WATER BOUNDARIES -- WHAT ARE YOUR RIGHTS AND LIABILITIES?

"riverrun, past Eve and Adam's, from swerve of shore to bend of bay, brings us by a commodius vicus of recirculation back to Howth Castle and Environs." -- James Joyce, Finnegans Wake (1939).

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No discussion on the topic of real property boundaries can be considered complete without touching upon the impact that the various forms of water have upon the land. This is especially true in the State of New York, which has a great abundance of water as reflected in the following table:

SURFACE WATER RESOURCES IN THE STATE OF NEW YORK	
State Surface Area	49,576 square miles
Rivers and Streams, Total Miles	52,337 miles
Lakes/Reservoirs/Ponds, Total Number	7,849
Lakes/Reservoirs/Ponds, Square Miles (Not Including the Great Lakes)	Approx. 1,235 square miles (790,782 acres)
Bays/Estuaries/Harbors, Square Miles	1,530 square miles (979,200 acres)
Great Lakes Shoreline, Shore Miles	577 linear miles
Atlantic Ocean Coastline, Shore Miles	120 linear miles
Freshwater Wetlands, Acres	2,400,000 acres
Tidal Wetlands, Acres	25,000 acres
SOURCE: New York State Department of Environmental Conservation, Division of Water, Bureau of Watershed Assessment & Research, New York State Water Quality 2000 1, 9 (Oct. 2000) (submitted pursuant to Section 305 (b) of the Federal Clean Water Act Amendments of 1977 (PL 95-217)).	

The subject of water law in the State of New York is as vast as the water itself. This presentation will cover briefly existing New York law relating to water boundary rights and liabilities relating to each of the foregoing types of surface water resources, which are located throughout the State of New York and especially here on Long Island.[1] This presentation will not cover any legal issues relating to ground water, also known as underground or subsurface water. This presentation also will not cover the non-boundary

aspects of the federal and state environmental laws relating to water resources. In-depth treatments of the entire subject of water law in the State of New York may be found in 15 Warren's Weed New York Real Property (4th ed. 2002), and 107 & 108 N.Y. Jur. 2d Water (1993 & Supp. 2002). Moreover, the following books are classics in the field: Joseph K. Angell, A Treatise on the Right of Property in Tide Waters (1826); Joseph K. Angell, A Treatise on the Law of Watercourses (1854).

Moreover, legal authorities cited in this presentation should be consulted for additional information on any of the topics covered. Although this presentation is organized in the form of a lecture, at the end of each topic I will try to take a few questions from the audience and -- in deference to the vastness of the subject -- any comments relating to any recent case-law or statutory developments.

A. WATER COURSE AS BOUNDARY.

Under New York law, confined bodies of water -- such as rives, streams, lakes, and ponds -- are categorized as natural monuments for the purpose of describing the boundaries of real property. See 15 Warren's Weed New York Real Property WATER § 5.01, at 43-44 (4th ed. 2002) (citing In re Opening West Farms Road, 212 N.Y. 325 (1914)). This is very important because under New York law descriptions of real property boundaries are governed by the following rules of construction, in descending order of preference:

- Natural monuments;
- Artificial monuments;
- Adjacent boundaries;
- Courses and distances; and
- Acreage.

See id. § 5.01, at 44 (citing Thomas v. Brown, 145 A.D.2d 849, 535 N.Y.S.2d 836 (3d Dep't 1988)).; see also Trustees & Freeholders and Commonality of Town of Southampton v. Buoninfante, 303 A.D.2d 579, 756 N.Y.S.2d 629 (2d Dep't 2003) ("Where there is a discrepancy in deed calls, the rules of construction require that resort be had first to natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances, and last to quantity.") (copy in Appendix).

"Prior to July 4, 1776 [i.e., the Declaration of Independence] title to all lands under tidal and navigable water, not therefore duly granted, belonged to the Crown of England." Meyer Scheps, Title to Land Under Water in Real Estate Titles 537(James M. Pedowitz ed., 1984). Up until that time, title to underwater lands could be divested only through royal grants or charter directly by the king or by the royal governor. Id. After July

4, 1776, "the State of New York of New York succeeded to the right, title and prerogative of the English Crown in the tidal and navigable water of the former colony." Id. The boundary line between the publicly owned and the privately owned is the high water mark. Section75 of the Public Lands Law governs grants of underwater lands to abutting upland owners. By contrast, land under non-navigable bodies of water is presumed to be owned by the abutting owners to the center line of the body of water.

> As stated by the New York Court of Appeals:
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> . . . [T]he settled law of New York continues to recognize the common-law distinction concerning the rights which a private owner may acquire and retain in nontidal, navigable-in-fact rivers and streams. These rights are distinguishable from public trust protections associated with waters deemed navigable-in-law or tidal navigable-in-fact waters . . . .

Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 479, 655 N.Y.S.2d 745, 747 (1997) (holding that owner of bed of navigable-in-fact nontidal body of water had exclusive fishing rights); Higgins v. Douglas, 304 A.D.2d 1051, 758 N.Y.S.2d 702 (3d Dep't 2003) (holding that dock located in navigable waters does not fall outside of state's exclusive jurisdiction merely because part of dock structure is connected to shore) (copy in Appendix); Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 304 A.D.2d 881, 757 N.Y.S.2d 357 (3d Dep't 2003) (holding that presence of motorized vehicles on lake was insufficient to deem lake "navigable" such as to divest town of zoning authority over lake) (copy in Appendix); Zanghi v. Rifice, 304 A.D.2d 11, 757 N.Y.S.2d 327 (2d Dep't 2003) (holding that boat basin located entirely within landowners' property remained private property and was not subject to any public right or easement). Poster v. Strough, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dep't 2002) (holding that town had jurisdiction to prohibit structures in ocean beach area) (copy in Appendix); Allen v. Strough, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dep't 2002) (copy in Appendix). But cf. Romeo v. Sherry, 308 F. Supp. 2d 128 (E.D.N.Y. 2004) (holding that colonial grant of property violated public trust doctrine) (copy in Appendix); Melby v. Duffy, 304 A.D.2d 33, 758 N.Y.S.2d 89 (2d Dep't 2003) (noting that town held title to navigable lands, as successor to English government, subject to public right of navigation) (copy in Appendix).

B. RIPARIAN RIGHTS.

1. Riparian Land.

Owners of land abutting bodies of water, such as rivers and streams, are known as riparian owners and, as such, they have certain rights known as riparian rights. See generally 107 N.Y. Jur. 2d Water § 107 (1993). Similarly, owners of land abutting oceans, lakes, and ponds generally are known as littoral owners, but their rights are the same as riparian owners' rights. See Black's Law Dictionary 842 (5th ed. 1979) (defining "littoral land" as "[l]and bordering ocean, sea, or lake"). Frequently, the term riparian rights is generally used to refer to the rights of both riparian owners and littoral owners. See Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001) ("Strictly speaking, [appellant] is a littoral owner, one whose land is bounded by the seashore. A true riparian owner owns land along a river. But this distinction is vestigial; we have long used 'riparian' to describe owners like [appellant].") (citations omitted) (citing Dellapenna, "Riparianism" in Water & Water Rights, § 6.01, at 88 (Michie 1991 & Supp.2000), and Tiffany v. Town of Oyster Bay, 209 N.Y. 1 (1913)).

"In general terms riparian rights connote the right and profit to the owner of the upland arising from its connection with the water such as the easement of passage and use, subject however to governmental regulation for the improvement of navigation." Allen v. Potter, 64 Misc. 2d 938, 316 N.Y.S.2d 790 (Sup. Ct., Yates County, 1970), aff'd, 37 A.D.2d 691, 323 N.Y.S.2d 409 (1971).

In the eastern part of the United States -- including the State of New York -- the common law doctrine of riparian rights prevails over the law of prior appropriation, which is common in the western part of the United States. See generally 15 Warren's Weed New York Real Property WATER § 1.03, at 7-12 (4th ed. 2002). On the other hand, "[r]ights in water in the western United States are based upon three major principles: (1) priority of claim gives priority of right (first come, first served); (2) use must be for a beneficial purpose; and (3) failure to exercise the right forfeits the right (use it or lose it)." 15 Warren's Weed New York Real Property WATER § 1.03, at 9 (4th ed. 2002). This is not the law in the State of New York.

Under New York law, riparian rights only arise from the ownership of the land abutting or surrounding a watercourse or other confined body of water, such as a lake or a pond. In other words, there must be contact between the watercourse and the land. Use of the water does not create riparian rights, and non-use of the water cannot destroy them. See Townsend v. McDonald, 12 N.Y. 381 (1855).

Under New York's "source of title" rule, "riparian rights attach only to a parcel which is contiguous to a watercourse, and is held under a single chain of title leading to the present owner."[2] See 15 Warren's Weed New York Real Property WATER § 2.02[2], at 15 (4th ed. 2002). Subsequent purchases of contiguous parcels of land do not enlarge the existing riparian tract; and subsequent conveyances away of a portion of the riparian land not abutting the water loses its riparian character. See id. "Thus, in New York, under the source of title rule, a riparian parcel can decrease, but can never increase in size; if a non-adjacent tract of land is transferred to other owners, the transferred portion becomes nonriparian and the new owner cannot claim riparian rights unless such rights are expressly reserved in the deed." See id. § 2.02[2], at 15-16; see also Durham v. Ingrassia, 105 Misc. 2d 191, 431 N.Y.S.2d 917 (Sup. Ct., Nassau County, 1980). But cf. Thury v. Brittania Acquisition Corp., 292 A.D.2d 373, 738 N.Y.S.2d 82 (2d Dep't 2002) (holding that property owners who openly used strip of adjoining owners' lad for access to harbor for more than ten (10) years had prescriptive easement) (copy in Appendix).

