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An Outline History of Environmental Law and Administration in Poland

By DANIEL H. COLE*

I. Introduction

The environmental tragedies in Central and Eastern Europe are a well-known legacy of socialism,¹ but what caused them? It is sometimes incorrectly assumed that the ecological crises resulted not from the "failure" of environmental protection, but from its complete absence. There is a kernel of truth in this notion. Early on the communist authorities tended to ignore problems of pollution and resource-depletion; at first, they assumed these were endemic features of capi-

* Associate Professor of Law, Indiana University School of Law - Indianapolis. Research for this article was facilitated by a Professional Development Grant from the Institute for International Education. I am grateful to the entire Wrocław-based Environmental Law Group of the Polish Academy of Sciences, especially Jerzy Sommer and Jurek Jendroška, for many enlightening discussions about Polish environmental law and for making their offices and library available to me while I conducted research for this article. I am also grateful to Vice-Dean Andrzej Mania of the Jagiellonian University Faculty of Law in Kraków for securing an invitation to conduct research in the university's libraries; the libraries' staffs, especially Zdzisław, were very helpful. Jurek Jendroška and John Clark provided helpful comments on drafts of this article. Rafał Ofierski provided excellent research assistance and did a good deal of the translating. I remain, however, solely responsible for the contents.

1. There are several excellent published accounts of the environmental crises in Central and Eastern Europe. Among them are ENVIRONMENTAL PROBLEMS IN EASTERN EUROPE (F.W. Carter & D. Turnock eds., 1993); D.J. PETERSON, TROUBLED LANDS: THE LEGACY OF SOVIET ENVIRONMENTAL DESTRUCTION (1993); MURRAY FISHBACH & ALFRED FRIENDLY, JR., ECOCIDE IN THE U.S.S.R. (1992); Jon Thompson, *East Europe's Dark Dawn*, NAT'L GEOGRAPHIC, June 1991, at 36; JOSEF VAVROUŠEK ET AL., THE ENVIRONMENT IN CZECHOSLOVAKIA (1990); BORIS KOMAROV, THE DESTRUCTION OF NATURE IN THE SOVIET UNION (1990); IUCN EAST EUROPEAN PROGRAMME, ENVIRONMENTAL STATUS REPORTS: 1988/89, VOL. I, CZECHOSLOVAKIA, HUNGARY, POLAND (1990); HILARY FRENCH, GREEN REVOLUTIONS: ENVIRONMENTAL RECONSTRUCTION IN EASTERN EUROPE AND THE SOVIET UNION (1990); MARSHALL I. GOLDMAN, THE SPOILS OF PROGRESS: ENVIRONMENTAL POLLUTION IN THE SOVIET UNION (1972). For accounts relating specifically to Poland, see, e.g., JAN MARCINKIEWICZ, POLLUTION IN THE HEART OF EUROPE (1987); POLISH MINISTRY OF ENVIRONMENTAL PROTECTION, NATURAL RESOURCES AND FORESTRY, THE STATE OF THE ENVIRONMENT IN POLAND: DAMAGE AND REMEDY (1992); Daniel H. Cole, *Cleaning Up Kraków: Poland's Ecological Crisis and the Political Economy of International Environmental Assistance*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 205 (1991).

talism, which would simply be planned out of existence under scientific socialism.² However, once it became apparent that ecological problems would not simply vanish with the advent of socialism, communist authorities took action to protect the environment. Their efforts, although obviously unsuccessful, were substantial and seriously intended.

What follows is a brief history of environmental law and administration in Poland from presocialist times through the end of the communist regime and into the transition period.³ The focus of the article will be on the comprehensive 1980 Environmental Protection and Development Act, though earlier piecemeal legislative efforts will also be discussed. The history demonstrates that the failure of environmental protection in Communist People's Poland cannot be attributed simply to neglect. To the contrary, Poland's Communist Party (*Polska Zjednoczona Partia Robotnicza* or PZPR) made environmental protection a national political priority and spurred legislative efforts to that end. But those efforts were all hindered by the legal, ideological, economic, and political shortcomings of the (Real) socialist system.⁴ In the final analysis, the Communist Party was unable to protect the environment because it was not powerful enough to overcome the systemic obstacles it had created for its own preservation.

Since the fall of communism, Poland's parliament and government have been working to improve environmental protection. The final section of this article examines the various regulatory changes

2. See, e.g., Hansmeyer & Rürup, *Umweltgefährdung und Gesellschafts-system*, WIRTSCHAFTSPOLITISCHE CHRONIK, translated in Zweigert & Gessner, *The Environmental Damage: Sociological Background and Means for Prevention and Compensation*, in LEGAL PROTECTION OF THE ENVIRONMENT IN DEVELOPING COUNTRIES 83, 93 (I.C. PRIETO & R. NOCEDAL eds., 1976) ("Industry working under an ideal central plan for the economy should not create any specific environmental problems.").

3. Among the best sources on environmental law in Poland are: LUDWIK JASTRZĘBSKI, *PRAWO OCHRONY ŚRODOWISKA W POLSCE* [THE LAW OF ENVIRONMENTAL PROTECTION IN POLAND] (1990); WOJCIECH RADECKI, *ZARYS DZIEJÓW PRAWNEJ OCHRONY PRZYRODY I ŚRODOWISKA W POLSCE* [AN OUTLINE HISTORY OF LEGAL PROTECTION OF NATURE AND THE ENVIRONMENT IN POLAND] (1990); WACŁAW BRZEZIŃSKI, *OCHRONA PRAWNA NATURALNEGO ŚRODOWISKA CZŁOWIEKA* [LEGAL PROTECTION OF THE NATURAL ENVIRONMENT] (1975); JERZY SOMMER, *Poland*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, ENVIRONMENTAL LAW, SUPPL. 6 (1993); WACŁAW BRZEZIŃSKI, *LEGAL PROTECTION OF THE ENVIRONMENT IN POLAND* (1974).

4. I am currently working on a comprehensive book-length explanation of the failure of environmental protection under socialism, using Poland as a case study. The book will discuss the various legal, economic, political, and ideological shortcomings of the socialist system that thwarted the Polish Communist Party's substantial efforts to protect the environment.

that have taken place since 1989. Some of the legal and administrative developments are highly significant, especially those relating to environmental law enforcement. However, the most important change in Poland since 1989 for environmental protection is unquestionably the institution of a constitutional *Rechtsstaat* (literally "law-state"), where law is no longer subordinated to politics.

II. Presocialism

Poland suffered from pollution long before it suffered from communism. The great Polish novelist Boleslaw Prus wrote in his 1890 masterpiece *Lalka* ("The Doll") about "a hill of the most hideous garbage, stinking, almost moving under the sun, while only a few dozen yards away lay the reservoirs from which Warsaw drank."⁵ Like other large European cities in the late 19th century, Warsaw struggled under the combined weight of rapid population growth and industrial development. Prus's description of Warsaw resembles nothing so much as Friedrich Engels's earlier and even more pungent descriptions of London's putrid working class boroughs.⁶ In the 19th century, environmental conditions in Poland were not much different from those of other European countries.⁷

Just as pollution in Poland predated communism, so did environmental protection. Polish historians trace environmental protection efforts to medieval statutes restricting hunting of foxes, bison, and other animals. Although these laws were surely not intended to preserve species for their own sake—it would be anachronistic to impute a naturalist or environmentalist intent to 10th and 11th century legislators—the practical significance of early hunting laws should not be underestimated. Medieval statutes restricting bison hunting to the King may be one reason why Poland is the only European country where wild herds of bison still roam free. In addition to early hunting laws, Poland has for several hundred years restricted mineral extraction, timber harvesting, and water use. Early sanitation laws regulated

5. BOLESŁAW PRUS, *THE DOLL* 80 (David Welsh trans., 1972).

6. See, e.g., FRIEDRICH ENGELS, *THE CONDITION OF THE WORKING-CLASS OF ENGLAND IN 1844*, 64-65 (W.O. Henderson & W.H. Chaloner eds. & trans., 1886) (1958).

7. It is, in fact, a misnomer to refer to 19th century Poland as a "country." At the end of the 18th century, Poland was partitioned by Russia, Austria-Hungary, and Prussia. At the time Prus wrote *Lalka*, Warsaw was under Russian rule. Poland regained its independence in 1919.

city sewer systems.⁸ During the Partitions (the period from 1795-1918, when Polish territories were under Russian, Prussian, and Austrian rule), some Polish landowners took it upon themselves to preserve endangered species and a few unspoiled forests.⁹ Their efforts notwithstanding, the modern history of Polish environmental protection realistically dates from the end of World War I, when Poland regained its independence.

In 1919, the newly reborn Polish state created a Provisional State Commission for Nature Protection (*Tymczasowa Państwowa Ochrony Przyroda*) within the Ministry of Religion and Public Education. Its purpose was advisory and educational, rather than regulatory. It advised the government on matters relating to nature protection, and promoted environmental awareness in the Polish educational system. The Commission influenced two important pieces of legislation from the interwar period: the 1922 Water Law and the 1934 Nature Protection Act.

The 1922 Water Law¹⁰ may be considered Poland's first environmental law, though its primary purpose was to regulate the right to use water. The statute specified that all waters not previously recognized as privately owned belonged to the public,¹¹ and that all citizens had equal rights to use the waters "in the ordinary way" without any kind of prior approval or permit.¹² However, the statute also included substantive provisions to protect water quality. The scope of these protections mark the 1922 statute as an early example of pollution-control legislation.

The 1922 Water Law regulated the discharge of industrial effluents into water bodies. Any user wanting to discharge pollutants or waste water "in excess of general usage" had to obtain prior approval from the appropriate administrative authority.¹³ The administrator could issue a permit only if the proposed drainage was in the "public interest," as ambiguously defined in Article 48 of the statute: if the

8. Andrzej Deja, *Rys historyczny zmian organizacji i zarządzania środowiskiem w Polsce* [Historical Outline of the Changes in Organization and Management of the Environment in Poland] (1992) (on file with author).

9. See Władysław Szafer, *History of Nature Conservation in the World and in Poland*, in *PROTECTION OF MAN'S NATURAL ENVIRONMENT* 7, 12-13 (Włodzinimierz Michajlow ed., 1973).

10. *Ustawa wodna z dnia 19 września 1922 r.* [Water Law of September 19, 1922], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 102, item 936 [hereinafter 1922 Water Law].

11. *Id.* art. 2.

12. *Id.* art. 21.

13. *Id.* art. 25.

administrator found a proposed discharge would have a negative impact on water quality that could not be prevented by installation of available and effective purification equipment, the discharge "should" not be permitted. This foreshadowed the technology-forcing standards that became a prominent feature of American environmental laws in the 1970s. If the administrator determined that a proposed discharge did not contravene the public interest (i.e., that the discharge would not be unduly harmful or could be purified with the use of existing technologies), a permit could be issued. Even then, the administrator could require compensation for any resulting water pollution damages¹⁴ or assess a fee for the mere privilege of using the public's waters for the "non-ordinary" purpose of discharging effluents.¹⁵ These fines and fees created, at least potentially, an incentive to conserve water quality and quantity.

Unfortunately, too little information exists about the implementation of the 1922 Water Law to determine its actual impact on pollution discharges and water quality. Given the state of environmental science, enforcement capabilities, and environmental awareness in the first half of the 20th century, the 1922 Water Law's impact was probably quite limited. As commentators have noted,¹⁶ the ambiguous terminology of the 1922 Water Law provided administrators with substantial leeway to permit any amount of industrial discharges. For example, administrators were not required to levy fines for damages or assess user fees. Despite these shortcomings, the 1922 Water Law was clearly a pollution control statute ahead of its time and remained in force until a new and, in some respects, regressive water law was enacted in 1962.¹⁷

In 1925, the Provisional State Commission for Nature Protection was transformed into the State Council for Nature Protection (*Państwowa Rada Ochrony Przyrody* or PROP), a group which would survive the destruction of the interwar Republic and reappear after the war in Communist People's Poland as an officially recognized (i.e., party approved) "independent" organization. Like its predecessor, PROP was a quasi-governmental agency organized within the Minis-

14. *Id.* arts. 47, § 5; 51, § 1.

15. *Id.* art. 32.

16. See, e.g., BRZEZIŃSKI, *supra* note 4, at 87 ("[I]n every case, the possibility to discharge waste into waters depended on the evaluation of the water administration organs which was the exponent of 'public interest,' and of 'policy considerations.' In that system, however, public interest was tantamount to the interest of the capitalist enterprise which could rely on the administration's support . . .").

17. On the 1962 Water Law, see *infra* notes 78-84 and accompanying text.

try of Religion and Public Education. From its headquarters in Kraków, the twenty-two member Council advised the government on environmental policy and drafted legislation. It also supervised the activities of branch units located in Lwów (today Lviv), Warsaw, Poznań, and Wilno (today Vilnius).

PROP greatly influenced the history of environmental protection in Poland through its scientific, educational, and legislative works. Between the wars, six national parks were established on the basis of plans prepared by the Council.¹⁸ In addition, PROP organized 180 nature reserves and inventoried approximately 4500 natural monuments.¹⁹ Under PROP's influence, the subject of nature conservation became a mandatory part of the secondary school curriculum in 1933, and nature conservation lectures became regular features at universities in Warsaw, Kraków, and Poznań. Most importantly, PROP played a central role in drafting the 1934 Nature Protection Act.²⁰

The 1934 Act closely resembled environmental protection legislation enacted in other European countries during the same decade. The 1934 Act sought to protect natural areas of special scientific, aesthetic, and historic value, including natural monuments and formations, caves, waterbodies, waterfalls, and riverbanks, as well as endangered species of animals and plants.²¹ The 1934 Act also established a system for designating National Parks.²² Any area at least 300 hectares (approximately 740 acres) in size with special natural beauty or a wealth of rare natural features could be designated a national park by order (*dekret*) of the Council of Ministers. Article 2 of the 1934 Act prohibited activities that might damage protected areas or species, except as permitted by the appropriate state authorities. Among other things, the law banned the use, alteration, or contamination of protected "objects"; prohibited the hunting or killing of protected species; and prohibited the removal of protected plant species. These prohibitions applied to private as well as public lands.²³ Viola-

18. Szafer, *supra* note 9, at 14-15.

19. *Id.*

20. *Ustawa o ochronie przyrody z dnia 10 Marca 1934 r.* [Nature Protection Law of March 10, 1934], *DZIENNIK USTAW* [JOURNAL OF LAW] No. 31, item 274 [hereinafter 1934 Act].

21. *Id.* art. 1.

22. *Id.* art. 9.

23. See Wacław Brzeziński, *Nowa polska ustawa o ochronie przyrody* [The New Polish Nature Protection Law], in *V CHROŃMY PRZYRODĘ OJCZYSTĄ* [PROTECTING NATURE OF THE FATHERLAND], July-Aug. 1949, at 3, 7-8.

tors were subject to prison terms²⁴ and fines²⁵ with the proceeds earmarked for a special Nature Protection Fund²⁶ created to finance a nature protection police force.

Unfortunately, the 1934 Act was never implemented. In the five years before Nazi Germany invaded Poland in 1939, only two implementing decrees were issued under the Act and they concerned administrative housekeeping matters. State authorities not only failed to implement the 1934 Act, they completely ignored its restrictions and prohibitions. For example, in 1936 the Polish government began a campaign to develop the tourism potential of the Tatras Mountains in southern Poland. As part of this effort, an aerial tramway was constructed in a protected area in clear contravention of the 1934 Act. The entire membership of PROP resigned in protest. This suited the state authorities well enough; the government did not bother to appoint new members. The Council was simply left unstaffed between 1936 and the end of World War II. Although PROP was not legally abolished, for all intents and purposes it no longer existed. The same might be said for the entire then existing system of environmental protection.

During the Nazi occupation of World War II, protection of the environment obviously was not anyone's concern. The rapacious German and Soviet armies, along with Polish civilians struggling to survive, cut down whole forests, slaughtered protected animal species, and decimated nature preserves. However, the war's most significant effect on environmental protection in Poland may not have been the damage inflicted on natural resources, but the loss of human lives. Many prominent leaders of the environmental protection movement in Poland were among the millions of Polish Jews and tens of thousands of Polish *inteligencja* murdered by Hitler's forces. Only ten of PROP's pre-war members survived to attend the Council's first post-war meeting held in September 1945.

III. 1945-1960²⁷

Environmental protection activities resumed quickly after the close of the War. The 1934 Act was still in force, at least on paper, but

24. 1934 Act, *supra* note 20, art. 24.

25. *Id.* arts. 24, 28.

26. *Id.* art. 15.

27. In this section and the two that follow, I rely heavily on Wojciech Radecki's analysis in ZARYS DZIEJÓW PRAWNEJ OCHRONY PRZYRODY I ŚRODOWISKA W POLSCE, *supra* note 3.

it was already considered a dead letter. The 1934 Act had been based on a preservationist conception of environmental protection that was no longer acceptable in post-war Poland where the Communist Party quickly came to own (by virtue of systematic expropriation) more than eighty-five percent of the forests.²⁸ The Communist Party planned to manage these and other so-called "productive forces of nature" rationally (i.e., economically) in accordance with Marxist-Leninist ideology. Since the pre-war environmental protection law did not provide for economic exploitation of natural resources, a new environmental protection statute was needed that would reflect the new dominant ideology.

