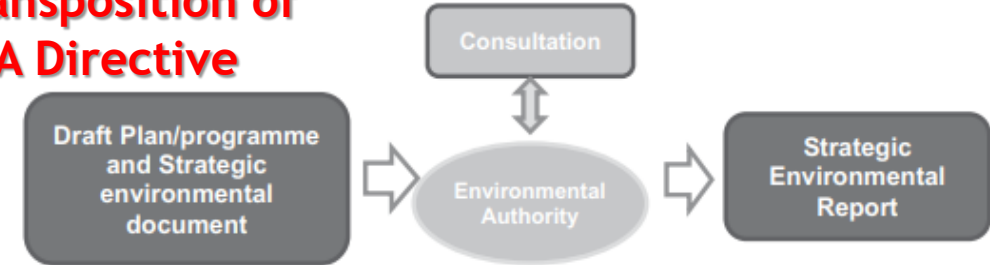


Figure 1. Simplified SEA process (based on the requirements of Law 21/2013 on Environmental Evaluation, 2019).

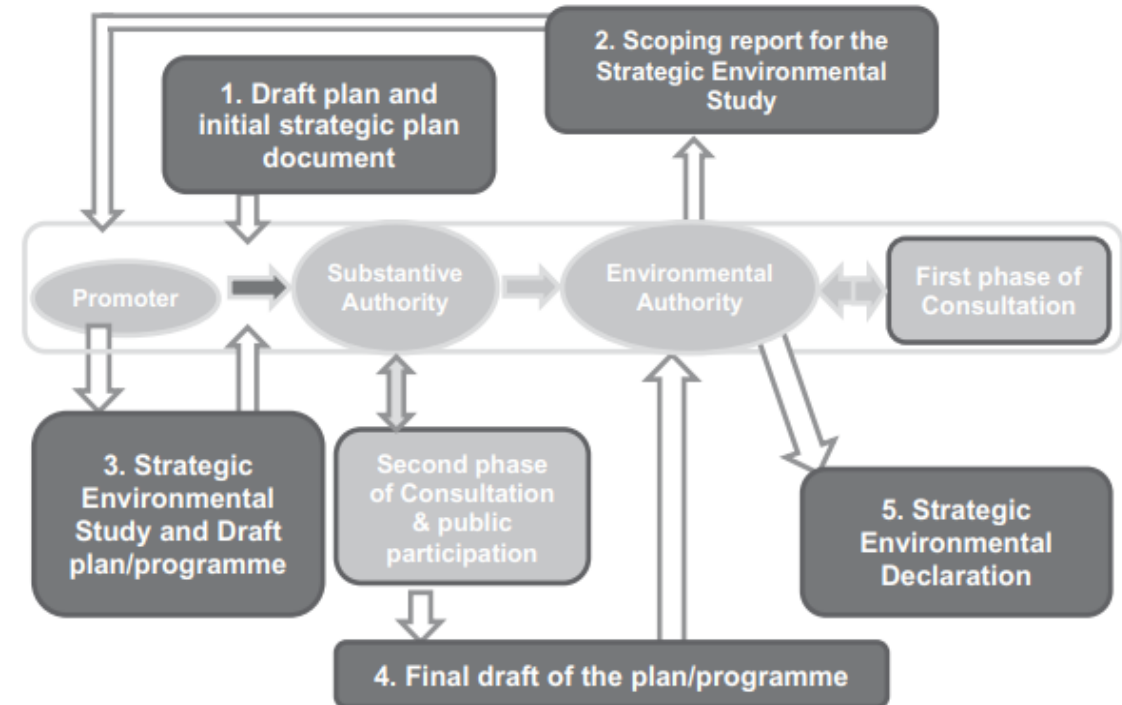


Figure 2. Ordinary SEA process (based on the requirements of Law 21/2013 on Environmental Evaluation, 2019).

