

Becoming a Side:
Legal Mobilization and Environmental Protection in Poland

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A dissertation
submitted in partial fulfillment of the
requirements for the degree of

Doctor of Philosophy

University of Washington

2016

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Program Authorized to Offer Degree:

Geography

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Abstract

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This dissertation presents a human geographic and socio-legal analysis of environmental legal mobilization in contemporary Poland. It examines how administrative law is being used by individuals and societal groups to enforce environmental protection commitments, and what the broader implications of interactions with the administrative legal system are for legal consciousness formation and social movement mobilization in a democratic society. I argue, first, that administrative law is an important site of inquiry for social scientists. Interaction with administrative legal processes shapes legal consciousness in consequential ways, because citizens are exposed to the state's power structure, prevailing governance logics, and the ways these might be reconfigured. I conceptualize administrative legal processes in environmental cases as contact zones between state, society, and the physical earth. Because Poland's administrative legal system is rather open to environmental advocates, and bolstered both symbolically and formally by the European Union (EU) governance system, meaningful opportunities arise for differently situated actors, including those not trained in law, to engage with the legal system and interact with others in the process of mobilizing their procedural rights. Environmental legal practitioners' contact with administrative legal processes shapes an evolving, spatially specific understanding of the form and substance of state power. In the

dynamic interaction between direct observations of the physical earth, procedural rights' mobilization, and legal argumentation by various actors, spatial and temporal aspects of law are brought to the fore. Consequently, environmental legal practitioners, individually and collectively, build a critique of legal accountability mechanisms, the normative commitments of the executive state, and the prevailing political-economic system, expanding a performative critique of law already resonant in post-socialist societies. Environmental legal practitioners are actively shaping, and mobilizing others around, the indeterminacy and political possibility afforded by administrative legal processes. These dynamics are captured in the phrase "becoming a side," which refers simultaneously to Polish legal requirements for admittance as a party (*strona*, literally "side") to administrative proceedings, as well as to iterative processes of legal consciousness formation through practitioners' interactions with administrative law. More broadly, "becoming a side," refers to evolving relationships between state and society in which societal actors struggle to be involved in policy decision-making. In the latter part of the dissertation, I elaborate this more expansive sense of "becoming a side" by examining how members of grassroots movements move from local protest to proactive environmental and energy policy formation at the national level. I analyze two cases: mobilization against air pollution in Kraków, and the struggle against shale gas exploration in Żurawłów. Through the concept "becoming a side," I argue that using administrative legal tools and discourses, within formal institutional channels and beyond, is a way through which legal practitioners enact not only a re-framing of environmental advocacy, but also the very exercise of political liberal rights. They do so by sustaining a spatialized, substantive critique of state power, equipping others with skills and support to do the same, and thus enabling members of society to push for more governance accountability.

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Preface

Many commonplace pronouncements about Polish people and society have inspired and driven this project. Some might be familiar descriptors of other societies. These assertions are understandable given Poland's complex history as a land, state, nation, and culture. Indeed, preeminent (Anglophone) historian of Poland Norman Davies described Poland as a community constantly in flux, "forever transmuting its composition, its view of itself and its *raison d'être*" (1981, pp. x-xvi). The pronouncements about Polish people include: that they are deeply mistrustful of state institutions, that they do not participate in public life, that they do not respect the law—what's more, that they try their best to get around it whenever possible, beating "the system" being a source of individual and collective pride.

There are also mixed typical pronouncements about Poles' relationship to the natural environment. By some accounts, they value nature and live closer to it than elsewhere in Europe. The "failures" of communist modernity have meant the (perhaps unintended) survival, in Central and Eastern Europe, of some of the richest biodiversity Europe. Rather than be fodder for Western counterparts' arguments about being underdeveloped or not properly modern, natural entities and ecosystems provide Poles with symbolic capital to claim that, given they could protect ecosystems and species long extirpated from the rest of Europe, they have "the history, resources and *etiquette* to think and act at a Europe-wide scale" (Blavascunas 2014, p. 479, emphasis in original). Other narratives with a less opportunistic and more realist flavor predict that Poles will continue to destroy their "pristine" nature and create aesthetic urban-suburban chaos before they realize what they have done.

Within and among all of these pronouncements, environmentalists are often considered outliers, "freaks," or "eco-fanatics," pesky disrupters of public peace and security—understood

mainly as economic growth and independence from Russia—who care more about frogs than people. Curiously, one also hears people remark, as I did many times when I explained my project, that there is no environmental movement to speak of in Poland, so the topic is laughable or even suspicious.

I do not claim to exhaustively address all of these declarations in this work, nor by listing them do I wish to further perpetuate them. Rather, using human geographical and socio-legal analytical tools, I offer productive ways to better understand them by, in what follows, examining how people think about and use law, in particular administrative legal channels for protecting the physical environment, and what their interactions with the legal system might mean more broadly for rule of law, or legal accountability, and political participation in a democratic society. My argument here is, first and foremost, that administrative law is an important site of inquiry for geographers and socio-legal scholars. Additionally, even if environmental law falls short of its promise in many of the ways other scholars have already long demonstrated, in reporting my research findings, I follow efforts to steer dialogue about environmentalism along more productive lines than sheer dismissal (see Stone 2008). Examining in depth how and why a subset of the Polish population is mobilizing environmental law makes clear that interaction with the administrative legal system shapes legal consciousness in consequential ways, on an individual level and with respect to building enduring social movement alliances. Administrative legal processes provide meaningful opportunities for differently situated state and non-state actors to interact, mutually learn, and shape ever-evolving legal accountability mechanisms.

Underpinning all of my arguments is an analytical lens which sees legal consciousness formation as a spatialized, multi-dimensional process. What I mean by this is that people's

orientations to and understandings of law develop in dynamic, often contradictory ways, and that spatial aspects—like direct observation of environmental degradation in a particular place, as well as detailed understandings of the organization of discretionary decision-making points at various jurisdictional levels and how those levels interact to constitute the world—are integral to understanding such processes. This lens allows for examination of rule of law beyond the usual metrics, and not merely as a state-led project; rather, it comprises a set of significant social practices at the interface between state, society, and the material world.

Acknowledgements

Even though I get to write my name on the title page as the sole author, this work could not have been possible without the help of so many people. I would like to first express special thanks to John C. Hudson for helping me get started on this grand geographical adventure, for keeping me grounded all along the way, for the cherished meals and laughs, and most recently for the office space and comradery in the “Clark House.”

I have been extremely fortunate to have a distinguished, dedicated group of scholars guiding my work. Thank you to my advisor, Steve Herbert, for the steadfast encouragement and support throughout this entire process. Steve has modeled for me and his other students the type of academic, educator, mentor, and writer I only hope to become. Profuse thanks to the other members of my doctoral committee: Matt Sparke, Lucy Jarosz, Rachel Cichowski, and George Lovell. These faculty members have been an immense source of support, inspiration, and scholarly review of my work. I am profoundly grateful for all their contributions in all the forms those have taken, whether it was deliberation in a graduate seminar, writing letters in support of my project so I could obtain funding, or providing feedback on the research at various stages—and of course, these faculty members have also provided essential material support in the form of teaching appointments. I have tried to channel each of these scholars’ strengths and contributions in this work, as I hope the final result attests.

Deep thanks to my parents, for life and nourishment, in the most basic as well as most diverse, rich senses of those words. My mother, Halina Grobelski, has always provided care and perspective, her own difficult journey and life-affirming energy reminding me I have the strength and grit to not give up when things get difficult. Christopher Grobelski, who I have more than once dubbed my “Red Cross,” has been a supporter, advocate, and reader—for all of his forms of

support I am more grateful than I could verbalize. Andrzej Krzysiak, a wordsmith and mentor in his own right, has been an immeasurable source of lifelong support. Andy, I am only sorry that your life was too short.

I have drawn much inspiration from my wickedly intelligent siblings: my sister, Jenny, who uses law as a tool for social justice every day, and my brother, John, who, when I see brought to life by curiosity and the investigative process, I have confirmation we're cut from the same cloth. Thanks to all the members of my family for rallying whenever I needed something, anything, large and small, across the ocean or continent. Thank you to Sophie Pratt, my last living grandparent, for feeding me and spoiling me whenever possible.

I hope that this work can honor the lives of Rozalia, Tadeusz, and Mieczysław Migut, as well as Charles Pratt. I did not know you as well as I would have wanted, but the seeds of inquiry and generosity were planted and nourished early by you.

My closest friends, who are like family to me, deserve so much recognition for keeping me honest and bringing so much love and joy into my life. Mónica Farías manages to bring warmth, comfort, and magical fun even in the most austere times. Uliana Prosvirina, Ryan Burns, Chris Lizotte, and Dan and Tatiana Weaver—you have all made Seattle a much more welcoming place for me, and for that I could not be more grateful. Meghan (Horbas) and Jim Gardner, Colleen Kenny, and Joshua Williams – I so cherish the ways you all know and anchor me. Much thanks and love to Mackenzie Miller, ruckuses notwithstanding, for helping coax me out of my shell, and for the much appreciated chances to practice affirmation and grace. Thank you to Michalis Avraam for the seemingly endless well of positivity, the occasional decadence, and the Philz deliveries. Thank you to the following pals (who all happen to be sociologists) for

letting me lean on you at various points during my graduate school journey: Jason Trefts, Nathan Obbards, and Tim Thomas.

For their for their fellowship, comraderie, and support, I thank my esteemed friends and colleagues (past and present) in the Geography Department at the University of Washington, especially Brandon Derman, Jesse McClelland, Mónica Farías, Matt Townley, Mike Babb, Ryan Burns, Chris Lizotte, Will Buckingham, Skye Naslund, Katie Gillespie, Joe Eckert, Lauren Drakopulos, Lee Fiorio, Leonie Newhouse, and Jeff Masse. Thank you to colleagues and mentors affiliated with the Law Societies and Justice Program/Comparative Law and Society Studies (LSJ/CLASS), especially Anna Reosti, Waleed Salem, Carolyn Pinedo Turnovsky, and Anne Frost. I would like to express appreciation to all my undergraduate students in Geography and LSJ over the years: you've kept me sharp and inspired.

The Department of Geography at University of Washington has been a dynamic community within which to work and grow professionally. Massive thanks to the departmental staff, past and present, including Darian Smolar, Marci Melvin, Rick Roth, Sue Bernhardt, James Baginski, Andrew Romero, Wendy Kramer, Sharon Frucci, and Parwati Martin—we could not do our work as teachers and researchers without you. Thank you as well to Professor Emeritus Craig ZumBrunnen for your fun-loving spirit and your initial welcome into the department.

The University of Washington Libraries facilities and staff were crucial in realizing this project. I especially would like to recognize Slavic Languages and Literature Librarian Michael Biggins and Geography Librarian Amanda Hornby for their outstanding work and support of scholarly inquiry. Thank you as well to Kat Dzwirek and the Slavic Languages and Literature Department, The University of Washington Polish Studies Endowment Committee, Phil

Shekleton and the EU Center of Excellence, and the Ellison Center for Russian, East European and Central Asian Studies (REECAS).

The following truly remarkable institutions in Seattle deserve high praise: The Seattle Polish Film Festival, the Polish Home Association/Polish Cultural Center, KEXP, and KBCS. Heartfelt thanks to the Polish Book Club in Seattle, especially Lena Wrozynski, and to the wise, skilled women at Phinney Ridge Yoga.

Thank you to all of the people in Poland who supported me and my project: Kasia Tomczak for initially picking me up from the train; Julia Świokła and Michał Chmielewski for your hospitality; Wielkie Żarcie for a place to go; Piotr Matczak and Marcin Sadło at Adam Mickiewicz University Institute of Sociology in Poznań; Gosia Grodzińska-Jurczak, Joanna Cent, and your team at the Institute of Environmental Studies at Jagiellonian University in Kraków; Ola Wagner at the Jagiellonian University Institute of Sociology in Kraków; the Varia Polish Language Center in Kraków, especially Ola Gołdyn and Monika Świerkosz; Zbyszek Migut, Monika, Nikoś, and Andrzej Garus; Przemek Zarubin for being a gracious landlord; the Kokosz family for always taking good care of me; Mietek Jabłoński for helping me navigate Lubelszczyzna; Ewa Sufin for your contagious positivity and energy; Marcin Harembski and the Harembski family for welcoming me in your home; Karolina Sobierajska for diligently following up on all my questions, even the ones that led to dead-ends; Anna Kalinowska and the Warsaw University Centre for Environmental Studies; Agnieszka Blaszczyńska for your regularity and etiquette; Liz Bryant for the perspective and sense of adventure; Hanna Machińska for orienting me on socio-legal scholars in Poland; the folks at ClientEarth; and to all of my respondents who shared their stories with me and took care to explain technical details. Extra special gratitude to Danuta and Stanley Migut for the nourishing meals and conversation. Rest in Peace, Wujek.

Thank you to Anne Burrill for introducing me to colleagues in the European Commission, and to Andrea Lode for brightening up my time in Brussels.

Last but not least, I would like to thank Eunice Blavascunas and Brandon Derman, wonderful scholars and thoughtful people, for lighting the way; Hannah Harvester for being a kindred spirit in our parallel explorations of Poland; and Maya Horowitz, Michael Horowitz and Jeannie Gutierrez for the unexpectedly pleasant and profound side gig. Finally, thank you to all the people who said “no,” forcing me to find another way to get where I needed.

I tried to tell the following story faithfully, and acknowledge those who deserve recognition; inevitable errors and omissions are mine. This work is dedicated to all the folks in Poland and elsewhere working hard to protect ecosystems and democracy. It is also dedicated to those entities, dead and alive, who teach us about resilience and redemption.

Chapter One

From ‘anti-political politics’ to becoming a side

“Nature! You are politically suspect”

-from *Nature-threat*
by Czesław Miłosz, 1944
(cited in Fiedorczuk 2011, p.238)

“And who will begrudge me
anthropocentrism in the land of
anthropocentric religion
Or of equally anthropocentric atheism?”

-from *To Nature*
by Czesław Miłosz, Final poems
(Miłosz et al. 2011, p. 304; cited in
Fiedorczuk 2011, p. 235)

“Natura! Politycznie jesteś podejrzana”

-z wiersza *Przyrodzie-pogróżka*
Czesława Miłosza, 1944
(Miłosz 2001, p. 244; cited in
Fiedorczuk 2011, p.238)

“I któż mi zarzuci antropocentryzm
w krajach antropocentrycznej religii.
Albo równie antropocentrycznej niewiary?”

-z wiersza *Do Natury*
Czesława Miłosza, Wiersze ostatnie
(Miłosz 2009, p. 279; cited in
Fiedorczuk 2011, p. 235)

“Who wants to swim in that green soup?” Jan¹ said, looking out across the water. Indeed, as I peered down into the lake from the wooden dock upon which we were standing, the water had barely any visibility. We stood in the beach and swimming area of a lake in a larger Polish city. The lake was about eight miles around. The area was sparsely populated considering the balmy July weather. This was the first stop on a bicycle excursion Jan had made countless times before. This time, in response to my request for an interview to discuss his environmental protection work, he had invited me to accompany him.

Jan told me about the aerator, the wind-powered, blue and silver contraption in the middle of the lake. He explained how it wouldn’t solve the problem—this lake, he reasoned, unlike a river, was not replenished with new water all the time, and it was not sufficiently

¹ All names have been changed.

oxygenated, which was unhealthy for the entire ecosystem. The problem, as he had identified it, was phosphorous compounds in detergents and wastewater coming from the adjacent district, which had undergone rapid development in the past decade. When it rained too much, the capacity of the sewage pipes and retention ponds was too small, so wastewater mixed with rain water and eventually drained into the lake.

With a sparkle in his blue eyes, Jan revealed that this was his Arcadia, where he spent his vacations as a child—that was one reason why he had taken so strongly to saving this lake. Then, sharply snapping out of his nostalgia, he mounted his bike and gestured for me to follow him on the bike he had lent me for our tour. The ride was bumpy from miniature conifer cones littering the ground. Under the pleasant shade of trees, we rode around to the opposite side, to the point Jan had identified as the one where the water run-off from the adjacent district was flowing into the lake.

Jan was a chemist, now retired, as well as a member of the local branch of an environmental organization. He had been taking water samples at various locations near the lake every week for the preceding year. Some detective work had been necessary to identify how the water was entering the lake, but since its discovery, he had been sampling and analyzing the water from that point and a few others on a regular basis, and publishing the results online. He also disseminated data about the depth of the water's transparency to the public on the dock of the lake, using a makeshift sign he crafted out of wood and paper.

The next sample location required a strenuous—and somewhat treacherous due to the prevalence of stinging nettle plants—ride through an untamed tall grass meadow. We arrived at a series of retention ponds, also full of green water, next to a pumping station. I noted a sign prohibiting unauthorized persons from treading on the property, which Jan waved off as

ridiculous. He said those signs are not really taken seriously in Poland, that the people who regularly walked through this meadow would continue to do so. At this stop on the tour, Jan explained that the second retention pond's barrier was not sufficient during heavy precipitation events, when the volume of storm water was too high. After this stop, we took a longer ride to the neighborhood development from which the wastewater originated, continuing our conversation as we rode.

In this way Jan provided me with his account of the biophysical story, the lay of the land and the causal processes by which a cherished ecosystem was being harmed. It was a story about lack of storm and grey water capacity amidst rapid suburban development, but, as Jan's narration along the way indicated, it was also a story infused with state power and law: how one might discover the tools and avenues law provided to do something about environmental harm, as well as how s/he might come to discover the limitations of those tools and avenues.

Jan's remarks about his interactions with the Polish legal system in which he was trying to get public officials to take responsibility for pollution of the lake indicate a rather negative assessment of the legal system, as well as a relatively detailed plotting out of the institutions and actors responsible, or potentially responsible, at various levels, for the continuing harm. He also notes how a biophysical entity with particular properties (in this case water) facilitates avoidance and delay of addressing the issue.

This is a criminal case, this is an administrative case, the permit, the law on which it was issued, was broken. Everyone knows what is going on, but they don't want to do anything about it. I think this comes from the type of policy they have adopted, all the institutions. They want to ride it out, wait the three or four years until [there's] a larger pipe through which the water from [village name] will run, and the problem will just go away on its own, because the sewage will be carried away. So they want to keep me at bay here, and everyone else who is pointing fingers and saying that [the village] should pay for this reclamation of the lake, they are counting on this technical problem to be solved by waiting it

out. Except that from what I know, if we wait four years and let all those things flow into the lake, no one will be able to save it (R2).

He goes on:

...this is an instance of just not dealing with the case, because if they dealt with the case, some institution, either the Provincial Environmental Inspectorate, or the Prosecutor would have to raise these questions – The village polluted the lake, the losses are already \$400,000 in reclamation costs, it will surely be a million, even more. Let them cut off the flow of wastewater, pay the costs. That is according to me what should happen in this situation, but all the government offices are fighting hand and foot to not do this, because if they did this, then the county would have to admit that they gave a water permit in an improper way, and for two years now they know that it's like this, that the law has been broken. We will keep working on this, but I see the mechanism at work here, trying to displace the responsibility, not making any kind of decision. The city [...] is also doing this, and the county. They would all have to admit it. The General Directorate for Environmental Protection who remitted the matter, said that in the fall the water's visibility had improved, spontaneously, as they so nicely wrote, which is complete nonsense to anyone who knows anything about lakes. If they wrote such nonsense, then there are two ways to look at it: either they are total morons to have written such a thing, which I don't think they are, or they know that they wrote nonsense, but only so that they don't have to deal with this issue (R2).

Jan critiques how various institutions shirk responsibility for environmental harm by coordinating delays. He asserts that violations of justice are occurring at multiple levels, spanning multiple realms of law, criminal and administrative. The integrity of an ecosystem is being knowingly violated, and Jan has scientific evidence to support this claim and challenge governmental institutions' own claims about the water quality. The biophysical environment itself is, paradoxically, implicated in the retreat by public officials from responsibility for harming it; the intentional prolonging of legal proceedings for several years, according to Jan's assessment, is an opportunity for public officials to allow the water to eventually carry the particular subject of the legal complaint elsewhere, while the irreparable damage done to the ecosystem would be overlooked.

This case, and others I encountered during my research, raises many of the usual, ever important questions about the extent to which governmental institutions, even those specifically designated to do so (such as Poland's General Directorate for Environmental Protection, named in the quotation above), may effectively prevent or remedy environmental harm in the face of economic development imperatives. How should a system of accountability to environmental harm be formulated, who exactly should be held accountable, and on whom does the responsibility fall to enforce this accountability? If legal tools are ultimately limited in their ability to prevent or remedy environmental harm, do they still matter? If so, how?

The cases I examined for this project provide some answers these questions. They show how environmental advocates' contact with administrative legal processes shapes an evolving, specific understanding of state power. In other words, environmental advocates gain a detailed understanding of governmental entities, their relationships to one another, to the public, and to the physical earth itself. Observation of the physical earth mediates how law (and the broader normative commitments of the state) is perceived and mobilized. Contact with administrative legal processes in concert with observation of the physical earth can be politically mobilizing, even while, or precisely because, it furthers a culturally resonant critique of law's effectiveness. In the lake reclamation case, for example, Jan's own field investigations and his interactions with the administrative complaint system, which were rather extensive despite the cynicism expressed during our conversations, fueled a larger campaign – not just within the narrow confines of formal legal proceedings – to save the lake and simultaneously expose the limits of the existing legal accountability model. Each time a legal accountability model and the state actors who put it into practice lean too heavily on formalistic procedure, are not adequately responsive to the public, and do not sufficiently apprehend biophysical harm, they risk de-legitimizing themselves.

The critique of law born out of contemporary environmental advocacy is not wholly unfamiliar in such a setting where many still remember firsthand styles of governance under administrative state socialism. In Polish society, even though environmental issues per se may not resonate that broadly, critiques of overly concentrated state power and state indifference to basic well-being, and the history of grassroots mobilization in response, certainly do.

In these ways administrative legal processes in environmental cases comprise “contact zones” between citizens and the state, which, in their invitation to detailed discovery of governmental power arrangements and their invocation of biophysical entities, are important sites of political critique and democratic learning processes between differently situated actors, within and outside of formal state structures.² As such, they are indeterminate and potentially capacious sites for fostering broader societal political mobilization. While Poland’s membership in the European Union governance structure exacerbates many domestic tensions and sources of environmental conflict, it is also a significant source of empowerment and external validation for environmental advocates’ arguments, and their exercise of civil and political rights.

In this dissertation I develop these ideas further. To do so, in this introductory chapter I take the reader through a swath of empirical developments and literature which inform my project and poise me to answer the fundamental questions of the study: why and how has environmental legal mobilization proceeded in Poland, and why does it matter? To begin this endeavor, I introduce one of the cultural tropes that has emerged around environmental legal

² Mary Louise Pratt (1991) used the term “contact zone” to refer to spaces wherein “cultures, meet, clash and grapple with each other, often in contexts of highly asymmetrical relations of power, such as colonialism, slavery, or their aftermaths as they lived out in many parts of the world today”(p. 34). This term continues to be used and adapted in human geography, by scholars interested in encounters and exchanges at and across sites of uneven, shifting relations between actors of disparate influence, including non-human actors (see for example Sundberg 2006; Haraway 2008).

mobilization in Poland: the so-called *ekoharacze*, or eco-extortionist phenomenon. It provides an initial glimpse into some narratives in society about the use of administrative legal tools by environmental advocates. Then, four sections lay out the analytical framework, which draws on a diverse set of academic literatures, including socio-legal studies, human geography, political science, and sociology. A short section after that addresses why the study focuses on the case of Poland, which leads into an overview of the dissertation's structure as a whole.

Eco-extortionists?

In 2012, major Polish daily newspaper *Rzeczpospolita* set off a fresh permutation of public debate about environmentalists' motives and tactics when it reported a new threat to Polish industry: environmentalists in suits. News articles warned that environmentalists had discarded their climbing gear and instead begun donning suits so that they could block investments using a new tool, law (Olszewski 2012; Roguski 2012; Skłodowska 2012; Stanek 2012). Climbing gear is an allusion to recognizable protest tactics used by perhaps one of the most familiar environmental organization "brands" in Poland, Greenpeace, in which activists scale smokestacks or buildings to hang provocative banners, or chain themselves to threatened biophysical entities such as trees, in order to send a message to the public and political decision-makers by way of the media.

Negative media coverage of environmentalists in Poland is not new, nor is Polish environmental organizations' use of law as a tool to further environmental protection. What this wave of articles and internet buzz was responding to was the appearance of an apparently new type of environmental group onto the scene in Poland, namely ClientEarth Poland, a London-based environmental legal organization, founded by an American, which had just opened an office in Warsaw. ClientEarth Poland opened its Warsaw office with a staff of Polish lawyers in

2012 and has received much criticism in Poland for being “from outside,” for having a foreign, difficult to pronounce name, and for contesting coal energy investments (Podolska 2014).

These “enemies of coal,” Poland’s predominant energy source, such media coverage explained, were using specialized legal expertise to block the country’s largest planned energy investments by questioning the validity of a suite of permits issued by government entities. Besides being presented as a new type of group (specialized in law), commentators also expressed unease about the way the tactics were being used, to challenge certain energy sector investments. This was, according to such narratives, a departure from the repertoire of “standard” or “native” Polish environmental groups, even the ones active in legal proceedings, such as Polish Society for the Protection of Birds (*Ogólnopolskie Towarzystwo Ochrony Ptaków*), and the types of battles such groups undertake (protecting nature and animals).

The cases brought against permits for new coal investments and media coverage of them in Poland exacerbated existing negative representations of environmental advocates as obstructers of the country’s economic development and national interests, or as charlatans to be treated with suspicion. A key source of such antipathy towards environmentalists can be traced to their increasing, and increasingly skillful, use of administrative legal tools, sometimes referred to as procedural rights, on offer to environmental organizations registered in Poland. These rights have long been anchored in domestic administrative law and have been augmented over time by the adoption of international and European Union (EU) law. Thus, a lively development within Polish environmental politics in recent decades is not only the growth of more specialized environmental-legal organizations, but also the expansion of legal activities among other environmental organizations, and the use of the administrative appeals system by an array of individuals and groups.

The apparent novelty of public interest environmental-legal organizations in Poland is part of larger shift in Europe, led by ClientEarth. In 2007 when the organization was formed, there were only a handful of practicing public interest environmental lawyers in Europe. This is in contrast to the United States and Australia, which have long histories of public interest environmental legal activity. James Thornton, the American founder and CEO of the organization, was surprised to find that European environmental groups in Brussels worked on legislation without lawyers helping them, a state of affairs which to him was akin to having an operation without a surgeon present (Thornton 2013, p. 23). Besides being helpful in the creation of good (meaningful, scientifically sound, enforceable) laws, public interest environmental lawyers, according to Thornton, also deliver four other distinct types of public good: implementation of laws, enforcement, providing the right incentives, and building basic democracy (Thornton 2013).³

Environmental advocates' use of legal tools in Poland has been met with much backlash. A set of discourses about environmental advocates' use of administrative legal tools circulate and popularize the "eco-extortionist" stereotype.⁴ This stereotype, which the Polish media began reporting on as early as 2000, and which was in a feature story in Polish Newsweek in 2002 (Kęskrawiec 2002; Newsweek Polska 2002; see also Łoziński 2003), runs as follows: an (insincere or founded just for this reason) environmental group enters into administrative proceedings to contest a permit decision or block an investment for its own gain—that is, in exchange for a "donation" (bribe) from the investor, the environmental group agrees to remove itself from the administrative proceedings and cease protest. Since it is rather easy to register a

³ By implementation, Thornton means detailed regulatory measures which make legal duties and obligations clear and will achieve a real change of culture envisioned in the law within companies, government, and among citizens.

⁴ Other words used synonymously with this term include: eco-blackmailers (*ekoszantażysty*); pseudo-environmentalists (*pseudoekolodzy*); eco-terrorists (*ekoterroryści*); eco-freaks (*ekooszolomy*).

social (and environmental) organization in Poland, and since such organizations have rather open access to administrative proceedings in Poland's legal opportunity structure (LOS, explained in detail in Chapter Three), this stereotype finds a plausible basis in the LOS itself.

Evidence suggests that there have been some incidents of potential misuse of the administrative complaint system, one of the most cited involving the organization "Friendly City" (*Przyjazne Miasto*). In 2002, the organization received two million Polish złoty (PLN) for withdrawing its administrative appeal to the Supreme Administrative Court against the construction permit for a shopping center in Warsaw, an investment worth 270 million Euro. In addition, the organization received 275 thousand PLN for consulting on the construction of the shopping center (Micińska 2011, p. 187). The previous year, 2001, Citizens Environmental Movement (ORE, *Obywatelski Ruch Ekologiczny*) accepted a donation of 240 thousand PLN and 11 mountain bikes from an investor of an entertainment-shopping center in exchange for the withdrawal of a complaint the group submitted about the construction permit. ORE published the text of the agreement with the investor online, and emphasized that according to the organization, the withdrawal of the complaint was done in a legally appropriate way (*ibid*, p. 187).

In subsequent years, there were debates among practitioners on this issue, often spurred by what was perceived to be negative or inaccurate media coverage. Some who had been accused of acting unethically seemed to be defending such practices, arguing:

when going up against huge capital interests for whom bribes are just a line item, we had to match our rival... the benefits from funds received, the ability to continue environmental educational work, outweigh the costs, the reputational costs, and that some parking lot was built a bit faster (quoted in Frączak 2004).

In this statement, the use of administrative legal complaint channels is understood as a mechanism of justifiable transfer and redistribution of resources from wealthy companies to

groups of modest means working for the public good. In response, the environmental movement in Poland denounced such groups as bad apples and wrote a “Green Ethical Charter” (*Zielona Karta Etyczyna*) to which environmental groups could sign on and clear their reputations (Polska Zielona Sieć 2013).

Elaborate theories about corruption and conspiracy, which find much currency in post-Communist societies, abound on all sides regarding these practices. Many see the proliferation of discourses about “eco-extortion” as a provocation on the part of investors to weaken environmental interests. Some have suggested or provided anecdotal evidence that the creation of an environmental group to block certain investments is a ploy being used by investors themselves to scare away their own competition from a lucrative investment (Kęskrawiec 2002).

A larger point is that eco-extortion discourses work to support attempts to roll back environmental and other groups’ access to administrative legal processes. Instead of discussing the use of existing criminal codes related to fraud and extortion for those who may be using such rights inappropriately, these occasions have been used to attempt reforms which limit societal groups’ access to administrative procedures for governmental monitoring purposes.⁵ This undermines the development of civil society and mechanisms meant to maintain accountability in governmental decision-making (Rybski no date).

Infringing on rights to access administrative legal processes—through the propagation of discourses which lead to antipathy and intimidation, or legislatively—limits the role social and environmental groups play in monitoring the public administration and upholding the public and

⁵ Specifically, an amendment was made to national regulations about Environmental Impact Assessment proceedings requiring public participation: only organizations that have legally been in existence for a minimum of 12 months before the beginning of a procedure are entitled to participate. Legal analysts have pointed out that this violates participatory rights foreseen in the Aarhus Convention, and that it is also unconstitutional, since differentiating between environmental organizations older and younger than 12 months in terms of legal status amounts to unequal treatment (Rybski no date).

environmental interest.⁶ When procedural rights are misconstrued or when their use is conflated with corruption, the power and resource imbalances between investors and social or environmental advocates may be further exacerbated.

Eco-extortionist discourses work to discredit not only environmental advocates, but other social movement actors wishing to enact political liberal rights. These discourses direct attention away from accountability in administrative decision-making related to public and private investment processes and the quality of democratic governance. Instead, they direct emphasis toward anthropocentric, economic growth values, and particular notions of geopolitical security, as primary and supreme to the “public interest.” They also suggest particular citizen-state relationships and reject others.

Would-be environmental advocates and other societal groups have the EU governance system as a bulwark against much of the backlash, particularly attempts to legislatively rollback access to administrative legal processes. The depth and durability of the EU’s reach, however, may be limited absent supportive domestic practices. Given all of these factors, what does mobilizing administrative law by environmental advocates in Poland mean, then? How and why does it matter?

I argue that it matters, because it can ultimately lead to broader societal mobilization around governance accountability. As individuals mobilize administrative law in particular cases, their experience doing so (and the mixed, often disappointing results) may over time lead to going beyond individual action on particular project. They may endeavor to be involved in

⁶ Data collected by the Polish Supreme Audit Office (*Najwyższa Izba Kontroli*) indicates that such monitoring is sorely needed. For example, the office found in one report that one in every three decisions in investment processes in the Mazowieckie Province is issued with legal violations (NIK 2004, cited in Kupczyk et al.). The office also negatively assessed how Strategic Environmental Impact Assessments are carried out in Poland, in ways that significantly hampered citizen rights to information and participation (NIK 2016).

more collective efforts to change how governance occurs more broadly—and this in turn may mobilize others, who may neither have direct involvement nor interest in environmental issues.

Put in another way, through experience with administrative legal processes (broadly meaning the entire range of ways individuals or environmental groups may interact with government officials, from information requests to administrative lawsuits), people acquire skills and critical awareness to pursue accountability of public officials, not only in individual cases, but more systemically. When it becomes clear that legal tools themselves are insufficient, broader mobilization becomes necessary to achieve substantive goals. Participation in administrative legal processes enable a skill set and way of thinking which facilitate the drawing of connections between—to use Rose-Ackerman’s (2005) terms—performance and policy accountability. Public interest legal organizations play a key role in supporting grassroots movements as well as small, local organizations and in connecting individual cases with a broader system.

As environmental groups increasingly undertake critiquing investment projects in Poland or shaping the course of economic development by mobilizing administrative law, they challenge dominant understandings of what environmentalists “do,” and the relationship of environmental issues to other social or public policy issues. They also assert a different sort of relationship between citizens and state, one in which the state must be held accountable for its decision-making and must allow for citizens to chime in on what “public interest” means.

Through the notion of “becoming a side,” the title of this work, I argue that using legal tools and discourses is a way through which environmental advocates enact a re-framing of environmental advocacy and the very exercise of political liberal rights by sustaining a spatialized and substantive critique of state power, and equipping others to do the same.

“Becoming a side” refers simultaneously to the formal legal requirements for environmental organizations to be able to bring an administrative complaint in Poland, as well as to, more broadly, the evolving relationships between state and societal actors in which societal actors actively struggle to be involved in governance and policy decision making processes. The term signals the analytical and interpretive lens of human geographers, and in particular those who have contributed to the interdisciplinary—or even post-disciplinary, see Braverman et al. (2014)—intellectual project of legal geography. The lens can be generally characterized as thinking about space and social entities in processual, relational terms. Social-environmental arrangements, accumulations of political power and their operationalization via formal legal institutions are not static backgrounds or inert containers. Rather, they are constructed through political and economic processes and the practices of social actors, and these processes and practices have a spatial dimension. This spatial dimension is integral to how those processes operate, intersect, are sustained or changed. “Becoming a side” thus implies emphasis on processual, formative, and spatial aspects of mutual interaction between individuals, social groups, state entities, and the material world.

Using human geographical and socio-legal analytical tools, in what follows, I use environmental legal mobilization in Poland in recent years as the basis upon which to theorize about the relationships between administrative law, legal consciousness formation, and social movement mobilization. My argument is, first, that administrative law is an important, if often overlooked site of inquiry for geographers and socio-legal scholars. Additionally, even if environmental law falls short of its promise in ways others have shown and that my data largely corroborate, this work shows how interaction with the administrative legal processes shapes legal consciousness in consequential ways, on an individual level and with respect to building social

movement alliances. Administrative legal processes provide meaningful opportunities for differently situated state and non-state actors to interact and critique existing legal accountability mechanisms. Underpinning all of my arguments is a conceptualization of legal consciousness formation as a spatialized, multi-dimensional process.

I now move through four sections which detail the analytical framework. First, I establish why administrative legal processes matter, and why it is worth examining them, particularly in Poland. I conceptualize administrative legal processes as contact zones between state, society, and the biophysical earth. The term “becoming a side” is meant to capture the important legal and political learning and socialization processes occurring at these contact zones. Second, I discuss legal rights’ mobilization as a form of political participation which shapes and is shaped by legal consciousness. I elaborate further on legal consciousness in Chapter Three. The main point for purposes of this chapter is that, in addition to the legal opportunity structure, legal consciousness is an important contextual factor to understanding how law matters to democratic governance and social movement activity. Third, I discuss how human geographic theory enriches analysis of legal processes by bringing in attention to the physical materiality of place and spatial dynamics. I then go on to discuss one of these spatial dynamics that is especially consequential to my study of environmental legal mobilization in Poland and the EU: scale politics.

Administrative legal processes as contact zones

In his first book on the topic, David Ost posits that the Solidarity opposition in Poland developed an alternative conception of politics, which he captures using the term, “the politics of

anti-politics.”⁷ What he means by this is a rejection of politics in the sense of a rejection of the business of government, a necessary and deliberate—but not indifferent—rejection of the (Communist Party-controlled) state. It was not a rejection of politics altogether, however, but rather the development of a different understanding of politics, one focused on civic activity within society. Solidarity’s project was about building a “vital, active, aware, self-governing, and creative *society*” (1990 p. 2, emphasis in original). It was not about seeking or taking power in state structures. It was about changing people, not governments. The point of “anti-political politics” was to create a world where people took an active, creative role in shaping their own worlds, and themselves in the process. Ost notes that in 1980-81, the word *podmiotowość* (literally translated as “subjectivity”) came up every time the domain Solidarity strove to create was under discussion. The word evokes autonomy, refers to “the creative, active process whereby people become the ‘subjects’ of history rather than its passive ‘objects’ ” (1990, p. 4). Through his account Ost shows how the Solidarity movement reintroduced the notion of “civil society”—as based neither in the state nor in the marketplace but itself a vibrant political public sphere—into contemporary political discourse, and in doing so challenged and ultimately toppled a communist regime.

The problem, of course, was that once recognized by (“legalized”) and negotiating with the state, and thus altering both the state’s and the movement’s very character, the movement could no longer maintain a politics that flouted the state and state power (ibid, p. 5). Ost ends his account of the movement on a somewhat pessimistic note, saying that Solidarity’s grand program failed due to its “lack of an institutional model for political interaction [between state and

⁷ Borrowing from George Konrad’s 1984 essay, “Antipolitics,” on the new (at the time) opposition politics in Eastern Europe.

society]” (ibid, p. 203, quoted in Ost 2005, p. 4). Its anti-political strategy had become obsolete (ibid, p. 5).

Taking up these provocative ideas put forward by Ost, I suggest a closer look at the legal institutions and practices that do exist in Poland. The institutions resulted from the mass societal mobilization Ost examined, and they bear the imprint of Solidarity dissident intellectuals. They are now reinforced by the EU governance structure. In this work I examine actually existing interactions between state and society occurring in the perhaps mundane but important administrative legal realm. I see *strona* (“side”) as cognate to the concept of *podmiotowość*. A key difference, of course, is the contact with the state implied in *strona*.

My conceptualization of “becoming a side” draws upon the important work of political scientists who have developed process-oriented, political socialization, or political learning accounts of how contact with state entities influences political orientation and participation (Soss 1999, 2005; Lerman and Weaver 2014). Such accounts, by looking at people’s direct experience of non-electoral institutions, further our understanding of how interactions with governmental institutions and actors play a socializing role, influencing how people conceptualize the democratic state and their place in it. These processes may be more complex to study than electoral politics, but as a “lived experience of citizenship,” they are no less crucial to thinking about political process, the character of a state and its democratic institutions. Noteworthy and weighty in this regard are the recent works of Lerman and Weaver (2014, 2010) who study how a growing number of citizens experience the “state-within-a state” comprising the US criminal justice system. They argue that the carceral state (criminal justice institutions)—in its institutional features and in the ways it has changed the lived experience of citizenship for so many Americans—has not only grown, but that it has grown more anti-democratic in character,

breaking with American democratic norms. This has individual level political consequences for citizens; the lessons instilled through these interactions inspire negative orientations toward government and are antagonistic to democratic participation (2010). Taken together, this work supports a larger, simple point: people learn about government through direct contacts with it. What is more, opinions about a specific institution or agency shaped through direct experience are generalized to broader notions of the government and political system (Lawless and Fox 2001), and influence individuals' own perceptions of political standing, membership, and efficacy (Lerman and Weaver 2014, 2010).

As people learn democracy by doing, experience of participation in government institutions can develop or hinder their civic capacities and habit, consciousness of membership in a political community. Institutional design is consequential, because it

provides a direct view of how government works, what role individuals are expected to play, and their worth vis-à-vis other citizens and the state. Through social programs, citizens garner important material resources, but also receive a blueprint of the character, capabilities, and commitments of the state. These lessons feed back into participation and engagement (ibid 2014, p. 13).

In this dissertation, I show how administrative law in a post-socialist setting serves to create contact zones between citizens and the state in which legal consciousness, social movement politics, and the physical earth itself can be consequentially shaped and re-worked. Administrative law “frames the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process” (Rose-Ackerman et al. 2010, p. 1). It encompasses a set of relationships and processes at the interface between governments and citizens. Its enactments, and the legal discourse produced therein, are not best understood as merely statutory or regulatory, but rather on the front lines of contestations about the structure and commitments of public law (See Spade 2011). Argumentation in and around administrative

law, particularly in environmental matters, unavoidably takes on constitutional weight (Aman 1992, pp. 2-3, 29). It draws attention to (and thus may raise questions about) the relative power of courts, administrative agencies, legislatures, and the executive to interpret the broader regulatory context and the rights and responsibilities therein.

Administrative law also deals in the day-to-day, nitty-gritty details of public administration. In the Polish environmental governance system, administrative entities issue administrative decisions, which are adjudicated through, and end, administrative proceedings. Decisions may: issue permits or licenses (for example a construction permit, an air pollution emissions permit); approve a plan (like a construction blueprint); establish a specific obligation (for example the fine for unlawful sewage discharge or for ‘legalizing’ an unlawful construction); or order some action (for example demolition of a building or structure). Decisions are issued by first instance administrative authorities, which citizens or organizations can appeal to second instance administrative authorities, if they have reason to think the decision made was inconsistent with relevant statutes, or that the proper procedural steps were not taken, or both. After that it is possible for citizens or organizations to bring an appeal to administrative courts.

That it deals in the nitty-gritty does not make administrative law detached from government policy-making and politics. Rather, it is deeply intertwined with government politics and policy-making, and it is an analytical oversight to conceive of administrative law as merely the formal structurer of state-society relationships or a procedural rule set, floating above politics (Rose-Ackerman 2008; Benson 2014). Public administrative entities *make* and *do* law when they deal with particular cases; they also *make* and *do* policy through creation of explicit or implicit rules and guidelines, as well as through the aggregate consequences of their work. In

other words, there is a consequential relationship between administrative law and public policy-making. Accountability mechanisms for individual-level administrative decision processes—such as procedural constraints, participation provisions, a record of justification, and possibility for substantive review—are mirrors of requirements in more macro level policy and legislative processes. Public contact with administrative legal processes at individual levels, therefore, might cultivate concrete skills and values relevant to political participation in other arenas. Such individual level contact occasions observations about governmental accountability, delegation of power, and democratic legitimacy which may inform views about the functioning of the state and shape further political action.

Much work, particularly in the realm of the government's "redistributive role" (welfare and service provision), and empirically focused on the US, has shown how contact with administrative arms of government and street-level bureaucrats influence one's orientation to the political process and assessments about how government functions more broadly (Lipsky 1980, 2010; Soss 2000, 2005). Such contacts have been described as a process of learning about the state and its responsibilities toward citizens through routine interactions. Yet voluntary citizen enforcement action—distinct from the state's role in social welfare provision as well as its supervisory or punitive role—is not covered in the depth it warrants.

The Polish administrative appeals system, including administrative courts, and its use by environmental advocates, is of particular interest because of how theoretically easy it is for an environmental organization to access it. In turn, it is relatively easy to register an environmental organization in Poland. The sheer number of registered environmental groups in Poland bears this out. A recent search for environmental organizations on the largest and well-known Polish

NGO database yielded 6318 organizations.⁸ Tiny groups may be formed and registered only to deal with a particular local issue.

More specifically, the lower administrative courts in Poland are easy to access in terms of costs of litigation and legal standing. Legal standing has been identified by scholars of environmental law as a significant barrier to adjudicating environmental cases (Stone 1972; Herbert et al. 2013; Vanhala 2012; Benson 2014). Likewise, legal mobilization scholars identify access to courts as a key factor shaping social movement strategies and legal activity (Andersen 2009; Vanhala 2012). Open administrative appeals systems, and the procedural rights⁹ they referee, are potentially a means for average citizens to compel the government to better protect environmental health and avoid some of the thorny financial and legal challenges of bringing civil suits, or the high evidentiary standards in criminal cases. Administrative procedures related to environmental matters, especially earlier stages like information requests (whether or not an administrative complaint is formulated) are theoretically rather accessible to everyone, truly, irrespective of citizenship status, place of residence, or reason for requesting the information. Rights to access information in Poland are fundamental constitutional rights (Article 61) which implicate the public sector as well as third parties who fulfill public sector functions or provide public sector actors with data. Environmental-administrative law reiterates and concentrates

⁸ Results of search conducted in December 2015 at <http://bazy.ngo.pl/>, search term under “*Działania*” (“Area of Activity”) was “*Ekologia ochrona zwierząt oraz ochrona dziedzictwa przyrodniczego*” (“Ecology animal protection and protection of natural heritage”).

⁹ By procedural rights, I am referring broadly to a set of rights which have also been called by various names, including: right to participation, right-to-know, right to public participation, participation rights, or right to consultation. In business-infused settings, such rights have been called “stakeholder involvement,” a term used frequently in environmental decision-making contexts. I do not focus here on the criminal justice context, where procedural rights are understood to be the rights of criminal defendants to due process, although those are not unrelated to the set of procedural rights I discuss here, in terms of procedural justice/legitimacy—the line of psychological and socio-legal inquiry which suggests that if people perceive a process and their treatment as individuals within that process to be fair, they are more likely to accept the outcome even if it is not favorable to them; that the perception of fair process increases legitimacy of legal institutions and compliance with the law; and that such a perception can increase social cooperation (Tyler et al. 2003; Tyler 2000; Bottoms et al. 2003).

such rights, and encourages their active exercise. The implied reach into state structures, state knowledge creation, and the fine-grained details (in textual, visual, and auditory form) of state practices make procedural rights and their exercise capacious and potent, potentially.

To study administrative legal processes and procedural rights' mobilization is neither intended to replicate the procedural-substantive binary pervasive in legal texts and interpretations, however, nor to elide power differentials among social actors. Procedural and substantive aspects of legal systems and processes are intertwined in inextricable ways. Their seemingly technical, apolitical separation obscures the power dynamics, exclusions, erasures, and violence involved in delineating their boundaries (See Cover 1975, 1986; Cover et al. 1992). Indeed, many assert that the legal system simply serves to uphold the prevailing economic system, the "substantive" demands of those in power (e.g. private ownership) folded in as part of the procedural consensus or default. Elements officially delineated as procedural, meanwhile, are concessions to the demands of non-elites who must fight to secure their inclusion using the very abstract, individualizing language of the system that dispossessed, oppresses them, and wreaks ecological havoc (Graham 2011; Harvey 2005; Spade 2011). Critical approaches to law may investigate and expose the ways "procedural" and "substantive" become artificially separated, for instance the ways in which this separation's enactment largely depends on the gatekeeping role of legal rules themselves, judges, and other state actors (Benson 2014, See Chapter Three of this dissertation). In other words, accounts of the potential in these legal spaces to enact progressive change must be attentive to power dynamics. At the same time, law and legal processes cannot be dismissed. Analysts can be attentive to law as one way to study the spatial geometries and practices that constitute power (Blomley 1994; Blomley et al. 2001). Such attentiveness is part of the larger goal of understanding the operation of social power itself,

as well as providing conscientious, agentic accounts (see Sparke 2008) of those who use law as one tool to seek broader protection of people and biophysical entities who might be the most vulnerable in the prevailing political-economic system.

Legal mobilization and legal consciousness

In order to further elaborate how contact with state institutions may be mobilizing or demobilizing for political identity and action, this dissertation also draws upon another body of process-oriented literature: legal mobilization. Legal mobilization refers to any process by which individual or collective actors invoke legal norms or discourse, including using the formal legal system, in order to enforce rights or enact change.

Most analysts agree that law generally supports status quo conventions and hierarchical relationships, protecting entrenched power interests through systemic organizational processes that create structural advantage for those who repeatedly use the legal system (Galanter 1974; McCann 2006, 1994). Yet sometimes law—as a set of normative principles and strategic resources—can be mobilized to challenge and even reconstitute the terms of the social or institutional order (McCann 2006, 1994). Legal mobilization theorists have drawn attention to the dynamic, mutually constitutive relationship between the so-called “structure” of legal opportunities and the agency of individuals and groups who mobilize law and legal discourse.

Socio-legal scholars have made a convincing argument that legal rights’ mobilization can accurately be conceptualized as political participation (Zemans 1983; Cichowski 2006). Through their role in allowing citizens who might otherwise be excluded from domestic political and legal systems to claim rights and enforce laws (provided they have the resources and access to do so [Börzel 2006]), courts and legal instruments should be included in the study of political participation, and more broadly, democratic governance (Cichowski 2006; Vanhala 2013;

Scheppele 2005). Even more expansively, law understood as social practice, as a set of symbolic meanings which shape practical and material interactions, may figure significantly into the ways social movements seek changes in social and public policies. Public interest lawyers can play a significant supporting and shaping role here (Sarat and Scheingold 2006), in formal state fora and beyond. They may help craft effective legislation and enforce existing laws. They can help empower the citizens they represent in enforcement cases, and also empower the public more broadly. Legal institutions can be used to re-frame or invigorate political processes and bring focus to the question of whether existing political processes are living up to their democratic aspirations. Strategies which incorporate litigation may serve to inform and mobilize the public around injustices (ibid). As the head of public interest environmental legal organization ClientEarth points out, people gain hope and confidence from seeing environmental problems being addressed through holding offenders accountable (Thornton 2013). In terms of the normative implications of the rise of adversarial legalism¹⁰ in European regulatory style (Kelemen 2006, 2012), many engaged in public interest environmental lawyering in Europe see it not as “the spread of an American disease,” but as a vital form of democratic participation.

The concept of legal consciousness plays a central role in understanding and explaining patterns and structures of meaning-making surrounding law. It is one of the contextual factors which interacts with, shapes, and is shaped by, the discursive terrain for public interest legal practitioners and the LOS in Poland. Therefore it is immensely important to understanding how and why law matters for social movement activity and democratic governance. Legal consciousness is the dynamic, ongoing process by which people use legal meanings and discourses to formulate their understanding of the social world and their relationship to it

¹⁰ A method of policymaking and dispute resolution characterized by comparatively high degrees of formal legal contestation, litigant activism, and substantive legal uncertainty (Kagan 1991, p. 372).

(McCann 1994, p. 7). The concept generally emphasizes lay perspectives on law, and how understandings of law become internalized through people's subjective experiences. This emphasis came out of its origins as a theoretical concept and topic of empirical research. It was developed in the 1980s and 1990s as a way to trace that "submerged iceberg," the hegemonic power of law (Silbey 2005). Silbey asserts that in pursuit of this project, it was not enough to map individual or group variation; rather, it was essential to demonstrate how the variations in what people thought and did about law together constituted the rule of law.

Ewick and Silbey (1998) produced an account of what they called legality, defining legal consciousness as the participation in this process, or social practice, of constructing legality (p. 45). Legality¹¹, the object or consequence of legal consciousness, is an emergent structure of cultural production that contributes to legal ideology and hegemony. Because legality and legal consciousness have internal complexity, any particular experience can fit within the diversity of the whole. The contradiction between the ideal and actual in the law, Silbey and Ewick argued, sustains rather than undermines legality. The multiple and contradictory character of law's meanings is what makes it powerful. Its multiple and contradictory meanings are also what make it a politically generative site for social movements, even if it is not entirely boundless (Andersen 2009; McCann 1994, p.7, 12).

¹¹ An examination of law uncoupled from legal institutions, as an embedded and emergent feature of social life. It collaborates with other social structures to infuse meaning and constrain social action. "Meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by the law" (p. 22). "In sum, we conceive of legality as an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. Legality operates, then, as both an interpretive framework and a set of resources with which and through which the social world (including that part known as the law) is constituted" (p. 23). Some see Ewick and Silbey's conceptual decoupling of legality from law (official law) as overstated (McCann 1999). My research design and findings attest that I share this view.

Legal geographies and political ecology

If a central question being tackled through the concept of legal consciousness can be posed as, “Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality?” (Silbey 2005, p. 323), a rephrasing of the question to make it more directly relevant to the empirical focus of this dissertation might be, “Why do people accept and use a legal system that, despite its promise of environmental protection, systematically reproduces environmental destruction?” Both questions suggest the legal system as a source of false consciousness. Theoretical interventions in legal geography, particularly by Nicholas Blomley, who has developed the field largely through a focus on property law, along with legal mobilization theory following the lineage of Scheingold (1974) which suggests law as a “political resource of unknown value,” assist us in moving past the issue of false consciousness in productive ways. Legal geography does so by suggesting we pay attention to the actual workings of governance, spatial considerations being of great importance in those workings.

Blomley (2013) points out that many critiques of property theory by “progressive property scholars” critique it on the grounds that it is a reductionist misrepresentation of actual realities. Such critiques hold that property theory is inaccurate in its descriptions of how property systems actually function as well as in its representation of our actual, lived ethical commitments. Performativity theory, Blomley suggests, in its resistance to the distinction between abstraction and reality, encourages us to shift our focus away from the “mismatch” between law and the “real world,” although such a critique is compelling. Rather, it directs our attention to practices and actions which are simultaneously spatial and temporal, which are combined and stabilized (as well as changed) in ways that constitute the world. Combinations

(or relational arrangements, assemblages) of objects/things, persons/bodies, their particular relations, and discursive practices are put together and become stabilized through repetition and routinization and through successfully citing other such performances, and compelling future similar performances (ibid, p. 36). In this way, they make certain things in the world, like private property or markets. An approach informed by performativity directs us to ask why, if such models are so flawed, they endure. The question has affinities to Silbey's cited above. Like much geographical scholarship, the approach of legal geographical scholarship in pursuit of answers to such queries brings us further down to earth, to material relations and objects and their mutually constitutive relationship with discourses.

Performativity suggests that to succeed, representations of the world do not have to be accurate so much as 'felicitous.' Certain conceptions of property are dominant, on this view, because of their ability to enroll resources and arrange other representations. In doing so, they can help constitute a world in which they become true (ibid, p. 25).

A model is more successful or 'felicitous,' or has more performative force, to the degree it meshes with prevailing conventions. Certain models have performative power due to their "citational ability" to reference innumerable other such manifestations, but also through their sedimented, repetitive, duplicated forms (ibid, p. 37).

Performativity does not trade in abstractions, but rather follows how certain assemblages are put together, stabilized, and made real (ibid, p. 39). To understand how the ownership model of property is made real, then, entails exploring how its proponents arrange the world so as to make the model successful.

Rather than a grandiose scholarly stance of critique exposing falsehood in the name of truth, or one that unwittingly performs dominance through its insistence on unfolding logics that limit freedom, performativity invites a more tentative yet still fully ethical exploration of political possibility" (ibid, p. 47).

A geographical lens can thus help us move forward in the endeavor to address if and how law matters to the efforts of social movement actors, in part by examining, and taking seriously, if and how space matters to law. Crucially, geographers bring attention to the physical materiality of place and spatial dynamics to the study of law and legal processes. This can help formulate a critique of law and light ways to make its abstract principles more procedurally and substantively legitimate (Carmalt 2007), or to make law responsive (Nonet and Selznick 2001).¹²

Geographic analysis can bring explicit attention to the physical world—actual conditions, capacities, and limits of the biophysical environment—along with the social and governance systems at multiple levels which are interrelated to ecological conditions and environmental change. Political ecology approaches in particular have cogently shown, in a body of work spanning decades, how environmental destruction, health risks, hazards, and so-called natural disasters must be understood and evaluated in terms of preexisting social and spatial vulnerabilities and uneven power dynamics within a particular political-economic system (Blaikie 1985; Robbins 2004; Peet and Watts 2004). Although law is not typically a primary focus in such studies as a causal factor or potential avenue of change, such engagement with law in political ecological analysis is arguably necessary, since laws and various levels of state authority are central to environmental conflicts in many locations (McCarthy et al. 2014).

¹² Responsive law arises from the tensions between the legal formalism of autonomous law (a system of legal regularity which tries to remain separate from politics) and notions of substantive justice. Put another way, the demand for responsive law stems from the limitations people perceive in the system of autonomous law (Nonet and Selznick 2001, p. 26). In a responsive legal regime, legal decision-makers interpret and reformulate rules in light of their actual consequences and are guided by broader principles of justice, including sensitivity to practical disadvantages faced by certain members of society. (Nonet and Selznick 2001, pp. vii-xiii). Responsiveness means that if stark injustices were left without a legal remedy, legal actors could and should reshape the law to provide it (ibid, p. xxi). Administrative law itself arguably has arisen out of a vision suggestive/evocative of responsive legal ideals and the political pressure it inspired (McCann 1986; Shapiro 1988; Rose-Ackerman 2010). One aspect of responsive law [in the American context] is “commitment to a style of legal reasoning that reaches beyond mere rule-following and seeks to ground law and legal decisions in their individual and social consequences. The more ambitious aspect of responsive law, however, envisions a partial ‘taming of politics’ through legally-structured participation and deliberation about law and public policy, guided by rational inquiry and legal values” (Nonet and Selznick 2001, p. xxiv)

Political ecology's concern with exposing and theorizing power dynamics to explain the nuances of place-making is shared with legal geography (and much human geography scholarship more broadly). Legal geography in turn arguably does not pay enough attention to the environment as an object of governance and terrain of struggle with respect to law (ibid), although this is quickly changing (Delaney 2016).

Nicole Graham (2011), building upon work of so many legal scholars who have considered the social and intellectual origins and implications of law and legal thought, considers the physical and environmental conditions of certain legal traditions. In her synthesis and analysis of property and environmental law, she contends that because property's dominant meaning is anthropocentric and about abstract rights and not real things, it detaches people from place, actual land use practices, and ecological consequences. As a result it prescribes and sustains unsustainable human-environmental relations, which is evident in landscapes across the world (Graham, p. 5). Graham writes,

The universalism of modern law is materialised by land use practices. In effect, what we see in a landscape is not a detached and separated physical realm, 'the land', but ourselves, our practices and our law—a lawscape (p. 5). The dysfunction of property law's propositions *are evident in the physical landscape* (ibid, my emphasis).

That the law includes its own potentially destabilizing forces is not a new insight (Nonet and Selznik 2001), but it may be especially true of property law, particularly as it scrapes against environmental law. This is because of the way observation and interaction with the physical, material world is implicated. One of the rather interesting aspects of environmental law, and about the administrative legal processes I examine in this dissertation, is that, perhaps more than in other realms of law, self-critique of the legal system is built in, invited even, due to the

participatory mechanisms inscribed in the rules, as well as the invitation issued to citizens to be enforcement agents.

There is, then, an opening for the physical earth and those who make claims on its behalf to *bear witness*. Grievances can be observed, measured, and registered in ways distinct from the way, say, this is done in human rights advocacy. That the biophysical environment itself and its apprehension by various actors is consequential to legal consciousness and mobilization is a foundational premise that runs through the dissertation, as this chapter's opening already illustrated, and as I detail further in Chapter Four. The biophysical can be at the interface between formal state structures and more informal politics. Biophysical entities, besides being beneficiaries or victims of legal processes, can also shape, facilitate, hamper, or indicate interactions, power imbalances or struggles (or lack thereof) between people and state entities.

Geographers, also crucially, bring attention to spatial considerations to the study of legal consciousness. A central insight in the legal geographical literature is that the legal and spatial are co-constituted. Legal consciousness is “deeply inextricable from and informed by spatial consciousness (and spatial imaginaries)” (Delaney 2010, p. 45). In other words, how one conceives the role of law in social life is necessarily intertwined with how one understands and imagines social spaces. Suspicions of coercive state power, a major roadblock to effective environmental regulation in the US (Short 2012), can be invigorated and exacerbated if the state seeks to regulate new spaces in ways that are in conflict with prevailing ways of thinking about particular types of space (Herbert 2014). Along similar lines, but drawing from an entirely different context, in Poland, egalitarian social welfare values of socialism (such as securing a basic level of material well-being and health) still resonate alongside already existing suspicions of state power emerging from an authoritarian governing style. Suspicions of the state are re-

invigorated and exacerbated if the state *neglects* to regulate or protect certain spaces (like air quality, rivers), or exploits spaces anew in conflict with prevailing ways of thinking about places by those who inhabit them (for instance health resorts, farmland). Ways of thinking about particular types of space, or spatial imaginaries, are relevant to understanding the development of legal consciousness, and the contradictory yet politically productive (mobilizing) forms it may take.

Scale and social movements

A type of spatial imaginary that is especially consequential to this study, and I suspect in other similarly situated sites within the EU, is scale.¹³ Human geographers, with their attention to the spatiality of social life, have been on the forefront of theorizing scale. Whereas cartographic scale is “the scale of representation or density of information found on a map,” geographical scale refers to the level at which a particular social phenomenon is situated or acted upon (Agnew 1997, p. 100). Attention to scalar dynamics provides an analytical tool for examining environmental politics in at least three overlapping ways: to understand the scalar architecture of governance structures, to understand the ways scale is used as a device for the delineation of environmental problems and their causes, and to understand the scale-focused strategies and tactics of various political actors.

There are at least two definitions of scale at work here. One is commonly used, popularly and by social scientists, to refer to a level within a set of spatial or jurisdictional levels, organized in a nested hierarchy, such as urban, regional, national, and international. This way of using scale often conforms to administrative or jurisdictional delineations used by governments, taking them at face value and using them for ease of description. Geographers, however, have argued

¹³ This section draws upon and overlaps with the review found in Herbert et al. (2013).

that these levels are not preexisting skeletal structures that actors simply operate in and across, but instead are constituted through social practice (Delaney and Leitner 1997; Marston 2000; Smith 1993; Swyngedouw 1997). Furthermore, each level must arguably be understood in relation to others and in the context of their varied usage by different social groups and institutions (Agnew 1997).

In most settings, dynamics in a particular location must be understood in a context of the geographically uneven, contradictory set of economic and social processes associated with capitalist accumulation. The production of place, space, and political activism under a global capitalist accumulation regime is differential and uneven, as production, investment, and labor relations are re-configured to remedy political and economic crises (Harvey 1982, 2003; Smith 2008; Brenner 2000, 2001). In short, understanding the expansions and contractions of the capitalist system helps us better understand how scale is produced by social actors and relationships. The second definition of scale at work in analysis of environmental politics fits within this more critical approach to scale. It examines scale's political-economic production and its usage as a discursive construction or framing device. Issues of scale, even though it is only one form of spatiality (Brenner 2001), are central to how (environmental) regulation and associated political conflict are structured and carried out.

Human geographers' contributions have in these ways opened up examination of "the politics of scale," which refers broadly to actors' perception, use, and production of various levels of political and economic organization. To put it another way, politics of scale are processes through which "social actors bring different concepts of space and modalities of power to bear on a social struggle," in part through "framing" reality a certain way (Delaney and Leitner 1997; Kurtz 2015, p. 862; Kurtz 2003). Brenner (2001) tried to sharpen this definition,

emphasizing the relationality of various spatial units and their embeddedness in a multi-layered and “hierarchically configured geographical scaffolding.” He defines politics of scale as “the production, reconfiguration or contestation of particular differentiations, orderings and hierarchies among geographical scales” (p. 600). Politics of scale, then, to Brenner (ibid, p. 600, 604) should more accurately be called “politics of scalar structuration” or “politics of scaling,” to refer to the material and discursive reconfiguring or reordering (or “hierarchization” and “rehierarchization”) of certain levels *in relation to others*. This “hierarchization” entails the exercise of power (understood as both discursive and material) but, as many analysts of scale politics show, not exclusively state power. Multiple actors may use discursive power “to shape the terms of political debate, establish their own authority and legitimate material courses of action” (Kurtz 2003, p. 893). Politics of scale are worthy of attention, then, because scalar definitions and (re)structurations may reinforce, challenge, or reconfigure social power relations.

In looking at context-specific variations of political-economic processes and their representations, geographers can raise distinct questions about the social and environmental justice implications of a globalized socio-economic system. Attention to the spatiality of development processes and discourses moves analysts away from a focus on only one level, such as the national level and national governments. Instead it entails examination of multiple levels and of scalar dynamism, such as the production, reworking, and jumping of scale on the part of a wide range of social actors (Smith 1993; Marston 2000; Jarosz 2011).

The meaning and structure of geographical scales of governance are a source of continual sociopolitical contestation. In environmental conflicts, much debate centers on whether the environment should be regulated in a more centralized or decentralized manner. The European Union is a lively area of such debates, as manifested, for example, in conversations about

subsidiarity (Jupille 2005; Leitner 1997; McCarthy 2005). The subsidiarity principle aims to limit EU-level intervention to only those policies for which it is deemed necessary, maintaining that the levels at which certain biophysical conditions occur should be congruent with levels of governance, and that environmental governance will be more democratic if dealt with at more local levels. Although language describing the subsidiarity principle appears technical and apolitical, critical analyses of scale politics help us see it differently. Any assertion that an environmental dynamic is appropriately regulated at a particular jurisdictional level is a deeply political one, because it determines who has the capacity to generate and enforce policy, who must provide resources for such regulation, and so on. Arguments over environmental regulation thus often provoke debates about the balance of power and resources between contending political entities.

These scalar questions deeply influence political outcomes. Such outcomes often depend on the level(s) at which actors organize themselves. State-generated political opportunity structures create different avenues for mobilization by social movement actors (Cichowski 2007; Miller 1997). Often, dominant political actors move to confine activities of subordinated groups to more local, manageable scales, which often plays different groups in different places who may have shared interests against each other (Herod 2001). For their part, subordinated groups often seek to harness resources and powers at other scales in an effort to overcome containment strategies—material and representational—of more powerful actors (Blomley 1994; Jonas 1994; Smith 1993; Smith et al. 2003).

Scale can be a consequential discursive framing device or means of legitimation. Kurtz's work on scale frames shows how multiple scale frames and "counter-scale frames" compete with each other to spatially construct a problem, who it concerns, and its solution (2002, 2003, 2015).

Scale frames are collective action frames (Benford and Snow 1988, cited in Kurtz 2003) that identify political problems and responses with reference to particular geographical scales (Kurtz 2015, p. 862). Scale frames are discursive practices that make meaningful and actionable connections between social relations at particular levels, specifically between the level at which a social problem is experienced and the level at which it could be addressed politically (Kurtz 2003, p. 894).

Scalar rhetoric can operate to secure legitimacy for political arguments in environmental conflicts. Social actors' attempts to scale their activities in certain ways—leveraging existing levels, negotiating through different scales, or operating at multiple scales simultaneously (McCarthy 2005)—may allow them to access more resources and more capacity to exercise power over other places or actors. Scale frames can be used simultaneously and complementarily, in what Sica (2015) calls “stacked scale frames.” This means combining or coordinating scale frames together to legitimate a particular set of interests as general interests. In other words, using a trans-scalar framing that talks about a phenomenon across multiple, overlapping scales, rather than only affecting particular scales individually, can make a set of arguments more powerful, or hegemonic (*ibid*). Sica's work builds upon Brenner's (2001) conceptualization of politics of scale as primarily being about structuring and restructuring relations between particular levels. Both materially and representationally, struggles over scale possess manifold implications for how the economic and political landscape is made, with extensive consequences for the biophysical environment. In this dissertation, I more fully elaborate how scalar structuration occurs and is politically contested by social movement actors and environmental advocates, in part as a result of their experiences interacting with formal state legal processes, which play their own role in producing scale (Varsanyi 2008).

Environmental advocacy and protection efforts are of course also dauntingly tied up in complexities regarding the spatial and temporal scale of ecological processes, such that regulatory efforts focused on one scale may be thwarted by constraints at others. Therefore, the means by which actors seek to comprehend ecological processes and to articulate claims about environmental outcomes in policy debates rely heavily on interpretations of ecological scale as well.

Synthesizing insights on scale from the social and ecological sciences is arguably a fundamental challenge unique to social scientific studies of environmental problems and regulation (Neumann 2009; Robbins 2004; Sayre 2005). Some have argued that the mismatch between the ecological or biophysical scales and socioeconomic scales should be the basic starting point for analysis of environmental politics (Rangan et al. 2009). Indeed, the degree of mismatch between scales of governance, scales of resistance, and scales of ecological processes creates thorny challenges for the resolution of environmental disputes and the regulation of environmental space. This is no more evident than when one considers just how environmental dynamics are, and are not, synchronous with the language and practices of law.

In the cases I investigate, politics of scale are integral to legal consciousness formation and social movement mobilization. These scalar politics entail a process of acquiring a scaffolding of state power (and counter-power): the institutions that make it up, how they fit together, and where points of intervention are located. They entail contesting national or subnational level legal interpretation which denies the applicability of other levels of law, such as European or international law. This process in turn entails “stacking” levels of political organizing, frames used to describe environmental issues, and various levels of legal argumentation, in order to mobilize more people to hold public officials to account as well as to

inspire public involvement in environmental and energy governance. By stacking scales and scale frames, and *reinforcing* work being done at the grassroots level (see Chapters Six and Seven), environmental advocates, legal practitioners, and social movement actors together create a more comprehensive map, and counter-map, of biophysical harm and governmental accountability. As societal actors use and shape legal opportunities and discourse in environmental politics, they are concomitantly engaging in efforts at scalar (re)structuration of state power and responsibility for environmental harm. As I illustrate in this dissertation, these spatial considerations, and the use of scale frames by a myriad of societal actors, are absolutely crucial to more accurate and updated understandings about Poland, its environmental movement, and more broadly the robustness of its civil society and the quality of its democracy.