2. Littoral Land.

Although the term riparian is often used to describe the rights of owners of land abutting an ocean, a lake, or a pond, the term "littoral" is also used. See 15 Warren's Weed New York Real Property WATER § 2.02[3], at 16 (4th ed. 2002). "Whether littoral or riparian, a landowner is entitled to rights in a lake or pond 'if his property touches the water.'" See id. (quoting Bromberg v. Ellish, Inc., 64 A.D.2d 684, 407 N.Y.S.2d 584 (2d Dep't 1978)). Owners of littoral land have generally the same water-related rights as owners of riparian land. See id. § 2.04[7], at 27; see also Allen v. Potter, 64 Misc. 2d 938, 316 N.Y.S.2d 790 (Sup. Ct., Yates County, 1970), aff'd, 37 A.D.2d 691, 323 N.Y.S.2d 409 (1971).

3. Navigable Waterways vs. Non-Navigable Waterways.

Riparian rights are defined by the distinction between navigable watercourses and non-navigable watercourses. Under New York's Navigation Law, navigable waters of the state are "all lakes, rivers, streams and waters within the boundaries of the state not privately owned which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties." N.Y. Nav. Law § 2(4) (McKinney 1989). For example, in Nassau County the Town of Oyster Bay "owns the underwater land beneath Oyster Bay by virtue of a colonial patent," and it holds this underwater land – sometimes referred to as the foreshore – in "trust for the public good." Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d

108 (2001); see also People v. Anton, 105 Misc. 2d 124, 431 N.Y.S.2d 807 (Dist. Ct., Suffolk County, 1980) ("This statutory exception [in the Navigation Law] has its basis in history. The townships in much of Nassau and Suffolk counties were established long before the sovereign State of New York. Their borders and jurisdiction were created by virtue of certain land grants which conveyed large tracts of land from the King of England through his colonial governors to the respective towns of Long Island. These grants conveyed not only ownership of the land and that of the water and land thereunder but also vested the subject Long Island towns with ownership of the bays and bay bottoms within the boundaries of the described parcel. Their ownership and control over these lands and waters survived the formation of the sovereign State of New York and has long been recognized as being preserved in them. The legislature's exception of the tidewaters of Nassau and Suffolk counties from the provisions of the Navigation Law must be interpreted and applied with this historical background in mind."). "Except in relation to the tidal waters in Nassau and Suffolk Counties specifically exempted by statute, municipalities cannot regulate navigable waters under their zoning powers." 15 Warren's Weed New York Real Property WATER § 6.03[2], at 58 (4th ed. 2002); see also Town of Alexandria v. MacKnight, 723 N.Y.S.2d 591, 2001 N.Y. Slip Op. 02499 (2d Dep't Mar. 21, 2001) (holding that town lacks authority to regulate construction or use of floating dock system located on navigable waters of state); Incorporated Village of Manorhaven v. Ventura Yacht Services, 166 A.D.2d 685, 561 N.Y.S.2d 277 (2d Dep't 1990) (holding that village lacked authority to apply its zoning ordinance to navigable waters of bay beyond its territorial limits); 1984 N.Y. Op. Att'y Gen. (Inf.) 153 (opining that village had no authority to regulate fishing, shell fishing, or construction of piers or docks); see also Pagnozzi v. Planning Board of Village of Piermont, 292 A.D.2d 613, 739 N.Y.S.2d 742 (2d Dep't 2002) (holding that landowner could use area of land underwater to satisfy bulk area zoning requirements) (copy in Appendix).

"Non-tidal rivers, streams, lakes, and ponds are presumed to be non-navigable." See 15 Warren's Weed New York Real Property WATER § 2.04[6], at 25-26 (4th ed. 2002). Nevertheless, there are exceptions; for example, certain large lakes in the State of New York are navigable, and the State holds title to the underwater beds of these lakes. See id. § 2.04[6], at 26 (citing Granger v. City of Canandaigua, 257 N.Y. 126 (1931)).

(a) Navigable Waterways.

Under New York law, an owner of land abutting a navigable waterway has title to the land only up to the average (also called the mean) high water mark. See Tiffany v. Town of Oyster Bay, 209 N.Y. 1 (1913); see also DiCanio v. Nissequoque, 189 A.D.2d

223, 596 N.Y.S.2d 74 (2d Dep't 1993) (village was not owner of river bottom because parcels conveyed were separated by river, and, therefore, village was only riparian owner with title only up to high water mark on either side of river). "This limit has been variously defined as an average of the high-tide line over an 18.6 year period or the line marked by the periodic flow of the tide, excluding the advance of the water caused by winds, storms and unusual conditions. Since 1975, however, it has commonly been determined by reference to the deed call and the 'tradition and customary method by which that verbal application has been put into practice in the past to locate the boundary line along the shore.'" See Michael Permut & Lee Snead, Coastal Erosion Presents Land Title, Beach Use Issues, N.Y.L.J., Aug. 24, 1998, at S7, col. 1 (footnotes omitted). It must be noted, however, that the State of New York has the power to convey title to underwater lands, and it has done so on a few occasions. See generally People v. Steeplechase Park Co., 218 N.Y. 459 (1916) ("Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands.").

