

# Westway and the Challenges of Regulatory Fragmentation

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Draft of September 30, 2004  
Presented at Florida State University College of Law  
October 7, 2004

*Please note: This is a quite preliminary draft of a larger project. At this point, due to its preliminary nature, it contains minimal footnotes. It does not contain surely needed attribution of credit to scholars who have written on related work, to sources interviewed in connection with this project, and to others who have provided research assistance. This therefore is not be cited or quoted without my express permission.*

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**I. The Westway project: introduction and anatomy of an environmental dispute study**

This presentation draft is a small and quite preliminary part of a larger multi-year research project that I hope eventually to turn into a book. The book's working title is *Westway, New York, and Environmental Law's Terrains*. The latter half of this colloquium draft, discussing regulatory fragmentation challenges, may end up a stand-alone chapter in the book, or may in fact be broken out as a freestanding paper, less focused on Westway, in which I set forth my typology of types of regulatory fragmentation and their implications.

I have several goals for the Westway book. The first is to tell the story of the 1970s and 1980s proposed Westway highway battles, focusing primarily on environmental law disputes, but situating those battles into their larger political and cultural context. Westway was the name given for a proposed few mile highway project along Manhattan's West Side. Westway would have been placed substantially in the Hudson River, in newly built tunnels with a new park overhead. This new park and elimination of the barrier of the former elevated West Side Highway were expected to help revitalize the area and enhance real estate values along Manhattan's West Side. Among many problems facing the project and policymakers were a struggling mass transit system and the presence of overwintering fish, especially striped bass, in the areas designated for Westway landfill. In the end, through persistent and capable action by a few citizen activists and attorneys, and due especially to a federal judge willing to enforce the law, the project was stopped. For project proponents, consisting of virtually all of the major elected politicians with a New York constituency, this was a debacle and loss for the city. For opponents, the judicial and ultimate political victory were vindication of the rule of law and power of federal environmental laws. The Westway story is remarkable in itself.

My second goal, but probably my main motivation, is to use the Westway story as a means to introduce readers to the many terrains on which environmental goals and battles are fought, as well as the huge chasm between articulating environmental goals and devising effective regulatory means to achieve them. I've often been struck by how otherwise sophisticated lawyers, law students, professors, political scientists and other academics, as well as citizens in general, have little if any comprehension about how environmental laws work. Goals and mandates are often the focus, with little attention to how regulatory schemes intersect and work in reality. Where one finds sophisticated legal analysis accessible to those not already expert, it often focuses on the micro-pictures of, for example, the likely implications of particular regulatory provisions. My goal is to present and grapple with the complex and often fragmented institutional frameworks through which, and sometimes in spite of which, environmental goals are translated into implemented reality. Regulatory complexity, fragmentation and overlap are themselves worthy of analysis. The Westway case study provides a valuable narrative for examination of these complexities and comparison of this case history to prominent theories

about politics, law and environmental policy.

My third goal is to offer a kind of legal study that is perhaps too seldom offered in the law. Rather than survey the Westway battle from afar, or perhaps through a judge-centered view where legal decisions are the chief if not only source referenced, I am more focused upon how Westway's many stakeholders actually sought to pursue their often disparate goals in this complex legal environment. Regulatory, legal and political decisions by government officials are undoubtedly significant events in this story, but perceptions, strategies and arguments of the many stakeholders will be a sustained attribute of this project. I thus have sporadically been reviewing a decade's worth of litigation legal files pulled from a federal court warehouse. I have also sought to reconstruct the major political and regulatory actions that occurred. To enrich my understanding and also be sure not to misunderstand why certain events occurred, I have also been interviewing many of the key actors, including the district judge who issued the two key opinions in the case and presided over innumerable hearings, motions and two lengthy trials over Westway and its environmental impacts. Others interviewed include citizen activists, elected officials such as Ed Koch, the then Mayor of New York City, attorneys who worked on the case, and the journalist who was perhaps Westway's most pointed critic, Sidney Schanberg, then of the New York Times. Where stakeholders are not available for interview, recourse to newspapers, public documents and paper records provide additional statements and historical context.

I therefore for purposes of this presentation provide this explanatory introduction about the scope of this project, a brief recounting of the Westway story, and a preliminary cut at analysis of the challenges presented by regulatory fragmentation. Other chapters that I will not present at this time will introduce readers to issues such as administrative law wrinkles, the implications of scientific uncertainty in devising regulatory policy, the press and environmental policy, the merits of roadblock versus more flexible regulatory strategies, the role of citizen litigation, and the role of the federal judiciary.

During our discussion together, I welcome both general comments about this project as well as comments focused on the Westway story or regulatory fragmentation chapter. This is all quite preliminary, so I truly seek guidance, criticisms and feedback.

## II. The Westway Story

The Westway saga has become a shorthand for a wide range of views of environmental law, regulation and politics. As its historical essence has been simplified and distilled with the passage of time, many of its complexities, historical contingencies, and realities have been lost. It may offer limited lessons due to those complexities and contingencies, but it does illuminate much about how environmental laws and regulations work in the post-1970s era. Top-down pursuit of projects with little regard to meddlesome details like environmental impacts or opponents' views is no longer a prudent option. Modern federal environmental laws provide a wedge to break apart durable New Deal coalitions that for decades had supported major infrastructure projects, especially federally funded highway and transportation projects. This reexamination of the Westway story also reveals the importance of hubris, human strategic error and imprudence. It may be easy to blame "the law" or wacky environmentalists for this project's defeat, but both rational legislative designs and poor strategic calls by Westway's proponents better explain the project's demise. This section provides only an overview of the Westway story. For anyone already immersed in the Westway controversies, omissions and simplifications will be readily apparent.

Westway's inception can be traced to two key events, one local and one federal. When large chunks of the elevated Miller Highway (also often referred to as the West Side Highway) started falling and imperiling this major New York City transportation artery, a transportation fix was inevitable. The other key event was from years earlier. The federal government in the post-New Deal era became centrally involved in funding construction of interstate highways. The allure of federal dollars to provide substantial local patronage and fund urban improvements encouraged cities like New York to think big, but at little local cost. If New York City could add this transportation route to the interstate system, Federal-Aid Highway funds would be available.<sup>1</sup> Westway grew out of this confluence of genuine transportation need and the promise of federal funding.

The plans developed were grand. City and state planners came up with a plan that would brilliantly avoid disruption of already vested property interests in the adjacent neighborhood, would qualify for federal funding, and would also provide new Manhattan acreage and a park. Massive landfilling in the river would create 200 new acres of land. Piers, shoals and flowing river would be replaced. A new interstate highway link would go under this new landfill, freeing access to the river and a new park that would sit above the highway.<sup>2</sup> The highway itself would have been 4.1 miles long. This presented what surely looked like a win-win situation for the city, its citizens and its business and labor interests. Short and long terms jobs would be

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<sup>1</sup>Albert Butzel, Recapturing New York City's Waterfront, Part I: The Demise of Westway and the Birth of the Hudson River Park, 13 *Envtl. Law in N.Y.* 217, 218 (Dec. 2002).

<sup>2</sup>Paul R. Pescatello, Westway: The Road from New Deal to New Politics 4-6 (January 1986) (Cornell U. Doctor of Philosophy dissertation)

created, adjacent real estate would leap in value, an unsightly highway would be buried, and citizens would have a new river-edge park to enjoy. This initial conception was estimated to cost \$2 billion, with 90 percent paid for by federal dollars.<sup>3</sup> It was often stated to be the most expensive highway segment ever proposed in the world.