Why Poland

Such a study of Poland is overdue. Much work has examined environmental and anti-nuclear movements in the Central East European (CEE) region and the ways they provided a platform for dissent and resistance against the Soviet regime (Dawson 1996; Jancar-Webster 1993; Pavlínek et al. 2000; Waluszko 2013). Many of these movements had a decidedly anti-state, yet nationalist, flavor. Scholars have documented the Polish environmental movement and the ways it changed in the 1990s just after political transition (Hicks 1996; Gliński 1996). Much meticulous work, particularly by Europeanists in the discipline of political science, has looked at the period leading up to Poland's and other CEE countries' accession into the European Union (EU) in 2004, as well as the years directly following, and what that has meant for environmental legal regulation and enforcement (Börzel 2010; Slepcevic 2009; Guttenbrunner 2009; Jordan et al. 2005). In recent years, there have been more studies about the ways environmental movements and governance in the region are evolving (Carmin and Hicks 2002; Hicks 2004;

Börzel and Buzogány 2010; Cent et al. 2013; Niedziałkowski et al. 2013). Researchers and observers have documented the development of newer social movements in Poland—feminist, squatter, tenant, and environmental movements—as well as the contemporary generation of Left organizations (Żuk 2001; Polanska 2014; Gajewska 2014, 2015; Ost 2005). Gajewska (2014), as well as Petrova and Tarrow (2007) note that mass mobilization and political participation in Poland (and the broader region) is limited. Petrova and Tarrow contend that a focus on individual-level political participation misses a robust “transactional capacity,” an activist type not based on mass membership organizations, among non-state actors in the region that may afford “Easterners” an advantage over their more “institutionally constrained and popularly accountable Western counterparts” (p. 15). Gajewska in turn observes that this might create a growing gap between grassroots mobilization and intellectual elite mobilization of socio-economic interests. Another noteworthy collection of studies attempts to move past the tired “weak civil society” thesis (Howard 2003) by going “beyond NGO-ization,” rejecting the oft-issued diagnosis that social movements’ discourses and practices are being depoliticized by non-governmental organizations. Instead, these studies examine relatively successful cases of social movement mobilization in post-Communist Europe, which become visible if a wider view of contentious action is taken, and if the expectation that social movements would operate in the same fashion as in Western Europe is shed (Jacobsson et al. 2013). I build upon these studies. Looking at some of these dynamics in the environmental-administrative legal realm, we may see connections being made across movements and scales which shed additional light on these dynamics and the lines of inquiry they have inspired.

Over ten years after accession into the EU and twenty five years after the collapse of Communist Party rule, it is also time to address in more depth whether, how, and why political-

economic transition and EU membership are delivering on their promises, specifically with respect to environmental protection and democratic governance. As political ecologists who study the region have pointed out, there are some “post-socialist specifics” of cases related to environmental protection and regulation in CEE countries like Poland (Blavascunas 2014; Whitehead 2010). CEE cases have unique empirical offerings that can enrich the socio-legal and human geographic academic literature described above.

I do not claim a Polish exceptionalism. I do suggest, however, that since Poland has undergone and continues to experience rapid transition, and since it has a unique history of mass grassroots mobilization, it is a case that can make certain lessons about law and politics particularly apparent. This is not just a story about Poland, then, even if that is the empirical focus of this dissertation. It is an in-depth look at legal mobilization which synthesizes human geographic and socio-legal thought.

Structure of the dissertation

I explain my study site and methods further in the next chapter, Chapter Two. In Chapter Three, I further discuss how I conceptualize “legal consciousness” and what I mean by “becoming a side.” I discuss ways in which people and organizations in Poland are interacting with the state through administrative legal channels related to environmental issues. I explain why and how they become “sides” or parties to administrative proceedings, what they learn about the state through doing so, and how they make sense of their experience of gatekeeping. I also discuss how individual experiences are being shared and aggregated to shape broader mobilization around this particular aspect of the governmental accountability system.

Chapter Four deepens further the analysis of environmental legal practitioners’ access to and contact with administrative legal processes, and in doing so further substantiates the

importance of administrative legal processes as state-society-material world contact zones where the relationships between these three are mediated and contested. The main point in this chapter is that spatial and temporal dynamics of law are brought to the fore in the process of mobilizing the administrative complaint system. In the dynamic interaction between direct observation of the biophysical earth, procedural rights' mobilization, and legal argumentation in formal legal venues by various actors, legal consciousness is being shaped in consequential ways. Among people already culturally primed to think of law as performative, interacting with administrative legal argumentation and seeing how the state can distance itself and private actors from responsibility for biophysical harm, further shapes a way of thinking about how law is "done," which in turn informs ways environmental advocates try to re-work it.

Chapter Five considers processes of legal consciousness formation at the interface between Polish and EU levels. I argue that the EU governance structure is integral to Polish environmental advocates' reframing, and re-scaling, both of environmental advocacy and of the exercise of political and liberal rights in Poland, even as they observe failures in delivery of its ambitious environmental protection goals. The EU's environmental legal rules and enforcement regime make available a set of normative and spatial arguments that assert the value of regional biogeography, as well as citizen participation in development decisions and environmental enforcement. In this way, it is a source of political and legal opportunities for environmental advocates in their domestic struggles. On the other hand, the EU governance structure is a cause of much of the environmental destruction environmental advocates are fighting against. The EU's development aid can reignite and further entrench previous versions of Poland's economic modernization, mobilizing existing resources behind enacting such visions and further insulating the state from scrutiny. The tension between these two aspects of the governance structure, and

the ultimate limits of formal, supranational law's reach is a main feature of the legal consciousness being forged by Polish environmental legal practitioners as they engage in a scale politics of environmental regulation rooted in their own observation and documentation of biophysical harm.

The analyses in Chapters Six and Seven include two instances of grassroots political and legal mobilization in which a group of societal actors mobilized initially around a local issue and eventually became "sides" in a more expansive sense. Not only were they party to administrative (and civil) legal proceedings, they also came to be involved in national level legislative or policy-making activity. In this way, Chapters Six and Seven turn more fully toward another crucial dimension of administrative legal processes, that related to what Rose-Ackerman (2005) calls policy-making accountability. While performance accountability processes focus on holding the government to account for the day-to-day implementation of programs, policy-making accountability processes entail making sure that government policies are a reflection of the needs and interests of a population (Rose-Ackerman 2005, p. 5).

One instance of grassroots mobilization I discuss is the mobilization against air pollution in Kraków, in Southern Poland, the second largest city in Poland and a center of Polish academic and cultural life. The mobilization resulted in the passage of a ban on solid fuel burning within the city limits, which was subsequently struck down by the Provincial and Supreme Administrative Courts, and led to advocacy for environmental legal reform at the national level. The other instance is the struggle against shale gas exploration in Żurawlów, a small rural village in eastern Poland about 12 miles northeast from the city of Zamość. The 15-month protest against shale gas exploration drilling by residents of the village ended in July 2014 when Chevron's subsidiary left the area. Of the numerous instances of political and legal mobilization

I encountered during my field research, I include these two because they are both linked to a grassroots social movement which eventually formed into a formally registered organization and which continues to be involved in energy policy formation and environmental protection efforts in Poland—indeed, both are integral, crucial parts of moving forward Poland’s energy transition away from coal. Energy transition involves fundamental changes in power arrangements in society, and I show how both movements expanded the scope and quality of Poland’s democracy, in institutional and non-institutional realms. Building upon the idea of scalar stacking, I use the term “scalar reinforcement” to highlight the ways grassroots actors’ efforts were supported and built upon, in large part due to partnerships and alliances with professional non-governmental organizations and other social movements in Poland and elsewhere, in ways which remained conscientiously committed to the work of people at the grassroots and their material or biophysical conditions. Both movements relied on national level symbolism and Poland’s rich social movement history to achieve resonance and gain broader support for their causes. Thanks to this reinforcement, both movements persevered in the face of backlash, raised the salience of what otherwise may have remained local struggles, and made effective, enduring connections across scales and movements.

In the end, both movements advanced energy transition and democratic expansion in distinct ways, which can in part be explained by paying attention to scalar power arrangements and how attempts to re-work them unfolded. The movement in Żurawlów expanded extra-institutional democratic spaces more than formal ones. Nonetheless, in both cases, social movements’ creation and maintenance of *extra-institutional* democratic spaces and practices *alongside* use of formal institutional accountability mechanisms, and the scalar re-structuration

processes such parallel endeavors entail, have enabled an expansion of democratic practice in Poland.

Chapter Eight summarizes the findings and draws out the broader lessons of the study.

Chapter Two

Field site and Research Methodology

Where would we be, after all, if the consolidation of minimal democracy was the basis of social science interest in other parts of the world?.....Rather than offering a scorecard on the existence of basic individual rights, it's time to treat East Europeans like citizens in other democratic countries and examine the nature and quality of the democracy they have. We need more ethnography, less transitology. And more debate about how to achieve a richer democratic life, rather than condescending satisfaction about the minimal forms already obtained (Ost 2005, p. 188).

“This phenomenon of social activism developed in parallel with the independent ‘Solidarity’ movement, in order to take Polish affairs, and the dignity of humans and their environment, into our own hands.”

-one founder of the Polish Ecological Club (Mikłaszewski 1996, p. 11)

“Ten fenomen społecznej aktywności, który powstał równocześnie z niepodległościowym zrywem ‘Solidarności,’ aby wziąć w swoje ręce sprawy Polski, godności człowieka i jego środowiska.”
- jeden z założycieli Polskiego Klubu Ekologicznego
(Mikłaszewski 1996, p. 11)

In what many consider one of the most important events in contemporary Polish history, between February and April 1989, negotiations known as the roundtable talks took place in Warsaw, Poland between Communist Party representatives and representatives of the opposition movement Solidarity (*Solidarność*). The talks marked the beginning of formal systemic change from the People’s Republic of Poland (*Polska Rzeczpospolita Ludowa*, PRL) to the Third Republic of Poland, and they ended in an agreement for, among other things, partially open parliamentary elections.

There are a few specificities of the Polish case, particularly as compared to other post-Communist regimes. Poland is a notable exception within the region in that its anti-regime dissident collective action became a mass phenomenon. In other places social movement activity was appropriated to a greater extent by Communist regimes and did not become mass

movements. Some “new social movements” such as feminist and peace movements elsewhere were tolerated and at times even (at least rhetorically) supported by communist regimes, as they were consistent with official anti-capitalist and anti-imperialist agendas (Císař 2013). The movement in Poland was vast, and most of the political and economic elite after regime change came out of that movement, as did the intellectual elite. To the extent that “those with communist pedigree” maintained their positions, it was only by playing by rules that the dissident intellectuals in Solidarity had shaped (Ost 2005, p. 3).

The Polish Ecological Club (*Polski Klub Ekologiczny*, or PKE), one of the oldest popular environmental organizations ever to exist in Poland¹⁴ was established around the same time as, and in parallel with, Solidarity (*NFZZ Solidarność*).¹⁵ Solidarity was the first independent labor union in a Soviet-controlled country which famously gave rise to a mass movement against the Communist government in Poland, and contributed significantly to the fall of the Soviet Union more broadly.¹⁶ Part and parcel of the movement was also the anti-nuclear movement, which, in the aftermath of Chernobyl, successfully mobilized against the construction of a Polish nuclear power plant in Żarnowiec (Waluszko 2013). The Polish environmental movement, born on the rising tide of protests during PRL, survived the initial and ongoing political economic transition from a centrally planned economy ruled by the Communist Party to a capitalist parliamentary democratic republic. A decade ago, the transition was punctuated by preparations for and formal entrance into the European Community in the EU’s 2004 eastern expansion.¹⁷ The environmental

¹⁴ PKE was founded in 1981 in Kraków. The other is the conservation group League for the Protection of Nature (*Liga Ochrony Przyrody*), founded in 1928.

¹⁵ Registered November 10, 1980. The PKE was registered as a legal entity on May 25, 1981.

¹⁶ Also not covered in depth here but significant, the Polish Catholic church, which was not forced underground as in other places under Soviet influence, played an important role in fomenting and sustaining dissident action and a sense of national identity and morality apart from Communist Party doctrines.

¹⁷ Part of the fifth and largest enlargement of the European Community, the following countries became members in 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

movement was, and remains, a revealing window into state-society relations under previous regimes and during transition (Hicks 1996; Gliński 1996).

As I hope I abundantly show in this dissertation, environmental advocates' use of legal tools is a revealing window into evolving relations between state and society into the present. Environmental protection principles, though they are referred to in law before and after transition, do not have an ideological function across regime change, as perhaps gender equality principles have had. If anything, both during socialism and afterwards, the environment was to be an invisible base upon which modernization—the socialist and capitalist iterations—could take place. The environmental movement, through its social mobilization and its participation in the roundtable talks, left its mark on the design of Poland's contemporary democracy and legal institutions. Environmental protection was enshrined as a governing value increasingly after 1989, having been a part of negotiations with the Communist party at the roundtable talks, and later incorporated in the 1997 Polish Constitution. The constitutional amendments related to the environment came out of an initiative, *Ekologia w konstytucji* (Ecology in the Constitution), led by members of parliament involved in the *forum ekologiczne Unia Wolności* (Freedom Union Ecological Forum) (Gawlik 1997; Unia Wolności no date).¹⁸ The inclusion of environmental principles in the constitution (Specifically, what became Articles 5, 30, 31, 68, 74, and 86) was of extreme significance, especially Article 5, because it expressed a broad commitment to environmental protection and sustainable development principles within the country's foundational legal text; it was conceived as a way of shaping Polish and global thinking about environmental protection such that it would be more holistic and perhaps less anthropocentric,

¹⁸ *Unia Wolności* (Freedom Union) was a Polish political party created in April 1994 when two other groups, *Unia Demokratyczna* (Democratic Union, previously *Ruch Obywatelski Akcja Demokratyczna* [Democratic Action Citizen Movement]) and *Kongres Liberalno-Demokratycznego* (Liberal-Democratic Congress) joined forces. The Ecological Forum in Freedom Union was previously the Ecological Faction in *Unia Demokratyczna*, a faction created in 1991 (Unia Wolności no date).

and as providing a strong legal basis for further pro-environmental legislative activity (Gawlik 1997).

One of the members of parliament involved in this initiative, as well as a participant in the roundtable talks (in the ecology sub-group) describes this as a powerful, foundational argument for environmental advocates,

It also helps us that we have... it does create a certain spirit, what we added to the Constitution, various articles related to environmental protection, about sustainable development, about access to information. So, in principle, even if someone wanted to skip over this, you can always come back with, listen brother, this is written in the Constitution. You can't just... information about the environment is [has to be] open. Access has to be guaranteed (R37).

Before the passage of the 1997 Polish Constitution, many of the legal successes of environmental advocates participating in talks with the Communist government had to do with institutional configuration. For example, one of the earlier laws passed in the first Sejm (*sejm kontraktowy*, or Contract Sejm – the parliament elected in the Polish parliamentary elections of 1989) moved the Ministry of Forestry out of the Ministry of Agriculture and placed it within the Ministry of Environment (at the time, *Ministerstwo Ochrony Środowiska, Zasobów Naturalnych i Leśnictwa*). In other words, the institutional configuration was to change the emphasis from an economic exploitation to an environmental protection mandate. Similarly, the development of system of national and regional funds to support environmental protection, of a law on protection of animal rights, and of Poland's general law on environmental protection were legislative efforts undertaken to lay a cohesive legal framework for environmental protection and to shape policy (as well as public understandings of “the environment” and “animals” underpinning policy). Such efforts were informed by the direct input of environmental advocates and citizens' groups and born out of a critique of Communist-era modernization policies.

More generally, in the 1980s, the last decade of the socialist regimes in CEE, Polish political leaders introduced new institutions designed to increase government accountability (at least in form) without dismantling the one-party state. This included the creation of an administrative court (1980), Constitutional Tribunal (1986), and Office of the Ombudsman (1987) (Elster et al. 1998, pp. 12-13, cited in Rose-Ackerman 2005).¹⁹ EU membership has—at least formally and nominally—increased state commitment to environmental protection principles and their accompanying citizens' rights. These include rights to information and to participate in decisions that may have an impact on the environment enshrined in such laws as the Aarhus Convention (internationally), and the Environmental Impact Assessment (EIA) Directive (EU level).

A 2004 reform to the Polish Administrative Court was to address certain weaknesses in its ability to more effectively hold government accountable for its performance and issue rulings with clearer national impact. The weaknesses included large caseload backlog and limited independence due to budgetary and personnel oversight by the Minister of Justice. The structure of the administrative court system changed with the addition of a second tier of 14 courts at the regional level as well as oversight responsibility given to the President of the Supreme Administrative Court instead of the Minister of Justice (Rose-Ackerman 2005, p. 72). Some of

¹⁹ Codification of administrative procedural rules in Poland goes back to at least 1928, during interwar Poland. New regulations developed at that time were integrated with provisions still in force from the Austrian and Prussian procedural rules. A measure of the quality of the efforts put into preparing these laws can be observed in the fact that they were in effect until the 1960s; any amendments preserved the fundamental premises of the original (Borkowski 2010). A significant change was made to the Polish Administrative Code in 1980. Judicial checks on the administration were reintroduced, principles of two-instances in administrative proceedings were strengthened, and the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA) was formed, through the law of 31 January 1980. The addition of regulations about administrative courts and the NSA's competencies resulted, in general, in a gradual broadening of the scope of judicial checks on administrative decisions (Borkowski 2010). The court could invalidate an administrative action, but not issue injunctions or resolve substantive issues; in other words it did not order what the government office/agency in question should do to satisfy legal requirements. An individual could then call on the government body to fulfill the judgment, and if necessary could again complain to the court.

the weaknesses which led to the 2004 reform persisted afterwards, including the backlog issue. In 2013, 81,600 new cases were lodged in the first instance courts, 20,000 more cases than 10 years earlier (Jaloszewski 2015). The average wait time for a case to be decided in the provincial courts is four months; in the Supreme Administrative Court, over one year. A more recent proposed reform is intended to speed up “citizen service” in the court. It remains to be seen how this reform will be taken up, and in particular how it would affect environmental organizations’ interactions with the courts, as opposed to, for example, private investors or other actors seeking administrative legal remedy.

I draw a line of continuity between Polish social movements pre-1989 and the current environmental movement to set the stage for what follows in this dissertation. My topic is not labor movements or unions, but I take up David Ost’s call to use the issues post-communist societies raise and the questions they uniquely help us answer in order to better understand “processes perennially at the center of social science concerns: the building of democracy and the rise of capitalism” (Ost 2005, p. 3).

Ost (2005) offers a lucid and ultimately pessimistic assessment of the aftermath and breakdown of Poland’s once-great Solidarity movement. His theoretical and methodological contributions are extended upon in this analysis, through the illumination of hopeful, if modest, developments in a distinct, but not unrelated realm of politics. Drawing this line of continuity goes beyond mere recovery of Solidarity’s political ideals as a “brief explosion of civic participation and political innovation” containing gems that could have been achieved (Ost 2005a). Rather, it shows actually existing institutions, current practices, and processes that are importantly connected to social movements’ activities and gains. Many of the environmental advocates I interacted with themselves make connections between Solidarity, the environmental

movement, and Polish democracy; several active participants in the current environmental movement were some of the same people active in dissident movement. Or, if they weren't directly involved, many draw upon it and recover it as a resource in current struggles. The movement put forth various conceptualizations of the relationship between citizens and government entities, particularly with respect to protecting health and environmental entities. It also put forth various conceptualizations of nature and biophysical entities (Bożek 2013).

Subsequently, perhaps the most salient environmental conflict in Poland since the country joined the EU, concerning a proposed road construction project through the Rospuda River Valley, which peaked in winter 2006-2007, was labeled “the new Solidarity.” In what Szulecka et al. (2013, pp. 408-409) describe as the effective grafting of the Rospuda controversy onto well-established traditions and symbols of the Polish “ideational landscape,” direct parallels were made to anti-Communist dissent. The presence of former Solidarity activists at the direct action camp protest site only strengthened such meaning-making. That round table talks were established for this conflict (in winter 2007, led by then newly elected Prime Minister Donald Tusk) further substantiates that the Solidarity movement's legacy, particularly the way the movement led to dialogue amongst variously positioned actors who came to the table as equals searching for better ways to organize society, remains alive and has currency in present day environmental conflicts. The round table in the post-Communist Polish context is a historically specific symbol of social movement actors having achieved power and the ability to discuss and negotiate with state actors.

Although the Polish environmental movement has changed and been influenced—some would argue too influenced (see Fagan 2006)—by the West, the movement arose organically too, and cannot be reduced to an import from elsewhere. There is simultaneously a connection and

continuity with the Polish environmental movement's origins along with a rapid transformation and influx of foreign, transnational influence. Both of these aspects are significant, and they shape each other. This study of environmental legal mobilization is not so much concerned with delineating which organizations are "truly" Polish, but rather empirically examining how law is being mobilized by environmental advocates there, and why it matters.

This study comes twenty-five years after formal regime change and a decade into Poland's EU membership. The years in between consisted of what some describe using the sanitary term "democratic consolidation," Poland's joining of NATO in 1999, and an influx of foreign development and capacity building assistance, first largely originating from the US, then increasingly from European sources. Among other goals, as in other places, building up the rule of law was seen as a way to facilitate democratization and transition to a market economy. Embracing "the West" in the form of NATO and EU was, for Poland's political liberals, not just an acceptance of American hegemony or global capitalism as some critics assert. It was a way to "take Poland out of the cocoon in which, they believed, it had been embedded since 1945" (Ost 2005, p. 98). It was a way for those weary of nationalism, lustration, and the enforcement of Christian morality on the populace, to promote universalism, gender equality, minority rights, and the embrace of NGOs and other aspects of the requisite (pro-western) world order (ibid). The fatal error of those who took power after transition, according to Ost (2005), was tying the defense of political liberalism too closely to the triumph of economic liberalism, by defining as political liberalism's main, rational function the introduction of a capitalist economy and the eradication of state ownership and government subsidies. In other words, ideas about rights and exercising them became too tied to developing a capitalist market economy, and capitalism—instead of the ways it could be reworked or challenged—was treated as a proxy for democracy

(Ost 2005, p. 99). Membership in the EU further complicates the picture and brings the tension between economic development imperatives and environmental regulatory objectives to the fore.

Poland has thus seen a whirlwind of change in a relatively short period of time. Within this, the history of law and the role of state power is fraught. The proper role of the state, and what the relationship between state institutions and citizens should look like are still being worked out, perhaps more conspicuously than elsewhere. This dissertation is one attempt to take stock of these changes by using environmental-legal conflicts as a window into these processes. The advantage of a close study of one case, Poland, is that it avoids minimizing the significance of particular events and cultural distinctions, as is often the case when multiple country studies are done, to the detriment of deeper understanding. Underlying lessons from this case, however, have relevance for other places. In a time when one regularly hears about the death of the EU as a legitimate or viable governance structure,²⁰ about political deadlock and a general rightward shift in electoral party politics, about economic and refugee crises, the administrative legal processes described here, their impacts on legal consciousness formation, and the “watchdog” functions of citizen groups continue quietly and importantly along. Examining them in detail helps develop a distinct narrative about the EU governance structure and the rule of law.

Biophysical, resource, and environmental quality factors

Besides its political-economic history and the specificities of its ongoing democratic transformation, Poland’s biogeographical attributes, resource endowments, environmental quality indicators, and energy system warrant some description. Certain ecosystems as well as species of plants and animals in Poland are unique or the last of their kind on the European continent. Poland has relatively high biodiversity due to its location, geologic structure, climatic

²⁰ Most recently exhibited by what is popularly known as “Brexit” (merging the words “Britain” and “exit”), the referendum held in the UK in June 2016 to decide whether the UK should leave or remain in the EU. In a 52 to 48 percent result, those who voted to leave were in the majority.

conditions, and large land area dominated by forests (about 29 percent of the country's land area) and wetland-type ecosystems (about 14 percent of the country's land area), as well as extensive agricultural areas which still preserve a mosaic of habitats and ecotones where a diversity of plant and animal species live (about 20 percent of which, 12 percent of the country's area, comprise pasture and meadow lands most significant for biodiversity) (GIOŚ 2014, p. 37).

Ninety-one percent of Poland's land area is comprised of lowlands, about 6 percent uplands, and 3 percent mountainous. The country's land area is characterized by three geomorphic west-east landscape zones: young-glacial zone with a coastal and lake district in the northern part of the country, an old-glacial zone in the central part of the country, and a southernmost zone of uplands and mountains in the south. Over half of the country's area, 54 percent, is in the Wisła River catchment area, 34 percent in the Odra River's, and 11 percent on the coast of the Baltic Sea.

There are about 57,000 species currently living in Poland (GDOŚ 2010). Species characteristic of lowland areas as well as mountainous areas, those associated with continental and Atlantic climates (boreal and steppe species), can be found. The Alpine region in the Carpathians (only 3 percent of the country's area) in the southernmost part of the country, is faring best in terms of species and habitat protection. Most of the country is in the continental region—this and the marine Baltic Sea region in the north have been assessed as insufficiently protecting habitats, according to European criteria (GIOŚ 2014, pp. 40-41). Many types of migratory birds' passage areas cross over Poland; therefore birds from various parts of the world are regular visitors (GDOŚ 2010).

Nearly 20 percent of Poland's national territory is protected by the Natura 2000 network designation,²¹ thanks in large part to the efforts of environmental NGOs which provided European institutions with a "shadow list" to supplement the 3.7 percent the Polish government originally proposed be protected by the network (Pawlaczyk et al. 2004). While protected areas have grown in terms of land area, habitat protection is threatened by intensification of agricultural land use practices, road infrastructure development, as well as development in the tourism, industrial, water use and management, and energy sectors. These factors lead to secondary ecological succession, habitat fragmentation, and the disappearance of rare species of flora and fauna found in wetland-type ecosystems (GIOŚ 2014).

By certain measures, environmental quality has improved in Poland since before the 1990s. There was a significant reduction in greenhouse gas and other emissions which can largely be attributed to the closure, for economic competitiveness or technical obsolescence reasons, of many heavily polluting industrial facilities in the early 1990s (Pavlínek et al. 2000). On the other hand, economic growth, increased car ownership, and consumerism has predictably increased the waste stream and contributed to extremely poor air quality (GIOŚ 2014). In this sense Poland's environmental health issues are converging with those of other industrialized European countries, although the indicators are mixed. Poland's economic growth is more resource and energy intensive than average for the EU. There is an alarming growth in industrial waste since 2006, which is being stockpiled instead of salvaged or recycled. Since 2000, there is a decrease in collected municipal waste, and Poland's per capita waste production is one of the lowest in the EU (ibid). Although the total area of forests has been increasing since 2004, the

²¹ This is only one, and the newest, of many other existing types of nature protection regimes in Poland, including national parks; nature reserves; landscape parks; protected landscape area; nature monuments; documentation sites; ecological areas; landscape-nature complexes; and plants, animals and fungi species protection (GDOŚ 2010a).

health of the forests as ecosystems (based on defoliation) between 2008 and 2012 has worsened (GIOŚ 2014, pp. 65-70). Poland has a relatively small water supply, among the smallest in Europe per capita. Water use per resident is also low (ibid, p. 89). Surface water quality in Poland is insufficient (and insufficiently studied) by European standards (ibid, pp. 90-92). Based on monitoring data from 2010-2012, about 30 percent of (natural and artificial/altered) rivers and about 35 percent of natural lakes were deemed to have a good or very good ecological state. About 45 percent of “intensely altered” lakes had good ecological potential (ibid, pp. 93-97 and pp. 98-105). Surface water quality is deteriorated from municipal, agricultural and animal husbandry, and industrial sources (ibid, pp. 116-121). Based on data from 2012, 20 percent of subsurface waters are in lower chemical classes (ibid, p. 114). The Baltic Sea is one of the most polluted seas in the world. Since the 1990s, there is a continual, but very slow, decreasing trend of nutrient load concentration, resulting from attempts to control sources of nutrient runoff from municipal, industrial, and agricultural sources (ibid, pp. 108-113, 186).

Poland’s energy system is based predominantly upon coal. In 2012, hard coal and lignite accounted for 88.6 percent of total electricity production. Nearly 55 percent of coal power plants are 30 years old or older, and a significant portion of the generation fleet must be retired by 2030 in order to comply with European environmental regulations (Bayer 2014). Coal power plants are an important contributor to outdoor air pollution in Europe, an acute public health threat. Exposure to outdoor air pollution is linked to higher rates of respiratory and cardiovascular disease, and increased numbers of premature deaths. Together, coal power plants in Poland, Romania, and Germany are responsible for more than half of the total health impacts from this type of energy production in Europe (HEAL 2013). The European Environment Agency (EEA) estimates that 80 to 90 percent of the urban population in Europe is exposed to levels of

particulate matter and ozone higher than recommended by the World Health Organization (WHO). Although coal power plants are only responsible for a small portion of total outdoor air pollution, they are the most important source of industrial air pollution; poor outdoor air quality in Europe is mainly caused by the transport sector, industrial processes, residential heating, and agriculture (HEAL 2013). Besides contributing to the health risks from exposure to outdoor air pollution in the shorter term, coal power generation, as the most carbon-intensive energy source in the EU, is a major contributor to climate change, which has already and will continue to create its own set of environmental health impacts.

The Polish power sector faces a number of challenges due to the profile of the power system, rising demand for power during summer peaks, and the penetration of renewable resources, particularly wind. The Polish power market is dominated by four large, vertically integrated, and largely state-owned companies.²² As it is predominantly coal based, state owned, part of a transition economy, and involves deeply vested interests, diversifying the energy system presents a stark challenge (Bradshaw 2013). As a regulatory advisor to the Polish Energy Regulatory Office put it, “it’s very hard to steer this huge beast in a different direction” (R43).

An increase in overall demand for electricity is expected in Poland through 2030, while at the same time there a trend of decommissioning old power plants. Poland’s largely homogenous fleet of aging, inflexible thermal plants struggles to meet energy system needs during times of highest system stress. In August 2015, Poland experienced a deficit in its power system which limited power supply transmission to industrial consumers for that month, measures taken for the first time in many years. This was caused by a heat wave (part of the growth of weather

²² PGE, Tauron, Energa, and Enea. PGE Operator, completely owned by the State Treasury, is the owner and operator of the national transmission grid. Even though five distribution companies are separate legal entities, they are part of large parent companies with significant generation and distribution assets and a significant share of the retail market (Bayer 2014). Most Polish power companies continue to be owned by the State Treasury; the Treasury holds a majority share in PGE (61.9 percent), Energa (50 percent), and Enea (51 percent), and a 30 percent stake in Tauron (Bayer 2014).

anomalies being experienced worldwide), in combination with hydrological conditions in major rivers, which resulted in deterioration of operating conditions of power generation equipment and power networks in Poland. At the time, there was an increase in energy demand, despite lower capacity in summer (Rączka et al. 2015).

Domestic and European climate and environmental policies, the decreasing competitiveness of domestic coal, the need to retire a large portion of the existing power fleet, and rising competitiveness of renewable resources are driving major changes in the industry (RAP, no date). The Polish Energy Policy to 2030²³ foresees significant investments in coal and lignite, development of nuclear power, and some added investment in renewable energy and gas-fired capacity to meet demand. The main way carbon will be reduced in the energy sector according to the policy is through construction of nuclear power and carbon capture and sequestration (CCS) for coal and natural gas. Improvement in energy efficiency is expected to play a role in slowing growth of demand (Bayer 2014). The prospect of exploiting shale gas was another potential avenue to diversifying the energy supply. Yet the question of how Poland will transition its current power sector to one capable of meeting climate and energy goals reliably and affordably in the next several decades has many dimensions that go well beyond what the future fuel and technology mix should be in the power system. These dimensions include detailed (re)consideration of energy producers and consumers and the relationship between them, of urgent environmental health and climate change mandates, as well as of Poland's interconnectedness with a larger European energy system.²⁴ In addition, energy systems must be understood in relationship to societal systems (Miller et al. 2015), and therefore energy transition

²³“*Polityka energetyczna Polski do 2030 roku*,”

<<http://www.mg.gov.pl/Bezpieczenstwo+gospodarcze/Energetyka/Polityka+energetyczna>> Accessed 1 December 2015. A draft of Poland's Energy policy till 2050 was under public consultations at the time of writing, “*Polityka energetyczna Polski do 2050 roku*,” <<http://bip.mg.gov.pl/node/24670>> Accessed 1 December 2015.

²⁴ Poland has one of the most isolated power systems in the European Union and, as a result, can cover only two percent of its energy demand with imports (Rączka et al. 2015, p. 3).

in Poland necessarily requires transformation of incumbent patterns of socio-economic power and privilege (Stirling 2014).

The timing of the study

I arrived in Poland at a poignant time for studying environmental legal mobilization. In November 2013, Poland—or, as some environmental NGOs were calling the country, “Coal-land”—was the host of the UN COP 19 climate talks (CEE Bankwatch Network 2013, p. 6). This meant that the Polish government was in the spotlight for its opposition to the EU’s ambitious climate policies in Brussels.

Poland earned itself a reputation in EU policy quarters as an isolated agitator against EU climate policies. This particularly came to a head in 2011-2012, when Poland began its tenure in the rotating European Council presidency by blocking EU attempts to establish carbon emissions targets. In June 2012, Poland’s was the sole veto among 26 other countries of an accord among environmental ministers in the European Council²⁵ on shifting to a low carbon economy by 2050 (“Council conclusions on the European Commission’s Energy Roadmap to 2050”). This was in contrast to a few years earlier, 2008, during climate and energy package negotiations, when Poland was able to build a coalition to support its demands. CEE countries met in advance of environmental ministerial meetings in the Council and coordinated positions such that they could stand together with a joint position.²⁶ Having more votes, they received certain concessions, for

²⁵ Also known informally as the Council of Ministers or EU Council, the Council of the EU is the institution representing the member states’ governments; national ministers from each EU country, depending on the policy area, meet to adopt laws and coordinate policies. If compared to national governments, one could say it is at once the EU’s cabinet and upper house of the legislature. It has a presidency which rotates between member states for a period of six months. The European Council is comprised of the heads of government of the EU member states who set the EU’s general strategies and policies. It meets four times a year, and its work is organized by its President, elected for a period of two-and-a-half years. These EU bodies should not be confused with the Council of Europe, which is the Strasbourg-based human rights and cultural organization separate from the European Union.

²⁶ It was a re-activation and expansion of the “Visegrad Four” group, which had been rather active before these countries joined the EU: the “Four” consisting of Poland, the Czech Republic, Slovakia, Hungary, and the “Visegrad Plus Two” added Bulgaria and Romania.

instance derogations from the ETS (Emissions Trading Scheme) in the form of free emissions allowances. Poland had strength with these allies, but when Poland alone vetoed three Council conclusions, two of the Environmental Council and one of the Energy Council, the country became isolated in terms of environmental and energy diplomacy within the EU. In this way Poland was also disrupting a consensual process and culture of EU policymaking. Being the host of COP 19 afforded the Polish government an opportunity to put forward an internationalist narrative and define the climate policy problem at the international scale. The government's position was that the EU should not move out ahead of other regions, but rather should take action according to a global agreement.

To add fuel to the fire, the international NGO community was aghast at Poland's decision to allow unprecedented corporate presence in the COP19 negotiations, for its arrangement of a World Coal Summit during the same time period as the climate talks, for its pro-coal and pro-shale gas minister of environment.²⁷ Also during this time, a group of Greenpeace activists from the Arctic Sunrise were being held in Russia, among them a Polish activist. All of this provided fodder for NGOs' direct actions in Warsaw, press releases, publications, tweets, and so on, and their eventual walk out of the climate talks.

Events surrounding COP19 provided an opportunity for mobilization. Polish NGOs met and networked with other NGOs, colleagues, and activists from all over the world, and collectively publicized environmental (and environmental-legal) struggles occurring in Poland. Two Polish struggles gained national and international salience in part due to the opportunity offered by the COP19 climate talks, in part due to social media campaigns and effectively working in coalition with sympathetic groups, including organizations with legal expertise.

²⁷ and then for dismissing that very Minister of Environment during the climate talks only to replace him with a Minister of Environment tasked with speeding up shale gas development through streamlining legal rules.

These two struggles—one over the passing a domestic coal burning ban in the city of Kraków (part of a larger air pollution protection plan for the Lesser Poland [*Małopolskie*] province), and the second against exploratory shale gas drilling by Chevron in the village of Żurawłów—are analyzed in this dissertation. The Kraków case is but one example of unprecedented activism against coal as a fuel source, much of it taking a public health angle.

COP 19 was an occasion to expose and shame the Polish government's failures in the realm of implementing the EU's climate and energy policy. The lawyers in ClientEarth published a report that month which reviewed Poland's implementation of directives constituting the EU's climate and energy policy, including the so called climate and energy package directives, and associated directives on energy efficiency, industrial emissions, and air quality. The report found that most of the directives were not transposed into Polish law in a timely or proper manner; of eleven analyzed directives, only one was transposed into Polish law in due time (a directive on environmental impact assessment), and two important directives (one on emissions trading and the other on industrial emissions) were not transposed at all, even though the transposition deadline had passed (ClientEarth 2013). In eight of the eleven cases, the European Commission had initiated infringement enforcement proceedings.²⁸ In March 2013, the European Commission referred Poland to the European Court of Justice for failing to transpose the Renewable Energy Directive (2009/28/EC) (EC 2013). In June 2013, the Commission issued a Reasoned Opinion for Poland to take action and ensure full compliance with its obligations under the Energy Performance of Buildings Directive (2010/31/EC). In

²⁸ Infringement procedure consists of a series of formal actions that can be taken by the European Commission against an EU Member States that is not meeting its obligations under EU law. It begins with a "Letter of Formal Notice" (request for information), which, if not sufficiently met, may result in a "Reasoned Opinion," a formal request to comply with EU law. The Commission may decide to refer the Member State to the Court of Justice if it is not satisfied that compliance has been ensured, and this can result in financial penalty; however, infringements rarely reach this stage (See EC 2012).

September 2013, the European Commission issued a Reasoned Opinion asking Poland to transpose the EU Emissions Allowance Trading Scheme Directive (2009/29/EC) into national law (EC 2013a). The Polish government's adoption of a legislative package, known as the "*Trójpak*" ("Three Pack") in August 2013, which introduced changes to the Energy act relating to regulation of the electricity, natural gas, and renewable energy sectors, brought Poland into compliance with the Third Energy Package, but not yet with the Renewable Energy Directive. Poland has not yet complied with its obligations under the Energy Performance of Buildings Directive (Bayer 2014).

These infringement cases are examples of a broader picture in which Poland had the highest number of complaints to the European Court of Justice filed by the Commission against a member state in connection with violation of European law (12 cases in 2012), mainly in the field of energy law and environmental law (Kening-Witkowska et al. 2013, p. 6). In 2011, Poland was ranked first among EU member states in the category of proceedings initiated by the Commission due to absence of timely transposition of directives (46 cases) (ibid, p. 6).

ClientEarth framed Poland's lack of implementation of EU climate law as "negligent," and furthermore as a "violation of the image of the Polish state as a rule-of-law state" (ibid, p. 6).

EU climate and energy policy can thus be thought of a second wave of political and legal opportunities, after the EU-accession period, for Polish environmental advocates.

The "first wave" of political and legal opportunities concerned nature protection policy during the time period surrounding Poland's official entrance into the EU in 2004. It consisted of a series of face offs between the European Commission and Polish environmental advocates on the one hand, and the Polish government on the other, over nature and biodiversity protection policy. Since these contestations occurred in the first several years of Poland's EU membership,

there were many uncertainties, overlapping issues to be addressed, as well as legal-financial tools at the disposal of the European Commission specific to that time period, which environmental advocates domestically and supranationally used to their advantage. Several salient environmental cases at the time, most especially controversy over the fate of the Rospuda River Valley, created a palpable sense of the European Commission's discretionary power and its ability to compel respect for environmental protection commitments through the combined threat of legal action and withholding of much-desired co-financing for large infrastructural projects, especially roads.

The Rospuda controversy is emblematic of the strengthening of domestic enforcement of environmental protection by environmental movement actors through use of the multi-level legal system to exert domestic and external pressure. The case illustrates how political and legal mobilization at multiple levels worked synergistically. This environmental controversy, in which the construction of a proposed roadway in northeastern Poland through rare peat bog and wetland ecosystems protected by the EU's Natura 2000 Network was thwarted, and a new route had to be chosen, was a spectacular victory for Polish environmental advocates. Perhaps just as important as the biophysical victories, the struggle shifted Polish society's legal consciousness and increased the perceived political power of environmental advocates, who, with the help of European networks and institutions, could question and even stop investments which had been approved by the Polish administration, something that did not happen before Poland was part of the EU. A comparison between the Rospuda case and the St. Anne's mountain case a decade earlier, before Poland's EU accession, illustrates this (Niedziałkowski et al. 2013).

The Rospuda case (examined in depth by Ziemińska et al. 2010; Szulecka et al. 2013; Niedziałkowski et al. 2013) was noteworthy as a widespread societal mobilization within Poland

related to “post-material” values. While legal threats from the EU and domestic venues loomed in the background, a 150,000-signature petition to the Polish president was published in a major Polish Daily (Gazeta Wyborcza 2006), several towns held pickets, and people throughout Poland wore green ribbons as a sign of solidarity. When it appeared that the development might proceed despite legal prohibitions, civil disobedience action in the form of a protest camp at the construction site ensued. The conflict, which ultimately ended in an alternative and less environmentally invasive route being chosen, is considered an important turning point by many observers, in particular by environmental advocates and their direct opponents. In response to the shock of Rospuda, investors and administrators saw value in consulting with NGOs in earlier stages of planning, rather than risk protests, litigation, and withdrawal of funding (Matczak 2008; Niedziałkowski et al. 2013, p. 113). The controversy is a milestone in meaning-making about environmental protection and democratic participation in Poland. Well-known nature journalist Adam Wajrak conveyed the weight of these events, conceiving of this nature protection case as unifying for the entire nation, and as helping to re-define law’s role in environmental protection and public life:

The opening of the Augustów highway which bypasses the valuable peat bog definitively closes the Rospuda case and clearly shows who in this fight was right, and who wasn't. The citizens were right, those who spoke out against political and bureaucratic arrogance. Various people. Educated and not, from cities and the country. Rightists, centrists and leftists. Environmentalists from non-governmental organizations, lawyers, scientists, those who hung fastened to the trees, those who demonstrated or collected signatures, and those completely ordinary people, who simply wore green ribbons...They showed that in Poland we don't agree to breaking the law, to destroying something beautiful...We showed that we, Poles, can organize and win before the fact, and not afterward...Poland before Rospuda and afterward, is two different countries. This can be seen everywhere. Everywhere, where people spontaneously speak out to protect forests, parks, trees, or just common space, one can feel something, which can be called 'the Rospuda effect' (Wajrak et al. 2014). [my translation]

This euphoric characterization of the case conveys the real sense which saturated the popular consciousness that EU membership had ushered in a new way of doing things. Never mind that the case was truly atypical: it involved one of the last habitats of its kind in Europe, and the broader environmental-legal situation made the European Commission DG Environment's intervention opportune.

The EC's (European Commission's) involvement in the Rospuda case may have sent a signal which resonated far and wide, but there was a deeper source of the problem for which Rospuda was one striking symptom. The basic foundations of Poland's environmental-legal house were not in order. The EC began to take what it calls legal non-conformity actions against Poland with regard to Poland's implementation of the Environmental Impact Assessment Directive, which was supposed to be effective in 2005. At the same time, the Commission identified insufficient designation of Natura 2000 sites,²⁹ and pursued legal suit in the European Court of Justice.³⁰ These legal issues jeopardized EU co-financing of development projects. Such a threat ultimately led to Polish legislators amending the country's EIA law, as well as to the Ministry of Environment's designation of Natura 2000 protected areas more in line with biogeographical research and incorporating the input of environmental advocates and naturalists. Environmental advocates had authored a "shadow list" of areas to be protected to supplement

²⁹ Natura 2000 is an EU-wide network of nature protection areas, which aims to assure the long-term survival of Europe's most valuable and threatened species and habitats. The protected habitat types and species are listed in corresponding annexes to the EU Habitat Directive and the EU Bird Directive. The Natura 2000 network consists of two types of site: (1) Special Areas of Conservation established on the basis of the Habitat Directive in order to preserve natural habitat types, and plant and animal species' habitats, and (2) Special Protection Areas established on the basis of the Bird Directive in order to preserve birds' habitats (Pawlaczyk et al. 2004, p. 6).

³⁰ Due to lack of action on the Polish government's part, the European Commission began infringement proceedings against Poland. A letter of formal notice was sent in April 2006. A final warning before directing the case to the European Court of Justice was a Reasoned Opinion sent in December 2007. The Commission then brought a case to the ECJ regarding insufficient designation (EC 2006). The case was dropped in 2009 after the Polish Ministry of Environment provided a more complete list of protected sites, 823.

what they felt was the government authored list's paucity (Pawlaczyk et al. 2004).³¹ The shadow list included 336 Sites of Community Importance (SCIs), which cover 9.4 percent of the country's land territory. In contrast, the Polish Minister of Environment had proposed 184 SCIs, covering about 3.7 percent of the country's area. Subsequent analysis eventually raised this number to 12 percent, more than triple the original proposal by the Polish government. The network is ever a work in progress, but currently, Natura 2000 sites comprise 849 habitats and 145 bird areas which make up almost 20 percent of Poland's land area. This mirrors the percentage of the Natura 2000 network's coverage across the European Continent (GDOŚ; Grodzińska-Jurczak et al. 2011). The shadow list was sent to the European Commission and its contents validated by the EC's actions. Thus, in this case and the other occurring more or less concurrently, environmental protection arguments and expertise were validated, and the Polish government compelled into action, by a supranational institution. Environmental advocates, it seemed, had a new source of legitimacy and power. Not only did environmental entities have a "higher" advocate in the European institutions, civil society assertions of influence on governmental policy would be affirmed and backed up.

Winter 2013 was an exciting time to be studying environmental politics in Poland in its own right. As one Polish environmental activist put it, he hadn't felt this kind of energy in the air since Solidarity. COP 19 provided me, as a researcher, a dense, concentrated and symbol-laden window into Polish, EU, and international environmental politics, as well as access to

³¹ In May 2004, the Polish Minister of Environment submitted a list to the European Commission that proposed 184 proposed Sites of Community Importance (SCIs), covering about 3.7 percent of the country's area. The list was made available for public consultation for a period of five days. None of the copious comments made about the list, however, were taken into account. A supplementary analysis was therefore undertaken by environmental organizations and naturalists, an effort which involved "practically every biologist in Poland helping with data collection," according to one participant. In order fulfill the purpose of the Habitat Directive, their analysis concluded, it would be necessary to add at least 152 sites to the government's proposal, 150 on land (comprising about 5.54 percent of Poland's territory) and two in marine areas of the Baltic Sea. They also showed it was necessary to alter the borders of 15 sites proposed by the government, enlarging some of them.

respondents and events, formal and informal conversations, all concentrated in one city for two weeks. In terms of data collection and analysis, the conference and side events were useful and treacherous for the same set of reasons: they shed dramatic and even harsh light on the political elite and the sense among citizens that they were being ignored in institutional processes entirely too permeated by elite and corporate interests. At the same time, the sweep of electrifying energy generated during marches, speeches, and numerous informal gatherings outside of the negotiations delivered perhaps overwrought optimism in the ability of social movements to band together, overcome power and resource differentials, and enact lasting, environmentally-progressive change. What I witnessed there was certainly neither representative of the day to day political or administrative grind, nor of social movement or political mobilization activity in Poland. Yet I was privy to symbolic actions and conversations which highlighted salient themes, grievances, and nodes (whether people or organizations) within networks trying to connect various movements together. I was exposed to a heightened self-consciousness on the part of environmental advocates in their strategies, their self-depiction and self-definition (as many of them were presenting themselves to outside visitors), as well as, for the same reasons, perhaps an increased audacity to speak out against what they saw as injustices of their own government's approach to environmental governance, due to the strength in numbers and the presence of foreign visitors.

I also observed, in perhaps more refined and premeditated form, public relations efforts by the Polish government, many of them prominently inscribed in the urban landscape and producing at times ironic historical juxtapositions irresistible to a geographer—for example, the enormous green, vertical COP 19 banner hanging from the Palace of Culture and Science (*Pałac Kultury i Nauki*), a structure in the center of Warsaw built between 1952 and 1955 as a gift to the

people of Poland from the Soviet Union. A continued reminder of Soviet propaganda and domination, now an important center of culture and education, the building donned massive green banners and the conference motto, “I Care.” That winter and into 2014, another geopolitical development raised the stakes of energy policy conversations: the conflict between Ukraine and Russia, and the armed conflicts in the Donbass region of Eastern Ukraine. This conflict stirred up and heightened longstanding geopolitical anxieties and reinvigorated conversations about energy security and independence.

Methodology

Addressing questions about how and why environmental legal mobilization has proceeded in Poland, how and why it matters, and what role the EU governance system plays in environmental legal mobilization, requires looking not only at formal legal rules and processes, but also how those who use legal tools (or not) employ and understand them. An analysis sensitive to the socio-cultural and biophysical context of my study site could only have been accomplished through extensive time in the field, cultural and linguistic immersion, and qualitative methods.

The empirical basis for this dissertation is data collected over 12 months in 2013-2014, using qualitative interviews, participant observation, as well as unobtrusive library and internet research. The research was supported by a David L. Boren Graduate Fellowship, a University of Washington Graduate School Fritz/Boeing Graduate Fellowship for International Research and Study, and a University of Washington European Union Center of Excellence Graduate Research Grant. During this time period, I was based in three Polish cities, for a few months each: Poznań, Kraków, and Warsaw (See Figure 1). During the first phase of the research I also spent one month in Brussels, Belgium.

Figure 1. Reference map of Poland
(Design by T. Miller)



In order to access respondents, I began with an initial list of organizations and individuals I was interested in based on previous knowledge and internet research. I tried to connect with them via email before arriving in Poland. Later, I largely relied on the snowball method, in which information or contacts gained through the interview or participant observation processes led me to subsequent respondents and organizations. While in Poland, I followed current events in major daily newspapers, social media posts of environmental organizations, and I explored noticeable or visible campaigns (or leads mentioned to me), as they arose during my time in each location where I spent time.

To triangulate interview data, I observed salient environmental actions, meetings, conferences, and court hearings. I made field visits to contested sites. I took detailed notes during these events and as soon after each event as possible. I attended, as a participant-observer,

two workshops held by environmental NGOs on the topic of administrative law and using procedural rights,³² and one workshop on implementing the Aarhus Convention in radioactive waste disposal.³³ I also collected news media, social media, policy, and legal texts for content analysis. The material included relevant Polish, European, and international statutes, Polish administrative court decisions, numerical data on administrative court cases, legal commentaries, environmental advocates' own analyses, documents issued by Polish environmental protection authorities, and documents published by European Union institutions.

I made side-trips as needed to meet with known or recommended environmental advocates/organizations, observe and/or participate in relevant environmental actions, meetings, conferences, and court hearings. The side trip destinations—See Figure 1—included: Lublin (“Let’s talk about shale gas” public hearing ran by the Polish Ministry of Environment in October 2013); Żurawłów (two visits to protest site against exploratory shale gas wells, one in winter 2013, another in spring 2014); Hrubieszów (observation of civil court trial, *Chevron v. protesters* in winter 2013); Wrocław (interviews, in May 2014, with members of Foundation for Sustainable Development [*Fundacja Ekorozwoju*], Environmental Law Center/ Jendrośka Jerzmański Bar and Partners [*Centrum Prawa Ekologicznego/ Jendrośka Jerzmański Bar i Wspólnicy*], Polish Ecological Club Lower Silesia Branch [*Polski Klub Ekologiczny Okręg*

³² One of them was called “Nature’s guardians – how to increase access to information about the environment” (“*Strażnicy Natury – jak zwiększyć dostęp do informacji o środowisku*”), run by the Wrocław-based organization *Fundacja Ekorozwoju* (Foundation for Sustainable Development) in May 2014 in Sopot (other trainings were held in several other cities). The other was called “You have the right to know. You have the right to decide - Right to information about the environment and its protection and citizen participation in decisions having an environmental impact,” (“*Masz prawo wiedzieć. Masz prawo decydować - Prawo do informacji o środowisku i jego ochronie oraz udział obywateli w decyzjach wpływających na jego stan*”) run by the the Warsaw-based organization *Fundacja Greenmind* (Greenmind Foundation) and Kraków-based organization *Polska Zielona Sieć* (Polish Green Network) in May 2014.

³³ “Implementing the Aarhus Convention in the field of radioactive waste management in Poland” (“*Wdrażanie Konwencji z Aarhus w dziedzinie gospodarowania odpadami promieniotwórczymi w Polsce*”), organized by the Regional Environmental Center and Civil Nuclear Monitor (*Spoleczny Monitor Atomowy*) in Warsaw, December 2013.

Dolnośląski], and Ecological Association EKO-UNIA [*Stowarzyszenie Ekologiczne EKO-UNIA*]; and Sopot [participant-observation in workshop “Nature’s guardians – how to increase access to information about the environment” in May 2014]).

Interviews in Brussels and Poland

The purpose of data collection in Brussels was to obtain in-depth, qualitative data from interviews with staff in the European Commission’s Directorate-General (DG) for the Environment, as well as with members of Brussels-based environmental advocacy groups who work with organizations in Poland. DG Environment was of interest because of its role in investigating complaints made by EU citizens and NGOs about compliance with EU environmental law. In short, the interviews in Brussels provided qualitative insight into the interactions between supranational and domestic levels in environmental politics and legal mobilization. These interviews helped make links from the micro level of legal meanings and practices in Poland, as apprehended by social movement actors, to the wide EU governance structure within which they are situated.

In Brussels, I conducted 17 interviews. Conversations with staff in the European Commission provided an inside look at how DG Environment policy officers view and interact with environmental NGOs, both in Brussels and member states. Those working on infringements and cohesion policy provided insight into what they consider landmark legal cases and why—I could then compare responses against what members of Polish NGOs or “regular citizens” considered landmark cases and why. My conversations with DG Environment staff allowed me to more fully grasp how the European Commission sees environmental law and policy, and how this way of seeing differs than that of social movement actors (Chapter Five discusses these dynamics in further detail).

Interviews in the European Commission were conducted with desk officers covering Poland in the LIFE-Nature unit, the Cohesion Policy and Environmental Impact Assessments unit, and the Legal/Infringements unit. I also spoke with members of nine different Brussels-based environmental groups to better discern Polish governmental and non-governmental sectors' positions and roles in EU environmental politics, and activities at the interface between domestic and supranational levels. The organizations include: Birdlife Europe, The European Environmental Bureau, Food and Water Watch, CEE Bankwatch, Friends of the Earth Europe, WWF, Health and Environment Alliance (HEAL), Climate Action Network (CAN) Europe, and ClientEarth Brussels.

In addition to the interviews in Brussels, I had 26 respondents in Poland, mostly social movement actors and members of environmental organizations.³⁴ The organizations covered include: ClientEarth Poland, *Fundacja Ekorozwoju* (Foundation for Sustainable Development), *Fundacja Frank Bold* (Frank Bold Foundation/Environmental Law Service), *Krakowski Alarm Smogowy* (Krakow Smog Alert), *Koalicja Klimatyczna* (The Climate Coalition), *Stowarzyszenie Ekologiczne "EKO-UNIA"* (Ecological Association "EKO-UNIA"), *Polski Klub Ekologiczny Okręg Dolnośląski i Okręg Wielkopolski* (Polish Ecological Club Lower Silesia Branch and Greater Poland Branch), *Polski Klub Ekologiczny Wielkopolska* (Polish Ecological Club Greater Poland), *Polskie Towarzystwo Ochrony Przyrody "Salamandra"* (The Polish Society for Nature Conservation "Salamandra"), *Centrum Prawa Ekologicznego/ Jendrośka Jerzmański Bar i Wspólnicy* (Environmental Law Center/Jendrośka Jerzmański Bar & Partners).

³⁴ of various types: registered as associations or foundations, more and less "professionalized," more and less specialized on law/ on a particular issue area.

I also interviewed a few people from the Polish public sector. This included personnel from the *Wojewódzki Fundusz Ochrony Środowiska i Gospodarki Wodnej w Poznaniu* (Provincial Fund for Environmental Protection and Water Management in Poznań) and the *Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej* (National Fund for Environmental Protection and Water Management).

During the interviews I tried to elicit rich descriptions of environmental protection goals, practices, and tactics vis-à-vis domestic and EU governance structures, especially legal aspects. The interviews were semi-structured, tailored to the interviewee's organizational position to allow for the emergence of themes important to each individual, yet standardized enough to allow comparability of data across interviews. Interviews with social movement actors and members of environmental organizations consisted of questions about the following main topics: what issues the person/organization worked on; strategies used, when, and why; if how and why legal strategies were used; key cases and why they were significant; whether and how the group works with other organizations; useful laws; access to justice in Poland; depiction of environmental organization activity in the public discourse; main successes and failures of the person's/organization's work. The final two main questions were more open-ended, asking if the interviewee had anything further to add about the topic, and whether s/he could recommend any other people or organizations with which to speak.

Interviews with public sector personnel consisted of questions about the following main topics: what duties and responsibilities the person has in the organization; current organizational priorities; interactions between themselves/the organization and non-governmental environmental organizations; the role of Polish and EU financial resources and the extent to which they are used by NGOs; the role of Polish and EU legal instruments and the extent to

which they are used by NGOs; which NGOs are noteworthy or influential and how/why; recent success(es) and current challenges of the organization/unit; the effectiveness of Polish and EU legal instruments; whether any significant changes over time could be noticed. As with the environmental advocate/organization member interviews, the final two main questions were more open-ended, asking if the interviewee had anything further to add about the topic and whether s/he could recommend any other people or organizations with which to speak. One key line of questioning in most of the interviews explored how environmental advocates' legal strategies were assessed against others, and how they were strategically combined or severed. Another probed interviewees' perspectives on administrative avenues for pursuing environmental goals, including administrative litigation. The interviews varied in their length, ranging from about 45 to 90 minutes.

Participant Observation

Even though a large amount of data were gathered using the interview method, participant observation was equally if not more important as a data collection method in this project. As I spent more time in Poland, I found this method more revealing than interviews. Partially this stems from cultural factors: the presence of an audio recorder and the interviewee's sense that s/he should be exhaustive and authoritative made some interviewees reluctant to share their thoughts beyond superficial statements or referring me to organizational publications. Some activists implied that the interview was a necessary formality, but that I should really come out and see them "in action," and the ecosystems or species they were working for – and this meant going into the "actual" field. This is why having more informal interactions with some of the interviewees, accompanying them on field visits, observing events or legal hearings in which they partook often gave me an enhanced sense of what they thought, what they actually did vis-à-

vis what they said, and how they were perceived by or interacted with other people involved in the movement. Some interviewees in public sector positions likewise were reluctant to share their thoughts beyond official stances of their organizations. This varied by individual, however, and often by the end of the interview or when the recording device was switched off, they shared more personal assessments of the topic at hand.

Analysis

Data analysis followed a responsive model, in which analysis occurs throughout the research process in an iterative fashion (Rubin and Rubin 2005; Charmaz 2004; Emerson et al. 2011). The data were transcribed, where necessary translated into English, and coded, initially according to a set of themes as framed by the interview questions, then with the addition of concepts and themes frequently mentioned by interviewees, and those that emerged from comparing interviews. The coding proceeded manually at first, and then the analysis was completed digitally with the aid of the computer program ATLAS.ti. The codes were subsequently refined and organized into a detailed coding structure, based on themes which emerged and were refined during the interview process and in analytic memos written during and after the data collection process. In order to assist the process of moving beyond description and towards drawing out broader theoretical implications of the data, the codes were put into families, and where appropriate, into hierarchies; in other words, concepts that were related were grouped together and classified lower or higher. Network manager/view and query functions in ATLAS.ti helped to facilitate and expedite this process.

Other types of data—field notes, media, policy and legal texts—were coded in a comparable fashion, then cross referenced with the interview data. Coding became more focused with subsequent examinations of the data, and a series of integrative memos elaborated ideas and

began linking codes and pieces of data together, trying to understand selected events and legal cases in relationship to others, with an eye towards developing theory (Emerson et al. 2011). The combination of interviews, participant observation, and textual analysis allows for an analysis of process, of multiple layers of meaning, which includes stated explanations of a person's or organization's actions, unstated assumptions, intentions, effects and consequences for further individual action and social relations (Charmaz 2004 p. 504).

Although this study was informed by and builds upon existing literature, the analysis at all phases was based on systematic coding and rigorous examination of the data collected, rather than looking for confirmation of my initial ideas or theories advanced in the literature (Charmaz 2004; Rubin and Rubin 2005, p. 202, 236). Theoretical concepts certainly served as points of departure and anchors for my research interests, but I tried to faithfully listen to emerging data. I tried to continually “tack back and forth” between the theoretical frameworks to which I had been exposed and the data at hand, maintaining as high quality a conversation between theory and data as possible, as well as openness and loyalty to the empirical evidence (Herbert 2010).

Note on positionality

My interest in Poland is personal. It began as an exploration of Polish language and culture, to which I had been exposed through family members. I wanted to know why my parents left Poland in the 1970s/80s, why they seemed to engage in selective erasure of their previous identities, and why they had rather negative assessments of the country and its people's ability to govern themselves, despite proudly maintaining many of the cultural traditions. Over time this personal quest transformed into an intellectual interest in post-socialist societies, and it fused with my interests in environmental science and policy into the intellectual pursuit that culminates in this dissertation.

My engagement in Poland and with Polonia in the US has been a contradictory, long term process, and it has implications for my position as a researcher, the data I sought and accessed, and the findings I report. My family background has afforded me some degree of familiarity with the language and culture. More directly, it has provided me with a social network within which to operate, which has facilitated access to certain resources and contacts that might not otherwise have been possible. At the same time, I did not necessarily “pass” as or identify as Polish. Rather, my American accent, identity, and acculturation were revealed, as well as the US funding sources of my research disclosed, in my interactions with respondents. The duality to my identity in which I find myself simultaneously in the position of an insider and outsider makes me sympathetic, yet distant and critical. The duality was once a source of distress, but my long term engagement with Polish people and places has allowed me to turn the tension to more productive analytic purposes over time. This, along with my unconcealed support of environmental protection movements and goals, unavoidably affects the lens through which I interpret the narratives and events in the pages that follow.

Chapter Three

“The only way is to become a side (*strona*)”:

Interaction with the administrative state

“Sometimes it’s better to go fishing than to participate.”

–Polish anti-nuclear activist

But sometimes it’s about, seeing that the investment is not going away, to win the case. And it’s going to be very difficult to win these cases, substantively. That’s why this is the biggest challenge. Not to win just on procedural principles, that someone noticed some kind of mistake, that evidence was not introduced or someone didn’t sign something right—I mean this is great, it’s the work of a lawyer, right—but that’s not what this is about.

–Polish lawyer for public interest environmental legal organization ClientEarth

Martin’s reputation preceded him. He was one of a handful of people in Poland whose name came up as being an environmental legal expert, “practically a lawyer”—that is, not formally trained in law, but having had enough contact with the administrative legal system and sufficient experience so as to have a decent grasp of the procedures, case law, as well as an ability to explain the system and how to use it to others. Known by others to be environmental legal gurus, these individuals themselves were often rather modest about their legal knowledge, or simply too busy with their cases to respond much to praise. Martin, for example, when I asked whether he had been working in the environmental legal realm for a long time, responded that it was a hobby, something he started “playing around with” in his spare time once his kids were grown and he had less family obligations. Eventually it drew him in. He emphasized that he was a biologist by education.

Martin is a member of three different environmental organizations, all with a slightly different legal character,³⁵ and he uses his membership in them depending on the situation. He formed one of the organizations specifically to streamline the process of bringing administrative complaints, on the basis of his iterative experience with the administrative legal system over time. He explains how he learned to write the organizational bylaws such that judges or lawyers representing the other (usually government) side of the proceedings have less ability to undermine the claim on the basis of standing. In some places, administrative judges have imposed an obligation that legal complaints and other documents be signed by all members of an organization. In others they require the organizational bylaws to indicate which person legally represents the organization (*osoba upoważniona do reprezentacji*). In larger organizations with a hierarchy of governance, a central executive board, and various branches, such as the other organization to which Martin belongs, or even an organization with a relatively small number of members, such requirements may complicate matters to a significant degree. The way Martin configured the bylaws for this particular organization, he is unambiguously the representative, and the bylaws succinctly name “environmental protection” as a goal. He explains this,

...if you want to do what I think is most effective, participation in administrative proceedings, the local government or court needs an authorized representative of the organization. It can't be an organization, it has to be a concrete person, and that's why I created another group with a similar name—it's very clear, black and white, that it's me representing the organization...as opposed to the large organizations, with the bylaws, there are too many potential loopholes, it depends on the bylaws, you can interpret them in various ways. Sometimes really good claims got stuck because of some formality like this, some formal lack...so when it's a serious matter, like the one we had in the case [regarding open cast mines], the Ministry instructed its lawyers to research our bylaws. They glimpsed here and there, various ambiguities, and in every set of bylaws it's going to be like this – the more extensive the bylaws are, the more opportunities for ambiguity...The longer it is, the greater the chance they will find some way to trip you up, undermine your claim. But when it's short, just two-sided (shows on a piece of

³⁵ *Stowarzyszenie* (association), *stowarzyszenie zwykłe* (ordinary association), and *fundacja* (foundation)

paper how short the bylaws are), *it is unambiguous. I have learned from previous experience how to write the bylaws so there would be no ambiguity. No court has challenged this* (R4).

Martin expresses a certain confidence about his ability, on the basis of longer term experience and engagement with these processes, to overcome procedural hurdles and gatekeeping attempts on the part of state actors. Subsequently, once admitted as a formal participant in the case, as a “side” (*strona*), his organization could have a practical impact. Indeed, many environmental advocates I spoke with in Poland insisted that the only way to be able to make a meaningful impact was to become a “side,” or a party to administrative legal proceedings related to government decision-making processes. The way to do this was to have a registered environmental organization, which, under Polish law, has the right to become party to administrative proceedings under certain conditions. As Martin put it,

The area one can do the most, the most one can try to do is to make these processes transparent. And they are supposedly transparent because the law contains an element about public participation, right, that is an element of the [2008 Environmental Impact Assessment] law. But this public participation has many dimensions, theoretically anyone can participate in this decision process, anyone can make a statement/comment (“wypowiedzieć się”). It’s just that nothing will come of it. To have a real influence, or even a chance at this influence, you have to be a side (“strona,”) and to be a strona you have to be an ecological organization (R4).

Martin suggests that becoming a “side” by exercising an environmental organization’s procedural rights confers, or at least has the potential to confer, some power to and recognition of those who may wish to shape government decision-making procedures. He expresses a cynicism about public participation procedures, their openness and sincerity, and notes the distance between participation as an ideal in theory, and its ineffectiveness in practice. At the same time, Martin plots a specific way to intervene that may yield some ability to influence the course of not only the particular decision in question, but a larger set of governmental decision-making processes. He insists that becoming a “side” is a necessity to these endeavors. As a self-taught

environmental legal practitioner, his legal consciousness has been forged out of repeated interactions with the administrative legal system and is rather detailed, specific to the legal opportunity structure (LOS) in Poland. The LOS appears rather accessible to environmental organizations.

Yet the LOS is no guarantee. Indeed, many critics assess seemingly progressive participatory institutional channels as facades which are neither a dependable source of protection of natural habitats, non-human entities, and human health, nor a meaningful enactment of civic participation. The epigraph about fishing at this chapter's opening from a Polish anti-nuclear activist is part of one such critique and alludes to others like it, which are largely rooted in a critique of tacit power relations. If unacknowledged and unaccounted for, uneven power dynamics and their obfuscation will limit even the most innovatively designed participatory institutions and processes, will marginalize or shut out alternative or oppositional perspectives, and may thus undermine public trust and legitimacy rather than promote democratic values (Chilvers et al. 2008). Furthermore, legal institutions and legal reform activities, uses of, and responses to them in post-Communist states are influenced by certain legacies: the prior existence of non-competitive party systems under strong executive leadership, pervasive distrust in the legal system, and lack of traditions of legalism or constitutional culture—although Poland is considered a relative success story in the region (Schwartz 2000; Scheppele 2010; Gross 2010).

Commitment to “rule of law” and the careful construction of legal-democratic institutions before and during Poland's transition process were to provide effective checks on government power and avenues for citizen participation. However, such commitments have a duality, fashioned out of the conditions under which they arose. Institutions such as the administrative

court system or the Office of the Ombudsman were created by Communist Party elites in the 1980s for the purpose of maintaining slipping legitimacy of the one-party regime, by providing the appearance that formal institutions could hold the state accountable (Rose-Ackerman 2005, pp. 24-36). The socialist bureaucracy at the time was not subordinate to the legal system in a meaningful or reliable way. After formal democratic transition, such institutions have been perceived, perhaps unsurprisingly, as cynical attempts to provide the form but not the substance of accountability (ibid, pp. 30-31). Societal perception of these institutions and their ability to hold state actors accountable are more complex than the formal institutional system of oversight and accountability checks suggest.