(b) Non-Navigable Waterways.

On the other hand, an owner of land abutting a non-navigable waterway has title to the center of the underwater bed of the lake or stream, unless expressly excepted by the deed. White v. Knickerbocker, 254 N.Y. 152 (1930); see also Hartwood Syndicate, Inc. v. Passaic Valley Council, 80 A.D.2d 871, 437 N.Y.S.2d 16 (2d Dep't 1981), appeal dismissed, 53 N.Y.2d 1029, 442 N.Y.S.2d 497 (1982); Barkus v. Fusco, 199 A.D.2d 450, 606 N.Y.S.2d 10 (2d Dep't 1993) (reversing grant of summary judgment on ground that material issues of fact regarding location of shoreline precluded summary determination of ownership of land to center dried up lake bed). "[I]f the description runs the title along dry land such as the bank or the shore, there is an express restriction which excludes or reserves title in the river or pond; whereas, if the boundary touches the water or is along the water or by the water, and not dry land, the presumption remains that title is carried to the center of the river or pond." White v. Knickerbocker, 254 N.Y. 152, 157 (1930); see also 1 N.Y. Jur. 2d Adjoining Landowners § 81 (1979).

3. The Proportional Method of Apportioning Riparian Rights.

In Freeport Bay Marina, Inc. v. Grover, 149 A.D.2d 660, 540 N.Y.S.2d 471 (2d Dep't), appeal dismissed, 74 N.Y.2d 892, 893, 547 N.Y.S.2d 850 (1989), the Appellate Division, Second Department noted that under New York law riparian rights of access and

navigation on navigable bodies of water are apportioned using the proportional method, which was described as follows:

> "[M]easure the length of the shore and ascertain the portion thereof to which each riparian proprietor is entitled; next measure the length of the line of navigability, and give to each proprietor the same proportion of it that he is entitled to of the shore line; and then draw straight lines from the points of division so marked for each proprietor on the line of navigability to the extremities of his lines on the shore. Each proprietor will be entitled to [access] the portion of the line of navigability thus apportioned to him, and also to the portion of the flats, or lands under the water, within the lines so drawn from the extremities of his portion of the said line to the extremities of his part of the shore."

149 A.D.2d at 661-62, 540 N.Y.S.2d 473 (quoting Groner v. Foster, 94 Va. 650, 652-653, 27 S.E. 493, 494 (1897)). See generally Apportionment and Division of Area of River Between Riparian Tracts Fronting on Same Bank, in Absence of Agreement or Specification, 65 A.L.R. 2d 143 (1959).

4. The Rule of Reasonable Use.

Under New York law, riparian and littoral landowners are subject to a "rule of reasonable use."[3] See 15 Warren's Weed New York Real Property WATER § 2.03[2], at 17 (4th ed. 2002). "[U]nder the reasonable use rule, each riparian landowner may use water for any beneficial purpose on or off riparian land, if the use is reasonable with respect to the needs of other riparian owners and does not interfere unreasonably with their legitimate water uses." See id. (citing Barkley v. Wilcox, 86 N.Y. 140 (1881)). Moreover, a riparian owner enjoys property rights that are distinct from and not subordinate to those of the owner of the land under the adjoining body of water. Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001). Under the rule of reasonable use, "neither the riparian owner nor the underwater landowner has an unfettered veto over reasonable land uses necessary to the other's acknowledged rights, and where the rights conflict the courts must strike the correct balance." Id.

5. Specific Examples of Riparian Rights.

"Riparian owners generally are entitled to access to water for navigation, fishing and other such uses." Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566,

734 N.Y.S.2d 108 (2001). "While a riparian owner's rights in navigable water must yield to the paramount rights of the public in such waters, the ownership of the land under water by the state, as sovereign, does not in and of itself deprive a riparian owner of his common-law rights as such." 107 N.Y. Jur. 2d Water § 107 (1993). "Riparian owners have the same rights in navigable waters that they do in non-navigable waters, subject to the superior rights of the federal government and the state . . . ." 15 Warren's Weed New York Real Property WATER § 6.05, at 63 (4th ed. 2002).[4] Thus, subject to the rule of reasonable use, riparian landowners have several common law rights in relation to the water, including the following:

- "[T]he right to the unimpeded flow of a watercourse in its natural channel and the use of riparian water for fishing, swimming, boating and bathing, and for other domestic purposes for the owners' families as the water passes their premises." 15 Warren's Weed New York Real Property WATER § 2.04[1], at 20 (4th ed. 2002).
- The right to divert water from the watercourse for riparian landowner's own use. See id. § 2.04[2], at 21. "Permanently diverting excessive quantities of water out of a channel for a use unconnected with the riparian owner's land, however, has been declared unreasonable." See id. § 2.04[2], at 21 (citing Strobel v. Kerr Salt Co., 164 N.Y. 303 (1900)).
- The right to build dams, levees, and retaining walls, but changing the natural course of a watercourse is not permitted generally. See id. § 2.04[3], at 22 (4th ed. 2000) (footnotes omitted).
- The right to access the water adjacent to their property and to build docks, piers, wharves, and other structures so long as they do not interfere with navigation or obstruct the flow of water. See id. § 2.04[4], at 23 (footnotes omitted); Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001) ("Accordingly, [appellant], like any riparian owner, has the right of access to navigable water, and the right to make this access a practical reality by building a pier, or 'wharfing out.'")(citing Town of Brookhaven v. Smith, 188 N.Y. 74, 85 (1907)); see also Andrew J. Gershon, Riparian Dredging Rights Recognized, N.Y.L.J., Oct. 26, 1998, at 1, col. 1 ("It is now well established that these [riparian] rights include: (1) the use of water for general purposes such as bathing and domestic use; (2) wharfing out to navigability; and (3) access to navigable waters."); Gamiel v. Innes, N.Y.L.J., July 16, 1997, at 30, col 1 (N.Y. Sup. Ct., Suffolk County)

(Cannavo, J.), (noting that owners of adjacent parcels of land on shore Shinnecock Bay both have common-law riparian rights, including right to construct dock and right of reasonable, safe, and convenient access to the water for navigation or fishing).[5]

- The right to discharge surface waters, wastes, or other materials into the water, but it is not reasonable to divert water from its natural channel and return it to the stream laden with pollution such as animal waste. See 15 Warren's Weed New York Real Property WATER § 2.04[5], at 24-25 (4th ed. 2002) (citing City of New York v. Blum, 208 N.Y. 237 (1913)). Nevertheless, "federal, state and local regulation of municipal, industrial and commercial waste has thoroughly overshadowed traditional common law private nuisance actions in limiting water pollution." See id. § 2.04[5], at 25 (citing Article 17 of the N.Y. Environmental Conservation Law).
- The right to create artificial waters, such as ponds and lakes, by damming, dredging the owner's land, and collecting water, subject to local land use and public health regulations. See id. § 2.04[8], at 28. Here on Long Island, there are a number of artificial waterways in the form of canals. "One who takes title to land along an artificial waterway, such as a manmade canal or channel, takes title to the center of such waterway unless there is clear evidence of a contrary intent." See 15 Warren's Weed New York Real Property WATER § 2.04[8], at 24 (4th ed. 2002) (citing Thornhill v. Skidmore, 32 Misc. 2d 320, 227 N.Y.S.2d 793 (Sup. Ct., Suffolk County, 1961)).

Most recently, in Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001), the Court of Appeals said the following regarding a riparian owner's right to dredge underwater lands:

> [W]ell over a century of common law adjudication has established the riparian owner's right to reasonable access, and nothing in these cases would preclude [appellant] from dredging to preserve such access, if the court was satisfied that dredging was necessary and did not unreasonably interfere with the rights of the Town [of Oyster Bay]. Because this standard was not applied below, we reverse and remit the matter to Supreme Court to strike the appropriate balance.

> We underscore that in reversing, we do not hold that, as a riparian owner, [appellant] has a general right to dredge or a particular right to dredge to maintain the prior depth of the basins.

Id. (holding that evidentiary hearing was necessary regarding balance between (i) riparian owner's right to dredge underwater lands to maintain access to navigable body of water and (ii) municipality's rights in underwater lands held in trust for public). Thus, Town of Bay v. Commander Oil Corp. is the latest example of the courts applying the "rule of reason" with respect to riparian rights. See id. ("the riparian right is limited to reasonable access, the right must be exercised in a manner that does not unreasonably interfere with the rights of the public owner"); see also Romeo v. Sherry, 308 F. Supp. 2d 128 (E.D.N.Y. 2004) (riparian right of "reasonable access to navigable waters" is not absolute right) (copy in Appendix); Gowanus Indus. Park v. Amerada Hess Corp., 2003 WL 22076651 (S.D.N.Y. 2003) (copy in Appendix); Milone v. Trustees of Freeholders and Commonality of Town of East Hampton, 775 N.Y.S.2d 351, 2004 N.Y. Slip Op. 02760 (2d Dep't Apr. 12, 2004) (holding that local municipality's denial of application to construct catwalk and fixed dock in harbor was not arbitrary and capricious) (copy in Appendix).