The need for a new environmental protection statute was made clear at PROP's first post-war conference in 1945 in a speech by the Minister of Education, Czesław Wycech. Noting that environmental protection was inextricably intertwined with the economic vitality of the country, Wycech stressed that economic exploitation of natural resources was essential to the nation's economic well being. This speech sent a clear message to the traditionally preservation-oriented members of PROP. In a response designed to reassure the government and the ruling party, Władysław Szafer, chair of the PROP conference, stated:

Because we, the nature protectors, were in the pre-war period sometimes unfairly accused of acting in opposition to the country's industrialisation, I must declare now that we were never opposed to national needs for transportation or industry, and we will never object in the future. We think that our activity will be right in line with the government of the Polish People's Republic.²⁹

While PROP's first post-war conference signaled a dangerous (from the point of view of environmental protection) change in focus from resource preservation to economic exploitation, it also gave some reasons for optimism about the future of environmental protection in Socialist Poland. The very fact that the new government paid any attention at all to issues of environmental protection as it confronted the daunting task of reconstructing Poland's decimated infra-

28. Under a law of December 12, 1944, the State took over all forest lands over 25 hectares (about 62 acres). *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 15, item 82; see J. Świąder, *Warunki rozwoju gospodarki leśnej* [Development Conditions of Forestry Economics], in *DZIEJE LASÓW, LEŚNICTWA I DRZEWNICTWA W POLSCE* [THE HISTORY OF FORESTS, FORESTRY AND WOOD-PROCESSING IN POLAND] 410 (A. Zabko-Potopowicz ed., 1965); see also RADECKI, *supra* note 3, at 93.

29. Minister of Education Czesław Wycech, Speech at PROP meeting (Sept. 1945), quoted in RADECKI, *supra* note 3, at 94.

structure suggested that the communist authorities might be more active protectors of the environment than earlier governments. A more specific cause for optimism was PROP's adoption at the 1945 conference of a resolution broadening the concept of environmental protection to include entire ecosystems.³⁰ This resolution ultimately led to the passage of new environmental protection legislation in 1949.

After the war, local governments also provided environmental protection advocates with reason for hope. In Zakopane (south of Kraków in the Tatras Mountains), the People's Council (local legislature) appointed a Committee for Nature Protection to prepare forest protection regulations. In addition, the *Wojewoda* (regional administrator) of Poznań published a general environmental protection regulation. In fact, local regulation of environmental protection became "a universal practice in the first years of the Polish People's Republic."³¹

However, in the midst of all these hopeful developments, the government issued a 1947 decree establishing central economic planning which was silent as to environmental protection.³² This was an ominous signal that economic plans would be designed and implemented with little or no regard for the natural environment. From the point of view of PROP and other environmental protection advocates, this decree made quick enactment of new environmental protection legislation imperative.

On April 7, 1949, the *Sejm* (Poland's parliament) enacted a new Nature Protection Act.³³ The 1949 Act closely resembled its 1934 predecessor. However, in keeping with the resolutions adopted at the 1945 PROP conference, the 1949 Act expressly broadened the focus of environmental protection from protecting individuals to preserving entire ecosystems.³⁴ Article 1 specified that the goal of the 1949 Act was to protect not only "separate individuals," but also "their complexes and communities." Also in keeping with the 1945 PROP conference, the 1949 Act contained an implicit but unmistakable shift in philosophy reflecting the changed political-economic circumstances of

30. See RADECKI, *supra* note 3, at 95; SOMMER, *supra* note 3, at 19.

31. RADECKI, *supra* note 3, at 97.

32. *Dekret z dnia 1 października 1947 o planowej gospodarce narodowej* [Decree of October 1, 1947 on National Economic Planning], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 64, item 373.

33. *Ustawa z dnia 7 kwietnia 1949 r. o ochronie przyrody* [Law of April 7, 1949 on Nature Protection], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 25, item 180 [hereinafter 1949 Act].

34. SOMMER, *supra* note 3, at 19.

the Polish state following World War II. Whereas the 1934 Act only spoke of resource protection, its 1949 successor introduced "rational use" as an equal goal.³⁵ Under Article 1 of the 1949 Act, the purpose of the new law was "preservation, restoration, and *proper use*" of nature (emphasis added). It should be noted that this did not reflect a uniquely socialistic approach to environmental protection; it was also consistent with the "conservationist" (as opposed to preservationist) approach to environmental protection advocated by Teddy Roosevelt, Gifford Pinchot, and the American Progressive Conservationists of the early 20th century. It is also worth noting that Article 1 of the 1949 Act called for the establishment of a general policy on environmental protection, though this mandate was not implemented before the 1970s.

Primary administrative responsibility under the 1949 Act was removed from the Ministry of Education to the economically-oriented Forestry Ministry.³⁶ However, the 1949 Act enjoined the administrator to "ensure that the management of natural resources is consistent with principles aimed at protecting and strengthening nature's creative powers."³⁷ The Forestry Ministry was thus responsible for preserving while at the same time exploiting forest resources, much like the United States Forest Service (located in the Department of Agriculture). In order to fulfill the environmental protection mandate of Article 9, the Forestry Minister was obligated to appoint a Chief Nature Conservator within the Forestry Ministry.³⁸ Subordinate Nature Conservators were to be appointed in the voivodships to deal with regional environmental protection issues.³⁹ At the local (*gmina*) level, the local administrator (*starost*) was instructed to act through a state forest inspector or national park director.⁴⁰ Article 6 provided for the appointment by the Forestry Minister of regional committees for environmental protection to serve as consulting agencies.

The 1949 Act specified an important administrative role for PROP. Under the 1949 Act, PROP's authority extended far beyond the quasi-governmental advisory and educational role prescribed by

35. On the socioeconomic implications of the 1949 Act, see JAN JULIAN NOWAK, *PRAWO I ORGANIZACJA OCHRONY PRZYRODY W POLSCE* [THE LAW AND ORGANIZATION OF NATURE PROTECTION IN POLAND] 24-30 (1964).

36. 1949 Act, *supra* note 33, art. 2, § 1; See Brzeziński, *supra* note 23, at 4. The Minister of Education retained responsibility, however, for environmental education. *Id.* § 3.

37. 1949 Act, *supra* note 33, art. 9.

38. *Id.* art. 5, § 1.

39. *Id.* § 2.

40. *Id.* § 3.

the 1934 Act. Under Article 9, section 2 of the 1949 Act, state authorities were "obligated to consult with the State Council for Nature Protection on matters which could significantly affect the balance of nature." This was a United States National Environmental Policy Act (NEPA)-like mandate,⁴¹ with PROP in the role of the Council on Environmental Quality.⁴² However, this obligation may have amounted to very little since, under Article 3, section 3 of the 1949 Act, the Minister of Forestry served, *ex officio*, as President of PROP. In effect, the 1949 Act's consultation mandate required the Minister of Forestry to consult himself on forestry matters.⁴³ PROP's statutory role in the administrative process, however, should not be underestimated, as it had the right to offer its opinion on draft laws, regulations, and candidates for administrative positions. Any administrative orders issued without a prior opinion from PROP expired automatically after three months.⁴⁴ But, while PROP's opinion had to be sought, its opinions did not have to be followed; the state authorities were always free to ignore or reject PROP's advice or opinion. In this regard, the 1949 Act was again quite similar to NEPA.

The 1949 Act provided four different legal categories for protecting natural resources: (1) natural monuments, defined as individual formations or groups of formations, could be designated by court order initiated by regional authorities, *i.e.*, the *Wojewoda* or People's Council;⁴⁵ (2) nature reserves (or sanctuaries), relatively small areas with natural features (including aesthetic considerations) worthy of protection, could be designated by regulation of the Forestry Minister;⁴⁶ (3) national parks could be established, by order of the Council of Ministers, in areas of at least 500 hectares (1235 acres) with special value to the public interest;⁴⁷ (4) finally, various endangered species of

41. NEPA, 42 U.S.C. §§ 4321-74(d) (1969), generally requires agencies of the federal government to systematically consider the environmental consequences of any proposed major actions significantly affecting the quality of the human environment.

42. Congress created the Council on Environmental Quality (CEQ) in NEPA to oversee the statute's implementation and administration. 42 U.S.C. §§ 4341-47 (1970). The CEQ issued regulations under NEPA which specified the procedural requirements for fulfilling the statute's mandates. See 40 C.F.R. 1500 (1994).

43. On nonforestry matters, the 1949 Act required other ministers to consult with the Forestry Minister, but not necessarily with any other representatives of PROP.

44. See Brzeziński, *supra* note 23, at 6.

45. 1949 Act, *supra* note 33, art. 11, §§ 1, 12.

46. *Id.* § 2.

47. *Id.* § 3. The Council of Ministers was the highest administrative organ in the state and was comprised of Ministers from all the ministerial departments. The Prime Minister was *ex officio* chair of the Council. It was analogous to the President's cabinet in the

plants and animals could be protected by order of the Forestry Minister, in cooperation with the Minister of Agriculture and Land Reform and the Minister of Health.⁴⁸ Once areas or species were designated through one of these legal mechanisms, they were protected in accordance with Article 18 which "prohibited" activities, including hunting, fishing, and development activities that might damage or pollute protected areas or species.⁴⁹ In keeping with its broadened concept of ecosystem protection, the 1949 Act sought to protect the habitats of endangered plant and animal species in part by prohibiting water pollution or changes in water courses in designated areas.⁵⁰ Criminal sanctions for violations of Article 18 regulations were provided in Chapter 7 of the 1949 Act.⁵¹ Knowing violators were subject to arrest, imprisonment for three months, and fines of 150,000 złotych (approximately U.S. \$3400 at 1980 exchange rates).⁵² It should be noted that these sanction provisions were taken directly from the 1934 Act. One important difference, however, was that the 1949 Act did not continue the special Nature Protection Fund established under the 1934 Act to finance the enforcement of environmental laws.⁵³ Instead, all fines levied under the 1949 Act became general revenues of the State Treasury.⁵⁴

Implementation of the 1949 Act was a mixed bag of real achievements and utter disdain for statutory directives. Achievements included the appointment of regional nature conservators,⁵⁵ the formation of regional advisory committees for environmental protection,⁵⁶ and the establishment of a registry of natural monuments.⁵⁷ In

United States, only more powerful, since it could issue regulations and rescind ministry orders.

48. *Id.* § 4.

49. *Id.* art. 18, §§ 2, 3, 6.

50. *Id.* §§ 2, 3.

51. *Id.* arts. 28-32.

52. *Id.* art. 28.

53. *See supra* text following note 23.

54. RADECKI, *supra* note 3, at 107.

55. Zarządzenia Ministra Leśnictwa z dnia 20 listopada 1950 r. w sprawie czynności konserwatora przyrody, nadleśniczego państwowego, kierownika parku narodowego i dyrektora parku narodowego w dziedzinie ochrony przyrody [*Regulation of the Forestry Minister of November 20, 1950 on the Duties of the Nature Conservator, State Forest Inspector, Managers of National Parks, and Directors of National Parks for Nature Protection*], MONITOR POLSKI [POLISH MONITOR] No. 1-132, item 1646.

56. Rozporządzenie Ministra Leśnictwa z dnia 17 marca 1952 r. w sprawie zakresu działania i organizacji wojewódzkich komitetów ochrony przyrody [*Regulation of the Forestry Minister of March 17, 1952 Concerning the Scope and Activity of the District Committees for Nature Protection*], DZIENNIK USTAW [JOURNAL OF LAWS] No. 16, item 99.

addition, between 1949 and 1960, nine new national parks, a network of nature reserves, and numerous natural monuments were designated.⁵⁸ However, many of the statute's most important provisions were simply ignored. For example, the Forestry Minister never appointed the Chief Nature Conservator as mandated by Article 9 of the 1949 Act. This failure left the regional nature conservators without any connection to central state authority thereby limiting their potential effectiveness. What little authority the regional nature conservators possessed was stripped in 1950 when the Communist Party curtailed local and regional autonomy in a new law designed to centralize regulatory decisionmaking.⁵⁹

Although PROP was supposed to play an important procedural role in environmental protection matters under the 1949 Act, it was in practice isolated from environmental protection policy making. Almost before the ink was dry on the 1949 Act, PROP members were notified that their organization's role in environmental policy making had been abolished. PROP's advisory and educational functions were taken over by a new Nature Protection Committee of the Polish Academy of Knowledge (*Komitet Ochrony Przyrody Polskiej Akademii Umiejętności*).⁶⁰ This reorganization or, more appropriately, co-optation made sense given the political-economic priorities of the Communist Party. As Wojciech Radecki noted, "[t]here was no place in the new centralistic and increasingly bureaucratic administrative system for an independent, self-governing organization such as PROP."⁶¹ As a result of the abolishment of PROP, the statutory provisions requir-

57. Zarządzenie Ministra Leśnictwa z dnia 4 stycznia 1952 w sprawie prowadzenia rejestrów tworów przyrody poddanych pod ochronę [Regulation of the Forestry Minister of January 4, 1952 Concerning the Management of Registers of Natural Formations Subject to Nature Protection], MONITOR POLSKI [POLISH MONITOR] No. A-27, item 376.

58. See RADECKI, *supra* note 3, at 110.

59. Ustawa z dnia 20 marca 1950 r. o terenowych organach jednolitej władzy państwowej [Law of March 20, 1950 on the Local Organs of State Authority], DZIENNIK USTAW [JOURNAL OF LAWS] No. 14, item 130.

60. This new committee was reorganized in 1951 as the *Zakład Ochrony Przyrody* (Nature Protection Works) located in the Ministry of Education. Two years later, the Nature Protection Works was removed to the newly established *Polska Akademia Nauk* (Polish Academy of Sciences or PAN). In 1957, a new *Committee for Nature and Natural Resources Protection* (*Komitet Ochrony Przyrody i jej Zasobów*) was created in PAN. That Committee, was reorganized into the *Komisja Ochrony Przyrody Komitetu Naukowego "Człowiek i Środowisko"* (Commission for Nature Protection of the Scientific Committee "Man and Environment") in 1978. In 1981, this last committee was officially acknowledged as the successor to the Committee of Nature Protection, which had replaced PROP in 1949. See RADECKI, *supra* note 3, at 108.

61. *Id.*

ing government agencies to consult with PROP on matters relating to environmental protection were never implemented by the Forestry Minister. His inaction, which reflected in part the Forestry Ministry's own weak position in an administrative hierarchy dominated by industrial ministries, permitted the Communist Party's industrialization plans to proceed unfettered by environmental protection considerations.⁶²

Despite the proliferation of national parks and nature reserves between 1949 and 1960, the period was characterized by the Polish Communist Party's strong emphasis on natural resources development over environmental protection.⁶³ In the same year that the new nature protection law took effect, Poland adopted wholesale the Soviet system of investment planning⁶⁴ with its built-in bias for heavy industrial development. Under this system, environmental protection considerations were eclipsed by the desire for industrial development. The effects of this disregard for environmental protection can be seen in the few environmental regulations issued in the wake of the 1949 Act.

In 1952, the Polish government enacted a new hunting law designed primarily to protect state property from expropriation⁶⁵ and new endangered species regulations.⁶⁶ Although both newly enacted laws were based on the framework of the 1949 Act, they took entirely different approaches to the issue of protection; while the new hunting law focused on protecting state property rights in wild game from expropriation, the endangered species regulation focused on preservation. In comparing the two laws, along with the penalties for their violations, it is clear that the Polish Communist Party was far more interested in protecting its property interests than in preserving endangered species: a violation of the hunting law constituted a "felony" while killing an endangered species was only a misdemeanor. Thus, to borrow Wojciech Radecki's example, a poacher convicted of killing an endangered mountain hare was punished much less severely

62. *Id.*

63. *Id.* at 110.

64. JOHN M. MONTIAS, *CENTRAL PLANNING IN POLAND* 148 (1962).

65. *Dekret z dnia 29 października 1952 o prawie łowieckim* [*Decree of October 29, 1952 on the Hunting Law*], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 44, item 300.

66. *Rozporządzenie Ministra Leśnictwa z dnia 4 listopada 1952 w sprawie wprowadzenia gatunkowej ochrony zwierząt* [*Regulation of the Forestry Minister of November 4, 1952 on Animal Species Protection*], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 45, item 307.

than a poacher found guilty of taking a common grey hare.⁶⁷ The incentives created by these laws were obviously not geared toward species preservation,⁶⁸ but they did clearly reflect the Communist Party's priorities.

After passage of the 1949 Act, the Communist Party turned its attention increasingly toward pollution control. New water pollution discharge standards were issued in 1950.⁶⁹ Unfortunately, these standards were issued without any effective enforcement provisions. Meanwhile, Poland's "forced industrialization" drive proceeded in accordance with central economic plans containing absolutely no environmental protection conditions. According to a 1956 report by the State Council for Nature Protection,⁷⁰ central economic plans permitted heavy industrial enterprises to be located without regard for environmental impact, and industrial enterprises were allowed to dump raw sewage directly into receiving waters with impunity. As so often happened in the history of People's Poland, the environmental regulations that did exist were undermined by economic plans that had at least equal legal status, higher political priority, and greater compliance incentives. This assured that, in case of conflict, the economic plans would prevail. Consequently, by the mid-1950s, water and air pollution levels in Poland reached alarming levels.

On January 1, 1957, a State Inspectorate for Water Protection (*Państwowa Inspekcja Ochrona Wód*) was established within the Ministry of Navigation (*Ministerstwo Żeglugi*).⁷¹ The Inspectorate became the chief water protection agency in the state apparatus. Its job

67. See RADECKI, *supra* note 3, at 113.

68. *Id.* at 112-13.

69. *Rozporządzenie Ministra Gospodarki Komunalnej z dnia 2 września 1950 w sprawie określenia warunków, jakim powinny odpowiadać ścieki wpuszczane do zbiorników wód powierzchniowych i do ziemi* [Regulation of the Minister of Public Utilities of September 2, 1950 concerning the Definition of Conditions relating to Waste Water Discharges to Open Reservoirs and the Ground] *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 41, item 371.

70. OCHRONA ZASOBÓW PRZYRODY PODSTAWĄ GOSPODARKI NARODOWEJ. REFERATY I UCHWAŁY ZWYCZAJNEJ SESJI PAŃSTWOWEJ RADY OCHRONY PRZYRODY ODBYTEJ W. WARSZAWIE Z DNIA 15 I 16 LISTOPADA 1956 R. [NATURAL RESOURCES PROTECTION AS A BASIS OF THE NATIONAL ECONOMY. REPORTS AND RESOLUTIONS OF AN ORDINARY SESSION OF THE STATE COUNCIL FOR NATURE PROTECTION, WARSAW, NOVEMBER 15-16, 1956] (1957).