My analysis confirms such cautionary findings about participatory legal channels to a significant degree, but it also pushes back on them by conceptualizing administrative legal processes (including, but not limited to, litigation) as contact zones between state, society, and the physical world. Administrative legal processes are sites of ongoing space-creating and political learning and socialization processes where a detailed appreciation of the form and substance of governance accountability, its contours and limits, stands to be gained, and also shaped and reworked. Dynamics related to administrative legal processes are worthy of social scientists' analytic attention because of their implications for political participation and mobilization.

The open administrative LOS in Poland incentivizes the establishment of ecological organizations (or use of existing ones) in order to establish oneself as a "side" and in this way gain access administrative complaint proceedings. What happens upon contact with the administrative state, as one is granted or denied access to information or to administrative legal proceedings, and as an individual/organization proceeds through one or more administrative

legal processes? How does it shape the individuals' involved legal consciousness, on an individual and group level?

I argue in this chapter that interaction with administrative legal processes shapes legal consciousness in contradictory, yet politically mobilizing ways. Underpinning this argument is a conceptualization of legal consciousness formation as an iterative, multi-dimensional process with spatial elements. I turn to this conceptualization first. I then characterize the formal institutional context at the interface with which consequential processes of legal consciousness formation are occurring. After a section which provides some quantitative indicators of the prevalence of use of these administrative legal tools (and hence the extent to which people in Poland are making contact with the state in the ways I describe), I illustrate how those who do have iterative contact with the administrative state acquire a comprehensive understanding of the various levels of state power and discretionary decision-making within it. In short, they map the power of the administrative state. The section after that shows how environmental legal practitioners experience and make sense of gatekeeping on the part of state actors which may preclude their participation, or their meaningful participation, in administrative proceedings. A final section discusses how individual experiences and legal consciousness formation are being shared and potentially leading to broader societal mobilization—in part through research projects, publications, and trainings on the topic which aggregate and spread practitioners' acquired knowledge about administrative legal processes and the state accountability more broadly to a wider audience.

Legal consciousness formation as multi-dimensional and spatial

Legal consciousness is the dynamic, ongoing process by which people use legal meanings and discourses to formulate their understanding of the social world and their

relationship to it (McCann 1994, p. 7). The concept generally emphasizes lay perspectives on law, and how understandings of law become internalized through people's subjective experiences. Using legal consciousness and the way it consolidates legality (Ewick and Silbey 1998) as a guiding concept, I show how disaggregating legal consciousness into multiple dimensions, and paying attention to its spatial aspects, allows us to better understand micro-level processes of legal consciousness formation, which in turn matter for broader societal political mobilization.

Many studies of legal consciousness focus on whether and why people choose to mobilize the law, or may be reluctant or even averse to doing so (Abrego 2008, 2011; Nielsen 2000). An important hypothesis put forth by Ewick and Silbey (1998) and subsequently tested in this literature is that a person's social location shapes her or his subjective attitudes towards the law; those in a more disadvantaged social position may be less likely to take formal legal action (Nielsen 2000). This maps onto one of three orientations towards law within Ewick and Silbey's (1998) typology of everyday notions of legality among Americans, "against the law." This attitude towards law sees it as burdensome and repressive. Those holding this attitude are pessimistic about law's ability to provide remedy or relief from their afflictions; therefore, such individuals may not take formal legal action but simply make do with what their situation has made available—sometimes this may take the form of subtle, momentary resistance or subterfuge. Resisting may be done to retain dignity, to exact revenge, or to instrumentally avoid the law and its costs, but it more often than not comes with a sense of justice or right (p. 49). The other two orientations towards the law identified by Ewick and Silbey (1998) are "before the law" and "with the law." The former suggests veneration for law and belief in its legitimacy and

impartiality. The latter is a more instrumental conception of law which sees it as a potentially useful tool or game to advance personal interests.

Ewick and Silbey's painstaking qualitative work generating three common orientations toward the law continues to be used by socio-legal scholars to understand and map legal consciousness along various axes and in various contexts, including how understandings of law and orientations to law might vary among differently situated citizens according to class, race, gender, as well as how it might vary in relation to different substantive domains or institutional arenas of official law. Their project and its offspring illustrate the dynamism and variability of legal consciousness. Perspectives on law vary across individuals and situations, as well as within a particular individual. In other words, many people may subscribe to all three orientations, move at times dizzyingly between them, or hold multiple positions simultaneously, depending on the circumstances.

What is more, through the process of legal mobilization, a person's legal consciousness might change in different directions along various dimensions. Gallagher (2006) captures this dynamic in the term "informed disenchantment." The term conveys a sense of personal or political empowerment coupled with skepticism about the legal system. She found that through the process of legal mobilization, Chinese workers' legal consciousness, in which the "with the law" orientation is dominant, changes in two separate dimensions: feelings of efficacy and competency vis-à-vis the law (How well can I work the law?), and perception/evaluation of the legal system (How well does the law work?). In the case of workers seeking assistance at a legal aid center in China, she observed positive changes in feelings of individual efficacy and competency combined with more negative evaluations and perceptions of the legal system in terms of its fairness and effectiveness. The positive feelings of efficacy and voice provided by

the legal process encouraged labor dispute plaintiffs to plan new lawsuits and to help others with their legal problems. Disenchantment with the promises of the legal system did not lead to despondency, but to more critical, informed action. The findings, much like those of Engel's work on Thailand (2005) or Hendley's work on Russia (2004), are an important corrective to unidimensional or linear, teleological accounts of legal consciousness, especially in places where the legal system itself is still under construction in fundamental ways, or has recently undergone rapid, conspicuous changes, as in Poland. Such work provides empirical evidence on the social response to, and societal agency with respect to, state led "rule of law" projects in legal systems which are developing in much more conspicuous ways than, say, in the US.

The disaggregation of process and outcome achieved through this two-dimensional operationalization of legal consciousness allows for us to better see educative aspects of legal mobilization. It also helps us understand unexpected or contradictory responses. For instance, it helps explain why, in the Russian context, apathy, resignation, or hopelessness about the legal system did not correlate with litigation levels, which may be increasing (Hendley 1999).

"Becoming a side," the concept used in the work's title which I develop in this dissertation, draws upon and extends these literatures, and in particular extends Gallagher's two-dimensional operationalization of legal consciousness formation resulting from legal mobilization, to include a spatial dimension. The term emphasizes process, signaled by "becoming." It is suggestive of identity formation. "Becoming a side" is suggestive of movement towards contact with state governance structures, contact which may take more or less formal (or, formally recognized) forms. "Side" in turn suggests a position that is opposite to or contrasted with another, one other position being that of the state. Its reference to a formal legal term regarding entry into administrative proceedings firstly suggests an entity with a formally

recognized stake in the conversation being had. While it may consequently suggest equality or balance with respect to the state side, it also potentially suggests an adversarial relationship to the state.

I develop “becoming a side” in this work as a capacious concept, one which captures dynamic and ever-negotiated interactions between various actors—including individuals, social groups, the state, and the material world—as mediated through administrative legal processes and the ways of thinking about accountability such processes inform and inspire. These interactions may take adversarial forms, and may indeed be adversarial at their root in most cases, but at times they may be less adversarial than formal legal delineations capture. “Becoming a side,” in its most utopian interpretation, could also be understood as the never finished quest to achieve the democratic ideal of deliberation and negotiation amongst equals. Recall the round table talks described in Chapter Two: the idea of that “institutional” set up was for the opposition to sit at a table with Communist Party leaders as equal negotiating parties and together craft solutions to a political-economic crisis. Even if that was true only in the most symbolic of senses, the larger point is that the concept of “becoming a side” is meant to capture an evolving continuum of society-state relationships: from individual (one-to-one) to organizational (group-to-group), from informal to formal, and from adversarial to cooperative, or even collaborative.

“Becoming a side” also encompasses spatial aspects of mutual interactions between state and society. Legal consciousness formation, just as it is multi-dimensional, is also a spatialized process. Spatial imaginaries, or ways of thinking about space, accompany the processes of mobilizing law, learning to navigate the legal system, and assessing whether or how the legal system works. One’s evolving conception of the role of law in social life is intertwined with

how one imagines and understands social spaces, or spatial consciousness (Delaney 2010). In environmental legal processes, of particular importance seem to be two dimensions of spatial consciousness. The first is how particular types of space are thought about; this is often informed by direct experience or observation of the material/biophysical world in a particular place—I discuss this in Chapters One and Four. The second is a scalar thinking. This refers to jurisdictional levels and the institutions there located, a detailed understanding of the various levels of state power and nodes of discretionary administrative decision-making. Moreover, it refers to a relational understanding of how different levels are produced, how they interact to “perform” policies and make the world (Blomley 2013; Delaney 2010) (See also Chapter One).

“Side” encompasses many identities that may not otherwise intermingle, and it has an environmental or biophysical referent. Many differently situated actors have ascribed to or are encouraged to ascribe to this identity, active participants in administrative legal processes. Accordingly they develop a common, rather technical, legalistic language. The mastery of procedural rules, not to mention the ability to present substantive arguments such mastery affords, is a source of pride. Furthermore, participants in environmental legal processes develop a sophisticated, spatialized critique of the formal legal system, as they are able to witness firsthand not only the “mismatch” between what environmental law says and what is happening on the ground, but also begin to see how and why the prevailing approach to environmental protection is sustained. They make connections between different levels and nodes of discretionary decision-making, while they simultaneously experience firsthand the structural position of environmental organizations and environmental law within the legal accountability system. Many then share this experience and knowledge with others, and in doing so, build up skills among the populace to use the system while also building a critical analysis of state

accountability mechanisms. This all suggests the contradictory and daunting aspects, as well as the potential capaciousness, dynamism, and politically generative possibilities of this site of contact with the state.

An example may help illustrate these points. About half an hour into our conversation, Martin received a telephone call. After he listened for a moment and determined what the call was about, he put his cell phone in speaker mode so I could listen in. It was a woman calling regarding a planned toxic waste storage site in her rural village. She talked about an Environmental Impact Assessment (EIA) procedure being conducted by the Regional Directorate for Environmental Protection, and mentioned that residents of her village had created an association (*stowarzyszenie*) to organize against it. Martin asked her if they had “environmental protection” in their bylaws. She asked for some legal help, to which Martin responded “what can I do for you that you can’t do for yourself?” He went on to say that he always advises people to start their own organization. He told them to check the EIA report and see if it matched the law—noting that it sounded like many laws could be involved in this case, including one about waste, another about asbestos. He advised them to read through all the laws that might be relevant to their situation. He told them to look at the report point by point, that they had to be a “side.” He asked whether they knew how many “sides” there were. He explained Article 10 of the Polish Administrative Code: the “sides” to proceedings are informed about the status of the proceedings either by internet or by letters in the mail, depending on how many there were. If there were more than 20, they would be informed via the internet; if there were less than 20, they would be informed by letter. If there were more than 20, there would be information on the Regional Director’s website. He advised them to call and ask how many sides there were. He then gave them writing tips. He recommended writing their documents in a format anticipatory

of the case going to court, point by point. He explained to the woman that there were very few environmental lawyers who do this kind of work, that they privatized long ago, and were too costly. Wrapping up the conversation, he said, “I advise you to independently, carefully go through the laws and the EIA report. This is no trivial task, so I wish you luck.” When the phone conversation ended, I asked Martin,

Me: Do you get calls like this a lot? I hear you are practically a lawyer.

Martin: Surely [my colleague] told you that, very nice of him, but I am a biologist.

Me: But you use the law, work with environmental law.

Martin: If you play around with this, whether you want to or not, you learn it. Working on these issues, I happened to pick this up. These processes are the most important if you want to do something useful. That’s why you have to know the procedures, and only then can you...And this is this kind of, on one hand it’s advantageous, on the other it’s a little alarming, how these local government entities act, to get them to act constructively on their own accord. For them to do something of their own initiative, it’s practically unheard of. All you can do is put a stick in the spokes (“włożyć kij w szprychy”), you can only stop something, you can’t get them to do something of their own initiative that is beneficial to the environment.

The idiom “to put a stick in the spokes” (“włożyć kij w szprychy”) provides visual representation of the perceived relationship between government officials and civil society actors using procedural rights to enforce environmental protection mandates: environmental advocates try to interrupt or stop a process of economic development well in motion, try to interject other values into a prevailing way of doing things.

Self-taught legal practitioners like Martin and his colleagues acquired a broad political economic critique of law, in which comparisons are made between communist and capitalist “economic modernization” policies and the ways in which public officials were not subordinate

to the environmental legal system in a meaningful or reliable way, to the detriment of the environment.

According to one of his colleagues, Martin was like a lawyer, because he had acquired the ability to navigate the technicalities of the gatekeeping system by which environmental advocates might be precluded from presenting their substantive arguments. Doing so, getting past the gates, enables confronting state actors who are neither accountable to the citizenry nor environmental protection commitments, in ways Martin's colleague identifies as similar to communist times, except for the involvement of the private sector

To me he [Martin] is nearly a lawyer, because he's really mastered all the environmental regulations and all the nuances and how all the government offices try to get out of their responsibilities on the basis of legal formalities like deadlines, and so on, so as not to engage with the substantive arguments. And this is not good in Poland, because like during communist times, they did everything during that time they wanted, build roads, cut down trees... now it seems like the strong lobby is private investors, connected/working very closely with, it turns out, very often with the local government (samorząd) in the sense of [the local government] being submissive and then giving out permits that, according to our analysis, break environmental law...all I can say, the word I can use, is that they are submissive to the investors. That's what it looks like (R2).

The same respondent describes having to learn complicated administrative complaint procedures on one's own, given the dearth of Polish lawyers specializing in environmental law, as well as the scarcity of resources among environmental advocates.

Our problem, like that of other organizations, is that administrative processes [...] are just very complicated, and really a lawyer would have to do this, and in addition he'd have to specialize in environmental matters, and there aren't that many lawyers of this type. Usually these lawyers deal with civil matters, crime, but those who specialize in environmental matters, there aren't very many of them. Even if there were more of them, they have high costs for their services and we completely don't have money for this...we don't have money to pay a lawyer. So if we want to do something like this we have to teach ourselves and [Martin] is an example of this. At the beginning I didn't realize he would make this kind of progress... (R2)

With repeated interaction with the formal information request and administrative complaint system comes an iterative honing of not only the administrative complaint procedures and how to navigate them, but also an increasingly systemic understanding of the governance structure, the decision-making points, a scalar scaffolding of power. While many of my interviewees invoked several realms of law, including criminal, civil, constitutional, and administrative law, it was administrative law that they described as allowing them useful access to state power structures and in which one's own observation of the physical earth and evidence collection could be drawn upon.

Participation in administrative legal processes thus serves a political/legal socialization function for differently situated actors. The open legal opportunity structure facilitates this process by allowing those not trained in law to engage with the legal system, and to learn to navigate it by trial and error. Those who do gain a sense of self-efficacy, a detailed knowledge of the rules, and a detailed scalar understanding of the governance structure and the ways power is wielded through it. I turn now to the LOS itself, to provide a detailed description of the formal institutional context at the interface with which consequential processes of legal consciousness formation and political socialization are occurring.

Legal Opportunity Structure (LOS) for environmental organizations in Poland

In service of my point that environmental advocates, in their interactions with the administrative legal system, acquire a detailed understanding of the various levels of state power and nodes of discretionary administrative decision-making within it, I must necessarily delve into some technical detail about the administrative legal system in Poland, its configuration, and the actors involved in its enactment. The purpose of this section is not dry recitation of legal background information and minutiae. Rather the point is to illustrate how the set-up of the LOS

itself, and environmental advocates' interactions with it, shapes their legal consciousness formation, as individuals and as a constituency.

Since the 1980s, environmental organizations in Poland have had relatively strong rights to contest or compel state action, relative to other societal actors, including individuals, as well as other types of non-governmental organizations. The Polish Administrative Code (*Kodeks Postępowania Administracyjnego*, KPA) forms the legal basis for social organizations and individuals to check and contest administrative decisions. The other main law from which the procedural rights of environmental organizations derive is what my interviewees often called “the law with the long name”: the law of October 3, 2008 on access to information about the environment and its protection, public participation in environmental protection, and environmental impact assessment (*ustawa z 3 października 2008r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko*). For expediency, I will henceforth refer to this law as “the 2008 EIA law.” Although not all of my interviewees could recite the 2008 EIA law’s long name by memory, most all of them flagged it as the most important, or one of the most important, tools they use in their efforts to protect biophysical entities and hold the government accountable. This is corroborated in numerous “how-to” manual style publications written by members of organizations more experienced using the system (Pawlaczyk 2012; Pawlaczyk et al. 2005; Mroczka et al. 2012).

One of the reasons the 2008 EIA law is so significant is because it essentially makes the bar to “get in the door” of administrative legal processes lower for environmental organizations than other types of societal organizations or individuals. Although social organizations of many types and individuals are legally entitled procedural rights as specified by the Polish

Administrative Code, environmental groups are entitled to legal procedural rights beyond those granted generally by the KPA. Chapter 4, Article 44 of the 2008 EIA law entitles environmental groups to participation in administrative proceedings as a “side” (“*na prawach strony*”) in any administrative procedure in which an environmental impact procedure is involved. Rather than petition to become a side, the group may simply announce its participation, provided that the group’s bylaws indicate it is an environmental organization. The group may also participate in later stages of an administrative procedure, contesting a decision or bringing a case to the administrative court, even if it did not participate in earlier stages.³⁶ Besides participating in proceedings related to environmental assessments, environmental decisions, and environmental impacts of a proposed development on a Natura 2000 area, the law also makes it possible for environmental organizations to participate in proceedings related to issuing construction permits and permits for road construction projects (if the projects do not meet any of the aforementioned criteria). In contrast, if an individual wishes to become a side to administrative proceedings more generally, s/he must demonstrate a legal interest in the case, per Chapter 6 of the Polish Administrative Code. If an organization wishes to become a side to administrative proceedings unrelated to environmental impact procedures, they have to demonstrate an interest in the case

³⁶ except that they are not entitled to bring an appeal to the Supreme Administrative Court if they did not participate in the proceedings in the lower provincial court (*Wojewodzki Sąd Administracyjny*, WSA). Bringing a case to the Supreme Administrative court (*Naczelny Sąd Administracyjny*, NSA), unlike for the lower instances, requires a lawyer. All environmental organizations surveyed in a recent research project on access to justice for environmental groups in Poland (Wiśniewska 2016) indicated that this requirement was a major barrier to court access for them, due to attorney’s fees (particularly if the organization did not have its own lawyers, funding for lawyers, or access to legal services on a pro bono or sliding scale basis). The cost of one proceeding before the Supreme Administrative Court can be up to several thousand PLN (200-800 USD). Two thirds of the organizations indicated the court registration fees to be a large or very large barrier to court access for them, particularly in cases related to construction law or spatial planning matters (about 500 PLN or 125 USD). For a typical environmental case, the fees are about 100-200 PLN (about 25 to 50 USD) (ibid, pp. 52-53). Environmental organizations can theoretically apply for financial assistance and get exemption from the fee, but in practice courts consistently denied such assistance. To justify denial, courts argued that any entity who files a legal complaint must take the costs into account and the state could not be expected to subsidize non-governmental organizations. Since environmental organizations could raise funds using various means, in order to receive assistance they would have to prove to the court that they made such efforts, but that those efforts were ineffective (ibid).

based on Article 31 of the Polish Administrative Code. This article requires the organization to show it is working in the public interest, and that the proceedings at hand are relevant to the organization's goals.

Another reason the 2008 EIA law is so significant is because it is the product of a longer legacy of environmental organizations' robust procedural rights and contestation around those rights. Attempts to legislatively rollback these rights have been unsuccessful, largely owing to Poland's position in the EU governance structure and as a signatory to the Aarhus Convention.³⁷ The legal rights of environmental organizations have been a subject of dynamic change in the past few decades. A statute passed during the People's Republic of Poland in 1980 provided for the broadest set of legal rights for environmental organizations.³⁸ It gave them four main sets of procedural rights. They could demand that an administrative authority used its resources to try and remove an environmental threat. They had standing (*legitymacja procesowa*), allowing them to enter into court proceedings against a party who was allowing an environmental disturbance to occur. They could bring motions and reservations in proceedings related to investments, and they had the right to participate in administrative proceedings as a "side" ("*na prawach strony*") in matters related to environmental protection, given that they were a social organization "interested in environmental protection on account of the subject and terrain of their operations"(quoted in Micińska 2011, p. 182). Administrative authorities were to inform organizations via a mailing list if administrative proceedings which might concern their organization were initiated. It can be said without exaggeration that at that time, Poland had exceptional legal instruments on the books regarding societal organizations' right to participate in matters related to the environment. A problem that hindered their active realization by

³⁷ Poland ratified the Aarhus Convention on 31 December 2001.

³⁸ *Ustawa o ochronie i kształtowaniu środowiska z 1980*, Art. 100

citizens, however, was censorship of information and a restrictive law on the formation of associations (*prawo o stowarzyszeniach*), which did not change until 1989.

For a period between 2000 and 2008, the legal status of environmental organizations was weakened, and many of the broad procedural rights to which they were entitled (at least on paper) were limited.³⁹ This was remedied, and infringement proceedings from the European Commission addressed, with the passage the 2008 EIA law.⁴⁰ Along with the EIA law of 2008, the Polish government also brought forth a significant institutional change which created a more independent environmental authority overseeing the system of issuing environmental decisions and assessing environmental impact assessment reports. The General Directorate for Environmental Protection (*Generalna Dyrekcja Ochrony Środowiska*) and its sixteen regional counterparts, the Regional Directorates for Environmental Protection (*Regionalni Dyrektorzy Ochrony Środowiska*) were Poland's own institutional solution to the shortcomings of its environmental decision-making procedure. It took some power out of the hands of regional

³⁹ *Ustawa z dnia 9 listopada 2000r. o dostępie do informacji o środowisku i jego ochronie oraz ocenach oddziaływania na środowisko* revoked most of the rights of societal organizations dealing with environmental matters. What remained was the possibility to participate as a “side” in proceedings which “required public participation.” It also introduced the definition of an environmental organization as a social organization whose goal, as stated in the bylaws, is environmental protection. After this law was repealed, these issues were governed by the 2001 Environmental Protection Law, *Prawo ochrony środowiska*. In the course of numerous amendments to the Environmental Protection Law, the procedural rights of environmental organizations were restricted (Micińska 2011, p. 182). For example, a requirement was introduced that gave organizations 21 days after the public announcement of the initiation of proceedings to submit comments and complaints, where previously there was no time limitation, and the organization could enter into the proceedings at any time, even in the later stages. The restrictions are chronicled in detail in Micińska (2011, pp. 181-186).

⁴⁰ The reform of previous laws containing similar but more restrictive provisions occurred after legal contention at the EU level regarding environmental organizations' barriers to access to administrative proceedings, for example in ECJ Case C – 435/97 WWF; European Commission Infringement Proceedings nr 2006/2281. Poland was in violation of Directive 85/337/EEC, the EIA or Environmental Impact Assessment Directive, and failed to transpose Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice, Council Directives 85/337/EEC and 96/61/EC (concerning the public participation pillar of the Aarhus convention). I detail the course of enforcement actions at the EU level further in Chapter Five.

(*województwo*) authorities and into the hands of a newly created, more independent environmental authority.

In summary, the procedural rights of environmental organizations in Poland derive from two main laws: the Polish Administrative Code and the 2008 EIA law.⁴¹ Together, these laws lay out a robust set of rights for environmental organizations to participate in government decision-making that may impact the environment. The 2008 EIA law remains a dynamic focal point for contestation,⁴² but enforcement action on the part of the European Commission to date indicates that any legislative rollbacks to environmental organizations' rights on the part of Polish legislators will face disciplinary action (See Chapter Five). The basic legal structure and set of entitlements will remain intact.

Changes in legislation and practice over time decidedly remedied the barriers to participation and becoming a “side” by environmental organizations enshrined in previous iterations of Poland's environmental protection law, thus creating an even more open legal

⁴¹ Other relevant laws include the Law on Access to Information (*Ustawa o dostępie do informacji publicznej*), Law on Nature Protection (*Ustawa o ochronie przyrody*), Environmental Protection Law (*Prawo ochrony środowiska*), Law on preventing and repairing environmental harm (*Ustawa o zapobieganiu szkodom w środowisku i ich naprawie*), Law on administrative judicial proceedings (*Prawo o postępowaniu przed sądami administracyjnymi*) and the Associations Act (*Prawo o stowarzyszeniach*). This list of relevant laws is not exhaustive, but in my view they are the laws which comprise the source of environmental advocates' procedural rights. Of course other laws/rights, such as property law/rights, which may be thought of as a counterpoint to environmental law, are of great relevance more broadly for those wishing to protect environmental entities. One manual published by experienced practitioners listed the top ten most important laws for those who want to legally intervene in environmental issues (Mroczka et al. 2012, pp.10-11). The list includes the laws I just mentioned (with the exception of the law on associations), in addition to: the law on spatial planning and management (*Ustawa o planowaniu i zagospodarowaniu przestrzennym*); law on real estate management (*Ustawa o planowaniu i zagospodarowaniu przestrzennym*); and construction law (*Prawo budowlane*).

⁴² The 2008 EIA law was amended in 2014 (*ustawa z dnia 5 grudnia 2014 r. o zmianie ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko oraz niektórych innych ustaw*). By way of an amendment to the Geological and mining law (*Prawo geologicznego i górniczego*), an amendment to Article 44 of the EIA law limited participatory rights within EIA procedures to environmental organizations that have existed for a minimum of 12 months before the beginning of a procedure. The law has been recently amended again, and the amendment will take effect 1 January 2017. The name of the amendment is: *Ustawa z dnia 9 października 2015 r. o zmianie ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko oraz niektórych innych ustaw („nowelizacja UOOS”)*.

opportunity structure and increasing the possible involvement of environmental organizations in investment decisions. These changes also have potentially made it such that Poland has one of the most complicated and time-consuming investment procedures in Europe (Bukowski 2008, cited in Kupczyk et al. 2008).

Prevalence of use

In such a study of individual and organizational legal mobilization, a sensible question to ask is how prevalent contact with such administrative legal processes is within Polish society. Involvement in the administrative processes described in this chapter is not a mass phenomenon. Survey research on contact with the legal system suggests that about 20 percent of Poles had contact with courts in 2008, and that contact varied along demographic and geographic characteristics such as education, profession, age, and place of residence (Kojder 2008).⁴³ My data suggest that those using the administrative appeals system in environmental cases, besides trained lawyers, tend to be middle aged or older and tend to have some training in the physical sciences.

The use of administrative legal tools, from information requests to bringing administrative suits to appeals courts, does appear to be on the rise. This section provides some quantitative indicators of such trends. One source of such information is from public environmental authorities. These data show that generally, the trend is upward for information requests. In 2011, the Environmental Inspectorates in Poland (the Chief Inspectorate and the

⁴³ The research design and results imply that “contact with the law” in Kojder’s study refers to criminal and civil law, generally. The Polish Ministry of Justice keeps statistics on civil cases dealing with “protection of man’s natural environment.” In 2011, there were 39 such cases initiated and 24 resolved in the first instance courts of general jurisdiction (civil and economic departments). In the second instance courts (*sądy okręgowe*, civil and economic departments), there were 24 such cases initiated and 49 resolved. The appeals courts (*apelecyjne*) had 31 such cases in 2011, and 33 resolved that year. In 2012, there were 76 such cases, 31 resolved. The second instance courts: 33 initiated and 60 resolved. Appeals courts: 11 cases, 14 resolved (Ministry of Environment 2014). Although imperfect, these numbers are nonetheless proxies for describing the extent of contact with the formal legal system in Poland.

Provincial level inspectorates) received 6,345 environmental information requests. The following year they received 6,765. In 2011, the Center for Environmental Information at the Ministry of Environment received 84 environmental information requests; in 2012, 108. The General Director for Environmental Protection received 82 information requests in 2011, 109 in 2012, and 84 halfway through 2013. The Regional Environmental Directorates together received 3321 information requests in 2011, 3921 in 2012, and 2949 halfway through 2013. The National Water Management Board received 34 information requests between 2011 and 2013. Regional Directors of Water Management Boards received 566 requests in 2011, 715 in 2012, and 433 as of halfway through 2013. From 2011 to halfway through 2013, the head of the State Mining Authority received 1708 information requests. Between 2011 and 2013, the head of the National Atomic Agency did not receive any such requests (Polish Ministry of Environment 2014).

These numbers do indicate a rise in the modest number of information requests submitted to public authorities in recent years. The numbers, although modest, are only a partial indicator of increasing environmental consciousness in society, awareness of environmental issues and procedural rights such as the right to information. Social movement actors play an intermediary and educational role here. The Ministry of Environment reported survey research conducted at the end of 2013 which indicated that 74 percent of Poles have never sought out information about the environment. The remainder sought such information mainly on the internet. Most Poles get information about the environment from mainstream press outlets. The research also indicates the growing role of social movement campaigns as a source of environmental information. Twenty one percent of respondents in this survey research indicated that they received information about the environment from societal campaigning. In the previous year, only seven percent of respondents reported this (Polish Ministry of Environment 2014).

Given the limited number of people in the population who are using administrative legal channels to seek information (and the limitations of that indicator itself), another aspect of the picture is the number of administrative court appeals among the population engaging with the administrative legal system. In 2011, there were 86 appeals to the Provincial Administrative Courts of decisions made by the General Inspectorate for Environmental Protection, which subsequently resulted in 15 appeals to the Supreme Administrative Court. In 2012, there were 165 appeals to Provincial level courts and 18 to the Supreme Court (Polish Ministry of Environment 2014).

We may also characterize how prevalent environmentally related administrative legal activity is in Poland by putting it against the backdrop of administrative litigation more generally over time. The following tables provide an overview of administrative litigation activity relevant to environmental conflicts since Poland's official entrance into the EU in 2004.

The first table (Figure 2) shows Supreme Administrative Court Cases. In general, an increase in the number of cases decided since 2004, and the proportion of environmental or procedural rights' cases to the total, can be observed. The proportion of cases related to environmental protection and procedural rights to total cases is modest, but it has risen from 0.72 percent in 2004 to 2 percent in 2015. This table is perhaps a conservative picture of administrative litigation activity by environmental groups, since it focuses only on the highest court and not provincial courts. This means that only the cases which were appealed all the way up to the Supreme Administrative Court (meaning a lawyer would have had to file the appeal) are represented in this table.

Figure 2. Number of Supreme Administrative Court decisions by topic, 2004-2015

<u>Year</u>	Environmental protection cases	Nature protection cases	Animal protection cases	Access to public information cases	Environmental conditions for enterprises cases	Social organization cases	Total cases related to environment/ procedural rights	Total cases	Percent of cases related to environment/ procedural rights
2004	11	4	0	6	0	3	24	3,348	0.72%
2005	56	2	0	25	0	4	87	8,274	1.05%
2006	96	16	0	22	0	2	136	10,315	1.3%
2007	143	26	0	20	0	1	190	10,973	1.7%
2008	115	54	0	42	0	7	218	14,424	1.5%
2009	82	45	0	19	0	4	150	14,784	1.0%
2010	128	24	0	67	0	2	221	16,765	1.3%
2011	135	21	0	78	0	2	236	17,889	1.3%
2012	117	33	0	140	2	5	297	18,832	1.6%
2013	117	12	0	245	7	6	387	20,747	1.9%
2014	156	34	1	274	10	1	476	24,255	2.0%
2015	185	38	7	226	15	3	474	24,102	2.0%

Data source: Centralna Baza Orzeczeń Sądów Administracyjnych, orzeczenia.nsa.gov.pl

A second table (Figure 3) shows Provincial level court cases decided from 2004-2015. In general, since 2004, the number of cases has increased, and the proportion of environmental or procedural rights' cases has increased from 0.16 percent in 2004 to 1.5 percent in 2015. Particularly striking is the rise of access to public information cases over the time period examined, rising from just 26 in 2004 to 1341 in 2015, a fifty-fold increase. Although less so than the one before it, this table is also likely a conservative picture of administrative legal activity by environmental groups, since it focuses only on provincial courts. This means that only the cases which were appealed to the Administrative Court (meaning a second instance administrative authority's actions or decisions were appealed) are represented in this table.

Figure 3. Number of Provincial Administrative Court decisions by topic, 2004-2015

Year	Environmental protection cases	Nature protection cases	Animal protection cases	Access to public information cases	Environmental conditions for enterprises cases	Social organization cases	Total cases related to environment/procedural rights	Total cases	Percent of cases related to environment/procedural rights
2004	54	10	0	26	0	0	90	56,729	0.16%
2005	59	13	0	20	0	1	93	60,065	0.15%
2006	108	26	0	36	0	0	170	56,883	0.30%
2007	191	64	0	73	0	2	330	61,900	0.53%
2008	482	107	0	153	0	1	743	82,163	0.90%
2009	421	97	0	240	0	9	767	84,943	0.90%
2010	489	125	0	323	0	5	942	92,145	1.02%
2011	386	113	0	274	0	3	776	98,935	0.78%
2012	425	93	0	674	43	5	1240	102,839	1.21%
2013	473	133	21	1355	35	0	2017	112,824	1.79%
2014	407	150	56	1914	28	0	2555	122,226	2.09%
2015	326	124	28	1341	55	8	1882	122,063	1.54%

Data source: Centralna Baza Orzeczeń Sądów Administracyjnych, orzeczenia.nsa.gov.pl

Potential limitations with these data presented in both tables include lack of comprehensiveness of the database (they most likely rely on self-reporting); lack of clarity as to how cases are categorized/tagged and whether that is consistent across jurisdictions and between lower and upper levels, whether the categories are mutually exclusive, and addition of new categories in later years.⁴⁴ Nonetheless, these descriptive data are in accordance with the expectation that administrative legal activity might become more prevalent given the expanding legal opportunity structure, augmented by international and EU law, available to social groups in general and environmental groups in particular. Environmentally-related litigation activity, however, is still a small percentage of all cases at the national level.

Providing descriptive data and characterizing the institutional and legal set up are useful to the study of administrative legal activity, but qualitative data provides more insight into them as sites where processes of legal consciousness formation occur. I return now to one dimension

⁴⁴ Other categories potentially relevant but not included in the data presented here due to relevance/potential overlap with more general categories like environmental protection or nature protection or social organizations: Forests, Public Health, Waste, Foundations, Water law, Construction law.

of this process: interaction with the administrative legal system enables a detailed mapping of state power.

Mapping state power

Through iterative contact with the administrative state, environmental advocates acquire a comprehensive understanding of the various levels of state power and nodes of discretionary administrative decision-making within it. This is particularly the case for those who have been engaging with the legal system in the longer term, and who endeavor to pass their acquired knowledge and experience onto others. Data presented in this section is taken from “user’s manuals” prepared by environmental organizations, as well participant-observation of trainings on how to use the administrative legal system run by environmental organizations. Upon examination, the data reveal a tremendous amount of knowledge creation about the administrative state on the part of experienced environmental legal practitioners.

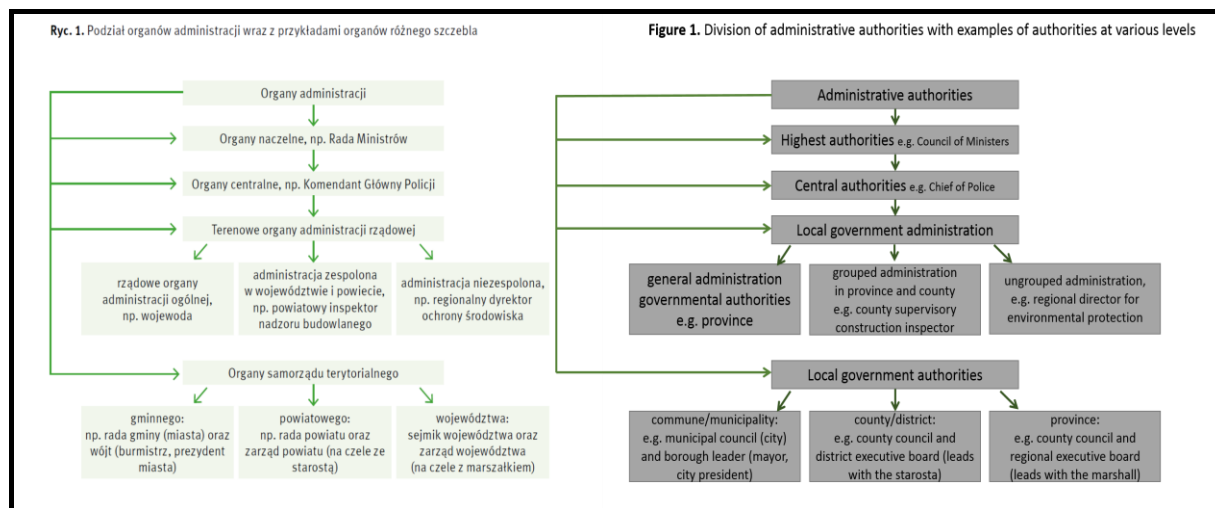
A fundamental aspect of the publications and trainings are visual representations of how the state is organized, the responsibilities each part of the state has in its purview, the actors involved, and locations of potential intervention by those wishing to protect biophysical entities, hold public officials accountable, or both. These materials and their manner of presentation are at once descriptive and didactic; as they describe how administrative legal processes work, they map state power and assert citizens’ role in holding that power to account. Whether the topic is requesting information about the environment, contesting a decision which rejects a community association’s participation in administrative proceedings, or bringing an administrative suit against a governmental ministry’s decision to administrative court, administrative legal formations themselves and the way they are presented promulgate a way of seeing, a scalar way of seeing, and a way of seeing through the lens of accountability. This lens is capacious and

culturally resonant, encompassing as it does citizen oversight of public institutions, monitoring the state, and increasing transparency. Such monitoring is done in service of improving material conditions, protecting public goods, and playing a role in determining the course of development in the place one lives. It makes the work environmental organizations do converge in important ways with other societal movements, those more or less involved with formal party politics. The capaciousness of the lens is illustrated by precisely how difficult it is to catalogue or delineate the groups or actors doing this sort of “watchdog” work (Wychowalek 2011). Environmental groups may be the quintessential example of watchdog style interaction with government entities in Poland (and perhaps elsewhere), however, in part because of their distinctive set of rights to access administrative procedures.

A few examples illustrate the knowledge creation about the administrative state occurring among environmental legal practitioners and those with whom they interact (readers of their publications or participants in their trainings, those who contact them to solicit legal advice, and so on). The first is a schematic figure which shows the hierarchy of public administration authorities in Poland. The figure, as the remaining figures in this section, was produced by the environmental organization *Pracownia na Rzecz Wszystkich Istot* (Workshop for all Beings). I have reproduced the figures with the addition of English translations. The schematic of public administration authorities in Poland is accompanied by examples of various actors at each level, as well as identification of where and who is responsible for environmental matters at each level, and general principles for corresponding with these government actors.

Figure 4. Scheme of Administrative Authorities in Poland

(adapted from: Mrocza et al. 2012, p. 17)



The next figure provides a generalized version of two-instance administrative legal structure in Poland.⁴⁵ The manual in which it was published explains that the two-instance structure means that administrative decisions, including “mini” procedural decisions, can be contested at a higher level. A first instance authority’s decision can be appealed to the second instance authority, and if the second instance authority upholds it, it may be further appealed to the provincial administrative court (*Wojewódzki Sąd Administracyjny*, WSA). The WSA’s decision may be appealed to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA) – it is only at this level that lawyer credentials are necessary to file an appeal. If the administrative courts decide that the first and second instance decisions were legally correct, then the previously contested decision becomes legally binding (*prawomocna*).

⁴⁵ This table is not exhaustive and does not cover possible exceptions or different configurations. For example, there are water permit proceedings in which the Regional Director of Water Management is the second instance authority. When the first instance authority is a minister or the SKO, there is not a second instance authority to which a decision or procedural decision can be appealed; however, there is the possibility to submit a motion to re-examine the case (*wniosek o ponowne rozpatrzenie sprawy*), a process which has a similar character to adjudication by a higher instance authority.

Figure 5. Two-Instance Administrative Structure in Poland

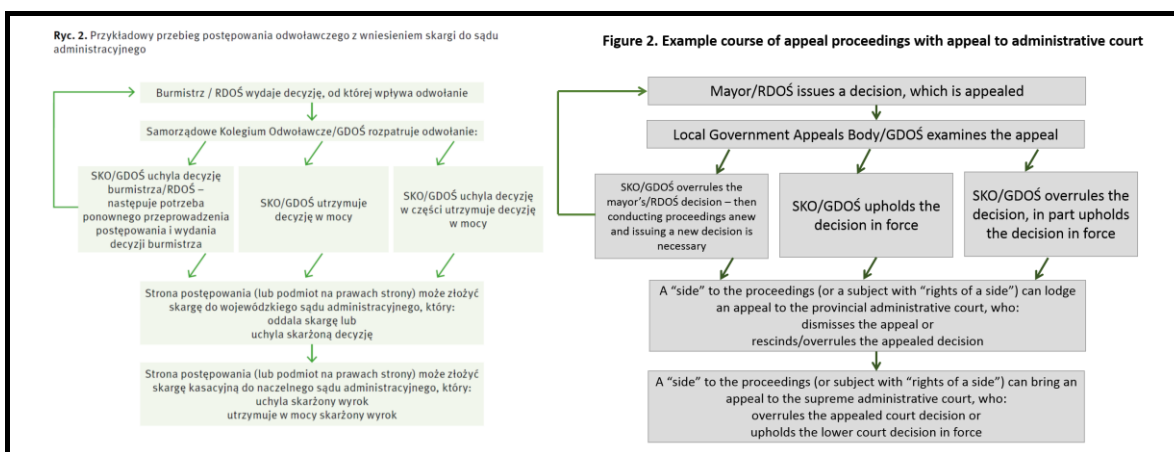
(adapted from: Mrocza et al. 2012, p. 21)

Organ I instancji	Organ II instancji
wójt/burmistrz/prezydent miasta	samorządowe kolegium odwoławcze
starosta/marszałek	samorządowe kolegium odwoławcze
regionalny dyrektor ochrony środowiska	generalny dyrektor ochrony środowiska
powiatowy inspektor nadzoru budowlanego	wojewódzki inspektor nadzoru budowlanego
wojewódzki inspektor nadzoru budowlanego	główny inspektor nadzoru budowlanego
wojewódzki inspektor ochrony środowiska	generalny dyrektor ochrony środowiska
dyrektor regionalnego zarządu gospodarki wodnej	prezes krajowego zarządu gospodarki wodnej

First instance authorities	Second instance authorities
borough leader/ mayor/city president	local government appeals body
starosta/marshall	local government appeals body
regional director for environmental protection	general director for environmental protection
county supervisory construction inspector	provincial supervisory construction inspector
provincial supervisory construction inspector	chief supervisory construction inspector
provincial inspector of environmental protection	chief inspector of environmental protection
director of the regional water management authority	president of the national water management authority

A subsequent figure illustrates the course of administrative proceedings with an appeal to an administrative court:

Figure 6. Course of Administrative Proceedings (adapted from: Mrocza et al. 2012, p. 22).



This diagram lays out the possible outcomes at each stage and avenues of appeal. Central messages being conveyed in the presentation of this material are: there are multiple

opportunities to contest decisions; such opportunities should be pursued; these processes may be time-consuming and require dogged commitment and attention to technical detail.

A “how-to” manual on citizen enforcement of environmental legal accountability necessarily touches upon most levels and aspects of the administrative state. This is because, depending on the issue at hand, different levels and actors (sometimes overlapping) may have purview over the issue being regulated or the decision being issued. Thus these publications and training materials provide a comprehensive catalogue of the actors comprising the administrative state, their location in terms of jurisdictional level, and relatedly, what each actor is responsible for—for example, processing public information requests, issuing environmental permits, issuing construction permits, informing the public about consultation around a new development, and so on. What is more, along the way, such manuals assert the necessity of exercising administrative procedural rights in order to hold governmental actors to account.

One “how-to” manual I examined (Wnuk 2002), this one a more general “citizens’ anti-corruption guide,” illustrates didactic work being done to encourage citizens to use administrative law. In its introductory section, it says goodbye to “Styrofoam” (a politically derisive term related to the strikes organized by the Solidarity trade union, during which protesters would stay in the factory for days and sleep on makeshift beds made from blocks of Styrofoam), and encourages fighting abuses of administrative power using administrative law. New times, the manual says, call for new solutions—things no longer depend on the whims of the Party Secretary, so politics and propaganda are not enough. Administrative law and engagement with legal processes are presented as useful tools which, although a bit daunting and onerous to learn and see cases through, can be effective, bring results, and can be used to hold the democratic state—which was won by overthrowing the totalitarian powers—accountable.

The old way of “doing” bureaucracy lingers, and such guides encourage citizens to take an active role in shaping the new way.

Perhaps one of the most significant sites of contact between environmental advocates and administrative state actors is that during the course of administrative proceedings involving Environmental Impact Assessments and what are called decisions on environmental conditions. This is in part because, as explained in the previous section, environmental organizations are legally entitled to participate as a “side” in any administrative decisions involving such assessments.

The purpose of the Environmental Impact Assessment process (EIA; Polish: *ocena oddziaływania na środowisko*) is to identify and examine the potential environmental impacts of a public or private project or investment before it is carried out.⁴⁶ This is done in order proceed (or decide not to proceed) in a way mindful of possible environmental harms, and more cognizant about the full range of costs and benefits of a proposed action and its potential alternatives.⁴⁷ In Polish law, permission to move forward with a public or private project, if it is listed in Group I or Group II of the 2008 EIA law, requires obtaining a series of permissions

⁴⁶In Polish and EU law there are three types of EIA procedures: (1) strategic environmental impact assessment (*strategiczna ocena oddziaływania na środowisko, SOOŚ*) – for policies, strategies, plans, and programs; (2) EIA for an individual project (*ocena oddziaływania na środowisko, OOS, dla indywidualnych przedsięwzięć*) – for assessing impacts of a planned construction project, other installation, system or activity which would cause environmental interference or change land use; and (3) impact assessment of effects on a Natura 2000 area, often colloquially called a “nature assessment” or “habitat assessment” (*ocena oddziaływania przedsięwzięcia na obszar Natura 2000*) – focused on researching potential impacts of a proposed project in a Natura 2000 area.

⁴⁷ The goal of enacting this process (in order of priority) is to eliminate, minimize, or compensate for negative environmental impacts. This is reflected in three principles in Polish environmental law (Articles 6 and 7 *Prawo ochrony środowiska*): the precautionary principle, the prevention principle, and the principle of responsibility for negative impacts (sometimes called the “polluter pays” principle) (Mroccka et al. 2012, pp. 37-38). Polish rules suggest the following elements to be integral to the environmental assessment process: a compilation of environmental documentation (EIA prognosis and/or EIA report); agreement upon and/or an opinion on the environmental documentation among the appropriate authorities (sanitary inspection authorities and environmental protection authorities; General or Regional Director for Environmental Protection; maritime office director); and guaranteeing the possibility of public participation (informing the public about the initiation of the EIA process as well as the ability to submit comments during the process).

from administrative authorities, one called a decision on environmental conditions (*decyzja o środowiskowych uwarunkowaniach*), sometimes called an environmental decision (*decyzja środowiskowa*) for short. Which administrative authority issues this decision depends on the nature of the project. Most commonly, it is a municipal level authority, such as a mayor, for the given location where the development is to proceed. If it is a project which “can always have a significant impact on the environment” (Group I), the Regional Director of Environmental Protection, the designated provincial level authority, will issue this decision.⁴⁸ The environmental decision needs to be procured before a construction permit or other subsequent permits are issued, and this decision is binding on subsequent investment decisions and subsequent administrative decisions. In administrative proceedings requiring an EIA, the environmental decision is the result of extensive analysis of the project, its geographic location, and exhaustive analysis of the types and extent of possible environmental impacts.

For development projects in Group I of the 2008 EIA law, an EIA is obligatory. For those in Group II, an administrative authority, in consultation with the Regional Directorate for Environmental Protection or other comparable environmental authority, decides if and EIA is needed, based on whether the project could have a significant negative environmental impact. This is but one of many points of discretionary decision-making where environmental organizations may intervene and contest the result.

⁴⁸ Decisions on environmental conditions may also be issued by: the General Director for Environmental Protection (national level), if the project is related to nuclear power plants; the *starosta* (country/district level), in the case of joining, replacing, or dividing land/soil; the Director of the Regional Directorate for the National Forests (provincial level), in the case of changing State Treasury-owned forest land use for agricultural purposes. To give a sense of the volume of decisions being issued, one employee of the Regional Directorate for Environmental Protection in Warsaw estimated that his (probably high-volume of requests) office issued about 10,000 decisions between 2008 and 2014, about 300 of those were decisions on environmental decisions (April 2014, lecture at University of Warsaw).

The following two diagrams illustrate this visually. Figure 7 illustrates what a typical process related to the issuance of a decision on environmental conditions for a project requiring an EIA (Group I in the 2008 EIA law) looks like. Administrative authorities who most commonly run such proceedings are those at the municipal level, e.g. mayor or borough leader.

Figure 7. Schematic diagram of the process of issuing a decision on environmental conditions, when an EIA is required (adapted from: Mroczka et al. 2012, p. 51)

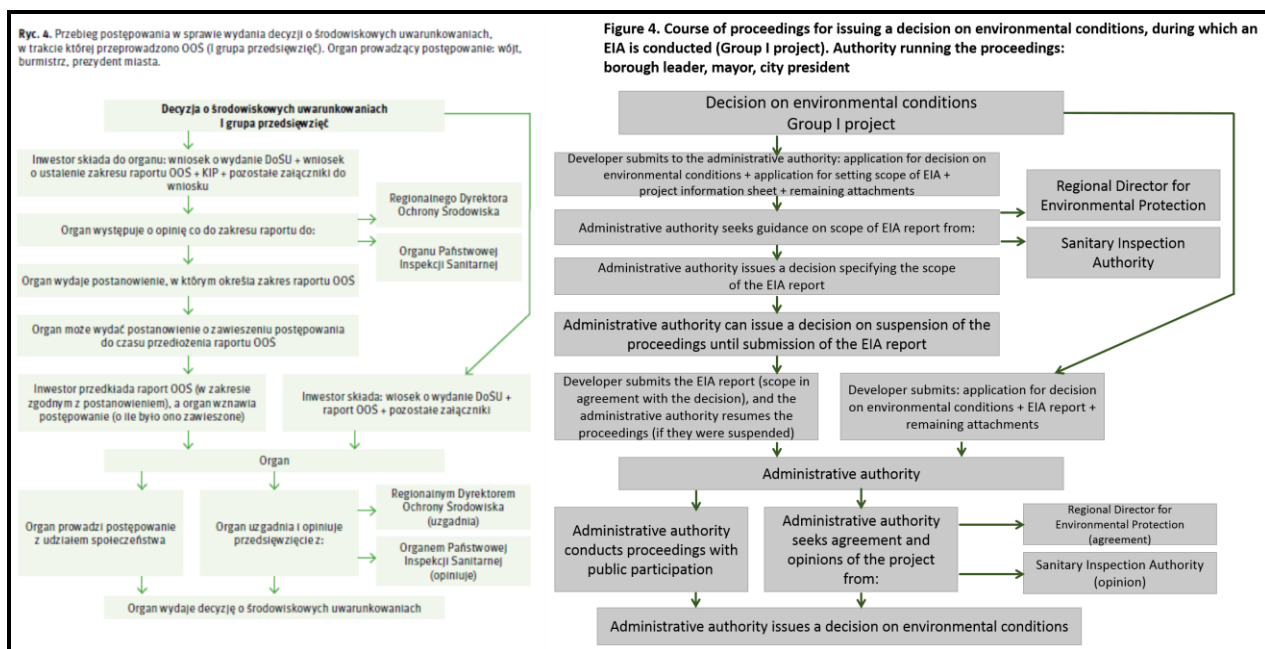
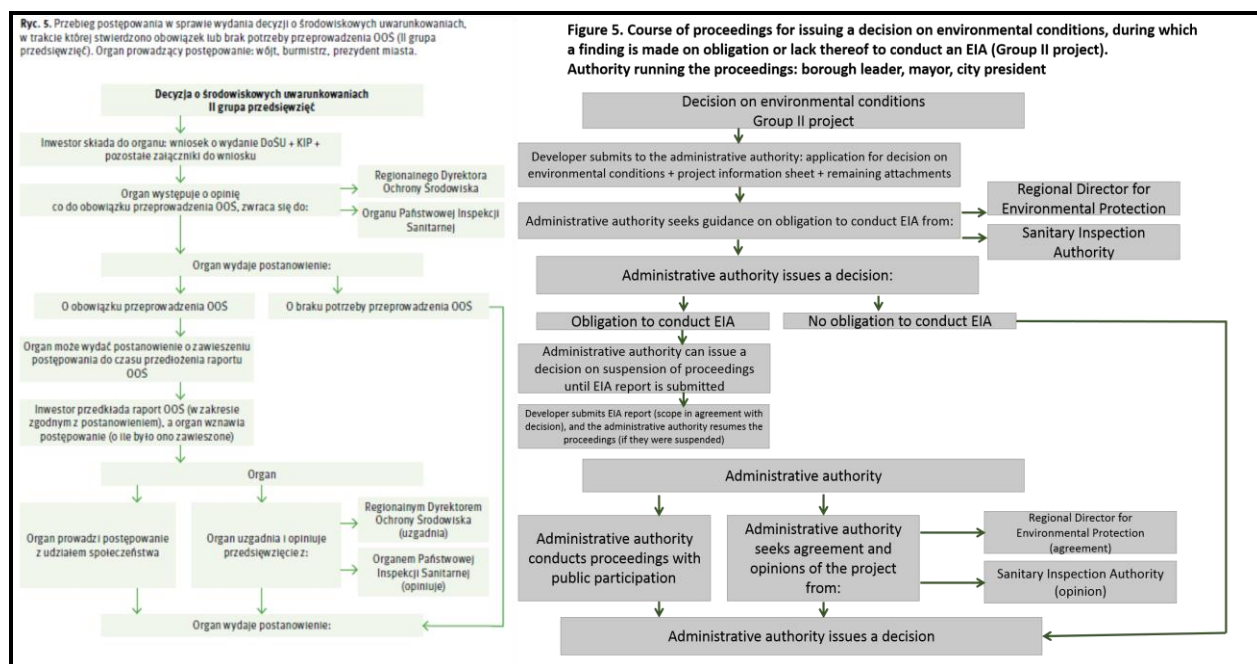


Figure 8 illustrates the process for the issuance of a decision on environmental conditions for a project not necessarily requiring an EIA. The obligation to conduct an EIA is at the discretion of the administrative authority (Group II in the 2008 EIA law). Again, the administrative authorities who most commonly run such proceedings are at the municipal level. The main difference in this case is the extra step (and subsequent “mini” administrative decision) required to determine if and EIA should be conducted.

Figure 8. Schematic diagram of the process of issuing a decision on environmental conditions, when an EIA is not necessarily required (adapted from: Mroczka et al. 2012, p. 52)



The fun does not stop with the decision on environmental conditions. A second Environmental Impact Assessment (*ponowna OOS*) may be required at the construction permit stage. To obtain a construction permit (issued either by the county level executive - *starosta* or province level executive – *wojewoda*), an investor submits an application along with a previously issued decision on environmental conditions. If the need for a second EIA is indicated in the decision on environmental conditions, or if there were changes to the plans were made which warrant such scrutiny, then this process (which also requires public participation) is carried out by the Regional Environmental Directorate, which issues a set of conditions the construction permit should be subject to in order to minimize environmental impact; the permit issuing authority must place obligations on the developer accordingly. The permit issuing authority may also refuse to approve the project, if the second EIA results in a finding that the project may have a significant environmental impact on a Natura 2000 area.

“Sides” to administrative proceedings have rights beyond that of the general public for these sorts of processes. The general public can participate within a designated 21-day consultation period, for example by sending comments to the administrative authority. “Sides” or those with “rights of a side,” however, may participate for the entire duration of the administrative proceedings. They may ask that certain documents (such as their own inventory of species or habitat, documents from other government offices, expert opinions, and relevant scientific literature) be admitted into the proceedings. A side may argue that the environmental decision cannot be issued, on the basis of any of the following factors: an incomplete EIA report; if the project does not accord with local spatial planning documents;⁴⁹ if the EIA reveals another variant of the project is more justified but the investor will not agree to this proposed variant; if the EIA reveals that the impacts on a Natura 2000 area will be significant; if the project will make water management goals unattainable. Given that the ways an environmental decision can be rejected are limited to those just listed, participants in administrative proceedings focus their efforts in such proceedings on showing that one or more of these conditions hold. For example, they may show an alternative variant of the investment is more environmentally benign, or present scientific research on the harm that may be done to a Natura 2000 habitat.

At the end of the proceedings, the administrative authority announces the decision made and how to access its contents and justification. “Sides” or those with “rights of a side” who do not agree with the decision may appeal it to the next instance authority – and (in decisions involving an EIA) they may do this even if they did not participate in earlier stages of the procedure. This means that an environmental organization may contest a decision which they may not have been aware of previously, perhaps in part due to an administrative authority’s

⁴⁹ Provided that such a spatial planning document exists and has been passed; this is uncommon in Poland.

negligence to inform the public appropriately (when such informing is done, it is typically online on a Public Information Bulletin website –BIP *Biuletyn Informacji Publicznej*).

In sum, in administrative proceedings related to proposed investments, particularly those involving an EIA procedure, environmental organizations have legal rights to actively participate, and, if warranted, appeal the resulting decision (or “mini” procedural decisions along the way). As one practitioners’ manual notes, however, appealing the decision is to be considered a last resort, used in the event that action in earlier stages, before the decision was issued, was ineffective. Having the “rights of a side” confers several benefits, beyond that perhaps most obvious one: the ability to appeal an administrative decision. An organization’s entrance into administrative proceedings may increase the overall substantive quality of the entire procedure. Sides and entities with rights of a side may participate throughout the proceedings, including the right to access documentation about the case at any point in the process.⁵⁰

In this section I have provided illustrations of how environmental legal practitioners acquire, document, and share detailed knowledge about the scaffolding of state power and points of administrative discretionary decision-making. This is important in its own right, as it shows the educative and spatial aspects of legal consciousness formation resulting from interaction with the administrative state. Lerman and Weaver, in their review of the literature on processes of political socialization resulting from contact with the state in various contexts (criminal justice and service provision) assert that through such contact, citizens “...also receive a blueprint of the

⁵⁰ Instructions about the rights of sides are supposed to be provided within a given decision or postanowienie/procedural decision. Even without the “rights of a side,” any individual can bring an administrative complaint (*wezwanie organ do usunięcia naruszenia prawa* or *zażalenie na bezczynność organu*) or subsequently an appeal to provincial administrative court if they are denied access to information, provided incomplete information, or their request for information is ignored or not responded to within legally prescribed deadlines.

character, capabilities, and commitments of the state. These lessons feed back into participation and engagement” (Lerman and Weaver 2014, p. 13). Data from a completely different context—voluntary citizen environmental enforcement action—show that through interactions with the administrative legal system in Poland, citizens also acquire a detailed *spatial* blueprint of state power. Earlier in the same review, the authors summarize important and rather intuitive findings:

Recipients of these [Social Security Disability Insurance] and other social benefits come to view their contacts with the state as ‘a microcosm of government,’ generalizing their experience within the program to the broader nature and goals of the political system. Lessons learned through contact with social programs are lessons learned about government writ large, as contact with one part of government forms a ‘bridge’ to perceptions of other aspects of the state (ibid, p. 11).

They go on to describe how in various studies welfare recipients saw their experiences as representative of the government as a whole, how they saw “government” as “one big system.” Implied here is lack of differentiation between one location or aspect of government and others. My data suggest that the generalizations occurring have spatial dimensions, even if the spatial dimensions are not made explicit: they represent a scaling up from local or state level service provision to the federal level, or across the national level from one service provision office to other government agencies. A main point emerging from my data is that the “bridge” being created from contact with the administrative state is being specified spatially, and that this matters for political socialization, critiques of state power, and broader movement mobilization.⁵¹

⁵¹ Lerman and Weaver recognize that “Carceral contact is not randomly distributed, but is both spatially and racially concentrated” (2010, p. 817). This contact, either by way of incarceration or being under some other sort of correctional supervision, is experienced the most by young black men, and further, by the most disadvantaged members of that population. “Similarly, incarceration and police surveillance are largely concentrated in certain cities, particular communities within those cities, and even specific neighborhoods” (ibid). Thus the particular face of the state being presented through the US criminal justice system is encountered the most among particular members of the population and in particular places. In short, the state (in this policy realm of criminal punishment) is spatially concentrated. This point is extremely important, and not unrelated, but distinct in some significant ways from the spatial learning dynamics observed in environmental law, which take place in an administrative legal framework where contact with the state is more voluntary and may be initiated by citizens.

If the analysis were to stop here, however, it would risk presuming that the rights on paper were granted in practice, that environmental organizations were reliably admitted as “sides” to proceedings in which their participation was warranted. What is gained in information and self-efficacy and plotting of how state power is arranged is only one dimension of legal consciousness formation. Another dimension of legal consciousness formation can be seen when people in environmental organizations directly observe and experience the enactment of state power. One example of this is when environmental organizations are precluded from participating due to gatekeeping by state actors. I turn now to this gatekeeping function of the state, illustrate how it might be achieved and with what effects on legal consciousness. As I do so, I continue to build upon and illustrate the points I have already made.

Importantly, the data presented in the remainder of the chapter is largely based upon the experience of trained lawyers, and individuals/organizations with formal training and/or extensive experience with the administrative legal system. This means that the mastery of procedural rules can be presumed, and the impacts on legal consciousness formation of interaction with the legal system may be more fully about acquiring and understanding of how and why the prevailing approach to environmental protection is sustained. The structural position of environmental normative commitments within the legal accountability system becomes clearer and spatially specific through direct participation in the dynamic interplay between bringing a claim, state actors’ legal interpretation, and observation of the physical earth itself.

Direct experience of gatekeeping and legal consciousness formation

Geographers have conceptualized litigation as a “space-creating process,” wherein procedural rules dictate who gets inside the realm of official legalities and who can participate in

the “world-making” enterprises that take place in the courtroom (Benson 2014, p. 218). Access to the courtroom dictates outcomes in other spaces.

...legal space is contingent upon a procedural obstacle that bears little resemblance to the underlying substance or validity of the plaintiffs’ argument. The issue becomes not whether the state’s action complies with its obligations but instead whether—on the basis of a combination of temporal and spatial factors—the plaintiffs’ challenge is sufficiently timed (after the planning stage) and spatially defined (confined to a specific project). So while the rules of engagement are procedural, they produce substantive and spatial outcomes. Without entry into legal space, the capacity to protect other spaces (e.g. endangered species habitats, public lands) becomes at best more difficult and at worst impossible (ibid, p. 228).

Administrative rules, judges, and other state actors play a crucial gatekeeping role in deciding who can participate in legal processes, who has the right to make claims about government action, which actions are open for scrutiny, and when (ibid). Seemingly neutral or technical procedural doctrines and the judicial decisions upon which they are based, have profound consequences for citizens’ ability to challenge government conduct, as well as for the biophysical environment itself. Procedural rules are often described in opposition to “substantive” aspects of the law; however, they are both discursive and interpretive, they reflect cultural values and consolidations of power, and are subject to interpretation and contestation. Benson (2014) shows how, in US environmental enforcement cases, these factors can insulate the executive or government agencies from scrutiny at crucial decision-making or policy planning stages, arguably stages where course correction or scrutiny is most consequential. The legal focus is narrowed, shifted to particular sites or site-specific projects.

In this section I build upon Benson’s work and specify further practitioners’ own experience and interpretation of such gatekeeping and the implications on legal consciousness formation. One empirical example I use is a set of cases brought by the environmental legal

organization ClientEarth to illustrate the ways in which interpretation of procedural rules may preclude meaningful participation in “world-making” enterprises, and the ways legal consciousness is shaped by direct interaction with the administrative legal system.

The cases are a set of thirteen which, upon examination in concert, confirm and illustrate the main points made by Benson, showing how gatekeeping can direct the legal focus to particularized aspects of a policy or particular sites, or an idiosyncratic procedural question, thus insulating state actors from more consequential scrutiny. Additional insight can be gleaned from practitioners’ own understandings of such gatekeeping. ClientEarth’s involvement in all 13 distinct yet similarly situated and thematically similar cases, along with interview data from the lawyers who worked to bring the cases, provides an opportunity to tease out some legal consciousness formation dynamics, for example, how a practitioner understands discrepancies across cases, as well as what the cases as a bundle mean to practitioners for environmental governance and the legal system more broadly.

The cases concern the [Polish Ministry of Environment’s] issuance of free greenhouse gas emissions allowances to power generation companies under Poland’s emissions allowances trading system, specifically allowances issued under the “10c derogation” in the European Union’s emissions trading system. When the EU adopted its climate and energy package at the end of 2008, the 10c derogation was an exception to the rule that all allowances for power companies, from 2013 onwards, should be auctioned rather than granted for free. Under EU rules, exemptions from the trading system could only be granted to power plants if their investment process was “physically initiated” before the end of 2008. Two planned, but not yet constructed, coal-burning plants, one in Łęczna, a town in southeastern Poland about 16 miles from the city of Lublin, the other in Rajkowy, in northern Poland, about 39 miles south of the

Baltic Sea city of Gdańsk, were included in an application for free carbon emissions allowances. In these two cases there was no visible evidence that construction work had begun by that deadline. Field investigations in 2010 and 2012 did not reveal any construction or power-plant related activity at the coordinates submitted by the investment groups, only a rural landscape of green fields and farmland. ClientEarth elected to challenge these power plants' and eleven others' issued permits using administrative legal channels. One argument among others the environmental organization sought to marshal was that, for the two coal-burning plants just described, construction permits had not even been issued for these sites before the 2008 deadline, so the process had not been "physically initiated"; thus these entities were not eligible for free emissions allowances. However, before these or any other arguments for the remaining cases could be delivered, the organization had to be granted access to the administrative proceedings in the first place by way of a procedural decision.⁵²

Through procedural decisions (*postanowienia*), ClientEarth was granted access in six of the thirteen cases by the marshal, the provincial level administrative authority. In the cases to which they were granted access, they proceeded to appeal the free emissions allowances, were unsuccessful, and subsequently in April 2014 appealed the second instance authorities' decisions to the Provincial Administrative Court in Warsaw.⁵³

⁵² While a decision (*decyzja*) involves the main issue of a case (for example, approval of a permit) and ends administrative proceedings if not appealed within a certain deadline, it is distinct from a smaller, procedural decision (*postanowienie*) which deals with incidental matters, for example, suspending proceedings or admitting a given individual or organization as a participant in the administrative proceedings as a "side" (*strona*) or with the "rights of a side" (*na prawach strony*). The smaller procedural decisions (*postanowienia*) can be thought of as cases within a case. A side is anyone with a legal interest or obligation in the case. An entity with the "rights of a side" is a social organization admitted to the proceedings, or a prosecutor who has announced her/his participation in the proceedings. Both decisions and smaller procedural decisions can be appealed by any of the sides.

⁵³ Case signatures: IV SA/Wa 819/14 decided 15 Sept 2014; IV SA/Wa 820/14 decided 24 June 2014; IV SA/Wa 821/14 decided 18 June 2014; IV SA/Wa 822/14 decided 24 June 2014; IV SA/Wa 823/14 decided 24 June 2014; IV SA/Wa 824/14 decided 23 June 2014.

This set of administrative proceedings was not one in which public participation was legally required, therefore the general rules in the Polish Administrative Code (KPA) about the rights of social organizations in administrative proceedings (rather than the 2008 EIA law – which confers environmental organizations’ rights in proceedings requiring public participation – generally those in which an Environmental Impact Assessment is involved) were applied.⁵⁴ Entering administrative proceedings on the basis of the KPA requires meeting two formal legal requirements. The administrative authority decides to admit an organization into the proceedings on the basis of (1) whether the case is relevant to its organizational goals as written in its bylaws and (2) the group is working in the public interest (Article 31 KPA).

The free greenhouse gas allowance cases show how an environmental group may face gatekeeping by judicial actors along these two dimensions, which precludes their ability to bring substantive arguments against an administrative decision. In six of thirteen cases, ClientEarth was denied participation in the legal proceedings (and thus could not contest the free emissions allowances). The decision to admit an organization can hinge on how administrative authorities or judges construe what constitutes an environmental issue. The organization had to show a connection between the content of the case and its bylaws, and according to the administrative authority, this connection was absent. Furthermore, the public interest requirement was not met either. The interviewee explains the argumentation underpinning the administrative authority’s claim that this was neither an environmental protection matter, nor was ClientEarth working in the public interest:

⁵⁴ Worth noting here is that the KPA provisions are often erroneously applied to situations where the 2008 EIA law should be used; findings of environmental legal practitioners’ research on the topic indicate that some administrative authorities have difficulty discerning the relationship between the two laws and when Article 31 of the KPA is inapplicable—in procedures requiring public participation (Wiśniewska 2016).

It [the permit allowance] was argued to be an economic mechanism, which might have some kind of, maybe, environmental effect in the future, but in the current moment, it's only there to allow the obtaining of certain legal entitlement [...] [...] And the money that's saved will be invested in clean energy sources, and so if they don't get these free allowances this money will be lost. And what the foundation is doing, this is not in the public interest to fight with this kind of permit (R26).