Further consultations, now including federal officials, led to addition of this road segment to the interstate highway system. The West Side Highway Project, a city-state joint project, subsequently was created in 1972 to move this plan to implemented reality. During this planning process, several variants on what would soon become known as Westway were on the table. These alternatives ranged from modest repair and replacement efforts to the “outboard” option that would include the landfill, buried highway, and park plan. With some minor changes, the “modified outboard” plan became the leading Westway proposal. This was the most costly of the options and most environmentally disruptive, at least in its water impacts, but also provided the largest array of benefits to the city. Many purely local benefits would be paid by the federal government at a rate of 90 cents on the dollar. Furthermore, assuming construction funding followed past practices, escalating costs during the process of actual construction would continue to be paid by the federal government at the same ninety percent rate. Thus, although the initial estimated cost was approximately \$2 billion dollars for this project, its actual costs could easily have reached in the \$4-6 billion range.<sup>4</sup> This would have provided such a boon for local interests of virtually all kinds that proponents originally did not anticipate local opposition, but wondered instead about environmentally oriented federal agencies. It appeared to be a textbook example of what Alshuler and Luberoff call, “Do No Harm Planning,” in which “even projects of the sort that had traditionally been most disruptive, such as new expressways and airports, should be sited, designed, and mitigated so as to leave no victims in their wake.” Westway “managed to avoid nearly all existing homes, parks, and major business structures,” while also creating huge opportunities for patronage, employment, and creation of a park.<sup>5</sup>

Such optimism about local sentiments quickly proved baseless. New York City was in the early 1970s in the midst of a fiscal crisis. That crisis of course could have weighed in favor of accepting any federal handouts, but part and parcel of that crisis and a degraded quality of city life were mass transit woes. The subways in New York City have always carried far more passengers than do city roads and highways, but those subways were suffering from a multitude of maintenance problems.

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<sup>3</sup>Butzel, *supra* note .

<sup>4</sup>Boston’s “big dig” project experienced even more egregious cost overruns, so far costing more than three times its original estimated costs, but with the federal government footing most of the bill. See Alan Altschuler & David Luberoff, *Mega-Projects: The Changing Politics of Urban Investment* 116-20 (2003).

<sup>5</sup>Altschuler & Luberoff, at 230.

By the time Westway's proponents had refined their plans and solidified their supporting coalition, Congress had amended the Federal-Aid Highway Act in accordance with efforts of Representative Bella Abzug. States could now withdraw urban segments from the Interstate System, such as the already designated Westway corridor. They could use those dollars as a "trade-in" for mass transit projects. The federal Westway dollars thus suddenly had two potential end uses: Westway in all of its "modified outboard" glory; or modest road repairs and investment in mass transit improvements. This "trade-in" alternative proved among the chief motivators for Westway opponents.

Westway's chief opponents were led, or at least most effectively represented, by a citizen activist, Marcy Benstock. Benstock had worked with Ralph Nader and had by the 1970s become an astute political actor. She formed an organization called the "Clean Air Campaign." Assisted at several stages in the protracted Westway battles by highly effective counsel, she proved to be a tenacious adversary able to defeat a virtually unanimous set of state and local leaders advocating Westway. Mayor Koch ruefully laughed when discussing Benstock's effective work, stating that "they were very smart . . . [to defeat Westway] they had to have beaten the unions in Congress. But to their great credit. I mean I admire their competence. They beat the unions and the banks and the advocates for Westway."

Among the lawyers working alongside Benstock were Albert Butzel, who had just succeeded in defeating a major infrastructure project in one of the first federal environmental litigations, the Storm King litigation. She also worked with a young lawyer, Michael Gerrard, in an array of meetings and fora where Westway was the subject of discussion. He later became a partner at the environmental law boutique, Butzel & Cass, later renamed Berle, Kass & Case. Gerrard is now an environmental law partner at Arnold & Porter and prolific environmental law scholar. Butzel led the litigation efforts through 1984, when two young lawyers at Berle, Kass & Case took over those efforts on a pro bono basis. The lead lawyer was Mitchell Bernard, now a litigator at the Natural Resources Defense Council, joined by Jean McCarroll, now a real estate lawyer in New York City. Despite broad federal, state and local support for Westway, several federal agencies were at least for a time allied with the citizen environmentalists, repeatedly voicing their opposition to the Westway project. New York State's Department of Conservation also initially denied an essential air pollution permit, as discussed below.

Benstock's organization, capably assisted by these lawyers and occasionally joined by other organizations, pursued a sequence of legal strategies to defeat Westway. These efforts initially had as their explicit goal defeating Westway and redirecting trade-in funds principally to the mass transit system. Later, after those efforts proved effective to cause delay, but not to defeat the project, attention turned to water and fishery impacts.

### **A. The Clean Air Act challenge**

In over ten years of regulatory and judicial skirmishing, an array of challenges were raised. The first tactic was to point to the discriminatory impact of funding a highway over mass

transit, where transit serviced a far more numerous and racially diverse population. This first attack was an early version of what subsequently came to be known as an environmental justice (or racism) argument. Westway opponents claimed that a “practicable alternative” to Westway was a modest road repair and mass transit investment. For a fiscally strapped city and populace confronted every day with often decrepit subway conditions, this alternative was appealing. For the more concentrated interests typically supporting major infrastructure projects—unions, banks, real estate interests, and politicians—this alternative was anathema. The initial legal hook utilized by mass transit proponents was to argue that permitting Westway would violate New York City’s Clean Air Act obligations. Under New York City’s State Implementation Plan, the City had to adopt enforceable strategies to protect air quality. Among the measures in the SIP was an “indirect source permit” program. New York State, which administered the Clean Air SIP and permitting process, would have to determine that permitting Westway, or other “indirect sources” such as parking lots, would not attract new cars and pollution to the area, thereby exacerbating several areas of City nonattainment with the federal National Ambient Air Quality Standards.

This challenge largely turned on whether easier transportation flow would bring an increased number of cars onto the highway and possibly into New York City. Project proponents conceded it would bring many thousands of new cars onto the Westway itself, but claimed that with improved traffic flow, ventilation systems and the tunnel construction, the project would either be air quality neutral or improve the air. Benstock and her lawyers challenged these assertions, claiming increased numbers of cars would drive into the city and use underutilized parking lots. This would add to city congestion and degrade the air. As this permit application was pending before the state, the regional director of US EPA for the region, Eckardt Beck, stated he disapproved of Westway.<sup>6</sup> While he was not at that moment deciding on a permit, US EPA oversees state SIP planning and compliance. To the consternation of federal, state and city officials, the New York State DEC commission, Peter Berle, denied the permit after finding that New York State’s Department of Transportation, the permit applicant, had failed to carry its burden.

In this setting of political hardball and with billions in potential benefits (and patronage) at stake, both federal and state leaders acted. If the law was a hindrance, at least new decisionmakers might utilize their discretionary latitude to grant Westway project applications. Beck was reassigned to Washington and replaced by an administrator expected to be more amenable to Westway. Berle was forced to resign and he too was replaced with a more congenial official. The permit application heard a second round of testimony that included some modest project revisions to address air concerns. This time the DEC granted the permit and US EPA took no action under its SIP reviewing authority. The underlying law and regulations were not changed, but the personnel changes did the trick.

## **B. The NEPA and Clean Water Act challenges**

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<sup>6</sup>Pescatello, *supra* note at 267-68.

