



STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY

ROBERT J. DEL TUFO
ATTORNEY GENERAL

December 14, 1990

Honorable Judith A. Yaskin
Commissioner
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

Re: FORMAL OPINION NO. 3 (1990):

Scope of Exemptions Under the
"Freshwater Wetlands Protection Act"

Dear Commissioner Yaskin:

You have asked for advice regarding the scope of the exemption provision of the Freshwater Wetlands Protection Act ("Act"), N.J.S.A. 13:9B-1 et seq. The exemption is essentially a grandfather clause, eliminating wetlands permit and transition area requirements for projects which were in progress on or before the effective dates of the Act. The exemptions fall into two broad categories: an exemption obtained with reference to municipal land use and planning procedures and an exemption grounded in permit applications within the jurisdiction of the United States Army Corps of Engineers ("Corps").* The exemption section, N.J.S.A. 13:9B-4(d), provides as follows:

* The Act was signed into law on July 1, 1987. L. 1987, c. 156. The majority of the Act's provisions were effective July 1, 1988, with the notable exception of the provisions regarding transition area requirements which took effect July 1, 1989. N.J.S.A. 13:9B-30; see also, Appeal of Adoption of N.J.A.C. 7:7A-1.4, 118 N.J. 552 (1990), reversing Id., 240 N.J. Super. 224 (App. Div. 1989) (Skillman, J.A.D., dissenting).

Projects for which (1) preliminary site plan or subdivision applications have received preliminary approvals from the local authorities pursuant to the "Municipal Land Use Law," P.L. 1975, c. 291 (C. 40:55D-1 et seq.) prior to the effective date of this act, (2) preliminary site plan or subdivision applications have been submitted prior to June 8, 1987, or (3) permit applications have been approved by the U.S. Army Corps of Engineers prior to the effective date of this act, which projects would otherwise be subject to State regulation on or after the effective date of this act, shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of this act;...

At the outset, it is important to note that the existence and scope of any grandfather clause raises significant policy issues. Also, many policy judgments have been urged upon us by interested persons and groups as we have sought to address the question at hand. It must be emphasized, however, that the Attorney General obviously has no authority to make legislative policy but only the power and obligation, as the legal advisor of State government, to interpret statutes and to attempt to discern legislative intent. See N.J.S.A. 52:17A-4(e). It is within the Legislature's domain to decide questions of policy and, in the present context, the scope of any exceptions to the Act. In this opinion, we have done our best to assess legislative intent and to offer a proper interpretation of the exemption provision of the Act. We are confident that if the Legislature intended something other than that seemingly suggested by the words it employed, or if it is now of a different mind, it will take any action it deems appropriate or warranted. See Appeal of Adoption of N.J.A.C. 7:7A-1.4, 118 N.J. at 555 (inviting the Legislature to take corrective action if it is in disagreement with the Court's holding); Tp. of Brick v. Spivak, 95 N.J. Super. 401, 406 (App. Div. 1967) (power lies with the Legislature not the courts to establish public policy).

1. Subdivision and Site Plan Applications and Approvals.

The present practice of the DEP is to search for evidence that the local planning board had knowledge that a development "project" existed with some concreteness at the time of any subdivision or site plan review by the board. Under this approach, DEP reviews schematic drawings, footprint maps, affidavits and

other evidence of an active "project." If DEP is satisfied on this score it grants an exemption.

For the reasons set forth below, you are advised that this approach is inconsistent with the Act which clearly ordains a more predictable and mechanical approach tied to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. The Act exempts from compliance with its requirements any project which received preliminary subdivision or site plan approval prior to July 1, 1988 and any project for which a preliminary site plan or preliminary subdivision application was filed prior to June 8, 1987.* These rather unambiguous, straightforward exemptions must be given effect. Their focus is upon planning approval and applications for preliminary approval as the legislatively ordained touchstones of exemption.

2. Army Corps of Engineers Permit Approvals.

The Department's current implementation of the exemption based on qualifying for a nationwide permit prior to the effective date of the Act is limited to the activities authorized by the nationwide permit and is incorporated in the Department's regulations. See N.J.A.C. 7:7A-2.7(g). We believe this view is consistent with the Act and therefore no change in the regulation is warranted. Also, where approvals based on individual determinations are obtained from the Corps, an exemption from the Act similar to one based upon the Municipal Land Use Law is required.