The parameters of “environmental protection” and “public interest” may in this way be set narrowly and wholly within economic terms by executive and judicial actors. Free emissions allowances are conceived formalistically as economic entitlements, severed from their biophysical implications (but not other material implications). In such cases—where an EIA is not involved and the proceedings are based on the KPA—greater onus is put on environmental organizations to prove their stake in the case and that they are working in the public interest. The following quotations by the lawyer who brought these cases illustrates the perception that the administrative authorities’ gatekeeping is inconsistent in cases related to energy developments, and that there is less certainty that environmental groups will be admitted into administrative proceedings which do not involve an EIA, even if on their face such proceedings seem related to environmental issues. Administrative proceedings which require public participation are perceived as more immune to the seemingly arbitrary requirements to prove that an organization is working in the “public interest” in general administrative proceedings:

[in cases where] public participation is required...although there are attempts to undermine this, they are ineffective. But when it's the general principles of administrative proceedings, that's where the problem is, a pretty frequent problem even. It's inconsistent, which you can see in the greenhouse gas cases. In seven cases the [administrative] authority said, okay you can participate, and in six cases they said no you can't, even though they are identical cases. It's never clear, well maybe not never, but sometimes it's difficult to assess the degree of specificity you have to demonstrate public interest, because in some rulings it says that environmental protection always lies in the public interest, in other rulings it says that you have to demonstrate what concretely the organization will do in this case so that it will be in accordance with the public interest (R26).

The existing case law's inconsistency means a considerable amount of indeterminacy and contestation surrounding terms such as "environmental" and "public interest." This set of cases indicates a tendency toward contraction of the access gates to administrative proceedings using narrow interpretation of these terms.

This set of cases is illustrative of broader gatekeeping trends among administrative authorities in Poland in cases where Article 31 of the Polish Administrative Code is invoked. In 2014-2015, seven environmental organizations submitted a total of 65 requests to various administrative authorities for participation in proceedings as "sides" or as parties with "rights of a side." In over one third of the cases, the organizations were not admitted to participate by the first instance authority. Subsequently, only three of 19 (16 percent) appeals lodged against such decisions were effective (Engel 2016, cited in Wiśniewska 2016). For those in environmental organizations, in most of those cases they were refused because the projects for which the proceedings were the subject were supported by the administrative authorities conducting the procedures (e.g. the mayor). Similar justifications were given to that described in the greenhouse gas permit allowances cases: lack of relationship between the organization's bylaws and the subject matter of the administrative proceedings (even if it was evident that project would have an environmental impact) and failure to show sufficient public interest. Another example of even more narrow interpretation of administrative procedural rules is the practice of refusing environmental organizations' participation on the grounds that participation in administrative and judicial procedures is not explicitly listed in the group's bylaws as a way of implementing statutory objectives (*ibid*).

Even in the seven cases in which ClientEarth was admitted into the proceedings (and thus could bring a substantive complaint against the issuance of the free permit allowances

themselves at the provincial administrative court level), the first argument raised by the opposing side (representing the Polish Ministry of Environment) was that the organization could not bring the appeal, because it should not have been admitted into the proceedings in the first place. This is a further attempt to constrict an environmental organization's access to administrative proceedings and preclude their substantive argumentation, one which raises a basic definitional issue: how a "social organization" is to be defined. According to Polish law, an "environmental organization" is defined as a specific type of social organization, which has environmental protection as one of its goals in its bylaws. There are different types of organizations, all defined in specific ways by statute: associations (*stowarzyszenia*), ordinary associations (*stowarzyszenia zwykłe*), and foundations (*fundacje*). The Polish Constitution names organizations such as associations and trade unions to be social organizations, but there may be controversy over whether a foundation, which, unlike the others is not membership based, counts as a social organization, and on that basis may not be admitted as a party to administrative proceedings.⁵⁵

The organization prevailed in those instances on the question of their procedural admittance, but ultimately the appeals were dismissed and the free emissions allowances upheld. The judges found that the "investment process" had indeed begun by the 2008 deadline, in the form of conceptual work and financial expenditures; this could constitute the "physically initiated" requirement, even absent construction permits or any other physical work at the sites themselves. Therefore the free emissions allowances were granted lawfully.⁵⁶ In this case, the

⁵⁵ A 2005 resolution by the Supreme Administrative Court (NSA) thus became a bone of contention in the free emissions allowances cases. While many interpret this resolution as a ruling which says that a foundation is always a social organization, ClientEarth's opponents argued that according to that ruling, only if the foundation meets certain criteria was it a social organization. ClientEarth did not meet these criteria, therefore it was not a social organization, and therefore it did not have the legal right to appeal the decision. The court disagreed with this interpretation and said that the NSA resolution was clear in its determination that every foundation is a social organization.

⁵⁶ Case signature IV SA/Wa 823/14

definition of “investment process” was drawn from an EU Directive, which had not been properly transposed into Polish law. In such circumstances, lack of a legislative definition of “investment process” in Polish law, the court asserted the direct effect of the definition in the European Directive. In this way, broadly defining “investment process” and drawing on European law to do so, the court was able to establish that, the investment process had factually begun. For environmental advocates, such expansive legal reasoning, its contrast to the narrow reasoning surrounding “public interest” and “environmental” in related cases, and its lack of correspondence to the reality witnessed and documented at the physical sites themselves (there were no construction permits or physical work done at the designated sites by the 2008 deadline), served to expose haphazard and even absurd qualities of the administrative accountability system. The implications for legal consciousness are at once disheartening and mobilizing.

In Chapter Four I delve further into how attention to spatio-temporal dynamics in legal interpretation, in part brought to the fore due to environmental advocates’ direct observation of biophysical harm, shape legal consciousness and critiques of the legal accountability system. For purposes of this chapter, I emphasize the effects of being subjected to gatekeeping on the legal consciousness of legal practitioners. The implications of the cases above and others related to energy governance are disheartening, because they provide direct insight into the state’s power to insulate itself from scrutiny, through judicial and executive actors. Conversations with environmental advocates who use the administrative legal system and the legal argumentation encountered there illustrate the manner in which an environmental organization may be precluded from presenting its substantive arguments in a formal legal venue, and the ways in which contestation of energy investments might be narrowed and neutralized on the basis of legal formalities. They are mobilizing, because they inspire outrage, in combination with a keen

sense of unevenly distributed or inconsistent discretionary power and agency on the part of those adjudicating administrative procedures.

The following quotation illustrates the mobilizing aspects of the environmental decision-making process. The interviewee defines his own understanding of working in the public interest, which, far from a formalistic legal decision, to him means making sure the content of these environmental analyses are transparent, that the decisions made are of high substantive quality. He explains what to outsiders might seem like counter-intuitive action on the part of his public interest legal organization,

Okay, so when it comes to [coal power plant in southwestern Poland], near the end of the month there will be a decision on the matter of the environmental decision, for that new energy block, and see, on the basis of this example I can say this, this is a modernization of a power plant. Someone asks us, why are you blocking the modernization of a power plant? That is, theoretically there would be better burning, and lower emissions really. The problem for me is, and a kind of motive for why we are involved in this, is the way that this is done. When it comes to the environmental decision, first of all, the emissions given in the environmental report don't agree with the emissions given in that European report on emissions. For some strange reason. This in and of itself would require clarification as to why (laughs). Second, to put up one cooling tower, three must be demolished. There is not even one sentence on the topic of what kind of environmental impact the demolition of the cooling towers will have, the way that they will guarantee that it won't be harmful. And we know that the cooling towers were built in the 1970s, so one can imagine that there might be, for example, asbestos in there. The environmental report only says that the new cooling tower will be located in the place where the old ones are. And that's it. So these are arguments that in our opinion determine [...] well, this is public interest. You [guys] are not saying everything, what kind of guarantee do we have that carrying out this whole demolition process, that the natural environment will in fact be taken care of, and above all the human environment there? Because if they don't take care of the spraying around of asbestos, everything around there will get covered in a thin layer of deadly dust. So they are these kinds of procedures, these kinds of problems that we meet. There is also this, maybe less clear, but for example, an employee who works for the investor, worked for the investor, right now participates in giving out the environmental decision. Because he works for the [administrative] authority. And maybe there isn't a conflict of interest there, but on the other hand, this is an unclear situation, not very transparent (R39).

The poor quality of certain environmental analyses themselves, and the potential conflicts of interest with respect to who evaluates this content, drives involvement in such processes. In the name of public interest, and public health, more transparency is sought. Such arguments can be precluded, however, if an organization is denied access to proceedings in the first place.

When denial is experienced at the initial access gates, considering that access had been granted previously in other cases, then, there is a sense of outrage and a recognition of political power plays. One interviewee describes an instance of overt contraction of procedural rights experienced when his environmental organization tried to request documents related to concessions for shale gas exploration, another lively area of energy governance politics in recent years in Poland,

Recently there was this kind of story that the Ministry of the Environment refused [access to the proceedings]...it's been a long time since we've had this kind of refusal, that we don't have these kind of rights. But we have them in black and white, because we have it in our bylaws, we fulfill all the legal requirements, but just firmly/resolutely (na twardo), they are breaking the law. Because they absolutely want to do anything for [company name], and (laughs) they can't. And our lawyer, she also got mad, she said, that this is, she just clutches her head in amazement, that a chief administrative authority is pulling these kind of stunts (robi takie numery), right. That it refused us access to the case and the proceedings, not substantively, but, you understand, poof (pyk), goodbye, you guys have nothing to do here. Which, actually, doesn't really happen anymore...in my opinion this is pure politics, politics (R37).

While access to certain types of information may be denied on the basis of formal rules related to state secrets, personal/private data, or “trade secret” confidentiality, the implication from this quotation is that denial occurs in the form of outright refusal, not even under the guise of legal argumentation. This interviewee’s description of the reaction of a trained lawyer and his own temporal comparison (he has been involved in the environmental movement in Poland for decades) both lend weight to his assessment that central state authorities are wielding their

executive power to allow shale gas investment by the private sector to proceed with very little public scrutiny.

More unified or centralized attempts at gatekeeping are seen in legislative measures to limit environmental groups' participatory rights. There have been many of these over time (some described in a previous section), but one of the more recent involved ratcheting closed environmental groups' access to proceedings in an area where their access is governed by perhaps the most liberal set of rules: cases involving an EIA. Amendments to legal rules about the exploration of hydrocarbons between 2012 and 2014 made procuring a decision on environmental conditions not required at the concession granting stage, but rather at the exploitation drilling stage. An environmental impact assessment was made optional for exploratory drilling, removing such activities from the legal category of planned investments that may have significant effects on the environment and require a mandatory EIA (Group I in Poland's 2008 EIA law, Annex I of EU Directive 85/337/EC). Instead, the EIA requirement was to be left to the discretion of administrative authorities. An EIA is only mandatory for *extraction* drilling (see Chapter Seven for more on these legislative developments). This makes it substantially more onerous for environmental organizations to be involved as "sides" in decision-making around such investments earlier on in the process, if at all. An interviewee comments on the absurdity of such rules, but he also notes that administrative authorities have discretion to decide which type of proceedings to follow:

...it was done like this, there was this one aspect of this Environmental Impact Assessment, that they can do one, but they don't have to. So in other words, these projects/enterprises, they weren't in a strict group of burdensome/significant impact projects, but [in reality] they obviously are huge (laughing). You've read about this, you know it's what we list all the time, that they are, it's [shale gas exploration] in the bag ("na bank") in the first group. But they were put in the middle group. That is, the [administrative] authority decides, right. So

(laughing) some kind of borough leader/alderman (wójt) in [village name] decides that no, because they said in RDOŚ [Regional Directorate for Environmental Protection] that it isn't mandatory to do the assessment, so he [the wójt] said no. But elsewhere, luckily they are wiser and they've already read up on this, they say that yes, right, they are more courageous, the government doesn't control everything like under Putin... (laughing), luckily. So they...in [city name], in [another city name], or in [another city name], they say, yes, you have to do an Environmental Impact Assessment. And that's how the laws worked (R37).

The listing of various levels and points of discretionary decision-making authority, the citing of differential outcomes in different places, as well as the contrasting of governance in Poland to the centralized, authoritarian governance style encapsulated by the mention of Russian President Vladimir Putin, all demonstrate this interviewee's awareness that, while the larger rule system was set up in favor of speeding up shale gas investment and in such a way that environmental health was plainly put in harm's way, the state was not a monolith. There were openings for administrative authorities in various locations to require stricter scrutiny of proposed projects.

Legislative gatekeeping itself, measures taken to pass or amend laws which directly or indirectly limit environmental organizations' access to administrative proceedings, is understood by environmental legal practitioners as a temporary, yet recurring roadblock. The legal rights as formally written may ratchet access up or down, but ultimately they will not survive legal scrutiny of higher levels, such as the Constitutional Tribunal or European level institutions. For example, with respect to the amendments to the hydrocarbon law just described, the European Commission has taken legal enforcement actions against Poland.⁵⁷

⁵⁷After sending a Reasoned Opinion in February 2015, in April 2016, the European Commission referred Poland to the EU Court of Justice for failing to ensure that the environmental impacts of exploratory mining drillings are properly assessed. Under Polish law, it is possible to drill to depths of 5,000 meters without assessing the potential impact on the environment beforehand, a threshold too high by EU standards. Under EU law, deep drillings need to be assessed, in particular for the waste they produce, their effects on water and soil, use of natural resources, the risk

Cognizance of the unavoidable legislative waxing and waning of the status of their access to administrative processes, as well as the variable interpretation of environmental advocates' arguments by administrative authorities across space and governance areas is disheartening and mobilizing. It is especially the latter when environmental legal practitioners aggregate their experience and knowledge and attempt to construct a more systematic, less isolated critique of the legal accountability system—both its legal aspects and the ways it is actually practiced in particular places. It is to one such coordinated endeavor I now turn.

From individual legal consciousness formation to broader societal mobilization

As environmental legal practitioners, self-taught or formally trained in law, aggregate their experiences with the administrative legal system, a more cogent, forceful critique of the legal accountability system emerges and can lead to further mobilization around governmental accountability and responsibility for environmental legal commitments. Several organizations, most notably Polish Green Network (*Polska Zielona Sieć*), the Greenmind Foundation (*Fundacja Greenmind*), and the Foundation for Sustainable Development (*Fundacja Ekorozwoju*) have endeavored to systematically investigate, map, and propagate the experiences of those who try to request information or access administrative legal proceedings in Poland. These two organizations conducted research which culminated in a “Shadow Report on Execution of the Aarhus Convention” published this year (Wiśniewska 2016) about access to environmental information, as well as guarantees of participation for NGOs in administrative proceedings about environmental decisions.

of accidents, and any cumulative effects they may have with other similar projects or activities. ECJ Case law (Case C-531/13) affirms this (EC 2016).

The shadow report is a counter-narrative to that of the state, written from the societal perspective, mostly environmental advocates and legal practitioners. It is a direct response to the report published two years prior by the Polish Ministry of Environment (2014) on the same topic. The organizations wanted to “confront” the Ministry of Environment’s findings, because their own research and experience showed that there were serious problems in Poland with access to information, generally, and about the environment in particular. In addition, public participation in decisions related to the environment “leaves a lot to be desired, and very often is simply a fiction.” Both of these, in the authors’ views, compromised the quality of Poland’s democracy. Their assessment of the situation in Poland was “diametrically opposed” to that of the Ministry of Environment; thus, the goal of the report was to contribute to the knowledge creation exercise of the next report, due to be published by the Ministry of Environment in 2017. More importantly, the goal of the report was to collect arguments to change both legal and practical functioning in the realms of access to information, public participation, and access to justice—so that these are less limited and limiting for societal actors. So, through iterative experience of “becoming a side” in individual cases in various jurisdictions throughout Poland and the knowledge gained therein, members of these organizations are demanding to be a side in a more far-reaching sense, by countering the government’s own narrative about its accountability system and pushing for more inclusion, not only in administrative processes themselves but in how they are assessed and improved.

Research on legal mobilization, and in particular on the mobilization of what some have called procedural rights by environmental and indigenous social movement actors, provides guidance in thinking through the implications of exercising procedural rights, for legal consciousness formation and social movement mobilization. Both Vanhala (2012) and Fulmer

(2014) illustrate the central importance of the interpretive work done by civil society in procedural rights' mobilization. In two drastically different contexts, they show how "winning" cases might be less useful to environmental advocates than losing in terms of being able to broadcast shortcomings in state structures and decision-making, and (in cases where the formal institutional infrastructure exists) in expanding access to justice for other groups.

Vanhala's (2012) work traces environmental movement legal mobilization of procedural rights in the UK. She addresses why the movement continues to pursue legal action in the face of "hostile" legal opportunity structures, in which there are difficulties gaining standing, frequent substantive losses, and high costs awarded against the groups under the "loser pays" system. The answer is that environmental organizations use litigation to improve future access to justice for themselves and other groups as well as to highlight the failings of the existing system. In other words, "despite substantive losses, many of the cases involve procedural victories and legal and political benefits" (Vanhala 2012, p. 525).

On the other hand, procedural rights' mobilization may not alter the LOS at all but rather serve as a resource for meaning-making in the absence of sufficient state and judicial institutions for their enactment. Fulmer (2014) explains the paradox that there is intense enthusiasm surrounding community consultation proceedings in Peru, and significant resources expended on pushing such consultation rights, even though they are so limited in scope and so weakly protected in law. She shows how such rights claims are legalized but not judicialized: international legal norms are appealed to, but formal remedies are not sought. Rather, invoking the right to consultation and staging such proceedings in a community serve a symbolic and expressive function, a focal point in a longer, multi-faceted campaign to defeat a given project. The prestige and sway of international legal norms, in Fulmer's analysis, is of greater

significance to political mobilization than the “merits” of the case (Fulmer 2014). She extends the idea that law’s cultural work matters; international law may come “from the top” and become localized, but the essential meaning of the right to consultation has come from below, as local communities have adapted the norm rather creatively for their own use in the absence of a supportive national institutional context.

Reading Vanhala’s and Fulmer’s work together is instructive for the analysis of procedural rights’ mobilization in a European, but former Communist Party-controlled study site like Poland.⁵⁸ Their work shows that studying the dynamic interaction between social movement agency and legal opportunity structures helps reveal the utility and significance of procedural rights’ mobilization, even if they are not fully realized, or recognized at all, in formal venues. Thus these rights have been called “strange,” because they may be more politically useful in some contexts when denied (Fulmer 2014). Such findings suggest that the richer context of legality—an emergent structure of cultural production, law’s depth and salience in social practice—must also be taken into account in procedural rights’ mobilization studies, especially in study sites outside of the US or UK.⁵⁹ In Poland and other Central East European (CEE)

⁵⁸ To help think through how best to understand Poland as a case, I draw on Scheppele’s research on legal transition from administrative state socialism (e.g. Scheppele 2010), along with Merryman’s (2007) distinction between legal traditions and legal systems. A legal system is an operating set of legal institutions, procedures and rules, whereas a legal tradition—although it may be reflected by rules—is a set of deeply rooted, historically conditioned attitudes about law, its role in society, and how it should operate. Through this lens which we can think about Poland as having a largely Western, European legal system, with remnants from the socialist legal tradition. State socialism involved an organized effort to construct a different legal tradition, and distinct vision of the state, law, and society than capitalist nations. Merryman notes that most socialist law nations had previously been participants in the civil law tradition, and they reverted to this tradition when the socialist law superstructure collapsed (p. 2); however, this “reversion” has arguably not proceeded as seamlessly as Merryman’s pithy sentence on the matter in his book’s third edition suggests.

⁵⁹ Vanhala (2012, p. 547) notes that despite some significant differences which make the UK an “unlikely case” for legal mobilization by the environmental movement, it is the closest to the US case due to its common law system.

states, ongoing processes of post-communist political and economic transition⁶⁰ away from what Kim Schepple (2010) terms “administrative state socialism” substantially complicates legality (Krygier et al. 2006). Notions about law depend partially on formal legal institutions, but also on other sources of normative order and socio-cultural dynamics in a given society, including human relations with and understandings of the biophysical environment. Attention to legal consciousness formation dynamics among those who mobilize procedural rights can make more clear what sorts of meanings are made about such rights, and whether, how, and why such rights matter.

The case of legal mobilization by environmental organizations in Poland provides an opportunity to expand the insights of legal mobilization theory, because the legal opportunity structure there, on the face of it, is rather favorable to environmental groups, and for the past decade has become embedded in the EU governance structure. As I showed in the previous sections, legal consciousness formation of individuals engaging with the administrative legal system proceeds along several dimensions. An individual may gain a detailed knowledge of the rules and a sense of self-efficacy through trying to navigate the system on one’s own. They may be disappointed in various aspects of how the accountability system works, including the way it narrows environmental problems and shields the state from responsibility. They build a map of the state—that is, a detailed, scalar understand of the environmental legal governance structure and how power is wielded through it.

Furthermore, as the remainder of this chapter shows, aggregating and sharing their experience with others is mobilizing, and mobilizes others, because it results in a more cogent,

⁶⁰ An entire literature beyond the scope of this work interrogates the terms “post-communist” and “transition” for their Western-centric, teleological assumptions, and their inability to apprehend the present. See for example Pickles et al. (1998), Pavlínek et al. (2000), and Krygier et al. (2006).

forceful, and culturally resonant critique of government accountability. The authors of freshly published research on procedural rights in Poland understand their publication of the report as an expression of their societal activism, and they encourage the public to help bring about the changes they identify as necessary (Wiśniewska 2016, p. 6). Examining research published by environmental legal practitioners on this topic, along with participating in and observing trainings at which such research was presented and discussed, I have identified several facets of the critique of governmental accountability being built and propagated in such materials. Through quantitative and qualitative data collection spanning the country, practitioners are able to map and identify systemic issues. Individual experiences and anecdotal evidence about experience with the administrative legal system can then be folded into such an analysis, and validated. The knowledge creation about administrative state practices helps inform a culturally resonant re-framing of procedural rights' mobilization—particularly directed towards non-believers who may be reluctant or averse to using such channels. Essentially, the message asserted in these materials and trainings is that more people need to watch what the government is doing, and that procedural rights are an underutilized resource. Even though it can be daunting and time-consuming, the government must be pushed, and the political process unblocked, via these venues.

The critique of governmental accountability being built, and the process of re-framing procedural rights' mobilization, entails several aspects. These include: the acquisition and sharing of both quantitative and qualitative knowledge about the environmental legal accountability system; the airing of grievances and validation of those grievances; convincing of the need to “play the game,” that using administrative law is worthwhile; providing practical skills and encouragement to see cases through, even if they seem daunting; and finally,

reimagining and reshaping state-citizen interactions. I detail these facets further in the next sections. Before I do so, I note that the re-framing works to more explicitly connect two levels: the level of performance accountability and the level of policy-making accountability.

In part thanks in part to the very structure of the Aarhus Convention, the implementation of which was the subject of the Ministry of Environment's analysis and Greenmind's counter-analysis in the shadow report mentioned above, experienced practitioners connect micro level individualized cases, and the skills, experience, and critiques gained therein, with broader legislative and policy-making activity. That is, they transfer the knowledge and skills gained from continued striving for performance accountability towards increased striving for policy-making accountability, especially as it becomes clear that the law isn't "working" for the environment or the public. While performance accountability takes policies as given and has as its central issue performance, policy-making accountability requires that policies be a reflection of the interests and needs of the population. This goes beyond having competitive elections and a working legislature and gets at involving citizens in government policy-making processes and the implementation of necessarily imprecise statutory goals (Rose-Ackerman 2005, pp. 5-6). Experienced environmental legal practitioners draw connections between these two levels and encourage people to become active participants in micro legal decisions and macro policy making processes, not mere fatalistic consumers of such decisions. This is no small feat, but I now detail some of the ways they undertake it.

One aspect of the critique of governmental accountability environmental legal practitioners are building and disseminating is a structural understanding of non-governmental organizations' position within the accountability system, in particular how they are funded. Funding for the type of watchdog accountability monitoring the individuals and groups described

in this chapter are doing is lacking. This is part of a larger structural issue with NGO funding, which is largely project based, will not cover administrative costs, and often requires the organization to put up some funding either as co-financing or as up front collateral “bank guarantees.” These factors systematically maintain or increase the separation between NGO “haves” and “have nots.” The government does not offer support for environmental organizations doing this kind of work (representing the public interest in environmental matters); only 3 to 37 percent of the income of the organizations researched by Wiśniewska 2016 (pp. 7-10) is not tied to project funding.

Systemic mapping of performance accountability

Another aspect of the critique of governmental accountability being built around procedural rights in Poland is a geographical mapping of uneven access to information and to administrative proceedings and outcomes across Poland, as well as at different jurisdictional levels. Greenmind Foundation’s research, conducted in 2014-2015, was a representative sample of 320 administrative districts (*gmin*) and a sample of all 16 Regional Directorates for Environmental Protection. It consisted of sending 64 requests to the Regional Directorates and 320 requests to municipal level administrative authorities to make EIA reports available.⁶¹ According international, EU, and domestic statutes, an electronic version of such documents should be available and sent the same day as requested via email to the person or entity requesting it. Some requests were made by the Greenmind Foundation, others by individual

⁶¹ The research was supplemented by an online survey disseminated in September 2015 and available until November 2015, as well as interviews with individuals from eight environmental organizations with experience using the administrative legal system, members of many of which I also interviewed for my project (*Górnośląskie Towarzystwo Przyrodnicze im. Andrzeja Czudka, Fundacja EkoRozwoju, Klub Przyrodników, Polski Klub Ekologiczny – Wielkopolska, Polskie Towarzystwo Ochrony Przyrody „Salamandra,” Stowarzyszenie Ekologiczne EKO-UNIA, Stowarzyszenie Pracownia na rzecz Wszystkich Istot, Towarzystwo na rzecz Ziemi*) – respondents were asked to their share information only based on activity since January 1, 2014.

volunteers. The requests concerned documents related to in-progress administrative proceedings about issuing an environmental decision, as well as proceedings in which such a decision was already issued. In addition, in order to test whether and how public participation rights in administrative proceedings related to environmental matters were realized, the Foundation sent 80 applications to be admitted into in-progress administrative proceedings regarding issuing a decision on environmental conditions at the municipal level, and 19 such requests at the regional level. This direct sampling was supplemented by interviews conducted during the study period with six environmental organizations. During the period January 2014 to March 2015, these groups requested access to procedures requiring public participation 39 times. They filed 56 complaints to administrative courts, mostly complaints against second-instance authorities' decisions, during this time period.

According to the authors, the results show that the state is not upholding its legal obligations to provide the public access to information about the environment. Polish governmental offices generally make it difficult to access such information. More than 10 percent of municipal level offices and Regional Directorates for Environmental Protection refuse requests for access to information for unlawful reasons, and 80 percent of government offices do not honor statutory deadlines for providing information.

Refusals to provide access to environmental information in the form of EIA reports occurred in 14 percent of municipalities and 12 percent of Regional Directorates for Environmental Protection (RDEPs).⁶² Seventy-four percent of municipalities and 70 percent of

⁶² The grounds for refusal given by public authorities were mainly: making the EIA report available constitutes an infringement of copyright; the EIA report and all related documentation has been submitted to a higher body in a review procedure; the report can only be accessed in person at the municipal office in the course of the ongoing procedure; EIA report has been submitted to the competent body along with a request for approval, which means the report may have to be supplemented upon the request of that body

RDEPs provided access to EIA reports in the requested way and form. In Greenmind's assessment, all identified cases in which municipalities or RDEPs refused to provide access to the EIA reports constituted a violation of national law, as well as a violation of the letter and spirit of the Aarhus Convention. A separate group of 25 municipalities failed to respond at all to written requests for access to EIA reports. The lack of any response was twice as frequent, and the difference statistically significant, if the requests were made by an individual (11 percent of requests, 18 of 160 requests) than if they were filed by the organization (5 percent, 8 of 160 requests) (Wiśniewska 2016, p. 14; Barnaś 2016, pp. 8-9).

Charges levied by administrative authorities for supplying environmental information were found to be inconsistent across Poland, and much undue charging took place at the municipal and RDEP levels. Here again, authorities responded more promptly to requests submitted by an organization and did not charge them as much, whereas individuals had to wait a few days longer and were charged more, more often. It was generally more difficult to access information that was part of ongoing proceedings than information related to decisions already issued. Greenmind's research findings about refusal of information requests, delays, and undue charges are corroborated by the Foundation for Sustainable Development's own project in which the organization analyzed RDEPs and urban municipalities (16 provinces) (Lubaczewska 2014).

In 2015, Greenmind Foundation conducted an analysis of a representative sample of the quality and functionality of Public Information Bulletins (PIBs) in terms of providing access to information in line with statutory requirements. There are about 2500 districts (gmin) in Poland,

and, as such, it is not treated as the final document; the report is unavailable in electronic form; the entity requesting access to the report does not have sufficient interest to do so (Wiśniewska 2016, p. 14; Barnaś 2016, pp. 8-9)

so a representative sample of 240 was used; within the sample there were 152 rural districts, 58 rural-urban, and 30 urban districts.

PIBs are provided by the majority of municipalities analyzed, but some (7 percent) do not publish notices concerning environmental decision-making procedures in the bulletins. In cases where such notices are published, they are usually difficult to find. Users looking for information about procedures related to issuing EIA decisions or about environmental impact assessments reported that searching the bulletin was an ordeal, because the information was not sufficiently organized, labeled, or comprehensive so as to be of use. The majority of municipal PIBs (71 percent) were not equipped with effective search aids, and their archival information was seriously lacking (50 percent of PIBs analyzed in 2015 did not contain information dating back to more than four years). This inhibits gaining access to information on the environment and reduces the transparency public authorities. Information related to the same set of administrative proceedings was not grouped or linked together on 89 percent of the districts' web pages.

Access to environmental information via Public Information Bulletins is much better at the regional level, but there are still significant problems for access to information and public administration transparency. The format of the websites is more uniform at this level, but the labeling and organization of the information, and relatedly the weakness of search engines, makes it difficult for users to find and identify information they seek. Although all PIBs provided by RDEPs contain a tab dedicated to historical notices and announcements published between 2008 and 2013, in 11 of 16 cases the actual contents of the archives did not correspond to the declared contents.

Public authorities are required by statute to maintain what are called publicly available lists of documents containing environmental information in electronic form and to publish these lists in PIBs. Only half of the municipal PIBs (48 percent) include such lists or effectively redirect users to lists maintained in one of the available systems, the most popular of which is the Eco-portal (*Ekoport*) platform hosted by the Polish Ministry of Environment.⁶³ In two thirds of the cases, there are reasonable doubts as to the completeness of information published in lists maintained by municipalities. Even if information about decisions passed in environmental procedures was available, it was often incomplete or the form in which it was presented did not comply with regulations. The relevant information files were completed correctly only by 22 percent of municipalities.

In sum, BIPs and public lists of documents neither make it easier for the public to be involved in the process of issuing decisions on environmental conditions, nor do they guarantee statutorily appropriate access to information about the environment and its protection—particularly at the local level this is the case. The flaws of *Ekoport* are confirmed by the results of the Foundation for Sustainable Development’s analysis, which yielded an extensive list of the online platform’s functional deficiencies (Lubaczewska 2014). Although *Ekoport* does not function perfectly, alternative systems in usage by some municipalities which are supposed to provide access to publicly available lists of documents were even more flawed. The Foundation for Sustainable Development found that the way these search engines worked was typically unacceptable.

These research results in large part illustrate an alarming lack of administrative and technical capacity, particularly at more local levels, to meet statutory access to information

⁶³ <http://www.ekoport.gov.pl/>, 40 percent of municipalities publish lists there

requirements. The geographical mapping of uneven access and outcomes across Poland, as well as at different jurisdictional levels is one aspect of environmental legal practitioners' critique of governmental accountability.

In terms of access to administrative proceedings, the research amassed the factors which make it more difficult or prevent organizations from participating in administrative proceedings. They are covered in more depth and illustrated in previous sections, but they generally include: requiring submission of organizational documents; questioning of foundations' status as "social organizations"; strict scrutiny of bylaws and determination of lack of interest in the case and/or public interest requirement unmet; refusals due to large numbers of participants; lack of communication by administrative authorities such that organizations were unaware of the proceedings or were not aware they had been admitted into a procedure; and inappropriate time frames for consultations vis-à-vis volume and quality of documentation and communication.

Systemic mapping of policy accountability

As was done with the access to information and environmental decision processes described above, shortcomings related to public participation or consultation in legislative and policy making processes are also put into a more global (Poland-wide) context by experienced environmental legal practitioners. They found that although the government is supposed to guarantee public participation in legislative activity related to the environment, as well as executive regulations and/or "generally applicable legally binding normative instruments," in practice environmental organizations rarely have any detectable impact on final version of

legislative documents, even if they submitted substantial recommendations or even expert opinions during consultation periods.⁶⁴

The observed impact of public consultations on the decision-making processes is very low. Considering how much time and effort may be expended on making comments and contributions, the effect of this is on environmental legal practitioners is, unsurprisingly, deterrence from participating in such processes in the future. The following quotation from Greenmind's survey research captures this, "I justify our weak interest in this form of activity by its very low effectiveness, alongside the large expenditure of work needed to acquaint oneself with the documents and formulate comments in a concrete way" (Greenmind 2015). The conditions to participate are theoretically present, including a centralized and well-organized IT system for sharing documents and communicating with stakeholders (unlike in the case of more local Public Information Bulletins discussed above). Yet this orderliness, absent meaningful conditions of participation, makes it so that legislative consultation procedures are understood as ritual formalities, empty fictions. By and large, summaries of comments submitted by the public were not even compiled, not to mention responded to or incorporated into the final legislative document. In addition, the timing and time frame of consultations often means that draft legislation is not consulted while "options are still open" and in a way that alternatives could truly be explored and incorporated. Instead, as routinely happens in EIA cases, alternative options are treated in a manner resembling formalistic accounting, presented as "background" to meet legal requirements, but not up for real, substantive consideration. The government-

⁶⁴ Often they do not even get to the point of substantive contribution, because of poor notification systems and selective invitations only to certain "routine" stakeholders, as well as inappropriate time frames and deadlines for consultations, including scheduling consultations during holidays and releasing many draft amendments simultaneously. Also, the public participation requirement can be avoided altogether by announcing different legislative modes, such as "special acts" or parliamentary draft bills (Wiśniewska 2016).

preferred solution is treated as a foregone conclusion. This is the source of comments such as the one I heard at one conference on the topic of procedural rights, “sometimes it is better to go fishing than participate.”

The lack of interest on the part of citizen groups in participating in legislative consultation processes, then, must be understood relationally with state actions/actors and as one dimension of legal consciousness formation which emerges from the negative experience of directly witnessing minor to complete lack of influence on the final form of legislative documents. It is not an inherently weak or passive civil society which explains lack of participation. Rather, organizations do not want to expend resources on a process which is ineffective. Environmental interests are blocked in these processes. Some organizations do not wish to legitimate processes in which they are not taken seriously as sides. The trainings I attended try to rework this. They are one site where attendees—some believers, some non-believers, and many in between—grapple with, negotiate, and try to come to a common understanding of what exercising procedural rights means.

Re-framing procedural rights’ mobilization

Presentation of rigorous quantitative, geographical, and quantitative data on the system of environmental legal accountability, in combination with already existing narratives about the Polish state, based on individual experience or cultural norms, can be validating. When it is further combined with a reframing of exercising procedural rights not as futile but as necessary, alongside other organizing, both for resisting authority and for upholding the public interest, it may mobilize people with divergent views about engaging with the legal system. This re-framing of procedural rights and tying it into people’s real and perceived grievances about the state was especially detectable at trainings I participated in, in which research findings such as

the ones above are shared, alongside a sort of “airing of grievances” about governmental bureaucrats. In such trainings, participants are taught how to use the administrative legal system more effectively (if they do already), or more readily (if they are reluctant to do so). As a participant-observer at several such trainings, I was able to see how cultural narratives about state power were not only transmitted, but also folded into making a case for exercising procedural rights by those who were leading the trainings and/or who had more experience with the system.

The re-framing of procedural rights’ mobilization involves first presenting not only egregious examples of perceived rights’ violations (which is validating to many participants who have directly experienced such violations), but also instances where environmental legal practitioners were able to gain access to and substantively influence decisions. For instance, there were several cases in which consultation periods were extended as a result of the intervention of environmental organizations’ demanding “reasonable time frames” for consultation. Other examples were provided in which environmental organizations’ participation in administrative proceedings led to a more environmentally benign outcome and a shift in the practices of administrative authorities and their interactions with environmental organizations. The point of rounding out negative experiences with positive examples was to show that administrative legal processes, and the actual people who work on behalf of the government, are not impervious to public intervention.

In the trainings I attended, there were very divergent opinions about using procedural rights and whether it was a waste of time or not. At times during such trainings, there were uncomfortable moments where this tension became vocalized, particularly by participants who had become embittered by encountering so many roadblocks to meaningfully participating in

governmental consultation procedures, who did not have the resources to take on lodging legal complaints, or who were fundamentally/ideologically against working within state channels. In one meeting, as a guest speaker went over the pillars of the Aarhus Convention, the anger amongst those disillusioned with governmental processes was palpable. One participant said that Aarhus was a “joke.” Another asked, “Is this meeting going to be about real issues?”

Many of the people who led conference sessions maintained that it was worth exercising these rights. Even if one was completely against the investment or policy in question, it was worth being privy to the conversation, if not part of it as an active participant. This is exemplified by statements such as, “We didn’t want to be in this boat in the first place, but we don’t want to lose again.” Such statements express a need to maintain vigilance and transparency over the government’s actions. This line of reasoning held that this work was not about having the same ideologies or positions about certain developments or policy courses, but about creating an intimate, powerful network watching the “state’s hands.” In another training, one experienced self-taught legal practitioner tried to level with his audience, “Even if we are against the investment altogether, we have to play the card of a ‘principled/rational variant’” –the ‘rational variant’ being a reference to the EIA process and the proposed alternatives to a given investment that were supposed to be analyzed during the process.

Another participant, experienced working on public advocacy in policy-making venues, highlighted the need to use the Aarhus Convention (or procedural rights in other words) to push back on a government that is blocking its citizens. Lawyers needed to support citizens and organizations doing this. Procedural rights are seen as a way to make inroads in a system largely closed to citizen intervention.

Another example of how attempts were made to convince training participants that exercising procedural rights was a way to fight or resist government bureaucracy's general orientation toward the public, lingering from administrative state socialism, was explained during a tutorial on access to information.

If the information cannot be found online, you can summon the authority to cease the legal violation (*wezwać organ do usunięcia naruszenia prawa*). That will not work, but then you need to bring a case to the administrative court for inactivity (*bezczywność*). Part of what we are doing when we do this, is fighting back against, breaking through, this standoff attitude among those in the government bureaucracy, 'and what will you do to me if I don't do this? (*A co mi zrobicie jeśli tego nie zrobię?*)'

More than the game itself being worthwhile, it was worth enduring the initial negative responses, being assertive, and in doing so, making abundantly clear to government actors that the public would demand transparency and inclusion. During a discussion about consultation around the Polish Nuclear Energy Program, one member of an environmental organization described how he started using "Aarhus rights" in practice. He learned of the Polish nuclear program in the press, and he called to ask the Ministry [of Economy],⁶⁵ "not *if* a public consultation will occur, but *when*." Then he pushed the Ministry on "reasonable time frames" for consultation, as the program was about 1500 pages long, much of it very technical. The public consultation also spanned a holiday period—another common practice in Poland (Wiśniewska 2016). He wrote a letter to the Ministry with three main points: three weeks was an unreasonable time frame for such a large document; the organization requested at least three months; and asking when the transboundary assessment would occur. He described the grudging response from the Ministry, "You will get your transboundary assessment," emphasizing to the

⁶⁵ The Ministry of Economy developed and published a draft of the Polish nuclear energy program in 2010. Between the end of 2010 and mid-2013, national and transboundary public consultations regarding the program were conducted.

group at the training that the obligation was on the government, not him: “It’s not me [who should have to demand it], but you [the government] who has to provide it.” The practitioner went on, incorporating another scalar level into the reframing of procedural rights, “We have rights, not just as Poles but also at a European level, we have rights.” Here he was referring to residents in Germany who were likewise entitled to comment on the Strategic Environmental Impact Assessment of the Polish nuclear program. In this way, assertion of procedural rights is re-framed as a series of governmental obligations to the wider public, within Poland’s borders and beyond. Connecting to other levels was a key way to convince participants to reconsider procedural rights and their expansive potential, for they could be used by the public on a much wider, European, transnational plain and have implications for other publics elsewhere.

Such scalar connections in turn resonated with cultural ideas about creative resistance to state power. For example, the practitioner discussing his use of Aarhus rights noted that if one European government would not release certain environmental or safety data, they could try to request it in another jurisdiction and work within a network to undermine governmental lack of transparency. This sort of resourcefulness—finding ways to get the information one needs even when official government channels stonewall, is one well-honed under “real socialism,” where it was absolutely necessary for survival. He advised the group on how to address governmental actors: “address them on the level of legal obligation. Make it clear, that if you don’t do it, see you in court...and they say ‘oh, you always want to take us to court’—but that’s not the point, we have a right.”

Thus, during such trainings, attempts were made to convince participants of the utility and potential of using these rights. On a much more practical level, the trainings contained sessions about actual skills needed to pursue administrative legal requests and complaints. While

many of the participants may have already had a basic working knowledge of what sorts or rights were available to them, the trainings provided skills and encouragement to deepen that knowledge and their own grit to see cases through and endure in the face of inevitable refusals and hardship. Participants were given tasks, for instance to find announcements and documents related to a particular set of administrative proceedings/EIA procedures on a municipal level public information bulletin. Subsequently, since those are difficult or impossible to locate online—as one participant put it, “you need to have strong nerves to find anything”—in groups, attendees drafted an information request about a decision on environmental conditions.

The trainings advocated for more sustained struggle, not to back down easily. One interviewee discusses a main goal of the trainings: to get people to go beyond a vague rights consciousness and towards a specific, pragmatic, and resilient rights praxis.

This obligation to make information on the environment available has been around more or less since 2000 or 2001 [...] On one hand there is a larger awareness in the government offices, though still not sufficient. Sometimes with what the foundation does this comes to light, it turns out that regulations are one thing, government officials another. And yet, it is definitely better than it was at some point when this was altogether a novelty, where a person comes and asks for information, which was not even imaginable. And on the other hand, there is also people's awareness, meaning, especially among environmental organizations [...]. And also on the part of private persons, this is increasing. That there is a possibility of demanding and pursuing this, and that we have a right to ask this of government officials. [...] This is not always super comprehensive knowledge, because people know that they can ask for something or other, but they don't know what they do if they don't get an answer, or if they get an answer that is different than the one they wanted, or they get refused. They are not always aware enough to know who they can appeal to, and to go through this procedure, but in general that something like this exists, I think this is pretty widespread (R34).

The interviewee notes a positive change over time, from the thought of asking a government official for information being unthinkable to a more general sense that this is possible or even expected (although actual practices vary across space). She notes a general increase in

awareness, or rights consciousness among people, and especially among environmental organizations. She also notes, however, that the rights consciousness is rather vague and superficial, that people often have a general sense that they have these rights, but would not know what to do if they were refused or if they got further along into the process. The trainings aim to educate them on this and also to encourage people to see their case through, even if it feels discouraging or takes a long time.

In one conversation with a self-taught legal practitioner at one of these trainings, he shared that he had been doing this for 13 years. In those 13 years, he noted things were not getting better or worse, just changing. He said, “you need to know that 90 percent of the time, it won’t go your way, but you need to do your thing anyway.” Another practitioner predicted all the losses that would eventually lead to sure victory: “You will lose in court, you will have to appeal. Then you will lose the appeal. Then go to the Aarhus Compliance Committee, and there you will win, I guarantee.” He noted the impact one such case could have on others, in Poland and throughout Europe even: “you do it on one, but the moment you win one, you change it for others.”

It was not only about convincing people to be tough and stick with cases, however. It was also about creating a community of people committed to this project. One trainer said, “Think about it 15 times before you do this. Can you stick with this for five, ten, fifteen years? Because if you don’t see it through, there might be reputational consequences,” communicating here that a person or organization exercising procedural rights was acting as part of a community of societal organizations, that they were all in it together, that this was a commitment.

The trainings also attempted to reimagine state-citizen interactions and show how it could be possible to actively reshape them. Not only are participants taught the lay of the legal land so

to speak, the nodes of administrative discretionary decision-making, and to be ready and willing to see cases through, they are also taught argumentation, debate, and interpersonal skills which are supposed to help them in their interactions with state actors and other sides of a potential environmental conflict. The trainings included role play activities, negotiation skills, active listening skills, and positive framing of arguments and demands. There were attempts to humanize public administrators, to teach participants to practice empathy for governmental bureaucrats. “Understand the guy’s stress,” one trainer said,

and his working conditions when you are asking for access to information. The [environmental] department likely has little money. It is the least liked department, it is seen locally as an office which might hold back local development. The guy works on an old computer with Windows 98....Recognize that they are trying to do something, sometimes they provide more than they are technically required to.

The more experienced practitioners shared instances when administrative authorities were responsive. Moreover, they discussed instances of administrative authorities learning from environmental advocates or taking their suggestions, provided the suggestions struck the right tone. This is illustrated in remarks such as, “the administrator may lack imagination; you can help him,” or “you’ll be talking with a person, it all depends on how he’ll react to you. You’ll have 90 seconds to explain.” In this way the people on the other side, and the process, were humanized. At the same time, attendees at the training were told that they could actively shape these relationships and processes.

Attendees were instructed on how to craft arguments such that they were legally recognizable and supported by appropriate evidence that could actually be used by administrative authorities to make and justify decisions. “Look through the eyes of a bureaucrat. You can’t argue that ‘the investment will smell bad,’—this kind of argument can’t lead to his rejection of the decision.” Attendees were guided to “help teach the administrative authority to make the

decision,” by, for example, providing scientific research on ecological corridors and animal passageways. Training participants were encouraged to “maintain working contact with government employees,” and assured that “it’s in his [administrative authority’s] interest to work with us.”

The content of the trainings illustrate the micro-mobilization occurring around the focal point of citizen interaction with the administrative legal system. By micro-mobilization, I mean personal interactions and how they help redefine the larger meaning of procedural rights’ mobilization. There is a mapping and discussion of state power, as illustrated above. There is a mixing of people with different orientations toward law and specifically towards procedural rights. Indeed, in all three of the workshops I attended on the topic of procedural rights, the organizers explicitly sought out a mixed group, including grassroots activists, members of NGOs, as well as local government administrators themselves—such that the trainings would not be (as many NGO trainings in Poland and elsewhere are) simply another exercise in “preaching to the choir,” (*kisić się we własnym sosie*) but rather a real—and sometimes rather uncomfortable—exchange.⁶⁶

Greenmind, Polish Green Network, and Foundation for Sustainable Development’s efforts culminated in conferences to which various non-governmental and governmental representatives were invited. At these conferences, they presented their research findings and tried to induce more of this cross-aisle mixing of governmental and non-governmental entities. In this way and the ways described in the past several sections, they try to refashion state practices and state-society interactions, as well as who creates knowledge, and how, on the topic

⁶⁶ In one of the trainings I attended, about half of the participants were from the public administration sector, and the other half were from the non-governmental sector and/or unaffiliated.

of procedural rights and governmental accountability. Their efforts highlight how state practices cumulatively, and at various levels, create hardships for environmental legal practitioners and ordinary citizens who try to be watchdogs of public administration and public policy making.

Conclusion

I often ended my interviews with some version of the question, “What is the biggest challenge your organization faces/facing your work in the organization?” When I asked this question of a lawyer in the organization ClientEarth, he responded,

To win these cases—something out of our control (laughing). Really that’s the biggest challenge. Like I’m saying, right now these cases are won on the procedural plane, it’s not like the court is saying, you guys are right, the decision should be a completely different one. No, right now they are only won on the procedural plane. Which, reflects well on Polish courts. It reflects really well on them. But for us, for this foundation, this isn’t the best, because it just prolongs the legal proceedings. And it means that someone somewhere made a mistake, someone conducted the legal proceedings in the wrong way. The court noticed this, but it means the administrative authority did something wrong. And this lengthens the proceedings, but this is not the foundation’s goal, not always. Sometimes the goal is to prolong proceedings, counting on the possibility that the investment will be discontinued. But sometimes it’s about, seeing that the investment is not going away, to win the case. And it’s going to be very difficult to win these cases, substantively. That’s why this is the biggest challenge. Not to win just on procedural principles, that someone noticed some kind of mistake, that evidence was not introduced or someone didn’t sign something right—I mean this is great, it’s the work of a lawyer, right—but that’s not what this is about (R26).

The recognition here that, while a lawyer’s mastery of procedural technicalities is decidedly useful, and while Polish administrative appeals courts recognize procedural errors denying environmental organizations admittance into administrative proceedings, “what this is about,” is larger: being able to contest the *content* of the decisions, and in this way holding public administrative authorities tasked with environmental protection accountable for the quality and substance of their decision-making. When the interviewee says “seeing that the investment is not going away,” he refers to the suite of investments in existing and new coal burning facilities

that the Polish government and private investors have a substantial interest in pursuing and doggedly did so in all available venues. He refers to the government's pro-coal energy policy and how in the other venues (such as legislative or media) in which it might be called into question or weighed against other sources of energy were blocked, environmental advocates stood no chance. If the goal was to steer the country's energy system away from coal, then new coal investments needed to be blocked using fierce court cases ("*ostre sprawy sądowe*"). As the interviewee put it,

You know, we can write a letter or appeal to government, and we do that, but it doesn't get us anywhere. Once we take things to court, we are listened to, taken seriously..... You might have seen our appeal to the Prime Minister in the newspaper in the newspaper before the climate summit, that gets things out in the media, but it won't change something like a court case will (R24).

Such remarks contain a similar message to that of many of the self-taught legal practitioners in Poland with which I spoke: "The only way is to become a side." In a political context closed to environmental interests, legal processes, specifically administrative proceedings, are a necessary arena of contestation. Involvement in them means delving into the nitty-gritty of state practices, and as such the acquisition of practical knowledge and, at times, practical results.

In this chapter I have provided empirical flesh to my conceptualization of legal consciousness formation, encapsulated by the term "becoming a side." "Becoming a side" captures the iterative process of legal consciousness formation and political learning processes through environmental advocates' interactions with the administrative legal system. Interactions with the administrative state, and with others trying to interact with the administrative legal system, offer learning opportunities and validation for differently situated actors, draw individuals into an ever evolving relationship with the state, while at the same time invite a spatialized and substantive critique of state power.

Recognizing that tinkering with minute details will be insufficient in a broader system which devalues ecological science and ethics and in which environmental advocates are maligned and deprived of financial support to do public interest work, some environmental legal practitioners aim wider. Those who have been playing the game for longer continue with localized cases but also begin to see the need to aggregate their experience with others fighting similar battles, with an eye toward more systemic change. Part of this undertaking is to conduct systematic research on this topic, and another is to share, teach, and propagate their experience and skills.

Through iterative contact with the administrative state, legal practitioners learn the procedural and substantive ropes and pass that knowledge onto others. They acquire a detailed map of what is essentially the administrative state, the various jurisdictional levels and the institutions at each which have discretionary authority and environmental enforcement powers. All the while they build a sophisticated critique of legal accountability mechanisms, the normative commitments of the executive state, and the prevailing political-economic system. They gain a working knowledge of the way spatial and temporal dynamics of law are held together, in ways that may be at odds with, but also shape, material reality. I turn to examine this last aspect more fully in the next chapter.

Chapter Four

Pic na wodę – fotomontaż:

Building a spatial and temporal critique of law

The teacher was planning to give them an object lesson about the elephant. He halted the group in front of the animal and began:

“The elephant is a herbivorous mammal. By means of its trunk it pulls out young trees and eats their leaves.” The children were looking at the elephant with enraptured admiration. They were waiting for it to pull out a young tree, but the beast stood still behind its railings.

“...The elephant is a direct descendant of the now extinct mammoth. It’s not surprising, therefore, that it’s the largest living land animal.” The more conscientious pupils were making notes.

“...Only the whale is heavier than the elephant, but then the whale lives in the sea. We can safely say that on land the elephant reigns supreme.”

A slight breeze moved the branches of the trees in the zoo. “...The weight of a fully grown elephant is between nine and thirteen thousand pounds.”

At that moment, the elephant shuddered and rose in the air. For a few seconds, it swayed just above the ground but a gust of wind blew it upward until its mighty silhouette was against the sky. For a short while, people on the ground could still see the four circles of its feet, its bulging belly, and the trunk, but soon, propelled by the wind, the elephant sailed above the fence and disappeared above the treetops. Astonished monkeys in the cage continued staring into the sky.”

-from *The Elephant*
by Sławomir Mrożek, 1958
(Mrożek 2004, p. 7)

Nauczyciel zamierzał przeprowadzić lekcję o słoniu w sposób pogładowy. Zatrzymał całą grupę przed słoniem i zaczął wykład:

— ...Słoń jest roślinożerny. Za pomocą trąby wyrzywa młode drzewka i objada je z liści.

Uczniowie skupieni przed słoniem oglądali go pełni podziwu. Czekali, żeby słoń wyrwał jakieś drzewko, ale on tkwił za ogrodzeniem bez ruchu.

— ... Słoń pochodzi w prostej linii od zaginionych już dzisiaj mamutów. Nic więc dziwnego, że jest największym z żyjących zwierząt lądowych. Pilniejsi uczniowie notowali.

— ...Tylko wieloryb jest cięższy od słonia, ale ten żyje w morzu. Możemy więc śmiało powiedzieć, że królem puszczy jest słoń.

Przez ogród powiał lekki wiatr.

— ...Waga dorosłego słonia waha się od czterech do sześciu tysięcy kilogramów.

Wtem słoń drgnął i uniósł się w powietrze. Przez chwilę kołysał się tuż nad ziemią, ale podtrzymany wiatrem ruszył do góry i ukazał całą swą potężną postać na tle błękitu. Jeszcze chwila i mknąc coraz wyżej zwrócił się ku patrzącym z dołu czterema krążkami rozstawionych stóp, pękatym brzuchem i koniuszkiem trąby. Potem, niesiony przez wiatr poziomo, pozęgłował ponad ogrodzenie i zniknął wysoko za wierzchołkami drzew. Osłupiałe małpy patrzyły w niebo.

-z opowiadania *Słoń*
Sławomira Mrożka, 1958
(Mrożek 1998, pp. 127-128)

Jan criticized local government offices for engaging in what he repeatedly called “*pic na wodę fotomontaż*” (hogwash, photomontage), responding to an information request or administrative complaint in a way that constructed a reality which contradicted the petitioner’s direct observation of material reality. In a case he worked on contesting large scale dam construction in western Poland, Jan noted, “there’s no expertise here, no research, just an additional ‘*pic na wodę fotomontaż*’ which is supposed to justify the construction of such a reservoir.” The phrase is indicative of an empty or incongruent reality created by formal government actors, which lacks empirical justification, scientific basis, and does not correspond to Jan’s own observed reality. His environmental organization sent a letter in protest to the Marshal (*Marszałek* – provincial level head of government), in contrast with another pending case about a lake (described in Chapter One), “more in a substantive tone, less from the legal perspective. More from the point of view of nature protection, that these reservoirs won’t accomplish anything.” Pointing to the letter sent regarding the other pending case about a lake, Jan notes that letter about the lake was edited by a lawyer. I ask whether he thought it was more effective to write in the tone in which he originally wrote, a description of the substantive issues, or to write in a more legalistic tone, to which Jan responded,

Neither one is effective. And this is the next problem, even though there is democracy and you can say what you want, just because you say something does not mean it is going to work on someone. When it comes to the water reservoirs, for example, it is likely that in the fall we will get in touch with the European Commission... (R2)

Despite the suggestion that domestic remedies are utterly ineffective and outside intervention from European level enforcement institutions is warranted, Jan goes on to plot out “the only route that works,” consisting of the preparation of sound scientific evidence validated

by the independent regional environmental administrative body, and, if the municipal level government is unresponsive to this affirmation, bringing an administrative complaint against it:

Only if we go through the government, the Regional Director of Environmental Protection (Regionalny Dyrektor Ochrony Środowiska, RDOŚ), and we prepare a report and some of our comments get recognized by the RDOŚ, then they won't let the municipal government (urząd) proceed. Our comments were seen as substantively sound, and so they were taken up. To be effective we need to have one anchor in the [environmental] regulations, prove that we are right in terms of the regulations, take that to the urząd, if they question this, then we take it to the administrative court, and only this route works and is effective. Only that way is effective, nothing else works, there's no other way. Talking, discussing is not worth anything. There is a huge arrogance of those in power, at all levels they think that the ecologists are crazy, demanding, we know what is best for people and for the environment (R2).

The quotation, the broader conversation, and others like it, suggest the concerted, formalized, and energy-intensive effort required to compel local government to take environmental protection measures. It expresses frustration with willful ignorance of on-the-ground conditions or scientific evidence, as well as of the perceived inferior position of ecologists vis-à-vis governmental decision-makers. A dialogue is not seen as possible, and formal administrative legal action coupled with sound scientific research is needed to try to achieve the desired results.

An incongruent reality created by government actors or legal decisions, which does not correspond to a person's own observed reality shapes legal consciousness by shaping some version of a "mismatch" critique: the commitments enshrined in law in the abstract, do not match what is happening on the ground (Blomley 2013, pp. 25-32). I draw on Blomley's theorizations about property, although my example, focused on unmet environmental legal commitments, is distinct. Blomley writes about the individual ownership model of property, and how many critics of this model say it is reductionist and descriptively inaccurate. It overlooks realities of diverse ownership models and the social reality of coexistence, and actual, lived ethical commitments. The model in turn distorts moral judgement in part by hiding pertinent

moral choices about alternative possible property regimes from consciousness (ibid, p. 27). Critical claims about the individualist notion of private property thus rest on uncovering departures from this model within legal jurisprudence as well as in dynamic lived realities beyond the formal legal realm (ibid, p. 30). A mismatch critique suggests, then, that better models are needed which better reflect the diversity of lived experience, and, subsequently, better, less “delusional” representations would lead to improved social and environmental outcomes. Blomley, although he embraces the ethical thrust of such critiques, suggests that they are incomplete, because they rely too much upon a divide between abstraction and reality. Instead it must be more fully recognized that statements about the world make that world; social reality is brought into being by the very act of performance itself. Some utterances have more performative force than others, depending on the degree to which they mesh with and further constitute prevailing conventions, the degree to which they are citational and reiterative (ibid).

Property as a legal or normative category neither came up very much in my conversations with environmental advocates and legal practitioners in Poland, nor in other data sources for this project, although some used broader notions of individual rights and freedoms in their argumentation for or against environmental protection. I suspect the reason for this lack of “property talk” is related to the historical and cultural specificities of Poland and notions of private ownership there, which are necessarily distinct from those in the US or Canada, not to mention my own empirical focus on environmental legal contestation from the perspective of environmental advocates, as well as Poland’s distinct statutory commitments. However, Blomley’s points about using performativity theory to develop legal analysis and critique are resonant with my data. Environmental legal practitioners, like Jan above, as they compare written statutes with actual practice, and as they compare these with their own observed

biophysical reality and knowledge of the physical sciences, develop their own version of the mismatch critique. But most of them do not want to change the “model”—most agree that environmental law is well-conceived and written. Rather, examination of environmental legal practitioners’ access to and contact with administrative legal processes reveals that legal consciousness, among people already culturally primed to think of law as performative, is shaped in such a way that the temporal and spatial aspects of how environmental law is performed, how the prevailing way of doing things is held together and by whom, are made vivid. The conversation with Jan described above begins to indicate this, because it recognizes the narrow window of activity that might bring desired environmental protection results, within a larger context of environmentalist arguments being subordinate to other imperatives, the governing style of “street level” bureaucrats being impervious to environmental advocates’ arguments.

The excerpt that opens this chapter is from a satirical short story which portrays the political-economic imperatives of the People’s Republic of Poland (*Polska Rzeczpospolita Ludowa*, PRL), its planned economy, and hefty bureaucracy. The director of a zoological garden, driven by careerist motives, decides to refuse a real elephant, which was part of the realization of a plan to fill the zoo’s shortages. Instead, he put forth his own plan to make a realistic looking elephant out of rubber, fill it with air, and display it in a pen. He wrote a letter to a government official, explaining that this was his “modest contribution to the common task and struggle” (Mrozek 2004, p. 6), and in this way he would be saving PRL money. In accordance with norms under PRL, the callous bureaucrat who received this letter accepted the absurd plan, mechanically guided by imperatives to reduce state expenses. As the zoo employees got to work inflating a huge rubber elephant, they quickly tired, and they resolved to fill the elephant with gas instead of air, because it would be more expedient. This is why the

elephant took flight during the school fieldtrip lesson depicted in the epigraph. The story's ending indicated that the students subsequently slacked off in their studies and became hooligans who didn't believe in elephants at all.

The story provides a fruitful jumping-off place to think about (environmental) law's performativity and legal consciousness in the Polish context. The elephant is a symbol of the political and economic system of the time and its precarious reliance on maintaining appearances. The story illustrates how Poland's political and economic system created an incentive structure in which careerism under the guise of patriotic civic duty was formulated into an absurd plan—absurd in the sense that it would not meet the needs or functions of the institution as an educational and research institution (leaving aside ethical problems with zoos for this particular thought exercise). This plan was then formally approved by the state bureaucracy, because it made sense within the prevailing discursive-material arrangements. The story also illustrates the demoralization and de-legitimation of the system (in this case on the part of the students attending the fieldtrip) possible when the depiction of reality by an authoritative source does not match actually observed or experienced reality.

The theoretical lens of performativity is especially penetrating when examining legal dynamics in post-Communist or former Soviet states. This is because the ways ordinary people understood and apprehended laws, policies, and the system such laws and policies purported to uphold, were poignantly shaped by comparing formal mandates and aspirations against their own lived experiences and direct observation of reality. More than this, people developed an acute sense of how the political and economic system was, through words, people, and objects, iteratively instantiated by those in power—and this was precisely the system's simultaneous strength and vulnerability. Experiences from that time period, and their cultural transmission

across generations, have yielded a particular sort of sardonic sensibility among Poles regarding law. Survival instinct and creativity, irrespective of formal rules, have long been paramount. If the official rules could help, so be it. If not, another way would have to be devised. Poles' sense of justice, out of necessity, has never been too closely tethered to formal law. At the same time, the normative ideals framing legal rules have given moral weight to resistance movements at various periods in the country's history. In a way, Polish people who lived under the Communist Party-controlled system (and perhaps several of the systems which came before it) themselves developed what might be called a performative critique of law—a way of thinking about how law is “done,” what it produces and the system it upholds, rather than about the rules themselves and how empirically (in)accurate they were. One key site where such relationships between lived reality, society, and the state are mediated and may be observed in the present day, I contend, is in and around administrative legal processes.

Spatial and temporal dynamics of law are brought to the fore in the process of mobilizing the administrative complaint system. In the dynamic interaction between direct observation of the biophysical earth, procedural rights' mobilization, and legal argumentation in formal legal venues by various actors, legal consciousness is being shaped in consequential ways. In service of these points, in this chapter I illustrate two main dynamics. First, the way the biophysical is apprehended inside and outside of formal legal proceedings is consequential to the legal consciousness formation process. Observation or measurement of biophysical entities provides external validation that informs a critique of legal formalism⁶⁷ and insufficiently restrained state

⁶⁷ Legal formalism refers to an understanding of legal interpretation as the uncontroversial application of rules or principles to facts. It largely accords with the view of legal process in civil traditions, the “folklore” about the legal process in which judges are merely “operators of a machine designed by [legal] scientists and built by legislators,” their task simply to find the applicable provision and apply it to the situation at hand. Difficult cases are rare, pathological examples, and unjust, unrealistic decisions regrettable, but they are the price to pay for certainty.

and/or private sector power. Second, much of the legal argumentation occurring in administrative court cases related to environmental issues involves reckoning with competing spatial-temporal governing logics, what Valverde (2014, 2015) calls spatiotemporalities. A key example of this is the conflicting spatial-temporal logics of construction law and environmental law. As environmental legal practitioners strive to put forth their spatial-temporal arguments for preventing environmental harm *before* it happens, they try to undo both the procedural and scalar distancing accomplished by administrative judicial reasoning which allows for contradictory spatiotemporalities to coexist. Environmental legal reasoning, particularly when combined with direct observation of biophysical processes, cuts past trading in abstractions, confronts the practical spatial-temporal aspects of law, and connects across scales of material and discursive practices. The legal consciousness forged through these dynamics enable a broader critique of environmental law's application. It is a critique which recognizes law's performative aspects—how it is held together and stabilized through iterative, citational material and discursive practices, in part by administrative judges, in part by developers, and so on. This means, at the same time, that environmental legal practitioners are also exposed to the indeterminacy and political possibility at these sites of contact with the state.

I move through four main sections. First, a short section illustrates how apprehension of the biophysical outside of formal legal proceedings can shape legal consciousness formation. The remaining sections build upon that point. The second section discusses the competing spatial-temporal logics in construction law and environmental law confronted by environmental legal practitioners within administrative legal argumentation. The third section discusses the ways environmental legal practitioners in Poland have made contributions to Polish legal theory

“Even [legal] scholars who recognize that this model is not working spend more effort trying to perfect its basic design than in trying to design a better model” (Merryman 2007, pp. 81-82).

and practice which are more in line with the preventative and precautionary spatiotemporal logic of environmental law. In this section, I also further illustrate how a performative critique of law emerges from participation in administrative legal processes and argumentation. The fourth section shows how practitioners' attempts to reshape how state actors' interpretations and enactments of environmental law are being taken up. Two instances of favorable judicial interpretations of environmental law illustrate this and show how the administrative legal processes investigated in this dissertation are important sites of legal consciousness formation where citizens are exposed to the state's prevailing governance logics, as well as the ways these may be re-configured.

Apprehension of the biophysical and legal consciousness formation

One of the main points in this chapter, and underpinning all of the cases discussed in this entire dissertation, is that the way the biophysical is apprehended inside and outside of formal legal proceedings is consequential to the legal consciousness formation process. Observation or measurement of biophysical entities provides external validation that informs an evolving critique of the legal accountability system, and which in part mediates the relationship between state and society.

The following example illustrates how one's own observations of the biophysical environment, even absent favorable legal decisions or formal validation of one's arguments, affects legal consciousness and perceptions of the legal system. A detailed evaluation of the legal regulations and the pragmatic impact one can make is assessed in part with reference to the physical earth itself.

One of Martin's particular focuses was on forest protection, and he noted that over a four to six year time period, during which he made administrative complaints on the basis of the Law on Environmental Damage (popularly known as the "*ustawa szkodowa*" or "damage law"),⁶⁸ the government started to "back away, little by little." What he meant by this is that the government modified its conception of forest management practices within this law, the legal arguments it used, and, more consequentially, modified its actual management practices on the ground to be more in line with an ecosystem view of the forest. He described the various stages by which this occurred. First, government actors attempted to argue that the National State Forests Holding (*Lasy Państwowe*) was not an "entity which uses the environment" (*podmiot korzystający ze środowiska*), a condition that needs to be met in order for the damage law to be triggered. Martin considered this a "formal trick" that the government eventually dropped. Subsequently, the government maintained that the law in question did not apply to the state forests, because they were managed according to principles of long term sustainable forest management.⁶⁹ So the task, in Martin's view, became to hold the government accountable to its claim that it was managing forests sustainably. He describes the process of collecting his own evidence at the site which was the subject of his complaints, and trying to get that evidence recognized by state

⁶⁸ Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage (*Ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie*), Poland's national legislation implementing Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability, also known as the Environmental Liability Directive. The Directive's fundamental aim is to hold operators whose activities have caused environmental damage financially liable for remedying this damage, commonly known as the "polluter pays" principle (EC 2015). The expected result is more prevention and precaution. In addition, the Directive is meant to hold those whose activities have caused an imminent threat of environmental damage liable to taking preventive actions. The European Commission distinguishes this legislation from civil liability regimes in that instead of covering damages to individuals or property, the focus here is on damage to the wider environment and obtaining remedy for that damage (EC 2015).

⁶⁹ "The Act does not apply to forest management carried out in accordance with principles of sustainable forest management, referred to in the Act of 28 September 1991 on forests"(Article 5.2, Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage [*Ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie*])

actors, with the ultimate goal of compelling the National State Forests Holding to change its actual land use practices. I quote him at length now,

...in every forest management plan, it is of course written that they are managed according to these long term “sustainable forest management” principles. Which generally is not true. So then the task was to show this wasn’t true, that they should be managing the forest according to these principles, but that they weren’t doing so. So the evidence, the photos that were taken after the fact, after the land had been plowed and these little plants appeared which showed that this was a broadleaved forest or meadow. They ignored the photo evidence. There was a period in which they said that this does not concern them, that they are not going to do anything, because the law didn’t include forest management that was being done according to those principles. Then after that they backed down again, started to consider that indeed the forest management wasn’t the way it was supposed to be, but they still ignored the photographic evidence.