# SEA AND EIA IN SPAIN

- ▶ **Law 9/2006, of April 28** transposed to the Spanish law the SEA Directive (outdated because the deadline was on July 21, 2004).
- ▶ Currently, the new regulation of environmental assessment is found in the currently in **Law 21/2013**. According to this law **all land use plans and urban planning are subject to SEA**, either in its evaluation modality ordinary or simplified, **but all plans, no matter how small**, have to carry out, at least the simplified strategic assessment .
- ▶ **ORDINARY PLAN:** Deadline 4 + 2 months.
- ▶ **SIMPLIFIED PLAN:** Deadline 3 Months.
- ▶ There is a **certain margin of appreciation** and doubt when assessing whether a plan has or does not have significant effects on the environment because if it does not, it is possible to go to the simplified evaluation.
- ▶ The SEA (plans and programs) and EIA (projects) procedures are quite similar, but there are some **differences**:
  - ▶ the SEA requires the **environmental authorities** to be consulted at the screening stage
  - ▶ **scoping** (i.e. the stage of the SEA process that determines the content and extent of the matters to be covered in the SEA report to be submitted to a competent authority) is obligatory under the SEA.



# “SABIA” PROGRAM

- ▶ The Spanish Ministry of the Environment (MITERD) has developed the SABIA project, which aims to improve the management of environmental assessments, as well as consultation by the interested public.
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- ▶ For this purpose, SABIA brings together the databases of the files in the environmental assessment procedure, both plans and programs as well as projects, incorporates their georeferencing and creates an interface for teleprocessing.
- ▶ Through this web page, open to the public, everyone can consult, among others, the Projects or Plans and Programs in environmental administrative processing.





# PLANNING JUDICIAL REVIEW

- ▶ In Spain, the Administrative Court is a **specialized tribunal**.
- ▶ All issues that occur on the occasion or as a result of the acts and agreements regulated in the legislation will have an **administrative legal nature**, according to the rules of article 303 Building Code 1/92.
- ▶ Urban planning plans are **deemed general regulations or requirements**, according to the Supreme Court's unified jurisprudence.
- ▶ As a consequence, **the omission of mandatory and/or binding sectoral reports in the processing of urban plans (including SEA) entails the nullity** of their definitive approval and of the plan, since, due to its normative nature, such procedural vice must be qualified as nullity of full right pursuant to art.47 of the law 39/2015.
- ▶ And the ruling of the Supreme Court of July 10, 2012, the lack of submission to the evaluation of environmental impact assessment (EIA) or strategic environmental assessment (SEA), implies **annulling the act of definitive approval of such revision of the general planning**.
- ▶ Only in 2017, more than **90 town planning canceled due to the lack of strategic environmental assessment (SEA)**.

# LEGAL OBSTACLES TO THE DEMOLITION OF ILEGAL WORKS TO RESTORE THE ECOLOGICAL BALANCE DISTURBED

- ▶ Article 105. 2 Law 29/1998 This article provides for the material impossibility of executing the judgment
- ▶ **Art. 108. 3. Law 29/ 1998** The Judge or Court, in the cases in which, in addition to declaring the construction of a building contrary to the regulations, orders the demolition of the same and the replacement of the altered physical reality to its original state, will require, as a prior condition to the demolition, and unless a situation of imminent danger prevented it, **the provision of sufficient guarantees to respond for the payment of compensation due to third parties in good faith.**
- ▶ The rule was given some flexibility by Supreme Court decisions on September 21, 2017 and March 21, 2018: “the judge who dictates the sentence that implies the demolition, to apply art. 108.3, you do not have to declare any right to compensation; what it has to do is verify the presentation of sufficient guarantees,
- ▶ This necessity to pay all debts owed to third parties as a result of criminal behavior is blocking the environment from returning to its previous original state and, as a result, harming the landscape.