71. Actually, the available sources conflict about the location of the State Inspectorate for Water Protection. Andrzej Deja of the Ministry of Environmental Protection states that it was established in the Navigation Ministry. Deja, *supra* note 8, at 4. Professor Radecki, in contrast, asserts that it was located in the Ministry of Public Utilities. RADECKI, *supra* note 4, at 114.

was to ensure that industrial enterprises and municipalities complied with the provisions of the still lingering 1922 Water Law. According to critics, however, the Water Protection Inspectorate's sole concern was to protect water *quantities* for the sake of further industrial development; sanitation and nature protection considerations took a back seat.⁷²

In May 1957, the Ministry of Navigation was transformed into the Ministry of Navigation and Water Management (*Ministerstwo Żelugi i Gospodarki Wodnej*).⁷³ This newly created ministry became the chief administrative agency responsible for water resources management and protection in Poland. Its responsibilities included flood control, coastal zone protection, long-term planning of water use and protection, management of municipal sewer systems, and water quality monitoring. Thus, for the first time in People's Poland, a departmental minister with a seat on the Council of Ministers had some responsibility for environmental protection. Unfortunately, this did not portend the emergence of pollution control and environmental protection as a political priority for the Communist Party-state.

IV. The 1960s

In 1960, three years after its creation, the Ministry of Navigation and Water Management was reconstituted as the Navigation Ministry and was stripped of its environmental protection responsibilities.⁷⁴ At the same time, a new Central Water Management Board (*Centralny Urząd Gospodarki Wodnej*) was created which took over the old ministry's environmental protection responsibilities. The new Board was not instituted as a ministry, but as a lower-level governmental agency; its chief did not sit on the Council of Ministers. This arrangement constituted a political demotion of environmental protection which had at least theoretically been represented on the Council of Ministers between 1957 and 1960. As a "central," but not "supreme" organ of state administration, the Central Water Management Board was subordinated to higher ministerial departments. Nevertheless, it con-

72. See RADECKI, *supra* note 3, at 114.

73. Ustawa z dnia 28 maja 1957 r. o utworzeniu urzędu Ministra Żelugi i Gospodarki Wodnej [Law of May 28, 1957 on the governmental institution of the Ministry of Navigation and Water Management], DZIENNIK USTAW [JOURNAL OF LAWS] No. 31, item 130.

74. Ustawa z dnia 14 czerwca 1960 o otwarciu Centralnego Urzędu Gospodarki Wodnej i przekształceniu urzędu Ministra Żelugi i Gospodarki Wodnej w Urząd Ministra Żelugi [Law of June 14, 1960 on the institution of the Central Office of Water Management and reorganization of the Ministry of Navigation and Water Management into the Ministry of Navigation], DZIENNIK USTAW [JOURNAL OF LAWS] No. 29, item 163.

stituted the first central agency in the state with a distinct pollution control mandate. As such, its creation marked a turning-point in the history of environmental law in People's Poland.⁷⁵

Initially, the responsibilities of the Central Water Management Board included all the nonnavigation-related tasks exercised by the former Ministry of Navigation and Water Management. It prepared and administered long-term water management and protection plans. It had legal authority, delegated by the Council of Ministers, to coordinate activities of other state agencies relating to water management. However, conflicts arose whenever the Central Water Management Board attempted to impose conditions on water-use activities governed by other "central" and "supreme" state organs. Industrial ministries in particular paid little attention to principles of environmental protection or to the Central Bureau.

Between 1960 and 1966, the Polish parliament was very active in the area of environmental protection. First, on January 31, 1961, the *Sejm* enacted a new Water Pollution Protection Act⁷⁶ which authorized the Council of Ministers to set norms for water pollution discharges. That same day, the *Sejm* enacted a new land use planning law that, among other things, expressly recognized the importance of natural resources and established their protection as one of the purposes of land use planning.⁷⁷

In May 1962, the Water Pollution Protection Act was subsumed by a new general Water Law which also replaced the 1922 Water Law.⁷⁸ More than anything else, the 1962 Water Law subjected the management and protection of water to central planning.⁷⁹ Other provisions of the 1962 Water Law, however, ostensibly permitted state agencies to regulate pollution discharges "independently" of the central plan.⁸⁰ Nevertheless, central plan compliance alone determined

75. RADECKI, *supra* note 3, at 116.

76. *Ustawa z dnia 31 stycznia 1961 o ochronie wód przed zanieczyszczeniem* [Law of January 31, 1961 on the protection of water from pollution], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 5, item 33.

77. *Ustawa z dnia 31 stycznia 1961 o planowaniu przestrzennym* [Law of January 31, 1961 on land use planning], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 7, item 47, art 1, § 1.

78. *Ustawa z dnia 30 maja 1962. Prawo wodne* [Law of May 30, 1962. Water Law], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 34, item 158 [hereinafter 1962 Water Law].

79. *Id.* ch. 2, arts. 22-24.

80. *Id.* art. 88, § 2; See WACŁAW TARASIEWICZ ET AL., *PRAWO WODNE: KOMENTARZ, PRZEPISY WYKONAWCZE I ZWIĄZKOWE* [WATER LAW: COMMENTARY, FEDERAL REGULATIONS AND IMPLEMENTATION] 113-115 (1965).

whether or not a water-use permit would issue.⁸¹ The permitting agency (*i.e.*, the ministry with jurisdiction over the particular development) was authorized to attach pollution control conditions to the permit itself, but the Central Water Management Board had no independent authority to do so.⁸² Industrial ministers preferred not to impose environmental conditions on development projects because they only added to the costs of construction and operation without providing any "productive" benefits (according to the socialist accounting system). Even if a permitting agency did impose water pollution conditions, compliance was not guaranteed. The permitting agency or the Council of Ministers *could* revoke the permit in case of a violation, but revocation was neither automatic nor mandatory. In extreme cases, violations of plan-based regulations or permit conditions could lead to criminal sanctions including fines and imprisonment under Chapter 10 of the 1962 Water Law.⁸³ Sanctions, however, were rarely imposed for illegal discharges. Most cases were dropped either by the prosecutor or the court on a finding that the violations resulted from "activities dictated by higher reasons," namely, fulfillment of plan production targets.⁸⁴ It must be kept in mind that economic plans were also promulgated as legal acts; in virtually every case, the need to fulfill the plan became a complete defense to violations of water pollution control laws.

The same problem plagued Poland's first air pollution prevention law which was enacted in 1966.⁸⁵ The 1966 Air Law was called "the best formulated and most progressive law of this sort in the world" by the PZPR's newspaper, *Trybuna Ludu*.⁸⁶ In reality, the 1966 Air Law was virtually without normative content. It defined air pollution as emissions of substances "which may result in violations of permissible concentrations in the air."⁸⁷ Under this definition, air pollution could not exist in the absence of regulations defining permissible concentrations of emissions. The 1966 Air Law did not, however, require the Council of Ministers to promulgate "permissible concentrations." It

81. 1962 Water Law, *supra* note 78, art. 46.

82. BRZEZIŃSKI, *supra* note 3, at 91.

83. 1962 Water Law, *supra* note 78, arts. 151-60.

84. BRZEZIŃSKI, *supra* note 3, at 111.

85. Ustawa z dnia 21 kwietnia 1966 o ochronie powietrza atmosferycznego przed zanieczyszczeniem [Law of April 21, 1966 on Protecting Air Against Pollution] Dziennik Ustaw No. 14, item 87 [hereinafter 1966 Air Law].

86. TRYBUNA LUDU, Mar. 25, 1969 at 1, quoted in F.W. Carter, *Poland*, in ENVIRONMENTAL PROBLEMS IN EASTERN EUROPE, *supra* note 1, at 107, 122.

87. 1966 Air Law, *supra* note 85, art. 1, § 2.

only enabled the Council of Ministers and other state agencies to impose air pollution requirements and restrictions at their discretion. As it happened, the Council of Ministers did adopt fairly stringent norms for air pollution concentrations,⁸⁸ but not because of any statutory mandate.⁸⁹ Presumably, it could also have rescinded or suspended the regulations at any time.

Once permissible concentrations were established, the 1966 Air Law had some potential enforceability. Article 3, section 1 expressly required new and expanding industrial facilities to install available emissions control equipment if their uncontrolled emissions would or could cause a violation of permissible concentrations. However, it was up to the administrator's discretion to demand pollution abatement.⁹⁰ If emissions posed an imminent threat to human life, the State Health Inspector could close down an industrial facility entirely.⁹¹ However, this kind of administrative authority over industrial production was unlikely to be exercised given its adverse effect on economic production. The Polish environmental law scholar Wacław Brzeziński, writing about the 1966 Air Law, noted the "frequent collisions" between air pollution prevention and industrial production that administrators had to solve on a case-by-case basis "from the point of view of state policy."⁹² Thanks to the vast administrative discretion afforded by the 1966 Air Law, administrators could, in every case, decide that production concerns took priority over pollution control.⁹³

Administrative responsibilities under the 1966 Air Law were vested in a new Office of Air Pollution Control (*Biuro do Spraw Ochrony Powietrza Atmosferycznego*) established within the Central Water Management Board, which became, as a result, Poland's com-

88. Regulation of the Council of Ministers of September 13, 1966 concerning the permissible concentrations of substances in the atmosphere, *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 42, item 253.

89. Another major problem of the 1966 Air Law was that it spoke only in terms of ambient concentrations (amounts of a pollutant in the atmosphere at a certain location, usually measured as a fraction of the total chemical make-up of the atmosphere, e.g., in parts-per-billion). The government was left to translate from ambient concentrations to emissions levels (amounts of a pollution released into the atmosphere, e.g., from a smoke-stack, usually measured in tons) for each individual source of air pollution in the country. This became a chronic problem of air pollution legislation and administration until the very end of People's Poland.

90. 1966 Air Law, *supra* note 85, art. 11, § 1.

91. *Id.* art. 1, § 11.

92. Wacław Brzeziński, *Legal Foundations for the Conservation of Man's Natural Environment (Fundamental Problems)*, in *PROTECTION OF MAN'S NATURAL ENVIRONMENT* 82-87 (Włodzimierz Michajłow ed., 1973).

93. BRZEZIŃSKI, *supra* note 3, at 129.

prehensive environment agency (albeit with substantial economic responsibilities, e.g., for water management). The Central Board promulgated regulations under the 1966 Air Law and the 1962 Water Law, including emissions standards. But, under both laws, the Central Board had trouble enforcing its authority against central and supreme organs of state authority. This foreshadowed a chronic problem in People's Poland which hampered environmental protection: the relative lack of authority of environmental ministries over industrial ministries.

While the *Sejm* enacted new legislation, Poland's Party-government was also active in environmental protection during the 1960s. The 1961 five-year socioeconomic plan, written by Communist Party planners and ratified by the Parliament, for the first time included provisions concerning water and air pollution.⁹⁴ In the middle of the decade, the Council of Ministers exercised its independent regulatory authority to issue environmental regulations intended to protect forests and agricultural lands against air pollution.⁹⁵ Of course, socioeconomic plans and Council of Ministers' decrees carried considerably more weight with industrial ministries than did environmental agency regulations, but they too went largely unenforced. After the 1960s, lack of enforcement more than lack of regulation or the poor quality of regulations obstructed effective environmental protection in Poland.

In 1964, the State Council for Nature Protection attempted to reinvigorate the concept of environmental preservation by designing new categories of protected areas including landscape parks and areas of protected landscape. The Council ultimately sought to amend the 1949 Act but its proposals were summarily rejected by the Party-gov-

94. On the first socioeconomic plans to include air and water pollution provisions, see Zbigniew Bochniarz & Andrzej Kassenberg, *Environmental Protection Through Integrated Planning*, in *THE ECONOMIC PROBLEMS OF ENVIRONMENTAL PROTECTION* 17, 18 (Adam Ginsbert-Gebert ed., 1988).

95. See, e.g., *Uchwała nr 198 Rady Ministrów z dnia 12 lipca 1966 w sprawie ochrony użytków rolnych* [Resolution No. 198 of the Council of Ministers of July 12, 1966 Concerning Protection of Agricultural Lands], *Monitor Polski* [POLISH MONITOR] No. 40, item 200; *Uchwała nr 301 Rady Ministrów z dnia 6 września 1966 r. w sprawie rekultywacji i zagospodarowania gruntów przekształconych w związku z poszukiwaniem i eksploatacją kopalni* [Resolution No. 301 of the Council of Ministers of Sept. 6, 1966 Concerning the Recultivation and Farming of Lands Recultivated in Connection with Mining Activities], *Monitor Polski* [POLISH MONITOR] No. 50, item 247; *Uchwała nr 18 Rady Ministrów z dnia 31 stycznia 1970 r. w sprawie ochrony lasów przed ujemnymi wpływami szkodliwych pyłów i gazów wydzielanych przez zakłady przemysłowe* [Resolution No. 18 of the Council of Ministers of Jan. 31, 1970 Concerning Protection of Forests Against the Negative Effects of Dusts and Gases Emitted by Industrial Works], *Monitor Polski* [POLISH MONITOR] No. 4, item 35.

ernment which, by that time, was less interested in setting aside protected areas and more interested in reducing levels of pollution and waste (as evidenced by the five-year socioeconomic plans for 1961-70).⁹⁶

In one respect, 1964 was a landmark year for environmental protection in People's Poland. It was the year the *Sejm* enacted a new Civil Code which made it possible for the first time for individuals to bring suit to stop or control pollution.⁹⁷ Under Article 222 of the Civil Code, property owners had the right to sue any person whose activities caused excessive damage to their property. In addition, property owners could sue to preempt prospective harm.⁹⁸ These provisions remained important potential sources of individual remedies against environmental harm even after comprehensive environmental legislation was enacted in 1980. However, the potential of these provisions was rarely tapped. Environmental lawsuits under the Civil Code were brought infrequently and, of those that were brought, relatively few were successful.

Finally, in 1969, a new Penal Code was adopted that provided criminal sanctions for specific environmental harms.⁹⁹ Under the new Penal Code, individuals (but not enterprises, organizations, etc.) could be fined or imprisoned for environmental crimes. Specified offenses included air, water, and soil polluting activities that created a common danger for human life and health¹⁰⁰ and illegal timber harvesting.¹⁰¹ As with the Civil Code, few criminal cases were ever brought, and many complaints received by prosecutors were summarily dismissed for reasons of "higher necessity."¹⁰²

96. See Jerzy Jendroska, Conservation of Nature in Polish Law (unpublished manuscript, on file with author).

97. *Kodeks cywilny* [Civil Code], ustawa z dnia 23 kwietnia 1964 r., *Dziennik Ustaw* [JOURNAL OF LAWS] No. 16, item 93. On the use of the Civil Code for environmental protection, see generally Wojciech Radecki, *ODPOWIEDZIALNOŚĆ CYWILNA W OCHRONIE ŚRODOWISKA* [CIVIL RESPONSIBILITY IN ENVIRONMENTAL PROTECTION] (1987).

98. CIVIL CODE, art. 439.

99. *Kodeks karny* [Penal Code], ustawa z dnia 19 kwietnia 1969 r., *Dziennik Ustaw* [JOURNAL OF LAWS] No. 13, item 94.

100. PENAL CODE, art. 140.

101. *Id.* art. 213.

102. Stanisław Biernat & Andrzej Wasilewski, *Environmental Legislation in Poland*, IV FORDHAM ENVTL. L. REP. 9, 44 (1992).

V. The 1970s

In an important sense, it is a misnomer to speak of "environmental protection" in Poland before the 1970s. The concept of "nature protection" was fairly well understood and, as the list of legislation from the 1960s illustrates, the threat from pollution was taken seriously. However, there was scant understanding of how these issues fit together. This was not just a Polish problem, of course; throughout the world, the concept of "environmental protection" was only beginning to be defined in the early 1970s.

Between 1971 and 1972, two important events facilitated the development of environmental protection in Poland. The first was the PZPR's Sixth Congress in 1971, where for the first time environmental protection emerged as a national political priority. In its resolution, the Congress called for a complete program of environmental protection to be prepared within two or three years.¹⁰³ However, the proposed "environmental" program was also to include, among other things, plans for a national network of superhighways.

The second important event for the development of environmental protection in Poland was the United Nations Conference on the Human Environment held in Stockholm in 1972. Actually, Poland did not attend the conference; it boycotted, along with all the Soviet Bloc countries, because nonmembers of the U.N. were not invited to participate. However, the Polish government had prepared to attend, and those preparations greatly influenced the theory, if not the practice, of environmental protection in Poland. New scientific committees were appointed to study environmental problems and scholars began to explore potential legal solutions. In March 1971 the Polish Academy of Sciences (*Polska Akademia Nauk* or PAN) Scientific Committee "Man and Environment" (*Komitet Naukowy "Człowiek i Środowisko"*) convened a conference of lawyers from around Poland to discuss the methods and goals of what was just beginning to be called "environmental protection" (*ochrona środowisko*).¹⁰⁴ Before the close of 1971, the Scientific Committee had issued a report entitled "Programme of environmental protection in Poland to the year 1990." This report was subsequently adopted in 1975 by the Presid-

103. VI ZJAZD PZPR. PODSTAWOWE MATERIAŁY I DOKUMENTY [SIXTH CONGRESS OF THE PZPR: BASIC MATERIALS AND DOCUMENTS] 252 (1972).

104. The Polish term "*środowisko*" directly translates to the English word "environment," and it was first used in Poland in the 1970 Academy of Sciences resolution appointing the Scientific Committee "Man and Environment." See RADECKI, *supra* note 3, at 119.

ium of the Council of Ministers and by the Politburo of the PZPR's Central Committee.