While the Clean Air Act challenge was underway, opponents also were scrutinizing other regulatory requirements. Given the scale of this project, the Army Corps of Engineers, which would have to grant at least one essential permit for Westway, the Section 404 dredge and fill permit under the CWA, as well as a permit under Section 10 of the Rivers and Harbors Act, proceeded to prepare an Environmental Impact Statement.<sup>7</sup> While the COE link to the project was the forthcoming Section 404 and Section 10 permit applications, its EIS under NEPA had to look at the full array of direct and indirect effects of the project, as well as resulting cumulative harms.

By this time, the Supreme Court's interpretations of NEPA had substantially curtailed NEPA's broad and aspirational reach. NEPA itself required nothing more than full and forthright public disclosure of the proposal, alternatives to the proposal, effects of the proposal and its alternatives, and mitigation measures that could be adopted. The Court had made abundantly clear that while NEPA has substantive goals of protecting the environment, its means to that end are purely procedural. Under NEPA, with adequate and honest analysis, a project could proceed even if its effects were significant.

Interviews, press coverage and past analyses of Westway, however, err in describing Westway's demise as attributable to imprudent failures to disclose under NEPA, a statute sometimes characterized as a "paper tiger." NEPA obfuscation and evasion were critical to the project's later federal court rejections, but these NEPA breaches were not lacking in rhyme or reason. The Clean Water Act's requirements under Section 404, as then interpreted and arguably expanded upon in binding federal regulations, created a near total ban on unnecessary "dredge and fill" operations where those operations would cause a significant degradation of the water habitat, especially harms to fishery resources. It was this failure to concede fishery impacts and their apparent unavoidability that proved fatal to Westway.<sup>8</sup> Significant fishery harms were a reality that virtually precluded approval of Westway, unless special statutory amendments specific to Westway permitted the project.

The fishery impact issue appears first to have been raised by EPA Administrator Beck, before his strategic reassignment to Washington, but the issue of Hudson river fisheries had been given a substantial airing in the earlier Storm King case<sup>9</sup> While the air Indirect Source Permit

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<sup>7</sup>Actually, the initial EIS was not prepared by COE, but adopted by it in contravention of usual NEPA practices. Several other water-related challenges were also pursued, but the combination that proved successful was scrutiny of NEPA analysis, coupled with underlying CWA Section 404 strictures.

<sup>8</sup>See *supra* for citation and discussion of those regulations.

<sup>9</sup>See Steven R. Weisman, *Delays on Westway Assailed by Adams in Call for Action*, *The NY Times*, Dec. 14, 1978, Sec. B, p. 8, col. 1 (discussed in Pescatello).

application was pending, three federal agencies officially voiced their objections to the Westway project. The Fish and Wildlife Service, the National Marine Fisheries Service, and EPA all objected based on threatened fishery impacts. Under applicable regulations, such impacts were to be avoided wherever possible, and these agencies' views were to be given great weight by COE in its analysis and ultimate decision.

Despite calls for greater analysis of fishery impacts and citizen calls for a new or supplemental EIS due to the passage of three years since the EIS had been prepared, the District Engineer granted the CWA and RHA permits. Due to the three federal agency objections, this determination had to be elevated first to the Division Engineer and later to the Washington-based Chief of Engineers. Although the COE at all three stages granted the requested permits, the underlying Final Environmental Impact Statement, or FEIS, contained significant flaws. Those flaws led to Westway's initial rejection in a case brought by the Sierra Club and Clean Air Campaign, assisted by Butzel, in June 1979.

The objecting agencies and later citizen challengers focused on claims in the FEIS that the Westway area was "biologically impoverished" and "almost devoid of macroorganisms."<sup>10</sup> A supplement to an underlying Technical Report on Water Quality contained conclusory language consistent with these conclusions. The problem for Westway proponents was the reality reflected in the initial Technical Report itself. It found "many macroorganism" and an "unexpected benthic community." Due to the objecting agencies' views, an additional study was undertaken in 1979-80. This study also contradicted common layperson views that the Hudson was polluted and lacking in environmental value. This second study found an especially high concentration of juvenile striped bass in interpier areas that would be displaced by the Westway landfill. Data reported internally and discussed in meetings with COE representatives showed the area to be by far the most significant overwintering area for striped bass. As reported in a contemporaneous memo made in one of those meetings: "the potential loss could be significant in terms of direct population losses and subsequent adverse effects on the level of future stocks of the species in the question for the lower Hudson area."<sup>11</sup>

The final supplemental study report, however, contained less dire predictions. The COE Chief Engineer, after seeing at least this supplemental study report and earlier documents, granted the permit. Shortly thereafter, in an unusual endorsement ruling declining to exercise its Section 404 veto right, acting EPA regional administrator Charles Warren basically conceded such a veto and elevation would be a futile act.

The case went before United States District Court Judge Thomas Griesa, a judge appointed by Republican President Richard Nixon. Griesa had previously been a partner at a

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<sup>10</sup>FEIS at 263, discussed in Pescatello at 287; Butzel at 219.

<sup>11</sup>Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367, 1374-75 (1982), aff'd in part, reversed in part, 701 F.2d 1011 (2<sup>nd</sup> Cir. 1983).

large corporate law firm in New York City. Nothing in his background indicated that he was an ardent environmentalist or anti-development. His reputation was as a no-nonsense judge with an irascible and sometimes impatient streak. He could at times be quite active in asking his own questions during court hearings.

The Benstock-Butzel attack centered increasingly on fishery impacts. By examining the FEIS and its underlying documentation, as well as by further seeking and reviewing underlying environmental consultants data and memos, they painted a convincing picture of willful inaccuracy in the FEIS. The underlying data and notes simply did not support the bland EIS assertions about the area's environmental insignificance. Despite the abundant contradictory data, the COE had neither supplemented nor corrected the FEIS with its assertions about the Westway area being a "biological wasteland." While it appears that some if not many COE employees knew that there was little if any basis for this assertion, and hence arguably made a decision with knowledge of the true facts, the public document on which it, other agencies, and the public was expected to rely retained this misleading discussion.

Once Judge Griesa was presented with abundant evidence of the underlying reality and its inconsistency with the FEIS, he held a trial to determine the adequacy and accuracy of the FEIS. As he repeatedly found in his ruling after trial, the Westway FEIS contained numerous falsehoods that rendered the approvals invalidly issued. He enjoined the project, pending preparation of a Supplemental Environmental Impact Statement rectifying the FEIS flaws. He also included a restraint on further federal funding of state Westway project exploration and an unusual requirement that any further Westway consideration and analyses be accompanied by rigorous record keeping, all overseen by a special master. Due to COE's reliance on the deeply flawed EIS, Judge Griesa also invalidated the CWA and RHA permits.

The Second Circuit affirmed many of Judge Griesa's ruling, most significantly his demand for another EIS analysis of water impact issues and most of his special record keeping requirements. Several other elements in his ruling were rejected, leaving the focus on the Section 404 permit and the new environmental analysis.

On remand to COE and other agencies involved in Westway, a new investigation ensued. Following the advice of a specially convened panel of experts, the District Engineer recommended a nineteen month study of fishery impacts. Under pressure from Governor Cuomo, however, the COE central office shortened that new review to a mere four months. Once again, politics prevailed over facts and more technocratic inquiry and expertise. Nevertheless, reality has a way of causing trouble, even when the political winds are to the contrary. The Draft Supplemental EIS (DSEIS), following extensive discussion of the significance of the proposed Westway landfill area, also found that Westway could have significant adverse impacts on the striped bass fishery. After discussing several scenarios, it stated that "it would thus be imprudent to consider any such habitat loss as projected by the Westway landfill to be minimal, insignificant, or sustainable at current population levels. Some measurable long-term reduction in the overall stock along with a reduced recovery would be a

reasonable expectation.”<sup>12</sup> Taking into account cumulative impacts of other projects in the area, more pessimistic appraisals were reiterated, leading to a final overall conclusion that “the site’s loss would be a significant adverse impact to the Hudson River stock of this species . . . .”<sup>13</sup>

Somehow, however, between the DSEIS and the FSEIS issuance a few months later, the prediction of significant impacts and underlying discussion was changed to reach almost opposite conclusions. The necessary permits were once again granted. Despite the special record-keeping requirements upheld by the Second Circuit, no notes or record explained this reversal of conclusions. Once again, the Sierra Club and Clean Air Campaign again went to Judge Griesa, and again he wanted to find an explanation for the change and the absence of explanatory notes.