# ENGOs AND FINANCIAL BARRIERS TO ACCESS TO JUSTICE: THE RIGHT TO FREE LEGAL AID

- ▶ The art.23.2 **Law 27/2006** establishes the right to free legal aid for non-profit legal persons in environmental matters.
- ▶ In the case of C240 / 09, LZ I, paragraph 50, the ECJ states that national courts must interpret the law to ensure effective judicial protection in the areas covered by the Union. Therefore, the European approach is to interpret domestic law as closely as possible to the purposes of the Aarhus Convention.
- ▶ Related to this point, the judicial resolution of the Superior Court of Justice of Extremadura on April 22, 2013, interpreting Article 23.2 of Law 27/2006, establishes that **all environmental NGOs** (not only those that have been in existence for two years) **have the right to free justice**.
- ▶ Nevertheless the matter is right now **under consideration of the Compliance Committee** in accordance with decision VII/8p of the Meeting of the Parties. (Decision VII/8p concerning Spain | UNECE).



# A LOOPHOLE: INJUNCTIVE RELIEF AND NGOS

- ▶ **Crimes and infringements are invisible**, when one becomes aware of the existence of the damage it is already too late. When one tries to stop a future catastrophe it is necessary to adopt immediate measures
- ▶ Precautionary measures are aimed at impeding the continuation of a situation liable to have harmful effects or **to ensure the effectiveness** of a future resolution.
- ▶ Environmental precautionary measures are strictly necessary, as they **usually affect large-scale facilities or works**.
- ▶ **NGOs have no budget to afford this type of measures**.
- ▶ These **measures were originally designed to protect private interests and not a “collective interest”** such as the protection of the environment.
- ▶ Regrettably we often find that final court decisions are unenforceable because the environment that they sought to protect is not there any more - is gone, and **there is no way to return to the previous situation**.



# THE “PORT GRANADILLA CASE”

Order of the Court of Justice of the Canary Islands of March 3, 2009, regarding stop the works in a new harbor to protect a vegetal specie (*Cymodocea nodosa*).

**PUBLIC AND COMMERCIAL INTEREST**



**ENVIRONMENTAL VALUES**



# MARINA DE VALDECAÑAS

- ▶ The case deals with an island located in an artificial reservoir. the area was located on land that was in the Natura 2000 network.
- ▶ The city council reclassifies the land as developable. the urbanization comprised 180 luxury villas -the cost of each one, on average, 550,000 euros-, a private beach, a four-star hotel, an 18-hole golf course and a yacht club.
- ▶ Both the Regional Court in 2011 and the Supreme Court in 2014 declared that the Administrative Decree changing the qualification of the land was null, as it was not adjusted to the legal system; and orders the replacement of the land referred to in the aforementioned actions to the situation prior to the approval of said Project and the acts that would have been executed based on it.
- ▶ There are enormous problems also for the execution of the sentence



# THE PARTIES

■ JUNTA DE  
■ EXTREMADURA



- ▶ In favour of the Project
  - ▶ Regional Government
  - ▶ Local government.
  - ▶ The Building company.



- ▶ Against the Project
  - ▶ NGO (Ecologistas en acción-CODA).
    - ▶ In 2012, the Court applied for an impossible bank guarantee of 41 million to carry out the demolition granted in the judgment.
      - ▶ The Building Company asked 75,395 millions of euros.
      - ▶ THE NGO asked a bond of 5.000 euros.



