July 30, 1975

HONORABLE DAVID J. BARDIN
Commissioner
Department of Environmental Protection
Rm. 801 – Labor & Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 16–1975

Dear Commissioner Bardin:

You have requested advice on certain questions arising out of the mapping and rule making functions of the Department of Environmental Protection (hereinafter "Department") under the Coastal Wetlands Act. N.J.S.A. 13:9A-1, *et seq.* In particular, you have asked whether wetlands maps promulgated by the Department pursuant to the Act are considered part of the regulatory wetlands orders, and therefore whether a hearing as prescribed in N.J.S.A. 13:9A-3 must be held every time a wetlands map is amended to either include or to exclude areas. For the reasons which follow, you are hereby advised that wetlands maps are not part of a wetlands order, but that a hearing should nevertheless be held whenever a wetlands map is amended to add a new area that is owned by someone who was not given the notice prescribed by the Act prior to the adoption of the wetlands order for that location. Conversely, there is no need to hold a hearing when a wetlands map is amended to delete an area.

The mapping and regulatory rule making functions of the Department pursuant to the Coastal Wetlands Act are distinct yet related activities. The wetlands maps are developed by the Department pursuant to N.J.S.A. 13:9A-1(b) which provides that:

> "The Commissioner of Environmental Protection shall, within 2 years of the effective date of this act, make an inventory and maps of all tidal wetlands within the State. The boundaries of such wetlands shall generally define the areas that are at or below high water and shall be shown on suitable maps, which may be reproductions or aerial photographs. Each such map shall be filed in the office of the county recording officer of the county or counties in which the wetlands indicated thereon are located. Each wetland map shall bear a certificate of the commissioner to the effect that it is made and filed pursuant to this act. To be entitled to filing no wetlands map need meet the requirements of R.S. 47:1-6."

This office has been informed by the Bureau of Marine Lands Management, Division of Marine Services, that all of the aerial photography from which the actual maps were made was completed within the two year period referred to in the above quoted statute, and furthermore, that the resulting wetlands maps were filed with each county recording officer prior to the promulgation of the wetlands order for such county.

Distinguished from the mapping process, the regulatory rule making process regarding coastal wetlands was only recently completed. That process, known as the promulgation of wetlands orders, is provided for in N.J.S.A. 13:9A-2, which in pertinent part states:

> "The Commissioner may from time to time, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting, coastal wetlands."

N.J.S.A. 13:9A-3 specifies the procedure that must be followed in adopting a wetlands order. That statute in part provides:

> "The Commissioner shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the county in which the coastal wetlands to be affected are located, giving notice thereof to each owner having a recorded interest in such wetlands by mail at least 21 days prior thereto addressed to his address as shown in the municipal tax office records and by publication thereof at least twice in each of the 3 weeks next preceding the date of such hearing in a newspaper of general circulation in the municipality or municipalities in which such coastal wetlands are located."

This office has also been advised by the Bureau of Marine Lands Management that as of February 21, 1975, identical wetlands orders have been promulgated for all eleven counties containing coastal wetlands, following a hearing in each county.

The above cited statutory scheme and implementation of same by the Department demonstrate that the mapping and regulatory functions regarding wetlands are distinct yet related. It is apparent from a reading of N.J.S.A. 13:9A-1 through 3 that the mapping of wetlands is a separate process from the regulation of wetlands through the process of promulgating wetlands orders. However, the maps have little real impact until a wetlands order regulating the use of the wetlands indicated on the maps is adopted.

Since the mapping and wetlands order process are separate, and since the only reference to a hearing in the Act is in connection with the adoption of a wetlands order, see N.J.S.A. 13:9A-3, it follows that there is no statutory requirement for a hearing in order to add or delete an area from a wetlands map.* However, the notice provisions of N.J.S.A. 13:9A-3 are very specific and strict in connection with the adoption of a wetlands order. As quoted above, that statute requires, among other things, individual written notice by mail to each owner having a recorded interest in the wetlands affected by the proposed order. In the face of such scrupulous concern by the Legislature for the right of wetlands owners to notice of their opportunity to object to the contents of a wetlands order at a public hearing in the county to be affected, it must be concluded that absent such notice a wetlands owner is not bound by the terms of an order. *Cf., Hepner v. Township Committee of Lawrence Twp.*, 115 N.J. Super. 155, 161-62 (App. Div. 1971).

This conclusion is reinforced by the fact that N.J.S.A. 13:9A-3, in addition to requiring notice of the proposed wetlands order for each owner of a recorded interest in such wetlands, also requires both individual written notice of the adoption of the order to such owners as well as the recordation of a copy of the order and plan of the lands affected as a judgment against each parcel of wetlands.** Moreover, N.J.S.A. 13:9A-6, which provides for a procedure whereby a wetlands order may be

challenged, is only triggered by the above described individual notice of the adoption of an order.