C. FLOOD PLAINS.

"When surface water in the form of 'runoff' travels from one property to another, questions arise as to the rights of the lower owner to receive the waters or to repel them, and of the rights of the upper owner to change either the destination or the manner of flow of the waters moving across the land." 15 Warren's Weed New York Real Property WATER § 3.01, at 35 (4th ed. 2002). Under New York law, "a property owner may leave land in its natural state and is not required to adopt or construct preventative measures to prevent the possible flow of surface water from his property to that of nearby landowners." See id. § 3.02[1], at 36 (citing Kossoff v. Rathgeb-Walsh, Inc., 3 N.Y.2d 538, 170 N.Y.S.2d 789 (1958)). On the other hand, any improvements made by a property affecting the flow of surface waters must satisfy all of the following rules:

- They must be for the purpose of developing the property for a rational use suited to the property;
- They must be made in good faith; and
- They must not direct surface water onto the property of another by artificial means, such as drainage ditches or pipes.

See id. § 3.02[2], at 37 (citing Kossoff v. Rathgeb-Walsh, Inc., 3 N.Y.2d 538, 170 N.Y.S.2d 789 (1958)); see also Osgood v. Bucking-Reddy, 202 A.D.2d 920, 609 N.Y.S.2d 690 (3d Dep't 1994).

D. ACCRETION, AVULSION, AND EROSION.

When water is in its liquid form -- as opposed to its solid form (i.e., ice) or its gaseous form (i.e., water vapor) -- its flowing nature easily enables it to cover and to carry away land by processes that are either (i) sudden and immediately perceptible or (ii) gradual and not immediately perceptible. This kind of interaction between water and land has led to the development of (3) three legal rules generally known as (i) accretion, (ii) erosion, and (iii) avulsion, each of which will be discussed below. See generally 78 Am. Jur. 2d Waters § 411 (1975); 108 N.Y. Jur. 2d Water § 145 (1993). See also Michael Permut & Lee Snead, Coastal Erosion Presents Land Title, Beach Use Issues, N.Y.L.J., Aug. 24, 1998, at S7, col. 1. "It is established that variable governmental boundaries, running along tidal waters, are affected by the rules of avulsion, erosion and accretion." See Lawkins v. City of New York, 272 A.D. 920, 71 N.Y.S.2d 112 (2d Dep't 1947), aff'd, 297 N.Y. 747 (1948).

1. Accretion.

Within the meaning of the law of water boundaries, the term "accretion" is defined as "[t]he gradual accumulation of land by natural forces, especially as alluvium is added to land situated on the bank of a river or on the seashore." Black's Law Dictionary 21 (7th ed. 1999). "Alluvium" -- derived from the Latin word for flood -- is the soil, clay, or other material deposited by running water. See id. at 77. Similarly, "'[d]ereliction' is the gaining of land that results when water recedes below the high water mark." 15 Warren's Weed New York Real Property WATER § 2.05, at 29 (4th ed. 2002); see also Black's Law Dictionary 455 (7th ed. 1999) ("An increase of land caused by the receding of a sea, river, or stream from its usual watermark."). Under New York law, when riparian or littoral land bordering on a body of water is increased due to accretion, the new land thus formed belongs to the owner of the upland to which it attaches. See Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001) ("[W]e have held that a riparian owner's rights include title to accreted land -- land previously underwater, which had emerged due to soil deposits -- because this was the only way to preserve the right of access."); In re City of Buffalo, 206 N.Y. 319, 325 (1912); see also Town of Hempstead v. Little, 22 N.Y.2d 432, 293 N.Y.S.2d 88 (1968); Town of Hempstead v. Lawrence, 147 A.D. 624, 132 N.Y.S. 615

(2d Dep't 1911) (holding that change of shore line by 400 feet per year was properly categorized as accretion because it was not perceptible at any given moment).

2. Erosion.

The opposite of accretion is "erosion," which is the gradual, non-perceptible wearing away of the soil by the operation of water currents or tides. See Black's Law Dictionary 562 (7th ed. 1999). Similarly, "deliction" is "[t]he loss of land by gradual, natural changes, such as erosion from a change in the course of a river or stream." Id. at 439. Under New York law, "when the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owners and the land thus lost by erosion returns to the ownership of the state [which owns the bed]." See In re City of Buffalo, 206 N.Y. 319, 325 (1912); see also Town of Hempstead v. Little, 22 N.Y.2d 432, 293 N.Y.S.2d 88 (1968).