Much as in the first trial, close scrutiny of depositions, documentary review and trial testimony and cross examinations revealed that the FSEIS language change had no underlying factual basis. Critical witnesses for the Westway proponents conceded that they had no particular basis for optimistic predictions about fishery impacts. Key government witnesses backed off of key claims about Westway’s minimal impacts. Factual claims turned out to be mere conjecture. Little testimony shed light on the critical question of why draft to final supplemental environmental impact statements were changed on the central question of Westway’s effects on fishery resources. Over a several week trial, judicial exasperation and government witness desperation became increasingly apparent.

Judge Griesa again invalidated the COE actions, finding the FSEIS to be arbitrary and capricious and accompanying permit grants therefore unlawful. His opinion, and the underlying briefs, also sharpened the analysis of why such official prevarication had occurred yet again. The EPA Section 404 guidelines, regulations binding on EPA and COE, were clear in their import. They stated that “Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse effect either individually or in combination with” with other activities. It further stated that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” Included in such effects were adverse effects on “aquatic system diversity, productivity and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat.” Such discharges were not permitted if there was an “practicable alternative.”<sup>14</sup> For Westway proponents, the obfuscated fishery impact language was thus not ridiculous covering up for no purpose, but a necessity if Westway was to have a future. It was doubtful that a permit grant could be upheld given the underlying data about the Westway site

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<sup>12</sup>614 F. Supp. at 1493.

<sup>13</sup>Id. at 1494-95.

<sup>14</sup>40 C.F.R. Part 230, sections 230.1, 230.10, subsection c, and 230.10(a).

and binding regulations.

### **C. The appeal and congressional endgame**

The Second Circuit again upheld most of Judge Griesa's ruling, but rejected a permanent injunction Judge Griesa had issued. Between the time of Judge Griesa's 1985 ruling and the Second Circuit partial affirmance, however, the Westway battle moved to Washington. New Jersey representatives, concerned that a Westway project might lead to denial of their own waterfront projects, moved to cut off federal Westway funds. More significantly, in a remarkable powerplay that citizen advocate Benstock calls "the highlight of [her] life," Westway opponents succeeded in enacting a legislative deadline for trade-ins of Interstate highway dollars. New York City now stood at risk of losing Westway and the alternative of federally funded improved mass transit. Confronted with this difficult choice between long odds on a reversal of Judge Griesa's order and losing all federal dollars, Mayor Koch and Governor Cuomo surrendered, accepting the trade-in dollars.

A scaled down project called Hudson River Park, combined with a more rudimentary highway resurfacing, are now underway in the area. This Park, too, has engendered citizen opposition, but no litigation has been filed attacking it for failure to prepare any EIS. Its prospects hinge largely on finding government and private funding to build paths, refurbish piers, and build a smaller scale river-edge park.

### III. Westway and Regulatory Fragmentation Challenges

Westway's history reveals a mixed set of lessons about the efficacy of the complex interrelationships and fragmentation that characterize United States environmental law. Part of the mixed nature of these lessons springs from diverse views about outcomes of the Westway controversy. For advocates of grand urban revitalization projects, such as Senator Moynihan, Westway's defeat on environmental grounds was an unfortunate debacle. The fish were viewed as a flimsy and insignificant pretext for an anti-highway coalition. For mass transit and environmental advocates, the ability of a few environmentalist citizens and attorneys, armed with powerful federal laws and regulations, to defeat a political juggernaut confirmed the wisdom of our regulatory frameworks. The "rule of law" prevailed over power politics and patronage, setting the stage for benefits to both the environment and popular interest in mass transit improvements.

This chapter uses the Westway controversy to illuminate ways this story confirms environmental federalism scholarship expectations, as well as ways the story reveals the insufficiency of a mere federal versus state view of environmental law's workings. In reality, especially in the context of urban environmental battles, one finds vertical legal layers, with federal, state and local officials all getting in the picture, with each responding to different legal restraints, institutional frameworks, and political and economic goals. At each level, horizontal fragmentation among multiple lawmakers and enforcers is also the norm, with federal agencies particularly notable in their different subject turfs and goals, perceptions, and regulatory cultures. The citizen role, now ensconced in the law, is also unusual and often misunderstood by many. Finally, despite legal frameworks typically dividing statutes, goals and implementation by media such as air or water, or by narrow goal, such as protecting endangered species, projects such as Westway inevitably implicate multiple bodies of law. This fragmentation of legal terrains, lawmakers and enforcers, and of regulatory schemes and strategies, is in large part a reflection of regulatory federalism. This fragmentation reflects more than just federalism, however. Multi-terrain regulatory battles result from the particular way our environmental legal schemes have developed.

Consistent with scholarship on environmental federalism, the Westway narrative suggests the powerful influence of institutional context for key decisionmakers. Most decisionmakers hewed closely to expected roles and few were willing to buck institutional imperatives due to contrary legal frameworks or personal values. Virtually the only institutional actors revealing concern with broad environmental repercussions were federal actors creating or enforcing generally applicable frameworks protecting environmental amenities such as fish, and a small handful of citizen activists and their lawyers. Of course, critics of Westway's outcomes and citizen activism view the citizen role with skepticism, assuming frequently that litigation focused on fish, for example, had other underlying motivations. At the level of particular decisions on this major infrastructure project, concern with less tangible and more remote concerns such as fishery impacts and long-term mass transit maintenance was virtually absent among most

government actors. Immediate local interests loomed far larger.

### **A. A regulatory fragmentation and overlap typology**

The recent wave of scholarship on federalism, especially that provoked by the Supreme Court's recent active revision of the bounds of federal and state governmental power, tends to focus on constitutional constraints on federal authority. In the environmental arena, debate focuses generally upon federal and state proclivities, especially in battles over the "race to the bottom" rationale for federal regulation. Some scholars emphasize the importance of providing states with latitude to use their particular resources to balance environmental and other goals. They see disregard or disdain for environmental protection as unlikely or at least a legitimate choice for state and local actors. Others have convincingly gathered data and arguments showing how states and local governments are more likely to sacrifice environmental protection for shorter term, more immediate gains such as tax revenues, employment, and other earmarks of economic vitality. Other literature, also triggered by judicial developments, examines the particular parameters of federal and state power under delegated program regimes handing federal regulatory primacy to states which, in turn, tailor their implementation and enforcement to their contexts and priorities.

Underdeveloped in the world of environmental law and federalism scholarship is ways of thinking about the implications of regulatory fragmentation and overlap that are pervasive features of environmental law schemes, yet are not captured adequately by the usual federal-state paradigm. Here, as in many other areas of analysis, the lack of suitable language or simplifying analytical constructs may blind analysts to equally significant attributes of our political and legal structures. This discussion suggests that environmental law, as confirmed in the Westway story, presents at least four distinct forms of regulatory fragmentation: temporal, vertical, horizontal (or subject), and institutional fragmentation. By "fragmentation," this discussion refers to the divisions of regulatory authority. Sometimes this fragmentation is found in the form of authority intentionally divided among several actors either vertically or horizontally, while in other settings authority may be allocated in a distinct way to a particular actor. Fragmentation thus, as used here, is a shorthand for the wide variety of ways authority is divided, dispersed, or allocated. Sometimes authority is distinct and separate, but other times fragmented authority may reveal areas of regulatory overlap.

