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WILLIAM W. BUZBEE is Professor of Law at Emory University School of Law and will be joining the law faculty at Georgetown University Law Center in the fall of 2014. He is coauthor of *Environmental Protection: Law and Policy* and editor of *Preemption Choice: The Theory, Law, and Reality of Federation’s Core Question*. He has published in many leading law reviews.

Cover design: Scott Laren.
Why a book about the 1971-85 war over Westway?

• An epic environmental battle—similar battles today
• Most expensive highway segment ever proposed
• History in dispute
• Environmental protection in crosshairs
• NYC’s fate and future transformed by Westway’s war
• Lack of previous great book about high stakes regulatory wars, where law and politics intersect, with science and environment central
• Important history, great story
• Show law as more than a picture, more than an opinion for analysis
  • Show law in action, strategic choices and errors
Why build Westway at all?

• Why not just use the old elevated Westside Highway?
This section of the existing West Side Highway stretches south from 23rd Street, passing the vacant Chelsea Piers.
Who would pay?
Who would benefit?

• Other people’s money: 90% federal, 10% state
• Costs to completion
• Initially only for interstate highway segment, but included more than just highway
The Westway plan

- 4.2 miles, 2.8 in the Hudson
- Massive filling
- Extending close to 1000 feet out; 1/10th of Hudson cross section
- Goodbye piers and pilings
- Sunken highway
- Mostly land for development, broader claimed redevelopment goals
- Linear park
From this, to ...
Who fought the Westway war?

Robert Moses? Not as a supporter
Ed Koch’s Westway wobbles

As a congressman
As mayoral candidate
As Mayor

Why the flip-flop?

When power meets power . . .
Agency decisionmakers, regulators and scientists

- COE, the EIS, and the permit choice
- FHWA, federal and state DOT
- US EPA
- US FWS
- NY DEC

- The prevalence of politics, advocacy, and political pressure
was Robert Kagan, father of Supreme Court Justice Elena Kagan. Combo, Kagan, and their consultants stated their objections to Westway and called
Competing Westway claims

- Democracy frustrated or vindicated?
- Tiny opposition? Hostile judge?
- Over a mere procedural snafu or over substantive protections and competing good choices for NYC?
- Killed just by delay? Error?
- Example of citizen activism and litigation rights run amok or victory for rule of law?
The Westway battles

• The critical legal change and choice: $ only for highways amended to the new trade-in option
  • Enduring motivation

• Legal infirmities:
  • Air pollution
  • Filling of the Hudson: NEPA and Section 404 of CWA
Focus today and 1980-85 on Westway’s fill and the protected Hudson

- CWA Section 404 “dredge and fill” prohibitions
- NEPA’s environmental impact statement claims
- Multiple attempts to shortcircuit or change the law
  - Battles in local, state, and federal political venues, both legislative and regulatory
- A drama in multiple parts: 2 EIS rounds; 2 end-runs attempted; 3 trials; 2 appellate rulings
- A claimed wasteland and the striped bass
Floating debris is common along the West Side waterfront in the basins between the remaining piers.
STRIPPED BASS

KEY

EBS  East Bank Shallow
EBD  East Bank Deep
HI   Hoffman Island
GB   Gravesend Bay Shallow
RHD  Red Hook Deep
RHF  Red Hook Flats Shallow
EID  Ellis Island Deep
EIS  Ellis Island Shallow
WHA-NJ New Jersey Interpier Site
WHA-1 Westway Interpier Site South (RM 1.8)
WHA-4 Westway Interpier Site North (RM 4.0)
WHA-2/3 Westway River Sites South (RM 3.9)
WHA-516 Westway River Sites North (RM 4.0)
WHC-7/8 Westway River Sites River Mile 9.0
TH   Tubby Hook River Mile 12.9
YW   Yonkers West River Mile 18.0
HS   Hastings South River Mile 21.2
PD   Piermont Deep River Mile 24.4
PS   Piermont Shallow River Mile 24.4
TZ   Tappan Zee River Mile 28.0
RL   Rockland Lake River Mile 32.9
PRD  Potato Rock Deep River Mile 35.8
PRS  Potato Rock Shallow River Mile 35.4
BI   Bowline Intake Shallow RM 37.1
BC   Bowline Channel Deep RM 37.5

0 0 0 1 1 0 0 0 6 1 1 3 2 5 7 0 3 0 0

SAMPLING LOCATIONS

FISH PER UNIT EFFORT BY SITE - FEBRUARY 20-27, 1980

EXHIBIT
Defeated? The 2\textsuperscript{nd} Chance

- New EIS

- The Draft EIS and Westway’s imminent defeat

- The Final EIS’s reversed conclusions, Section 404 permit granted

- Back to court

- Oddity of trials over regulatory choices

- The cross examination
September 11, 1985
Assessing Westway’s defeat

- Was Westway needed?
- Anti-democratic claims?
- Procedural snafu?

- Law’s priorities
- Legal empowerment of citizens and their lawyers
- Genuinely high environmental stakes

- And what followed in Westway’s wake?
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