3. Avulsion.

A sudden -- as opposed to a gradual -- loss of land caused by, for example, a river's change in course or a flood is known as "avulsion." See Black's Law Dictionary 132 (7th ed. 1999). Under New York law, boundaries do not change when a loss of land occurs by avulsion, "defined as the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress." See In re City of Buffalo, 206 N.Y. 319, 325 (1912). See generally 108 N.Y. Jur. 2d Water § 149 (1993) ("The title to land submerged by avulsion is not lost, even temporarily."). The owners of land lost by the process of avulsion have the right to reclaim the suddenly lost land. See Schwartzstein v. B.B. Bathing Park, 203 A.D. 700, 197 N.Y.S. 490 (2d Dep't 1922) ("Such loss of land was not erosion, or the gradual eating away of the soil, and did not change the boundaries, nor did the owner lose his title, where the extent and quantity of his land was apparent; the owner endeavoring as best he might to protect and reclaim his property."); Trustees of Freeholders v. Heilner, 84 Misc. 2d 318, 375 N.Y.S.2d 761 (Sup. Ct., Suffolk County, 1975). On the other hand, "a riparian owner whose land is diminished by erosion does not have a right of reclamation." 15 Warren's Weed New York Real Property WATER § 2.05, at 30 & n.70 (4th ed. 2002) (citing State v. Bishop, 46 A.D.2d 654, 359 N.Y.S.2d 817 (2d Dep't 1974).

E. WETLANDS.

Wetlands may be under the jurisdiction of up to three levels of government – federal, state, and local. See generally John R. Nolon, Wetlands Controls: Untangling an Intricate Web of Rules N.Y.L.J., Aug. 19, 1998, at 5, col. 2. Under New York law the threshold determination is whether a particular piece of property contains, or is adjacent to,

wetlands. This determination is made by reference to wetlands maps created and maintained by the New York State Department of Environmental Conservation. 15 Warren's Weed New York Real Property WETLANDS § 2.02, at 5 (4th ed. 2002). The NYSDEC's failure to provide to a landowner with actual notice that his property was located within a freshwater wetlands does not constitute a deprivation of due process. See Zaccaro v. Cahill, 100 N.Y.2d 884, 768 N.Y.S.2d 730 (2003) (copy in Appendix).

1. Freshwater Wetlands.

As noted at the beginning of this presentation, the State of New York has 2,400,000 acres of freshwater wetlands. See New York State Department of Environmental Conservation, Division of Water, Bureau of Watershed Assessment & Research, New York State Water Quality 1998 1, 9 (Oct. 1998). Under New York law, freshwater wetlands are regulated under the Freshwater Wetlands Act, which is codified in Article 24 of the N.Y. Environmental Conservation Law ("ECL"). See N.Y. ECL §§ 24-0101 to 24-1305 (McKinney 1997). See generally 55 N.Y. Jur. 2d Environmental Rights § 56 (1986). The NYSDEC also has promulgated regulations in connection with the Freshwater Wetlands Act. See 6 NYCRR §§ 663.1 to 663.11 (1992). It is beyond the scope of this presentation to discuss in detail the NYSDEC's regulations governing freshwater wetlands, and, therefore, the practicing lawyer is urged to review the regulations carefully.

The Freshwater Wetlands Act defines freshwater wetlands as lands and waters within the State of New York that are shown on the NYSDEC's freshwater wetlands map and which contain lands and submerged lands, also called marshes, swamps, bogs, and flats, supporting certain defined species of aquatic or semi-aquatic vegetation. See N.Y. ECL § 24-0107(1) (McKinney 1997).

Under the Freshwater Wetlands Act, "[t]he State protects [freshwater] wetlands that are 12.4 acres in size or larger, including a one hundred foot wide buffer surround these areas. Smaller wetlands may be protected under state law if the [NYSDEC] determines that they are of 'unusual local importance.'" See John Nolan, Wetlands Protection Invites Reflection on Federal Law, N.Y.L.J., Aug. 16, 2000, at 5, col. 2. To determine "unusual local importance," the NYSDEC must find that the wetland meets one or more of the specific benefits outlined in Section 24-0105 of the ECL, including, but not limited to, whether the wetland (i) is a habitat for a threatened or endangered species, (ii) provides flood control protecting a neighboring development area, or (iii) is hydrologically connected to a source of public drinking water. See N.Y. ECL §§ 24-0105, 24-0301 (McKinney 1997). The NYSDEC's determination of "unusual local importance" must be supported by substantial

evidence or it will be overturned by the courts in CPLR Article 78 proceeding. See, e.g., Tilles v. Williams, 119 A.D.2d 233, 506 N.Y.S.2d 193 (2d Dep't 1986) (overturning NYSDEC Commissioner's determination that property containing wetlands was of unusual local importance requiring inclusion on final freshwater wetlands map). Wetlands that do not appear on the NYSDEC's official map remain subject to local regulation by counties, cities, villages, and towns without the necessity of filing a map to identify the wetlands regulated solely by local law. See Drexler v. Town of New Castle, 62 N.Y.2d 413, 477 N.Y.S.2d 116 (1984). Freshwater wetlands protected under the Freshwater Wetlands Act may not be developed without a permit from the NYSDEC. See N.Y. ECL § 24-0701 (McKinney 1997).