Depending on the nature of the particular issue or dispute, regulatory fragmentation can present salutary opportunities or undesirable hurdles for regulatory stakeholders. The four types of regulatory fragmentation suggested are not mutually exclusive, but often are all elements in regulatory disputes such as the Westway battles. Indeed, differing perspectives regarding the Westway outcomes, as well as diverse views regarding which institutions are best suited to handle environmental regulatory tasks, can largely be traced to analysts' tendency to focus on an element, layer or institution in this fragmented setting. After briefly laying out these four forms of regulatory fragmentation and how they were manifested in the Westway battles, the discussion turns to interactions among these forms of fragmentation. Regulatory fragmentation,

American style, offers a perhaps unavoidable combination of regulatory benefits and risks; one cannot easily look at a Westway case study and point to a structural regulatory failure or flaw. In this fragmented regulatory setting, different regulatory modes and actions create incentives for action, inaction, facilitation or rejection of complex, huge, infrastructure projects like Westway.

### *1. Temporal fragmentation*

In the Westway story, one finds approximately two decades of regulatory, political and litigation battles. In fact, some would say the battles continued from the 1970s until the “son of Westway” project – Hudson River Park --was proposed and escaped litigation after its political acceptance during the late 1990s. Even today, potential battles over actual Hudson River Park construction choices remain possible. The Westway project had to surmount a long sequence of reviews and approvals by, among others, the United States Army Corps of Engineers, the Environmental Protection Agency, the Fish and Wildlife Service, the Department of Transportation, and the Federal Highway Administration. Similar state and city agencies also had to review and grant linked actions necessary for the project. Many court hearings and two substantial trials also reviewed the project and its regulatory approvals. Finally, the federal legislature acted in several significant roles over a decade, initially in its funding of projects like Westway, its provision of a potential trade-in right of highway dollars for mass transit, its belated addition of a deadline for exercising such a trade-in right, and a last second vote to cut off federal support for Westway. This prolonged multi-front battle required sticking power, funding, and expertise. The law and underlying regulations were not a static given to be applied to a settled project, but were all dynamic and ever-changing. The project was modified over time, as were key legal provisions.

The temporal fragmentation of the Westway project was crucial to its increasing momentum but also its demise. By dividing key decisions into a sequence of regulatory reviews, several judicial challenges, and a few key legislative and presidential decisions, opponents were presented with daunting hurdles. A classic collective action disparity put project opponents in a disfavored position. As Mancur Olson anticipated in his classic *The Costs of Collective Action*, those with significant political and business stakes in the proposed project were undoubtedly players in every phase of the project’s development and review. Huge monetary and political benefits would flow from the project; neither politicians, regulators, nor private sector interests such as banks, real estate developers and unions could fail to monitor and participate. In Mayor Koch’s memorable phrase, he as mayor revised his past opposition and became a Westway supporter after listening to “a group probably led primarily by David Rockefeller and the construction unions.” They and Governor Hugh Carey “importuned [him] to reconsider.” Endurance and monetary resources were crucial to proponents’ sequence of successes, as stage after stage of the project proceeded through reviews, approvals and the project gained momentum.

In contrast, project opponents were classic dispersed interests, advocates for cleaner air, mass transit or fish preservation. They had power, but not due to money or large organized

numbers. Environmental laws and implementing regulations gave these opponents a powerful hand with which to play. They were arguably beneficiaries, at least indirectly, of statutory regimes meant to further such interests. The Westway tale reveals citizens and attorneys of great commitment and intelligence, but also an unlikely confluence of commitment and skill of those opponents. Even if Westway's demise is perceived as a harmful result, that outcome does not necessarily point to any systemic legal flaw. Reexamining Westway's battles, it is clear that with a slightly different cast of characters, outcomes could have been quite different. Mayor Koch himself bemoans Westway's defeat, but refers to lead citizen activist Marcy Benstock as a "brilliant, brilliant tactician; she was the brains of the outfit." Although the law and regulations underlying the key Section 404 permit did not provide much latitude to agency officials and Judge Griesa, many discretionary decisions made by elected and agency officials long before the second district court injunction were key to its demise. A more political judge could probably have found ways to avoid the final Westway showdown in court.<sup>15</sup> For a judge focused on vindication of the "rule of law," regardless of the powerful array of project proponents, approval of Westway was difficult, if not impossible. Blatant unexplained changes to key EIS documents and flouting of court orders left the trial judge few options, unless he turned a blind eye to the reality placed before him.

The temporal fragmentation did provide opponents with what scholars and proponents of mega-projects characterize as blocking power. The many approvals gave opponents time repeatedly to test the waters, seek denials of crucial approvals, and gain expertise on the project and its various regulatory veto gates. Many approvals or denials were not project killers, but a few did have that potential. The Clean Water Act "dredge and fill" section 404 permit was essential to the full scale, in the river, "outboard" Westway project ultimately presented for regulatory approvals. Unsurprisingly, that approval and linked National Environmental Policy Act (NEPA) environmental impact analyses became the focus of opponents' actions after earlier, weaker Clean Air Act arguments failed.

## *2. Vertical fragmentation*

Wading through the court papers and news articles about Westway during its heyday, one is struck by the variety of actors interacting and, on occasion, engaging in simultaneous or overlapping regulatory roles. There was no paramount decisionmaker or forum for Westway politics and law, but vertically overlapping federal, state and local government actors. Citizens,

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<sup>15</sup>Both Mayor Koch and Senator Moynihan viewed Judge Griesa not just as a law applier, but a decisionmaker who exercised discretion in unfortunate ways. Mayor Koch conceded there was "a basis" for Judge Griesa's actions, but also said that "there's no question he could have found the other way . . . he destroyed something that would have been an enormous asset to the city." Senator Moynihan did not see the project as rejected due to its demerits, but because "a bunch of overeducated lawyers, pro bono, convinced a federal judge that if you removed those piers you would destroy the spawning grounds of the striped bass. There are plenty of striped bass." June 2002 American Enterprise Online interview with Pat Moynihan [add web cite].

project advocates and other stakeholders were active in all regulatory venues.

The federal role was decisive for the Westway project. The Westway story does not present a federal “white knight” scenario, in which federal environmental laws were ridden to the rescue to defeat a project advocated by merely parochial state and local interests. Instead, the federal government and laws provided a mixed array of roles. The federal government was perhaps foremost a critical enabler of the Westway project, providing massive transportation funds that could be used to repair the highway and, as well, provide the means to build a new major park. In characteristically blunt fashion, Mayor Koch conceded that without federal dollars underwriting most of the Westway project, it would not have been an appropriate priority for the city: “it was too expensive, in the billions—[New York City] couldn’t afford it.” The federal government also, however, was persuaded by mass transit advocates to provide the later statutory right to trade in highway dollars for mass transit, thereby catalyzing mass transit advocates to oppose Westway and seek a trade in of those dollars. The pinch was further felt when that trade-in option was time limited, forcing Westway advocates to choose between the slim prospects of an appellate court reversal of the second district court ruling finding Westway’s disclosures and analyses legally insufficient, and possible loss even of trade-in dollars for use on mass transit.