THE FRESHWATER WETLANDS PROTECTION ACT

The Act was enacted "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." N.J.S.A. 13:9B-2. To do so, the Legislature established a permit program for the systematic review of a broad range of activities in wetlands. N.J.S.A. 13:9B-9(a). In addition, the Act regulates areas known as transition areas which surround higher quality wetlands. The transition area provides a "temporary refuge for freshwater wetlands fauna during high water episodes, [a] critical habitat for animals dependant upon but not resident in freshwater wetlands and [provides for] slight variations of freshwater wetlands boundaries over time ..." N.J.S.A. 13:9B-16. An exemption from the freshwater permitting requirements of the Act pursuant to N.J.S.A. 13:9B-4 exempts one

*By judicial decision, projects which were preliminarily applied for after June 8, 1987 and which were approved prior to July 1, 1989 are exempt from the transition area requirements of the Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4, supra.

from the requirements of both a freshwater wetlands permit and a transition area waiver.

EXEMPTIONS BASED ON MUNICIPAL LAND USE LAW APPROVALS

The environmental objective of the Act to place strict limitations on activities in freshwater wetlands and their transition areas is both clear and laudable. However, the Legislature was also cognizant:

that in order to advance the public interest in a just manner the rights of persons who own or possess real property affected by this act must be fairly recognized and balanced with environmental interests; ... [N.J.S.A. 13:9B-2, Legislative findings and declarations].

To achieve this balance, the Legislature included the exemption or "grandfather" provisions of N.J.S.A. 13:9B-4(d) to accommodate projects that were in the municipal review process or had Army Corps permits. (See quotations of the statute, supra, p. 2).

In interpreting a statutory provision, the starting point must be the language of the statute itself. Sheeran v. Nationwide Mutual Ins. Co., Inc., 80 N.J. 548, 556 (1979). When a statute is clear and unambiguous on its face, it is not open to administrative construction or interpretation. Vreeland v. Byrne, 72 N.J. 292, 302 (1977). In such circumstances, there is no need, nor may there be any resort, to look behind the plain words of the statute to discern the legislative intent. Demsey v. Mastropasqua, 242 N.J. Super. 234 (App. Div. 1990); Russell v. Saddle Brook Restaurant Corp., 199 N.J. Super. 186 (App. Div. 1985).

The application of these principles to the Municipal Land Use Law-based exemptions in the Act leaves no room for administrative interpretation. The plain language employed by the Legislature at N.J.S.A. 13:9B-4(d) is clear and precise. It exempts projects for which (1) preliminary site plan or subdivision applications have received preliminary approvals from the local authorities pursuant to the Municipal Law Use Law (N.J.S.A. 40:55D-1 et seq.) prior to the effective date of the Act.* The statute also clearly exempts projects for which preliminary site plan or

* As noted earlier, applications approved prior to July 1, 1988 are exempt from all requirements under the Act while applications approved on or after July 1, 1988 but prior to July 1, 1989 are exempt solely from the transition area requirements of the Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4, supra.

subdivision applications were submitted prior to June 8, 1987 (the date Governor Kean issued Executive Order No. 175 imposing a construction moratorium in freshwater wetlands). This straightforward reading of the statute is consistent with dicta in Matter of Freshwater Wetlands Rules, 238 N.J. Super. 516, 528-529 (App. Div. 1989) that the statutory exemptions "are total. Those projects which receive preliminary Municipal Land Use Law approval and for which site plan or subdivision applications have been submitted prior to June 8, 1987 are totally free from all freshwater wetlands permit and transition area requirements under the statute's express terms." (emphasis supplied). Parenthetically, the preliminary approvals and preliminary applications identified in the exemption section implicate specific procedures well-defined in the Municipal Land Use Law (see N.J.S.A. 40:55D-46, 48) and in municipal planning ordinances (see N.J.S.A. 40:55D-38 to 44), procedures which necessarily call for the submission of concrete plans and information. (Ibid.)

That the Legislature meant to free ongoing development projects from the requirements of the Act is evident not only from the plain language of the exemption provision but also from the purpose of a "grandfather" clause and the general circumstances surrounding the adoption of the Act. A grandfather provision, such as that set forth in N.J.S.A. 13:9B-4(d), finds its raison d'etre in exempting some group or entity from the provisions of a particular legislative enactment because it is perceived to be unfair or inappropriate to subject investment in an on-going matter to a change in the rules governing its progress and fruition. Paul Kimball Hosp. v. Brick Tp. Hosp., 86 N.J. 429, 440-441 (1981). The very existence here of a grandfather clause therefore creates a tension between the broad remedial goals of the Act and a competing legislative judgment to apply the Act in a prospective fashion. See Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980) and United Advertising Corp. v. Borough of Raritan, 11 N.J. 144 (1952), zoning ordinances permitting continuance of a nonconforming use are valid.