Now I have a fresh letter, that came in a few days ago, regarding an issue from 2009 that the General Directorate [for Environmental Protection, GDOŚ] in Warsaw, to which of course everything else must refer, and they ordered the photographs as evidence – so little step by little step I am getting there with this whole disquisition, that they are, little baby step by little step, very drudgingly, withdrawing. In terms of the positive reasoning of GDOŚ to the actual actions it’s come to on the part of a mighty interest like the National Forests—let me repeat, this is one third of the area of Poland. It’s simply one huge, mighty company. It’s still going to be a long road. These kind of tiny steps. In this ecological game there aren’t ever really spectacular successes, just generally in these small matters, not talking about going up against colossal interests like the National Forests, but...What they have already done wrong they won’t fix, but very often they won’t do it a second time. In these more local matters in general it is like this that, seemingly there is no ostensible effect, but when you take a look, the effect is good to the extent that in the future negative action is firmly stopped. Nothing is really black and white here, we operate in this grey area, no spectacular successes...it’s not like someone’s going to shut down their operation and fix something right away, but generally they back down and won’t do something again.

Me: Do you have an example of this, maybe a local example?

Martin: [The Provincial National Park] is an example, where, in a national park you have the highest level of protections in Poland. There is no economic excuse here. In other cases they can cover/shield themselves by saying that the forest has to fulfill its economic purpose, that it has to provide wood, but in a national park the only goal is nature protection, there isn’t any other excuse. It was being exploited in a way that it should not have been, it was not supposed to be exploited at all. Planting—there is also the question of what kind of plants they were planting and whether they were in agreement with the native environment or

not. Once I was able to win this court case in Warsaw and get an administrative decision from [Provincial] RDOŚ for them to stop planting beech trees in this broadleaved forest habitat. In this habitat, it's oak and hornbeam. The beech tree does not appear in in our region, it's beyond the geographical range. They introduce them artificially. [...] If hornbeams are native, why would you introduce beech trees here? I got the decision then, stopping them from planting beech trees. Riding around the park a little, I noticed that they are no long planting beech trees in the former agricultural land, they are introducing the hornbeams, not the beech anymore. I didn't notice beech anywhere. Officially, of course, they didn't admit that they did anything wrong, they wrote me back letters, these wry letters and so on, from Warsaw, of course because the matter had to do with a national park which is directly under Warsaw's control. But they started acting in such a way that matched what we thought they should do, let's say. They didn't admit they made any mistakes, but in practice they changed what they are doing. Slowly, slowly in actions they're going in a positive direction (R4).

A few aspects of this lengthy quotation deserve some elaboration. First, as an environmental legal practitioner, Martin collects his own photographic evidence of a site under contestation and submits it to the environmental protection authority, which can compel other actors to change their practices. Evidence from the biophysical earth and landscape itself, and his own collection of it, provides him with external validation for his own arguments, as well as confirmation later that his efforts were not entirely futile. The independent environmental authority, the Directorate for Environmental Protection, is another source of validation and pressure upon the State Forests. However, Martin does not have illusions about how tiny the win he describes here is in a much longer-term battle against powerful state-owned interests. On the local level, though, he has a sense that his work is having some modest results. This is confirmed by his actual observation of the land.

Martin goes on to describe a similar mechanism of external validation in other cases. Even if it was never formally admitted that the practices in question were inappropriate, those charged with managing a particular area altered their behavior, particularly in response to administrative decisions validating environmental protection arguments. The practices that were

the source of complaint and the subject of photographic or other evidence did not occur again. The incremental process Martin describes of compelling modest shifts in governmental actor behavior, the stages through which he viewed his interactions with government entities, the years of time which passed, and the many more he predicted would be required, all indicate his understanding of the environmental governance system as one which is held together and stabilized through iterative material and discursive practices, which, on the whole, are not receptive to ecological practices. Nonetheless, there are openings for people like Martin to introduce, iteratively, other discursive and material practices. I turn now to another site where discursive-material practices are encountered and reworked by environmental advocates: legal interpretation in administrative courts.

Spatial-temporal logics in environmental law versus construction law

This section examines administrative legal argumentation to illustrate how environmental legal practitioners in Poland seek to re-work the ways administrative judges interpret environmental law. They seek to contest the disjuncture between environmental law's theoretical temporal-material configuration and how it routinely gets re-configured and performed in practice. Many environmental laws, in their "unadjudicated" state, specifically those related to environmental impact assessment, seemingly promise due scrutiny of projects *before* environmental destruction occurs. What they actually provide, if the temporal-material configuration of another aspect of law (in this case construction law) is given precedence, is a legally formalistic approach which distances itself from environmental harm while still recognizing other types of materiality (in this case built structures). The privileging of construction law's temporal-material configuration, or environmental law's temporal-material (re)configuration, undermines environmental law's progressive potential.

I use the term “temporal-material (re)configurations” to capture the mutually constitutive relationship between legal discourse and physical entities, and what the temporal and spatial dimensions of that relationship may yield, as is seen in many cases in Poland: legal authorization of environmental destruction after-the-fact, or, conversely, the pre-authorization of environmental harm based on not yet materially existing economic enterprises.⁷⁰ The term has affinities with, and is informed by, Mariana Valverde’s theorization of law’s spatio-temporalities, its own internal pluralism along both temporal and spatial dimensions (Valverde 2014, 2015). Valverde’s work and that of other legal geographers helps us piece together how governance actually works, how it enrolls things, ideas, acts, people, and so on into assemblages that are stabilized and made real (Blomley 2013; Mitchell 2002). Valverde suggests we do so by identifying distinct sets of “spatio-temporalizations,” which constitute the specificity of certain socio-legal mechanisms. As Bakhtin used the term “chronotope” to get at the “particular spatiotemporal modes” which make up the “essence” of a literary genre (Valverde 2014, p. 67), Valverde asserts the concept can be used as a way to better apprehend particular governance logics and dynamics.

The academic terminologies may be a bit cumbersome, and indeed foreign to most legal practitioners themselves, but in this section I show how environmental legal practitioners themselves are at the front lines of attempts to re-shape prevailing sets of spatio-temporalizations in Poland’s environmental governance regime. Administrative appeals processes are sites where various actors reckon with conflicting spatio-temporalities: the precautionary spatiotemporality of environmental impact assessment and the retroactive approval mechanisms available in

⁷⁰ This pre-authorization refers to a series of cases in which free greenhouse gas permit allowances were issued for coal-fired power plants or additions to plants that were not yet constructed, described in Chapter Three. Administrative judges found that the investments had been “physically initiated,” and thus met the criteria to opt out of an environmental regulation, even though they did not even have construction permits.

construction law. Each inform a distinct apprehension of material entities and processes.

Through their involvement in administrative legal processes as “sides,” environmental legal practitioners learn about, and how to contest, the prevailing spatio-temporality of environmental governance in Poland, as it is expressed in administrative legal interpretation. I now take the reader through a case to illustrate these points.

In the Beskid Mountains, part of the Carpathian Range in southern Poland, mountain dwellers and members of an environmental organization based there noticed construction activity in 2009. Apparently the private owner of the land, a wealthy business owner, had expanded an existing ski resort, adding a chair lift, a system for making artificial snow, and a lighting system. He did not have the necessary construction permit to build—and therefore also neither secured a decision on environmental conditions, a pre-condition for approval of a construction permit, nor a required water permit. Since December 2009, environmental organization Workshop for all Living Beings (*Pracownia na Rzecz Wszystkich Istot* – hereafter referred to as “Pracownia”), with the help of an environmental law firm in Wrocław, have been taking a range of actions to legally contest this situation and hold the owner accountable. Although there are criminal and civil legal elements in this complicated and long-running case,⁷¹ I focus solely on the administrative legal processes.

It appears the landowner was counting on using a provision in Polish construction law which allows for “legalization” of structures built without proper permits. Providing someone

⁷¹ Pracownia submitted a request to start proceedings on environmental harm to the Regional Directorate for Environmental Protection, RDOŚ commissioned expert research on the scope and magnitude of environmental harm. As of January 2012 the proceedings were ongoing. Pracownia as well as RDOŚ also submitted a notice to the Regional Prosecutor in Wadowice about criminal activity. The Regional Prosecutor did not find significant law breaking, and refused to begin an investigation. Pracownia and RDOŚ submitted an appeal to the Regional Court in Wadowice, who overruled the Prosecutor’s decision. The case was taken up by the District Prosecutor in Kraków, whose investigation led to bringing charges against the investor. The proceedings were ongoing as of January 2012.

who already built a structure with a procedure to “make right” with the law is perhaps a pragmatic response and more sensible one than ordering demolition of an already standing structure. Indeed, public administration deals in pragmatism—it is the day-to-day provision of government services and regulation of a whole host of detailed areas of life. However, in Polish law there is also requirement to conduct an EIA, Environmental Impact Assessment, before realizing certain investments, even private ones, and ski infrastructure is subject to this law.⁷²

The EIA procedure is used to predict the environmental consequences of a project *prior* to moving forward with it, in order to mitigate negative environmental impacts. The environmental assessment procedure results in what is called a decision on environmental conditions, a decision with stipulations according to which construction blueprints must be adjusted. In this particular case, the landowner submitted paperwork to have the construction “legalized,” and to obtain a decision on environmental conditions, after-the-fact. This was after Pracownia notified the County Supervisory Construction Inspector (*Powiatowy Inspektor Nadzoru Budowlanego*) that illegal construction had occurred, but the County inspector could not move forward with legal “fixing” until the investor secured the necessary documentation, including the decision on environmental conditions—this decision and its status thus became a focus for subsequent administrative contestation.⁷³

⁷² A proposed amendment to the Regulation of 9 November 2010 regarding projects which may significantly impact the environment (*projekt zmiany Rozporządzenia Rady Ministrów z dnia 9 listopada 2010 r. w sprawie przedsięwzięć mogących znacząco oddziaływać na środowisko*) frees most ski infrastructure investments from the obligation to conduct an EIA. This constrains public scrutiny of such investments.

⁷³ The County Supervisory Construction Inspector began the “repair” proceedings (*postępowanie „naprawcze”*), but denied Pracownia status as an entity with the “rights of a side.” Pracownia then appealed this denial to the Provincial Supervisory Construction Inspector, who overruled the County Inspector’s decision. Subsequently, the landowner appealed this decision of the Provincial Inspector to the Provincial Administrative Court (WSA). The WSA concurred with the Provincial Inspector’s (and Pracownia’s) argumentation. According to regulations, the Country Inspector cannot complete the “repair proceedings” and “legalize” the investment until the investor completes all necessary steps, including the attaching the decision on environmental conditions—this decision and its status thus became a focus for subsequent administrative contestation.

The series of events which ensued, and lasted four more years, illustrate the ways legal argumentation, in part relying on scalar sovereignty claims, negates the spatio-temporal argumentation of environmental advocates in favor of a spatio-temporality in construction law which privileges a retroactive procedural accounting of already undertaken environmental alteration. Scalar differentiation is often used to allow for conflicting or contradictory spatial-temporal governing logics to co-exist (Valverde 2015, pp. 13-14; See also Chapter Three). Administrative judges engage in such differentiation when they, for instance, reject the direct applicability of an EU legal provision in favor of a domestic one. In contrast, environmental advocates may try to “undo” this scalar separation by pulling international and/or EU legal claims down to the domestic level and in this way explicitly juxtaposing contradictory spatiotemporalities. In this way, environmental legal practitioners confront state actors’ attempts to distance themselves from recognizing biophysical harm. Environmental advocates are alarmed to see that the logic of regulation within construction law may be increasingly applied to investments without considering time, space, and context of the events being regulated. In this way, to borrow Valverde’s words, the “space-time of the state is homogenized” (Valverde 2015, pp. 11-12). Environmental legal practitioners work against these dynamics by attempting precisely to reinsert space, time, and context, and to demand their consideration. To make their arguments more forceful, they try to streamline environmental-legal spatio-temporality across scale. Along the way they identify how particular spatiotemporalities are being furthered and by whom—in other words, how law is iteratively performed and where/how it might be reconfigured.

The investor submitted paperwork to obtain a decision on environmental decisions in March 2011. The mayor (*burmistrz*, first instance administrative authority, municipal level)

subsequently began administrative proceedings regarding issuing a decision on environmental conditions. Pracownia (along with another environmental organization and the District Prosecutor) entered into these administrative proceedings as a “side.” As part of the proceedings, the mayor sent a request to the County Sanitary Inspector as well as the Regional Director for Environmental Protection, requesting guidance on whether an EIA was necessary; the Sanitary inspector found that an EIA was not necessary in this case (For reference, see Chapter Three, Figure 8, “Schematic diagram of the process of issuing a decision on environmental conditions, when an EIA is not necessarily required”). The Regional Director for Environmental Protection refused to issue a decision on the question of whether an EIA was needed, arguing that given the situation, such proceedings were “without subject” (*bezprzedmiotowe*), since an EIA may be conducted only for planned investments, not those already realized. The Regional Director discontinued the proceedings. The investor appealed this procedural decision to the General Director for Environmental Protection, but the appeal was rejected in October 2011. Given the situation, Pracownia expected the mayor to refuse issuance of the decision on environmental conditions, which he did in February 2012.⁷⁴

The mayor’s decision was appealed by the landowner to the second instance administrative body, the SKO (*Samorządowe Kolegium Odwoławcze* – Local Government Appeals Body). The investor argued that the lack of a coordinating authority’s guidance cannot be the basis of refusal to substantively review the decision request. In June 2012, the SKO validated the landowner’s arguments, overruling the first instance body’s decision and asking for its reconsideration. The SKO reasoned that the realization of the investment cannot be grounds

⁷⁴ He instructed the landowner to provide a statement that obtaining this decision is necessary to obtaining a “legalization” decision, per construction law. He stated that obtaining guidance on the EIA question is an obligatory element of proceedings, which meant that it was not possible to issue a decision.

for discontinuing proceedings; it does not make the proceedings “without subject.” Since legislators have allowed for “legalization” of already realized investments, the possibility of giving out a decision on environmental conditions cannot be ruled out. The Regional Director thus did not have a basis for discontinuing proceedings.

According to the SKO, if legislators allowed for legalization in construction law, then they did so with all of its consequences, including the ability to complete the normal course of administrative proceedings which would be necessary for the construction investment. Otherwise, the regulation allowing for the possibility of legalization of an unlawfully built structure (*legalizacji samowoli budowlanej*) would be a dead/defunct law (*przepisem martwym*). The SKO cited a Supreme Administrative Court ruling⁷⁵ which said that an environmental assessment cannot be ruled out for a realized investment. At the same time, the stage of this kind of proceeding was important. In this case, the enterprise had not yet been put into use, and the aim of legalization proceedings was to “bring about a situation” in keeping with the law. In short, the SKO argued it was possible to legally reconcile the situation.

In August 2012, the General Director for Environmental Protection and Pracownia appealed the SKO’s decision to the Provincial Administrative Court (WSA). They presented several procedural and substantive legal violations, drawing attention to deliberate lawbreaking on the part of the landowner, irreversible environmental damage, the lack of respect for environmental law, and the nature of the EIA process being preventative and for planned investments, not already realized ones. They both argued that EU law—the EIA Directive and the ECJ’s interpretation of this directive—confirmed their position that rejection of the decision on environmental conditions is justified. It was emphasized that Article 49, section 4 of

⁷⁵ Case signature II OSK 2501/11

construction law (*Prawo budowlane*) raises doubts as to its agreement with EU law, and as such, since EU law has precedence over domestic law, the administrative body should decline its use.

The Provincial Administrative Court upheld the second instance body's decision. That is, it found that, in the case of an already built investment, built without necessary permits, and related to this the commencement of "legalization" proceedings per construction law, it was allowable to have proceedings about, and issue a decision on, environmental conditions. The judges dismissed the General Director's appeal on grounds that it was not part of the preceding administrative proceedings. As for Pracownia's appeal, the court did not find the argumentation convincing. It emphasized an administrative court's job: to make a finding on the legality of administrative decisions—whether they were conducted properly. The main arguments of the court were that construction law allows for legalization, whereas the EIA law is procedural with respect to decisions on environmental conditions. Second, there cannot be unequal treatment of developers; according to existing administrative case law, there have been other instances on which legalization was permitted, and this included issuing a decision on environmental decisions after an investment was already carried out. The court also emphasized that the EU EIA Directive was not directly effective, but that Polish statutes and regulations determined its implementation in Poland—this and existing administrative case law is the proper source of legal interpretation in this case.

Glaring contradictions between different spatiotemporalities are thus circumvented by choosing the scale at which each applies, with each scale to some extent corresponding with jurisdictional divides (Valverde 2015, pp. 76-77). The Provincial Court's legal argumentation accomplishes this by denying the direct effect of the EU EIA Directive⁷⁶ and the applicability of

⁷⁶ cited in the case as 2011/92/EC

European Court of Justice case law.⁷⁷ It asserted the binding character of domestic law which implements general aims of EU directives, as well as the domestic administrative case law upholding the view that a decision on environmental conditions can be issued after an investment has already been realized.

A privileging of construction law principles at the expense of environmental-legal principles, and concurrently a retreat into procedural logics, distances those interpreting the case from the material effects (See Cover 1975, 1986) and from apprehending biophysical harm. The judges argue

the goal of construction law regulations regarding administrative proceedings is not in the first place ‘punishing’ developers, but first and foremost allowing them to leave already existing investments in place, provided that investment does not contravene regulations of substantive law (*prawa materialnego*), so therefore above all the resolutions within city plans – decisions on building development conditions; technical conditions; and, precisely, environmental law. The law on access to environmental information has, whereas, within the scope including administrative procedures where the subject is obtaining a decision on environmental conditions, a procedural character, and does not regulate the material-legal (*materialnoprawne*) norms of environmental protection.

This argumentation relegates environmental law to procedural, and not substantive law.

It recognizes the materiality of existing investments but not environmental harm.

The Provincial Court’s decision was appealed by General Director for Environmental Protection and Pracownia to the Supreme Administrative Court (NSA) in February 2013 (decided in August 2014). The General Director’s appeal was thrown away for the same reasons the lower court did so (not having been part of previous stages of the proceedings). Pracownia, for its part, argued that there were procedural and substantive errors in the WSA’s decision, motioned to overrule the WSA’s decision in full and send the case back to the Provincial Court

⁷⁷ ruling C215/06 regarding the EU EIA Directive 85/337

for reexamination. The environmental organization also attempted to confront domestic legal interpretation with EU level legal interpretation, or undo the scalar distancing accomplished by the lower court's legal interpretation. It put forward a motion for the NSA to ask for a preliminary ruling on this case from the European Court of Justice regarding interpretation of EU law. Specifically, Pracownia recommended the following questions be addressed by the ECJ: a) whether the standards stemming from Article 2.1 and 2.2 of Directive 2011/92/EC on the assessment of the effects of certain public and private projects on the environment (EU EIA Directive)⁷⁸ be interpreted in such a way that an assessment concerns exclusively planned, and not already realized investments b) whether a decision approving a completed construction project within the domestic construction law "legalization" procedure for enterprises constructed without required construction permits fits into the notion of "consent to projects" in Article 2.1 of the EU EIA Directive and c) whether the standards stemming from part 7 of the preamble to the EU EIA Directive⁷⁹ excludes the possibility of conducting an EIA procedure after realizing a development.

Pracownia, at the same time it tried to undo scalar distancing, also tried to undo the procedural distancing accomplished by the judges' argument that EIA law was merely procedural and not substantive. In an extensive justification of its appeal, the environmental organization argued that it is unacceptable, as the first instance court did, to interpret

⁷⁸ Article 2.1: "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4." Article 2.2: "The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."

⁷⁹ "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

environmental assessment regulations through the prism of legalization procedures specified in Polish construction law. The goal of said regulations in construction law, the organization argued, is first and foremost making it possible for developers to leave already realized developments be, provided that those developments do not violate substantive law (*prawo materialne*). It cannot bring about the obligation to conduct an environmental impact assessment in the case of an already realized development. This kind of interpretation would lead to absurd conclusions from the perspective of the environmental protection legal system—that it is possible to cause transformation/change in the natural environment as a result of building something, which then must be legalized using an EIA procedure. The environmental organization cited the EU EIA Directive, ECJ case law, and domestic administrative court case law in order to support its motion to refer the case for an ECJ preliminary ruling.

In a supplementary document to its appeal, the environmental organization elaborated its arguments further. It pushed back against the argument that putting various requirements on developers who are realizing different types of projects constitutes unequal treatment under constitutional law. They also reaffirmed the argument (using the treaty on European Union Article 4.3 as well as Article 91.3 of the Polish Constitution) that EU law takes precedence over domestic law in cases such as this one when domestic law is in violation of EU law.

The landowner argued for a dismissal of the environmental organization's appeal. He argued that the supplementary arguments were submitted after the deadline for appeal, so those should not be considered at all. As for the remainder of the appeal, it did not raise any new arguments that would challenge the WSA decision. The claims raised in the appeal, the developer argued, essentially amounted to the closure of every pathway that might lead to

legalization of any construction project that happens to alter the natural environment. In this way, he argued to maintain the procedural distancing from environmental harm.

The NSA upheld the WSA's decision. It rejected that the case be referred to the ECJ for a preliminary ruling. This was unjustified, the court argued, because there was no conflict between the EU EIA Directive and regulations within Polish construction law as indicated by the appeal claimants. A preliminary ruling is indicated when there is a question about the correct legal interpretation of EU law. The Supreme Administrative Court judges agreed with the lower court's assertion that the EIA law does not rule out issuing a decision on environmental conditions for a development that has already been unlawfully commenced, or completed. This assertion, according to the judges, does not stand in contradiction to the assertion that such a decision is issued for planned projects, before obtaining other decisions listed in Article 72 of the EIA statute.⁸⁰

What is the justification for this overt doublespeak? Essentially, it is the reading of environmental law through construction law, the privileging of the "legalization procedure" and the material fact of a realized development—and getting the paperwork in order related to this—over the material fact of environmental harm. The Supreme Administrative Court cited other NSA cases which confirmed their interpretation that this type of solution was possible within "legalization" proceedings.⁸¹ The EU EIA Directive does not specify the definition of "development consent," and this concept is not contained within Polish construction law. Therefore, the way to understand this concept is to look to domestic statutes which comprise the equivalent of development consent, and these are the decisions listed in Article 72 of the EIA law. If those decisions include a decision on approval of a construction project (*decyzja o*

⁸⁰ decision NSA II OSK 470/13, p. 7

⁸¹ decisions II OSK 2147/11 (March 2013); akt II OSK 1820/11 (October 2011); II GSK 6/10 (February 2010)

zatwierdzeniu projektu budowlanego) or a decision on a permit to resume construction work (*decyzja o pozwoleniu na wznowienie robót budowlanych*) on the basis of construction law, this means that the domestic legislators fulfilled their requirements to transpose the directive in a way that includes the obligation to have environmental proceedings before an investment is realized. This kind of permission will not be given if the environmental proceedings do not end favorably for the developer; in that case, demolition of the structure in question will be ordered, or an order to return the subject of the case to the previous state. To put it more simply, the court put to rest that there was any legal problem here, by distancing domestic law from EU law and by using a formalistic legal interpretation which apprehends the materiality of development projects over biophysical harm.

In sum, both administrative court decisions found that a decision on environmental conditions may be pursued, and an EIA conducted, after an investment is already realized, if such steps are needed for the purposes of a construction law “legalization” procedure. These cases carried forward a line of administrative judicial reasoning which likewise asserted that an EIA (for those projects where one is called for) may be carried out “after the fact,” of a development—that is, not only after a development project has already commenced, but also after it has already been completed.⁸²

After these court decisions, the case went back to the mayor, the first instance authority, who conducted the administrative proceedings regarding issuing a decision on environmental conditions. Unsurprisingly, given the court decisions just described, the mayor issued a decision favorable to the landowner.⁸³ That decision was appealed again to the SKO by Pracownia—and

⁸² NSA cases: II OSK 2147/11; II OSK 1820/11; II GSK 6/10; II OSK 470/13

⁸³ Decision from 19 November 2014 (BTO.6220.12.2014.MS)

this time eight other environmental organizations. In January 2015, the SKO upheld the decision in force.⁸⁴

Throughout these administrative legal processes, environmental legal practitioners seek to contest the disjuncture between environmental law's theoretical temporal-material configuration and how it gets re-configured and performed in practice due to a privileging of the spatiotemporality of construction law. One way they do so is by putting out their own legal interpretations asserting alternative spatiotemporalities. Undoing the separation from environmental harm done by prevailing legal interpretation is part of what they try to accomplish, and one aspect of shaping legal interpretation itself is going to the primary source: altering the wording of the law itself.

Pro-environmental contributions to legal theory and practice

One institutional actor that is often an ally in environmental organizations' endeavors to rework the interpretation and practice of environmental law, as evidenced by its joining in on the appeals with Pracownia, is the Directorate for Environmental Protection. While the case described was developing, the General Director for Environmental Protection put forward its own interpretation of the law, asserting that a decision on environmental conditions can be issued in some cases if a development has been commenced, but only if the project's realization is on such a level that a relatively full scope environmental assessment can be completed and irreversible environmental damage has not already been sustained. In such a case, any construction work must be suspended until the project and its variants are analyzed by the authority responsible for issuing the decision on environmental conditions. This legal interpretation, of course, is not binding upon (nor was it very likely known to) administrative

⁸⁴ Decision from 29 January 2015 – SKO.OŚ/4170/396/2014. This decision by the SKO was subsequently appealed to the WSA, the Provincial Administrative Court.

judges, and so the previous line of legal reasoning among the Supreme Administrative Court was continued. To solve the problem, the Polish Ministry of Environment proposed an amendment to Polish Construction Law (Article 49, section 4a). The amendment was passed in July 2014 and became legally binding as of January 1, 2014.⁸⁵ The amendment essentially incorporated the General Directorate's legal interpretation. It specified that for already commenced development projects, an EIA can only be done in the cases in which it is actually possible to do so—that is, possible to analyze alternatives to the project and possible to set environmental protection provisions. In other words, the development must be in rather initial stages. In legislative justification documents for the amendment, a stated goal was removing uncertainty as to the possibility of conducting “legalization” proceedings while still guaranteeing accordance with the goals of the EU EIA Directive.⁸⁶

Even before this legislative change, a few of the better established environmental legal experts in Poland⁸⁷ had offered legal analysis of the appropriate interpretation of the EIA laws vis-à-vis construction law. In doing so, they were building up and disseminating a spatial and temporal critique of law. They contested treatment of the EIA process as an abstract, one-off accounting of paperwork. Instead, they asserted it to be a preventative instrument, and a process, that must be grounded in an empirical recognition of ecological entities and life cycles. In doing all of these things, environmental legal practitioners confront the procedural and scalar distancing accomplished by prevailing legal interpretation. Their argumentation works in part by “pulling” international and EU legal-normative claims down to the domestic level, and thus

⁸⁵ According to one of my interviewees, the lawyer helping Pracownia file these appeals, this means that the amendment applied when the SKO issued its January 2015 decision. Although the SKO was therefore supposed to take this change into account in its decision, it did not do so.

⁸⁶ *Druk Sejmowy nr 2352, Sejm VII kadencji*; Bar 2015

⁸⁷ and internationally – one is a member of the Aarhus Compliance Committee

undoing the scalar separation accomplished by administrative judicial reasoning which allows for contradictory spatiotemporalizations to coexist, and the concomitant procedural separation which distances the legal interpretation from biophysical harm but not physical structures related to economic developments. They connect different levels together and build a less narrow, more expansive interpretation of environmental law.

Such environmental legal practitioners assert that Polish laws related to EIA must be interpreted in accordance with the EU EIA Directive. They emphasize what the EIA is, as a legal instrument: a preventative environmental protection instrument that allows for a more holistic environmental policy practice. Internationally, there is a generally accepted view of the legal character of the EIA and its role in decision processes; namely, it is a procedural tool which is supposed to enable better decision making (Jendroška 2006). It is not “art for art’s sake.” The goal is not to satisfy investigative curiosity or to research the state of the environment “in general,” but to make a better, environmentally conscious decision (ibid). As a consequence, it only makes sense to do this before a decision is taken, or in an early enough stage that alternatives are available. It makes little sense to conduct an EIA process if a development is already realized or nearly finished, because then the only effect of the process would be cosmetic changes. Then the EIA would not fulfill its preventative role, which is precisely its constitutive character and is what differentiates it from “first generation” environmental legal instruments (often called command and control instruments). Conducting an EIA after realizing an investment is pointless and contrary to the very essence of the process (ibid, quoted at length in Bar 2015). Likewise, describing “reasonable alternatives” to a development project should be realistic and genuine, otherwise such so-called alternatives are written into a report pro forma, doomed in advance not to be taken up. The alternatives also should not be merely cosmetic, but

potentially make a real difference in the characteristics of the development. The EIA should not be an abstract, intellectual exercise (Bar 2015).

Environmental legal practitioners also attempt to assert better practices for legal interpretation by state actors. They are doing some of the educative work absent in legal training. Summarizing her analysis of the legal interpretation of Polish construction law vis-à-vis the EIA law, Magdalena Bar (2015) gives the following simple guideline for administrative authorities leading such proceedings: honestly ask if conducting an EIA at the given stage of the development in question still has any sense. Key to answering this question is understanding that the EIA process (and the resulting decision on environmental conditions) does not serve to check that a development project meets environmental protection regulations (like emissions standards and the like). Those regulations apply irrespective of the EIA or its results, and they apply even to those developments and activities not requiring an environmental decision. An EIA is a broader instrument. Its function is not binary. That is, it is not just about determining whether the development does or does not meet the norms, and therefore can or cannot be undertaken (although if the development were in conflict with existing environmental regulations, it would not be endorsed, but not necessarily through the environmental decision process). The process is supposed to give administrative authorities who issue decisions broader knowledge and understanding about environmental impacts of the proposed development, not just determining if it meets/does not meet environmental standards. Subsequently, on the basis of this knowledge, administrative authorities can determine the conditions under which the project should move forward, so as to reduce harm. In putting forth these distinctions, environmental legal practitioners advocate for more expansive and accurate understandings of contemporary environmental legal instruments.

The argument, at its root, is a simple one, one well established in environmental legal reasoning: an EIA should be done before a development project is commenced. The degree to which this point must be hammered home by environmental legal practitioners and analysts in Poland, however, speaks to the prevailing logics in the governance system and how they are upheld. Each time this argument is made, in legal fora and outside of them (where environmental harm can be directly observed and experienced), the illogicality of the prevailing governance logics, and the normative values they uphold, are revealed.

The following quote further illustrates how environmental legal practitioners make sense of the legal argumentation as partially stemming from the internal culture of the legal profession as well as that of administrative judges. This internal culture insulates them from apprehending irreversible biophysical harm. The quotation is especially telling, because it describes a situation in which an environmental legal practitioner attempted to make an intervention into such thinking and alter it—when she led a training for administrative judges. It shows her understanding of the mechanisms by which, how and why, such citational performances, which privilege the spatiotemporal logic of construction law, are duplicated and are resistant to other potential spatiotemporal logics.

It [justification of the legalization procedure] is absurd. When I first saw the justification [...] I could not believe that the court is interpreting it in this way. But when I saw that this was not only one case, but that there were more of them, and that this is being duplicated, and unfortunately that's what it looks like. Sometime ago, last year, I led a training, just one lecture for administrative judges, [...] this training specifically for them, and, among other things, it was about exactly this. And they were very...I tried to explain to them, that you can't do this, because this is not logical, that this [the assessment] has to happen before. But they were unconvinced, because for them it is like this: they say, 'but what? It could turn out that after the fact this investment is entirely not harmful to the environment.' They don't even understand this mechanism at all, that it's all about thinking about it beforehand, and not afterwards [...] to think about it

beforehand, what kind of conditions to put on this, in what way to prepare the investment from the beginning and not when it already stands ready. But they say, if it is going to fulfill all the [environmental] requirements [...] that means it is okay. We know that it has to fulfill those requirements, because those conditions are specified, [...] the level of emissions that are allowed into the water, into the air, and so on. We know that it has to fulfill this, every investment [has to]. But that doesn't mean it [the development] doesn't need to be assessed sooner, because it can turn out that [...] there was some kind of habitat of a protected species which, when we come here after the fact, won't be here anymore. But the judges say nah, for them this is only this kind of...maybe some of them understood, but the ones in the room that talked, they were saying, 'that's why there is a petition for legalization, there we can also specify some kind of conditions.' For a lot of conditions, though, it is already too late at that point. Because when it's already standing, you can modify something there, but you can't change, say, the location. But they seemed to be unconvinced. And during the breaks when I talked to them informally, a lot of them were saying that they hate cases related to environmental protection, because they don't understand any of that stuff. [...] [...] [...] (R34)

She thinks one way to rework the pattern of performances is to provide more such trainings and try to shift the thinking. However, the internal culture and careerism might still prevent a shift in judicial legal interpretation practices.

Maybe if they had this kind of training more from the basics, some of them maybe know about this because they are interested in it, but most of them deal with administrative law in general, and they don't have this kind of typical environmental knowledge, so I suspect that this is why, not educated on this, and in this case, I suspect that specifically in this particular case, they could have been acting out of personal ambition. There were already two cases about this, so they were protecting their own honor [...] that, no, there were already two decisions, we won't allow ourselves to say now that they [our colleagues] were silly [...] (R34).

She contrasts this one particular case with the wider array of case law throughout Poland, noting the variance in approaches and interpretation. That the legal interpretation is not all encompassing or monolithic means that environmental legal practitioners see openings for intervention, despite dogged resistance in some places. At the same time, while they

recognize the positionality of administrative judges and the legal difficulties presented by the ski case and others like it, they challenge legal argumentation which, in the face of spatial-temporal dissonance, shirks placing responsibility upon the developer:

But there are some solid approaches. There are some decisions, not in this particular case, but decisions that are sensible, and they are rather progressive and pro-environmental. But this all depends on what the case is, which judges happen to be dealing with it, and so on. It's not like the courts don't have any respect for environmental issues at all and that everything is very 'anti,' but like I am saying, in this particular problem, which seems rather obvious, because if you know the regulations and how this mechanism is supposed to work, it seems obvious, but it's met with such resistance, this wall, that is very difficult to break through. They are right with one thing though, a little, which is that we wouldn't know what to do with this kind of built object or building or some kind of infrastructure, if it turned out that it was not allowed to legalize it. But this is a different problem though. This is the next thing. One can't say, you can do the assessment, because otherwise we wouldn't know what to do with this. This is the developer's problem then. If he built it illegally, then he should worry about it, and bear the risk (R34).

In this way, again, environmental legal practitioners build a critique of legal accountability, which arises out of bringing spatial and temporal elements to the fore, and out of making explicit connections across scale. The responsibility should be first on the wrongdoer, the one harming the environment. If judicial actors obfuscate this using some kind of spatiotemporal work-around, they too shirk their own responsibilities to the public. Environmental advocates (or other citizen groups or individuals party to administrative proceedings) in this way are exposed to, and work to expose, what developers and judicial actors may attempt to obscure.

In environmental legal practitioners' views, environmental protection law, and its temporal-material configuration, cannot be subordinated to construction law. Their argumentation works in part by "pulling" international and EU legal-normative claims down to the domestic level, as well as "placing" construction material realities alongside environmental

material realities, and thus undoing the scalar and procedural separation accomplished by administrative judicial reasoning which allows for contradictory legal spatiotemporalizations to coexist. Although it remains within the realm of legal argumentation in publications of limited circulation, such attempts at reworking prevailing legal argumentation on the part of environmental legal practitioners creates an internal and external problem for the legal system. Its legitimacy and accountability are called into question.

Valverde describes how formal legal delineations (specifically jurisdiction), often considered to be purely technical, apolitical aspects of law, determine not only who governs, but also, quietly, how. Jurisdiction, she writes, is a true “anti-politics machine” (Ferguson 1994, quoted in Valverde 2015, p. 84; Valverde 2009)

Hence, the machinery of jurisdiction hides from view the contradictions between different legal chronotopes that would otherwise pose problems, legitimation problems if not legal problems, for the legal system as a whole. How so? Because the game of jurisdiction acts to perform a kind of ethnomethodological miracle by which incommensurable processes are kept from clashing, and the consumers of legal decisions are kept from asking: how should problem X or Y be governed in the first place? (Valverde 2015, p. 86)

Those directly participating in administrative legal processes, and crafting counter-argumentation to that put forward by judicial actors, are privy to these “ethnomethodological miracles.”⁸⁸ Bringing spatiotemporal contradictions to the fore, as the environmental legal practitioners described in this chapter do, they open up consideration, discussion, and critique about what sorts of governance are appropriate in a given situation, in this case regarding the intersection of economic development and environmental protection. Since ordinary citizens and environmental organizations are encouraged in the formal law itself to participate in administrative proceedings,

⁸⁸ Ethnomethodology is “the methods, or the procedures, that people use for conducting the different affairs that they accomplish in their daily lives” (Coulon 1995, p. 2), or the methods people use for understanding and producing the social order in which they live (Garfinkel 1974).

they are thus encouraged to not only learn the technical aspects, but to observe and critique the broader “how” of governance enacted by such so-called technical processes. They experience firsthand how formalistic application of administrative law and the privileging of the spatiotemporality of construction law over that of environmental legal doctrine allows for economically lucrative investments—of private or state actors—to bypass sincere public scrutiny.

Re-configuring legal interpretation

Environmental legal practitioners’ interventions are becoming more visible in the legal argumentation of the state. Worth noting here is that judges are not bound to follow legal precedent in civil legal systems, although they may opt to do so. Environmental legal practitioners gain an intimate understanding of this, and try to shape it. They know that individually and in the aggregate these cases matter, in that they give signals to other judges on how to interpret such cases (and other developers on how best to acquire administrative permissions). More broadly, they also are component parts comprising the environmental governance system, and the governmental accountability system, in practice. One environmental lawyer describes her understanding of this:

...somewhere around 2008, 2009, the NSA decided, too, in a rather careless way, that doing an impact assessment after the fact doesn't hurt anything really, because what is important is to check if the investment is harmful to the environment or not. Which doesn't make any sense, because it is as if they don't understand the essence of why the assessment is done... [...] it's not like in Poland that the law of court decisions is binding, right? But, despite this, somehow they are guided by this, the administrative authorities and judges, for them this is a kind of tip for interpretation. So when the court has decided something a certain way before, of course it can change its mind, but if one decision like this shows up, then there is a good chance that others, especially other judges who are not familiar with all of this, and who don't understand

environmental law, that they will go along with this one. Someone [a judge] said this, it is easier to share this [argument] than to think up a counter-argument. And two of these first decisions appeared that said you can do an assessment after the fact, [...] there the main person responsible was this judge that specialized in construction law, so you could see that he was doing everything paying special attention to construction law, and he argued it like this: since construction law says that you can legalize after the fact, so let's do everything we can to make the legalization possible. [...] And because those two decisions appeared at some point, it sort of moved on momentum, that these judges are deciding like this. And this is a kind of incentive for other developers, that even if the administrative authorities give them a problem and say they can't do something, then the administration, the decisions of the administrators are subject to verification by administrative courts. And if administrative courts say that it is allowed, well then the investors can get off scot-free...[...] Holding this kind of line, this kind of case law and this kind of practice, is dangerous insofar as it can encourage others to do the same thing. [...] If it keeps going the same direction, it will be lousy, because it will mean that this is all a little illusory (R34).

The use of “illusory” at the end of this quotation is telling, and it speaks to the sort of critique of law being built by environmental legal practitioners in Poland—one that tries to confront law with its own internal spatial and temporal logics, as well as its external material impacts. The respondent recognizes the citational-material-discursive nature of this legal argumentation. The danger here is that one case can lead to other similar ones proliferating, and this would really erode the credibility of the environmental governance system as a whole.

The next quote provides insight into how environmental legal practitioners make sense of the legal interpretation of administrative judges and the proliferation of such case law.

Administrative judges' exposure to and professional training (or lack thereof) in environmental law is one source of the problem. While other actors in the administrative legal system (first and second instance authorities, most especially the Directorates for Environmental Protection) “understand” the issue—that is, they assert the temporal-material configuration or spatiotemporal logic of environmental law and the illogicality of reading it through construction law—lawyers

for the most part, do not. This speaks in part to environmental law's marginality within the legal academy and profession, as well as the lack of communication between the actors and institutions which "understand" and those which do not.

The WSA [Provincial First Instance Court] said that there's no problem, this is already built, that this environmental conditions decision can be given out....[....] administrative authorities understand this problem, and Regional Environmental Directorates, the General Directorate, understand this, and they are against this type of interpretation that an assessment can be done after construction, after the fact. However, the courts, judges, judges are lawyers (laughing). They don't really know about...they aren't very specialized in environmental protection, these are courts for all administrative matters. And I have the impression that they don't really understand this so much, what this assessment is for, how it works... (R34).

A few minutes later, as part of her discussion of how long it takes for such cases to be decided, the same interviewee, who has eleven years of experience in working with such cases, indicates two aspects of such administrative legal processes which support the point that environmental legal practitioners are exposed to the indeterminacy and political possibility located in and around administrative legal processes, which may make them more inclined to keep trying to shape them. One such aspect is the relative newness of such cases. The second is an awareness of institutional power dynamics.

The truth is that, it might be like this, that there are some kind of informal pressures [...] because there is nothing else [no other case] like this, so it waits, and because it is so complicated, and this is kind of controversial, because the [Supreme Administrative] Court, if it were to uphold the decision of the Regional Court, then it would be acting against the position of the General Directorate for Environmental Protection, which is the main authority in Poland responsible for impact assessments, and which clearly says that something like this is improper, impermissible (R34).

Given that these issues are relatively new and there is contestation among different parts of the state about them, environmental legal practitioners' access to and participation in

such processes is to touch upon, and potentially shape, such meaning-making and power struggles.

There are indeed examples of favorable interpretations of environmental law which further and privilege environmental law's spatiotemporality over the one stemming from construction law or economic development imperatives. I now describe two such instances.

The Broiler Chicken Facility

One such example is directly related to the legal interpretation by environmental lawyers described above. The lawyer who assisted Pracownia in its struggles was also involved in preparing complaints against the unlawful expansion of a broiler chicken breeding facility which was brought to the attention of local authorities by residents living in its vicinity. The first instance authority (*burmistrz*) refused to conduct environmental decision proceedings, because the expansion had already occurred. The operator of the facility subsequently appealed the decision to the second instance authority (SKO), who overruled the decision. The SKO's decision was appealed to the Provincial Administrative Court with the help of the lawyer's firm. The lawyer's arguments were liberally cited in a decision by a Provincial Administrative Court in December 2015,⁸⁹ which overturned the SKO's decision and held that an EIA should be conducted *before* a development is undertaken. The court held that the one exception to this is a situation in which an environmental decision would need to be given out in order to fulfill "legalization" proceedings under construction law (under article 49).⁹⁰ The court made clear that

⁸⁹ WSA Wrocław Decision II SA/Wr 729/15

⁹⁰ This is only a possibility, however, if the conditions in Article 49, section 4a are met - namely when the implementation of the project is at an early enough stage that real analysis of alternatives is possible, and it is possible to shape the evolution of the actual project by establishing the conditions for its configuration or operation

this chain of events should only be an exception, within the specific legalization procedures specified, and not general practice.

The court reprimanded the SKO for its misunderstanding not only of the EIA as a tool and process, but also its erroneous premise that environmental impacts can only be ascertained after a development is realized and in operation. Both of these were evidenced in the SKO's legal reasoning,⁹¹ which contended that the completion of a development may in fact be favorable, because it allows for empirical verification of estimates. The judges note several decades of experience in environmental assessment work, contemporary research, and theoretical modeling methods which do indeed allow for specification of environmental consequences and impacts of a planned development, all of which make it unnecessary to wait until the completion or operation phase to ascertain this (p. 9).

The Provincial Court in this case specified its role more broadly than in the "legalization" cases above, and thus in an albeit different manner (not through procedural retreat but through affirmation allowing for a procedural "fix" of the case at hand), touched upon core ontological and epistemological questions which inevitably and uniquely surface in environmental legal cases. In its judgement (as most administrative judgements do), the Provincial court delineated its role: evaluation of the correctness of the application and interpretation of material *and* procedural law within administrative proceedings in question. In conducting its examination of the functioning of public administration, the court is obligated to take into consideration the factual and legal condition which existed at the moment of the appealed decision or procedural

with respect to environmental protection. The court emphasized that analysis of alternatives to the project must be "reasonable" – understood as realistic and possible to carry out, and not merely cosmetic. This means that picking one and not another has significance with respect to environmental impacts.

⁹¹ present also in other Provincial Administrative Court argumentation – e.g. case II SA/Łd 56/10

decision. Although the judges did not have to, they took it upon themselves to enact their right—obligation even—to take into account all regulations relevant to the case, irrespective of the appeal’s substance (p. 4).

This judgement breaks with past Supreme Administrative Court legal reasoning (and lower administrative courts who have followed suit), according to which an EIA process is allowed both before and after project. It is not a final decision (*prawomocne*) until and unless the deadline to appeal it passes without any successful appeals. It remains to be seen then, if the Supreme Administrative Court will put the Provincial Court in its place. Nonetheless, the effects on legal consciousness of environmental legal practitioners is a sense that a reworking of the spatiotemporal logics is possible, that the state is not a monolith, that judges can be better trained, and their legal argumentation reshaped and re-sculpted.

The Szczecin Bypass

Another case illustrates the capacity for Administrative Courts to validate environmental protection advocates’ arguments regarding the meaning and goal, and spatial-temporal aspects of the EIA procedure. This case shows judicial actors going even more deeply into the actual substantive contents of environmental analysis. The legal question in this case was whether the procedure for determining “environmental conditions” laid down for an express roadway, to bypass the city of Szczecin, was conducted appropriately. The Regional Director for Environmental Protection (first instance authority) issued a decision on environmental conditions which was appealed by an environmental organization on the grounds that the environmental impact assessment report was insufficient. Specifically, the report did not contain a complete inventory of amphibian habitats; the time frame of conducting the inventory was questionable; and the number location and design of passageways and protective areas for amphibians were

insufficient. The environmental organization requested the decision be overruled and sent back to the first instance authority for re-examination, incorporating a methodologically proper inventory of amphibians. The second instance authority, the General Director for Environmental Protection, found the environmental organization's appeal premature. The reason given for this was that the Regional Director would be requiring a second EIA,⁹² before the construction permit would be given out, which would address the need raised by the complainant to fill in missing data regarding impacts on and protections of amphibians. The General Director agreed that more data were needed to complete the environmental assessment, but that this could be done at the second EIA stage. This was not grounds for reversal of the environmental decision, however, because the additional assessment analysis would be done at the stage of the second EIA. Environmental harm will not occur before "optimal variants" which minimize environmental harms, and if necessary take compensatory action, were determined and incorporated into the construction permit.

Here again, environmental-legal practitioners' reasoning insists on a preventative spatio-temporality, which resists procedural distancing from biophysical harm—this time by suggesting the state examine more closely the spatio-temporal governance logics in the multi-stage EIA process. In the environmental organization's view, however, determining the impacts on fauna should be done at the earlier stage, the stage of the decision on environmental conditions. They were not optional and to be specified at a later stage in the process. Otherwise, the possibility to

⁹² The EIA in Poland, particularly for large infrastructural projects, is multi-stage (discussed in greater detail in Chapter Three). Developers often postpone field studies until a later stage in the procedure. This causes a number of problems: at earlier stages, environmental authorities have to issue administrative decisions without full environmental knowledge; late collection of field data prohibits meaningful analysis of alternatives at a stage of the planning process when different options for project location and technology are still possible; engineers designing a road cannot include proper mitigation measures (wildlife passages, fencing, etc.) if they do not have complete data. The case brought by the environmental organization here (led by a person specializing in amphibians) argues against the practice of delaying field studies.

choose between variants of the project most favorable to the environment is foreclosed. At that stage, absent all relevant data, an option may be chosen which is not the ideal one, or, perhaps even the worst one, in terms of environmental impact. The decision on environmental conditions determines the subsequent shape of the project and may foreclose later modifications—in the case of roadbuilding, this may mean that the road's design and calculations about longitudinal angles, leveling, etc. would make the design of passageways for animals limited or even impossible. To determine the full inventory at the second EIA stage, after the design framework of the development had already been established, would be too late. The organization emphasized the precautionary principle of environmental law. It emphasized the iterative character of these administrative decisions: the results from a nature inventory shape the decisions regarding minimization of and compensation for harm, which in turn shape the guidelines for the development. The organization cited scientific literature on amphibian protection.

What is more, in raising its scientific/technical arguments, the organization in parallel made arguments about the structure and proper functioning of the accountability system within which they were operating. The organization argued that the administrative authorities, both in the first and second instance, did not meet their obligations as specified in Article 77 of the Polish Administrative Code, that an administrative authority is required to collect and consider, in an exhaustive way, all evidentiary material. They pointed out that completing a full environmental inventory at the earlier stage of the decision procedure (at the environmental decision stage) would better guarantee a group like theirs' ability to appeal a decision to a second instance authority, one which have nature protection expertise and specialized knowledge (in this case the General Directorate for Environmental Protection). In other words, the quality of the

entire decision-making process and the ability to scrutinize it by those best qualified and institutionally designated to do so would be all the better if the front-end assessment work were done conscientiously. To put it in yet another way, the environmental organization is asking, through its argumentation, what are all these laws and institutions for, structured as they are, if, in practice, they undermine their own normative goals and division of labor?

The Provincial Administrative Court found the justifications for the appeal to be warranted. The judicial argumentation reaffirmed that environmental assessments should be done at as early a stage as possible before achieving other subsequent permits. The second EIA is rather for analysis not possible at earlier stages, but it is not acceptable to issue a decision on environmental conditions without specification of the parameters of the development and all of its environmental impacts. The possibility of doing a subsequent analysis and modifying the investment later does not free the developer from the obligation to present a full assessment, with all necessary and available data, previously—which then serves to formulate the environmental conditions for later stages in the project. The court notes that the first instance authority itself admitted that the developer did not submit sufficient data in his environmental assessment regarding amphibians (and bats), as this was the justification for conducting a second, “updated” EIA. Pushing this obligation to a later stage, the construction permit stage, in the court’s reasoning, would be unacceptable. The purpose of having an EIA at various stages is not to make up for analysis required but not undertaken earlier, but to have a more detailed and informed analysis at the later development design stage. The judges in this way affirm the purpose of the institutional configuration and the time-order of the process, and reject its treatment as one of many pro forma procedural hurdles where the time-order does not matter as long as the paperwork is amassed by the end of the process (as the “legalization procedure” in

construction law discussed previously is commonly treated). The judges also affirm the environmental organization's argument about the very system of two-instance appeals and its design; it is meaningful that an appeal of the decision on environmental conditions goes to a second instance administrative body with specialized knowledge in environmental protection.

The Provincial Court decision notes that although both the first and second instance authorities indirectly acknowledge the accuracy of the environmental organization's appeal, they (particularly the second instance authority) do not directly respond to its critiques regarding the amphibian inventory, except to say (curtly and without justification called for in the Administrative Code) that it will be completed later. In short, the court argued that placing the obligation on the developer to do a second EIA was a result of the developer having provided insufficient evidentiary material, but the EIA Law cannot be interpreted that way. It can only be interpreted in that way in exceptional cases where assessment may not be possible, not merely when there was insufficient research conducted. The Provincial Court found that the second instance authority should have overruled the first instance decision in full – and therefore it overturned both decisions and sent the matter back for reevaluation. It provided guidelines for the lower instance authority, which included that the proper nature inventory should be done at the earlier stage of determining variants of the road construction, that the lower instance administrative authorities should gather all necessary evidentiary material to make its decision, and this should be reflected in the justification for the decision it reaches. In this way the court ruling is an instance of administrative judges not retreating into procedural formalism; to the contrary, they make assertions about the substantive quality of environmental impact assessments. The court agreed with the environmental organization and concluded that to obtain

even the initial environmental permit, the project developer needs to submit full environmental information. The case should apply to all similar projects.

Such cases, where the spatiotemporal logic of environmental law is recognized and affirmed, are validating for environmental legal practitioners. What is more, such cases illustrate the ways in which such spatiotemporal reckoning in legal argumentation, goaded along by environmental legal practitioners who become “sides” to administrative proceedings, works against procedural distancing from biophysical harm. As administrative judicial purview necessarily dips into the actual content of environmental reports and decisions in these processes, environmental legal practitioners see at least glimmers of the accountability system working in a way they see as more proper. The following quotation from an interviewee describes the dual challenge and opportunity of the environmental impact assessment process as it is scrutinized and adjudicated within administrative legal channels. On the one hand, administrative law and the actors who enact it are resistant to delving into any technical details about environmental assessment analysis, perhaps partially because they are not sufficiently trained in physical and engineering sciences. Civil cases in some ways may be better suited to such disputes where evidence might be introduced and expert witnesses consulted. On the other hand, there is room for opening, and for administrative state actors to “perform” environmental law differently, to “see” more substantively the content of environmental assessment upon which their decisions rest. My interview recognizes both of these aspects,

...the problem is that this [Environmental Impact Assessment] is a technical document, so courts don't really know about it very much. And most readily they wouldn't even look at this. The courts deal with procedure first and foremost: were all the procedural steps correct, were all the typical formal legal requirements met. But when it comes to the dispute over whether the report is good or not, then a problem comes up which—on the one hand I am not surprised because these are judges, lawyers, and they themselves are not in a position to

[...] For example, an opponent of the investment claims that noise is not calculated properly in there. Well, how is a judge supposed to know this? He has some kind of calculation...especially if there is no [published legal] opinion on [it]...because administrative courts don't have any—civil courts in Poland (sądy powszechne), they can call experts forward. For example, if there is some kind of case in civil court, [...] I don't know, getting compensation for the damage of something or other, then the court can call an expert witness who can confirm that this damage was actually done, and if it was caused by this reason or for some other reason. [...] But administrative courts don't have these kind of rights to call expert witnesses. A judge is not in a position to assess this, because he doesn't have this specialized knowledge, so really it is not surprising. But despite everything, [we] can see traces of this, that they are trying to get into the contents of the report and saying, maybe not questioning specifically any kind of technical calculation, but for example, saying that certain elements of the report are missing, and the report is the basis document that serves to give out the decision, so. If someone raised these kind of doubts during the administrative proceedings, for example [...] neighbors or an environmental group, then the administrative authority is obligated to weigh these [...] [...] it's...an understanding of what this game is for [...] (R34)

“What the game is for,” according to such environmental legal practitioners, is a type of accountability that does not sever substantive aspects from procedural ones, one that is responsive to citizen intervention, and one that allows for sincere scrutiny of public and private development projects.

As I hope it is evidenced by now in the cases I have detailed, administrative proceedings in environmental matters are sites where competing spatiotemporalizations of governance are confronted and reckoned with. While judicial actors may attempt to reconcile them through spatial or procedural separation, they may also, with the help of environmental legal practitioners, rework such logics and iteratively craft a new way such citational performances occur.

Conclusion

This chapter has shown how administrative legal processes serve as citizen-state-biophysical contact zones around which legal consciousness formation processes take place. Alongside some of the legal questions presented by the cases, I have considered implications for legal consciousness formation for environmental legal practitioners interacting with administrative legal processes. In the dynamic interaction between direct observation of the biophysical earth, procedural rights' mobilization, and legal argumentation in formal legal venues by various actors, legal consciousness is being shaped in consequential ways. Namely, environmental legal practitioners gain an appreciation of the spatial and temporal dynamics of law and the ways they are held together, or pushed apart, in ways that may be at odds with, but also shape, material reality. Observation or measurement of biophysical entities provides external validation that informs a critique of legal formalism and state and/or private sector power that is not sufficiently transparent or accountable to citizens. This all amounts to a broad critique of law as the normative commitments of the state in practice, a critique which recognizes law's performative aspects—how it is enacted and stabilized through iterative, citational material and discursive practices, in part by administrative judges in their legal argumentation which reckons with competing spatial-temporal governing logics.

Environmental legal practitioners try to insert their own spatial-temporal reasoning to counter and correct that of judges, developers, and so on. Particularly when combined with direct observation of biophysical processes, doing so means that they confront abstractions and separations occurring in such venues. They try to overcome and invalidate such separations by connecting environmental legal spatio-temporal logic across scales. The legal consciousness forged through these dynamics enable a broader critique not only of environmental law's

application, but also the governmental accountability system itself. Such critiques build upon a performative critique of law already resonant in post-socialist societies. In these ways, environmental legal practitioners are exposed to, and actively shaping, the indeterminacy and political possibility located in and around administrative legal processes.

**Chapter Five - “*Nie każdemu psu Burek*” (Not every dog is named Burek):
The Possibilities and Limits of Environmental Legal Enforcement by EU Institutions**

“In the forest nothing screams, ‘we don’t want to be moved out from our house.’”

–Civil servant, European Commission DG Environment

If there is one contemporary Polish environmental-legal controversy which is familiar to people in Poland and perhaps elsewhere, it is Rospuda. The Rospuda is a river and river valley in northeastern Poland which contains a rare mosaic of wetland habitats, part of one of the largest and best maintained primeval forests in central Europe. This area forms part of the EU’s Natura 2000 network of protected nature sites, sites deemed to be “of European importance.”⁹³ In the mid-2000s, this area was threatened by the planned construction of a 17.1 kilometer (about 10.6 miles) expressway, the Augustów bypass, part of the Via Baltica Helsinki-Warsaw road corridor. The planned road would cut across the valley and disturb this unique wetland system considered by scientists to be of exceptional European ecological value.

In February 2007, contractors were given the green light to start construction work on this and another site (Wasilków bypass) in northeastern Poland. In response, the European Commission accelerated an existing infringement procedure against Poland over these two roads. As Poland failed to respond satisfactorily to the Commission's warnings, the Commission decided to refer the case to the European Court of Justice in March 2007. The Commission also asked the Court to issue an order suspending work on the projects while the case was pending.

⁹³ although these were not formally designated in the earlier stages of the conflict

Environmental advocates were successful in framing the struggle during the conflict escalation stage as one of moral duty to preserve European natural heritage (Szulecka 2013, p. 406). With the continuing support of major daily newspaper *Gazeta Wyborcza*, they organized a green ribbon campaign to create a visual symbol of the issue and draw even more attention to it. They framed the case as one of “Europe-wide shame” and bad domestic governance. Europe and European values were powerful symbolic and rhetorical resources in the public sphere. Yet on the ground, it was unclear whether the contractor would comply with EU-level orders to suspend construction. Meanwhile, domestic administrative authorities upheld approval of the construction permit in early February 2007.⁹⁴ Consequently, Polish environmental activists set up a direct action camp at the site, “The Green Town,” to block construction activity. Shortly before the camp site was set up, the Polish Ombudsman (*Rzecznik Praw Obywatelskich*),⁹⁵ issued a statement that the administrative decision upholding the investment was unconstitutional. This was a crack in the previously monolithic stance of the Polish government, and it also shifted the controversy into one not just about development versus the environment, but about the rule of law, human rights, and participatory governance (Szulecka et al. 2013, p. 407).

The Polish government (and local residents in Augustów) argued that the road project was of overriding interest on public safety grounds. It denied that European nature legislation required protection of the site through cancellation of the bypass’s construction. Polish

⁹⁴ In a decision on February 9, 2007, the regional government executive (*marszałek*) confirmed the route through Rospuda. In April 2007, the Regional Administrative Court in Białystok revoked the environmental permit. In September 2008, Supreme Administrative Court Case II OSK 821/08 dismissed the General Directorate for National Roads’ appeal. In December 2008, the Administrative Court in Warsaw revoked the last remaining permit.

⁹⁵ Literally translated at the Commissioner for Citizens’ Rights, currently calling itself on the English language version of its own website the Commissioner for Human Rights (<https://www.rpo.gov.pl/en>) the Polish Ombudsman office is a repeat litigant in Polish Constitutional Court cases. A survival of the Communist regime, the Commissioner has been involved in many major political controversies in Poland, including religious education and abortion. The institution’s role has been to hold government officials to the rule of law, a sensitive issue well into the post-Communist era. Much of his work involves pursuing illegal government action through the Constitutional Tribunal and Supreme Administrative Court (Elcock 1997).

authorities claimed that they had complied with all environmental protection requirements, because they had assessed the damage the road would cause, looked at alternatives, and offered compensatory measures.⁹⁶ The European Commission in turn asserted that Poland had a duty to protect the site, and that the assessments and examination of alternatives had been weak and unconvincing. The Commission argued that road safety could be adequately addressed by other routes that would avoid irreparable damage to the protected site. As for the compensatory measures offered, these would not offset the destruction of unique natural features (EC 2007).

In the end, the highway was re-routed to avoid the wilderness area altogether. In February 2009, a report commissioned as part of roundtable negotiations which occurred in late 2007 and early 2008 (punctured by an attempt to continue construction on the existing variant, in violation of court decisions) was released. The report concluded that the road could not run through Rospuda marshes without damaging the natural site and violating EU law. In mid-April 2009, the European Commission withdrew the case from the ECJ.

Many, if not most, accounts emphasize the role of EU institutions and legal aspects as the main reason why a more environmentally-benign option was chosen in the end.⁹⁷ Yet in-depth case study analysis of the conflict, using a process tracing approach, suggests that domestic agency mattered more than EU action (Szulecka et al. 2013). The normative shift, the term Szulecka and Szulecki (ibid) use to describe the legitimization of certain value statements and

⁹⁶ In 2005, the General Directorate for National Roads and Motorways presented an environmental impact assessment of the planned bridge over the mire and river, which suggested that the investment's impact would be minor (EFORT, quoted in Szulecka et al. 2013, p. 405). Proposed compensatory measures included taking some forest out of production, creating ponds, blocking small streams to bring up the water level in drainage channels, planting trees, and restoring and managing wet meadows. Even though Rospuda was protected under Polish law since the early 1990s as a landscape conservation area, the valley was initially denied special status under the Habitat Directive, which was the legal justification for the planned construction (Szulecka et al. 2013, p. 405).

⁹⁷ Other explanations include the elections (which occurred in October 2007) while the controversy was at its peak which made the new government opt for a more environmentally friendly option; or that there was a general change in values among Polish society and decision-makers.

behaviors over others, was very context dependent and unstable in this case. Although EU institutions played a visible role in this conflict, “the action,” the analysts argue, was on the domestic level (ibid, p. 399). While the conflict had a strikingly legal character, the determination by European enforcement institutions that building the road would be “illegal” was not a causal factor; European legal involvement was a significant resource in the Rospuda case, but not sufficient for the conflict to have played out the way it did. How the conflict was framed on the ground and mobilized societal groups mattered more. Domestic actors succeeded in linking the ecosystem’s preservation to Polish national history, identity, and duty. Transnational action could not have substituted for political contestation domestically.

If the case caused domestic change in how the environment was governed, that change was fleeting. Providing further support for their argument that this normative shift was context dependent and unstable, Szulecka et al. note that shifts toward environmental and participatory decision-making did not seem especially deep or enduring after Rospuda (ibid).

Yet there was, at least in the immediate aftermath of the case, a shift in what one of my interviewees continually referred to as the Polish “mental frame” regarding environmental issues, or what I might translate as the popular environmental legal consciousness, even if this way of thinking was inaccurate. There was a perception—generally, but especially among governmental and non-governmental actors—that the European Commission would intervene and hold the Polish government accountable for environmental commitments. A civil servant in the European Commission DG-Environment working on legal enforcement described the way Rospuda, in her view a unique instance of the Commission asserting its discretionary environmental enforcement power, was idealized, to the detriment of accurate understandings of the technical workings of EU legal enforcement system:

In 2006/2007, when I first arrived the first thing we did was the Rospuda case, this is actually not something that the Commission... [...] should be doing, in all honesty. In the sense that it was an individual project, and that should be treated at the national level. But it looked like all the national mechanisms failed. And even though in the Directive there is no reference whatsoever to the value of different sites. The Directive does not say anything about the relative value of sites. But this one is the last of its kind in Europe, there is no other... If this was destroyed, there is no way to reproduce it... You cannot compensate for something which took thousands and thousands of years to create. It's just impossible. So that was somewhere in the back of our heads, that was perceived by the hierarchy here as well. And it was a truly exceptional case. It took a while for the NGOs to understand that not with every project are we going to be taking the same steps. My friend that worked with me, the predecessor of [current DG Environment Nature Unit Policy Officer for Poland and Hungary], she used to say 'Nie każdemu psu Burek,' (laughs) – not everyone is the same, you know? You cannot compare.⁹⁸ But okay. So I think for the Polish NGOs it took a while to understand that we are not going to solve all the problems at the national level by taking it to the ECJ. Which I think would not be liked by the ECJ, because the ECJ is not there to rule over each and every project at the national level (R7).

The Rospuda case came to be illustrative for many of how environmental NGOs could make skillful use of European political-legal opportunity structures, circumventing their strong-willed national and subnational government actors in biodiversity governance decision making processes (Börzel and Buzogány 2010). For many environmental advocates, the case is the quintessential example of the EU environmental enforcement system working “correctly” or “as it should.” They do not emphasize as much the exceptional circumstances cited by the civil servant in DG Environment just above, which made the EC’s intervention in the case an anomaly. The EC’s use of its discretion to intervene in environmental conflicts in the first five years or so after Poland’s EU accession contributed to a perhaps inflated sense of when and how the Commission could intervene. This is one example of the legal consciousness formation processes occurring at the interface between Polish and EU levels, the focus of this chapter.

⁹⁸ This takes a Polish expression, “*Nie jednemu psu [na imie] Burek*,” Many a dog is named Burek (a common Polish name for dogs), which refers to many having the same common names, circumstances, opinions, and the like. This version somewhat flips it around to playfully emphasize the point that one cannot overgeneralize, not every case is the same.

Incorporating qualitative interview data from EU officials responsible for processing environmental enforcement complaints, and juxtaposing those data with responses from environmental advocates in Poland, I argue that the EU governance structure is integral to Polish environmental advocates' reframing both of environmental advocacy and of the exercise of political and liberal rights in Poland, even as they observe failures in delivery of its ambitious environmental protection goals. The regional level of the EU, and its environmental legal rules, make available a set of normative and spatial arguments that assert the value of regional biogeography, as well as citizen participation in local development decisions and environmental enforcement. In this sense, the EU level is understood not as a standalone level acting upon or being acted up by other levels, but as a site where various levels interface and various actors engage in an active politics of scalar restructuring. Reframing environmental protection by environmental advocates entails rescaling, re-ordering, or reprioritizing discursive and material practices at various levels, including legal ones, such that biophysical harm is prevented. EU public servants and Polish governmental actors may engage in their own sorts of rescaling, reflecting their own prerogatives and constraints, which may at times be at odds with that of environmental advocates, and at other times complementary.

Thus, in terms of legal consciousness formation of environmental advocates, the EU governance structure, and its impact on both environmental protection itself as well as how people think about EU level legal enforcement, comes to be understood in a dual fashion. On the one hand, it is a source of political and legal opportunities for environmental advocates. It provides external validation in at least two crucial ways, as illustrated in the Rospuda case just described. The first regards the encouragement and even valorization of ecosystem thinking. The second regards multi-level governmental accountability which invites and expects citizen

involvement. Commenting further on Rospuda and its effects on Polish governmental actors' ways of thinking about environmental protection, the same interviewee quoted above notes that even if they spread inaccurate notions about the EC's interventionism, the effects on the "mental frame" could nonetheless be beneficial. The easiest route from the government's perspective, the one that might have required less expropriation of land occupied by people, was not sufficiently evaluated in terms of its *biophysical* expropriation.

It's not a bad mental frame to have, it's better than just going, just pass through. Because, the frame pre-Rospuda was that they just cut through, because it was easier than taking other variants which included displacing people from their homes. But environmentally speaking it's definitely a better option. I don't know how many houses they needed to move precisely, or if it was really necessary ...but there are financial means to do that in the member state...in the forest nothing screams 'we don't want to be moved out from our house'
(laughing) (R7)

The European Commission's access to vast technical expertise and its broad discretion to decide whether or not to pursue enforcement, sometimes backed by financial consequences, facilitates these two aspects of external validation for environmental advocates. On the other hand, the EU governance structure facilitates much of the very environmental destruction environmental advocates fight against. Direct witnessing of environmental harm and tracing its sources across scales makes this clear to environmental advocates. The EU's development aid can reignite and further entrench previous versions of Poland's economic modernization, mobilizing existing resources behind enacting such visions and further insulating the state from scrutiny. These two aspects of the EU governance structure are in tension, and they ultimately point to the limits of formal, supranational law's reach, absent a concomitant shift in domestic practices and ways of thinking about the biophysical earth.

Nonetheless, I maintain that the external validation of the EU governance structure is indispensable in a domestic political opportunity structure significantly closed to environmental

protection interests. One fundamental reason it is closed is due to dominant anthropocentric and economic modernization narratives in Polish political discourse. The legally-tinged external validation the EU provides taps into powerful ideas about Poland's place in Europe, Poles' commitment to democratic ideals, and their aversion to overly concentrated state power. As for the EU's legal enforcement mechanisms themselves, their reach may be limited and unending absent wider societal mobilization, but they still serve to lay important, if at times dissonant, *legal* infrastructure. Such legal infrastructure, at its best, not only steers member states towards a better functioning system of environmental governance, but also makes available normative arguments which assert citizens' rights to participate in governmental decision-making and which are correctives to dominant modernization accounts that see rapid, environmentally invasive development as paramount.