Lurking in the background of this transportation proposal and debate were an array of federal environmental laws that had to be applied as part of the regulatory approval process. These laws all had the potential to force a scaling back or even shelving of Westway if environmental impacts were of types subject to potential outright permit denials. Fishery impacts that had been wilfully ignored proved among three final fatal blows to the project. The federal judiciary also was the venue in which these environmental regulatory claims were heard. The district court judge, Thomas Griesa, insulated by life tenure from political pressures and repercussions of his actions, was able to apply and enforce the law. Despite partial rejections of his rulings by the Court of Appeals for the Second Circuit, his close scrutiny of project proponents’ misleading claims and flouting of a record-keeping order he had issued were decisive.

The state roles were many. State funds would to a minor extent underwrite a Westway highway project, and state transportation officials were the key recipient and advocate for the project. State environmental and parks officials had a potential interest in the project, but proved less active. Still, to the extent state leaders voiced their Westway sentiments, they were overwhelmingly positive, although some officials within state agencies provided critical appraisals of Westway impacts.

New York City and its government stood to benefit most directly from Westway. Largely underutilized and often run down real estate along the lower West Side of the Manhattan provided little benefit to the city. By utilizing federal highway dollars to bury the previously elevated and decrepit West Side Highway, city officials anticipated broad local benefits in the form of jobs, real estate revitalization, a substantial new park along the Hudson, and ripple

benefits for the financial sector. Without federal dollars, however, Westway would never have gotten anywhere. Mayor Koch particularly emphasized the real estate sector's importance to New York City in explaining his changed views regarding Westway. He also conceded that without federal dollars, the project would never have gotten off of the ground. Mayor Koch stated that, as Mayor, he virtually had to support Westway to encourage development and its associated benefits:

*Some cities have gold mines, other cities have car plants, other cities have steel mills. New York City's major contribution in terms of generating jobs is development. Development is very important to New York City; it is an industry for us. And so while I am not for irresponsible development and I am not for uncontrolled development, I am for development.*

City officials and agencies were thus unsurprisingly quite united in their public statements of support for the Westway project. As with any real estate project in New York City, Westway and related work required an array of local reviews.

### *3. Horizontal (or subject) fragmentation:*

Within each of these levels of government, an array of institutions, especially agencies, were either proponents of Westway or had to review the many Westway-related applications. This subject matter fragmentation is a virtual inevitability due to the United States legal system tendency not to grant task-based legal authority, but to allocate authority by subject. Rather than a federal czar of mega-projects, who would be responsible for reviewing all aspects of a project, turf is horizontally divided by subject. US EPA had a key role in CAA permits, potentially vetoing 404 fill permits, and in consulting with other agencies regarding environmental effects. Transportation and highway authorities generally were limited to fulfilling functions directly related to funding and related construction, although they also had to provide NEPA analyses of the Westway project they would fund. This kind of subject by subject division of authority is most prevalent at the federal level, but also evident with analogous regulatory bodies at the state and city level.

### *4. Institutional fragmentation*

Although the most visible Westway battles were fought and recorded in federal court, Westway stakeholders in reality all fought on several institutional fronts. In addition to the courts, the many involved agencies were the initial site of approvals and statements of opposition. The administrative record made in the agency settings proved crucially insufficient to justify government claims about Westway's impacts. The federal legislature was also a remarkably engaged institution, not only providing funds for Westway, but also engaging in several legislative changes that made the Westway proponents' capitulation inevitable following the second loss in federal court. While not an institution in the sense of a body with a recognizable location, office and title, citizen activists were also crucial institutional players.

Armed under US law with the ability to participate, object and ultimately pursue claims in court, including the possible recovery of attorney's fees, citizen activists influenced all aspects of Westway's tortuous passage.

## **B. Implications of regulatory complexity, fragmentation and overlap**

Divergent views about Westway outcomes are mirrored in equally divergent scholarly views about the implications of regulatory complexity, fragmentation and overlap. Some of this divergence reflects common federalism debates, but other views and predictions about regulatory fragmentation are less familiar. In this section, I start by reviewing briefly federalism literature views on regulatory fragmentation in the form of political-legal regimes with multiple lawmakers and enforcers. I then focus more on regulatory fragmentation itself, proposing that regulatory fragmentation can be seen as arising in a continuum of contexts that can give rise to a broad range of proclivities or incentives. At the level of addressing broadly dispersed social ills that are not clearly the primary turf of a particular institution or regulator, fragmentation engenders a "regulatory commons" problem, creating incentives for regulatory inattention and attendant regulatory gaps. Few institutions other than more senior bodies, such as the federal legislature, are likely to see much if any benefit in addressing these dispersed social ills. Any regulatory intervention is unlikely, but where it will be found, if at all, will likely be through actions of central, larger jurisdiction actors such as the federal legislature or federal agencies.

At the other end of the spectrum, when numerous regulators are confronted with a more particularized project or proposal with localized and discernible effects, and these many regulators actually already have some regulatory power over the proposal, fragmentation can create both momentum or challenging hurdles for any high stakes large scale project like Westway. With numerous actors with unquestioned authority over portions of a particular project, and some with veto power, blocking power and actions are a distinct possibility.

No particular cure is self-evident or necessarily desirable to address these fragmentation challenges. Particular and tangible projects like Westway are not just local in their effects, but can in aggregate with other actions contribute to broad social ills such as fishery harms and high aggregate levels of pollution. Such large scale social ills are unlikely to be addressed by institutions other than more senior institutions with broader jurisdictional turfs, such as the federal legislature or agencies. Conversely, more distant senior regulators are ill equipped to handle and weigh the many local nuances and tradeoffs inherent in any large-scale urban mega-project. At the local, state and federal levels, different project repercussions and environmental concerns call for regulators with diverse areas of expertise. With increased numbers of regulatory hurdles, however, particular proposals such as Westway are vulnerable to defeat at one or more critical veto gates.

### *1. Federalism and regulatory fragmentation*

Political and scholarly debates over the values and place of federalism in our political and legal systems vary widely. A substantial literature has been both provoked by and perhaps influenced the Supreme Court's recent active revision of federalism doctrine and drawing of real limits on federal and, less frequently, state power.<sup>16</sup> These historically rooted arguments will not be the focus of this analysis. Instead, the federalism literature of greatest salience to this chapter's analysis has been variously described as exploring "normative" and "instrumental" federalism issues. This literature tends to see as desirable the allocation of regulatory authority to either federal or state regulators, depending on the analyst's particular weighing of constitutional values and empirical predictions about federal, state and local incentives and areas of competence. Portions of this literature predict benefits and risks that flow from the existence of numerous legal institutions that can compete with each other, come into conflict, or fail to coordinate to achieve common goals.

Horizontal fragmentation of regulatory power among the various states gives rise to two linked but contrasting views on divided and independent spheres of regulatory power. Public choice theories applying economic assumptions and expectations to political and legal behavior predict both salutary and harmful effects of interjurisdictional competition. For those viewing the protection of environmental amenities as a regulatory priority, interjurisdictional competition for business, jobs and tax revenues risks the sacrifice of less tangible amenities such as environmental protection. Building on literature assuming that economic growth is a high priority for cities and states, a race to the environmental bottom is predicted. State and local governments will be tempted to sacrifice environmental regulatory protections to attract and retain business.

The federal government, being far less vulnerable to economic blackmail from businesses that could otherwise play jurisdictions off against each other, is relatively more likely to preserve environmental quality. Furthermore, given the breadth of its powers and the power to preempt, the federal venue is often viewed as most likely to hear demands for protection of widely shared environmental resources. Under these views, the federal government is most likely to respond to widely shared desires for environmental quality. With its power to set uniform federal standards and preempt contrary state approaches, the federal government can prevent an environmentally destructive race. The federal environmental and natural resource agencies, combined with Judge Griesa, arguably served such a role in stopping Westway due to its substantial, but wilfully ignored, fishery impacts.