Meanwhile, member countries of the Soviet Bloc's Council for Mutual Economic Assistance (CMEA) began to cooperate more closely on matters of environmental protection. From the start of the 1970s, one sees a great deal of coordination in their environmental activities. New environmental legislation began appearing in each country at roughly the same time, and one country's environmental statutes began to closely resemble another's.

Poland was poised at the start of the 1970s to pursue a fresh approach to problems of environmental protection. But almost immediately, there were set-backs. The first was in 1972 when the Central Water Management Board proposed to be transformed into a new Ministry of Water Management and Environmental Protection (*Ministerstwo Gospodarki Wodnej i Ochrony Środowiska*). The intention was (1) to give environmental protection a more prominent place in the Central Board's mission and (2) to raise the status of environmental protection to the ministerial level. The proposed transformation would have given environmental protection advocates a voice on the Council of Ministers for the first time since the late 1950s. However, agricultural and industrial ministries objected to the proposed administrative changes which they correctly perceived as threatening their authority. As usual, the industrial interests prevailed. Not only was the Central Water Management Board's proposal rejected, on March 29, 1972, the Central Board itself was abolished¹⁰⁵ and its various responsibilities were scattered among the Agriculture Ministry, the Navigation Ministry, and a newly created Ministry of Local Economy and Environmental Protection (*Ministerstwo Gospodarki Tere-nowej i Ochrony Środowiska*).¹⁰⁶ This new ministry was given responsibility for city planning and development; urban land use management; public utilities regulation; housing; property expropriation; and environmental protection of water, air, and "green areas" (*zieleni*) within cities and towns. This diffusion of environmental protection responsibilities constituted a major administrative defeat for environ-

105. *Ustawa z dnia 29 marca 1972 r. o zniesieniu Centralnego Urzędu Gospodarki Wodnej* [Law of March 29, 1972 abolishing the Central Bureau of Water Management], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 11, item 79.

106. *Ustawa z dnia 29 marca 1972 r. o utworzeniu Urzędu Ministra Gospodarki Tere-nowej i Ochrony Środowiska* [Law of March 29, 1972 on the institution of the Ministry of Local Economy and Environmental Protection], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 11, item 77.

mental protection interests. The diffusion of responsibilities, however, may have been purely coincidental. According to one former official of the Central Water Management Board, the administrative changes resulted from a personal vendetta against the Central Board's chief by other high-ranking Communist Party members.¹⁰⁷ The 1972 reorganization of environmental protection administration was not the only administrative change during the 1970s. In 1975 the Ministry of Local Economy and Environmental Protection was replaced by the Ministry of Administration, Local Economy and Environmental Protection (*Ministerstwo Administracji, Gospodarki Terenowej i Ochrony Środowiska*).¹⁰⁸ The addition to the title was significant. As Wojciech Radecki has noted, the new ministry's duties were predominantly administrative with environmental protection responsibilities "added as an afterthought."¹⁰⁹

The 1970s were also a decade of busy legislative and regulatory activity on environmental protection. In 1970, the Council of Ministers promulgated a regulation to protect forests from air pollution which required industrial enterprises to compensate for forest damages caused by their polluting activities.¹¹⁰ In addition, industrial enterprises could also be forced to restore damaged forests to their pre-existing state. In 1971 this regulation was subsumed into a new law to protect agricultural and forest lands¹¹¹ which sought to promote conservation of productive agricultural lands by preventing their conversion to non-agricultural uses (except in cases of economic necessity), limiting soil erosion, reclaiming agriculture lands previously converted to industrial uses, and reducing waste in land use.¹¹²

107. Interview with Andrzej Deja, Chief of the Water Management Office, Ministry of Environmental Protection, Natural Resources and Forestry, in Warsaw, Poland (June 9, 1992).

108. *Ustawa z dnia 28 maja 1975 o utworzeniu urzędu Ministra Administracji, Gospodarki Terenowej i Ochrony Środowiska* [Law of May 28, 1975 on the creation of the Ministry of Administration, Local Economy and Environmental Protection], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 16, item 90.

109. RADECKI, *supra* note 3, at 122.

110. *Uchwała Rady Ministrów z 31 stycznia 1970 r. w sprawie ochrony lasów przed ujemnymi wpływami szkodliwych pyłów i gazów wydzielanych przez zakłady przemysłowe* [Council of Ministers' resolution of January 31, 1970 concerning protection of forests from the harmful effects of noxious dust and gases emanating from industrial plants], *MONITOR POLSKI* [POLISH MONITOR] No. 4, item 33.

111. *Ustawa z 26 października 1971 r. o ochronie gruntów rolnych i leśnych oraz rekultywacji gruntów* [Law of October 26, 1971 on protection of agricultural and forest lands and reclamation], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 27, item 249.

112. See Andrzej Stelmachowski, *Agricultural Law*, in *GENERAL PRINCIPLES OF LAW OF THE POLISH PEOPLE'S REPUBLIC* 339, 347-48 (Leon Kurowski ed., 1984).

The most significant new statutes of the 1970s were the Water Law and the Building Law enacted on the same day in 1974.¹¹³ The Building Law contained a special "chapter" (*rozdział*) devoted to "[e]nvironmental protection in building construction." Article 113, section 8 of this chapter provided that buildings should be designed, built, and used in a way that ensured "water, air, soil, nature and landscape protection, as well as protection against noise, vibrations, radioactivity, and electromagnetic radiation."

The 1974 Water Law did not so much replace the 1962 Water Law as consolidate it with other statutes regulating various aspects of water use. The 1974 Water Law more comprehensively treated all aspects of water management, including municipal and rural water supplies, irrigation, and drainage.¹¹⁴ The main focus of water management, however, remained water supply and the permitting process stayed much as it had been under the 1962 Water Law.¹¹⁵ The 1974 Water Law did, however, make a substantial contribution to water quality protection by requiring the establishment of protective zones around water intakes¹¹⁶ and authorizing the Council of Ministers to institute a classification system for water quality.¹¹⁷ Most importantly, the 1974 Water Law created for the first time in People's Poland and, perhaps, the world a system of fees for water consumption and disposal. This was significant for a variety of environmental, economic, and ideological reasons.¹¹⁸ First, the fees were to be set by the Council of Ministers at levels exceeding the cost of water treatment in order to encourage water conservation and reduce waste. Second, the fees were to be paid into a Water Management Fund to finance water improvement and water quality protection projects.¹¹⁹ Finally, the 1974 Water Law attempted to ensure greater compliance with its environmental re-

113. *Ustawa z dnia 24 października 1974. Prawo wodne* [Law of October 24, 1974. Water Law], *Dziennik Ustaw* No. 38, item 230 [hereinafter 1974 Water Law]; *Ustawa z dnia 24 października 1974. Prawo budowlane* [Law of October 24, 1974. Building Law], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 38, item 229.

114. See Stanisław Surowiec & Andrzej Deja, *Water Law and Its Application in Poland*, in 1 WATER DEVELOPMENT AND MANAGEMENT, PROCEEDINGS OF THE UNITED NATIONS WATER CONFERENCE, MAR DEL PLATA, ARGENTINA, MARCH 1977, 1737, 1738 (1978).

115. See *supra* notes 78-84 and accompanying text.

116. 1974 Water Law, *supra* note 113, arts. 59-61.

117. *Id.* art. 62, § 3.

118. For more on the institution of resource use and pollution fees, see, e.g., MAREK MAZURKIEWICZ, *OPŁATY I KARY PIENIĘŻNE W SYSTEMIE OCHRONY ŚRODOWISKA W POLSCE* (STRUKTURA PRAWNA I FUNKCJE) [Fees and Penal Fines in the System of Environmental Protection in Poland (Legal Structure and Function)] (1986).

119. 1974 Water Law, *supra* note 113, art. 56.

quirements by beefing up criminal sanctions for violations. The financial penalties remained the same as under the 1962 Water Law (50,000 zł.), but the possible term of imprisonment was increased from two to five years.¹²⁰

Despite the new laws and changes in administration during the first half of the 1970s, the PZPR was apparently dissatisfied with the piecemeal approach to environmental protection in Poland. At its Seventh Party Congress in December 1975, the issue of environmental protection rose from third (in 1971) to first on the list of political priorities. The 1975 resolution stated:

[w]e must give more attention than before to the protection and shaping of the environment. With this in view we must build our towns and villages and protect the aesthetic values of the countryside. This should be an important part of development planning, investment programming and technology preference. Taking into account the importance of the problem there should be prepared, with the help of scientists, a bill regulating environmental protection.¹²¹

The 1975 Resolution ultimately led to passage of the 1980 Environmental Protection and Development Act. It is significant that the increased focus on environmental protection in Poland during the 1970s did not result from any particular catalytic event or grass-roots political movement. Rather, the impetus for increased environmental protection came from the highest echelons of the PZPR. Claims that the Communist Party did not care about protecting the natural environment at all are exaggerated.

As if to "codify" the PZPR's 1975 resolution, the Polish constitution was amended in 1976 to include, among other new provisions, two articles raising environmental protection "to the highest level of law and politics."¹²²

Article 12, paragraph 2: The Polish People's Republic ensures the protection and rational shaping of the environment.

120. *Id.* art. 122.

121. VII Zjazd PZPR. Podstawowe materiały i dokumenty. [VII CONGRESS OF THE PZPR: BASIC MATERIALS AND DOCUMENTS] 236 (1975), *quoted in* Jerzy Sommer, *Constitutional protection of environment in Poland*, in *DISCUSSION PAPERS: SPECIAL: ENVIRONMENTAL CONTROL AND POLICY: PROCEEDINGS OF THE HUNGARIAN-POLISH SEMINAR ON THE THEORETICAL PROBLEMS OF ENVIRONMENTAL CONTROL AND POLICY* 25, 26-27 (Andras Tamas & Dorottya Lodner eds., 1988).

122. RADECKI, *supra* note 3, at 122.

Article 71: Citizens of the Polish People's Republic have the right to utilize the values of the natural environment and the obligation to protect it.

It is unclear just what these provisions were intended to accomplish. As the Polish legal scholar Jerzy Sommer has pointed out, the very fact of their inclusion seemed to elevate environmental protection as "one the basic aims of the socialist state."¹²³ However, Professor Sommer also has recognized that "[t]he real significance of constitutional provisions depends largely on the subordinated legislation which is to implement constitutional regulation."¹²⁴ In Communist People's Poland, as in all socialist countries, constitutional provisions were not automatically legally enforceable; they had to be given legal effect by Parliamentary legislation.¹²⁵ Unless and until the *Sejm* enacted a law specifically implementing Articles 12 and 71, the constitutional rights they supposedly guaranteed were legally meaningless.¹²⁶ Consequently, the provisions had no immediate impact on environmental protection in Poland. The real test of their legal significance had to wait four years for the enactment of the 1980 Environmental Protection and Development Act.

In the meantime, there was a great deal of conversation about what form new environmental legislation should take. Should it be comprehensive or should nature protection be separated from pollution control?¹²⁷ Should it be in the form of a code (like the Civil

123. Sommer, *supra* note 121, at 28-29.

124. *Id.* at 33. This signifies an important difference between "negative" constitution-writing as practiced in the United States and "positive" constitution writing as practiced in much of Europe, both communist and democratic. In the former, constitutional guarantees are largely self-executing; in the latter, positive constitutional guarantees require implementation.

125. See, e.g., Rett Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 INT'L & COMP. L.Q. 89, 90 (1988).

126. On the debate about the legal meaning of Article 71 of the Polish Constitution, see Jerzy Jendrośka, Jr., *Citizens' Right to Environment*, in DISCUSSION PAPERS: SPECIAL: ENVIRONMENTAL CONTROL AND POLICY: PROCEEDINGS OF THE HUNGARIAN-POLISH SEMINAR ON THE THEORETICAL PROBLEMS OF ENVIRONMENTAL CONTROL AND POLICY 77, 80-82 (András Tamás & Dorottya Lodner eds., 1988).

127. Some scholars argued that nature protection should be treated separately from environmental protection. See, e.g., Antonina Lenkowa, *Ochrona środowiska a ochrona przyrody* [Nature protection and environmental protection], in CZŁOWIEK PRZECIWKO SOBIE? [MAN AGAINST HIMSELF?] 27-29 (Antonina Lenkowa ed., 1986); LUDWIK JAS-TRZĘBSKI, *OCHRONA PRZYRODY I ŚRODOWISKA W PRL. ZAGADNIENIA ADMINISTRACYJNE* [PROTECTION OF NATURE AND ENVIRONMENT IN THE PRL: ADMINISTRATIVE ISSUES] 25 (1979). Others argued that nature protection and environmental protection should be combined. See, e.g., Wojciech Radecki, *Ochrona przyrody a ochrona środowiska* [Nature Protection and Environmental Protection], 18 Prawo i Życie 5 (1978).

Code), a general framework act with more specific legislation to be promulgated later, or something in between, *e.g.*, a comprehensive statute?¹²⁸ As legal scholars debated these questions, drafts of the new law were prepared, beginning in May 1976. The first draft bill combined all elements of environmental protection, including nature conservation; it would have replaced the 1949 Act. Subsequent drafts from March and April of 1976 and December 1977 refined the definition of "environment" to make it more inclusive in some respects but less inclusive in others. These later drafts excluded nature protection, so as to maintain the 1949 Act.

In 1978, a Research Group on Environmental Law was organized within the Polish Academy of Sciences' Institute of State and Law. This was the first officially-established environmental law bureau in the Soviet Bloc and, perhaps, the whole of Europe. It included many of Poland's best environmental law scholars, including Jerzy Sommer, Wojciech Radecki, and Jerzy Jendrośka, Jr. Over the years, they and their colleagues have published literally hundreds of books and thousands of articles in Polish, German, English and other languages about environmental law. This record has earned them considerable respect and influence, especially since the fall of communism. Virtually every piece of legislation enacted in Poland since the transition period began in 1989 was drafted, at least in part, by members of the Environmental Law Group.

VI. The 1980 Environmental Protection and Development Act

A. *Structure and Definitions*

On January 31, 1980, the *Sejm* enacted the new Environmental Protection and Development Act (EPDA).¹²⁹ Its title "*Ustawa o*

128. See Leon Łustacz, *Kompleksowa ochrona środowiska (W świetle ustawy o ochronie i kształtowaniu środowiska)* [Complete Environmental Protection (in the Sense of Legal Protection and Shaping of the Environment)], 3 PAŃSTWO I PRAWO 37 (1980); RADECKI, *supra* note 3, at 123-124; Jerzy Rotko, *The place of environmental law in the system of law*, in DISCUSSION PAPERS: SPECIAL: ENVIRONMENTAL CONTROL AND POLICY: PROCEEDINGS OF THE HUNGARIAN-POLISH SEMINAR ON THE THEORETICAL PROBLEMS OF ENVIRONMENTAL CONTROL AND POLICY 55 (András Tamás & Dorottya Lodner eds., 1988).

129. *Ustawa z dnia 31 stycznia 1980 r. o ochronie i kształtowaniu środowiska* [Law of January 31, 1980 on Protection and Development of the Environment], *Dziennik Ustaw* [JOURNAL OF LAWS] No. 3, item 6 [hereinafter 1980 EPDA]. There have been many commentaries on the 1980 EPDA. See, *e.g.*, Ludwik Ochocki, *Ustawa o ochronie i kształtowaniu środowiska* [Law on Environmental Protection and Development], 27 BIBLIOTECZKA DWUTYGODNIKA RADA NARODOWA GOSPODARKA ADMINISTRACJA 3-11

ochronie i kształtowaniu środowiska"¹³⁰ signified that its purpose was not only protection, but economic use of the natural environment. The 1980 EDPA consisted of eight titles containing 118 articles:

Title I: General provisions.

Title II: Substantive provisions on air and water pollution, protecting "green areas", waste management, noise and radiation pollution.

Title III: General directives on land use and development, forest management, public works construction, building and other potentially environmentally destructive economic practices.

Title IV: Liability provisions with reference to the Penal Code, Civil Code and Code for Petty Offenses.

Title V: Economic measures for environmental protection, including a schedule of fees for resource use and pollution charges to finance new state environmental protection funds.

Title VI: Organization and administration of environmental protection.

Title VII: Penal provisions.

Title VIII: Transitional and final provisions.

It was a comprehensive statute designed to deal with the whole panoply of environmental media and their problems. Only specific nature protection responsibilities were excluded,¹³¹ thereby preserving the 1949 Act. Otherwise, the new 1980 EPDA blanketed the entire field of environmental protection. Article 1, section 2 broadly defined "environment" to include "the totality of natural elements, including the surface of the earth together with the minerals, water, air, flora and fauna, and the landscape as found in its natural state and as transformed by human activity." In keeping with this broad definition, Ar-

(1980); EDUARD RADZISZEWSKI, *Ustawa o ochronie i kształtowaniu środowiska — Komentarz, przepisy wykonawcze* [LAW ON ENVIRONMENTAL PROTECTION AND DEVELOPMENT: COMMENTARY AND EXECUTORY REGULATIONS] (1987); JASTRZĘBSKI, *supra* note 127; Ludwik Jastrzębski & Alfred Rest, *Environmental Protection in the People's Republic of Poland*, 8 ENVTL. POL'Y & L. 21 (1982); A. Walaszek-Pyziol, *Prawne zasady ochrony i racjonalnego kształtowania środowiska* [Legal Principles of Protection and Rational Development of the Environment], 9 PAŃSTWO I PRAWO 96 (1982); Jerzy Jendrośka, Jr. & Wojciech Radecki, *The Environmental Protection and Development Act of 1980: An Overview and Critical Assessment*, in DESIGNING INSTITUTIONS FOR SUSTAINABLE DEVELOPMENT: A NEW CHALLENGE FOR POLAND 57 (Zbigniew Bochniarz & Richard Bolan, eds., 1991); Biernat & Wasilewski, *supra* note 102, at 9.

130. The verb "kształtować" literally means to shape, form, or mold. See JAN STANISŁAWSKI, *THE GREAT POLISH-ENGLISH DICTIONARY* (1978). As used in the title of the 1980 EDPA, it has been variously translated as "shaping," "control," and "development." In my opinion, the English term "development" comes closest to the meaning of "kształtować" as used in the 1980 EPDA.