I turn first to an overview of the EU's environmental legal compliance system, a source of awe or disappointment, depending on how it is studied. This first section begins to make the case that in order to better analyze the possibilities and limits of EU enforcement mechanisms, the interactions *between* levels, or various actors' attempts at re-scaling, which interface at the supra-national regional level, and the mutually constitutive legal consciousness formation processes occurring therein, should be studied in more depth. This site of interface is where various understandings of legal rules themselves, state power, citizen oversight, and biophysical harm get negotiated. I delve into a case which occurred during the same time period as Rospuda and can be understood as the larger problem of which Rospuda was merely the charismatic symptom: the environmental impact assessment system in Poland. The EIA case and the ones I describe after it, concerning the S3 roadway and the Water Framework Directive, both illustrate the European Commission's primary enforcement prerogative: legal conformity. This

enforcement prerogative, and the sacrificial cases which lie in its time-consuming wake, means that EU institutions' apprehension of and ability to prevent biophysical harm is ultimately limited. Both the initial displays of discretionary enforcement on the part of the EU and its subsequent activity have implications for the legal consciousness formation of Polish environmental advocates—namely an understanding of the EU governance structure as potentially validating of ecosystem protection arguments and as laying out a legal infrastructure which creates political opportunities for environmental advocates to highlight a lack of governmental accountability to the public, while at the same time and ultimately further entrenching an environmentally invasive modernization project in Poland. The final section about Poland's implementation of the Water Framework Directive brings these points home.

EU legal integration and compliance system

Over the past several decades, literature on the relationship between European Union (EU) institutions and domestic politics has proliferated. Studies of “Europeanization” are broadly concerned with the impact of EU-level policy outcomes and institutions on domestic policies and politics (Börzel and Risse 2003). Scholars have documented the European Court of Justice's (ECJ) impact on outcomes in various policy domains, as well as the impact of EU law on national legal systems—also known as the Europeanization of national law.

In their systematic comparison of the Europeanization of environmental policy across ten countries over 30 years, Jordan et al. (2004) employ a simple definition of Europeanization as a “top-down process of domestic change.” Top-down approaches, although they make measurement of this concept easier, fail to recognize that Europeanization, a problematic term

itself,⁹⁹ is not unidirectional and one-off but rather multi-directional and ongoing. States may try to shape an emergent EU policy to their advantage (Jordan et al. 2004, p. 6). This is one type of “bottom-up” Europeanization—that is, the making of EU policy or shaping of EU rules by member state actors in order to align them with their own values or practices. In the case of CEE countries, this type of bottom-up agency of domestic actors is significant, particularly as the temporal distance from formal entrance increases. Legal change in CEE countries at the stage of accession negotiations was undeniably more of a one-way street in certain respects (Héritier 2005, p. 207). There was an export of EU environmental policy, “downloaded” by the new member states. Some accounts highlight how the role of public and societal actors (a distinct set of “bottom up” contributions) was limited in accession transactions, which to a large degree were negotiations only by name, and served to bolster state power and existing rifts between the “haves” and “have nots” of civil society, all at the expense of transparency (Börzel et al. 2010; Sissenich 2010).

Europeanization scholars have identified several key factors that matter in explaining how and why member states do and do not adopt EU rules (Jordan et al. 2004; Panke 2007, 2009; Schimmelfennig et al. 2005). A variable of note in these studies is policy fit. Policy fit refers to how well an EU Directive fits with existing national law and practices. If less adaptation is required, shaming and the threat of legal action are enough to induce compliance (Panke 2007). The “goodness of fit” or “misfit” concept is measured as the domestic status quo which differs to some degree from an EU rule. The misfit concept helps explain why countries may or may not adopt EU rules even after the initial EU bargaining process, when there are more

⁹⁹ It is teleological, aspatial, and EU-centric, not sufficiently attentive to empirical observation, as it overemphasizes the international or supranational “source” of a given norm or rule at the expense of already existing or previously existing domestic dynamics, domestic actor agency, and the co-constitutive relationship of norms and values (See Szulecka et al. 2013).

carrots and sticks. If the changes political actors are faced with are expensive or relatively difficult to make, they are less likely to occur without sustained political pressure (Schimmelfennig et al. 2005).

In the case of Poland, to provide some examples of one set of “bottom-up” dynamics, political actors in the electricity production and coal sectors have historically resisted the adoption of EU pollution control rules. This is the case for several reasons. Poland’s abundance of coal reserves, the unionized energy sector, and the societal opposition to nuclear power have entrenched the coal and coal-burning electricity production sector in Poland as a powerful player in political and economic matters, particularly those involving costly environmental standards (Andonova 2005, p. 151). Even under conditions of more coercive conditionality during the EU accession process, these sectors were granted concessions and extended compliance deadlines (Andonova 2005). In this sector, the Polish government is “catching up” with European rules, if not actively resisting them. More broadly, the EU’s rules on industrial emissions are a policy misfit with Poland’s broader environmental regulatory style, at least the one in place since the early 1990s, which was heavily influenced by Western-trained environmental economists. This regulatory style emphasizes a gradual and flexible approach to curbing emissions, economic incentives, and capacity to support environmental investments (Andonova 2005, p. 151; Schimmelfennig et al. 2005, p. 219).

Another, distinct type of “bottom-up” process for consideration in studies of EU governance is the ways in which citizens, social movements, and environmental organizations use legal changes, and spatial claims, as political resources. Incorporating attention to such dynamics, European integration is better understood as both a top-down and bottom-up, agentic, spatial, and dynamic legalized process. Such conclusions emerge from more in-depth qualitative

study of decentralized aspects of the system of legal enforcement within the EU governance structure (Cichowski 2007; Slepcevic 2009; Panke 2007, 2009), as well as studies of social movements' uses of this political and legal opportunity structure (Anagnostou 2014; Jacobsson et al. 2013). Cichowski's (2007) account of the EU's institutionalization, made up of the processes of litigation and mobilization, identifies four key elements of institutionalization: a legal claim, litigation, legislative action, and transnational mobilization. A legal claim activates the ECJ, whose judicial rulemaking can expand the meaning and scope of EU law, which in turn can affect legislative action at the supranational and national level. These institutional changes create political opportunities for transnational political mobilization, which can lead to an increasingly expansive public sphere in EU politics (ibid, p. 26). Through this process, national judges, individuals and societal groups, and the ECJ are all given a greater role in EU rulemaking.

National, legal, social, institutional, and political factors may enhance or restrict the ability of individuals and social groups to mobilize the law or access the justice system (Börzel 2006; Anagnostou 2014; Jacobsson et al. 2013), and socio-legal research focused on Europe continues to examine how legal action becomes incorporated in social reform goals and social movement strategies and with what effects. Much of this sort of research yields a quite idiosyncratic set of findings which, taken together, might be summarized in a rather unsatisfying way as "context matters." Nonetheless, one central thread running through this body of work is that social movements of various stripes have introduced their own "bottom-up" dynamics distinct from the ones already described above. For instance, counter to the Polish industrial and coal interests, environmental and public health advocates and other social movements attempt to assert alternative energy futures for Poland, ones not dominated by coal (See Chapters Six and

Seven). This is thus yet another layer of so called “bottom-up” processes in EU environmental and energy politics worthy of scholarly attention. Multi-level analysis, and especially analysis of the relationships *between* levels, and between state and non-state actors’ attempts to engage in the politics of scalar (re)structuration (Brenner 2001), is therefore essential to better understanding this dynamic governance system, the degree to which it is permeating member states’ domestic politics and vice versa, and with what implications.

Two mechanisms by which EU norms and institutions may permeate domestic politics include the non-compliance procedures all EU members are subject to, such as the Article 258 Infringement Procedure, as well as litigation of EU law in national courts, which may lead to Article 267 Preliminary Reference proceedings (Tallberg 2002; Börzel 2001; Cichowski 2007). Courts—supranational, national, and subnational—are integral to the EU’s system of compliance (Stone Sweet 2010, p. 35; Tallberg 2002). At the supranational level is the centralized compliance system by which EU institutions such as the ECJ and European Commission hold states accountable for rule violations. At the national level, EU law enforcement is more decentralized. Individuals, interest groups, and corporate actors, through legal action in national courts, pressure national governments into compliance with EU law.

Various elements of the EU compliance system have been studied in an attempt to explain how they serve or fail to bring about compliance. Tallberg (2002) characterizes the EU’s compliance system as a combination of more coercive enforcement and more cooperative management strategies operated by supranational institutions and empowered by societal interest groups (p. 610). Article 258 Commission Infringement proceedings are an example of more centralized enforcement, whereby the Commission, based on its own monitoring as well as complaints received from EU citizens, serves as a prosecutor and the ECJ, a judge. Infringement

proceedings consist of a series of formal steps. They begin with a “Letter of Formal Notice,” a request for information, which, if not sufficiently met, may result in a “Reasoned Opinion,” a request to comply with EU law. The Commission may decide to refer the member state to the Court of Justice if it is not satisfied that compliance has been ensured, and this can result in financial penalty; however, infringements rarely reach this stage (See EC 2012; Börzel 2006, p. 133). Infringement proceedings contain many elements of informal consultations and negotiations between member state governmental actors before referral to the ECJ. In the face of infringement proceedings, member states tend to back down and settle cases domestically before they reach the ECJ (Tallberg 2002, pp. 617-618).

Article 267 Preliminary Ruling proceedings, in contrast to infringement proceedings, constitute the more decentralized aspects of the EU compliance system, since they provide a means for upholding EU law in national courts. In this way national courts are a key nexus between individuals and groups in society and the legal obligation and entitlements enshrined in EU law. National judges can refer cases to the ECJ, and apply EU law based on the ECJ’s interpretation. More decentralized aspects of the EU’s judicial enforcement system are not as well-studied. Even when they are, research which attempts to get at enforcement activity of national courts using preliminary references alone captures instances where existing EU law was not clear enough for a lower court to decide a given case and enforce EU law on its own. These instances are significant, but they are not the full picture of how national courts enforce EU law. National courts may interpret EU law differentially: they may accept or decline a provision’s direct effect, and they may interpret a provision more or less strictly (Slepcevic 2009, p. 382). I presented evidence of Polish administrative judicial actors engaging in such interpretation in the previous chapter. I illustrated the ways in which accepting or declining a provision’s direct

effect involves judicial actors reckoning with conflicting spatiotemporalities present within different types of law, and at times, engaging in scalar distancing in order to reconcile conflicting governance logics. Environmental legal practitioners in turn, may resist such scalar distancing and insist on pulling EU legal conceptions “down” to domestic legal interpretation and practice and connecting environmental legal reasoning across scales. In this chapter, I consider interactions between the supra-national regional level (where EU enforcement actions may be triggered), and other levels, specifically interactions between EU public civil servants charged with enforcing EU environmental rules, state and non-state actors in Poland, and the physical earth itself, in order to take an integrative, human geographical analytical approach to scale politics and legal consciousness formation. This approach takes formal legal rules and cases seriously, but supplements their analysis with deeper qualitative insights from those directly involved in the environmental governance and enforcement system’s enactment (and hence the actual scalar structuration and restructuration processes occurring in this realm).

The EU’s compliance system, especially its more centralized aspects, has been depicted as relatively effective as compared to other transnational legal regimes.¹⁰⁰ Some suggest that correcting non-compliance is merely a question of time (Tallberg 2002, p. 620; Panke 2009; Stone Sweet 2010, pp. 18-19). The focus in compliance studies on infringement proceedings, however, is largely on formal legal transposition. These instances are more straightforward to study, and violations are easier to detect by the Commission (Tallberg 2002, p. 625), but absent significant enforcement resources, accurate information (which the Commission relies on

¹⁰⁰ Particularly those whose scope extends beyond commercial law, as well as human rights conventions and international criminal legal provisions. The EU legal system in particular has been identified as a key driving force in Europe’s economic and political integration. A growing body of scholarly work on EU governance has “conclusively demonstrated” that the legal system has pushed the project of European market and political integration “further and faster than the member states had been prepared to go on their own” (Stone Sweet 2010, p. 5).

domestic member state actors for) and coercive pressure of the financial variety, only so much can be done. Infringement proceedings cannot necessarily compel timely action, or action at all.

In the sections that follow, I examine several cases in which the European Commission (EC), specifically DG-Environment, attempted to compel Poland's compliance with EU environmental law using the enforcement tools at its disposal. Along the way, I illustrate the process of legal consciousness formation at the interface between the EU level and the domestic level. The evidence indicates, unsurprisingly, that the EC has most leverage in instances when a development project is being funded with EU funds. The threat of blocking financing can be leveraged to compel legal compliance. Early on in Poland's EU membership, individuals in the EC decided to use these tools to induce national and subnational governmental actors to take a "hard look" at their practices. Not only government and private actors, but also non-governmental actors and private citizens, were looking at projects funded by the EU very closely to make sure they complied with environmental law. Basic presumptions about economic development or modernization were not questioned, however, and environmental harm is to a certain degree tolerated or overlooked as a price to pay for correcting broader legal compliance. The implications for legal consciousness on the part of environmental advocates, especially since about a decade has passed since an initial flurry of enforcement activity and dynamism, are of a decidedly dual character, celebrating the ecosystem and biogeographical scientific framings offered by EU regulations, as well as support for exercising civil and political rights, while lamenting biophysical harm ultimately condoned by them.

The EIA Case

According to the civil servant in DG Environment who handles infringement cases against Poland, the case which has been most significant in her time working for the European

Commission is the EIA Case. The EIA case refers to European Commission Infringement Proceedings taken against the Polish government regarding the improper transposition of Directive 85/337/EEC, the Environmental Impact Assessment Directive.¹⁰¹ While my respondent conceded that Rospuda was significant in other ways (for example the way it shifted how people think about that ecosystem) and certainly the most exciting, it was part of a more fundamental and systemic governance problem in Poland: the environmental impact assessment process was, in many cases, a pro forma exercise. The EIA cases shows how the EC can compel change in the structure of domestic member state institutions and practices, and it provides insight into how the EC “sees” its own enforcement imperatives—specifically its delineations of what actions are within its purview and what actions are best left to member states.

The aim of the Environmental Impact Assessment (EIA) Directive is to ensure that projects which are likely to have a significant effect on the environment are adequately assessed before they are approved. Before a decision is taken to allow such a project to proceed, its possible impacts on the environment are identified and assessed, and subsequently developers can adjust projects to minimize negative impacts before they occur, or administrative authorities can incorporate mitigation measures into the project approval. Another way the Directive tries to ensure quality of development decisions is by foreseeing public participation in this process. The EIA Directive includes a list of types of public and private projects, some of which are always required to undergo environmental analysis and approval, others which may require such analysis at the discretion of environmental authorities, based on statutorily defined criteria.¹⁰²

¹⁰¹ Infringement nr 2006/2281. The initial Directive of 1985 and its three amendments are codified by Directive 2011/92/EU of December 2011. Directive 2011/92/EU was amended in 2014 by Directive 2014/52/EU.

¹⁰² Both annexes of the directive which contain these lists were transposed to Polish legislation by means of the Regulation of the Council of Ministers of 9 November 2010 on projects that may have a significant environmental impact (Dz. U. of 2010, No 213, item 1397, as amended). Selection criteria for projects of the second type are included in Article 63 of the EIA Act, which transposes Annex III of the Directive (Matuszewski 2013).

The environmental assessment process includes a public consultation procedure, and upon its completion the “public concerned” may trigger administrative review of permitting decisions taken by public authorities.

Prior to 2005,¹⁰³ environmental impact assessments in Poland occurred at two stages. The first was part of the decision on building conditions and land management (*decyzja o warunkach zabudowych i zagospodarowania terenu, WZiT*).¹⁰⁴ The second was part of the construction permit process. An environmental impact assessment was called for at both of these stages. With the 2003 amendment of the EU EIA directive,¹⁰⁵ Polish government actors added what is called a decision on environmental conditions (or environmental decision, *decyzja o środowiskowych uwarunkowaniach przedsięwzięcia*) to this process, which they put in between the two decisions just described. The presumed rationale for this was to avoid duplicate public consultations (with their possibilities for appeals of the decisions in the administrative legal system). That is, an environmental decision was made after determining the location of the planned development, but before issuing the construction permit.

In 2006, the EC began discerning that for many projects, the environmental decision was only a formality. It was issued after locational siting, but too early to account for what environmental requirements needed to be in the construction permit. The environmental decision was binding on the construction permit, but because it was issued so far in advance, and thus phrased in vague terms, it was not in practice a meaningful assessment of environmental

¹⁰³ The EIA Directive’s amendment of 2003 had a transposition deadline in 2005.

¹⁰⁴ The WZiT decision is issued in the absence of a land use plan (plan gospodarowania przestrzennego). Given that the majority of Poland’s territory is without a land use plan, this decision is issued for most developments (Gawrońska 2007). Therefore, these decisions are a main instrument of spatial planning in Poland (or lack thereof – as many critics have pointed out).

¹⁰⁵ The EU’s EIA Directive of 1985 has been amended three times: in 1997, in 2003 and in 2009.

impacts. It did not allow for making adjustments or supplements to permits accordingly, before development consent was given for a project.

In its infringement case, the European Commission voiced reservations about this system. The case also included misgivings about the manner in which information and documentation was provided to the public, the scope of that information, and the processes by which the public could submit comments. Also at issue were definitions of the terms “development consent” and “public concerned.”¹⁰⁶ From the European Commission’s perspective, public consultation and access to justice were fundamental pillars needed for checking compliance and enforcement, because those make it possible for an environmental organization to contest a project in national court. The logic of the infringement action was to compel the member state to make its domestic governance system’s form (and, it follows, function) in accordance with European and international environmental legal principles (elements of the Aarhus convention put into European Law).

In large part in response to the EC’s enforcement actions, Poland adopted its domestic 2008 EIA Law, and changed its EIA process. Now the environmental decision is issued before the WZiT, and consequently the public can get involved at a much earlier stage in the development process. For larger projects, projects where the construction permit might introduce significant changes, the permit issuing administrative authority can ask for a second assessment at the construction permit stage (See Chapter Three for more detail about the course of administrative proceedings). In Polish legislation after these reforms, then, “development consent” refers to two decisions, the decision on the environmental requirements for consent to

¹⁰⁶ The Directive defines “development consent” as “a decision of the competent authority or authorities which entitles the developer to proceed with the project.” “Public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures. Under this definition, non-governmental organizations promoting environmental protection should have an interest (Matuszewski 2013).

implement a project and a final decision on consent to initiate the implementation of a project. Because the EU Directive defines “development consent” as “a decision of the competent authority or authorities which entitles the developer to proceed with the project,” the Polish EIA Law rightly imposes an obligation to conduct a separate EIA for each decision (Matuszewski 2013).¹⁰⁷

In sum, the EIA process in Poland, particularly for larger infrastructural projects, is multi-stage. An environmental decision, which is binding on subsequent permits, is now issued before the decision on building conditions and land management, and then there is possibility for another one later, at the discretion of the administrative authority. As one interviewee in the DG-Environment Infringements Unit wryly noted regarding whether administrative authorities tend to opt for a second EIA, “You can be sure that if the project is co-financed and if it’s bigger there will be two—they make sure.” Her comment illustrates how the EC has compelled a change in domestic practices, partially driven by the fear of European Union co-financing being withheld, or worse yet, the need to pay back the money with interest.

Another more recent example of attempts by the EC to compel “corrective” action in Poland in the way EIA procedures are done involves trying to eliminate instances in which certain development projects are altogether beyond the scrutiny of the EIA process. The EC referred Poland to the ECJ (after sending a Reasoned Opinion in February 2015) over what projects must be made subject to an environmental assessment. Specifically, the EC argued that Polish law fails to ensure that environmental impacts of exploratory drilling for hydrocarbons are sufficiently assessed.¹⁰⁸ This more recent case further illustrates how the EC monitors legal

¹⁰⁷ There are still doubts about the Polish EIA Law’s conformity with the EU Directive. For a more detailed legal analysis of Polish legislation vis-à-vis the EU EIA Directive, see Gruszecki (2013) and Matuszewski (2013).

¹⁰⁸ Case C-531/13. Under Polish law, it is possible to drill down to depths of 5,000 meters without the need for an EIA. This threshold is too high, and does not take into account all relevant criteria established by the EU EIA.

provisions and necessarily, their substantive implications, and tries to discipline member states away from not only formalistic approaches to the EIA process, but also away from foreclosing the very possibility of EIA scrutiny (and the attendant public participation requirements) for certain investments (See also Chapter Seven).

Returning to the EIA infringement proceedings in 2006, they also inspired institutional change to very structure of Poland governmental bureaucracy dealing with environmental decisions. Not only did the Polish government change its EIA process, it also made a significant institutional change by creating a more independent environmental authority overseeing the system of issuing environmental decisions and assessing environmental impact assessment reports. The new institutional set up took some power out of the hands of regional (*województwo*) authorities and into the hands of a newly created environmental authority, which would have the technical expertise to assess the quality of environmental analyses and verify their contents: the General Environmental Protection Authority (*Generalna Dyrekcja Ochrony Środowiska*) and its sixteen regional counterparts (*Regionalni Dyrektorzy Ochrony Środowiska*). An EU official evaluated the new system and how it compared with the old one as follows.

They themselves assessed the weaknesses of their system, and one of the weaknesses of their system was that they didn't have independent environmental authorities. You had someone responsible for the environment who was sitting in the voivodship [Province], who was issuing the permits, and that lady knew that if she didn't give a positive, she would be fired. For example. I'm not saying that every province would do that, but there is an interrelation. Whereas now there are independent authorities, and the province may like it or not, but if they issue a negative opinion, he needs to swallow it, there is no way he can fire them... Well, there are still ways of exercising influences, and I'm not saying that the environmental authorities in Poland are extremely strong, but they are definitely stronger than they used to be (R7).

Under EU law, deep drillings need to be assessed, in particular for the waste they produce, their effects on water and soil, use of natural resources, the risk of accidents, and any cumulative effects they may have with other similar projects or activities. The EC cited European Court of Justice case law which has already confirmed these arguments.

Two points warrant emphasis here. First, the EC enforcement actions at this time were successful in large part because they were cumulative and involved the threat of blocking co-financing of road development projects. At the same time this case was occurring, there was a problem with insufficient designation of Natura 2000 sites (described in Chapter Two), and there were proceedings related to Rospuda and Wasilków, described earlier. Second, these were Poland's own legal and institutional solutions to the shortcomings of its environmental decision-making procedure, not specific prescriptions from the EU level. My interviewee emphasized this point, that the EC's enforcement action does not reach into domestic affairs as far as many end up believing based on observed changes. Such changes partially stem from EC enforcement actions, but are not entirely determined by them.

This set up, so you get it correct—there's a lot of misunderstanding. It is felt that this set up has been imposed on Poles. That was their own idea. They identified the problem, and they identified it correctly. We have no tools to tell them, oh you need to create that or that institution. That's the complete competence, exclusive competence of the member states. We can suggest that they might want to consider..., but we can't force them to do anything with [their] authorities (R7).

EU Directives specify the general goals of a policy but not the means by which member states should accomplish it. This results in differential practical application of general EU policies which empirically refutes “level-playing field” discursive aspirations of a common market (Grobelski 2010). Yet paradoxically, as this quotation suggests, a domestically crafted solution to a general EU governance goal in Poland creates an inflated perception of the EU's reach into domestic affairs. Put in another way, EU enforcement activity, while limited in teeth, bolsters in legal consciousness a sense of supranational institutional reach into domestic affairs.

What may amount to a strongly worded suggestion (at times backed by threat of financial sanction), whose power really depends on whether and how it is taken up by domestic actors and

whether there is societal mobilization around the issue, comes to be understood as an increasingly all-encompassing reach of EU regulation, on the part of those who begrudge such regulation as well as on the part of those, such as environmental advocates, who might welcome it as a means to further public interest goals. This perception in turn is reflected in the number and quality of complaints submitted to the European Commission. They are numerous, but most do not contain a viable legal case.

Speaking further about environmental NGOs' unrealistic explanations about what the EC is willing and able to do, the same interviewee described several cases in which there was not sufficient scientific evidence or legal basis, or both, to bring a case. One such case had to do with approving construction plans for an airport for low-cost airlines. In an environmental organization's view, this would have a significant impact on birds located in nearby Natura 2000 Special Protected Areas.

They referred it to the [domestic administrative] court, they went all the way through the Supreme Administrative Court, and they failed, and therefore they thought they would have a chance with us, and that we would take the case to the ECJ. It was a co-financed project with EU funds. But we do not have evidence. I believe they were disappointed, and I understand, I can understand them. But if we don't have evidence of a breach we cannot bring a case to court...the number of complaints that make it into an LFN [Letter of Formal Notice] and Reasoned Opinion [both later stages in the Infringement Procedure], it goes like that (gestures to show a sharp decrease). And now most of the complaints get closed because of lack of evidence. There's just no breach to be detected. Because people believe that European legislation covers everything, and how can that not be regulated? For example, there was a road that was put on a floodplain. There is not legislation on the European level which forbids roads on areas which are likely to flood. So I mean, there is no breach..... there is no added value from the complaint, because we don't receive any scientific information from the individual or [environmental NGO] which was helping them. They have concerns of a different sort, concerns that are not regulated by EU law (R7).

This quotation gives insight into how the EC “sees” complaints, what is useful information, and what “counts” as information that can be used in a formal complaint. These may be seen in

instrumental or narrow ways by EC environmental enforcement actors. The comment that “they have concerns of a different sort” acknowledges the limits of supranational law’s reach, and suggests EU law as only one rather limited tool for the high volume of grievances being communicated by complainants.

Environmental advocates in turn have their own way of “seeing” the EC. One of these ways of seeing is acknowledging the potential power of EC enforcement actions, particularly the ones that involve freezing funds, even while they occur through quasi-legal or extra-legal means. The following excerpt from my conversation with an environmental advocate in Poland, with considerable long-term experience both in grassroots organizing and within national level government, illustrates some of the effects on legal consciousness of observing or participating in the European Commission’s infringement proceedings. To him, the European Commission’s ability to withhold financing can be an effective disciplining tool, and he recalls an early example of this, even before Poland’s official entrance into the EU. Paradoxically, the negotiations with the EC yielded an ad hoc legislative process in which the Polish government wrote recommendations to existing laws. The hope was that these would serve as legislative promissory notes—not full-on delivery of the legal reform which was the reason for the EC’s withholding of money, but enough to satisfy the Commission enough to unblock funding. Based on the interviewee’s previous experience in government, he found this manner of doing things to be inappropriate, and even farcical, because it was not within the bounds of legitimate legal practice. Despite faults found with the negotiation process, he recognizes that the EC’s enforcement action made Polish governmental actors aware that projects being financed by the EU would be scrutinized, and that money could be withheld until the EC was satisfied with Poland’s response.

There were attempts to limit the rights of [environmental] organizations. For example, certain changes were even introduced, but the European Commission actually pointed them out, that it can't be this way, that this is contrary to Directives, to EU regulations, and the government had to back off. This was [...] I think in 1997, and the government was so stubborn, said no, it refused these amendments, and the European Commission then showed its claws and said, 'No? So we are not going to give you your money, we'll put a hold on your cash.' And then, you had to have seen this in Poland. Everyone got the shits, everyone was running around, 'No! What should we do?!' Politicians, when their cash is taken away, taking away the money! Gasp, there is nothing worse! And they thought up something that was completely beyond the constitution (pozakonstytucyjne)—this is actually an interesting tidbit, if we are talking about the legal side of things. They did these sort of guidelines (wytyczne). That is to say, there were Polish [environmental] laws, and they made these guidelines to them, like guidelines to the environmental impact assessment, that was the title, let's say. Two ministers signed this and (laughing), they showed this to the Commission—I mean, they did this in agreement with the Commission. And they showed everyone, that they did these guidelines and that the law is going to come into being, but it's just that they can't pass a law that fast, but the guidelines they can do quickly, and so their funds should be un-blocked. And I was thinking to myself, cackling, this is useless (psu na budżę), because they did this legal change in half a year, but it was so incredibly important to them to un-block the money, to get this moving, to, as if, show politically that the government here has agency to act, that they did something that was, in general, anti-constitutional, who knows what: using some kind of guidelines (laughing), they wanted to change the law. I was cackling, there was a huge conference about this, when the people from the Commission arrived, and our ministers came in, and I looked at all this and thought, what a farce (szopka). They are participating in this song and dance (laughing).

Me: And the Commission then, what did it do?

R37: The Commission simply turned a blind eye to this...because they were looking for some kind of compromise. Because it wasn't possible to change the law that quickly. But, pfff, I was in [government] once, if something has to be changed quickly, then it gets changed, in two days. So for me this was just strange. These guidelines should have been transferred into law and moved through [the legislative process] and not create this farce. But like I'm saying, that's how it was already then, and related to this those regulations were restored, they already know right now—the government—knows that it can't pull these kinds of stunts, because the Commission has this instrument, in the form of freezing money, saying that we can't finance something that is in violation of something over here (R37).

In this commentary, a dual legal consciousness is being forged. On the one hand, partially on the basis of his own experience of the Polish government's inner-workings, the interviewee's

observations of the negotiations inspire more disdain for the way his own government handles its affairs and the way politicians are driven by financial motives at the expense of legislative propriety. On the other, he has a clear sense of how EU legal enforcement mechanisms—using infringement proceedings and threatening to block money—have worked in the past and they could work in the future to compel governmental respect for environmental rules. I now turn to another case which explores these interactive dynamics further, in particular the relationships between EU environmental enforcement actors, member state governments, and the appraisal and apprehension of biophysical harm.

“The poor S3”

Around the same time when the Rospuda controversy was occurring, another, less well known, but according to some in the European Commission, arguably more important case was brewing. Even though significant environmental destruction occurred and environmental legal mechanisms were ineffective at stopping it beforehand, this case was, in the view of EC actors, a much more far-reaching success in terms of the ways the EC could leverage the case to compel the Polish government to not only generously compensate for the environmental damage it had already done in the construction of a roadway, but also to reexamine its entire national highway system for potential impacts on Natura 2000 sites. The case further illustrates how the EC sees its enforcement prerogatives, in particular how it apprehends environmental harm.

In this case, the EC was able to synergistically wield legal and financial tools at its disposal. During this time period there were concurrent infringement proceedings occurring due to Poland’s failure to sufficiently designate Natura 2000 sites,¹⁰⁹ and this subsequently made it

¹⁰⁹ These proceedings were helped along by a complaint from Polish NGOs in 2005. The so called non-designation case was withdrawn by the Commission once the Polish government provided a more exhaustive list of Special Protected Areas.

easier to block co-financing for the S3 roadway construction. Had these two actions not been occurring in parallel, the EC would have been significantly weaker.¹¹⁰ During the two financing periods this case spanned (2000-2006 and 2007-2013), the Polish government was especially keen on expanding its roadway network.¹¹¹ The threat of losing funding support for this infrastructure the government considered crucial would have been devastating. The Polish government's supplicant position, and eventual deferral to the EC's wishes, was therefore understandable.

The S3 case came to the attention of the EC as early as 2004 through the complaint of an NGO. It concerned an 81 kilometer (about 50 mile) section of a roadway going from Szczecin to

¹¹⁰ Absent legal grounds, verbal threats to withhold funds could only go so far. Blocking financing is difficult unless the second step of infringement proceedings, the Reasoned Opinion stage, just before sending a case to the ECJ, is reached.

¹¹¹ For the 2000-2006 funding period, the European Commission co-financed a "Transport" Operational Programme, amounting to more than 1,163 million Euro. The two main priorities of this program were to develop different modes of transport in a balanced way, and to make road infrastructure safer. In addition during this funding period, the European Commission co-financed an "Integrated Regional" Operational Programme for 2004-2006, which was the largest of the seven Operational Programmes within the Community Support Framework for Poland, with an EU contribution of 2,970 million Euro out of a total Structural Fund budget for Poland of 8,630 million Euro. The Integrated Regional OP was supported by the European Regional Development Fund (85%) and the European Social Fund (15%). Transportation infrastructure was a priority in this program. For the 2007-2013 funding period, Poland's transport infrastructure projects were co-financed through the Infrastructure and Environment Operational Programme, co-funded by the Cohesion Fund and the European Regional Development Fund. The total budget of the programme is 37.56 billion Euro. The Community assistance amounts to 22.18 billion Euro from the Cohesion Fund and 5.74 billion Euro from the ERDF. The EU contribution is approximately 41% of the total EU support for Poland under the Cohesion policy in the 2007–2013 period, making it the largest operational programme in Poland. It is also the largest ever operational programme in the entire European Union. The program's stated goal was "supporting the development of technical infrastructure, and simultaneously protecting and improving the condition of the natural environment and health as well as preserving cultural identity and developing territorial cohesion." Since the program contains investments both to the transport infrastructure and in environmental protection, it is difficult to tease out the precise amount of money used on transport infrastructure projects alone (Bouda et al. 2014). The European Commission was contributing an estimated 20 billion euro to transport, according to its breakdown of finances (EC 2015a). It was expected that 636 km of motorways and over 2219 km of expressways would be constructed, 1566 km of railway lines would be modernized and 8 airports would be expanded. The managing authority of this program in Poland is the Ministry of Regional Development. The Ministry of Environment is responsible for the management of environmental projects. The General Directorate for National Roads and Motorways, which is the central authority of national administration that has been set up to manage the national roads, is the beneficiary of a significant amount of projects that are co-financed with EU funds (EC 2015, 2015b; Bouda et al. 2014).

Gorzów in Northwest Poland¹¹² which affected several Natura 2000 sites. The criteria used to determine the highway route neither included nature impact and environmental analyses, nor sufficient species and habitat inventories. Priority habitats and breeding sites were not accounted for. The EC suggested that the project, on the basis of paperwork submitted to it by the Polish government, was too difficult and should not be pursued as configured absent sufficient environmental foresight. The EC did not hear back from Poland on this matter until 2008. In the meantime, the government had moved forward with the permitting process, and some construction work had ensued before alternative routes were considered. The Polish government submitted paperwork to the EC in 2008¹¹³ which contained environmental studies that had been missing in 2004, but the studies were found to be disingenuous with respect to EU Natura legislation. An assessment was conducted, but in the EC's view, it did not sufficiently take nature criteria into account.¹¹⁴ Here, the EC cut past a formalistic, procedural accounting style approach to environmental legal compliance and took issue with the merits of the case, the ecological substantive content of environmental analyses.

The Commission began infringement proceedings, sent a Letter of Formal Notice, and indicated that this project could not be funded (co-financed). The Polish government, not wanting to lose valuable road infrastructure funding, approached the EC to negotiate a solution. It was agreed that the money would be disbursed if the Polish government met several conditions. First, the government had to properly designate all environmentally significant

¹¹² part of a larger motorway, express road S3, connecting the D11 at the border with the Czech Republic all the way up to Świnoujście on the Baltic Sea, with a total length of 480 kilometers (about 300 miles).

¹¹³ the next financial programming period

¹¹⁴ In this case as well as Rospuda and others the Polish government's seemingly dogged insistence on a particular route for certain roads when other alternatives were available can at least in part be explained by a preference to build on state-owned property, rather than go through the time-consuming, legally onerous, and expensive process of expropriating privately occupied/owned property.

natural sites vis-à-vis road construction plans. It had to change its approach to all highways and national roads, by reassessing all highway construction plans in the country. Even if administrative decisions had already been issued for certain roads, they would need to be re-assessed. If the roads would have a negative impact on a Natura 2000 site, they would need to be re-routed and administrative decisions re-issued. The government had to prepare a new plan with all the projects and subject it to Strategic Environmental Impact Assessment, specifically looking at impact on Natura 2000 sites. Second, the Polish government had to conduct detailed environmental study of the particular stretch of S3 roadway in question and propose a package of compensation measures. Since it had not made sure environmental studies were sufficiently conducted before project construction began, the EC expected the government to come back with much larger compensation measures to make up for this omission and the resulting environmental damage. It took the Polish government three years to meet these conditions and conduct the strategic assessment. Once it did, the infringement proceedings were halted and the project funding was reimbursed (it had already been spent).

This case, from the European Commission's perspective, better demonstrates (than more sensational cases like Rospuda) how wielding a synergistic combination of the EC's legal and financial tools can discipline the Polish government into respecting the environmental legislation of the European Community, in a more wide-reaching sense.¹¹⁵ As a staff member in the European Commission DG-Environment working on Cohesion Policy and Environmental Impact Assessments put it,

From what I see now, after these many road projects came to us, the situation has changed. It is different since then. So it was a project, so to speak, a victim, a sacrifice, but it really changed the approach of the Polish authorities. So for me,

¹¹⁵ Noting here that EU institutions' decisions to fund or co-fund a project do not determine whether a member state will pursue other means of financing the project.

from the perspective of EU funding, I wouldn't say it was Rospuda that changed everything, it was this poor S3 expressway that changed the situation in Poland...because they had to change the planning of the roads, even reconsider the roads which they had already planned...(R6).

The case also shows how legal enforcement actors at the EU level may use their discretion and technical expertise to check, and if necessary seek to adjust, the interpretation of a legal and scientific term, in this case “significant environmental impact.” Their reach can go further, and can include scrutiny of the substantive content of an environmental assessment, not merely checking that formal legal conformity or procedural requirements are met. In the words of an individual working in the DG-Environment Legal Infringement Unit, the S3 was, like Rospuda, “an individual project which normally we wouldn't interfere in.” She continues:

...but it was subject to co-financing, and what they did was judged unacceptable in the sense that they defined impact which in our view is significant, as insignificant. And this is a way to avoid obligation of the Directive. If you always say the impact is insignificant then you will never have a problem....legally it's sound, but on the merits...that's another value of the Commission, because the Commission can also review the merits of the decision and of the environmental report and not only the administrative part...There we thought it was necessary to actually show that we do not agree with the mental frame of not seeing impact where there is, and therefore we started an infringement procedure. It was just an LFN [Letter of Formal Notice], but it was sufficient for them to wake up, because the LFN triggered a blocking of co-financing. And I'm sure [my colleague] told you the rest. They agreed to do a strategic impact assessment of roads, so it repaired the situation of roads in general. We solved the problem (R6).

The case, in combination with others occurring concurrently, shows the ability of a supranational European Union enforcement institution to intervene in and interrupt overly formalistic environmental legal practices which do not sufficiently apprehend impacts of development projects on biophysical entities and processes. It signals and models what should occur in the domestic administrative system: the content of an administrative permit decision cannot be entirely focused on procedural aspects (e.g. whether paperwork was submitted within the correct

deadlines), without probing into the substantive content of an environmental assessment (See Chapter Four). The EC, as described in the quotation above, may opt to do both, using a combination of its legal and technical expertise, in order to try to teach a lesson to decision-makers within a member state that “environmental impact” determinations must be more than formally legally sound. They must contain meaningful substantive content based on biological and biogeographical science.

The EC’s own resource and personnel constraints may make such instances of intervention in individual cases rare, but when they do happen they send a message to member states and all involved about the fundamental purpose of environmental impact assessment procedures and environmental legal principles. Procedural or administrative aspects are empty bureaucratic exercises absent a meaningful engagement, based on agreed upon scientific or technical standards, with the biophysical entities or processes under study. Such cases, in the way they shake up the status quo, may have radiating effects on legal consciousness and practices of various actors throughout Poland’s administrative legal system at various levels.

The EIA case described in the previous section compelled a reconfiguration of Poland’s domestic permit issuing procedures, and inspired an institutional innovation within Poland’s environmental governance system to make it less beholden to political whims and more accountable to ecosystem science, as well as to complaints from the public. The S3 case reached further into domestic legal application and practice in the EIA realm, compelling more meaningful interpretation of the EIA law’s content. Although the EU cannot dictate how exactly Poland complies with Community environmental legislation, it can nudge Poland away from certain “mental frames,” as my interviewee called them, and towards others.

Yet DG-Environment's way of seeing and its mandates are still rather tolerant of environmental harm. Basic presumptions about development, development aid, and economic modernization are not in question. Returning to the quotation above, individual biophysical victims and sacrifices along the way are judged acceptable if they end up being in service of more "horizontal" compliance. Harm is commonly thought of and talked about as being interchangeable with "compensation measures" elsewhere which can make up for environmental destruction. The end of the quote, "we solved the problem," is telling about how EU enforcement institutions see such cases – as one off, open then closed, solved, despite potential irreversible harm which occurred along the way. They operate according to enforcement prerogatives which do not question particular types of economic development or modernization projects themselves and which impose a sort of stasis, as is seen in the way the interviewee discusses the case.¹¹⁶

The EC largely sees its role as ensuring that the proper legal infrastructure is laid in a given member state, such that the domestic system functions to sufficiently protect the environment and provide the public with means to enforce environmental rules without outside intervention. Although legal transposition and its monitoring will continue as long as EU level legislation is added or modified, as temporal distance from EU accession negotiations and EU entrance increases, governments may become less sensitive to legal challenge from below and above or both. That is, they may still be the targets of legal challenges, but they may be more

¹¹⁶ Worth consideration is DG-Environment's relative position within the larger European Commission bureaucracy. Just as DG Environment, since its creation in 1981, quickly received a reputation for activism and as a channel of influence for environmental groups to get the Commission as a whole to pursue greener policies, they also may be relatively marginalized vis-à-vis other units, or such activism may put DG-Environment at odds with counterparts engaged in economic development or internal market policy.

skilled in navigating the process, or at least buying more time—while irreversible environmental harm is occurring and escaping timely scrutiny.

The EC's approach and member state governments' adaptations in turn shape an evolving legal consciousness on the part of environmental advocates. An interviewee who has been involved in the Polish and German environmental movements for about 15 years declared the electrifying period, in which it was unknown what effects transposition of EU law would have in Central and East European countries, to be over. He meant the period leading up to and just after Poland's entrance into the EU in 2004. He was convinced that an important window of opportunity for Polish environmental activists had closed. Whereas in places like Germany EU laws were "absorbed" into an already well-established environmental governance system, in places like Poland, there was a real opportunity to be creative and build a new system. It was not clear how laws would take shape, what institutions might form, and there was room and openness for NGOs to enter these conversations and processes and innovate.

In contrast, many participants and observers of domestic dynamics in Polish environmental governance describe the current situation as having stabilized, ossified. Previously, NGOs had more of a potential advantage; they were first-movers, even ahead of government institutions on their awareness of legal changes and developments in the EU, and their extensive information sharing network was used to their advantage to get ahead of certain issues. The observation that Polish NGOs and environmental advocates were very active during this time period, well-educated (in sciences and/or law), and knowledgeable about EU environmental laws is borne out by my interviews with officials in the European Commission DG-Environment. Now a wider array of actors have learned how to use and be part of the system, such that NGOs that may have led or had an advantage during a certain moment no

longer have the same capacity to compel compliance with the help of supranational legal tools. Such an impression is bolstered not only by the particular time period and conditions surrounding Poland's EU accession, but also by the EC's exercise of its discretion during that time.

I again emphasize the development of legal consciousness at the interface between domestic and EU levels, during different time periods in Poland's relationship with the EU. On the one hand, environmental advocates in Poland have acquired perhaps somewhat inaccurate understandings and unrealistic expectations about the EC's willingness and ability to intervene in environmental enforcement actions. The EC's power to validate arguments for ecosystem protection continues to shape action in subsequent cases and understandings of those cases by would-be environmental advocates in Poland. On the other hand, the supranational rule of law project and those enacting it have their own institutional enforcement priorities and logics, in part because entities like DG-Environment are rather lean in terms of staff and resources.¹¹⁷

The EC's priority is first and foremost correct legal transposition, to get national legal systems in member states set up to function autonomously with respect to each legislative directive. "Law needs to be correctly written down before you can speak about something else," one interviewee emphasized. DG-Environment personnel are accepting of "sacrificial cases" in which an individual site or local level ecosystem might be destroyed, if such destruction is in

¹¹⁷ The EU pursues cases in the following order of priority: non-communication cases, non-conformity cases, then "structural" or "horizontal" cases. The first refers to a member states' lack of communication with the Commission about meeting legal transposition requirements and deadlines. Poland is a decided "leader" in such cases (Article 260 Paragraph 3 cases), according to the legal infringements unit staff member in DG-Environment with which I spoke. The second refers to the Commission checking content and wording of actual statutes to see that they accord with EU level requirements and Directives. The third can refer to legal transposition or legal application, but they must involve a widespread issue within the member state, not an individual case. Those cases require more robust evidence in order for the EC to take formal enforcement action.

service of what interviewees in the European Commission DG Environment frequently called “strategic” or “horizontal” gains.

Environmental advocates in Poland and staff in DG-Environment may have distinct vantage points, but in their interactions what is ultimately yielded in terms of legal consciousness—on the part of both sets of actors—is a distinct sense of the limits of EU-level legal mechanisms to apprehend and prevent harm to the biophysical environment, particularly if those are rooted in more deeply entrenched “mental frames” – historical, cultural, social ideas about the environment, about economic modernization and development, and about law itself and how it works and can be worked.

DG-Environment staff members defend their enforcement prerogatives while acknowledging the continued dissatisfaction of environmental organizations. For example, after describing her view of the negotiations between the Polish government and European Commission surrounding the S3 roadway as a decidedly successful outcome, one DG Environment staff person contrasted her own view with that of many of the Polish NGOs,

... Whereas if you talk to the NGOs they are still unhappy with this or that or whatever. I agree, the process can always be done better, but having a strategic assessment of all the roads in Poland is better than not having one, because that allows you to take the strategic decision, oh here we have a Natura site, here we have this etcetera etcetera, you take a decision at a more horizontal level whereas if you go...if it's [the individual route] already decided...there is no place for a decision anymore (R7).

The discussion with this individual and her colleagues provided much insight into how the EC “sees” the environmental governance system—necessarily with some detachment from individual or localized sites or investments in favor of seeing systemically, and in terms of whether there is sufficient scientific or legal evidence to build a formal case. Later in our interview I probed further about the interactions between Polish environmental organizations and the European

Commission's environmental enforcement agents. The interviewee's response illustrates another contradictory aspect of legal consciousness formation at the interface between Polish and EU levels—complainants are beholden to the EC's enforcement priorities and logics, which can lead to frustration and a sense that complaints are not being heard. At the same time, there is a validation of citizens' rights to contribute, complain, and try to hold public officials accountable. This external validation is essential for environmental advocates in Poland who operate in a political context rather closed to their arguments.

Do I see a change in Polish NGOs? Not really... We have yearly meetings with the Polish authorities where we discuss the infringement cases, and we have yearly meetings with the NGOs on the outskirts of that meeting. And, year by year, we try to explain to them what our priorities are, what we do, which cases are good to bring to us and which ones aren't, and it's a learning process and I don't think we are there yet. But on the other hand, it's their right. It's their right to expect from us. So maybe it will always be like that... You might be interested to know that some officials in the Polish government believe that they [NGOs] are there for a reason, against the Polish interests. I was surprised, because that's their right, to demand from us, to demand from the Polish authorities. That's their role to play, to make the lives of the Polish authorities uncomfortable, they are there to push them on the environment (R7).

The interviewee, herself Polish, repeated “it's their right” several times during this conversation, emphasizing her view that the role of non-governmental environmental organizations within this governance structure is to expect and push public officials to protect the environment, and even more broadly, to be accountable to citizens. The quotation above may seem banal, but it touches upon several core issues in Polish environmental politics and why the EU governance structure is so important, even if its ability to prevent environmental harm is limited—indeed it also creates conditions for more environmental harm. Relationships between civil society actors and government officials in CEE member states are marked by an enduring adversarialism. The administrative and political culture and dominant attitudes towards state-societal interactions are

still colored by socialist culture and the administrative state model (Grosse 2010). Many organizations see themselves as independent watchdogs rather than partners of the government or implementation agents, and they do not want to be perceived as co-opted by the state. At the same time, NGOs may be perceived by political elite and the masses and unaccountable and therefore non-democratic and illegitimate. Involvement of civil society actors in the policy process outside of majoritarian institutions is often considered clientelistic and non-transparent (Börzel et al. 2010; Fagan 2010).¹¹⁸ In this context, environmental organizations and advocates are continually put in an impossible position of proving they are legitimate and working in the public interest without ulterior motives or questionable funding sources while still pursuing their substantive goals. The EC staff member I quoted above affirmed that adversarialism between public officials and civil society may be appropriate, that environmental organizations may or may not work within the EC's enforcement logics or categories, but they are entitled to demand change anyway. That their aspirations are high, their demands for a high standard of protection insatiable, and their complaints incorrectly formulated—this may always be the case, but that is to be tolerated and even expected. The official neither has illusions that the EC is molding environmental organizations to its agenda nor that the governance system in Poland and the EU is moving toward working in cooperative, collaborative harmony. She accepts an inevitable incompatibility between the governmental and non-governmental sector, a division of labor between them which necessarily creates conflict and discomfort. “That is their right,” succinctly captures what is a validation of the exercise of procedural, civil, and political rights on the part of environmental advocates. This external validation is essential to environmental advocates in Poland, who operate in a context where there is a larger cultural dispossession of protest and a

¹¹⁸ Hence the proliferation of charges of “ecoterrorism,” working against the Polish interest, conspiracy theories about Russian influence, etc.

severing of political liberalism from economic liberalism (Ost 2005; Kalb 2009; cited by Gajewska 2015). European institutions like the Commission, irrespective of the actual outcomes of cases, are an anchor for legal and political arguments which might not otherwise gain as much traction domestically.

The Water Framework Directive

Perhaps no case better illustrates the dynamics described in this chapter—the contradictory processes and dual character of legal consciousness formation at the interface between Polish and EU levels—than that of the challenges associated with implementing water legislation. Since 2009, similar mechanisms to the ones described in this chapter, where the threat of blocking co-financing is combined with threat of legal infringement proceedings, have been occurring around anti-flood construction, river basin management, and the Water Framework Directive.

The Water Framework Directive came into force in 2000, and as the name suggests, it sets up a framework for managing water resources in an integrated way in river basin districts across Europe. It commits member states to protect and restore all ground and surface water (rivers, lakes, canals, coastal water) so that all river basin districts would achieve “good status” by 2015. Article 5 of the Directive obliges Member States to prepare an analysis of river basins, review the environmental impact of human activities on water, and analyze economic aspects of water use. This analysis is considered an indispensable initial step, a basis for other requirements in the Directive. According to the European Commission, an incomplete or inadequate transposition of the Directive’s Annexes is likely to lead to a faulty analysis, and river basin management plans may also be affected, with potentially negative consequences for human

health, water quantity and quality. The time order is important, as subsequent steps build on the initial analysis. Therefore one aspect of the European Commission's enforcement in this case, as in the EIA case described earlier, is correcting the time order of certain environmental legal processes and practices (See also Chapter Four).

The European Commission took enforcement action against Poland for failing to transpose European water legislation correctly.¹¹⁹ Polish water legislation fell short in a number of areas, including the transposition of some definitions provided by the Directive and gaps in transposition of the Directive's Annexes. The Commission was particularly concerned about the absence of Annex II, which outlines the characterization system for surface waters and groundwater, and about omissions in the transposition of Annex III, which should provide specifications for river basin district analysis, reviews of the environmental impact of human activities on water, and the economic analysis of water use. The monitoring of water status was also a cause for concern.

The Commission first sent Poland a Letter of Formal Notice on its implementation of the Water Framework Directive in June 2008. Poland's response did not address all of the Commission's concerns, so the Commission proceeded with a Reasoned Opinion in June 2010. The Polish government subsequently revised its water legislation in March 2011 and also adopted a number of regulations in November 2011. One issue here was the Water Framework Directive's many provisions on exceptions—for instance, Article 4, which lists exceptions to environmental objectives and what conditions allow for exceptions to be taken. Poland transposed this in 2005, but glaringly included only the exceptions, not the main conditions. The government remedied this in 2011, because of the threat of blocking co-financing: there

¹¹⁹ EC (2013b); For more information on Poland's river basins and water management scheme see also EC "River Basin Management Plans" (no date) and Błaszczuk (no date).

were projects using the conditions, but those conditions were not transposed into national law. The government understood it would run into funding problems with these projects, so this gave impetus to transpose the Directive.

Yet some of the issues identified in June 2010 were still unresolved, so in February 2013, the Commission brought suit against the Polish government before the European Court of Justice. Poland received a similar ECJ summons the previous month over nitrates and water pollution.

On balance, many member states, including the ones known for being more environmentally proactive like Germany, had difficulties implementing the Water Framework Directive. A reason often cited for this is the Directive's complexity, and related high costs and impracticality of putting its ambitious goals of dealing with water holistically across space and jurisdictional levels, into practice.¹²⁰ At the beginning of 2012, the EC had taken legal action against Belgium, Greece, Portugal, and Spain for not preparing river basin management plans.¹²¹ These cases and the Polish case attest to how time consuming the process of implementing this directive has been. The deadline for transposition was 2004, and a decade later, Poland had not sufficiently done so.

Once again in this case, a DG-Environment staff member acknowledges the limited reach of law, and notes a distinct source of the problem, a way of thinking not only about law but about

¹²⁰ Germany extended its deadlines to meet Water Framework Directive objectives from 2015 to 2021 and 2027. Germany's three-tier state administrative structure has been an obstacle in this case; there is a disconnect between lower and higher levels in terms of information sharing. An EC report from November 2012 on Poland's implementation of the Water Framework Directive river basin management plans shows similar disconnects, and multiple layers of authority (Freyberg 2013).

¹²¹ UK Lords Select Committee Report on EU freshwater policy 2012, "An Indispensable Resource: EU Freshwater Policy," 33rd Report of Session 2010–12, cited in (Freyberg 2013).

rivers. This way of thinking is rooted in economic modernization narratives and tenets that can be traced back to the era of Communist-Party rule, and, relatedly, to the technical training of hydro-engineers in Poland during the 1970s. The sort of legal nudging the EC can do would not be enough to overcome these deeply entrenched ideas about economic modernization which encourage environmentally invasive practices.

R7: ...but the Water Framework Directive is a different problem in Poland, it's not a problem of transposition, it's a problem of change of mind. This is similar to Rospuda and the EIA in the sense that there was this law and they disregarded it, or they interpreted it in a way that meant nothing, and they are trying to apply the same logic now to the Framework Directive, and it's going to be a hard lesson for them.

Me: What is at stake?

R7: (laughs) co-financing as usual [...] it might be interesting for you that for right now the biggest problem Polish NGOs see with environment, and I would tend to agree with them, in terms of application of law on the ground, is with water. 'Cause there's a mental shift needed in the water authorities, and a mental shift isn't easy to achieve. ...A lot of authorities in Poland, have a kind of [frame] of mind from the deep 70s, that we have water, river bed, and we need to regulate it. I'll give you an example. At one of the conferences, one of the Polish authorities responsible for water expressed [...]: We have so many rivers that are regulated, and so many rivers yet to be regulated. So, already regulated, and still to be regulated. They cannot consider that the river can just be. This is the mental shift that's needed (laughs). ...it's probably not every single one that has this [frame] of mind, but there's a lot of them (R7).

Paradoxically, EU funding may in fact further entrench environmentally invasive economic modernization accounts and practices, and at the same time further insulate the state from scrutiny related to such projects. A long-time environmental activist describes how he sees this working, noting the environmental destruction that has occurred and how the European Commission's role could have been otherwise. I quote him now at length, as his comments touch upon many of the points I have made throughout this chapter about a dual legal consciousness being formed at the interface between Polish and EU levels.

[...] We are seeking right now to have this instrument [blocking co-financing] be used in water management. Because unfortunately they devastated rivers with

EU money, I don't know if someone told you about this. [Colleague name] in WWF tracked this. What happened with the rivers, small and medium rivers, this is some kind of massacre ("masakra"). Using a mechanical saw, bulldozers. They estimate that some 16,000 kilometers of river were destroyed. Through deepening, cutting down vegetation...some kind of annihilation ("total"). And this was with EU money. And the EU is working very slowly, because we have been harping about this for ten years, that the Water Framework Directive is being violated. And in the end....and also this is one of these legal elements I would say, but, not related to one concrete investment, but related to an entire program, or the entire activity of the government, so this kind of large issue. Violation of the Water Framework Directive for rivers. Mainly WWF did this, but other organizations too: [names two other groups]. And here...I would say...the most effective method would be if they were to put a hold on the money. If they said nope, you broke the law, we can't use EU funds to break the law (laughing)... But this was this kind of shower, this kind of similar shower like the one that they talk about from the year 1997. That then (laughing), putting a hold on the money, taking back the money, meant that they would have to change the policy. When they get [the money] now, right now they're doing this kind of, this kind of, post factum lipstick, they are doing this kind of...an environmental impact assessment of something that has already happened. They already destroyed the rivers, and now they want to do an environmental impact assessment, so some kind of absurdity. They complete the documents...it just makes no sense ("kosmos") to somehow legalize this...so if this happens, nothing is going to change. They are going to keep [destroying] the rivers. Besides that they will just find more clever ways to scheme (sprytniej kombinować).

So this, from the front lines, so to speak, this is something that hurts me even more than shale gas, because shale gas hasn't happened yet, but the rivers happened. Here it came to, despite lots of positive things happening related to environmental protection, with the rivers it has come to shambles. Because, you know how it works, when a river meanders and it is to some extent re-naturalized, it has vegetation...they straighten it, they make that trapezoidal shape and they deepen it and make a canal out of it or drainage. And they are satisfied, because 'we've made a flood-control investment.' ...

...This is, you know, golden rain. They've never had this much money. They say, you guys have 100 million złotych to make use of, you have to prepare the documents quickly, what, quickly? So what do we know how to do? We cut through rivers. And 100 million, that's that, they divide it up, and...it's cash....If they needed to, if there were to be told, listen, but you guys need to do this in such a way such that rivers get re-naturalized. So, to do for example... we've been saying this for years, instead of going into the wild rivers, go to those leveled out rivers and try to restore them, right. (laughing) That's what they do in the West using this money. Yeah, this requires more...indeed—knowledge, information,... some new engineers are needed. Some of these grandpas don't know how to do this. This is true. But if there were told, if policy went like this, that only for this are you getting money, pssshhh, they would learn. They learn quickly. In half a

year everyone would rushing to do pro-ecological projects. I'm not kidding—if you only knew.

...The Commission acted very slowly here. The Commission found out about this, and they sent this note to the government, and it was [done] very bureaucratically. We lost ten years. In those ten years they, I don't know, undid several thousand kilometers of river. It was possible to have put a stop to this much earlier. Because we know that the Commission can. That the Commission can say, no, these activities are activities in conflict with the Framework Water Directive, we can't finance this. This is straightforward. We have been repeating this for these 15 years, or 10 since we've been in the EU, but already earlier we knew what was going on but, here... (sighs)....this also shows that there is a weakness in all of this.... How laws—because the laws aren't bad, the Water Framework Directive is written clearly, right. There is good interpretation. We know what a good state of water is. It's not just clean water, it's the entire ecology, an entire ecosystem. In other words, it means the river valley is in good condition. It's nicely written. But it is implemented completely wrong. Or it's not implemented. It's like my friend said once, when we did this kind of assessment of this. He said, on paper, everything is going to be great. On paper they will square accounts with the European Commission. But in real life, nothing will come of this. Because that crew is only trying to come up with a ways to get around this. And this, unfortunately...[colleague name] this person who deals with water management and works in the World Bank ...he said that, this was already ten years ago, we were at a seminar about the Baltic. And I asked him to do an assessment of the water management in the Water Framework Directive...He said that in the documents everything will add up, but when it comes to the approach, the spirit of this Directive, they will go their own way, and they will demolish these rivers. And unfortunately this was a good prophesy. Unfortunately. (laughs) So, I talk about this like...when I start talking about this I start seething (gotuję się), because I travel and see what this looks like in this country. ...

And I think that in the end, one day we will win. Of course this might be a desert by then, right. Unfortunately this is a risk. It's a risk, unfortunately, looking at this sluggishness (opieszalność). This is disappointing ... If you were to talk with [another colleague name in WWF]... he puts this even more strongly. He says that we simply lost ten years, that our concerns were not taken into account and ...the devastation could have not come to pass. ... And I'll say honestly, that I personally didn't believe that it would go so much that way, that badly. When I saw their report, that this is eleven thousand kilometers of rivers, or sixteen—they're estimating. The government isn't even leading this [research] ...because they [WWF] did this with scientists from the University, this kind of research on the amount per province (województwo), and they estimated. We don't know, it could even be more. But that 16 thousand, that maybe 25 percent of all the rivers, they took care of one fourth of the rivers! And this in the course of, I don't know, five years! Cash ("forsa") has its way with people... (R37)

Several points from this interviewee's discussion of the European Commission's role in environmental law enforcement and the devastation of water ecosystems in Poland warrant emphasis and elaboration. The interviewee's involvement in environmental-legal issues at various jurisdictional levels and his direct observation of environmental damage on the ground have shaped a trans-scalar, structural critique of law. He recognizes that European Union funding is propelling forward the very environmental destruction its environmental legislation seek to prevent. At the same time, that environmental legislation is strong in its formulation; it puts forth a holistic, ecosystem view of environmental quality. He says "we know that the Commission can,"—that is, it would be possible for the European Commission to refuse funding for projects which do not honor the European Community's environmental commitments. He criticizes the Commission for being sluggish and bureaucratic in its approach, an approach which has contributed to widespread environmental devastation and which fosters a procedural accounting between member state governments and the European Commission, spatially and temporally remote from biophysical harm. He recalls colleagues' predictions that "on paper" Poland will square accounts with the Commission, but in "real life" practice the spirit of the directive—protecting river basin ecosystems—will be violated, and deems those predictions accurate. The comparison between the late 1990s and more recent years illuminates his conclusion that compliance which can be induced by the European Commission, although it has power in its control over purse strings, is limited in its depth and endurance. In the former, earlier period, newer member states were shocked and scared into compliance with EU policy. In the latter, they adapt and learn to more skillfully engage with the European Commission in what the interviewee calls "post factum lipstick," papering over of already perpetrated environmental harm. Member states neither change policy, nor restructure their overall approach

to how things are done, but gain cosmetic legal endorsement to continue well-entrenched existing practices. He is confident they, the environmental advocates, will “win”; their legal and scientific arguments are sound. But the price of the drawn out, bureaucratic process will be the very ecosystems they are trying to save. Observing the destruction first hand, and knowing it may have been possible to prevent, causes hurt and anger.

The report he refers to at the end of the quotation (Jabłońska et al. 2013) notes the violent speeding up of river ecosystem degradation since EU entrance, funded by the flood (pun unintended) of development aid into Poland, which is in violation of EU and Polish environmental commitments. The degradation results from the regulation and deepening of thousands of kilometers of river, without any substantive scientific or economic justification and using an anachronistic technological method, flying in the face of ecological best practices. For about a decade, WWF Poland, other environmental organizations, and the scientific community has been trying to draw attention to this problem, but the Polish Ministry of Environment did not taken action, and the degradation of river ecosystems continued apace. However, there was a lack of data which would allow discernment of the scale of this problem. No central institution in Poland conducted a systematic register of all inland water hydro-technical projects – the report was an attempt to portray the scale of the problem of these so called “river maintenance” projects. Mainly this “maintenance” consists of deepening rivers by removing a layer of deposits from the bottom of the river, deposits integral to the river ecosystem, in doing so often creating a trapezoidal profile of the river bed. Most often the justification for this type of work is flood prevention and control, and/or related to agricultural land use.¹²²

¹²² Some of these projects may actually exacerbate flood risk along larger rivers (Jabłońska et al. 2013, p. 8).

The report is the first attempt to estimate the scale of these activities in Poland, based on projects announced on Provincial Water Management Board websites. The report covers ten Provinces, those with data available and representative of various regions in the country. The authors note that the report touches upon not only the Water Framework Directive but the Nitrates, Habitats, Birds, and EIA Directives—thus they take a holistic view of EU environmental policy. The report's authors estimated that at least 5612 kilometers of rivers and their tributaries in the ten provinces studied were affected by this river deepening work. Extrapolating to the other six provinces in Poland, they estimated that about 9000 kilometers of river were affected by these processes in just the three years preceding the publication of the report. (For comparison, the Wisła River, the largest in the Baltic drainage basin, is 1047 kilometers long) (ibid, p. 3). The report also tried to estimate how much money was spent on such investments, much of it from EU funding sources, since Poland had been in the EU. Although data to address this question was also difficult to find (and tease out from money allocated for environmental protection investments), they estimated this number to be about one billion PLN (ibid, pp. 8-9).

The report emphasizes the misnomers in the development projects' representations, as well as the lack of accountability to the public,

It is worth emphasizing that so-called 'maintenance' work, practically devoid of institutional and public control of its environmental effects, are a systematic violation of the Water Framework Directive and the EIA Directive, resulting from improper transposition of these directives into Polish law and their incorrect implementation (ibid, p. 4).

The report ends with a detailed commentary by WWF and *Klub Przyrodników* (The Naturalists' Club) on the Ministry of Environment's proposed legislative changes to several laws,¹²³

¹²³ *Projekt 2012-12-18 obejmujący nowelizację ustawy Prawo wodne, ustawy o ochronie przyrody, ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o*

presumably action taken by the Ministry in response to criticism about its approach to inland water regulation. Despite some positive aspects, the organizations assert that the changes will lead to increased pressure for environmentally destructive practices on inland water ecosystems and simultaneously would weaken institutional and public scrutiny of the planning and execution of maintenance projects.

The report and the interviewee's assessment connect individual instances of environmental destruction together into a trans-scalar, structural account of environmental governance in Poland, as situated within the EU governance structure. This critique of law is built partly in and through participation in administrative legal processes, where an "overview" of the governance structure and how it operates is acquired. Such accounting for environmental harm enables the drawing of connections between individualized instances of directly observed environmental harm and the governance system at various levels. When the interviewee said that this is a legal issue "not related to one concrete investment, but related to an entire program, or the entire activity of the government," he is engaging in just this sort of analysis. This is precisely the sort of systemic thinking that EU Directives and EU environmental enforcement agents aim to cultivate, except that the enforcement priorities of the European Commission dictate an emphasis on legal transposition. Cases of bad application of community law are more difficult to build, and are more appropriately dealt with nationally. Although the EC may acquire information from member state citizen group complaints about what is happening on the ground, it does not "see" complaints as useful to building a formal legal case, unless they are proven to be strategic or unless sufficient evidence is provided, in the EC's understanding of

ocenach oddziaływania na środowisko [Project 2012-12-18 regarding amendment to the Water Law, the Law on Environmental Protection, the Law on Access to information about the environment and its protection, public participation in environmental protection and on environmental impact assessments]

those terms. This is simply easier for the EC to establish and analyze in cases where what is at issue is legal transposition, writing the law down. The following quotation illustrates the disconnect between received complaints—which often try to *integrate* legal transposition and application—and the European Commission’s own enforcement logics—which often must separate the two, often at the expense of the biophysical environment itself. A staff member in the DG-Environment legal infringements unit describes her view of citizen and NGO complaints,

I mean, they probably believe that they are very strategic – I’ll give you an example, I won’t name the guys. They wrote a huge complaint about the Water Framework Directive which took me 26 pages to reply and close the complaint, because there was nothing was justified. [Complaints are normally 1-3 pages, maybe 5.]...They had a huge amount of complaints. And they are very proud of themselves. I told them, not in the [complaint response] letter, but in private, during the NGO meeting, it’s a waste of my time. Consider it, I’m only one person, and you’re using my time for this and not for something else. But it’s a learning curve...they do...they are very valuable for us in the sense of knowing what is happening on the ground. I mean I can make fun of them about their complaints, but it tells you what happens on the ground.

...

Me: So you would rather get the long complaint than not?

R7: That particular one was really a waste of time in the sense there was just their complete misconception of what is transposition, what needs to be written in the law, and what is bad application. Bad application is much more difficult to justify and build the case, because in bad application you need to bring examples and quite a lot of examples, to show that it’s a systemic problem and not individual, that this authority happened to do this. And in transposition you say it hasn’t been transposed correctly and you analyze it. But [in bad application cases] the analysis has nothing to do with transposition, it’s how they apply the law. So it’s a different level. But as I say, this is an important link to real life, to what is happening on the ground...It’s normal in a way that they would refuse to hear it [the feedback]. We keep telling them we want strategic stuff and they keep sending us stuff that’s not strategic. Although they believe it’s strategic.

Direct experience and intimate familiarity with particular instances of environmental harm, and connecting those to the larger approach of the government and the EU governance structure, is precisely what is mobilizing, and mobilized, in Polish environmental advocates’ complaints.

This quotation, the comment “although they believe it’s strategic,” however, illustrates the rift

between domestic environmental advocates' legal consciousness formation processes and legal mobilization and supranational environmental enforcement actors' more narrow mandates, limited resources, and the particular ways complaints need to be formulated in order to be acted upon by European enforcement institutions.

In fact, those working on legal infringements in DG-Environment emphasized that much of the pertinent information needed for infringement proceedings did not come from individual citizen complaints, but rather from the EC's own "conformity checks," in combination with at times more scientifically and legally professional complaints which provide more of the "overview" the EC seeks,

When we look at complaints, the motivation doesn't matter, whether somebody is truly concerned for the environment or just for his own home, it's not a factor that you take into account. My observation, however, is that it is only[...] the NGO concerned with the environment, which is capable of providing sufficient information on either which particular project, program, whatever, or about law not being correctly transposed. Whereas if you have individuals, they are less likely to come with valuable and reliable information, they have less of the overview if you like. And if you have NGOs that are concerned about a project and "not in my backyard," they are usually focused just on that particular investment, and not seeing true systemic problems...So my analysis of complaints, you don't really get that much information from complaints. You get a feeling that maybe the national authorities or the local level made some mistake there, but sometimes people are not even capable of providing you with sufficient information to say what, let aside the fact that we would not interfere with individual cases of bad application, and we would advise them to continue at the national level (R7).

The purview of the EC, as opposed to what should be dealt with at the national level, is delineated here, nonintervention defended, and environmental harm unmentioned.