# PROBLEMS OF THE DEMOLITION

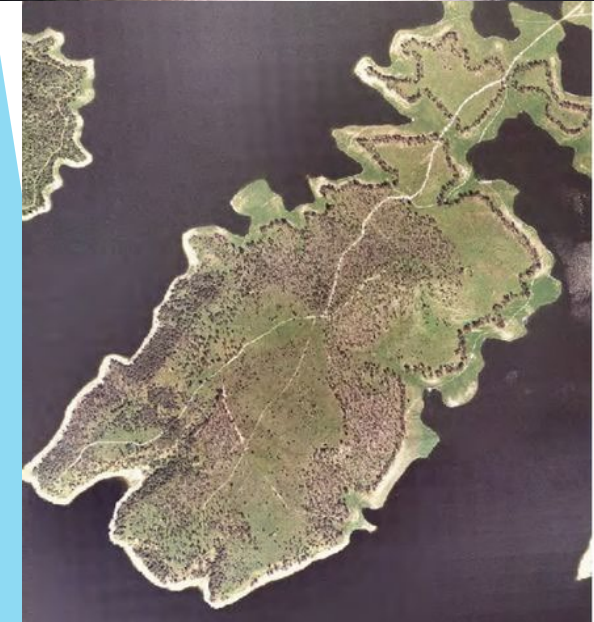
BEFORE BULIDING



AFTER BULIDING



CURRENT SITUATION





# HOTEL ALGARROBICO: SUPREME COURT JUDGEMENT 272/2016 de 10 Feb. 2016,



# THE FACTS



ALGARROBICO



# INJUNCTIVE RELIEF TO STOP THE WORKS

▶ The stop of the construction works of this hotel on the coast of Almeria constitutes another relevant case related to the precautionary measures. In this particular one, the sponsors of the project asked for the deposit of a **12 million € bond**.

▶ In contrast, the Ruling 131/2008, of 17 March 2008, from the High Court of Justice of Andalusia:

▶ “it is evident that the requirement of such a high amount as the bond requested by the appellant (...) may result in the impairment of the right to an effective judicial protection given the obvious difficulty for a non-commercial non-profit organization to meet such obligation”



# JUDICIAL RULINGS

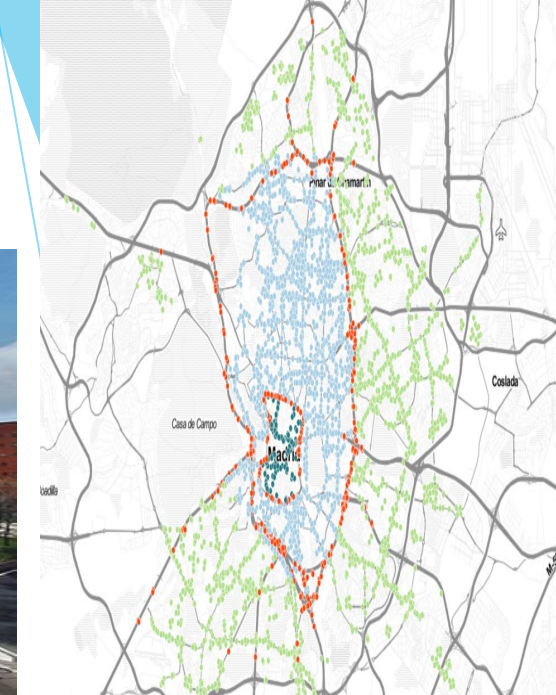
- ▶ Sixteen years ago, on February 21, 2006, a judge in Almeria gave the order to stop the construction of a immense hotel in Carboneras. This new hotel has been built with the approval of the City Council and the Board. By this time the company had constructed 73% of the hotel which started in 2003.
- ▶ The judge acted at the request of three NGOs who saw in said gigantic hotel a clear violation of environmental regulations as it misconfigured a protected natural area and violated coastal regulations. Another resolution of the Regional Court confirmed the resolution of the judge in order to stop the building of the hotel
- ▶ After this, the Superior Court of Justice of Andalusia (TSJA) turned the case upside down.
- ▶ Finally, the Supreme has resolved this contradiction this Thursday: the building is in an "environmentally protected area" in which it cannot be built
- ▶ Difficulties for Court demoliton



# PRELIMINARY RULING CJUE: CASE C-142/07, ECOLOGISTAS EN ACCIÓN-(CODA NGO)- ADMINISTRATIVE COURT NUMBER 22 DE MADRID



# THE FACTS



# POSITIVE CONCLUSIONS

## THE ROLE OF NEGOS: THE EMPEROR'S NEW CLOTHES



# ENGOs AND PRECAUTIONARY MEASURES





**THANK YOU SO MUCH  
FOR YOUR ATTENTION!**