131. 1980 EPDA, *supra* note 129, arts. 13, § 2; 35, § 1; 39.

ticle 111 expressly preempted conflicting provisions of other resource-use statutes, including the 1974 Water Law, and economic statutes with environmental mandates such as the 1974 Building Law.

The definition of "environmental protection" provided in Article 2 was broad enough to have covered any activity having anything to do with nature and its resources. The covered activities included all "actions or restraints necessary to restore or maintain the balance of nature,"¹³² i.e., "equilibrium in the reciprocal influences of people, the elements of living nature and the habitat conditions produced by elements of inanimate nature."¹³³ This general definition was followed by a list of four categories of "environmental protection" activities: (1) rational environmental "development," (2) rational natural resources management, (3) measures to prevent harmful environmental effects causing damage, destruction, pollution, or changes in the physical features or character of its natural elements, and (4) restoration of natural elements to their proper state.¹³⁴ These categories clearly indicate that the focus of "environmental protection" was not preservationist; use and development of the environment also constituted a major part of "environmental protection," as the 1980 EPDA's title suggested. The inherent conflict in the statute's ultimate aims was supposedly minimized by language narrowly defining "rational use" (*eksploatacja*) of the environment as any use consistent not only with economic values, but also with extra-economic values such as quality of life. Any decision to use natural resources was suppose to be carried out so as to not diminish the quality of the environment.¹³⁵ However, this language was merely precatory: The phrase "quality of the environment" is amorphous, and any kind of "use," rational or otherwise, is bound to have some detrimental impact on environmental values. It was certainly not a well-defined *legal* test for determining whether development activities could proceed.

B. Environmental Protection and Central Planning

The most significant new features of the 1980 EPDA concerned the relationship between environmental protection and central economic planning. Before 1980 socioeconomic planners paid no attention to the environmental consequences of their decisions. This disregard for the environment unquestionably hampered protection

132. *Id.* art. 2, § 1.

133. *Id.* art. 3, § 1.

134. *Id.* art. 2, § 1.

135. *Id.* § 2.

efforts. The new law required socioeconomic plans to give due consideration to environmental protection:

Art. 5 § 1: Environmental protection constitutes an essential element of national socioeconomic policy. Matters pertaining to environmental protection shall be included in the national socioeconomic plans, land use plans, and normative statutes, and will be taken into account in the activities of national organs, national economic units and social organizations.

Art. 5 § 3: The national socioeconomic plans shall take into account, as an integral part of the planning provisions, tasks and means to ensure effective environmental protection and the effective elimination of activities with negative environmental impacts.

In addition, environmental protection considerations were to become an integral part of land use plans which were the basis for development and investment location decisions. Under the 1980 EPDA, land use plans had to "guarantee conditions for maintaining the balance of nature, rational economic management of natural resources and protection of landscape and climatic values."¹³⁶ Administrative decisions that violated land use plan mandates were automatically void.¹³⁷

While these provisions undoubtedly constituted a significant and beneficial addition to the planning process, it is important to note that the new restrictions on socioeconomic planners were purely procedural. The law did not shackle them with substantive environmental mandates; rather the planners were only required to "consider" environmental protection in the planning process. Article 4 suggested that environmental protection standards were just as important as planning mandates: "[T]he resources of the natural environment may be used to serve socioeconomic needs to the extent permitted by the socioeconomic plans, land use plans, and environmental protection standards." On a plain reading of this provision, natural resources could be utilized only to the extent permitted by plans *and* environmental standards. However, neither Article 4 nor any other provision of the 1980 EPDA specified what would happen if the plan called for a use inconsistent with environmental norms.

Additional provisions on environmental protection in planning activities were located in Articles 68 through 70 of Chapter 2 of Title III concerning specifically environmental aspects of capital investment.

136. *Id.* art. 6, § 2.

137. *Id.* art. 7, § 2.

C. Specific Environmental Protection Provisions

Part II of the 1980 EPDA included nine chapters dedicated to accomplishing specific environmental protection goals:

Chapter 1: Protection of the earth's surface and minerals (Arts. 13-17),

Chapter 2: Protection of waters and the marine environment (Arts. 18-24),

Chapter 3: Protection of the atmosphere (Arts. 25-32),

Chapter 4: Protection of flora and fauna (Arts. 33-37),

Chapter 5: Protection of landscape values and rest environments (Arts. 38-41),

Chapter 6: Protection of green areas in cities and villages (Arts. 42-48),

Chapter 7: Protection of the environment against noises and vibrations (Arts. 49-52),

Chapter 8: Protection of the environment against wastes and other forms of pollution (Arts. 53-58),

Chapter 9: Protection against radiation (Arts. 59-63).

Generally speaking, these Chapters restated for each specific environmental medium the general goals outlined in Title 1, Articles 1 and 2. Although they did not include specific environmental norms, such as emissions standards or discharge limits, the chapters dedicated to specific environmental protection goals provided the framework for further regulation by appropriate ministerial departments.

Article 15 was the central provision of Title II, Chapter 1 on protecting the earth's surface and minerals. It required anyone using land to ensure its protection against pollution. More specifically, Article 15 enjoined farmers and forestry workers to use chemicals, such as pesticides, only in quantities that would not disturb the balance of nature, *e.g.*, by contaminating the soil or water or by poisoning plants, animals, or ecosystems. Detailed controls on chemical use were to be established by regulation of the Ministers of Agriculture and Forestry in consultation with the Minister of Administration, Local Economy and Environmental Protection and the Minister of Health and Social Welfare.

Chapter 2 on protection of waters and the marine environment required that waters be managed rationally; responsible agencies and users were to "prevent or control" any changes rendering waters unfit for human consumption, plant and animal life, or economic use.¹³⁸

138. *Id.* art. 18.

Measures for preserving "the balance of nature" had to be designed and implemented when a proposed water use threatened significant environmental harm.¹³⁹ Similar measures were required for any land-based activities (irrigation, drainage, etc.) that, without protective measures, could substantially affect water quality.¹⁴⁰ The newly created State Environmental Protection Inspectorate (*Państwowa Inspekcja Ochrony Środowiska* or PIOS)¹⁴¹ could impose conditions on the construction and operations of water works in areas requiring special protection from water pollution.¹⁴² Article 22 provided that before any economic activity could proceed in such areas, an expert analysis of environmental impacts was required. In order to preserve drinking water supplies, Article 21 placed groundwaters under "special protection" from pollution, and the Ministry of Administration, Local Economy and Environmental Protection was instructed to restrict or prohibit the use of waters when necessary to protect water quality.¹⁴³ Under Article 24, that ministry and others with authority over water resources were to issue specific regulations implementing these statutory mandates.

The goal of Chapter 3 on protection of the atmosphere was to keep air pollution concentrations at or below levels established by regulation and limit emissions from production facilities, automobiles, waste-dumps, and other sources of air pollution.¹⁴⁴ This provision was ahead of its time in regulating non-specific sources of air pollution such as waste-dumps and refuse-heaps. Article 26 of Poland's 1980 EPDA also defined inclusively the phrase "air pollution" as "the emission into the air of solid, liquid or gaseous substances in quantities which may adversely affect human health, the climate, flora and fauna, the soil or waters." This constituted a radical and progressive departure from the old definition under the 1966 Air Law.¹⁴⁵

The basic legal requirements of the 1980 EPDA for air polluting activities were contained in Articles 27 and 28, which respectively obliged individuals and organizations engaging in economic activities to take appropriate measures to curtail or control air pollution, and required sources of air pollution to monitor pollution concentrations

139. *Id.* art. 19.

140. *Id.* art. 20, § 1.

141. *Id.* arts. 94-95.

142. *Id.* art. 20, § 2.

143. *Id.* art. 23, § 1.

144. *Id.* art. 25.

145. *See supra* notes 85-93 and accompanying text.

at the emissions site. Under Article 29, the Council of Ministers was authorized to promulgate regulations establishing permissible concentrations of air pollutants and guidelines for measuring and monitoring pollutant levels in the atmosphere. The regional (*Wojewódstwo*) authorities were also given a substantial role to play in the protection of the atmosphere. Article 30 authorized them to regulate categories and levels of air pollutants. Interestingly, under section 2 of that provision, compliance with established standards did not relieve individuals and organizations from civil liability for damages resulting from their polluting activities.¹⁴⁶ In the event of a violation of air pollution norms (established in accordance with the 1980 EPDA), the regional organ of state administration at the *Wojewódstwo* level could indefinitely suspend the activities causing the violation until levels of air pollution were brought within the standards.¹⁴⁷ It is important to note, however, that the authority to suspend pollution-causing activities was discretionary. Only in cases where polluting activities combined with "especially disadvantageous atmospheric conditions" posed a direct threat to human life or health were the regional authorities *required* to shut down polluters.¹⁴⁸ In such cases, the agencies also had the discretion to restrict the use of internal-combustion motor vehicles. Regional authorities had discretion to suspend polluting activities where necessary to protect designated monuments.¹⁴⁹ Finally, the Minister of Administration, Local Economy and Environmental Protection, in cooperation with the Minister of Health and Social Welfare, was instructed to establish more specific regulations on emissions levels on air pollutants emitted by internal-combustion vehicles, and was authorized to prohibit the use of fuels, raw materials, and technological processes that produced health threatening levels of air pollution.

146. Article 30, section 2 did not change existing law. Long before the 1980 EPDA was enacted, the Polish Supreme Court ruled that a glass factory was liable for damages when its air pollution emissions destroyed vegetables in neighboring fields even though its emissions were within permitted limits. *Uchwała Sądu Najwyższego z dnia 7 kwietnia 1970 r.* [Resolution of the Supreme Court of April 7, 1970], *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* [Rulings of the Polish Courts and Arbitration Commission or OSPiK] 1971, notebook 9, item 169 reprinted in WOJCIECH RADECKI, *ORZECZNICTWO SĄDU NAJWYŻSZEGO I NACZELNEGO SĄDU ADMINISTRACYJNEGO W SPRAWACH ZWIĄZANYCH Z OCHRONĄ ŚRODOWISKA* 59 (1991). See also JÓZEF JAN SKOCZYŁAS, *CYWILNOPRAWNE ŚRODKI OCHRONY ŚRODOWISKA* [CIVIL LAW MEANS OF ENVIRONMENTAL PROTECTION] 167 (1986).

147. 1980 EPDA, *supra* note 129, art. 31, § 1.

148. *Id.* art. 32.

149. *Id.* § 2.

Despite strong language in the air pollution provisions about suspending polluting activities that posed a direct threat to human life and health, it is important to note that the 1980 EPDA provided administrators with a way to avoid imposing that sanction. Under Article 71, where the harmful environmental impacts of an activity could not be reduced by available technologies, *but* the activity "fulfills a social need," the administrator could order construction of a "protective zone" around the facility instead of shutting it down.

Chapter 4 contained measures to protect plant and animal species through land use planning,¹⁵⁰ proper forest management,¹⁵¹ and the pre-existing 1949 Act (referred to in Article 35). The goals of all protective measures were to: (1) create conditions under which plants and animals could fulfill "their biological functions for the benefit of the environment," (2) prevent or control harmful environmental impacts on plants and animals, (3) prevent the intrusion of outside threats into ecosystems that have exceptional social and scientific value, and (4) ensure the balance of nature to preserve species from extinction and over-exploitation.¹⁵² Article 34, section 4 authorizes the Council of Ministers to issue specific regulations for protecting forests from air pollution, and Article 36, section 2 empowered the Minister of Administration, Local Economy and Environmental Protection to establish rules for protecting botanical and zoological gardens. The most legally significant provision of Chapter 4, however, was Article 37 which "prohibited" the destruction of plants that bond to the soil and the destruction of plants and animals which contributed to a clean environment in general and water quality in particular. This provision might have become a powerful tool for protecting wetlands and other natural resources.¹⁵³

Chapter 5 on the protection of landscape values and rest environments incorporated by reference the provisions of the 1949 Act, adding only a few significant new features to landscape protection. Article 40 required that landscape values and their protection be considered in socioeconomic and land use plans, and Article 41 authorized the regional People's Councils to prohibit or enjoin, when

150. *Id.* art. 34, § 1.

151. *Id.* §§ 2-4.

152. *Id.* art. 33, § 2.

153. However, the provision was largely overlooked, even by top environmental law scholars in Poland, as a source of wetlands protection. See Jerzy Sommer, *Legal Aspects of the Conservation of Wetlands*, IUCN ENVIRONMENTAL POLICY AND LAW PAPER NO. 25, 107 (1991) (addressing wetlands protection in Poland, but not mentioning Article 37 of the 1980 EPDA).

necessary, activities threatening destruction or deterioration of regional landscapes.¹⁵⁴

Chapter 6 concerned protection of green areas in cities and villages including urban park lands, lawns, workers' garden plots, and small undeveloped spaces between buildings.¹⁵⁵ The goal was to preserve "appropriate conditions of sanitation, climate and recreation" for city dwellers and workers.¹⁵⁶ Any decision to alter green spaces for other uses had to be consistent with local land use plans and changes planned for areas containing old-growth forests had to be approved by the regional *Wojewoda* and the Ministry of Administration, Local Economy and Environmental Protection. One important provision of Chapter 6 restricted the use of chemical substances in urban areas to prevent harm to existing green spaces.¹⁵⁷ In villages, the People's Town Councils were authorized to designate rural parks, even on privately owned properties.¹⁵⁸ Private property rights were also restricted under Article 48 which required property owners to maintain undeveloped properties "in their proper states." Before a property owner could remove living trees and other vegetation in the course of developing land, the property owner had to receive permission from the local office of the regional organ of state administration which had the authority to require replacement or relocation of removed trees.¹⁵⁹

Chapter 7 included provisions to protect the environment against excessive noise and vibrations (a subject not dealt with in the federal environmental laws of the United States). Article 49 required individuals and economic units to protect the environment from excessive noise by refraining from noisy activities or by applying appropriate technologies to reduce noise levels. Article 50 provided that "excessive noise" was to be defined by regulations of the Council of Ministers establishing permissible ambient noise and vibration levels. Authorities at the *Wojewódstwo* level were authorized to assign noise limitations to specific facilities, and when violations occurred, to sus-

154. On the relationship between nature conservation and environmental protection in the 1980 EPDA, see Waclaw Brzeziński & Michał Kulesza, *Ochrona środowiska i ochrony przyrody w nowej organizacji administracji państwowej* [Environmental Protection and Nature Protection in the new state administrative organization], in 5-6 PAKSTWO I PRAWO 59 (1982).

155. 1980 EPDA, *supra* note 129, art. 42, § 2.

156. *Id.* art. 43, § 1.

157. *Id.* art. 44.

158. *Id.* art. 47, § 2.

159. *Id.* art. 48, § 2.

pend noise-generating activities.¹⁶⁰ Under Article 52, local authorities could even restrict the use of trucks and other means of transportation at night to minimize noise pollution.

Chapter 8 concerned measures to protect against pollution from waste. This marked Poland's first ever attempt to regulate waste disposal and treatment.¹⁶¹ It required, among other things, that waste-generating facilities and individuals take measures, such as recycling, to reduce waste.¹⁶² Any wastes not amenable to recycling or reuse had to be destroyed, rendered harmless to the environment, or collected and removed to designated disposal sites under conditions ensuring environmental protection.¹⁶³ The methods of disposing of particularly harmful (*i.e.*, contaminated or infectious) wastes had to be approved by the appropriate *Wojewódstwo* authorities. Local governments were responsible for ensuring appropriate conditions for waste disposal¹⁶⁴ and picking up and disposing of household wastes.¹⁶⁵

Chapter 9, the last in Title II of the 1980 EDPA, concerned environmental protection against radiation. This was an interesting addition to Poland's environmental law as the number of atomic activities in Poland was quite low—Poland had no nuclear power plants. There were, however, a substantial number of nuclear weapons in Poland, but these were all under the control of the Soviet Red Army and thus beyond regulation by the Polish government. The Polish Party-government was appropriately concerned, however, with the environmental threat posed by low-level radioactive wastes from other sources such as medical institutions. Articles 59 and 60 on protection against radiation required the safe generation, use, and disposal of radioactive substances and equipment. Buildings housing radioactive substances and associated activities were to be constructed, maintained, and decommissioned in a manner designed to protect public health.¹⁶⁶ Regional administrators could also require the construction of protective zones around the buildings (in accordance with Article 71 of Chapter 3). Under Article 61, radioactive wastes were to be recycled, when possible, under the supervision of the State Environmental Protection Inspectorate. Finally, Article 62 provided that all organiza-

160. *Id.* art. 51.

161. Jendrośka & Radecki, *supra* note 129, at 70.

162. 1980 EPDA, *supra* note 129, art. 53.

163. *Id.* art. 54.

164. *Id.* art. 56.

165. *Id.* art. 57.

166. *Id.* art. 60.

tions utilizing or producing substances or equipment emitting harmful radiation were obliged to monitor and measure radiation levels in the immediate ambient environment.

Again, the Chapters of Title II of the 1980 EPDA did not provide specific standards to accomplish any of the goals they established. That task was left primarily to the Council of Ministers which, before the end of 1980, issued more than one dozen regulations implementing various provisions of the 1980 EPDA. By 1981, most (but not all) provisions of the 1980 EPDA were implemented.¹⁶⁷

D. Environmental Duties and Liabilities

Title III, Chapter 1 of the 1980 EPDA was intended to establish environmental protection duties. Article 64 provided that all economic enterprises and persons engaged in economic activities were obliged to ensure environmental protection. Individuals were also responsible for protecting the environment when using it for non-economic purposes such as tourism and recreation.¹⁶⁸ Under Article 66, government agencies, enterprises, and individuals all had a duty to ensure environmental protection by:

1. carefully citing production facilities to create the least environmental impacts;
2. taking protective measures during economic activities;
3. restoring environmental conditions damaged by economic activities;
4. making use of new technologies to reduce environmental impacts of economic activities, especially waste-reduction and waste-prevention technologies;
5. constructing, installing and maintaining appropriate environmental protection equipment;
6. installing monitoring equipment and conducting necessary measurements;
7. complying with environmental protection requirements in planning, designing and manufacturing machinery, equipment, etc.;
8. recycling wastes and effluents, or ensuring their effective neutralization or disposal; and,
9. making use of scientific and technical progress and legal, economic and administrative means of environmental protection.