Because the consequence of lack of the prescribed statutory notice is the inapplicability of a wetlands order vis-a-vis a wetlands owner without notice of a wetlands order, it follows that whenever a wetlands map is amended to include a new area, the order is not effective against the owners of the additional wetlands since, it can be assumed, they would never have received the prescribed notice. Thus, a hearing after proper notice, see N.J.S.A. 13:9A-3, should be accorded to anyone with a recorded interest in any area of wetlands that is added to a wetlands map, if that person was not given the notice prescribed by the Act prior to the adoption of the wetlands order for that location, and conversely, since the requirement for a hearing springs from the need to follow the legislative notice mandate in order to bind wetlands owners by a wetlands order and not from the mapping process itself, there is no need to hold a hearing when a wetlands map is amended to delete an area. Of course, the Department is free to devise an expeditious hearing procedure to deal with map amendment problems, such as by inviting written comments from affected land owners in lieu of a personal appearance at the hearing and by only scheduling an actual hearing upon the request of a landowner.***

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: JOHN M. VAN DALEN
Deputy Attorney General

* This conclusion is reinforced by an analysis of the legislative history behind the Act, inasmuch as an earlier wetlands bill, A-768 (1969), specifically required a public hearing prior to designating any property as wetlands. The clear absence of such a requirement in the Act as passed evidences a legislative intent not to require a hearing in connection with the mapping process.

** It is assumed that if a wetlands owner were not given notice of the proposed adoption of an order that he also would not have received notice that the order had been adopted and that the order would not have been filed with the force of a judgment against his parcel of land.

*** The Department is already contemplating a second round of hearings in all counties except Cumberland because of the existence of a new series of wetlands maps encompassing very small parcels of wetlands that were not part of the original set of maps for most counties. This round of hearings can be utilized for the additional purpose of covering in unnoticed owners of any parcels of wetlands that the Department has added or would like to add by amendment to its original maps.

August 5, 1975

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 17—1975

Dear Commissioner Schaub:

You have inquired as to the legality of a commercial bank chartered under Pennsylvania law making loans to New Jersey residents secured by second mortgages on New Jersey residential property. More specifically, you have inquired whether a commercial bank chartered under the laws of the Commonwealth of Pennsylvania would be subject to the provisions of the Secondary Mortgage Loan Act, N.J.S.A. 17:11A-34 *et seq.* You have informed us that such a bank has been making loans to New Jersey residents upon the security of second mortgages on the borrower's New Jersey residence. Those loans were finalized at the Pennsylvania offices of the bank, with the documentation evidencing such loans executed and delivered by the borrowers to the bank in Pennsylvania. The terms of the loans comply in all respects with applicable federal and Pennsylvania banking laws.

The Secondary Mortgage Loan Act does not apply to the transactions described *supra.* N.J.S.A. 17:11A-61 provides as follows:

> "Nothing in this act shall be construed as expanding or restricting the powers otherwise conferred by law upon financial institutions, such as State and National banks, State and Federal savings and loan associations, savings banks and insurance companies, to engage in the secondary mortgage business as defined in Section 3 [N.J.S.A. 17:11A-36], and no such financial institution, in exercising any power otherwise so conferred upon it, shall be subject to any provision of this act."

The language of this exemption is quite broad, and on its face, would apply to commerical banks chartered in sister states. moreover, a review of the legislative history of the Secondary Mortgage Loan Act (1970) and its predecessor, the Secondary Mortgage Loan Act (1965), indicates clearly that the legislation was aimed primarily at foreign loan companines, not foreign banks, savings banks or savings and loan associations. *Oxford Consumer Disc. Co. of No. Phila. v. Stefanelli,* 102 N.J. Super 549 (App. Div. 1968), 104 N.J. Super. 512 (App. Div. 1969), mod. 55 N.J. 489 (1970), appeal dism. 400 U.S. 808, 91 S. Ct. 45, 27 L. Ed. 2d 38 (1970), order amended on other grounds 400 U.S. 923, 91 S. Ct. 183, 27 L. Ed. 2d 182 (1970).

It is also important to determine whether, in light of all activities surrounding the mortgage loan, a foreign banking institution is engaged in the prohibited transaction of business in this State in contravention of the Banking Act of 1948, N.J.S.A. 17:9A-316 *et seq.* Such impermissible transaction of business by a foreign bank may be illustrated by solicitation, advertisement or the use of brokers in New Jersey or other activities in this jurisdiction leading to the consummation of the secondary mortgage loan. However, in those cases where all of the activities surrounding the

challenged, is only triggered by the above described individual notice of the adoption of an order.

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