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<sup>16</sup>This literature focuses on issues such as constitutional limits on the federal government's power under the Commerce Clause or the 14<sup>th</sup> Amendment, state immunities from monetary sanctions in actions brought by citizens, and regulatory strategies available to a federal government of limited power that seeks to enlist state assistance. This literature is often about where federal regulatory authority ends, rooting its analyses in textual and historical exploration of constitutional provisions.

The recent revisionist view, articulated with greatest force by Dean Revesz, questions several assumptions in the race to the bottom scenario. Most significantly, he questions precluding states and local governments from utilizing their fullest array of bargaining chips to further local priorities. If state and local governments are precluded from considering environmental regulatory laxity, they will have to offer other enticements to business that will be less tailored to the jurisdiction's strengths and needs. Thus, depending on the extent to which one views environmental protection as a priority, interjurisdictional competition can be a source of concern or an opportunity. He also recently has questioned the assumption of federal environmental leadership, offering examples of areas where states and local governments have sometimes been more innovative or protective than the federal government.

A related but nonetheless distinct public choice-based critique of interjurisdictional competition is that states and cities should have broad latitude to compete with each other as a device to reduce "rent seeking" in the political process and discourage imposition of excessive regulatory burdens on business. This literature, most frequently focused on issues such as corporate charter competition and elimination of unnecessary and costly regulation, sees such competition as essential to deter the more unseemly proclivities of the political realm. Under this view, by preserving independent spheres of regulatory power, where regulation itself can become a source of competition, politicians will be disciplined.

The mere existence of distinct state, local and federal governments and bodies of law also can provide benefits in the form of venues for regulatory experimentation. With greater numbers of regulators with plenary power to experiment and try new means to achieve desired ends, beneficial improvements may arise. This benefit of multiple regulators does not rely on competition or public choice fears as a necessary element of its embrace of multiple "laboratories of democracy," but they are often mutually reinforcing perspectives.

In the federalism literature, the existence of widely shared problems and the need to find economies of scale in researching social ills and devising solutions weigh in favor of handing such key environmental regulatory functions to federal actors. State and local governments will underinvest in information of broad interest that cannot be captured exclusively for the investing jurisdiction. Horizontal cooperation among states to gather such information is a possibility, but difficult to structure and enforce.<sup>17</sup> Especially in light of the complex scientific underpinnings of many environmental challenges such as air quality science, fisheries dynamics and biology, and water quality strategies, many federalism analysts favor allocation of research and information sharing functions to the federal government. Even if interjurisdictional competition is viewed as a good, one can embrace allocation of such information-gathering functions to federal actors.

## *2. Regulatory fragmentation and an incentives continuum*

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<sup>17</sup>See Craig W. Thomas, *Bureaucratic Landscapes: Interagency Cooperation and the Preservation of Biodiversity* (2003) (discussing challenges of interagency cooperation

The federalism literature thus offers many valuable, although often conflicting, perspectives on the implications of divided regulatory authority. Perhaps due to its typical normative inquiry into whether federal, state or local governments should handle certain regulatory tasks, however, this literature gives little emphasis to the incentives, risks and challenges created by regulatory fragmentation in itself. The Westway story confirms the value of much federalism scholarship, but also reveals the inadequacy of the typical federal-state-local inquiry.

This section's discussion steps away a bit from the Westway tale to suggest that regulatory fragmentation can be seen as a raising a continuum of challenges, each creating predictable incentives depending on the setting and the modality of the regulatory action. Political and legal systems can be engaged in an array of settings and modalities, ranging from the initial recognition of a societal ill that might benefit from regulatory intervention, to application of already well established regulatory frameworks in adjudicatory settings. In these more adjudicatory settings, there is yet another continuum of types of actions, but typically will involve applications of regulatory frameworks to particular proposals, legal violations or disputes. One should view regulatory fragmentation as creating distinct regulatory proclivities or incentives, depending on the nature of the issue presented and the regulatory modality. Such a view offers a means to reconcile contrasting views of challenges presented by regulatory fragmentation.

Several law and economics scholars have each recently suggested that regulatory fragmentation leads to excessive regulatory action and burdening of beneficial activities. In William Fischel's view, for example, if the legal system grants many parties the ability to challenge development projects, there will be excessive exercises of the "right to exclude." "Economically myopic behavior" will block development because those with such power will not perceive aggregate associated costs.<sup>18</sup> Hylton and Khanna similarly see regulatory fragmentation in the enforcement process as creating the likelihood of excessive enforcement. In their view, "vertical fragmentation of the enforcement process means that each individual [enforcement] agent is in a position similar to that of successive owners of a toll road."<sup>19</sup> Each enforcer will perceive only his own benefits, while the excessive aggregate imposition of

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<sup>18</sup>William A. Fischel, *Regulatory Takings: Law, Economic, and Politics* 251-2 (1995).

<sup>19</sup>See Keith N. Hylton & Vikramaditya S. Khanna, *Toward an Economic Theory of Pro-Defendant Criminal Procedure*, Revised Version of Discussion Paper No. 318, The Harvard John M. Olin Discussion Paper Series (February 2003) at 27 & n. 105 (asserting that in an enforcement setting "vertical fragmentation of the enforcement process means that each individual [enforcement] agent is in a position similar to that of successive owners of the pieces of a long toll road," imposing tolls or sanctions that are in aggregate excessive because agents do not take others' enforcement actions into account);

burdens may deter activity that would and should otherwise occur.<sup>20</sup> Buchanan and Yoon theorize that regulatory fragmentation will excessively discourage activities. For example, where environmental or land use laws require multiple permits and approvals, the existence of multiple approval hurdles will discourage conduct in ways not captured by most models of regulatory behavior.<sup>21</sup>

Altschuler and Luberoﬀ’s recent book on “mega-projects” relatedly analyzes changing prospects for mega-projects, going from an era of blunt top-down imposition of such projects on often unhappy residents, to a period during which “the points of potential veto are proliferating . . . and threaten nearly all projects that arouse any significant controversy with endless delay, if not with definitive rejection.”<sup>22</sup> Although the authors analyze how mega-projects are nevertheless now sometimes built, they still see the multiple potential veto points as shaping mega-project approval strategies and physical plans to avoid triggering veto actions.<sup>23</sup>

All of these works thus see regulatory fragmentation as risking a sort of political and legal stasis. With too much law, new development and projects will be discouraged. Excessive threatened sanctions may lead to too much risk avoidance. All of these works, however, look at the implications of regulatory fragmentation at the point of application of regulatory frameworks to particular projects. In such settings, the mode of regulatory action is adjudicatory, where laws and past regulations are applied to particular proposals. The benefits and costs of a pending proposal in such settings are typically quite apparent. If the law creates multiple potential veto opportunities, it is unsurprising if they will be used strategically in the regulatory

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<sup>20</sup>Id.

<sup>21</sup>James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 *J. L. & Econ.* 1, 11 (2000) (developing a model to further develop Michael Heller’s “anticommons” theory, see Michael A. Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 *Harv. L. Rev.* 621 (1998), and suggesting that in settings such as “bureaucratic barriers to residential construction” or where environmental laws “interpos[e] additional authorities with the right to exclude development of facilities,” permit seekers required to obtain multiple approvals from diverse and overlapping agencies may be discouraged in ways not captured by most models of regulatory behavior).