Additional duties of plant managers and workers were specified in Section 67. It is questionable whether the use of the term "duty"

167. See RADECKI, *supra* note 3, at 131 n.140.

168. 1980 EPDA, *supra* note 129, art. 65.

throughout Chapter 1 was meant to signify *legal liability*. Legal liability is not discussed in Title III, Chapter 1, but is discussed later in Title IV (Arts. 80-85). Those later liability provisions were remarkable in that they were based on the "polluter pays principle," which in 1980 was a relatively new and untested concept of environmental policy.¹⁶⁹ Unfortunately, the "polluter pays principle" was ill-suited to, if not completely meaningless in, a command economy where the Party-state was ultimately responsible for virtually all pollution. Nevertheless, according to Article 80 of the 1980 EPDA, the person or organization responsible for pollution damage was supposed to bear the expense of compensation. Section 82 reiterated the mandate of Section 66 requiring enterprises and individuals engaging in economic activities to eliminate environmental threats and restore pre-existing environmental conditions. The *Wojewódstwo* authorities were authorized to specify requirements under these provisions and could levy fines for non-compliance. In addition, Article 83 *required* the Minister of Administration, Local Economy and Environmental Protection to recommend that other ministerial departments with authority over specific economic activities close down any plants causing serious environmental damage while in chronic violation of administrative regulations.

Besides the economic penalties, polluters could be subject to sanctions provided under the Penal Code of 1969¹⁷⁰ or Petty Offenses Code of 1971.¹⁷¹ Under the Penal Code of 1969, polluters who intentionally created a great threat to human life, health and property could be imprisoned for up to ten years,¹⁷² or five years for negligently created threats.¹⁷³ The 1980 EPDA added to these provisions new offenses punishable by three years imprisonment for (1) pollution causing "potential danger,"¹⁷⁴ (2) negligence in the utilization or maintenance of pollution control equipment,¹⁷⁵ (3) violation of duties with respect to environmental protection of agricultural and forestry

169. The first detailed description of the "polluter pays principle" is found in J.B. OPSCHOOR & HANS B. VOS, *THE POLLUTER PAYS PRINCIPLE* (1975).

170. *Kodeks Karne, ustawa z dnia 23 kwietnia 1969 r.* [*Penal Code, statute of April 23, 1969*], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 13, item 94.

171. *Kodeks wykroczeń, ustawa z dnia 20 maja 1971 r.* [*Petty Offense Code, statute of May 20, 1971*], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 12, item 114.

172. Penal Code of 1969, art. 140, § 1.

173. *Id.* § 2.

174. 1980 EPDA, *supra* note 129, art. 107.

175. *Id.* art. 108.

lands,¹⁷⁶ and (4) waste imports from abroad.¹⁷⁷ For lesser offenses involving mistreatment of animals,¹⁷⁸ water pollution,¹⁷⁹ contamination of real estate,¹⁸⁰ destruction of plants,¹⁸¹ and damage to fields, forests, or gardens,¹⁸² the 1980 EPDA stipulated prosecution under the Petty Offenses Code. Conviction for a petty offense could result in a three month prison term, plus fines. However, up to the end of the communist era, penal sanctions were rarely imposed on polluters.¹⁸³

E. Administrative Fees and Fines

The liability provisions of the 1980 EPDA were not the only economic mechanisms in the statute. Title V created a system of resource use fees and Title VII required economic penalties for violations of environmental norms. The resource use fees mandated in Article 86 were to be imposed on all resource-consuming and polluting activities. Air pollution emissions fees were to be exacted per unit of emission, including those emissions within legal (permitted) levels. This was a novel mechanism for emissions reductions in 1980; even today for example, the United States government does not charge for air pollution emissions within legal limits. The Council of Ministers established the fee schedule by regulation.

Emissions exceeding legal limits were subject to additional penal fines under Article 110. *Wojewódstwo* authorities were to institute schedules of fines for effluent discharges, pollution emissions, noise producing activities, chemical uses, and waste dumping activities that violated environmental conditions. Collected fines and fees were earmarked for a new Environmental Protection Fund,¹⁸⁴ which would finance construction of sewage treatment facilities, and other environmental projects.¹⁸⁵ This system of fees and fines became the Party-

176. *Id.* art. 109.

177. *Id.* art. 108a.

178. *Id.* art. 62.

179. *Id.* art. 109.

180. *Id.* art. 117.

181. *Id.* art. 144.

182. *Id.* arts. 148-157.

183. See *infra* note 192 and accompanying text. For a more complete description and assessment of criminal sanctions for violations of environmental protection laws in People's Poland, see WOJCIECH RADECKI, PRAWNOKARNA OCHRONA ŚRODOWISKA NATURALNEGO W PRL [CRIMINAL LAW OF PROTECTION OF THE NATURAL ENVIRONMENT IN THE PRL] (1981).

184. 1980 EPDA, *supra* note 129, art. 87.

185. *Id.* art. 88.

state's primary tool of environmental protection during the 1980s; civil and criminal liability were only of secondary importance. Unfortunately, the 1980 EPDA's economic mechanisms were ill-suited to the socialist economic system with its endemic soft budget-constraints.¹⁸⁶

F. Administrative Responsibilities

We have already seen that Article 66 of the 1980 EPDA imposed a general duty on government agencies as well as enterprises and individuals to ensure environmental protection in implementing Party-state economic policy. Regulations implementing these duties were to be issued by the Ministry of Administration, Local Economy and Environmental Protection. Additional administrative responsibilities were set forth in Chapter 1 of Title VI of the 1980 EPDA on organization of environmental protection. The most important of these additional administrative responsibilities concerned the duties of the newly created State Environmental Protection Inspectorate.¹⁸⁷ Under Article 95, the Inspectorate was responsible for: (1) supervising compliance with environmental conditions established under the 1980 EPDA, (2) monitoring the state of and changes in the environment, (3) initiating activities of environmental protection and restoration, and (4) furthering "popularization" of environmental protection principles. The Inspectorate was not, however, an "enforcement" agency; it had no independent statutory authority to levy fines or shutdown harmful polluting activities. The Inspectorate was subordinated to both the Minister of Administration, Local Economy and Environmental Protection and the Council of Ministers, either of which could override decisions of the Chief Inspector. In addition to the Inspec-

186. The budget constraint is a concept developed by Hungarian economist János Kornai to determine the degree of independence and self-reliance of actors in an economy. A hard budget constraint denotes a situation in which a firm's survival depends on its profitability; it cannot rely on government subsidies to sustain it. A soft budget constraint denotes a situation in which firm survival does not depend on profits; it can expect the government to support it for other reasons such as those related to size or level of production. Soft budget constraints were endemic to the socialist economic system.

The budget constraint is relevant to environmental protection because environmental protection depends on market mechanisms such as fees and fines. Specifically, environmental fees and fines can only be expected to influence the behavior of firms subject to relatively hard budget constraints. Firms subject to soft budget constraints are likely to be oblivious to fees and fines because their survival does not depend on earning net profits. This was the predominant situation in People's Poland and the Soviet Bloc.

For more on the soft budget constraint under socialism, see, e.g., János Kornai, *The Soft Budget Constraint*, 39 KYKLOS 3 (1986).

187. 1980 EPDA, *supra* note 129, art. 94.

torate, a new State Environmental Protection Council was established under Article 97 as an advisory body to the Council of Ministers on environmental protection matters.

G. Public Participation in Environmental Protection

In Poland, before the 1980 EPDA, nongovernmental organizations and private citizens had virtually no role to play in environmental protection. Even traditional quasi-official groups, such as the State Council for Nature Protection and the Nature Protection League, were reduced to playing only insignificant roles in the system. The 1980 EPDA was a first step toward giving independent "social organizations" at least a limited role in the administrative process. Such organizations were empowered to file lawsuits to suspend environmentally threatening economic activities and order environmental restoration.¹⁸⁸ In addition, before an administrative authority could approve any new economic activity likely to have substantial environmental impacts, the social organizations had to be informed and their comments and objections considered. As we shall see, however, these provisions were never fully implemented, and to the extent they were implemented their value was limited. Nevertheless, nongovernmental environmental organizations became increasingly active in Poland and asserted considerable political, if not legal, influence.

H. Environmental Research

Various provisions of the 1980 EPDA were designed to further scientific understanding and public awareness of environmental problems and values. Section 10 of the statute required educational institutions and research facilities to conduct research on environmental conditions and ways to improve environmental performance in production such as through technical innovations. Section 11 mandated that environmental protection be added to the curricula in schools at all levels and in worker training courses. Section 12 required the mass media to disseminate information on environmental protection but did not assure the media access to environmental information.

I. Assessment of the 1980 EPDA

The 1980 EPDA constituted the Polish Party-state's single greatest legislative effort to protect the environment. As we have seen, the

188. *Id.* art. 100.

statute covered a broad range of environmental issues and media, taking a variety of approaches, some of which were quite innovative for the time, e.g., the use of market mechanisms. Many of the statute's provisions had potential "bite," contingent on their proper implementation. Generally speaking, the law was *enforceable*.¹⁸⁹

The environmental devastation in Poland strongly suggests, however, that the 1980 EPDA did not have much impact on production/pollution and resource-use patterns. Certainly, the 1980 EPDA had its problems, though this descriptive history of environmental protection in Poland is not the place for a detailed assessment.¹⁹⁰ Suffice it to say that the 1980 EPDA was little better or worse than most legislative enactments in People's Poland. Like most statutes, it was largely declarative, with few substantive and directly enforceable standards; administrative agencies were left to interpret the declarations and issue specific norms. That arrangement, in itself, was not necessarily a problem. Indeed, it is a common practice in many countries, including the United States, for the legislature to create a framework that is filled in later by administratively promulgated norms. The problem with Poland's 1980 EPDA was that it did not provide regulators with sufficient direction. For example, when Article 17, section 3 of the 1980 EPDA called for "specific regulations" to ensure environmental protection in mining activities, it did not specify (1) an agency responsible for promulgating those regulations, (2) a deadline for issuing norms, (3) means of determining the sufficiency of regulations, i.e., whether they conformed to statutory goals, or (4) consequences for failing to issue regulations. Such ambiguities and gaps were rife throughout Poland's environmental law; there were unclear provisions, fuzzy mandates, and far too many holes in administrative authorizations. Despite the gaps and ambiguities, most provisions of the 1980 EPDA were implemented by administrative regulations, some of which were surprisingly stringent. For example, permissible air pollution concentration levels established under the 1980 EPDA covered more pollutants and were far more stringent than emissions limits es-

189. In my usage, "enforceability" is a necessary, but not sufficient, condition for actual "enforcement." A law that is thoroughly unenforceable cannot, by definition, be enforced under any circumstances. A law that is perfectly enforceable, however, may not be actually enforced; but, if unenforced, it must be for incidental or systemic political and/or economic reasons extraneous to the legal text. There are, of course, degrees of enforceability.

190. For a detailed assessment of the 1980 EPDA, consult the author's forthcoming book. See *supra* note 4.

tablished in the United States under the Clean Air Act.¹⁹¹ Poland's air quality norms certainly were not lax by American standards. The same cannot be said, however, for the fees and fines established under the 1980 EPDA for pollution emissions; administrators tended to set them far too low to induce desired changes in enterprise production/pollution patterns.¹⁹²

By far the biggest *legal* problem with the 1980 EPDA was that it provided so many exceptions and exclusions from regulation and liability. These were the political-economic "safety-valves," the legal means of last resort by which the Party-government could avoid its own environmental rules. The 1980 EPDA's exceptions and exclusions raised enforceability problems because they allowed policy to trump law. This was most clearly evident with respect to the 1980 EPDA's criminal provisions. By incorporating provisions of the 1969 Penal Code,¹⁹³ the 1980 EPDA was automatically subject to that Code's "higher necessity" exception. Article 23, section 2 of the Penal Code permitted (and still permits today) courts and prosecutors to waive liability where the activity causing the violation furthered some "higher necessity." In practice, this exception was interpreted as an economic balance; if the "value" of the activity causing the violation was greater than the "value" of the environmental damage, then liability could be waived.¹⁹⁴ According to one report, the majority of prosecutions for penal violations of the environmental protection law were discontinued for reasons of "higher necessity."¹⁹⁵ Hardly any criminal cases made it into court.

191. For example, American law allows an annual mean concentration of 80 micrograms of sulfur dioxide (SO₂) per cubic meter; 1980 Polish regulations allowed concentrations of only 64 micrograms per cubic meter. Poland's 24-hour mean standard for SO₂ was also lower — 350 micrograms per cubic meter compared to 365 in the United States. Polish ambient concentration standards for other air pollutants, such as nitrogen oxides (NO_x) and ozone (O₃), were likewise comparatively stringent. *Rozporządzenie Rady Ministrów z dnia 30 września 1980 r. w sprawie ochrony powietrza atmosferycznego przed zanieczyszczeniem* [Regulation of the Council of Ministers of 30 September 1980 concerning protection of the atmosphere from pollution], Dziennik Ustaw No. 24, item 89. American ambient air quality standards are reprinted in FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 165, Table 3-1 (2d ed. 1990).

192. See Jerzy Jendrośka, *Environmental Law in Poland in a Transition Period: Recent Development of Legislation*, 10 *TJDSCHRIFT VOOR MILIEU & RECHT* 532, 533 (1992).

193. See *supra* note 170 and accompanying text.

194. See WOJCIECH RADECKI, *PRAWNOKARNA OCHRONA ŚRODOWISKA NATURALNEGO W PRL* [THE CRIMINAL LAW OF ENVIRONMENTAL PROTECTION IN THE PRL] 220-224 (1981).

195. Karol Mykietyn & Wojciech Radecki, *Przyczyny niskiej efektywności ścigania przestępstw przeciwko środowisku* [The causes of ineffective prosecutions for environmental offenses], 2 *PROBLEMY PRAWORZĄDNOŚCI* 27, 38-40 (1985).

The 1980 EPDA itself provided another broad political exception. Under Article 82, every legal person and organizational unit was obliged to do everything possible to protect the environment but, under section 3 of that article, polluting activities could continue where the environmental effects could not be prevented by technological or economic means. This exception was limited—the polluting organization or person had to contribute to the Fund for Environmental Protection “an amount corresponding to the amount of the harm resulting from the environmental disturbance.” However, that limitation did not amount to much since the value of the environmental harm was determined by the same kind of economic balancing test used to determine “higher necessity” under the Penal Code.

Another problem in the 1980 EPDA was the lack of enforcement provisions. The State Environmental Protection Inspectorate created by the 1980 EPDA was small and weak. It had authority to monitor pollution emissions and “supervise compliance,” but not to enforce environmental norms; it could not impose penalties or close down polluters.¹⁹⁶ Moreover, the 1980 EPDA did not specify procedures or techniques for the Inspectorate to follow so there was little consistency in its activities.

The 1980 EPDA's various *legal* problems certainly affected its implementation and enforcement, but they did not render the statute unenforceable; it could have been more effectively and consistently enforced than it was. By and large, the enforcement problems of the 1980 EPDA were caused by relatively extraneous factors of politics and economics, a discussion of which is outside the scope of this legal history analysis. Suffice it to say (too simplistically, of course) that the environmental protection mandates of the 1980 EPDA could not compete with certain *legitimacy principles* of the communist regime, including the drive to surpass Western levels of production and the commitment to full employment.

VII. The Administration of Environmental Protection in Poland: 1980-88

A. *The Birth of an Independent Environmental Movement*

Enactment of the 1980 EPDA constituted only the first event of what was to be a very active period for environmental protection in

196. See Jerzy Jendrośka, *Compliance Monitoring in Poland: Current State and Development*, 1 INTERNATIONAL CONFERENCE ON ENVIRONMENTAL ENFORCEMENT 351, 352 (1992).

Poland. The year 1980 also marked the birth of Solidarity and a critical, if too brief, period of political liberalization in Polish politics. Environmental information, traditionally guarded as a state secret,¹⁹⁷ was made available albeit in limited quantities and to limited audiences. The government and especially the *Sejm* ordered detailed investigations into the state of the environment which led by the middle of the decade to official disclosures of widespread environmental devastation. In 1985, for example, the official Communist Party daily, *Trybuna Ludu* (*People's Tribune*), reported that thirty-five percent of Poland's population lived in exceptionally bad environmental conditions that would require at least twenty-five years to correct.¹⁹⁸ Meanwhile, new "social organizations" appeared under the banner of Solidarity, including the National Commission for Environmental Preservation established in July 1981, and the Polish Ecology Club (*Polski Klub Ekologiczne* or PKE) which became the first truly independent pro-ecological organization in People's Poland.¹⁹⁹

At its founding in Kraków in September 1980, the PKE was an illegal protest organization, comprised of academics, journalists, scientists, farmers, and workers. By the middle of 1981, by virtue of its association with Solidarity, it had more than 1,000 members and was registered as a legal social organization. Thereafter, the PKE was able to operate through official political and legal channels as well as through grassroots protest actions. The PKE became a force in Polish politics, accomplishing real and lasting achievements for environmental protection before, during, and after the period of Martial Law (from December 1981 to December 1982). Among its notable early accomplishments was a series of protests and a lawsuit against the Skawina aluminum works near Kraków which, in combination with the poor economic performance of the factory, led the Party-government to permanently shut down the plant in January 1981. This single event gave the PKE popular exposure and credibility which greatly facilitated its efforts to increase public awareness of environmental issues. The PKE conducted scientific investigations, published reports and newsletters, and held weekly public meetings in Kraków. Significantly, when Martial Law was declared in December 1981, the PKE

197. See THE BLACK BOOK OF POLISH CENSORSHIP 218-227 (Jane L. Curry ed., 1984).

198. *Uncensored Polish News Bulletin*, No. 16, Aug. 8, 1985, at 5. See also JOHN RENSENBRIK, POLAND CHALLENGES A DIVIDED WORLD 168 (1988).