When I probed further about complaints, and asked what, if any, changes the interviewee has observed over time about DG-Environment's interactions with citizens or NGOs, her answer speaks to, and indeed helps summarize some of the main dynamics discussed in this chapter

regarding the European Commission's way of seeing and legal consciousness formation processes at the interface between Polish and EU levels. Individuals directly observing environmental harm, in combination with perhaps inaccurate and inflated expectations of the EC's ability or willingness to intervene in domestic environmental conflicts which were shaped early on in Poland's EU membership, may lead to dismay and disappointment, but also necessarily a more holistic, trans-scalar, and structural critique of the legal system and how it is embedded in a broader cultural and political-economic context. The individual described in the following quotation, for example, may have gotten the somewhat inaccurate impression that the EC can act in a timely way and effectively to solve problems,

... What I have noticed, is that in the old days, before the strategic or systemic problems, when there were more systemic problems that hadn't yet been solved, not saying that there aren't any anymore, but, there more complaints from individuals that touched upon systemic issues, and that is gone now. Probably because those issues are gone now. But that was amazing that you could get a complaint from an individual, ... capable of seeing through the system and saying this is not a correct transposition, this is not how the system works (that particularly concerned the EIA Directive which provides access to justice and public consultations). ... This was part of a nonconformity check procedure [which] was already open, and we got this guy's letter in parallel. In that case it was quite funny, because I was able to tell him in six months that it has already been solved, which does not happen very often that I'm able to get back to someone immediately and say that it's solved (R7).

In this interviewee's view, there are less systemic issues than before, as they are "legislatively solved." Individual complaints, in this way of seeing, have less and less of a chance over time of (accidentally or consciously) putting a finger on a systemic problem. Whereas in environmental advocates' views, the systemic problems have not been solved and many see their complaint, based as it may be on an individual case, as an instance of a wider problem, a problem which cannot be solved by making sure laws get written down properly.

Conclusion

In this chapter, I have shown how the EU governance structure comes to be understood by environmental advocates in a dual fashion. On the one hand, it is a source of political and legal opportunities that provides external validation of citizen efforts to hold governments accountable to environmental protection rules, as well as validation of environmental protection arguments based in ecological and biogeographical science. The European Commission's access to vast technical expertise and its broad discretion to decide whether or not to pursue enforcement, backed by financial consequences, facilitates its ability to provide external legal and scientific accountability—and impressions of this ability.

On the other hand, the EU governance structure is a cause of much of the very environmental destruction environmental advocates are fighting against. Direct witnessing of environmental harm and trying to document and trace its sources across scales makes this clear to environmental advocates. The EU's development aid can reinvigorate and further entrench preexisting visions in Poland regarding economic modernization, mobilizing existing resources behind enacting such visions and further insulating the state from scrutiny.

These two aspects of the EU governance structure are in productive tension, which can be seen upon examination of legal consciousness formation at the interface between Polish and EU levels. EU level enforcement actions are concentrated sites of scalar flux, where various state and non-state actors' rescaling attempts interact and compete. The cases I detailed in this chapter have illustrated these dynamics. While EU level actors may be most concerned with laying formal legal infrastructure, and Polish state actors may be most concerned with laying transportation infrastructure, environmental advocates may be most concerned with maintaining biogeographical ecosystems from the local to continental scale.

Ultimately, my data point to the limits of formal, supranational law's reach, absent a more sustained shift in domestic practices and ways of thinking about the biophysical earth. The EU's various policy and legal prerogatives may at the end of the day work at cross purposes. Nonetheless, the external validation of the EU governance structure is indispensable in a domestic political context significantly closed to environmental protection interests. The EU's legal enforcement mechanisms, however limited, still lay legal infrastructure, more expansively designate biophysical entities to be protected from harmful practices, and at times correct the course of development projects towards more environmentally benign practices.

Although they can be nudged along with help "from above," environmental enforcement efforts must also ultimately achieve resonance across domestic levels of regulation and enforcement in order to be effective. In the previous chapter, I looked at the critique of law being built through interaction with the administrative legal system in the process of enforcing environmental protection commitments within Poland. The process of changing course, of correcting "widespread disregard for environmental legislation," consists in part of reckoning with and confronting conflicting spatio-temporal logics within and among legal regulation regimes. Broader mobilization efforts, which draw more attention to the political-economic system, how it operates, and the energy sources fueling this development, also appear necessary to change course. It is to such broader mobilization efforts I now turn.

Chapter Six

“Even Mickiewicz Can’t Breathe”: Mobilization against air pollution in Kraków

They started up the horse—the kibitka
moved—
He raised his hat, called loudly to the host
Three glorious times: “Still Poland is not
lost!”
They fell into the crowd—but his hand,
raised in that manner
To Heaven, his black hat like a funeral
banner,
That head, by shameless tyranny made bald,
Proud and undaunted doth from far
proclaim
To all the world his innocence, their shame,
Stands o’er the background of black heads
that swarm
Like a dolphin leaping, herald of the storm—
That hand, that head my vision have
enthralled,
And will be in my thoughts—there they will
show
Where virtue is, and whither I should go!

If I forget them, God in Heaven, Thou
Forget me too!

-from *Forefathers* Part III by
Adam Mickiewicz, 1832
(Mickiewicz 1968, pp. 150-151)

A wtem zacięto konia –kibitka runęła—

On zdjął z głowy kapelusz, wstał i głos
natężył,
I trzykroć krzyknął: «Jeszcze Polska nie
zginęła.»
Wpadli w tłum – ale długo ta ręka ku niebu,

Kapelusz czarny jako chorągiew pogrzebu,
Głowa, z której włos przemoc odtarła
bezwstydna,
Głowa niezawstydzona, dumna, z dała
widna,
Co wszystkim swą niewinność i hańbę
obwieszcza
I wystaje z czarnego tyłu głów natłoku,

Jak z morza łeb delfina, nawałnicy wieszczą,
Ta ręka i ta głowa zostały mi w oku,
I zostaną w mej myśli - i w drodze żywota
Jak kompas pokażą mi, powiodą, gdzie
cnota;
Jeśli zapomnę o nich, Ty, Boże na niebie,
Zapomnij o mnie. –

-z III części *Dziadów*
Adama Mickiewicza, 1832
(Mickiewicz et al. 1998, pp. 209-210)

On a foggy Friday evening in October 2013, a funeral procession made its way through the cobblestone streets of the Old Town in Kraków, Poland. Hundreds of attendees gathered for the procession in the main square, underneath the famous statue of revered national poet Adam Mickiewicz. This area, a central meeting place for locals and tourists alike, is usually buzzing with a particular type of energy—that of a University student nervously clutching a red rose waiting for his date, or of a raucous group of friends awaiting the last of their party before

heading to a nearby pub, or of tourists feeding pigeons and snapping photographs. On this hazy night, however, that energy was muffled by a distinctly different mood.

Mickiewicz's dark statue loomed over the darkly-clad crowd, and, like many attendees, was wearing a white dust mask. Many held black funeral flags, or signs with black-and-white stenciled images of the classic and instantly recognizable Cracovian couple donning folk attire, a woman with a flower wreath in her braided hair and a man wearing a hat with a peacock feather. These signs, however, added a novel, jarring element to the folk costumes: gas masks (See Figure 10, *Air! A new representation of the Cracovian folk couple*). The crowd began marching to the somber beat of funeral gongs.

The procession made its way down Floriańska Street, through St. Florian's watch tower, a node in the 14th Century city walls, and ultimately ended at the entrance to the seat of the regional government, the Lesser Poland Regional Executive Board (*siedziba Zarządu Województwa Małopolskiego*). Here, a coffin and wreaths were laid, and the hushed crowd waited for remarks to be made about the deceased. A banner laid next to the white, wooden coffin read, "Why are you letting us be poisoned?"

As the above description suggests, this was no ordinary funeral march. The deceased, and the contents of the coffin, was air. Specifically, Kraków's air. It is no exaggeration to say that Kraków's air quality can be fatal, particularly during the colder months when some residents¹²⁴ burn solid fuels—mostly low-grade coal, but also other materials including domestic waste—for household heating, releasing pollutants into the air as a result. The pollutants—also caused by motor vehicles, local industry, and air borne pollutant inflow from elsewhere in the region—subsequently are not dispersed, due to Kraków's geographical location in a valley and

¹²⁴ less than 10 percent

low number of windy days. Kraków's air has ranked among the most polluted not only in Europe, but the world (where data on annual mean concentrations are recorded). In a World Health Organization (WHO) study, Krakow ranked eighth among 575 cities globally for levels of PM 2.5 (particulate matter of 2.5 microns or less in diameter) and 145th among 1100 cities for levels of PM 10 (particulate matter of 10 microns or less in diameter). Exposure to small particulate matter of 10 microns or less in diameter causes serious acute and chronic health problems, including cardiovascular and respiratory disease, and cancers, which in turn lead to premature death (WHO 2014). Kraków also made the rankings of the European Environment Agency in the fall of 2013, in which 400 European cities were compared for how many days the acceptable daily concentration for PM 10 was exceeded. Kraków received third place—in 2011 the norms were exceeded on 151 days (an average for three monitoring stations), even though European Union (EU) law states they should not be exceeded more than 35 days per year (KAS).

Each year, pollution levels in Kraków regularly and dramatically rise above “safe” levels for particulate matter. For example, in the winter of 2012, Kraków experienced only three days of “safe” air, meaning that the 24-hour mean PM10 concentration was below 50 $\mu\text{g}/\text{m}^3$ (KAS 2012, p. 2).¹²⁵ Air pollution monitoring devices regularly record levels of PM 10 as high as 300 to 400 $\mu\text{g}/\text{m}^3$, concentrations exceeding the so-called maximum safe level of 50 $\mu\text{g}/\text{m}^3$ by 500 percent. In 2012, it is estimated that about 80 percent of the urban population of Kraków was exposed to air pollutant concentrations above EU air quality objectives for PM10 (50 $\mu\text{g}/\text{m}^3$) (EEA 2014, p. 10). Particulate matter pollution in Kraków is estimated to be the source of 300 to 600 deaths annually, which could be avoided if WHO standards, or even the more lax US

¹²⁵“Air quality measurements are typically reported in terms of daily or annual mean concentrations of PM₁₀ particles per cubic meter of air volume (m³). Routine air quality measurements typically describe such PM concentrations in terms of micrograms per cubic meter ($\mu\text{g}/\text{m}^3$). When sufficiently sensitive measurement tools are available, concentrations of fine particles (PM_{2.5} or smaller) are also reported.” (WHO 2014).

Environmental Protection Agency Standards ($150\mu\text{g}/\text{m}^3$ for 24-mean PM₁₀ concentration), were met (Jędrak). Nonetheless, WHO guidelines for particulate pollution recommend achieving the lowest concentrations of PM possible, given that PM exposure has health impacts even at very low concentrations, with no threshold having been identified at which no damage to health is observed (WHO 2014). Particulate matter is only one of a suite of air pollutants of concern in Kraków and other cities, discussed here because it is arguably of greater relative risk to human health.

Thus through this impressive mobilization, of which the funeral march was a culmination, residents of Kraków asked their regional and local elected officials to take action to improve the air quality. More concretely, the funeral procession was directed towards Vice Marshall Wojciech Kozak and his Lesser Poland Regional Executive Board who were to vote in the coming month on a solid fuel ban in the city, not unlike legislative measures instituted in other cities with smog problems, such as London beginning in 1956 (Urbinato 1994). The immediate goal of the march was to demand that the Regional Council pass the ban, an action the Council had the legal authority to do under Article 96 of Poland's Environmental Protection Law. This symbol-laden action was organized by the Kraków Smog Alarm (*Krakowski Alarm Smogowy* or KAS), a grassroots initiative started by residents of the city who were fed up with the terrible air quality they and their loved ones had to endure. The march forcefully showed that Kraków residents wanted air; indeed, that was one of the chants during the funeral ("*chcemy powietrza*"). Other chants were about children's health; another asked members of the regional government what air they breathe. Another chant tapped into Poland's national symbolism while merging it with an urgent public health issue: "Even Mickiewicz can't breathe" ("*Nawet Mickiewicz nie może oddychać*").

One month after the funeral march, the Lesser Poland Regional Assembly (*Sejmik Województwa Małopolskiego*) passed a resolution specifying which fuels could be used in Kraków, banning the use of solid fuels for domestic heating purposes, a ban which was to take effect in 2018 for existing buildings and for new construction in 2014.¹²⁶ It was an unprecedented, and, even to the last moments of voting, unexpected success. The ban's passage was unexpected, because the clean air advocates had many opponents, including people associated with the coal furnace industry. Opponents argued that this ban was a violation of fundamental Constitutional principles of law and order (*praworządność*), equality, and freedom to conduct business activity. In addition, they argued the ban was unfair to the less well-off, that it would hurt Kraków's poorest residents who would have to pay to have their furnaces converted to the centralized system and then have a "choice" between paying expensive utilities bills or freezing. At the same time, more wealthy residents could still enjoy their wood-burning fireplaces, since technically they weren't being primarily used for heating purposes, but rather for "ambiance." Further, the Regional Assembly did not have the legal authority to ban fuel types; thus this was an overreaching of authority that would not uphold legal scrutiny. The ban's passage was unprecedented, because never before had a grassroots movement in Poland mobilized so powerfully and effectively against coal, the basis of Poland's entire energy structure often invoked as a national Polish treasure, and against the coal industry, perceived as untouchable, especially by legislators.

Backlash against this legislative milestone ensued straight away, as two administrative lawsuits were brought against the ban. The Regional Administrative Court (*Wojewódzki Sąd Administracyjny*, WSA) found that the ban constituted an overreach of the Regional Assembly's

¹²⁶ Resolution from 25 November 2013 nr. XLIV/703/13 (*Uchwała z dnia 25 listopada 2013 r. nr XLIV/703/13*)

legislative authority, which neither allows for banning fuels outright nor distinguishing them based on the purpose of their use; it could only provide guidance as to the fuel quality or chemical properties of certain fuels.¹²⁷ This decision of the Regional Court was subsequently appealed to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA) by KAS. According to KAS, local authorities had been denied their legally endowed authority and Constitutional obligation to protect life and health. Thanks to a particularly robust bundle of procedural rights' protections for environmental organizations in Poland anchored in domestic law and bolstered by EU and international law, environmental organizations can become “sides” (“*strony*”) in such proceedings (See Chapter Three). This is how KAS, along with one of the organization’s sources of legal expertise throughout the entire campaign, ClientEarth Poland, were admitted into the proceedings.

While the case was awaiting adjudication in the Supreme Administrative Court, the ban technically applied, which meant that any newly constructed buildings could not have solid fuel furnaces. Despite the uncertainty of the ban’s fate, KAS continued with its campaign, which included subsidy programs for replacing old furnaces, particularly for low-income residents who would bear greater costs related to switching to gas or electric heating.¹²⁸ Using events in Kraków as a model, KAS and ClientEarth also moved forward with helping organize campaigns in other Polish localities where residents were organizing for cleaner air,¹²⁹ in the hopes that the successes in Kraków could be replicated elsewhere. Such campaigns were set in motion other

¹²⁷ Case signature II SA/Kr 490/14

¹²⁸ Between 2013 and 2015, eleven thousand old or inefficient furnaces and boilers were eliminated, and 2,300 buildings underwent renovation of their heating systems. Much funding for these efforts come from EU funds, part of its Regional Operational Program for Lesser Poland for the years 2014-2020 (*Regionalny Program Operacyjny Województwa Małopolskiego na lata 2014-2020*). As many as 420 million Euro were allocated for regional energy policy (Województwo Małopolskie 2016, <http://www.malopolskie.pl/Wydarzenia/index.aspx?id=15819>)

¹²⁹ or even simply more aesthetically pleasing surroundings, as with the organization in the Lesser Poland Province “Made in Zakopane”

localities near Kraków in the Lesser Poland Region (Zakopane, Podhale), and eventually in about ten other localities, mostly in Southern Poland, in the Silesia and Lower Silesia Regions (Śląsk, Dolny Śląsk), as well as Poznań in the Greater Poland Province (*województwo wielkopolskie*) and Warsaw in the Masovia Province (*województwo mazowieckie*).

The Supreme Administrative Court upheld the lower court’s decision invalidating the solid fuel ban in Kraków.¹³⁰ Anticipating this result, KAS resolved to pursue an amendment of Poland’s Environmental Protection Law in the Polish Parliament, specifically to make Article 96 of the law less ambiguous about the authority of subnational governments to pass such bans, and in this way have a legal means to meet domestic and EU air quality requirements. Thanks to KAS’s organizing efforts, the amendment to Poland’s Environmental Protection Law came to be popularly known as the “anti-smog act,” and it was (also unexpectedly, given the political implications for the coal sector and the timing just before Parliamentary elections) passed and signed into law by President Andrzej Duda in October 2015.¹³¹ Meanwhile, the European Commission pursued infringement proceedings against Poland by for failure to meet air quality requirements (EC 2015c). Once the national law was in place, KAS once again pushed forward a resolution in the Lesser Poland Regional Assembly (*Sejmik Województwa Małopolskiego*). The Assembly—this second time around—passed a resolution banning domestic solid fuel burning, to take effect in September 2019.

One interviewee described this second round of local legislative activity enabled by a national legal amendment, and the ways it was different from the first round, as follows:

¹³⁰Case signature II OSK 255/15

¹³¹Forty well known doctors, pulmonary specialists, allergists, cardiologists, and oncologists appealed to the president to sign the bill into law, arguing that air pollution can kill anyone—children, adults, furnace producers, coal miners, and politicians all the same. Thousands of people, by way of Krakow Smog Alarm, signed on in support of the bill.

We finally have a [national] law with less legal uncertainty surrounding it. Now on its basis, the Regional Assembly can create a new resolution and introduce a coal ban for Kraków. This time we don't have to fight with the Regional Assembly anymore (smiles). The Marshalls (marszałkowie) themselves have already said that the new resolution would be passed by the end of the year. A lot has changed in the understanding and consciousness. Maybe it won't necessarily be as easy as I think, because the resolution will be consulted, and that means those who are against it have a chance to show what they can do. But I'm hoping for the best (R40).

The funeral event for Kraków's air, the struggle to pass and implement legislation that would ban solid fuel burning in the city, the lawsuits and legislative activity which resulted, the societal mobilization in other locales around this issue, and the larger struggle in Poland to reckon with a coal-dominated fuel base, raises many questions about social movement politics in Poland, Central and East Europe, and elsewhere, as well as the role of law in attempts to improve environmental quality.

Given that existing environmental air quality regulations are so routinely breached, not only in Kraków, but in cities throughout Poland, Europe, and the world, why do social movement actors turn towards the law in their struggles? To what extent do legal tools and discourses strengthen or weaken grassroots social movements, help them, or hinder them from meeting their goals? Why and how are national symbols and discourses mobilized during such struggles, and how are they perhaps re-defined as a result? To what extent does scale matter in such struggles, specifically social movement actors making interconnections between local, regional, national, and international processes? How do such place-based struggles connect with, inspire, or affect other place-based movements? What is the role of more professionalized legal actors and organizations, as well as transnational advocacy groups, in such struggles?

I address some of these questions in this chapter by focusing on how KAS became a "side" in legislative activity in Poland and with what broader implications for political and legal

mobilization and democratic governance. In this chapter and the next, I further expand upon and elaborate the concept of “becoming a side,” by examining how grassroots actors engaged in “contentious politics” move from protest to proactive policy formation, following Romano’s (2012) study of Nicaraguan movements against water privatization. I further substantiate the argument I have been making in previous chapters, that the normative structure and argumentation, as well as the practical access to state structures and practices afforded by administrative law, are significant ingredients facilitating increased involvement in governmental law and policy making. Furthermore, again following and building upon Romano’s (2012) work, I argue that social movements’ creation and maintenance of *extra-institutional* democratic spaces and practices *alongside* use of formal institutional accountability mechanisms in parallel, and the scalar re-structuration processes such parallel endeavors entail, have enabled an expansion of “the contours of democracy”(ibid) in Poland. In other words, the movement has broadened the space and scope of Polish democracy, in tandem for informal and formal spheres, and processes of scalar (re)structuration (Brenner 2001) at the interface between state and non-state realms has been essential to this result. In particular, scalar “stacking” (Sica 2015), in which social movements build connections across multiple, overlapping scales, from a local level struggle to the national level, in order to make arguments more powerful and resonant, was accomplished in this case.

Building upon the idea of scalar stacking, I suggest the term “scalar reinforcement” to signal attention to grassroots actors’ agency, as well as commitment to and support of grassroots struggles in the process of making connections across levels and frames. Partnerships and alliances, and successes in the formal legal realm, according to this term, can be assessed and measured according to the extent to which scalar stacking occurs in such a way which maintains

social movement members' agency in this stacking process. Partnerships with professional organizations and strategies which incorporate legal reform must remain conscientiously connected to the work of people at the grassroots and their material and biophysical conditions (see Spade 2011), or they risk sacrificing their transformative potential.

Originating from the local movement level, KAS reasserted the necessity and importance of extra-institutional political space and practice, and in doing so, the social movement revived and reclaimed Poland's history of civic protest and civil disobedience. At the same time, the movement sought to improve accountability within existing formal legal institutions, in part by shaping the ways formal environmental legal rules were structured by Poland's public administration hierarchy. They began at the city and provincial levels, and ultimately found that success at those more local levels necessitated legislative action at the national level.

Incorporating and reworking national level scale frames into local struggles, and connecting these local-national narratives across to other levels, was part and parcel of scalar stacking and reinforcement which makes possible a critical yet productive engagement with state actors, legislative processes, and legal structures. This case shows the ways in which actors with technical expertise, including public interest lawyers and transnational non-governmental organizations with scientific and economic expertise, are integral to scalar restructuring and reinforcement processes, and hence social movements' successes, provided their support is context sensitive and mutually interdependent with the grassroots movement and the material or biophysical conditions out of which the movement arose.

The series of events in Southern Poland were an intersection of grassroots mobilization around air quality issues with issues of energy planning and management which led to an important shift not only amongst participants, but also an important shift in energy policy

making practice. Non-governmental organizations with technical expertise, namely the public interest environmental legal organization ClientEarth Poland and the transnational power sector reform advisory group Regulatory Assistance Project, provided crucial support to the grassroots movement at various stages. The combination of a mobilized local populace and technical support enabled KAS to “become a side” in Polish energy and environmental policy-making. The significance of the Kraków case is perhaps no better illustrated than by two subsequent, ongoing developments: the ongoing roundtable style working group Forum for Energy Analysis (*Forum Analiz Energetycznych*) and the similar mobilizations occurring in other localities in which grassroots groups are similarly proclaiming and exercising their rights to be sides in shaping air quality and energy policy, with administrative legal process principles comprising a cornerstone for organizing.

I move through four main parts. First, I detail further how the mobilization against air pollution in Kraków proceeded. Then, I discuss the backlash, in the form of administrative suits against the solid fuel ban, and how it was addressed. The third section discusses how legal tools were and remain insufficient to address environmental health issues, but why they were still necessary to create political openings. I end with a section which frames those who mobilized against air pollution, and subsequently became “sides” in environmental policy making in Poland, as active agents in Poland’s energy transition process. Along the way I emphasize the importance of scalar reinforcement and the role of public interest legal organizations, professional NGOs, and EU level organizations in supporting the grassroots movement in general, but also specifically in scalar reinforcement efforts.

How the mobilization proceeded

The social movement KAS began as a group of acquaintances who met often, and whose conversations regularly concerned the poor air quality in their city. Many members of the group were particularly concerned with the how the air quality was affecting, or would affect, their children. During one of those conversations, on the basis of the information they had gathered from an acquaintance who worked on air pollution issues, as well as the air protection program being developed around that time by the regional government which suggested some solutions, they decided they needed to do something about this issue. As a way to communicate with people in the city and get others involved, in December 2012, they created a page on the social media website Facebook. The Facebook page rapidly became very popular, and as its digital presence grew, the group also began to organize actions within the community. They wrote a petition in which they described their expectations, both of the city government and the provincial level government. The local media took an immediate interest in the initiative. KAS saw the Facebook page and the petition as preparing the ground for the legislative activity they undertook to be successful.

From the beginning, members of the organizations Polish Green Network (*Polska Zielona Sieć*) and ClientEarth Poland were involved. The three groups met regularly to plan actions and discuss what could be done, and eventually they approached the provincial level government (*urząd marszałkowski*), at first with the simple question of whether it would consider the possibility of introducing a ban on domestic solid fuel burning in Kraków. The answer the groups received is that such a ban had been considered before, but it was deemed economically and legally unfeasible. This is where the legal expertise of ClientEarth began to come into play. The organization prepared a legal opinion on one of the main uncertainties in question, regarding

the constitutionality of Article 96 in Poland's Environmental Protection Law. Article 96 was a succinct, vague (meager even, one legal analyst, [Olejarczyk 2015, p. 114] hazards to suggest) paragraph which delegated authority to the provincial level government to, "with the aim of preventing negative impacts on the environment or on cultural goods, issue a legal directive which specifies the type and quality of fuel permitted for use, as well as the manner of enforcing this obligation, within the terrain of the province or some part of it."¹³²

In one previously written commentary to the Polish Environmental Protection Law, the constitutionality of [action stemming from] Article 96 was put into doubt (Gruszecki 2011; Olejarczyk 2015). The uncertainty concerns when it is legally permissible to infringe on individual constitutional rights—this can only be done through enacted laws and only when it is necessary for the public safety and order, as well as for the protection of health, the environment, public morality, or the freedom and rights of other individuals (Article 31.3). According to such argumentation, Article 96 should therefore be used narrowly and with caution, and it should not be used in ways which too deeply interfere with individual rights and freedoms or equality under the law. The worry of legal analysts was that Article 96 was too vaguely construed to prevent potential constitutional violations of local level legal actions stemming from it, even if such actions purported to achieve important public aims.

It was thus clear from the outset that these jurisdictional delegation of power issues could be challenged legally, and so those mobilizing around this issue were keenly aware of the need to bring various levels (city, provincial, national) into agreement—and along three interrelated planes: grassroots organizing, legal argumentation, and technical (including economic)

¹³²Original: "Art. 96. Wojewoda może, w drodze rozporządzenia, w celu zapobieżenia negatywnemu oddziaływaniu na środowisko lub na dobra kultury określić dla terenu województwa bądź jego części rodzaje lub jakość paliw dopuszczonych do stosowania, a także sposób realizacji i kontroli tego obowiązku."

feasibility. Although they all necessarily had to work across all three of these planes, there was a division of labor among the groups involved, with ClientEarth contributing its legal expertise and advancing the legal framing of the issue. A lawyer from ClientEarth describes the implications of Article 96 for the actions taken by those who wanted to compel the local government to do something about the air quality, and the meticulous awareness of jurisdictional levels and the purview of authorities at each,

...one can say this isn't the most well-written law, but according to us, the fact that the law has some deficiencies doesn't mean it shouldn't be used. It's a binding law, and we prepared a legal opinion... In Poland there is a three-level organization of local government, which encompass an increasingly large area: commune/municipality, county/district, and province (samorząd gminny, samorząd powiatu i samorząd województwa). And this ban can only be introduced by the Provincial Assembly [sejmik województwa], so from the rank of the province (województwo), these ranks are independent from each other, one can't tell another what to do...but in a practical sense, we know that this would be realized by the municipality Kraków, because the province doesn't have the resources, it doesn't implement these things. That's why it was known from the very beginning that without the cooperation of these two levels of local government, that this will not come to pass. That's why we went to the mayor of Kraków, asked him how he sees the ban, and the mayor reacted very positively. He said that if only there would be that possibility then he would be for it. We also prepared an opinion supporting the ban, saying it's possible for the city council of Kraków, so that the mayor could also [share this] within his contacts. And our goal, last year [2013], was to update the air pollution program for Małopolska. This is a very extensive document which recommends very specific actions that should be taken in particular places to improve air quality. And we called for including the ban into this air protection program... [the ban would be] just in Kraków. And this is also important, because...of course there was a fear that we would try to pass a ban on the entire terrain of the province, but first of all ... Kraków has a really bad [air quality] situation, and secondly there's a technical possibility to have this ban, because there is a heating network for the city—there's gas, there's a full infrastructure. In the countryside this might not be possible due to a lack of alternative options for heating. So the ban, from the beginning we were clear that the ban would only affect Kraków (R28).

The coalition worked to collect signatures of about 15 other organizations in support of the ban, and they participated in the formal consultations of the air protection program (essentially a policy framework document), calling for a ban on solid fuel burning to be

included. KAS encouraged the community to participate in the consultations, distributing the email addresses of Regional Assembly Members. So many people participated that “at a certain moment all the inboxes in the Regional Assembly were clogged...the Marshall stopped the consultations. But this shows that, it showed them that people, they don’t just sit there idle, they want these changes, they expect this” (R40). KAS collected signatures as part of a petition supporting a ban. They collected about 18 thousand signatures, a strong statement of support from the public.

The ban was ultimately included in the air protection program, which was approved by the Regional Assembly on October 1, 2013. That program signaled that such a ban, the first of its kind ever in Poland, although limited to Kraków, would be considered in the future in other places within the Province such as Zakopane and Nowy Sącz. This is key to how members of ClientEarth especially, but also the other groups involved, saw this case, as a test case to be replicated elsewhere,¹³³

So this is also a good signal because it shows that Kraków is going to be a test city, because there’s not a ban like this anywhere else in Poland. But if it will be introduced effectively then it can be introduced in other cities (R28).

At the same time, the coalition, especially KAS, worked with the city council to work out economic solutions, such as financing of furnace replacement and subsidies of heating bills, which would allow low-income residents to be minimally impacted by the ban. There had already been an extensive and highly effective educational campaign, called “Kraków wants to breathe” (“*Kraków chce oddychać*”), on billboards and posters throughout the city and beyond,

¹³³This “strategic” way of seeing on the part of actors working deeply on energy issues in Poland but within larger transnational advocacy organizations mirrors dynamics observed in other cases not covered in this dissertation, namely the ways in which transnational organizations saw administrative and constitutional cases against Polish energy policies within relatively more accessible Polish legal venues as test cases, which, if successful, could be replicated elsewhere in Europe.

which launched in February 2013 and was made possible through support from a local advertising firm. That campaign encouraged residents to sign the online petition which demanded effective action on improving the air quality and instituting a solid fuel burning ban in domestic furnaces.

KAS prepared visually lucid and accessible educational materials online and in print illustrating the causes, severity, health impacts, and possible solutions for the problem. They disseminated these materials to local legislators and the public. Because of the digestibility of the material presenting a truly appalling problem, the local, Polish, and international media readily picked up on it. One of the more dramatic, memorable, and widely cited examples of this was KAS's calculation that residents of Kraków, inhaling the air, take in the same amount of carcinogenic benzo(a)pyrene in one year as they would if they smoked 2500 cigarettes (versus 160 per year in Vienna and 25 per year in London). Another highly effective aspect of KAS's campaign was the clever way information and data were presented visually and cartographically, connecting the local struggle to national symbols, as illustrated by the group's logo which incorporated one of the most famous characters in Polish folklore, the Wawel dragon (the word for dragon in Polish, *smok*, being similar to 'smog'). The group's mapping of Kraków onto a map of other major European cities and degrees of "safe" levels of air pollutants in each place, as well as their community mapping project on sources of toxic smoke from domestic sources, both served to highlight the severity of the local problem while also connecting it relationally to other sites and levels. The Polish Green Network was a key actor in the educational activities on a more micro-scale, holding meetings, trainings, and working in classrooms with teachers and students to further a more accurate message about the sources of air pollution in the city and region. The educational interventions were meant to correct the widespread erroneous

assumption that it was primarily car transportation causing the smog, when the furnaces and domestic burning played a more significant, and more preventable, role. Another aim was to propagate the research prepared for the Regional Assembly members on this topic.

Once the air pollution program was passed, work began on writing and passing the ban itself, which would take the form of a resolution to be passed by the provincial level Regional Assembly and implemented at the city level in Kraków. The work on the ban and its eventual passage illustrates the meticulous, diligent labor required by advocates of the ban along the three planes mentioned above—to mobilize society, to provide effective legal argumentation, and to offer feasible technical solutions. This work necessarily included connecting, or stacking, several scale frames. Due to the initial resistance among certain actors, the only way to accomplish this was often through focused, one-to-one meetings with naysayers to elucidate the comprehensive, carefully prepared technical and scalar argumentation.

[The mayor] was offended, but later when we asked him for another meeting he wasn't offended anymore, so. [...We], got along very well, also thanks to the fact that we didn't attack, but we just showed the good sides of this, what would happen if they introduce these changes. We never criticized anyone publicly, we never pointed out mistakes, we just showed that it's better to do it this and this way, and not tell someone that what you are doing is rubbish and you're never going to achieve anything. So we tried to...and also often we tried to meet personally with people, with those in power, and with everyone individually, to present our arguments, and [...] the arguments were so strong and substantively...we were so well prepared substantively that there wasn't a discussion. So every meeting like this, this was one person who was convinced of this that we were right. But it was very nice, we were always very nicely received, and even when someone criticized us on Facebook, so I contacted that person right away, most often it was some council member, right away we contacted him and asked for a meeting. Of course, with pleasure, everyone met with us, and then the relations were totally different (R40).

In this meticulous, one-to-one fashion, KAS and its supporters became not only resisters of air pollution, or the state, or both, but a “side” with substantive arguments to be reckoned with in formulating public health and environmental policy. It could leverage its growing mass public

support; many joining the resistance against air pollution and the state on the streets, as well as in policy-making and legislative venues.

KAS, as well as ClientEarth and RAP, received an invitation from the provincial level government executive to help with the creation of the ban resolution. The mayor of Kraków was also party to these discussions. Eventually the city and provincial governments signed a letter of agreement with RAP to allow the organization to help craft solutions. ClientEarth saw its role as helping prepare a resolution which would be legally airtight. The team had regular meetings, every two to three weeks, working out the argumentation step by step. The first challenge was to prove that such a ban was constitutional, but this did not end up being the greatest challenge—the greatest challenge, as put by one interviewee, was “negotiation on the pure political level.” When she described what she meant by this, it became clear that a key aspect had to do with scale, with bringing together individual levels. She made clear that social movement grassroots mobilization and educational work on public health impacts of air pollution was crucial to overcoming competing scale frames, particularly the provincial and municipal levels, by connecting and reconciling them in a built up trans-scalar framing that ultimately was rooted in poor air quality experienced at the bodily level.

Like I said, the Regional Assembly (sejmik) voted on the ban for [the city of] Kraków. Because of this, most of the constituents are not from Kraków. And often these are places that are in some way connected to coal. So for these politicians this was a very uncomfortable decision, because they had a lot to lose, because in those places people might say, ‘you want to take away our jobs,’—that was one of the arguments on the side against the ban, that Poland is based on coal, that we are working against the public interest because jobs will disappear, because less coal will be sold. So that unfortunate/unlucky situation, that a different level had to decide—the city council (rada miasta) in Kraków was very pro and passed the protective financial measures (program osłonowa). Here there wasn’t a problem, because the city councilmembers are from there, constituents are in Kraków. But on the provincial level, it turned out to be a big problem, and here for sure the role of KAS as a social movement, a grassroots movement which came out on the streets, [was huge]. There was a billboard

action, they really did a lot of work of this kind, mobilizing people. They did a huge amount of educational work about the effects of pollution on health, so people really got interested in this issue. Earlier, people just thought, okay the air is bad, and that's how it is, and there's nothing that can be done about it. Suddenly they realized that even some kind of silly winter cold that lots of people in Kraków suffer from—and they are the types of colds that you can never recover from completely—that this is caused by the air. That kids get sick, that kids can't go outside and take walks because there are these kinds of pollution. So this growth in societal consciousness, this work that KAS did is huge (R28).

The tension between levels is indicated by events leading up to voting on the resolution. Just before it was to be subjected to public consultation, the Regional Executive Board decided the ban was too restrictive, and should be toned down. Instead of instituting a ban, they wanted to introduce regulations about furnace specifications and performance (emissivity, etc.). Yet, as ClientEarth helped point out, Article 96 of Poland's environmental protection law does not allow for such a possibility, it only talks about the type and quality of fuels. ClientEarth provided crucial support for KAS during development of the resolution, by introducing expert legal opinions on versions of the resolution. One member of KAS described ClientEarth's role in this way,

ClientEarth, we worked together in situations like when the draft of the resolution was presented, which it turns out it was not in accordance with the law. So that was from their side, their competence... they introduced an expert opinion that the resolution is not in accordance with the law. So we had to have something to back ourselves up with, because we [were the ones who] appeared in the media. And we showed our position and our opinion on this topic, so, we wouldn't have this knowledge if it weren't for the help of ClientEarth and, and their activities. At every moment we could lean on their knowledge and their support (R40).

ClientEarth's legal arguments could be mobilized by KAS to invalidate an earlier draft of the resolution which was too heavily influenced by coal and coal furnace producer interests. Importantly, as indicated by the quotation just above, ClientEarth's work was largely behind-the-scenes, discrete. This was a way to support the movement in a context sensitive way, providing

technical legal arguments but neither overshadowing the local movement itself and the power it had itself built up, nor detracting from the movement's legitimacy by playing too public a role.

Context sensitive, or discrete support for grassroots movements involves providing technical resources or material support, but not co-opting the movement or pushing an externally imposed agenda. Such support is crucial to making connections across scales and thus building the power of the movement. In addition to ClientEarth, two transnational non-governmental organizations, and their relationship with KAS and other similarly situated groups in Poland illustrate this sensitivity to material and power imbalances between civil society organizations, as well as the sensitivity of issues related to climate and energy in Poland: the Brussels-based Health and Environment Alliance (HEAL) and the global network Global Call for Climate Action (GCCA).

At the European level, HEAL tries to support smaller grassroots organizations in Poland who are working on environmental health, not simply increase its presence in Brussels,

... we've also learned that we really need to coordinate to increase our impact and to not kind of have an impact as a European organization that is being made on the back of Polish NGOs, because then internally in Poland [...] would be interpreted domestically so differently and then lead to more harm for Polish environmental NGOs. Where our goal is actually of course to support them, as they are our partners or part of our networks. And so I would say it's... for us it's really important, becoming an increasingly important country and we are [...] speaking about public health, we are very interested to have the Eastern-Central European position very well reflected in our position papers and in our resources. [...] we have to engage in the long term to change that [concern for environmental health] and also support these small organizations in Poland that we know do similar work that we do, that they might also be promoted through cooperation with us (R16)

At the global level, GCCA, a network of partners working to strengthen the climate movement, are working to help emergent grassroots movements in Central and East Europe become more

effective, visible, and linked up with global actions, but in a way sensitive to the delicacy of climate and energy issues in the political arena in Poland and to material imbalances between organizations.

The GCCA has engaged in an exercise which is going a bit deeper I would say, [...] as we met [...] a very diverse set of Polish organizations and try to develop a narrative that is more targeted toward the Polish situation, so how the situation right now with coal is relevant and how you can develop it into a narrative that [...] how you don't only stop at blaming Poland for having its blocking stance, but also showing how kind of conflicted the country is in itself, because it has a dilemma, it has this situation which is kind of detrimental for economic development or kind of causing hiccups, and they haven't had investments in the energy sector for a really long time [...] to really have a narrative that can be appealing to the general European public and also the Polish public at the same time. And health was very prominent in the end, which I didn't push, it just happened [...] they very much also understand themselves as sharing resources between smaller and larger NGOs, so kind of shifting the balance a bit towards those that are in a more difficult situation (R16)

The quotation indicates that public health narratives are inroads to climate and energy organizing in Poland, and connecting across scales.

The Regulatory Assistance Project (RAP) also had a significant, yet distinct role to play in supporting KAS's initiatives. RAP is not advocacy-oriented, and the organization does not come out in favor of any fuel. It is a mission-oriented organization, funded by private foundations, which focuses on climate change and is made up of many former power-sector regulators. RAP typically works on an invitation basis, providing assistance on power sector reform, as well as working with non-profits in an advisory role. The organization offers "best practices" from around the world, and in this way maintains a type of public neutrality. Such neutrality proved crucial to forging collaborative relationships within governmental policy making venues related to air quality (and, necessarily, energy and fuel—a delicate policy area in

Poland with a rather closed public dialogue). RAP has been working in Poland for about six years, having begun its work in Poland just before ClientEarth did.¹³⁴

RAP's refusal to endorse or reject a particular fuel type and the organization's framing of the issue as thinking about fuel type alongside detailed consideration of a host of other factors (including power reliability needs, end-use energy efficiency, air quality and greenhouse gas requirements, the internal energy market of Europe and broader power sector trends, cross-border interconnections, transparency, and demand-side participation in the energy system) was and remains an integral part of fostering a shift in dialogue and knowledge creation about energy policy in Poland. KAS, for its part, by way of mobilization against poor ambient air quality, has reshaped the conversation about energy policy in Poland. ClientEarth made the case that it was legally feasible. All three, in their own right, contributed to reinforcing connections between and across spatial as well as temporal scales, from the local level to the transnational level, and from meeting short term needs to envisioning a longer term plan to secure a reliable and safe energy system. RAP framed the issue across temporal scales as follows: "Ensuring reliability of the Polish power system requires immediate action to address current problems, as well as a longer-term plan to secure reliable system operations over time."(RAP).

When information came out that the ban would be softer than demanded, people took to the streets.¹³⁵ The funeral march depicted at this chapter's opening, and subsequent coverage of

¹³⁴ RAP's European program began about seven years ago. They began in Brussels, but quickly realized that it was important to work on/in key EU member states.

¹³⁵There was a march in early 2013, with an estimated attendance of 200-300 people. In comparison, the march in October 2013 was attended by about 2000 people.

it in news and social media, put pressure on the Executive Board to adhere to public demand for more restrictive measures.¹³⁶

The tension between levels, and the uncertainty about the extent of the success of attempts to connect and reconcile multiple levels, is also illustrated by the uncertainty surrounding the ban's passage, described by one interviewee,

The very passage of the resolution to the very end was not certain. Individual voices/votes literally were being weighed, to the very end. That very day when the resolution was passed was very turbulent and emotional, but it turned out that public power is very great, that showing that the public demands good quality air, this has an influence. So from the point of view of an approach to democracy, it really worked. ...I think without that [the actions on the streets] it would have never worked out. But politicians simply have to reckon with their constituencies (R28).

Backlash

Just after the resolution's passage, KAS decided to formally establish itself as an association (*stowarzyszenie*). This was partially in response to those who demanded transparency from the group in terms of funding sources and motivations.

*And this was for us, this kind of first breath [after the ban was passed], when we could start dealing with this, organizing an association (*stowarzyszenie*). Okay, okay we decided to establish this, because well we also picked up on talk from people who thought that we are financed through gas furnace producers, people demanded transparency from us in terms of funding. And we of course, not being an [official] organization, we didn't have any funding (laughs). We couldn't acquire any kind of funds whatsoever. That's why we were accused of working with furnace producers, for whom the elimination of coal furnaces would be profitable, because then they would come in with gas which is more*

¹³⁶Fireplaces were a key source of contention, not least because of their class implications, and ultimately their omission from the resolution's wording were a compromise on the part of ban advocates. The first draft of the resolution stated that solid fuels (including coal and wood) could not be used for heating purposes "and in fireplaces"—a phrase that was ultimately crossed out. It would therefore be up to the discretion of the ban's enforcers whether fireplaces were a source of heating or merely a source of "ambience." Closed fireplaces with heat conducting systems seemed clearly to still be subject to the ban's restrictions, even with the striking of the phrase; open fireplaces ("the ones people sit next to with a glass of wine once per week") could be more open to interpretation. Some critics saw this change to the text as a concession to wealthier residents, including politicians themselves, who had such amenities in their homes, while "poor grandmas" would not be allowed to burn coal.

environmentally friendly. So that's what it looked like. So we thought we would establish an association (stowarzyszenie), so there would be clarity (R40).

KAS was officially registered as an association in December 2013. Besides perhaps lending the movement more credibility, and allowing the group to apply for domestic and European grant money for subsequent projects and campaigns,¹³⁷ it also enabled it to more easily become party to administrative proceedings.

Also just after the passage of the ban, a group who was against its passage organized its own Facebook page, mockingly using a name similar to Krakow Smog Alarm's name, Krakow Stop-the-Ban Alarm (*Krakowski Alarm Stop Zakazowi*). The group, along with an association related to coal furnace producers, and an organization based in the Silesian city of Katowice called The Polish Ecological Society (*Polska Izba Ekologii*),¹³⁸ came out against the ban. They were late to the party. The respondents with which I spoke who had been involved with organizing efforts to pass the ban suspect this is because the other groups simply did expect the ban to pass. This is perhaps indicative of the underestimation of social movement power and an overestimation of the political security of the status quo when it came to anything coal-related—precisely what KAS dislodged starting in Southern Poland. This coalition against the ban tried to

¹³⁷Funding sources for KAS include: the Provincial Fund for Environmental Protection (*Wojewódzki Fundusz Ochrony Środowiska*) – 50 thousand PLN for an information campaign for furnace replacement, the European Climate Foundation, The Stefan Batory Foundation (*Fundacja im. Stefana Batorego*) – for expansion of the campaign beyond Kraków into the entire Lesser Poland (*Małopolska*) Province, and the Polish National Fund for Environmental Protection (*Narodowy Fundusz Ochrony Środowiska*).

¹³⁸The name is somewhat misleading, as the organization promotes “clean coal burning” technologies. The group was formed in 1999 in Katowice, the main city in the Upper-Silesian industrial region whose growth has historically depended on the coal and steel industries, on the initiative of the then-director of the Central Mining Institute (*Główny Instytut Górnictwa*), as well as another individual who at the time was the head of the Parliamentary Committee on Environmental, Resource, and Forest Protection (*przewodniczący Sejmowej Komisji Ochrony Środowiska, Zasobów Naturalnych i Leśnictwa*). In recent years, the group started a campaign called “*EkoLOGICZNA gmina. Ogrzewamy z głową*” (“EcoLOGICAL district. Let's heat with our brains”) with the goal of educating people about more economical and ecological ways to use existing heating sources (using higher quality coal, not burning garbage, regular inspections of heating equipment, upgrading equipment for more efficient combustion, etc.). The localities who signed on to this program include: Rzeszów, Nowy Targ, Olkusz and Trzebinia, and Dąbrowa Górnicza. (“O polskie izbie ekologii,” <http://www.pie.pl/>; Minorczyk-Cichy 2014; See also <http://czysteogrzewanie.pl/2014/11/ogrzewamy-z-glowa-akcja-polskiej-izby-ekologii/>)

collect signatures for a petition to the Regional Assembly to appeal the resolution (“*wezwanie do usunięcia naruszenia prawa*”), and they also appealed to the Polish Ombudsman (*Rzecznik Praw Obywatelskich*),¹³⁹ arguing the ban was a violation of individual freedoms. KAS in turn submitted its own defense of the ban to the Ombudsman, written with the help of one of the attorneys in ClientEarth who specializes in constitutional law.

The Ombudsman, in her response to KAS,¹⁴⁰ demonstratively affirmed that the ban was justified and validated that rights to life and health take precedence over individual property or entrepreneurial rights. As a consequence, she decided not to pursue the complaint against the ban, as requested by the counter-coalition. Instead, the institution limited itself to advising the complainants of the possibility to appeal the resolution in administrative court.¹⁴¹

Two complaints were indeed lodged against the ban in provincial administrative court, and KAS, along with ClientEarth, entered the proceedings as a “sides” (*na prawach strony*). They were entitled to do so, because as organizations they dealt with environmental issues generally (as expressed in each organization’s bylaws), but also because they had been involved in working on this concrete issue (passing the resolution) during the preceding year. The complaints were combined into one legal case to be adjudicated by the court.

¹³⁹at the time a position held by Irena Lipowicz. Literally translated at the Commissioner for Citizens’ Rights, currently calling itself the Commissioner for Human Rights on the English language version of its website (<https://www.rpo.gov.pl/en>), the Polish Ombudsman office is a repeat litigant in Polish Constitutional Court cases. A survival of the Communist regime, the Commissioner has been involved in many major political controversies in Poland, including religious education and abortion. The institution’s role has been to hold government officials to the rule of law, a sensitive issue well into the post-Communist era. Much of the Commissioner’s work involves pursuing illegal government action through the Constitutional Tribunal and Supreme Administrative Court (Elcock 1997).

¹⁴⁰*Pismo z Biura Rzecznika Praw Obywatelskich, Zespół Prawa Administracyjnego i Gospodarczego*, V.7203.24.2014.ŁK, Warszawa 27.02.2014r.

¹⁴¹on the basis of article 90.1 in the Law on provincial level government, (*art. 90 ust. 1 ustawy z dnia 5 czerwca 1998 r. o samorządzie województwa*)

From ClientEarth's point of view, in part because of the careful work that had gone into construing the resolution in such a way as to stave off legal challenge, the arguments in the complaints were not especially strong. The resolution had already withstood considerable legal scrutiny. On the other hand, there was still uncertainty as to how many legal challenges there might be and how they would be resolved in the judicial arena. Here again, the uncertainty was palpable, and exciting.

I am optimistic. We worked on the contents of this resolution, really for a long time and very carefully, and the resolution itself is short and very concise. It has I think ten to twelve pages of justification, in which each regulation in the resolution is very well argued: why Kraków, why ban these and not other fuels, why this transition period. So up till now we have an impression that from the legal perspective, the resolution is very well received. In the normal legislative process, after passage, the province (województwo) can question it. Their lawyers read it and didn't find fault with it, so I personally am optimistic. But this is a pioneering solution which has never been done in Poland, so anything can happen. I think that these two court cases, and who knows how many more will come in [...] I think it will be extremely interesting. And also if it's possible to protect this resolution, this also opens doors for other places (R28).

Between the confidence and worry expressed in the quotation, and the uncertainty related to both, we may understand what is being expressed here as a real sense of political possibility and indeterminacy, created through being part of an active process of the politics of scalar re-structuration.

Given that both the Provincial and Supreme Administrative Court struck down the ban, as described earlier, it then became necessary to change the national level law, namely Article 96 of Poland's Environmental Protection Law (described earlier). Prevailing through the backlash and passing national legislation was another victory to be added to the social movement's list. The struggle to improve actual air quality, however, was nowhere close to being over.

Law and political opening

The legal struggles, and ultimately the legislative victory at the national level, is tempered by several factors. That the legal tools exist does not mean they will be put to use or, if similar bans were to be passed in other areas, that they would be enforced. The solutions are focused on individual locales, and phased in over time, despite the urgency of the public health problem. Kraków's ban, the second one passed, does not come into force until autumn 2019. The law KAS helped put on the books in this way is severed from the biophysical harm being done, from the actual and often rather fatal air quality. The law remains distant from the change needed. However, in this case we see how law was used to successfully create political openings, to make change that seemed impossible to many different actors seem possible.

My interviewees discussed the legal aspects as victorious, but recognized that the challenge of actually improving the air quality was ongoing. Because this was a novel mobilization and legal development, it certainly altered the resigned perception among public officials and their constituents alike that “nothing could be done” about the dreadful air quality. In this sense the formal legal changes that resulted from this mobilization attest to, and inspire further, societal agency to improve environmental health. Yet my interviewees made a clear distinction between the legal realm and actual socio-ecological conditions.

... [the coal ban in Kraków] was the first of its kind in Poland, and above all it's a breaking through of a mental blockade that nothing can be done. We showed that something can be done, that legal instruments can be used to fight air pollution. So it seems to me this is a thing that opens up a gate for the fight with air pollution problems....But I think generally the big challenge is to improve air quality in Poland. The air here is awful, mostly from local dispersed sources, and of course work with individual locales brings effects, this is huge work to complete, educating local government officials, showing them that there's a problem, that it's possible to solve it, that there are financial instruments. But probably the biggest challenge strictly in a legal sense will be the [civil case in Silesia] (R28).

As described in other chapters, formal law—particularly when it is developed or reworked in conjunction with a mobilized civil society—may be used as one tool to shake up prevailing ways of thinking, it can help rework cultural neural pathways about civic engagement, as administrative legal processes helped accomplish in Poland. Yet formal law’s role vis-à-vis organizing and education cannot be overstated. Participants in such processes were not under illusions about the intensity of the work ahead. They noted that the meticulous, often one-to-one educational and political work undertaken in Kraków would have to be repeated, in ways considerably fine-tuned to each locale in question. While a narrow legal goal could be achieved on a case-by-case, and place-by-place, basis, the larger goal was to improve the air quality across the entire area of the province, and the country. In some places passing local legislation would prove more difficult than it had in the Kraków case, as the mayor in Kraków was receptive to passing a ban, and there was a clear technological solution suited to a more densely populated urban area, which was connecting homes to the centralized heating system.

In a smaller and more rural setting near Krakow, Zakopane, the coalition began working with another receptive mayor of the 30,000-resident mountain town, a local social movement, as well as RAP to develop solutions to improve air quality there. In Zakopane, homes are more dispersed and tend to be single-family homes, so the solutions put forth in Kraków were not appropriate. In Zakopane, however, there is the potential to heat using geothermal water, already the source of 30 percent of the town’s heat. ClientEarth, KAS, and RAP commenced a more detailed exploration of obtaining external (EU) funds to further develop this energy source and distribution network (in Zakopane and the four surrounding districts [*gminy*]). The groups recognized at the outset that the chain of events would not proceed as smoothly in Zakopane as it did in Kraków, in part due to local cultural aversions to outside meddling and legal intervention.

We expected that...in Zakopane there are highlanders, so they can have tough opinions, and they don't like when someone from the outside meddles in their affairs. There's even this saying that in Zakopane construction law hasn't even caught on yet (W Zakopanym prawo budowlane się nie przyjęło (laughs) (R28).

The reference to construction law not having caught on yet refers to the observed tendency in that area to build new structures at will, without legal permissions, a phenomenon analyzed more closely from a legal perspective in Chapter Four. More broadly, though, and for purposes of this chapter's analysis, it illustrates that the societal mobilization needed to create changes in fuel use and air quality must be brought about in ways highly attuned to local culture and legal-spatial consciousness. Despite these concerns, the cooperation between ClientEarth and local actors seemed to initially go well, thanks to a group called Made in Zakopane. This was a group of younger people who, like KAS, also created a Facebook page, in February 2014, as a way to connect with their community and beyond.¹⁴² They officially became an association (*stowarzyszenie*) in June 2015, with the goal to improve quality of life in Zakopane and Zakopane's image. Since this movement was focused largely on aesthetic considerations, those who undertook improving air quality found a natural ally in this group, along with others, such as the Tatrzański National Park.

Other places, such as in Silesia, where the coal sector is much more deeply entrenched, would make what my interviewees called “the peaceful route” (cooperation among various actors on crafting and passing legislation, implementing affordable and technically feasible solutions)

¹⁴²Another similarity between KAS and Made in Zakopane, and a plausible explanatory factor for the receptiveness of the mayors of Kraków and Zakopane to air quality interventions, is the reliance of both places' economies on income from tourism, and the fear that air pollution was soiling the image of each place for potential visitors. In the earlier stages of the struggle in Kraków, the mayor criticized KAS for trying to scare tourists away with the English language version of its poster and billboard campaign, “No Smogging Please” – this ended up being even further politically mobilizing, as residents asked why the mayor cared more about the city's image with tourists than its own residents' well-being. As for the mountain towns, there was a similar element of scandal when social movement actors and the media began exposing that so-called “health resort” towns, or places where people supposedly went to breathe “fresh mountain air” actually had worse air quality than Poland's largest and most densely populated cities (See e.g. Olszewski 2014).

much more difficult. Instead, the environmental lawyers in the coalition discussed the potential necessity of bringing strategic litigation against the state. Specifically, an individual would bring a case against the state treasury (*skarb państwa*) for compensation due to violation of personal interests (“*zadośćuczynienie z powodu naruszenia dobr osobistych*”), in this case health. The hope is that such a case, if the plaintiff prevailed, would set a precedent and, through its potential to financially penalize the government, hold the government accountable for upholding air quality standards.¹⁴³

The challenges of making the environmental regulatory promise of safe air real and of replicating the successful aspects of the KAS-Kraków model of interaction between grassroots organizing, legal, and technical expertise notwithstanding, the Kraków case shows how such interactions and the scalar (re)structurations which occurred in tandem successfully created political openings. Change which seemed utterly impossible to many different actors—along legal, political, technical, economic dimensions—became conceivable. In the final section of this chapter, I suggest that this is precisely the way through which energy transition, understood not narrowly as a shift in fuel source but more expansively as a shift in the very relationships and power arrangements between societal actors which uphold prevailing incumbent energy systems, is proceeding in Poland. Which is also to say, this is a means through which social movements, in coalition with lawyers and regulatory experts, are democratizing the governance structure and opening it up to more participants and ideas. Attention to the politics of scalar (re)structuration

¹⁴³The first such case was lodged in Poland in 2013 and dismissed (Kozieł 2013). A main difficulty in such cases is establishing a direct causal relationship between a person’s health condition and air pollution. Although correlative and even causative relationships have been established in the epidemiological and environmental health literature between air pollution and health impacts, in a civil case this would have to be demonstrated for an individual, and the impact of other variables would have to be conclusively eliminated. Another civil case was brought in December 2015 by a member of the Rybnik Smog Alarm (RAS, *Rybnicki Alarm Smogowy*). RAS also brought administrative cases against localities that were collecting a health resort tax (literally “climate fee,” *opłata klimatyczna*) despite consistently poor air quality (PAP 2015).

at the interface between formal legal venues and social movements, and along the dimensions I have detailed in this case, makes this more visible and clear.

Becoming a Side and re-mapping energy transition

In a final comment about how legal tools are being used by non-governmental actors in Poland, one of my respondents described the shift that could be observed in the Kraków case over time, from resignation to active participation, due to the legal changes demanded by a large scale societal mobilization there,

It's new in Poland in general, society in Poland still hasn't learned how to use their rights, the imprint (piętno) of the communist period still visible all the time. Actually, this could be clearly seen in the Kraków case. People at the beginning didn't even want to sign anything, didn't want participate in the public consultations, because they thought, it won't change anything anyway, because public consultations don't have binding force, and legally the public voice doesn't mean anything. But later, when they saw that the local authorities take these voices into account, and there were so many people at the march, and the amount of people taking part in those later public consultations, the amount of people was really enormous, so this also excellently showed that if you give people that chance, that they can. To show them that they can change something, that those in power pay attention to their voice, they are much more likely to participate in this public life. ...After the ban was passed, also thanks to our work with other European organizations, in the Danish press, an article appeared whose title was "Poland is leading Denmark in environmental issues" – (laughs) – because they tried to pass a similar ban, except they, in turn, have a problem with wood, and it's not working out for them. So this was nice, to show that in Poland something is possible, a change is possible (R28).

The case was thus claimed as a point of pride for Poland, and Poland's reputation. It is an affirmative counter-narrative to the one described in Chapter Two, in which the transnational NGO community was welcoming everyone to "Coal-land."

In a rather emotional moment at the end of an interview with one of the main organizers in KAS, she in turn described the transformation which occurred over time among the legislators in the Regional Assembly who were to vote on the ban, from obstinate rejection to respectful affirmation,

At the beginning, everyone was against it. They said openly that a ban ... that these solutions are not possible in Kraków, that no way, never, that no. They publicly spoke this way during the consultations. And later, the Chairman of the Regional Assembly (przewodniczący sejmiku), Bartczyk, later he shook our hands and said, 'Congratulations, you did a fine piece of work, we are going to vote for it.' (R40)

I could hear my respondent's throat tightening up when she described this, the local government representative's recognition of the social movement's painstaking, skillful efforts. The sudden emotionality brought goosebumps to my arms, and we both paused to take in the moment. What remained unspoken in that pause was humility and accomplishment. It was an affirmation of social movement agency, and unanticipated power to change prevailing practices and ways of thinking. The organizing work of KAS, and the support of other organizations, resulted in the social movement being a highly effective force for change, becoming a "side" in governmental policy-making, respected by those in power. Subsequently KAS and its offshoots continue to organize throughout Poland and pass along its members' experience. What began as a localized social movement continues to have national resonance and implications. Figure 9, one of the banners on KAS's main web page, illustrates the re-mapping which has been accomplished by the social movement. It is not just an issue to be addressed Kraków, but also other places throughout Poland.

Figure 9. “Smog not only in Kraków – Other places want to breathe, too!”



Source: KAS, <http://krakowskialarmsmogowy.pl/> Accessed 11 July 2016

This sort of shift from obstinate rejection to affirmation, which happens in part because of strong substantive arguments and scalar reinforcement, can be observed in various other shades and contexts throughout Poland where individuals and societal organizations are trying to gain access to and participate in governmental decision-making procedures. Another interviewee working for a nature protection organization in western Poland describes how his organization’s relationship with administrative authorities shifted over time

... right now the General Directorate for Environmental Protection [...] commissioned us to prepare a new proposal for the regulation on species protection. This shows that even though we fight with the Ministry and with the General Directorate [...], we are treated more and more like a serious partner...at first it was more difficult, at this point they treat us like a serious partner who at the same time, they can fight with, but also if they need someone to prepare something with a lot of expertise then they come to us...they know what they are getting from us is of high quality. So ... there is this respect that has been born, even though we often have disagreeing opinions, now we have a type of rough friendship (laughs) (R1).

Alongside the adversarial, reactive model of citizen-state interaction in administrative proceedings, in which one side widely (and arguably misguidedly, due to characteristics ascribed to ecologists in the mainstream discourse [see Tomiałojć 2013]) understood as “anti-

government” brings complaint against the government, there is also evidence of a partnership relationship being formed, however fragile or tentative, and despite unequal power relationships. Surrounding interactions with the administrative legal system and more or less prolonged relationships between government officials and ecological or biological scientists, ornithologists, chemists, farmers, urban residents, and so on, what is being built is a re-conceptualization of what “state” activities and “anti-state” activities entail, a critique of the rigid bifurcation of infallible “state interests” and supposedly anti-state “ecological interests.” Practitioners and observers attempt to re-conceptualize the role of environmental advocates, not as anti-state, but as doing the long term thinking and visioning the state should in fact be doing. They ask how environmental circles could reportedly be “anti-state,” when it is exactly the environmental circles which are looking after the multi-generational continuity of “our existence, our society, and our natural environment” (Tomiałojć 2013, p. 9; Karaczun et al. 2012). Interactions with the state break down these dichotomies, and they more precisely reveal to those involved the ways in which the state is configured to uphold certain models and ideas, as well as the ways it could be reconfigured to facilitate exchange of ideas rather than fueling and exacerbating anti-environmental biases and societal divisions.

Although state-society relations vary across space and time, the case of mobilization against air pollution in Kraków shows the mechanisms through which energy transition is actually being accomplished, through the agency and efforts of non-state actors. Following Araújo (2014), Miller et al. (2015) and Stirling (2014), an energy transition is not diagnosed merely as a shift fuel type and technology. Rather, when energy systems are understood in relationship to societal systems, an energy transition requires transformation in incumbent patterns of power and privilege themselves, for these patterns constitute social, economic, and

technical knowledge, consequentially shaping social understandings of how energy regimes should be scrutinized and what comprises realistic directions for technological change (Stirling 2014). Energy transition is being accomplished in this case, then, through non-state actors' efforts at integration across scales, and along three dimensions: societal mobilization, legal argumentation, and technical-economic feasibility. Connecting across scales does not smooth out varied state-society and political-economic relations across space; rather, it accomplishes a more cogent understanding of the patterns of power, including state power, which constitute social, economic, ecological and technical knowledge. These all ultimately frame whether or how energy regimes are evaluated and altered, and by whom. Such an understanding can bring more actors into a much more wide-ranging conversation about crafting alternative configurations and patterns. The case of mobilizing against poor air quality in Kraków illustrates these dynamics and how they resulted in civic activation with implications for Polish national and European regional climate and energy policy. Thinking through the mobilization against poor air quality in Southern Poland through this socio-energy system lens provides further purchase on the question of how and why environmental legal mobilization matters in this case, even if the air quality continues to be dismal.

The initial public health framing of the issue by KAS, and the subsequent layering of other scalar levels and frames, has mobilized thousands across Poland. The diverse coalition of city residents, advertising agencies, artists, doctors and cardiologists, academics, environmental activists, and city government allies, in combination with the technical assistance provided by lawyers and power sector regulatory experts, support from a transnational environmental health NGO, and national and EU financial support, made for a broad based show of public support and

effective, trans-scalar substantive messaging. KAS was able in this way to penetrate the broader public sphere, and dislodge an issue that seemed impossibly impervious to intervention.

Of the shifts enabled by KAS's organizing efforts, besides the multitude of other "Smog Alarm" groups that have proliferated throughout the country, the Forum for Energy Analysis (*Forum Analiz Energetycznych*, FAE) is a key manifestation of how the social movement's efforts, in coalition with other groups, expanded democratic spaces. FAE is a non-profit initiative to support public debate about how to affordably transform the Polish electricity sector so that it may move toward a low emission system with an eye towards goals laid out at the European level. It was born out of the efforts detailed in this chapter. FAE had its first meeting in summer 2014, a type of "roundtable" in which a diverse group of people (business, think-tanks, government, NGOs) sat down to have dialogue about the energy system in Poland and how it could potentially be changed.¹⁴⁴

One of the participants in these efforts summarized the entire series of events that culminated in the formation of FAE as follows: "...That's the greatest success I think, getting these people to talk to each other for four hours, this diverse group" (R43). She stressed that the success story in Kraków is not any organization's success, but rather the success of the grassroots level, the success of a mobilized civil society. "Becoming a side" in air quality policy discussions and legislative activity, then, has meant that KAS also became an active agent in Poland's energy transition process, as well as in the process of improving the quality of democracy there.

The next chapter further illustrates how efforts to expand the conversation about a society's energy system, born out of localized grassroots resistance to an environmental

¹⁴⁴FAE is funded by Agora Energiewende, Regulatory Assistance Project, WiseEuropa, and the European Climate Foundation

disturbance, simultaneously and unavoidably also come to be about expanding the conversation about the quality a society's democracy. In contrast to the KAS case, the movement in the next chapter faced institutional actors and conditions much less receptive to its interventions, which helps explain why its efforts were in the end more focused on expanding democracy in the non-institutional realm. Nonetheless, both formal legal and more informal forms of scalar reinforcement strengthened the movement and what its members were able to accomplish in terms of expanding conversations in Poland the energy system and the quality of the country's democracy.

Figure 10. Air! A new representation of the Cracovian folk couple



Chapter Seven

“Demokracja po polsku” (“Democracy in Polish”) –

Mobilization against shale gas exploration in Żurawlów, Poland

“Thanks to this I got a new wagon, but also new troubles. People arrived to look at the wagon, and me, I ended up in the slammer every once in a while, on the charge of illegal assembly”

-Michał Drzymała
(Podgóreczny 1971, p. 23)

“Dzięki temu dostałem nowy wóz, ale i nową biedę. Ludzie przyjeżdżali oglądać wóz, a ja pod zarzutem nielegalnego zgromadzenia co jakiś czas wędrowałem do kozy”

-Michał Drzymała
(Podgóreczny 1971, p. 23)

In 2011, the US Department of Energy estimated that Poland had some of the largest shale gas reserves in Europe (US EIA 2011).¹⁴⁵ Such findings spurred buzz about Poland, and Europe more broadly, about a shale gas “El Dorado.” The touted potential benefits of shale gas exploitation included: a decrease in energy import dependency, strengthening of negotiating position with external suppliers, and cheaper energy costs. These potential benefits especially resonated in a place like Poland, where decreasing gas imports from Russia would mean more energy independence and an increase in ever desired geopolitical security.¹⁴⁶ In addition, shale gas could help Poland move toward the goal of diversifying the energy fuel mixture beyond coal-dominated sources of energy production, a stated goal in Poland’s Energy Policy until 2030

¹⁴⁵According to the report, Poland had reserves of about 22.45 trillion cubic meters of shale gas, of which 5.30 trillion cubic meters were recoverable. Most of the shale gas was located in the Baltic Sea/Warsaw Trough Basin (about 3.66 trillion cubic meters), the Lublin Basin (about 1.25 trillion cubic meters), and the Podlasie Basin (0.4 trillion cubic meters).

¹⁴⁶ Imports comprise about 70 percent of natural gas consumed in Poland (Polish Ministry of Economy 2009).

(Polish Ministry of Economy 2009; Wagner et al. 2016).¹⁴⁷ Adding to the gold-rush vision in the Polish public debate was elaborate discussion about the creation of a state-run fund, the Intergenerational Hydrocarbon Fund (*Międzypokoleniowy Fundusz Węglowodorowy*) comprised of tax income from shale gas exploitation activity, modeled after Norway's pension fund. Discussions on how to spend those yet to be collected taxes were highly developed, despite geological uncertainties about actual reserve size.

A subsequent report issued by the US EIA updated the prior assessment of shale gas resource estimates from 2011. Shale gas resource estimates for some formations were revised lower, including those for Poland's Lublin Basin (US EIA 2013, p. 14). Poland's Lublin Basin shale gas resource estimate was reduced from 44 trillion cubic feet (1.25 trillion cubic meters) in the 2011 report to 9 trillion cubic feet (0.25 trillion cubic meters) in the 2013 report. For Poland as a whole, the shale gas resource estimate was reduced from 187 trillion cubic feet (5.30 trillion cubic meters) in the 2011 report to 148 trillion cubic feet (4.19 trillion cubic meters) in the 2013 report.¹⁴⁸ The Polish Geological Institute, for its part, estimated Poland's recoverable shale gas reserves to be between 346 and 768 billion cubic meters, up to 85 percent less than the US Department of Energy estimate from the previous year. The Polish numbers were a conservative estimate, based on an analysis of 39 wells drilled in Poland between the 1950s and 1980s. Reserves could have been as much as 1.9 trillion cubic meters, assuming maximum productivity (Polish Geological Institute 2012; Strzelecki 2012). Meanwhile, an assessment by the US

¹⁴⁷ Not to mention that it could also help the government move toward meeting EU climate and energy policy targets.