2. Tidal Wetlands.

Finally, the State of New York also has 25,000 acres of tidal wetlands. See New York State Department of Environmental Conservation, Division of Water, Bureau of Watershed Assessment & Research, New York State Water Quality 1998 1, 9 (Oct. 1998). Under New York law, tidal wetlands are regulated under the Tidal Wetlands Act, which is codified in Article 25 of the N.Y. Environmental Conservation Law ("ECL"). See N.Y. ECL §§ 25-0101 to 25-0404 (McKinney 1997). The NYSDEC also has promulgated regulations in connection with the Tidal Wetlands Act. See 6 NYCRR §§ 661.1 to 661.19 (1992). It is beyond the scope of this presentation to discuss in detail the NYSDEC's regulations governing tidal wetlands, and, therefore, the practicing lawyer is urged to review the regulations carefully.

"For the purposes of the Tidal Wetlands Act, the term 'tidal wetlands' means and includes the following: (1) those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters; and (2) all banks, bogs, meadows, flats, and tidal marsh subject to such tides, and upon which grow or may grow some or any of the following: salt hay, black grass, saltworts, sea lavender, tall cordgrass, hightide bush, cattails, groundsel, marsh mallow, and the intertidal zone including low marsh cordgrass." See 108 N.Y. Jur. 2d Water § 278 (1993) (footnotes omitted). Nothing in the Tidal Wetlands Act prevents its application to wetlands that are artificially created. See Coletta v. New York State Dep't of Envt'l Conserv., 128 A.D.2d 755, 513 N.Y.S.2d 465 (2d Dep't), appeal denied, 70 N.Y.2d 602, 518 N.Y.S.2d 1025 (1987).

As with the Freshwater Wetlands Act, tidal wetlands subject to the Tidal Wetlands Act may not be developed without a permit from the NYSDEC. See, e.g., In re

Michael Matthews, 2003 WL 22970546 (N.Y. Dep't Envir. Conserv., Dec. 2003) (denying application for permit to construct dock structure in tidal wetland) (copy in Appendix). But cf. Friedenburg v. New York State Dep't of Envir. Conserv., 3 A.D.3d 86, 767 N.Y.S.2d 451 (2d Dep't 2003) (holding that NYSDEC's restriction on use of property as tidal wetlands constituted taking of property) (copy in Appendix).

ENDNOTES

1. In addition to the distinction between surface water and underground water, New York water law also recognizes the distinction between unconfined surface waters, such as run-off, and confined surface waters, such as rivers and streams (also known as watercourses), lakes, and ponds. See generally 15 Warren's Weed New York Real Property WATER § 2.01, at 13-14 (4th ed. 2002). "A flow of water constitutes a stream or watercourse if it 'usually' flows in a particular direction, in a defined bed or channel with banks and sides, and has a permanent source of supply, although it is not essential that the flow be uniform or uninterrupted." See id. § 2.02[1], at 14 (footnote omitted) (citing Town of Hamberg v. Gerasi, 269 A.D. 393, 55 N.Y.S.2d 876 (4th Dep't 1945)).

2. This rule is in contrast to the "unity of title" rule, under which a tract of land is "riparian" if it is (i) contiguous to another tract abutting the water and (ii) held in common ownership with the abutting tract, regardless of when the tracts were acquired. 15 Warren's Weed New York Real Property WATER § 2.02[2], at 15 (4th ed. 2002). "Under this rule, a riparian parcel of land can be continuously increased by the purchase of contiguous land." See id.

3. This rule is a modification of the "rule of natural flow" -- derived from English common law -- which entitles each riparian owner to the naturally occurring uninterrupted quantity and quality of water, subject to certain important, potentially rule-swallowing, exceptions for domestic water uses for the owner's family and animals, such as drinking, bathing, cooking, and washing. See 15 Warren's Weed New York Real Property WATER § 2.03[1], at 16-17 (4th ed. 2002).

4. "It is important to note that in New York the public has the right of navigation, that is the right to use the waters of streams and most lakes and ponds for boating and fishing, whether or not they are classified as 'navigable,' although the public has no right in the foreshore of private waterways or a right of access over riparian land to non-navigable, private waterways." 15 Warren's Weed New York Real Property WATER § 6.06, at 65 (4th ed. 2002) (footnotes omitted).

5. Nevertheless, riparian rights are subject to local zoning and land use regulations. 15 Warren's Weed New York Real Property WATER § 2.04[4], at 24 (4th ed. 2002) (citing Hayer's Sodus Point Bait Shope, Inc. v. Wigle, 139 A.D.2d 950, 528 N.Y.S.2d 244 (4th Dep't), appeal denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595 (1988)).