199. On the history of the Polish Ecology Club, see Zygmunt Fura, *Institutions: The Polish Ecological Club*, 27 ENV'T. 4 (1985).

was not outlawed, though its publishing and protesting activities were forced underground.

The PZPR's apparent tolerance of the PKE, even during Martial Law, supports the view that the Party was, at least to some extent, sincerely interested in improving environmental protection. When Martial Law was lifted in December 1982, the PKE emerged larger and more influential than ever. By the mid-1980s, it had 3,000 members and 17 branches throughout Poland, and it continued to exert substantial influence even over the Party-government. Polluting factories, built without facilities for waste disposal or sewage treatment, were forced to close by PKE protesters. On one occasion, the PKE persuaded the Party-government to relocate a bitumen processing plant which was polluting waters used by another enterprise for making fruit-juice.²⁰⁰ These successes spurred on other groups which became, by the end of the decade, a diverse environmental movement consisting of more than eighty different organizations including the government-sponsored Social Movement for Ecology, the Catholic church-sponsored Franciscan Ecology Movement, and the green-anarchistic Freedom and Peace group.

The few but remarkable successes of Poland's environmental movement, particularly the PKE, were especially impressive given the totalitarian political climate in which they operated. People's Poland was not an open and pluralistic democracy where interest groups were tolerated, and indeed expected to participate in policymaking. The members of the PKE and other environmental organizations risked their freedom and (infrequently) their lives in protest actions. Even after Martial Law was lifted, police sometimes responded with violence, as at a 1987 protest in Kraków when a crowd of about 500 members of the Freedom and Peace environmental group gathered in the Market Square for a peaceful protest against air pollution emissions from the Lenin Steelworks in neighboring Nowa Huta. According to published accounts, police dragged away several protesters, struck one in the face, and kicked another; ten protesters were arrested.²⁰¹ Environmental protesters were commonly charged with taking part in an illegal assembly, a misdemeanor under Poland's Petty Offenses Code,²⁰² which brought the case within the jurisdiction of Poland's in-

200. *Id.* at 5.

201. *Environmentalists Held in Protest Against Kraków Steelworks*, Reuters N.Eur. Service, March 27, 1987, available in LEXIS, News Library, Arcnews File.

202. *Kodeks wykroczeń* - ustawa z dnia 20 maja 1971 r. [Petty Offenses Code of May 20, 1971], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 12, item 114.

famous lay-courts, the *kolegia*. The judges on these thoroughly non-professional courts had no legal training, court proceedings were devoid of legal process, and defendants before the court had virtually no possibility of acquittal. Of 230 citizens tried in the *kolegia* during November and December of 1986, for example, 229 were convicted. Once arrested, an environmental protester could fully expect to be convicted and sentenced; *kolegia* were empowered to send "criminals" to prison for up to three years, levy stiff fines, and seize any property used in committing the offense—bad news for an environmental protester caught distributing leaflets from her car.²⁰³

The threats faced by environmental protesters should not be exaggerated, however. Environmental protests were often tolerated and took place without incident, as in 1988 when 1,500 members of Freedom and Peace staged a protest against a toxic chromium factory contaminating Wrocław's water supply.²⁰⁴ By tolerating environmental protests and occasionally acquiescing to protesters' demands, the Party-state demonstrated a limited commitment to environmental protection. However, its environmental concern extended only so far. The Party-state would never act to protect the environment at the cost of its own political authority or the ideological principles that (at least for the Party itself) legitimized its rule, e.g., the commitment to full employment, high rates of production and economic growth. Coincidentally, enterprises closed following environmental protests always happened to be uneconomic and obsolete. Enterprises that were profitable or significant for national defense were never closed or even significantly restrained following environmental protests. That does not mean, however, that the environmental protests were irrelevant. On the contrary, without them it is quite unlikely that any plants would have been closed. The communist authorities virtually never shut down plants simply because they were economically inefficient or obsolete, so long as they met production targets. Environmental protests did, therefore, play a significant role in closure decisions.

Poland's emerging independent environmental movement also fostered general public awareness of environmental problems by conducting studies, publicizing environmental statistics, and holding pub-

203. For more on the *kolegia*, see, e.g., Piotr Ł.J. Andrzejewski & Marek A. Nowicki, *The Functioning of the Kolegia in Public Order Offenses*, in JERZY KWAŚNIEWSKI & MARGARET WATSON, *SOCIAL CONTROL AND THE LAW IN POLAND 74* (Jerzy Kwaxniewski & Margaret Watson eds., 1991).

204. See *Polish Youths Stage Protest Against Toxic Chromium Factory*, Reuter Lib. Rep., Sept. 16, 1988, available in LEXIS, News library, Acnws file.

lic seminars. The dissemination of environmental information could be as dangerous as protest actions, however. Under Polish law, environmental information was a state secret subject to censorship.²⁰⁵ Actually, enforcement of these laws was inconsistent during the 1980s; it seemed that the Party-state could not decide whether to keep environmental information secret or not. At the beginning of the decade, even during Martial Law, Party-affiliated groups published a great deal of environmental information. For instance, in 1982, the State Planning Commission publicly disclosed that Upper Silesia and Kraków were areas of "ecological catastrophe" and twenty-three other regions of the country were threatened by severe pollution problems.²⁰⁶ Subsequently, in 1985, Poland's Academy of Sciences issued an official report describing a nationwide "ecological disaster" threatening the health of eleven million Poles. The report provided statistics and detailed explanations of the "ecology bomb" ready to explode in heavily polluted regions such as Katowice. The report cited Poland's industries as the worst polluters in Europe.²⁰⁷ That same year, the Party's mouthpiece, *Trybuna Ludu*, published an equally dramatic account of Poland's ecological crisis.²⁰⁸ However, when the same news came from an unofficial source not authorized by the PZPR, the Party responded with denials, sometimes venomously. For example, when Western media first began to publicize the Polish Academy of Sciences' 1985 findings on Poland's environmental problems, the Polish government strenuously denied that Poland was "an area of ecological disaster."²⁰⁹ Then, in 1986, Radio Free Europe (RFE) issued a report on Poland's environmental "Apocalypse" authored by Stefan Bratkowski, a former PZPR socioeconomic planner. The Polish government immediately issued a press release denouncing the report and its author. According to Jerzy Urban, the PZPR's infamous press spokesman, the RFE report was nothing more than "lies, lies and only lies," and its author Bratkowski was "poisoned with political venoms of his milieu . . . a hysterical demagogue seeking idiots among listeners."²¹⁰ The government continued to be schizophrenic about disseminating environmental information throughout the decade.

205. See THE BLACK BOOK OF POLISH CENSORSHIP, *supra* note 197, at 219-220.

206. See F.W. Carter, *supra* note 2, at 121.

207. Report Says PPR Facing 'Ecological Disaster', FBIS-E.EU., Sept. 12, 1985 at G4.

208. See *supra* note 198.

209. Urban Gives Weekly Press Conference 10 Sep, FBIS-E.EU., Sept. 11, 1985, at G1.

210. Radio Free Europe Criticized for 'Lies', FBIS-E.EU., Nov. 10, 1986, at C3.

B. Environmental Protection in Socioeconomic and Land Use Planning

Spurred by the emerging environmental movement, the Party-state continued to move forward with its own agenda for environmental protection. In July 1981, at the Ninth Extraordinary Congress of the PZPR, environmental protection concerns were once again at the top of the agenda. The Congress adopted a resolution reiterating the "polluter pays principle" for enterprises, and called for the use of "legal-financial mechanisms" to support the implementation and administration of the environmental laws.²¹¹ Beginning in 1982, economic reforms included substantial environmental components, and new laws enacted to implement the reforms contained environmental provisions. Article 9, section 3 of the 1982 Law on Socio-Economic Planning,²¹² for example, expressly required the inclusion of environmental concerns as part of the planning process. As a result, environmental requirements began to appear in socioeconomic plans. The three-year plan for 1983-1985 included a section on environmental protection that "recommended" actions (1) to avoid spreading contamination to still pristine areas of the country, (2) to preserve areas of special beauty and endangered species, and (3) to stop further degradation of already devastated areas. Even more significantly, this three-year plan, which had the force of law, designated four areas of the country, including Gdańsk and Kraków, as environmentally "endangered." For those areas, the plan banned further industrial development that might exacerbate environmental conditions and instructed the Council of Ministers to develop detailed plans for protecting and restoring environmental conditions.²¹³ Nevertheless, as Professor Ludwik Jastrzębski noted, the 1982 socioeconomic planning law did not "create a balance between the interests of industry and environmental protection."²¹⁴ It did not mandate imposition and implementation of environmental protection conditions by economic planners, rather, it only mandated their "consideration." Two years after the new socioeconomic planning law, still more significant environmental requirements were included in the 1984 Land Use Planning

211. IX Nadzwyczajny Zjazd PZPR. Podstawowe dokumenty i materiały 133-134 (1981), *cited in* RADECKI, *supra* note 3, at 131.

212. *Ustawa z dnia 26 lutego 1982 r. o planowaniu społeczno-gospodarczym* [Law of February 26, 1982 on Socio-economic Planning], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 7, item 51.

213. See JASTRZĘBSKI, *supra* note 3, at 82.

214. *Id.*

Act.²¹⁵ In the West, land use planning serves an important regulatory function to ensure that diverse activities in a given area are compatible. Under socialism, land use planning was unavoidable; since the Party-state owned all the means of production and centrally planned virtually the entire economic system, there was no way for it to avoid responsibility for development decisions and other important land use considerations. Rather than deal with those issues as part of a single plan, People's Poland, like the other socialist countries of Europe, adopted a bifurcated planning system. The socioeconomic plans set levels of production, resources allocation, prices, etc., while separate and distinct land use plans determined where economic activities and other developments could be located. Unfortunately, this bifurcated process resulted in the subordination of land use plans to socioeconomic plans with predictable results for environmental protection requirements.

The goal of land use planning, under Poland's 1984 statute, was the "comprehensive management of the territory of the entire country."²¹⁶ Land use plans were to be prepared at three different levels—national, regional, and local—and updated every five years.²¹⁷ National plans included primary environmental protection safeguards consisting of conditions on land use to ensure environmental protection and the "proper use" of resources.²¹⁸ Regional plans were supposed to assure achievement, in a given region, of the goals outlined in the national plan.²¹⁹ Similarly, local plans were to be based on regional and national plans.²²⁰ The planning process started with research into possible uses of a given area of the country, including considerations of present and future needs, followed by preparation of specific development plans, plan approval, and finally, project development. The process was supposed to be inclusive, but in practice the scope of participatory rights depended on the type of plan under consideration. For national plans, only associations had to be consulted; individuals had no right to participate and no specific procedural provisions were mandated.²²¹ At the regional level, administrative authorities had to provide public notice of the planning process and

215. *Ustawa z dnia 12 lipca 1984 r. o planowaniu przestrzennym* [Law of July 12, 1984 on land use planning], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 35, item 185.

216. *Id.* art. 1.

217. *Id.* art. 7, § 1; art. 19, § 3.

218. *Id.* art. 18.

219. *Id.* art. 20, § 1.

220. *Id.* art. 25, § 3.

221. *Id.* art. 19.

specified individuals (experts and specialists) had the right to intervene at various stages. The authorities had to give due consideration to all recommendations, comments, and objections before approving a final plan.²²² The same was true at the local level where the participatory rights were greater; any interested individual could intervene and even more detailed procedures were specified.²²³

C. *Changes in the Administrative Structure of Environmental Protection*

As environmental protection was being incorporated to a limited degree into socioeconomic and land use plans, the administrative organization of environmental protection underwent further changes. Responding to a perceived lack of progress on environmental protection and pressure from academic and scientific organizations, the Parliament in 1983 created a new Ministry of Environmental Protection and Water Management.²²⁴ This agency took over primary administrative responsibility under the 1980 EPDA, though not for long. After only two years it was replaced by a new Ministry of Environmental and Natural Resources Protection (*Ministerstwo Ochrony Środowiska i Zasobów Naturalnych*). This reorganization was significant because, for the first time, it vested primary nature protection responsibilities (under the 1949 Act) and environmental protection responsibilities (under the 1980 EPDA) in the same department. This facilitated the coordination of pollution control and nature protection activities. There was a notable omission, however: silvaculture activities in national parks were controlled by the Ministry of Agriculture, Forestry, and Food Management (*Ministerstwo Rolnictwa, Leśnictwa i Gospodarki Żywnościowej*).²²⁵ Consequently, there was confusion about which agency had primary responsibility for national park management.²²⁶ Finally, in 1987, the two ministries agreed on shared responsibility for national park supervision; the Forestry Ministry would be

222. *Id.* arts. 21, 22.

223. *Id.* arts. 27-28; On public rights in the land use planning process, see Jerzy Jendrośka & Konrad Nowicki, *Participation Rights of Environmental Associations and their Possibilities of Taking Legal Action in Poland*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE: CURRENT LEGAL SITUATION AND PRACTICAL EXPERIENCE 39, 41-42 (Martin Fuhr & Gerhard Roller eds., 1991).

224. *Ustawa z dnia 28 lipca 1983 r. o utworzeniu Urzędu Ochrony Środowiska i Gospodarki Wodnej* [Law of July 28, 1983 on Creation of the Office of Environmental Protection and Water Management], *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 44, item 201.

225. RADECKI, *supra* note 3, at 135.

226. See Wojciech Lachiewicz, *Organizacja administracji ochrony przyrody w świetle nowych regulacji prawnych*, 1986 (6) *CHRONMY PRZYRODĘ OJCZYSTĄ* 5, 9-10.

in charge of general park management, while the Environment Ministry would be the lead agency for all nature protection responsibilities within the parks.²²⁷

From 1985 to the end of 1988, the administrative structure of environmental protection remained fairly stable. The main focus during these years was on improving the implementation, administration, and enforcement of environmental legislation and regulations. In 1985, the *Sejm* issued a resolution committing regional People's Councils to devote at least seven percent of their total spending to environmental protection. By 1987, this mandate had only been met in eleven of forty-nine regions. Consequently, the *Sejm* issued another resolution that year calling on the Council of Ministers to improve environmental law enforcement.²²⁸ Meanwhile, the Ministry of Environmental and Natural Resources Protection was preparing a "National Program for Environmental Protection in Poland to the Year 2010."²²⁹ When completed, that document became the subject of high-level meetings organized at the Council of State in July 1988.²³⁰ Environmental interests were critical of the plan, and before the end of that year, new ecological political parties were formed such as the Polish Ecological Party and the "Green Party." Environmental protection remained at the top of the political agenda until the end of socialism and the demise of the Polish Communist Party. As we shall see in the next section, environmental protection also remained a top priority as the new Polish Republic was formed.

VIII. Environmental Law in Post-Socialist Poland

In 1989, Poland began its ongoing transformation from totalitarian socialism to a market-based democracy. The first important step of the transition occurred while the Communists still held power. On January 1, 1989, a new Law on Economic Activity²³¹ abolished central economic planning which, since the early 1950s, had dictated resource allocation, prices, wages, and production levels. Virtually the entire

227. See RADECKI, *supra* note 3, at 139.

228. *Uchwała Sejmu PRL w sprawie ochrony środowiska [Resolution of the Sejm of the PRL Concerning Environmental Protection]*, cited in Radecki, *supra* note 3, at 136; see also *Sejm Resolution on Environmental Protection*, FBIS-E.EU., Feb. 4, 1987, at G5.

229. *Narodowy program ochrony środowiska przyrodniczego do roku 2010, Projekt [National program of protection of the natural environment to 2010]* (1988).

230. See RADECKI, *supra* note 3, at 136.

231. 1988 DZIENNIK USTAW No. 41, item 325, available in English translation in *Binder 4 Central & Eastern European Legal Materials* (Sept. 1993).

economy was deregulated²³² with potentially disastrous consequences for environmental protection. For example, waste imports that previously had been heavily restricted were temporarily deregulated, meaning that hazardous wastes could be brought into Poland without permit requirements or dumping restrictions. In April 1989, the communist government signed the "Roundtable Agreements" which provided a basis for further political and economic reforms. Among other things, the accords re-legalized Solidarity, called for early (semi-) free elections, and included an important and highly detailed protocol on the environment. The Environment Protocol called for the appointment of a special commission of environmental law experts to completely overhaul Poland's environmental protection legislation by the end of 1990, and stipulated six specific provisions to be incorporated into new legislation, including: (1) a right to access information on environmental quality, (2) a right to conduct and publish environmental research, (3) a right to environment, specifically implementing Article 71 of the Constitution so that any citizen could, free of charge, institute a lawsuit to protect the environment, (4) the establishment, in each local community, of a "civic warden of the environment," elected by the local population, to collect environmental data and inspect polluters and local agencies, (5) the publication, by the authorities, of state environmental information, including a list of the most dangerous sources of pollution, and (6) an amendment to the state secrets law specifically excluding environmental information from its coverage.²³³

The free elections, called for by the Roundtable Accords, were held in June of 1989. The Accords guaranteed the Communists a majority (sixty-five percent) of seats in the lower and more powerful house of Parliament. Nevertheless, the elections clearly constituted a public referendum on Communist rule. The outcome was beyond dispute, as Solidarity-backed candidates won every seat in Parliament available to them (except one which went to an independent candidate). For a few months longer, the Communists retained control of the government, thanks to their assured majority in the *Sejm*. However, Party leaders proved unable to form a new government, and so,

232. This had immediate and unfortunate environmental consequences. For example, hazardous waste imports, which had previously been highly regulated, were now completely deregulated. This led to a massive inflow of hazardous waste from Western Europe. Waste imports were subsequently banned, in a 1989 amendment to the EPDA.