¹⁴⁸ "The resource reduction was due to the more rigorous application of the requirement that a shale formation have at least a 2 percent minimum total organic content (TOC). The more rigorous application of the TOC minimum requirement, along with better control on structural complexity, reduced the prospective area from 11,660 square miles to 2,390 square miles" (US EIA 2013, p. 14).

Geological Survey estimated only 38.09 billion cubic meters of potentially recoverable shale gas (Gautier et al. 2012).

The Polish government was eager to grant shale gas exploration concessions. Initially, over 100 concessions were granted to 28 companies. The concessions covered one third of the country's territory.¹⁴⁹ That number has decreased and been consolidated over time. As of October 2013, there were 51 exploration wells open, and 336 planned to the year 2021. As of September 2014, the Polish government had granted 68 shale gas concessions (Polish Ministry of Environment 2014a), and there were 65 wells open. The companies with concessions at that time included: Chevron, PGNIG S.A., Polski Koncern Naftowy Orlen S.A., Grupa Lotos S.A., Petrolinvest S.A., Winsent Oil & Gas Plc, San Leon Energy Plc, LNG Energy LTD, ConocoPhillips B.V., Moorfoot Trading Limited, Cuadrilla Resources Limited, BNK Petroleum, BNK Poland Holdings B.V., Kaynes Capital S.a.r.l., Mac Oil Spa, Basgas Pty Ltd. (Polish Ministry of Environment 2014a; Gotev et al. 2014). As of February 2016, there were 31 exploration and/or exploitation concessions, divided amongst eight Polish and international licensees. Among the licensees, 72 exploratory wells have been completed.¹⁵⁰

Most major international companies pursuing shale gas investments have pulled out of Poland over time, due to reduced reserve estimates, challenging geological and technical factors, as well as legal and regulatory difficulties, all of which led to a very slow exploration process.¹⁵¹

Meanwhile, at the European level, reports by the European Academies Science Advisory Council

¹⁴⁹ the count was 110 in June 2012 (Baginski 2012); 105 in October 2013; one NGO had the total count at its peak at 113 concessions (Sufin-Jacquemart 2015)

¹⁵⁰ The remaining companies are: PGNIG S.A., Polski Koncern Naftowy Orlen S.A., Grupa Lotos S.A., San Leon Energy Plc, Palomar Capital Advisors Limited San Leon Energy B.V., Stena Investment S.A.R.L., Cuadrilla Resources Limited, and PPI Chrobok S.A. (Polish Ministry of Environment 2016)

¹⁵¹ The companies that have been part of the shale exodus from Poland include ExxonMobil, Marathon Oil (2014), Eni (2014), Talisman Energy, ConocoPhillips (2015), and Chevron (2015).

(EASAC) as well as the Institute for Sustainable Development and International Relations (IDDRI) both tempered hopes that Europe would experience the type of “shale gas revolution” experienced in the US, in terms of the scale of production (EASAC 2013). Compared to the US, Europe’s energy service industry and rig counts were much smaller; its geology and land access less accommodating; public acceptance much lower; urban density higher; and environmental regulations more stringent. This would affect industry profitability (IDDRI 2014). Nonetheless, the Polish government forged ahead with efforts to develop this sector. It was a leader in European forums in championing shale gas as an energy source and opposing too much regulation of this sector at the European level (European Parliament 2012; Hauter 2012).

Unique to Poland within Europe at the time was also the seemingly widespread support among Polish society for shale gas exploitation. According to survey research conducted in 2013, the majority (72 percent) of residents in the provinces where shale gas exploration was occurring or planned (Pomeranian Province – *Województwo pomorskie*, and Lublin Province – *Województwo lubelski*) supported shale gas extraction. Moreover, 60 percent of respondents would accept this extraction near their place of residence (TNS Polska 2013).¹⁵² Some think tanks in Poland, including at least one well-respected environmental think tank, held that, if the appropriate environmental precautions were taken, shale gas could play an important role in the transition from fossil fuels to renewable energy sources in the Polish energy mix.

Given the factors described above, in addition to observations that civil society there is feeble (Howard 2003), Poland would seem like a “least likely case” for political and legal

¹⁵² There were some problems with the research design of those particular studies, which reflect a larger concern about public opinion research, its representativeness, and accuracy (Fishkin 2009). The survey by TNS, focused only on two provinces, was supposed to supplement and provide comparison with research done on the same topic but at the national level by the Public Opinion Research Center (CBOS 2013).

mobilization against shale gas exploration/exploitation. This chapter examines how and why such mobilization did occur and analyzes the 15-month protest against shale gas exploration drilling—and specifically against the actions of the Chevron Corporation—by residents of the small village of Żurawlów, in southeastern Poland, about 12 miles northeast from the city of Zamość.¹⁵³

It cannot be determined conclusively the extent to which the protest in Żurawlów and related political and legal mobilization led to Chevron’s ouster; that is not the question this chapter seeks to answer. After all, geological, technical, and financial considerations played a role in company decisions to cease shale gas exploration activity in Poland. The Polish government’s own difficulties with providing a predictable, sensible (according to investors) legal regime for concessions also played a role as a push factor. Ironically, the government undermined its own efforts to develop shale gas while helping the cause of those against shale gas development, as well as fueling a broader critique of its approach to policy more generally, from many sides.¹⁵⁴ A main point of this chapter was made rather succinctly by one of my interviewees, the president of the Polish branch of a public interest legal organization who became involved in the conflict by providing legal support to the residents in Żurawlów. He described another administrative legal case his organization became involved in for similar reasons, “The problem for me is, and a kind of motive for why we are involved in this, is the *way* that this is done” (R39). The series of events related to shale gas development occasioned a conversation about governmental transparency and accountability. I argue that this occurred in

¹⁵³ less than 100 residents

¹⁵⁴ European level Parliamentarians; ECJ ruling and seven employees of the Ministry of Environment facing corruption charges; investors, especially non-Polish ones, talking about excessive ‘red tape’; Supreme Audit Office Report (NIK 2014); and a variety of others within Poland, notwithstanding their positions or lack thereof on shale gas development, who had additional evidence confirming that the Polish government was incompetent.

part due to the triggering of a growing administrative legal consciousness, in which citizens learn about the arrangement and enactment of state power across scales and demand not only resolution of scalar dissonance but also inclusion in energy development project decision-making. Thus one arena in which the conversation about governmental accountability occurred was in and around legal cases, both administrative and civil. Along with illustrating these points about governmental transparency and accountability, this chapter examines how to understand the impact of these events upon those who mobilized against shale gas exploration, as well as those who came to support or work in alliance with them. I argue that a politics of scalar reinforcement (layered support for a grassroots resistance movement) emerged out of an initial scalar dissonance. By scalar dissonance, I mean the observed discrepancies between local government and corporate practices, legal rules and their implementation at various levels, and national government practices. In other words, I refer to what activists came to understand as an undemocratic monopoly on energy policy development concentrated in the national government executive, at the expense of participatory democracy and more accountable energy policy development spread out across levels.

On one hand, this was a localized conflict which relied on a rather small group of dedicated individuals' direct action tactics: physically blocking a subcontractor company's vehicles. On the other hand, the conflict spurred a multifaceted politics of scale, or scalar (re)structuration, in which local actors secured legal and political support from allies at various levels in order to contest national government and international corporate practices. As a result, events in in this tiny village advanced broader conversations about what comprises energy security and a functioning democracy in Poland and Europe. The case illustrates the generative

potential of such conflicts for activation of civic engagement, as well as for building cross-movement, cross-border, and trans-scalar alliances.

National level symbolism and Poland's history of civil disobedience were of particular significance in raising the salience of this local struggle, in making connections with other struggles across scales, and making it about more than just a small farming village in Poland. Likewise, those who might have at first been characterized as "NIMBY" protestors were transformed in the process of this struggle into more active participants in energy policy formation and environmental protection efforts in Poland. They, in short, moved from being involved in contentious politics to becoming active contributors (See Romano 2012) to a national conversation about energy policy among non-state actors. Yet the movement did so in a distinct sense from the social movement in Kraków in the previous chapter. The movement in Żurawłów expanded extra-institutional democratic spaces more than formal ones, understanding the former as necessary to, or even more pertinent, than the latter. This is partially due to the unreceptiveness of formal government venues at various levels to alternative energy conversations, as well as the ways the movement was shaped by key allies, the urban squatters and anarchist movements in Poland.

The chapter proceeds through the following sections. First I move through two sections which characterize the Polish government's approach to the shale gas issue—public communication and consultation aspects, as well as legislative aspects. Both of these led to societal mobilization against development of the fuel source and what were perceived to be undemocratic and non-transparent practices. The third section characterizes the protest in Żurawłów, to illustrate how a multifaceted politics of scale, and in particular scalar reinforcement of resistance against non-democratic governance styles, developed out of this

localized conflict. The fourth section discusses how the legal backlash taken against the protesters in the form of civil suits, given the support across scales rooted in a direct action protest, ultimately strengthened the moral weight and resolve of the movement. A final section discusses the ways in which events in Żurawłów helped expand the contours of Polish democracy by creating extra-institutional democratic spaces and practices, reasserting the importance of such spaces, and in this way reclaiming and reactivating Poland's history of civil disobedience and autonomous democracy building. This case illustrates how struggles related to energy transition and struggles related to democracy go hand in hand. Żurawłów is one of many other locales and movements in Poland trying to democratize both state and energy structures across scales, from below.

“Let’s Talk About Shale Gas”

This section describes how the Polish government spurred conversations about shale gas, but perhaps not in the way it anticipated. I argue that what might be called a growing administrative legal consciousness, which, as detailed in previous chapters, consists not only of a general rights consciousness, but also an increasingly detailed understanding of the nitty gritty of state power, and the organization and practices which constitute it, can be evidenced in mobilization against shale gas exploration in Poland. The government's own approach triggered mobilization around procedural rights, specifically transparency and governmental accountability to its citizenry, irrespective of people's inherent or original positions about shale gas.

In October 2013, I attended one of two public hearings held that month sponsored by the Polish Ministry of Environment called “Let’s talk about shale gas” (“*porozmawiajmy o lupkach*”). These hearings were part of a larger campaign of the same name, supported by European Union Funds as well as matching funds from the Polish National Fund for

Environmental Protection and Water Management (*Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej*).¹⁵⁵

In accordance with European funders' guidelines, the campaign had a regional character. It was directed first and foremost at the residents of both Polish regions considered to have the most shale reserves and which already had the most activity in terms of exploration activities. These were in Northern Poland, the *pomorskie*, *kujawsko-pomorskie*, and *warmińsko-mazurskie* provinces and *Lubelszczyzna*, the Lublin region. It was also directed toward other interested parties, including personnel from local government administrations, environmental protection officials, non-governmental organizations, private companies, academics, and the like. The stated goals of the campaign were to provide those interested with verified information on shale gas, as well as to create the possibility for dialogue amongst various groups involved in the shale gas exploration process. The campaign included its own website hosted on the Ministry of Environment website (<http://lupki.mos.gov.pl/>), with information, FAQs, and a way for users to submit questions to be answered by experts in geology and environmental protection.

The campaign also ran a survey of residents in both regions, asking them about their level of knowledge and acceptance of shale gas and perceptions of environmental and safety risks. Critiques of the research design aside, there were two especially surprising findings of the research. One was that when comparing residents in the Lublin Province (*Województwo*

¹⁵⁵ At the end of 2012, the European Commission announced that funding was available to help realize information campaigns and encourage dialogue within society about shale gas. The hearings were partially financed by the European Commission DG Energy, with the goal to start a public debate and information campaign before decisions on shale gas industrial exploitation were taken and to "test the feasibility and usefulness of closer links between public debates in member states and efforts and activities taking place at the EU level" (DG ENER). In this case, EU level activities refers to a series of studies done for the European Commission on unconventional gas. The call for proposals noted that the 2012 EU Parliament asserted that, "a public debate on shale gas, its merits and negative effects, has started in Europe, but it is not always based on concrete knowledge and information...it is important, therefore, to start a citizens' dialogue and information campaign before industrial production begins"(ibid). Poland, along with Lithuania and Romania received funds under this program. The campaign lasted until the end of 2013.

Lubelskie) with exploration wells in their neighborhood to those without wells in their neighborhood, those who lived near wells saw shale gas sector development in a more positive light than those who did not live near wells. The other, that residents trusted law would protect the environment.

The public hearings were supposed to be the culmination of the entire campaign, and after they were completed the Ministry of Environment published a document summarizing the responses and identifying the most important needs, expectations, hopes, and fears that emerged from all the stakeholders, as well as the actions that needed to be taken in the future.

One hearing was held in Gdańsk, the other in Lublin, the major cities in two provinces where shale gas was expected to be found in Poland. The hearing in Lublin was my introduction to the politics of participation and state-society relations in energy policy in Poland.¹⁵⁶ In this hearing I observed something similar in form, content, and connotation to what Stankiewicz (2014), who examined the development and decision making around the Polish nuclear program, characterized as a classic, expert based, and technocratic approach. This is an approach directed at convincing society to accept a decision that had already been made. Stankiewicz (2014) and Lis et al. (2014) found that the style of communication with the public on nuclear energy as well as shale gas in Poland is based on the deficit model and assumes that the protests or fears of the

¹⁵⁶ At least one aspect of them – there was another campaign which took place between 2013 and 2015, called “Together about shale gas” (“*Razem o łupkach*”), which had a different format. This was a dialogue and information campaign in Northern Poland sponsored by the National Head Geologist (*Główny Geolog Kraju*) financed by the National Fund for Environmental Protection and Water Management, as well as its Provincial counterparts in Gdańsk, Torun, and Olsztyn. This approach, organized by an NGO in Gdańsk in cooperation with regional authorities, was an innovative and pioneering undertaking in the Polish context. It consisted of seven local dialogue committees made up of an array of stakeholders (license holder, NGOs, public officials, local residents) who were to exchange information, gain knowledge on the issue, have an ongoing dialogue for a year, and ultimately to come up with a social contract specifying the conditions of shale gas exploration in the given locality. The campaign provided support for local authorities to organize and conduct dialogue actions on local controversies, in a way differently designed than the regional level public hearings.

public are irrational, or the actors raising such concerns are incompetent. Risk and uncertainty dimensions are negated and marginalized, if not altogether excluded, as a frame from policy processes.

The hearing was highly structured, beginning with the formal pre-registration process. Every participant was vetted, and it was made clear that the number of spots was limited and would be evenly allocated to industry representatives, NGOs, and “private interested parties.” In the end everyone who wanted to attend the hearing, even if they registered the day of, was admitted. In Gdańsk, there were 130 participants (not including organizers or media representatives), 27 of which actively participated by speaking. In Lublin 117 people gathered, 28 of which spoke. During both of the hearings there were also 21 written recommendations or written version of comments, which were also accounted for in the final written documentation of the event.

The moderator emphasized that this was a public *hearing* not a *consultation*. The stated goal was to provide a forum for collecting diverse opinions and providing more information on the topic, not to debate or discuss among participants. Hence the program provided blocks of time for government specialists to give presentations on shale gas, and blocks of time for people to state opinions or comments. Each presentation from government agencies was about 15 minutes long, and each “private person” received four minutes to speak. The rules were carefully laid out, both in advance of the meeting on the website and just before the hearing began. In theory, one was not supposed to address any other participant directly or respond to anything another speaker said. Of course, in practice, it was not so easy to strictly follow these rules, discern when they were being broken, nor was it easy for the moderators to enforce them.

The sleek logo of the campaign, the glossy gift bags given to participants, complete with “Let’s talk about shale gas” notepads and pens, gave the impression one was at a corporate investor’s conference. Indeed, there was a distinct sense at this event and others like it I observed that the Ministry of Environment was trying to further two goals simultaneously, goals that worked at cross purposes: allowing for speedy and streamlined economic development of this sector, and environmental protection.

One participant in the hearing, representing an environmental NGO, discussed this conflict of interest during her remarks when she expressed the environmental constituency’s main concerns, water supply and drinking water quality. She said that it was difficult to trust the Ministry of Environment when it seemed to have two conflicting goals, and that it was easy to see right away which was the priority: the geology (and its exploitation), not the *hydrogeology* of the country (and its protection). Concerns were expressed during the public hearing and elsewhere that local government officials were ill equipped, in terms of technical expertise and administrative capacity, to regulate this sector (on lack of administrative capacity to regulate the industrial sector in Poland see Guttenbrunner 2009); spatial planning was a related concern.

The very hosting of the “Let’s talk about shale gas” campaign’s website on the Ministry of Environment’s site, and more broadly that the Ministry of Environment led this effort, given the content and connotations, was somewhat curious, as critics of the government’s approach did not hesitate to point out. That the institutional configuration (the ministry charged with protecting the environment, holding a ‘public hearing’) and message (that shale gas exploration has had/would have minimal environmental impacts if properly regulated and in the absence of human error, that the public just needed to be properly informed/assured) were incongruous, was made unabashedly clear only a month later, during the COP 19 climate talks. While the entire

international community was watching, Polish Prime Minister Donald Tusk, part of an unfortunately timed larger reorganization of his cabinet, dismissed the Minister of Environment who was the host of the UN climate talks only to replace him with a Minister of Environment who was explicitly tasked with speeding up shale gas development through streamlining legal rules.

Upon comparison, the public informational campaigns related to nuclear energy in Poland, one run by the Polish Ministry of Economy launched in 2011 another by the main investor in the project, PGE (Polish Energy Group SA), launched in 2012, had similar characteristics to the one related to shale gas examined here—that is, they sought to gain societal acceptance of a particular technology, discussed an already taken energy policy decision largely as a foregone conclusion, and ideas about responsibility and expertise were used to ultimately shield the government and investors/industry from more fundamental critique (See Ottinger 2013). For those who had a working sort of administrative legal consciousness which I have been laboring to characterize in previous chapters of this dissertation, the government's approach was a source of outrage, and ultimately led to mobilization against the government's efforts.

I now illustrate how this played out in the legal realm. Legislative actions undertaken in Poland related to development of shale gas were largely aimed at deregulation and creating a climate favorable to investors. However, these legislative activities on the part of the government, particularly surrounding Environmental Impact Assessments (EIA), likewise became fodder for critique, and paradoxically, further encumbered efforts to develop this sector.

Administrative legal consciousness

In previous chapters, I have developed the concept of “becoming a side,” which might be also thought of as a way of thinking forged through iterative contact with administrative legal processes. It is a lens through which people begin to see and understand the world and environmental harm in terms of governmental accountability to the public. It is a procedural rights consciousness combined with a detailed understanding of the operation of state power, at various levels, and as it is manifested in the physical earth. It might also be called administrative legal consciousness. This sort of scale-spanning and integrative administrative legal consciousness is well illustrated in the following quotation, in which a respondent discusses how shale gas investments proceeded in particular locales, and why his public interest legal organization became involved in what he came to see as case of governmental negligence and a civil rights issue.

The problem in [town name] is that they are trying to put wells on drinking water bodies, meaning, I'll say it like this, it's too far to say that the process itself is harmful, but that what is being done now, that is lack of appropriate public consultation, lack of geological discrimination of where we are putting the wells, forcing wells onto the people, meaning making the land available for wells. I don't know how much you are familiar, but the plots of land which are allotted for the wells, they are longer, they often cover several districts (gminy), and the law is such that consultations are only conducted with the largest district, and not with the smaller ones. And we had a few situations in which borough leaders (wójtowie) came to us and said that for the first time they see that cars are driving onto the terrain of their district, because no one told them about this before. So a lack of communication with these people somewhere at the end. To a large degree what we are doing there is protecting civil rights, really. Of course, this results in pausing or lengthening the procedure ...

...but, I don't blame the investor entirely for this. Because there is also a problem here that the state allowed this, negligence (zaniedbań) in the entire process of obtaining a concession. And if they, let's say, did this soundly, then I think they'd be able to avoid a majority of these [legal] processes. And there wouldn't be these... at a certain moment they saw an el dorado and they wanted to create it

within a year, instead of doing the procedure in the way they are supposed to conduct it (R39).

This quotation from the director of a public interest legal NGO indicates an unresolved scalar dissonance between the level at which public consultations were carried out, the borough level, in which local government officials were not aware of shale gas exploration activities to commence in their own jurisdictions, the national level concessions process, and the siting decisions for drilling wells vis-à-vis water supply. The scalar dissonance described in this quotation is a central aspect of a main finding of my analysis of this issue in Poland: the national level government largely undermined its own efforts to develop this sector and make it easier for investors to conduct activities in Poland. Simultaneously, it fomented legal mobilization against curtailment of civil and self-determination rights.

The general hydrocarbon legal regime, based in the Geological and Mining Law,¹⁵⁷ applies to shale gas in Poland. It covers the exploration and extraction phase for all hydrocarbons and other fossil fuels. While legislative actions at the EU level have been aimed at additional regulation of this sector, the ones undertaken in Poland have been largely aimed at deregulation. Work to introduce a new regulatory framework began in 2012, and an amended bill on exploration of hydrocarbons was adopted in July 2014. A key incentive for investors was the lack of an EIA requirement for exploratory drilling. Under this amendment, an EIA would only be required for *extraction* drilling, a set of rules which makes little sense, considering that often exploratory drilling is converted to extraction drilling, so many environmental impacts will

¹⁵⁷ Geological and Mining Law from the 9th June 2011, published in the Journal of Laws of the Republic of Poland, No. 163, position 981; “As a general rule, deposits of hydrocarbons, hard coal, methane (as an accompanying mineral), brown coal, metal ores, ores of radioactive elements, native sulphur, rock salt, potassium salt, magnesium-potassium salt, gypsum and anhydrite, and precious stones, irrespective of the place where they are found, are covered by mining ownership. The right of mining ownership is vested in the State Treasury, which may use the resource constituting the object of mining ownership and dispose of its right through establishment of a mining usufruct.”

have already occurred (Rybski no date). Another controversial element of the changes related to the EIA concerns the scope; it was only necessary to analyze the area within a 500 meter radius of the drilling pad, which is an unclear rule and perhaps improper in terms of determining impacts (ibid).

In addition to these ways that environmental standards were legislatively decreased, participatory rights of environmental groups to participate in EIA proceedings were curtailed, not only due to the changes described above, but also by limiting those who are allowed to participate in administrative proceedings to organizations that have existed for at least 12 months before the beginning of the procedure. This limits local communities in their exercise of participatory rights, violates international law (specifically the Aarhus Convention), and could be considered unequal treatment under Constitutional law (ibid). Furthermore, for all of these reasons, it undermines the development of civil society (ibid).

Constitutional legal scholar Robert Rybski (no date) noted some positive developments within the newest regulatory framework for shale gas in Poland, mostly having to do with information disclosure and access to information. Disclosure of chemicals being used in fracking fluid would be required. Information disclosure aspects would make it easier for the public to gain information, as data would be less protected by “trade secret” type refusals. Another way transparency would be increased is the obligation that operators publish information related to their concession online, including maps and other documents. Operators would be required to have insurance coverage against civil liability (not covering environmental damages, however), and licenses could be revoked for infringement of terms (including securing environmental protection).

One interviewee discussed the changes related to the EIA being optional for shale gas exploration, contrasting Poland's approach with the European Commission's recommendations, and in this way pointing out another scalar mismatch between his government's own practices (which he seems to recognize all too well), and European-wide policy recommendations,

So even, even more forcibly, not even just in the regulation (rozporządzenie), that they took it out of the threshold, but they wrote it down hard (twardo). From here to here...like how the drilling is happening, they don't require an environmental impact assessment. And at this point this is a scandal ("granda") totally in conflict with what the European Commission recommends/prescribes. They battled with the Commission so that there wouldn't be strict discipline like a directive that would apply to everyone, or regulations, [but rather] that everyone decides for themselves. But the Commission very clearly wrote down recommendations, that assessments rather must be carried out, or that they should be carried out, but ours [our people]? Nope. (laughing) Poland, as usual, you know, "kukuryku" (cock-a-doodle-doo)... (R37)

He goes on to discuss the importance of EIA procedures and how they are used to question investments, and, if not stop them, at least gather pertinent information—opportunities significantly hampered by the legal rules which make the EIA for shale gas exploration/exploitation optional and which limit participatory rights for environmental organizations.

So with shale gas this is a scandal ("granda") indeed, it's a scandal, because, because we already know this, I can say already that thanks to these assessments, the local community can find something out. Very often it can find out that nothing is known (laughs), yes, yes, but this, this led to the fact that in [town name], we also drew attention to this, that they prepared an environmental impact assessment, because this is a question of execution, right, how the assessment is executed, and this one was a textbook/manual. There wasn't even one place indicated where this was supposed to be done. They just wrote like this: "the water will be used, the water will be taken up... in accordance with environmental protection regulations, it will be taken back up, later stored, and transported away," and so on. But where, what is going to happen where, nothing. So we let the authority know, in this case the mayor (burmistrz) in [town name], know, that this is a complete...that it's a textbook, that there is nothing there to even assess. That if the investor wants to [drill], then why doesn't he show in what place he

wants to drill, where the water is going to be utilized, where it is going to be taken up from [...] [...]... they know this very well. I mean, they know-they don't know. These are also the first environmental impact assessments [related to shale gas], there weren't any [like this]. Of course they're supposed to do this, the mayor of [town name] said that he was going to refuse them. He sent the papers back to them, so he was standing on his own side, what we were talking about earlier. I'll say this much, not going into details, that these assessments, we already know that they fulfill a very important role. Because people aren't defenseless/helpless (bezbronni). Even if this bloody gas is to be drilled for, then at least let them know what kind of rules there will be, where it will be stored, where it will be utilized, whether it will be utilized (R37).

This quotation emphasizes the importance of EIA procedures, not just as a tool to block potentially harmful investments, but, if an investment is to proceed, for the public to be sufficiently informed about locations of operations, environmental impacts, and potential health and safety risks. The quotations, taken together, also suggests how legal changes, and attempts to rollback participatory rights, particularly within the multi-level governance structure of the EU, were ultimately politically mobilizing. One of the reasons this was so was because of a developing administrative legal consciousness whereby once people see the utility and potential access to state power and practice encountered in administrative legal processes, they resist attempt to rescind their rights to access them. Another reason attempt to rollback participatory right were ultimately politically mobilizing has to do with the broader universe of meaning making which occurred domestically around law-breaking, differential power dynamics, and resistance to authoritarian governance styles. All of these are particularly culturally resonant in Poland, specific to the social movement history there which were often about resistance to foreign occupation and building an autonomous style of practicing democracy. I now turn to the protest in Żurawłów to illustrate and deepen these points.

The Protest¹⁵⁸

It was really the local direct action protest site and the material relations there which were the basis of the governmental critique and which originated, and enabled, a politics of scalar reinforcement. Residents and local government actors alike, in their quest to understand what was occurring in their immediate surroundings, necessarily made connections to other realms, such as the administrative legal system, and Poland's energy policy—each which have their own scalar structures and nodes of power. The direct action site was the anchor: the site of initial radicalization, of continual renewal of commitment to fighting for democracy (by fighting the central state by way of fighting Chevron), and the building of mutual solidarity with other autonomous social movements in Poland and internationally.

One account from someone who was an active participant in the struggle holds that

Żurawlów's most important method in the fight against Chevron was constant, very thorough monitoring of the company's every tiniest move and its compliance with the law. Calling the police, checking permits, procedures, documents. With the help of a lawyer specializing in environmental protection, a local amateur lawyer was quickly educated. An association, '*Zielony Żurawlów*' (Green Żurawlów), was created, and supported by experienced environmental organizations (Sufin-Jacquemart 2015, p. 2).

While law was indeed an important tool in this struggle in the direct, narrow sense suggested by the above quotation, it was perhaps even more important in a broader sense to the larger meaning-making and framing of the struggle. For the struggle to have resonated with a broader public in Poland and elsewhere, it seems important that at the heart of this protest was a direct action civil disobedience occupation of a field by farmers, that the government was made to look

¹⁵⁸ This section is reconstructed largely based on accounts and perspectives of those who participated directly in the protest, my own observations, field notes, and conversations with those involved, as well as with the help of the following written sources: Sufin-Jacquemart (2015), and the chronology on Occupy Chevron (Poland) <http://occupychevron.tumblr.com/> which documented the conflict from beginning to end and was a significant source of information and mobilization of supporters all over the world.

unaccountable and incompetent, and that a powerful foreign corporation was retaliating against a small group of protestors using lawsuits. Reinforcement from the European level and from a well-networked group of social movement activists nationally and internationally, and the steadfast support of a few leaders, one with considerable experience in French environmental politics, sustained not only the 400 day protest itself. It also sustained an enduring social movement within Poland through backlash and intimidation, a social movement which rose out of this particular site and conflict to become an active participant in energy policy debates and a supporter of other grassroots movements.

Around 2011, residents in the vicinity of Żurawlów began to learn about shale gas. The Chevron Corporation was conducting seismic testing around this time in the town of Rogów, after which the water drawn from one of the town's wells visibly changed in appearance, and the walls in a few houses cracked. In response, town residents demanded explanations of the impacts of the wells on the environment. Chevron then moved its work to the neighboring village of Żurawlów. Chevron's involvement in the area originated earlier, however, in at least 2007, when the company obtained a concession (nr 30/2007/p) from the Polish Ministry of Environment for shale gas exploration on the territory of the "Grabowiec" concession. The concession consisted of an area 1200 square kilometers (about 460 square miles), containing 19 administrative districts (*gminy*) in the Zamość area, in southeastern Poland.

Chevron organized an informational meeting with the residents of Żurawlów and Szczelatyna in January 2012, but representatives of the company left five minutes into the meeting when they saw that residents had invited TV journalists and members of environmental organizations. Around this time, Chevron began to mount a local (and eventually national)

public relations campaign regarding the safety of hydraulic fracturing as a method and Chevron as a socially responsible, transparent company.¹⁵⁹

In March 2012, Chevron employees arrived to a leased field in the village with machinery, which presumably was to be used to begin to prepare the land for exploratory well construction. Residents notified the police, and asked that the company's employees' documents be checked. It turned out the company did not have a permit required for driving a heavy duty vehicle on a local district road. Those monitoring Chevron's activities also noted that the company could not carry out work from March 1st to July 15th, because it was bird breeding season, per the EU Birds Directive. Work was discontinued. Chevron's concession for exploratory drilling to a depth of 3800 meters expired on June 6th, although the company still had permission to conduct seismic testing until the end of December 2013. There was an attempt to extend the concession, but it was never completed in the Ministry of Environment. Chevron withdrew its application for a decision on environmental conditions (*decyzja o środowiskowych uwarunkowaniach inwestycji*) for the Żurawłów location, and according to the company's press spokesperson remarks in July 2012, Chevron was pulling out of drilling operations in the Grabowiec district, including in Żurawłów.

Early in the morning on June 3, 2013, however, workers from the subcontractor company Praktibud arrived to the leased land with what appeared to be materials for building a fence and other equipment. Farmers working nearby arrived and blocked the access roads to the property with their tractors, so that no more company vehicles could enter. The women threw back some

¹⁵⁹ Hydraulic fracturing, or "fracking," is a process which involves the injection of water, sand, and chemicals at high pressure down and across into horizontally drilled wells below the ground. The pressurized mixture causes the rock layer to crack. The fissures are held open by sand particles, and thus natural gas from the shale can flow from the well (<https://www.propublica.org/special/hydraulic-fracturing-national>).

of the fencing equipment which had been taken out of the truck. The police arrived, along with negotiators sent by the province. Chevron filmed the entire series of events. The next day, the residents went to the borough leader (*wójt*) in the hopes that he would support their actions, since they knew the company's concession was set to expire. Instead, the borough leader threatened them with police action and forcible removal. The following day, the residents set up a large tent and an open air kitchen right along the dividing line between a farmer's land plot and the plot of land leased by Chevron, blocking the access road to Chevron's plot. Eventually, they added more infrastructure, like an electric generator and wireless internet. They would remain there for 400 days.

The two plots of land, side-by-side, one Chevron's and one the farmers', were bisected by a small dirt access road. The road was being blocked by farmers and prevented Chevron affiliates from entering the company's leased property. On the plot being leased by Chevron was a small trailer for round-the-clock security guards, a portable toilet, an outdoor security light, and security film recording equipment. On the farmers' plot, the tent was eventually replaced with an old trailer for the colder winter months. The mobile trailer as a vehicle of resistance to an occupying force is unmistakably suggestive of legendary national hero, Michał Drzymała, to whom the quotation at this chapter's opening is attributed. Drzymała was a peasant living under Prussian rule who has become a Polish folk hero due to his circumventing of the occupying forces' legal rules regarding what was considered a "house" in the early 1900s. He resisted Prussian authorities' "germanization" policies by living in a wagon and moving each day to avoid legal penalties associated with building a more permanent structure on one's land.

Figure 11. Protest site in Żurawłów, Poland



Whether or not most participants or observers of the protest made this connection directly—at least one of them did—statements such as, “We have survived many occupations, we will survive Chevron’s too” and “this is not in the tradition of Polish democracy,”¹⁶⁰ show the ways that this struggle was made meaningful for Polish people. Connections were made to Poland’s difficult history of foreign occupations, and its robust and long history of civil disobedience. In these narratives, clever and instrumental uses of law by resistance actors overcoming oppression were celebrated. Relatedly, particular ideas about democratic governance and autonomy by the people were revived and discussed. From organizing against and resisting Prussian occupation to the Solidarity movement, attempts were made to *graft* the struggle in Żurawłów onto well-established symbols and traditions of the Polish “ideational

¹⁶⁰The first quote is from one of the protesters; the second quote is a statement made by Rebecca Harms during a conference held by the European Greens in parallel with the COP19 talks in Warsaw.

landscape,” as was done in the well-known Rospuda controversy (Szulecka and Szulecki 2013). In this case too, “symbolic warfare” ensued (ibid, p. 409): from pop culture to high culture, any symbol that could help the anti-Chevron message was fair game. Symbols were used to try to make this struggle more inclusive. For example, the Pope was used as a unifying symbol between environmental interests and perhaps more conservative constituencies. At a debate following the screening of the film *Drill, Baby, Drill*, one of the side-events at the UN climate talks in November 2013, Polish activists publicized the pope’s stance on shale gas, saying “The Holy Father is With Us!” The activists displayed an image of Pope Francis, standing with two Argentinian activists, holding an anti-fracking shirt.

Inside the trailer was a small stove heater, a kitchenette, and two beds for those working the night shift. The walls were gradually filled up with newspaper clippings, stories, and images about shale gas and the anti-fracking movement, in Poland and abroad. In due course, a small makeshift office was set up, as well as internet and a live-stream camera. The large banner hung on the protestors’ second tent and eventually the trailer read “They Feed and Defend,” a summary of the farmers’ fight to protect their land and way of life.

On the other side of the main paved road situated beneath the two plots were colorful meadows, protected by the European-wide Natura 2000 Network. On that field, the protestors eventually placed a large “Occupy Chevron” banner, which framed a line of gasmasks on sticks. There was also a sign that said “freedom” in Polish and English, as well as a sign reading “Poland has gas, America has profits”—all of which looked particularly sinister when covered in a light frost layer in early winter. The sign about profits worked to draw attention to the lines of spatial and material accountability, or lack thereof, in this case, by emphasizing and contrasting the location of resources with the location of financial enrichment.

Figure 12. “Poland has gas, America has profits”



Another banner read, “We don’t want [to go to] gas” – a play on words, talking about shale gas but also a reference to Nazi extermination methods, a chilling allusion to one aspect of events in Poland during World War Two. A sign leading up the main road to the protest site connected the contemporary struggle against shale gas exploitation and its potential disastrous environmental impacts, with that of the struggle against nuclear energy in the 1980s: “Yesterday Chernobyl – today Chevron.”

The events described in this section marked the beginning of a direct action that protest participants and observers often boasted was “the longest protest since Solidarity.” Many would also later be the subject of civil suits for blocking road access and obstructing work (discussed below).¹⁶¹

¹⁶¹ One complicating aspect is that the piece of land that the protestors were occupying, which happened to be the only way Chevron could drive onto the plot of land it wanted to conduct work on, actually belonged to the local government. Therefore, technically the protestors were on public land and not on Chevron’s leased land. There was a deep ditch between the main road and the plots of land, so Chevron’s vehicles were not able to drive onto the land from another point without getting stuck. This illustrates a central premise in legal geography, that space is integral

Various flags began to accumulate at the protest site. Left by the many visitors the community hosted, the flags represented the broad network of international support for the Żurawlów protestors. The protest site became a kind of incubator for democracy, a space for democratic education and practice. Żurawlów hosted documentary film screenings, talks with experts in various fields, teach-ins, concerts, conferences, workshops, and the like. The residents of Żurawlów over time increasingly took an active role in these events.

The first period of the protest was largely about education and acquiring knowledge. The topics covered included shale gas, the global capitalist system and the political economy of fossil fuels, climate change, habitat destruction, and species extinction. Residents began to better understand the water situation in Poland. Working with a hydrology professor, they learned that their province is situated on top of three very large major groundwater reservoirs. Overlaying a map of the groundwater reservoirs on a map of issued shale gas concessions, they found that the locations of concessions largely coincided with reservoirs. Four of Chevron's concessions in their entirety were found in the area of the major groundwater reservoirs of the *Lubelszczyzna* region. They learned that the groundwater systems in question, which were supposed to be protected in accordance with European Union Directives, did not yet have management plans drawn up for them. This meant that the concessions, which covered nearly one third of the country's area, technically had been issued in compliance with law.

The website and social media, as well as a widely disseminated documentary film made about the protest shortly after it began, were essential in spreading word about the protest

to the way law operates. Private property may try to stabilize boundaries of space using legal categories, even though the situation on the ground may be much more dynamic and contested, natural entities may not cooperate, and so on (See Blomley 2008).

internationally.¹⁶² Support poured in from many places. The combination of virtual support, documentary footage, the internet camera, and the material support at the protest site itself, plus the political support at the sub-national and European level, and finally the legal support—which, given a highly mobilized and networked group of protestors—altogether became a “protective shield” and source of power.¹⁶³

The first physical support for the village, which ultimately shaped much of the analysis and critique of national and corporate practices, came from the urban squatters’ movements in Lublin, Warsaw, Kraków and Poznań. The farmers of Żurawłów were forced to be more open-minded to the youth’s perceived “otherness”: nose rings, dread locks, different clothing styles, and vegetarianism. Over time the younger people from the squatters’ and anarchist circles won over the farmers with their politeness, effectiveness, and commitment. They helped build an autonomous, supportive space at the site of the direct action and a more lasting sense of support and security through their solidarity actions and organizing. This would be crucial to carry the protestors through moments of fear, intimidation, and backlash.

Later, in response to requests disseminated on websites and through email networks, other people came, from all over Poland, from various circles, and of all ages and genders. In the summer, the farmers had to work the fields, and 24/7 shifts in the protest tent needed to be

¹⁶² Odile Alliard made the website *occupychevron.tumblr.com* in three languages. Odile wrote accounts from the protest in French and English on the basis of daily stories from Lech Kowalski, a documentary film-maker who quickly arrived to document the events surrounding the protest and captured much footage which would eventually make up the film *Drill, Baby, Drill*. Soon the tumblr site was taken over by Polish volunteers from one of the urban squats. There was also the online community, *Occupy Chevron Żurawłów* on Facebook, a window to and from Żurawłów and the rest of the world.

¹⁶³ which in turn also inspired and gave strength to other protestors. Balcombe, England was commonly referred to as “Żurawłów’s baby,”—that is, due to outreach activities by residents, the village representative (*soltys*) of Żurawłów, and the documentary filmmaker Lech Kowalski, the residents of Balcombe began their own protest against the Cuadrilla Company.

covered. There was always someone on duty. People slept in makeshift beds made from straw bales, or in their own tents. In the event that more support would be needed, there was a large hand-cranked siren looming over the space. Upon its sounding, the entire village showed up within a few minutes. I witnessed this during my first visit to the protest site; an unknown vehicle pulled up near the property, and everyone mobilized rapidly, ready to take action if needed.

During this time period, Żurawlów residents also tirelessly traveled—to conferences, debates, public hearings, seminars, and the like. They participated as a delegation in a conference about shale gas in the European Parliament, where they met Josh Fox, writer and director of “Gasland.” They were invited to the Polish *Sejm* (lower chamber of Parliament) for a meeting of the Sejm Commission for Agriculture and the Environment. They organized their own demonstrations and participated in larger ones organized by others, in order to spread the word about their struggle, for example an action in Berlin for agricultural policy, and in the March for Climate and Social Justice during the COP 19 climate negotiations in Warsaw in November 2013.

COP 19 was an opportunity to strengthen ties and support from the European Parliament, particularly the Greens/European Free Alliance Group. José Bové, renowned farmer, environmentalist politician, and member of the alter-globalization movement, made a personal trip to Żurawlów, and Rebecca Harms, the Greens/European Free Alliance Group’s president, met with protestors at a conference in Warsaw, “Citizens' energy for a good climate: A participatory debate about Poland and its future.” COP 19 was also a chance for various local social movements throughout the country to increase the salience of their struggles, and try to connect around common themes and grievances, namely the Polish government’s approach to

energy policy and public consultation. Indeed, although many local movements' struggles were rather distinct with their own specificities, they all seemed to be united by a sense of not having been consulted about certain developments, about not having a voice. As they exchanged stories and notes, they were also united by a resolve to better "watch the state's hands."

Key to facilitating such connections were NGOs such as INSPRO (*Instytut Spraw Obywatelskich* – Institute for Civic Affairs), which during the COP 19 meetings organized a side conference illustrative of the type of work the group does connecting social movements, "*Kuznia Kampanierow*" (Breeding Ground for Campaigners). The goal of the conference was to bring together various groups and social activists, around a more general set of principles about organizing in Poland, and to answer the main question "How to win a citizen's campaign in Poland?"¹⁶⁴ Organizations like INSPRO and certain individuals served as "connectors" between Żurawlów and other movements, as well as between the protest in Żurawlów and conversations about energy in Poland. The struggle also articulated with that of the fight against the development of nuclear energy in Poland. A series of events in early 2014, among others related to the anniversary of the Fukushima disaster, were occasions for certain leaders in the Polish Greens and anti-nuclear movement to more explicitly connect their struggles together.

Women from Żurawlów took part in the annual Congress of Women in Warsaw in May 2014, speaking on a panel entitled "Energy Democracy - Responsibility for the Climate" and engaging with other women leaders working on climate and energy policy at the national level.

¹⁶⁴ At the end of April 2014 through July 2015, a project called "Citizens monitor/control – upholders of good energy" (*„Obywatele Kontrolują – strażnicy dobrej energii”*) got off the ground, an offshoot of a larger conception/campaign "Citizens monitor/control" which was conceived as a "transmission belt" for information between residents and local government and vice versa. Some of the main mottos of the initiative are educate, mobilize, and monitor. The initiative focuses on activists and organizations which represent local communities. The project sponsored the website <http://zlupieni.pl/>, a main forum for resistance against fracking in Poland.

Both the COP 19 conference and the Congress of Women took place in the Palace of Culture and Science, in the very center of Warsaw and an enduring symbol of Soviet domination. Thus, even in that very physical sense there was a reclaiming of Poland's history of resistance against foreign occupation, enabled by scalar reinforcement which connected this tiny village's plight all the way up through the Polish level, to the global ambition to reduce anthropogenic climate change.

It is not entirely clear the extent to which the international activist networking was important in terms of putting pressure on national level, on the Polish government regarding its energy policy. It was, however, perhaps more important in terms of securing external validation and scalar reinforcement up from the local level, working against a very particular sense of isolation that Polish grassroots activists feel. This is captured well in one correspondence between two of the more active participants in the protest its related legal/political mobilization, and a more experienced organizer with considerable experience abroad who helped Żurawlów residents with strategizing. Describing a "form letter" the group was preparing to distribute so that supporters in other countries could contact their Polish Ambassador in their respective countries, she wrote in an email correspondence in April 2014,

The letter is supposed to express outrage, that in Poland, an EU member state, it has come to these kinds of manifestations of the lack of democracy, like the treatment of Żurawlów residents by Chevron, with the participation of the Polish government administration, local government, and police. It should be a letter with a similar tone to the one we sent to the ambassadors of Romania and Great Britain...

...this is a type of pressure, to show that the question of Żurawlów cannot be kept a secret, just "in Poland's yard" (do you remember how Woźniak [Polish Deputy Minister of Environment] reacted during the Parliamentary Committee meeting for Agriculture [and Environment] when I spoke French to the Minister of Environment of France?...for them, this coming out beyond our Polish backwater/hole, it hurts, oh it hurts)

The quotation illustrates how scalar reinforcement helps local social movement actors overcome their own sense of isolation and marginalization by more powerful domestic governmental actors, and in turn bolster their own power and leverage during interactions with state actors.

Backlash

I arrived to the protest site on December 18, 2013. It was cold, and the fields were covered in a layer of frost. Residents had been occupying a small piece of land there since June, 24 hours a day, seven days a week, blocking the access road onto the property Chevron was leasing and upon which it had a permit to conduct preparatory work for shale gas drilling.

By this time, the protest had been ongoing for over five months, and a pervasive black humor reigned. People were smoking like chimneys. “Nerves. Thanks to Chevron, I’ve even taken up smoking, another way they are threatening our health,” one of the protestors told me. There was a mouse in the trailer, and someone joked that she was a spy for Chevron. Every time the sound of a car driving up was detected, all tensed up and quickly glanced out the door or window of the trailer to find out who was approaching.

There were more and less subtle attempts to intimidate the protesters. Earlier on in the conflict, in March 2012, one of the protestors received a letter from the law firm CMS Cameron McKenna, representing Chevron, informing her of the potential legal consequences associated with using Chevron’s logo. In June that same year, 46 people received summons from the police for questioning as suspects; the evidence upon which police relied was video recordings given to them by Chevron. In the legal case I observed,¹⁶⁵ Chevron had brought civil suit against thirteen

¹⁶⁵ Case signature IC 644/13

protestors. The case deals with the events of June 3, 2013 (described above - the day the protest began) and whether the protestors violated the company's lease rights.¹⁶⁶

During the nearly five hour long hearing, various witnesses called by Chevron answered questions from both sides' lawyers. The witnesses included two security specialists from Chevron, a construction engineer from Chevron, a Chevron employee who filmed events on site, and a police negotiator who had been present on June 3rd to mediate the situation. The witnesses claimed that the protestors blocked Chevron from constructing a fence on the company's leased land, and also prevented Chevron's subcontractors from delineating the borders of the property, for example by ripping posts out of the ground, and not allowing fence construction materials to be taken out of a truck.

One striking observation from the courtroom, besides all the seats for the public being occupied by supporters of the protest, many of whom had driven from other cities in Poland, was the power difference between sides. This was evident in many of the micro courtroom dynamics: how many lawyers each side had, how they were dressed, the ratio of clients to counsel, and gender dynamics. At the left bench, three lawyers, men, dressed in what appeared to be expensive suits, had driven to Hrubieszów from Warsaw and made an ostentatious entrance, pulling up in their BMW SUV. One of the lawyers appeared to be there only to take notes while the others paid full attention to the trial, consulted with each other when needed, and jumped up with objections in lightning speed.

At the right bench, the defense lawyer, a woman, represented 13 individuals, who all rode together to the courthouse in Hrubieszów in a motley caravan of vehicles. The defense lawyer,

¹⁶⁶ This was one of perhaps 8 cases brought against 34 people. Another legal case involved activists who demonstrated in 2011 at the "Shale Gas World Europe" conference in the Intercontinental Hotel.

dressed conservatively but decidedly not like a corporate lawyer, took furious notes throughout the trial and had to be quick on her feet with objections and questions for witnesses, quicker than the three well-groomed men across from her. She also had two of the thirteen defendants next to her, who whispered to her as needed.¹⁶⁷

All around me, the defendants and their supporters—farmers, their wives and kids, young and old activists and organizers—wore normal street clothes. Emotions were high. For the defendants and their supporters, the court room and this translation of their situation into legal jargon was far removed from their real lives and their struggle for their land and self-determination. Indeed, at times there was raucous laughter among the crowd who had turned out to observe the trial, at Chevron’s lawyers’ attempts to paint a picture of them as violent and disruptive protestors, as provocateurs, when, to them, it was Chevron who was violent and disruptive. This case and others were advertised by supporters in this way, “We invite you to court for the next round of the fight between David and Goliath.”

The legal focus of the case, perhaps unsurprisingly, became muddled. This was, after all, the first case of its kind in Poland. The judge, Chevron’s lawyers, the defense lawyer, all kept trying to (re)define the parameters of the case. It was only supposed to be about the events of June 3rd, and Chevron’s rights to their plot of leased land. Yet a whole host of other issues inevitably got raised, including: motivations of the protesters; hydraulic fracturing as a process and its environmental impacts (arguably not relevant to the case, but the judge allowed an “expert” witness—a construction engineer from Chevron—to explain it anyway); whether Chevron’s filming had been lawful, and whether the video evidence was admissible; whether the

¹⁶⁷ The 13 accused referred to themselves as the “*parszywa trzynastka*,” the outcast thirteen.

protestors used violent force; whether Chevron followed proper procedure in terms of public consultation; whether the company had appropriate permits to begin conducting work. It became apparent that civil, criminal, and administrative legal issues were all surfacing during this initial hearing. The struggle could not neatly fit into one sphere of law.

The judge did not quite know how to properly disentangle all of these issues, what to allow, and where to draw what sorts of lines. After over four hours of hearing; the next date to continue was set for February. That date, the video-recording evidence taken by Chevron's employee was to be shown. Although Chevron's lawyer tried to argue, "in the name of efficiency," for just showing "the most significant clips," the defense lawyer argued that only continuous recordings can be admitted as evidence, not clips. The judge agreed to watch the continuous video footage. Someone among the Żurawłów protest supporters/spectators mentioned that there was 72 hours of footage. At the next hearing, of the 10 DVDs provided by Chevron, it was only possible to watch two, so another subsequent hearing was scheduled for March. At least one of the protestors was cleared of charges on March 27th, and the remainder of the cases were eventually withdrawn by Chevron.

These ethnographic details of the hearing itself support the point that backlash in the form of civil suits taken by Chevron against protestors ultimately strengthened the movement. The protestors and their growing number of supporters used these court cases to make moral and political arguments outside of the courtroom, contrasting Chevron's legal actions with its ubiquitous public image campaign in which it presented itself as a good neighbor and responsible corporation. Invitations to solidarity actions by the protestors used this campaign ironically, writing texts such as "Come see how the American energy giant Chevron is building neighborly relations with a community of farmers in Zamojszczyzny at the Regional Court in Hrubieszów..."

Ultimately, however, many saw the fight against Chevron as a fight with the Polish government, who had allowed companies such as Chevron to conduct business in Poland in ways that were unaccountable and lacking transparency. As one of the more active residents put it: “we aren’t just fighting Chevron, we are fighting our entire government.”

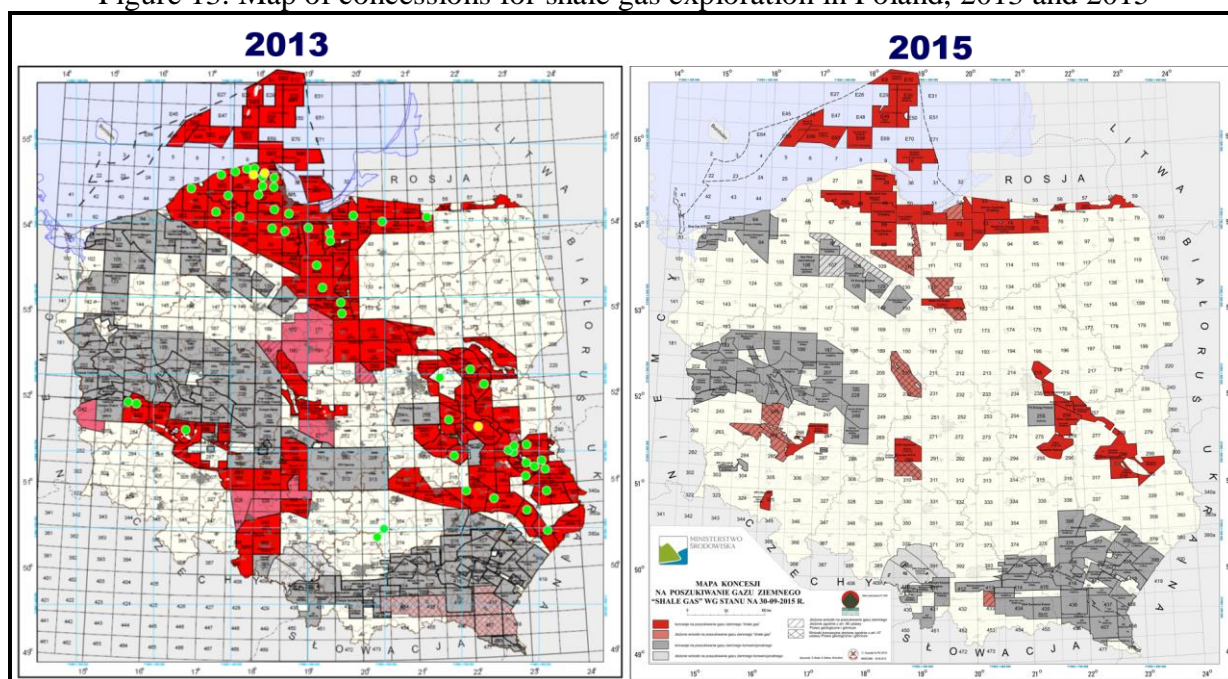
Becoming a side and re-mapping energy transition

Ewa Sufin-Jacquemart, part of the struggle all the way through, ends her account of the events in Żurawlów as follows:

On July 7, 2014 at dawn, when the village was asleep, Chevron gathered its equipment and people and left Żurawlów. The contract for leasing the plots of land was dissolved. Because of the protest, drilling did not come to pass, neither in Żurawlów nor in the vicinity. But the protest also changed its participants. The community integrated, and people not only acquired very much knowledge, they also became real citizens, conscious of their right to decide their own fate. They also understood that they must use their acquired knowledge and experience to help other communities contending with similar threats (Sufin-Jacquemart 2015).

Indeed, through the formation and registration of the Green Żurawlów Association (*Stowarzyszenie Zielony Żurawlów*), those involved in the protest in turn helped others to protect the Roztocze region, located several dozen kilometers from their village. Roztocze is a UNESCO Biosphere Reserve, yet there were attempts to transform it into an extractive-industrial region, including introducing shale gas wells. The Green Żurawlów Association supported activists from Roztocze and advised them on how to organize and lead resistance. In October 2015, they were able to claim a victory in a re-mapping of the shale gas concessions in which they had played an active hand: in Southern Lubelszczyzna, there were no longer any concessions (See Figure 13). They celebrated their victory, conceived as that of a local community deciding its own fate, with the phrase “Roztocze is Free!”

Figure 13. Map of concessions for shale gas exploration in Poland, 2013 and 2015



Source: Polish Ministry of Environment (2013, 2015)

Map on left: Map of exploratory wells as of October 7, 2013,

Red = concessions for hydrocarbon exploration, including shale gas; Green dot = completed exploration wells; Yellow dots = exploration wells in progress;

Map on Right: Map of concessions for shale gas exploration as of September 30, 2015,

Red = shale gas concessions for exploration

More broadly, the residents of Żurawłów, as their own local struggle matured, became part of a multifaceted effort among various groups in Poland to offer their own vision of energy security, one that relied less on extractive industry and centralized energy producers and owners, and more on a decentralized and democratic energy system. Żurawłów strives to become an energy collective around renewable energy, looking to collectives in Germany as models.¹⁶⁸

They maintain their connections with leaders in the still nascent Green Party in Poland, as well as with other social movement actors that struggled alongside them, such as the squatters,

¹⁶⁸ They won a Greenpeace Poland contest, “Liberate Energy” (“*Uwolnij energię*”), in September 2014, the prize for which was photovoltaic panels. A “House of Good Energy” was thus created on the roof of their fire station, a trophy of their victorious struggle and a reminder of their responsibility as citizens to further promote democratic energy systems.

tenants, and anarchist movements. In a distinct way than KAS in the previous chapter, residents of Żurawlów re-mapped energy transition in Poland and became sides in energy policy-making. They created and expanded autonomous political spaces in which to develop alternative democratic and energy practices, in solidarity with other social movements.

Chapter Eight

Rule of law as socio-spatial accountability

A party to proceedings (“a side”) is any person whose legal interests or responsibilities are the object of the proceedings or who requires the intervention of a body in respect of their legal interests or responsibilities.

-Art. 28, Polish Administrative Code

Stroną jest każdy, czyjego interesu prawnego lub obowiązku dotyczy postępowanie albo kto żąda czynności organu ze względu na swój interes prawny lub obowiązek.

-Art. 28, Kodeks postępowania administracyjnego

During the writing of this manuscript, developments in Polish politics which concern the issues of rule of law and democracy have drawn European and international attention. In October 2015, Law and Justice (*Prawo i Sprawiedliwość*, PiS), a Euro-sceptic party, secured an outright parliamentary majority. It was the first party since the fall of communism in Poland in 1989 to hold an absolute majority in Parliament. Since the election, PiS has passed laws which limit the powers of the Constitutional Tribunal and which allow more tight control of public broadcasters. The subsequent attempt by the Polish Constitutional Tribunal to rule the new legislation unconstitutional was thwarted by the government, which refused to recognize the ruling. Taken together, these events are seen as a dire crisis of Polish democracy.

Besides being condemned by the Constitutional Tribunal itself, the Venice Commission, an advisory group of the Council of Europe, issued a report on the ongoing constitutional crisis in Poland. It found that “as long as the situation of constitutional crisis related to the

Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights”(Venice Commission 2016, p. 24). The report’s conclusion continues:

Crippling the Tribunal’s effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground (ibid).

Subsequently, in April 2016, the European Parliament passed a resolution calling on the Polish government to cease defying the Constitutional court.¹⁶⁹ The Polish Supreme Administrative Court issued a resolution in which it appealed to respecting the independence of courts and the separation of legislative, executive, and judicial powers in a democratic state (NSA 2016). Meanwhile, members of the ruling Law and Justice Party resolutely defend their actions, Polish sovereignty, and socially conservative Catholic values against a secular, multicultural EU.

The European Commission has moved forward with taking steps in its “rule of law” framework, which may ultimately result in Poland losing its voting privileges in European venues (EC 2016a). Although the Polish Parliament developed a new Constitutional Tribunal Law and publicized it as an attempt to help solve the constitutional crisis, commentators argue it

¹⁶⁹ a non-binding measure, approved by 513 votes to 142 with 30 abstentions. The resolution stated that if the government did not end the crisis, the European Commission should activate the second stage of its rule of law procedure against Poland. However, punitive measures in the Commission would require unanimous support, and it appears Hungary would not support any such measures.

will have the an opposite effect and further aggravate the deadlock (Stefan Batory Foundation 2016). The stand-off has also led to a downgrade in Poland's financial and other ratings.

These events in Poland are all occurring against the backdrop of “an unresolved financial crisis, a refugee crisis, a deteriorating security environment, and a stalled integration process” which “have created throughout Europe a toxic, unstable political environment in which populism and nationalism thrive” (Verhofstadt 2016). The “erosion of the rule of law” in the EU, in particular in Hungary and Poland, is, according to some observers, perhaps the clearest manifestation of this political instability, in addition to Britain's vote in June 2016 to leave the European Union.

What do these recent developments mean for the arguments I have put forth in this dissertation? How does this study of administrative law and environmental legal mobilization help us see the crisis differently?

In this dissertation I have put forth my own qualitative conceptualization of rule of law, one I have developed on the basis of research on recent environmental controversies in Poland and the use of administrative legal channels by Polish people and societal organizations to enforce environmental protection rules. Drawing upon and building upon human geographical and socio-legal theory, I do not see rule of law merely as a state-led project driven or rescinded by elites “from above.” Rather, rule of law is also set of meaning-making and social practices at the interface between society, state institutions, and the physical world. Its development is dynamic and contradictory, not linear or teleological.

I have argued that social scientists should pay attention to administrative legal processes, even though they may seem dry, technical, and unexciting. Administrative law encompasses a set

of relationships and processes at the interface between governments and citizens. Contact between citizens and state in this realm shapes legal consciousness, civic identity, and social movement politics in consequential ways. Through the notion of “becoming a side,” I have argued that using administrative legal tools and discourses, within formal institutional channels but also beyond, is a way through which environmental legal practitioners enact not only a re-framing of environmental advocacy, but also the very exercise of political liberal rights. They do so by sustaining a spatialized and substantive critique of state power, and equipping others with the skills and support needed to do the same. Polish society, in part through these administrative legal processes and lenses of thinking, is mobilizing to push for more governance accountability.

Put differently, rule of law might be understood as a set of socio-spatial accountability processes which involve the public and which maintain connection, and responsibilities, to actual places, biophysical entities, and the people who live among them. Examining how and why a subset of the Polish population is mobilizing environmental law makes clear that administrative legal processes provide meaningful opportunities for differently situated state and non-state actors to interact, to build a detailed understanding of the governance structure, and to critique, as well as re-fashion, existing governance accountability practices. This understanding of the governance structure occurs in part through the refinement of an already culturally resonant performative view of law: how certain assemblages of discourses and material objects are put together, stabilized, and made real, and by whom, in order to maintain a particular political-economic system. Contact with the administrative legal system, irrespective of the formal results, can lead to further legal and political participation and broader societal mobilization.

In this dissertation, I have examined the legal consciousness formation process of practitioners who use the administrative legal system in Poland. I have built an understanding of

legal consciousness that is multi-dimensional and spatialized, addressing various dimensions of the legal consciousness formation process. Contact with the administrative legal system cultivates a detailed understanding of the workings of the administrative state and a sense of self-efficacy in learning and navigating procedural rules. Such contact shifts or reinforces assessments of the legal system's effectiveness and its ability to yield just outcomes for citizens and for the environment. Through participation in administrative proceedings, practitioners build a comprehensive map of the administrative state for (environmental) governance which includes nodes of discretionary enforcement power. Relatedly, practitioners gain an appreciation of the spatial and temporal dynamics of law and the ways they are held together, in ways that may be at odds with, but also shape, material reality. Taken together, these dimensions of legal consciousness formation may amount to a broad, trans-scalar critique of law as the normative commitments of the executive state in practice.

The main findings and arguments in this dissertation are represented in the following table (Figure 14). They can be summarized using the phrase and concept “becoming a side,” which refers simultaneously to two things. First, it refers to the formal legal requirements for environmental organizations to be able to bring administrative complaints in Poland (“*strona*” – literally side in Polish, refers to a formal party to legal proceedings). Second, the term refers in a more expansive sense to the evolving relationships between state and societal actors in which individuals and groups struggle to be more involved in governance decision-making processes. I conceptualize administrative legal processes as contact zones between state, society, and the physical earth, which are important because they are sites where the relationships between differently situated actors and entities are confronted and negotiated, where such entities mutually interact, learn, and try to potentially shape and re-work their relationships and practices

vis-à-vis each other. Mobilizing administrative-environmental law matters, because not only can it affect legal consciousness and civic identity on the individual level, it can shape further political action and ultimately lead to broader societal mobilization around governance accountability. The bottom part of the table itemizes various dimensions of the legal consciousness formation process I discovered in my examination of environmental legal mobilization in Poland.

Figure 14. Summary of main findings and arguments

<p><u>Becoming a Side</u></p> <p>I. Formal requirements to be party (“<i>strona</i>”) to legal proceedings</p> <p>II. Evolving relationships between state and societal actors</p>
<p><u>Administrative legal processes</u></p> <p>state – society – biophysical contact zones</p>
<p><u>Dimensions of legal consciousness formation resulting from contact with administrative legal processes :</u></p> <ul style="list-style-type: none"> • Acquisition of knowledge about procedural rules → Iterative learning over time → Mastery <ul style="list-style-type: none"> -sense of self-efficacy -self-trained environmental-legal practitioners • Acquisition of knowledge about form and substance of state power <ul style="list-style-type: none"> -mapping points of discretionary decision-making -spatial and temporal aspects of institutional structure and legal argumentation • Observation of the physical environment <ul style="list-style-type: none"> -external validation against content of formal legal decisions -evolving perceptions of legal accountability system’s effectiveness • Incorporation of regional (European Union) and international (Aarhus Convention) legal frameworks <ul style="list-style-type: none"> -external validation against domestic practices and scientific claims -building trans-scalar analyses of governance system • Individual use → Group use and analysis → Re-framing procedural rights’ mobilization → Broader mobilization <ul style="list-style-type: none"> -research, educational work, trainings, and grassroots organizing -developing shared analysis of governance system and ways to re-work it -scalar stacking and reinforcement of local citizens’ movements

My analysis yields some sobering (and hardly novel) conclusions, namely that formal administrative legal processes are limited in their ability to apprehend biophysical systems, more often than not to the detriment of those systems themselves and the public’s ability to scrutinize government conduct. At the same time, evidence—of iterative learning processes surrounding these administrative processes, of recent efforts to aggregate the experience of the most active

organizations/environmental advocates, and of the external validation gained from observation of the biophysical earth itself as well as from supra-national normative frameworks—suggests that the processes examined are mobilizing individuals and groups to engage in broader societal organizing, which they see as necessary given the limits to legal action and law they have identified. This organizing interrogates the normative commitments of the state as manifested in directly witnessed governance practice, brings in aesthetic and public health sensibilities more resonant with the broader populace, and reframes nationalism not as isolationist geopolitical fear-mongering and insular decision-making on the part of elite politicians, but as civic autonomy and self-determination which the state must accommodate, if not support.

Coverage of Poland's recent legal crisis often focuses on elite actions without concurrently covering societal mobilization in response to government actions. Polish society has mobilized en masse against the Law and Justice party's recent reforms to public media and Constitutional law, and against the government's subsequent (and ongoing at this writing) refusal to recognize the Constitutional Tribunal's verdict. This mass mobilization hearkens back to the Solidarity movement. The newly elected government's actions prompted Krzysztof Łoziński, a communist-era opposition activist, to call for the formation of a civic protest movement to defend democracy modeled after the 1970s Worker's Defense Committee (KOR – *Komitet Obrony Robotników*). Tellingly, Łoziński wrote, "We have to remember, the goal isn't to overturn the legally elected authorities of the country, but rather the defense of democracy" (quoted in Cienski and Harper 2016). Thus the Committee for the Defense of Democracy (KOD – *Komitet Obrony Demokracji*), led by Mateusz Kijowski, is re-activating a very specific vision of civil society that was forged during the struggles of the Solidarity movement. This is a vision that distances itself from formal institutional venues and power-holders. It is a deliberate—but

not indifferent—rejection of politics in the sense of a rejection of an authoritarian functioning of the state.

An individual taking part in the recent KOD protests was quoted as saying “His [Jarosław Kaczyński, leader of the ruling PiS party] power is just like the first secretary in communist times — he rules but has no constitutional function. It’s a return to the methods of communist Poland under a different ideology”(ibid) I read this as a recognition of law’s performativity—a way of thinking about how law is “done,” what it produces, rather than merely official labels or the rules themselves. This is a potentially powerful and rich critique of law, a critique which can be developed, among other ways, by interacting with the administrative legal system in environmental protection efforts.

Indeed, responses to the PiS government’s Constitutional legal reforms and media reforms in Poland support many of the arguments I have made in this dissertation. Scale politics, or the politics or scalar re-structuration, are an integral element in legal mobilization and legal consciousness formation. European level institutions may not so much serve to directly enforce rules, but rather provide a vital source of external validation and bring scrutiny to the national level, stirring up existing, competing forms of nationalism in the process. One mobilizing form of this nationalism is a reclamation of Poland’s history of social movement mobilization against authoritarian style rule and against infringements on rights to autonomy and self-determination. Over-use of executive power and its manifestations in and around the legal system are not only detected, but are specified, spatially and substantively, and mobilized against by citizens. What is more, citizens and social movements endeavor to re-work existing discursive-material systems, some within the formal legal realm, as well as craft new systems and practices, as with the energy transition processes examined in the latter chapters, from the ground up. Social

movement actors are making connections across scales—across jurisdictional scales, legal scales, and ecological scales. Allies like public interest lawyers, environmental NGOs, and others with specialized technical knowledge, are integral to the scalar reinforcement of social movement initiative, the building up of citizen power, and the democratization of overlapping socio-ecological and state systems.

During political moments like this one, it is all the more imperative to provide conscientious accounts of law and legal reform which not only incorporate, but begin with, citizen and social movement agency and meaning making. Continued social movement agency, ingenuity, and solidarity not only continues to serve legal watchdog and reform functions on a more daily, mundane level, but also supports societal efforts to ask broader questions about how governance is occurring, for whom, by whom, and why. Environmental-administrative legal processes, as crucial contact zones between citizens, state, and the biophysical earth, are important places to examine governmental accountability structures, practices, and how they are being refashioned and reworked by individuals and societal groups.

The recent developments in Poland—that is, social movement mobilization in tandem with legal developments—then, in a way, attest that rule of law there, understood as a set of socio-spatial accountability processes, is very much alive. This is why geographical and social scientific analysis must be brought to bear on legal issues – because not just within legal processes, but at the interface between formal legal processes and other sectors of social and political life, and the physical earth itself, is where a more credible, just environmental protection system—and more broadly a state accountability system—will be crafted.

The lessons people learn from interacting with the state in the ways I have illustrated in this dissertation are very relevant indeed to the larger, crucial endeavors of building democratic

accountability and more environmentally and socially just societies. The lessons here, and the ones which can be taken from recent political developments in Poland, are germane to other settings where the stakes of governmental accountability to its publics are weighty and urgent.

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