<sup>22</sup>Alan Altschuler & David Luberoﬀ, *Mega-Projects: The Changing Politics of Urban Public Investment* vii note 2 (2003) (quoting Alan Altschuler & Robert Curry, *The Changing Environment of Urban Development Policy: Shared Power or Shared Impotence*, 10 *Urban Law Annual* 3, 40 (1975)). In the quoted earlier work, the view is that “shared power” threatens to create “shared impotence.” Id.

<sup>23</sup> Id. at 227-34.

process. These analyses would seem to counsel the elimination of regulatory fragmentation. With fewer hurdles and bodies of overlapping regulation, they seem to imply, desirable activity would occur.

One should not overgeneralize from insights focused on this one modality. As I have recently explored at length, nearly opposite implications are raised by regulatory fragmentation when a societal ill is juxtaposed against fragmented or mismatched legal frameworks where no entity has clear regulatory primacy.<sup>24</sup> Even where a social ill is widely recognized, the existence of multiple potential regulators will create predictable incentives for regulatory inattention. Especially where the causes of an ill cross jurisdictional borders, the harms themselves cross borders, and there is vertical or horizontal fragmentation of potential regulatory turfs, incentives for regulatory inattention are strong. Those who desire regulation will be uncertain where to turn and will thus likely dissipate their resources by seeking action from numerous regulators. Potential regulators will each only perceive limited demands for action because of splintered demands from citizens for action. Those invested in the status quo will predictably devote resources to oppose any change. Thus, to the extent a politician considers attacking such an ill, credit-claiming opportunities will be few, plus others' actions could counteract the benefits of such regulatory efforts. I refer to these settings of shared regulatory opportunity as "the regulatory commons."<sup>25</sup> Fragmentation of regulatory frameworks thus can discourage initial efforts to deal at all with a widely dispersed social harm. Larger scale, more central actors will face disincentives to act, but are relatively more likely to choose to act in the regulatory commons setting. Smaller scale actors have relatively less control over others' actions, may only experience a fraction of the aggregate harms, and can offer few economies of scale.

In between these extremes of adjudicatory "toll roads" and dispersed "regulatory commons" settings is a continuum of settings and regulatory modes. At one end, the risk is of duplicative and perhaps excessively discouraging regulatory activity. At the other end, at the point of potential initial grappling with a dispersed social ill that matches no particular regulator's jurisdiction, the regulatory commons dynamic will provide disincentives for regulatory action.

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<sup>24</sup>William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 *Iowa L. Rev* (forthcoming fall 2003).

<sup>25</sup>*Id.*



dispersed environmental amenities like wetlands and fish initially served their intended role, pointing out flaws in the COE's initial blatantly erroneous assertions about interpier areas being a "biological wasteland." Those objections, coupled with citizens who stepped up to challenge the project in court, created the record and basis for initially halting the project. When the COE subsequently failed to keep required records and could not justify its Final Environmental Impact Statement assertions of no significant adverse effects on fish, the district court hearing the challenge had little choice under existing law and regulations.

Despite the breadth of its impacts, Westway actually faced few project veto threats. Proponents' insistence on pursuing the most environmentally destructive project due to its considerable political benefits appears to have reflected a certitude that a project of this significant value, supported by so many powerful interests, simply could not be stopped. The Section 404 permit was probably the only legal hurdle that did not provide wiggle room for weighing political and urban benefits over associated costs. The many other regulatory hurdles and delays were a hindrance, but were paltry compared to the size, scale and long-term significance of the Westway project to New York. A Westway project that relied less on landfill in the Hudson might have succeeded, much as the scaled back Hudson River Park and adjacent highway improvements today appear destined to be built without any regulatory veto

It is difficult to conceive of a contrary regime that would not have led to other significant losses. The loss of Westway undoubtedly created costs, or at least foregone benefits, for residents, businesses, and the city itself. The capped mass transit trade-in benefit was likely a fraction of what the federal government would have actually paid had Westway been built; cost overruns would still likely have been paid at a rate of ninety cents on the dollar. Conversion of Westway dollars into mass transit investment still provided broad benefits, but benefits that were far more dispersed. Real estate interests and unions gained nowhere near the boon that Westway could have offered. Relatedly, the particular form of Westway that became the reviewed proposal was not the only option. Other less complicated alternatives could have generated some of the lost Westway benefits, but had not been pursued.

Would it make sense to add a legal escape valve to trump Section 404's concern with fishery impacts where a project provides substantial benefits and is supported by some broad coalition of political interests? The most vocal critics of the Westway outcome, chief among them Mayor Koch and Senator Moynihan, desired such an option. In other large-project settings, Congress has on occasion utilized appropriations riders to exempt particular projects from otherwise constraining regulatory hurdles. These kind of situation specific changes in the law, however, are typically not known to the public, subject to little or no debate. Such regulatory trumps or safety valves could threaten to undercut the most unlikely of regulatory schemes—those protecting natural resources such a fisheries and wetlands from destruction. Little or no countervailing opportunity for the voice of dispersed environmental interests would be heard. As Justice Marshall observed in the *Overton Park* case, if decisionmakers have to balance in a particularized proposal context development against conservation, local

development benefits will virtually always prevail.<sup>26</sup> No decisionmaker at the local level would have incentives to protect fisheries, wetlands, and linked environmental resources for the broad benefits they provide outside the local jurisdiction.

Furthermore, if all local regulators had the ability to trigger a trumping of otherwise applicable constraints, these dispersed and interdependent resources could over time be threatened. For example, court files reveal studies indicating that the Hudson River, New York Harbor area was one of the two most significant breeding and overwintering areas for the striped bass. The other most significant area, the Chesapeake Bay, had at that point become a severely threatened fishery resource due to growing development in the region. Striped bass fisheries, like many fisheries today, were in a threatened state. It might seem ridiculous to think a few miles of Manhattan river edge shoals and collapsed piers were really significant, but they apparently were, both viewed independently and as a significant part of several such estuarine environments on the East Coast.

### **Conclusion:**

Westway thus offers several lessons about environmental law and regulatory fragmentation. Elimination of the vertical federal overlap and horizontal subject-coverage divisions by weakening or eliminating Section 404's strong mandates would risk major environmental harms. All similarly situated developments would be far more likely to proceed. If commons resources are to be protected, such project by project weakening of protections could be devastating.

This fragmentation discussion points to a sort of extended syllogism that argues against any simplistic embrace or rejection of regulatory fragmentation. Regulatory fragmentation renders unlikely regulatory grappling with the sorts of dispersed, multijurisdictional harms and underlying causative phenomena that characterize most environmental challenges. Where such environmental ills have nevertheless been regulated, regulatory fragmentation will create many ways in which such goals can be lost or weakly implemented. At the point of particular projects, however, environmental protection may be aided by fragmented regulatory regimes that provide numerous and extended opportunities for close project scrutiny and, especially, rejection due to significant environmental harms. Fragmentation hence can frustrate efforts to protect the environment, but also may at the point of application of regulatory strictures provide means to discourage piecemeal destruction of environmental amenities. For environmental laws to overcome high stakes political pressures and parochial preferences for yet more development,

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<sup>26</sup>He stated that it “is obvious that in most cases consideration of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction wherever possible . . . . [T]here will always be a smaller outlay from the public purse when parkland is used since the public already owns the land . . . . no one will have to leave his home or give up his business.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-12 (1971).

such regulatory regimes need to preserve the sort of rigidity so criticized in the Westway context. Without rigidity limiting regulator and judicial discretion, case by case weakening of environmental protections would inevitably follow. Westway may have been lost, perhaps to New York City's long term detriment, but the underlying regulatory goals were laudable and supported by political economic logic.