233. See *Protokół Podzespołu d/s Ekologii Okrągłego Stołu* [Protocol of the Roundtable Subunit on Ecology] 22 (SCITRAN trans. 1989).

in September 1989, the first post-communist "Solidarity" government of Prime Minister Tadeusz Mazowiecki took office. This signified the end of Communist rule in Poland. Still, many institutions of socialism remained in place at least until January 1, 1990, when the so-called "Balcerowicz plan" (named for Finance Minister Leszek Balcerowicz) of shock therapy economic reforms took effect.

The purpose of the "Balcerowicz plan" was not to establish a *laissez-faire* economic system as some have maintained.²³⁴ If it had been, environmental protection would have been systematically deregulated and there would be no other developments worth noting here. Rather, the facts show that the Polish government has been devoted to an active and improved program of environmental protection. Indeed, in his first public statement as Prime Minister, Tadeusz Mazowiecki specifically mentioned the importance of improving government environmental protection policy.²³⁵ Since then, new policies have been enunciated and implemented, old laws have been substantially amended, important new laws have been enacted, new sources of financing have been innovated, administrative structures have been improved, and, perhaps most importantly, the "rule of law" has been instituted as the paramount constitutional principle of the post-socialist Republic of Poland.²³⁶

During the communist era, environmental laws, like all laws, were subordinated to policy; government officials and enterprise managers simply disregarded with impunity laws that interfered with Party-state policy. The institution of a constitutional *Rechtsstaat* (literally "law state") has changed that, making environmental laws automatically more potent. This is well illustrated by the political controversy that erupted in the summer of 1992 over Warsaw's new Okęcie II airport. The airport was planned in the 1980s when the Communists still held power. According to the 1980 EPDA, as amended in 1987, the airport could not be built without certain environmental protection equipment including a sewage treatment plant, a waste incinerator, acoustic barriers, and noise monitors. However, in an agreement that typified the status of law under communism, Warsaw city officials summarily and without legal authority waived the

234. See, e.g., ROGER MANSER, *FAILED TRANSITIONS: THE EASTERN EUROPEAN ECONOMY AND ENVIRONMENT SINCE THE FALL OF COMMUNISM* (1993).

235. Tadeusz Mazowiecki, *Przychodzę jako człowiek "Solidarności"* [*I come as a man of "Solidarity"*], *Gazeta Wyborcza*, Sept. 14, 1989, at 3, 4.

236. Article 1 of the Polish Constitution now expressly states that the Republic of Poland is based on the rule of law.

environmental rules. Needless to say, this occurred behind closed doors and without public comment. However, by the time the airport was ready to open in June 1992, the system had changed; the law was the law, and it could no longer be simply disregarded when inconvenient. The airport's noncompliance with environmental regulations was headline news all over Poland creating a public furor.²³⁷ The State Environmental Protection Inspectorate threatened to close it down.²³⁸ The Main Administrative Court ruled that it could remain open,²³⁹ but required the airport to install all the pollution control equipment specified by environmental regulations. That constituted a substantial victory for environmental protection resulting from the institution of the "rule of law."

Systemic changes have facilitated improved environmental protection in other ways as well. For example, the gradual privatization of the economy is lessening the Polish government's conflict of interest as environmental regulator and nominal owner of polluting enterprises.²⁴⁰ Private firms tend to be subject to harder budget constraints than state-owned enterprises²⁴¹ which means that environmental fees and fines, if set at appropriate levels, can more effectively induce firms to reduce pollution emissions. Indeed, from 1990 to 1991, environmental payments to the government have increased by a factor of thirteen.²⁴² Meanwhile, pollution has declined nationwide by forty percent, according to the latest figures.²⁴³

237. See, e.g., Juliusz Urbanowicz, *New Okęcie II Airport: Environmental Hitch*, The Warsaw Voice, July 5, 1992, available in LEXIS, World Library, Wrsawv file; *Okęcie warunkowo otwarte: PrzeLOTne święcenia* [Okęcie conditionally opens: temporary reprieve], Super Express, June 29, 1992; *Zgoda na Okęcie II* [Agreement on Okęcie II], Gazeta Wyborcza, June 29, 1992; *Okęcie II warunkowo dopuszczone do eksploatacji* [Okęcie II conditionally permitting to operate], NOWA EUROPA, June 29, 1992; *Puste rękawy* [Empty terminal], Sztandar Młodych, June 29, 1992; Zofia Jóźwiak and Jacek Skorupski, *Za pół roku monitoring, za półtora oczyszczalnia* [Monitoring in a half-year, purification plant in a year-and-a-half], Życie Warszawy, June 30, 1992.

238. See, e.g., Juliusz Urbanowicz, *LOT Fails Eco-Investments*, Polish News Bull., Mar. 25, 1993, available in LEXIS, News Library, Curnws file.

239. *Warsaw Airport Will Not Be Closed*, Pap News Wire, May 21, 1993, available in LEXIS, News Library, Curnws file.

240. For more on this conflict of interest, see, e.g., Daniel H. Cole, *Marxism and the Failure of Environmental Protection in Eastern Europe and the U.S.S.R.*, 17 LEGAL STUD. F. 35, 51-52 (1993).

241. See, e.g., Kornai, *supra* note 186.

242. Manser, *supra* note 234, at 117 (noting that environmental revenues increased from \$30 million in 1990 to \$400 million in 1991).

243. *Pollution Down 40 Percent in Poland, Minister Says*, Pap News Wire, June 5, 1994, available in LEXIS, News Library, Curnws File.

Aside from the structural improvements resulting from systemic reforms, the Polish government has sought to improve its environmental laws and policies. First, in 1989 all environmental and nature protection responsibilities were again consolidated in a single new Ministry of Environmental Protection, Natural Resources and Forestry.²⁴⁴ Immediately, the Ministry focused its attention on developing new policies to restore and protect Poland's environment into the next century. In November 1990, it released a White Paper on National Environmental Policy which was subsequently adopted by a Parliamentary resolution in May 1991. The policy was based generally on the concept of "sustainable development," and it established short-term, medium-term, and long-term environmental goals to be achieved through a combination of administrative regulation and market mechanisms.²⁴⁵

In order to facilitate the design and implementation of new environmental policies, the Mazowiecki government established in 1989 an Environmental Law Reform Committee as called for in the Roundtable Accords. Its specific task was to draft comprehensive new environmental legislation. However, the Committee soon came to realize that a rapid and complete reworking of Poland's environmental laws was an overly ambitious goal. Accordingly, it turned instead to a more gradual and piece meal approach, replacing some old laws and simply amending others.²⁴⁶

Between 1989 and 1993, the 1980 EDPA was amended seven times.²⁴⁷ The most important of these amendments banned hazardous waste imports, strengthened the law's environmental impact assessment (EIA) procedures, and established an innovative Environmental Protection Bank (Bank Ochrony Środowiska) to provide low-interest loans for private environmental protection projects. According to some commentators, these amendments amounted only to a "face-lift" of legislation that was designed for a dead and buried political-

244. 1989 DZIENNIK USTAW [JOURNAL OF LAWS] No. 101, item 404.

245. MINISTRY OF ENVIRONMENTAL PROTECTION, NATURAL RESOURCES AND FORESTRY, POLAND, NATIONAL ENVIRONMENTAL POLICY OF POLAND (May 1991). See also Jendrośka *supra* note 192 at 532.

246. See Jendrośka, *supra* note 192, at 534.

247. See 1989 DZIENNIK USTAW [JOURNAL OF LAWS] No. 26, item 139; 1989 DZIENNIK USTAW [JOURNAL OF LAWS] No. 35, item 192; 1990 DZIENNIK USTAW [JOURNAL OF LAWS] No. 34, item 198, 1990 DZIENNIK USTAW [JOURNAL OF LAWS] No. 39, item 222; 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 77, item 335; 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 101, item 444; 1993 DZIENNIK USTAW [JOURNAL OF LAWS] No. 40, item 183.

economic system.²⁴⁸ But those criticisms fail to grasp that the 1980 EPDA is in many respects better suited to the new system than it ever was to the old. For instance, as already noted, the 1980 EPDA's market mechanisms—fees and fines—can and do operate much more effectively in a market-based economy attended by relatively hard budget constraints than in an administrative economy attended by relatively soft budget constraints.²⁴⁹ Nevertheless, legislation to replace the 1980 EPDA is still in the works.

Meanwhile, new regulations have been promulgated under the 1980 EPDA. For example, in 1990 the Council of Ministers, by Executive Order, issued new ambient concentration standards for air pollutants including especially strict norms for protected areas such as national parks and nature reserves.²⁵⁰ Fees and fines for air pollution emissions also rose dramatically,²⁵¹ and they are now among the world's highest.²⁵² New regulations have also been promulgated under the 1974 Water Law and the water protection provisions of the 1980 EPDA.²⁵³

Amendments to old environmental laws and regulations have been accompanied by substantial new legislation. The most important new laws enacted so far concern nature protection and the State Environmental Protection Inspectorate. The 1991 Nature Protection Act²⁵⁴ replaced the 1949 Act, and returned nature protection in Poland to a more preservationist orientation reminiscent of the old 1934 Act. Where the 1949 Act established "rational use" of natural resources as an equal goal of nature protection activities, Article 1 of the 1991 Act speaks only in terms of "preserving" and restoring ecosystems and species. To that end, the statute calls on the Ministry of Environmental Protection, Natural Resources and Forestry to develop a national strategy for nature protection in all protected areas, including national parks, nature reserves, scenic parks, areas of protected

248. See JERZY JENDROŚKA, *STATE OF ENVIRONMENTAL LAW: POLAND* 21 (1992).

249. See Daniel H. Cole, *Poland's Progress: Environmental Protection in a Period of Transition*, 2 PARKER SCH. J.E.EUR. L. — (forthcoming July/Aug. 1995).

250. 1990 DZIENNIK USTAW [JOURNAL OF LAWS] No. 15, item 92.

251. 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 125, item 558.

252. See Stanisław Wajda, *Improvement of Compliance with Environmental Legislation: The Case of Poland*, paper presented at United Nations Economic Commission for Europe, Workshop on Legal and Regulatory Framework for Environmental Management 19 (1993) (manuscript on file with the author).

253. 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 116, item 503; 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 125, item 556.

254. 1991 DZIENNIK USTAW [JOURNAL OF LAWS] No. 114, item 492, available in WESTLAW, Polishlaw database [hereinafter 1991 Act].

plant and animal species, and natural monuments. The law establishes a new administrative unit within the Ministry specifically to manage the national parks. This new National Park Service is comprised of a Director (subordinate to the Minister of Environmental Protection, Natural Resources and Forestry), a scientific committee to make policy recommendations, and park rangers to enforce park ordinances. In addition to the new state authorities, the 1991 Act provides relatively greater policy and enforcement roles for regional (*Wojewódstwo*) authorities. The 1991 Act also contemplates a Nature Protection Guard, comprised of private citizens, to enforce regulations in protected areas. Severe sanctions are provided for violations—up to two years in prison for anyone who “destroys, significantly damages or decreases the natural value of a protected area,” protected natural object, or protected plant and animal species.²⁵⁵ Prison terms are also provided for anyone conducting illegal construction or economic activities in protected areas.²⁵⁶ Financial penalties ranging from five thousand to fifty million zlotys (almost \$5,000 1990 U.S.) are also available.

Unlike the new Nature Protection Act, the 1991 Law on the State Environmental Protection Inspectorate²⁵⁷ has not changed the substance of Polish environmental law; it is purely procedural. Nevertheless, it is probably the most important legislative development for environmental protection in Poland since the fall of communism. The Act was designed to respond to the greatest weakness of environmental protection under communism—lack of enforcement. To a limited extent, that problem was ameliorated by the structural/systemic changes discussed earlier, *e.g.*, the institution of the “rule of law” and the improved performance of environmental fees and fines in a market economy where actors are subject to relatively hard budget constraints. However, the 1991 Law on the State Environmental Protection Inspectorate constitutes a more direct attack on problems of environmental law compliance, monitoring, and enforcement.

Prior to the new law, the State Environmental Protection Inspectorate had been, as already noted, a small unit attached to the Ministry of Environmental Protection consisting in a headquarters and six regional offices with a total of about 400 employees (to monitor 43,000

255. *Id.* arts. 54, 55.

256. *Id.* art. 56.

257. 1991 *DZIENNIK USTAW* [JOURNAL OF LAWS] No. 73, item 433, CENTRAL & EASTERN EUROPEAN LEGAL MATERIALS (Sept. 1993), available in LEXIS, World Library, EELEG File.

polluting facilities). It was authorized to check compliance with environmental standards, but it was hardly an enforcement agency since it had virtually no power. As the Polish environmental law scholar Jerzy Jendrońska has noted, the Inspectorate was supposed to be an "environmental watchdog," but it was "a watchdog without teeth."²⁵⁸

Under the new law, the watchdog can bite. The Inspectorate can now impose non-compliance fines, shut down facilities endangering the environment, ban the importation or sale of environmentally hazardous raw materials, fuels, machinery and technologies. No new facility can begin operations until it notifies the Inspectorate and complies with all required environmental measures. In addition, the Inspectorate has oversight authority over all agencies involved with pollution monitoring. Monitoring procedures, which previously were haphazard and inconsistent, today are clear and consistent; all monitoring agencies and laboratories must comply with the Inspectorate's guidelines. The Inspectorate now maintains an elaborate environmental information database, and serves as a clearinghouse for information exchange.²⁵⁹ To fulfill its several new legal responsibilities, the State Environmental Protection Inspectorate has grown dramatically in size and organization. Today, in addition to the Warsaw headquarters, there are 49 branch offices (one in each *Województwo*), staffed by some 3,000 inspectors.

So much has changed under the 1991 Law that it cannot possibly be considered simply an amendment to the 1980 EPDA. It is, as Jerzy Jendrońska has written, a "powerful" new environmental enforcement law, which has proven itself in its first few years of operation.²⁶⁰ Poland has seen a significant overall improvement in monitoring compliance and environmental enforcement since it was enacted. For example, under a six-year program, instituted in 1990, aimed at reducing pollution from Poland's eighty largest industrial emitters, the Inspectorate has already issued some 3,000 orders (*decyzji*) requiring facilities to install pollution control equipment; plants have been completely shut down; twenty-five have been "partly closed;" and twenty-two have been forced to temporarily curtail some amount of produc-

258. Jendrońska, *supra* note 196, at 352.

259. For more on the Inspectorate's new authorities under the 1991 law, see WOJCIECH RADECKI, *Ustawa o Państwowa Inspekcji Ochrony Środowiska* [Law on the State Environmental Protection Inspectorate] (1992); WOJCIECH RADECKI, *PRAWO OCHRONY ŚRODOWISKA W PRAKTYCE* [ENVIRONMENTAL PROTECTION LAW IN PRACTICE] ch. 12 (1994).

260. WOJCIECH RADECKI, *PRAWO OCHRONY ŚRODOWISKA W PRAKTYCE* [ENVIRONMENTAL PROTECTION LAW IN PRACTICE] ch. 12 (1994).

tion. According to the Chief Inspector's office, these enforcement activities have resulted in substantial declines in pollution emissions from plants on the list of eighty: dust emissions from cement plants on the list have declined by sixty percent; lead and copper emissions from foundries on the list have declined by sixty and thirty-two percent respectively; and carbon dioxide emissions from power plants on the list have fallen by forty percent.²⁶¹ This certainly denotes a "significant" improvement in monitoring compliance and enforcement.²⁶²

IX. The Future of Environmental Law and Administration in Poland

For the remainder of this decade, changes in Polish environmental law and administration will primarily be driven by European Community policy. On April 8, 1994, Poland applied for full membership in the European Union, hoping for complete integration by the year 2000.²⁶³ As a precondition to membership, Poland will have to "harmonize" its environmental laws with E.C. directives.²⁶⁴ The Polish government has already taken the first steps towards harmonization. For example, a new water law to replace the 1974 Law has been drafted but not yet enacted. Its express purpose is to incorporate E.C. directives on water pollution discharges,²⁶⁵ groundwater protection,²⁶⁶ and drinking water quality.²⁶⁷ This process of harmonization is not simply an instrument for gaining admittance to the E.C., however; from the point of view of Polish legal scholars, the incorporation of E.C. standards makes Poland's environmental laws better.²⁶⁸

Besides the draft water law, many other environmental issues remain on Poland's legislative agenda, including replacement legislation for the comprehensive 1980 EPDA, a hazardous waste law, and laws to increase public participation in environmental decisionmaking

261. *Poland: Program Cracking Down on Polluters Through Fines, Inspections Deemed Success*, BNA Int'l Env't. Daily, May 28, 1993 available in LEXIS, News Library, Curnws File.

262. Jendroška, *supra* note 196, at 354.

263. *See Poland Hopes for EU Membership by Year 2000*, Reuter Eur. Bus. Rep., April 8, 1994, available in LEXIS, News Library, Curnws File.

264. This obligation is express in Poland's association agreement with the E.C. *See Poland's Environmental Opportunities*, E.Eur. Energy Rep., Dec. 20, 1993, available in LEXIS, News Library, Curnws File.

265. Council Directive 76/464, (1976).

266. Council Directive 80/68, (1980).

267. Council Directive 80/778, (1980).

268. *See Jerzy Sommer, Polish Environmental Law Developments from an EC Perspective*, 2 RECIEL 11, at 11 (1993).

(along the lines of the American NEPA²⁶⁹ and the Freedom of Information Act²⁷⁰). A great deal of work remains to be done. Given the disastrous state of its natural environment, Poland has a long road ahead to environmental health and safety. The history of environmental law and administration in the democratic Republic of Poland has only just begun.

269. *See supra* note 41.

270. 5 U.S.C. § 552 (1988).