Here, the exemption provision balances the Legislature's concern for strictly regulating future development in freshwater wetlands and transition areas with a recognition that ongoing development projects not be halted after the expenditure of significant funds, planning and time. While the Act was properly hailed as "one of the most important pieces of environmental legislation ever enacted in this State," (see Remarks of Governor Kean, Public Bill Signing, July 1, 1987), it is uncontroverted that the Act was passed only after much negotiation between the development and environmental communities. ("this bill was the result of arduous negotiations and compromise. It took almost four years to wind its way through the labyrinth of the legislative process." Ibid.) The intense debate over the bill makes it unlikely the

Legislature would have been inexact in clarifying the nature of the exemptions.*

*The Senate Committee Statement attached to the Senate Committee Substitute, dated June 25, 1987, which was eventually signed into law as L.1987, c.156, lends further support to this view. That Statement appears to confirm that the exemption from the Act extended to a broad range of matters which had been the subject of a request for local municipal approval or had actually been approved:

In addition, farming, ranching and forestry activities would not be subject to the provisions of this bill, nor would projects that have received preliminary local approvals prior to the effective date of this bill, projects for which a preliminary site plan was submitted for local approval prior to June 8, 1987 ... and projects for which a federal freshwater wetlands permit has been received from the United States Army Corps of Engineers prior to the effective date of this bill. (emphasis supplied).

Further, the Assembly Committee substitute for A-2342 and A-2499 (1985) was drafted after public hearings before the Assembly Agriculture and Environment Committee on September 24, 1984. Those hearings reveal that the building community was specifically concerned that projects which had completed review under existing law not be required to undergo a second review under the new Act which might render hard-won approvals under existing law worthless:

One final matter that I would like to bring to the attention of the Committee is the applicability of the statute once enacted. We strongly suggest that if wetlands legislation is released, it should contain a 'grandfather' provision, allowing those approved preliminary municipal approvals to proceed in good faith, as they were designed, subject to the protection of Public Health, Safety, and Welfare. [Public Hearings Before the Assembly Agriculture and Environment Committee on Assembly Bills 672 and 2348, September 24, 1984, p.70 (Testimony of David B. Jackson, New Jersey Builders Association)].

Under its present application of the grandfather provision, the Department views the exempted "project" to include all activities determined to be part of the project at the time of and for which a preliminary subdivision or site plan application was filed or an approval was granted. Under this approach, applicants have been required to show that they submitted to the planning board some evidence of the structures they anticipated building in order to claim an exemption for those structures, regardless of whether specific details such as the size or location of buildings are required by local planning boards when making determinations. If no evidence could be produced, the exemption was limited to that which was actually approved by the planning board, which, in the case of subdivision approval, could be as little as the partitioning of land. Because building details are often not required by local planning boards when making determinations, and assuredly not in the situation of a residential subdivision which involves a delineation of lots with the type and size of structures, set-backs and the like being determined by the provisions of the local zoning ordinance, it is merely fortuitous that any particular applicant would have informally presented such evidence. The anomaly of requiring that information not necessary for an approval be submitted in order to claim an exemption based on that approval should be apparent.

This search for evidence of a "project" to define the scope of exemption is precluded by the plain and precise words of the exemption provision at N.J.S.A. 13:9B-4(d)(1) and (2) which

Legislative hearings before the 1986 Assembly Energy and Natural Resources Committee contain testimony that echoes the concern that projects with all necessary approvals not be made to start the approval process over again:

Existing projects in a town which are being built, which have all the approvals from DEP and the town and everybody, even Army Corps, where the next phase of development comes in-Phase III - and they have to go back to DEP under your legislation, Maureen, they would have to start from scratch, redefine the wetlands under this bill, and redefine the buffer. That would stop those developments in their tracks. You would have, in essence, a construction stop order at that phase. [Public Hearings Before The Assembly Energy and Natural Resources Committee on Assembly Bills 2342 and 2499, August 1, 1986, p. 73 (Testimony of Sean Reilly, Builders League of New Jersey)].

attaches when preliminary approvals under the Municipal Land Use Law have been obtained in a timely manner or when subdivision and site plan applications were submitted prior to June 8, 1987. Although "project" is not defined in either the Act or the Municipal Land Use Law, an administrative interpretation of that word which narrows the exemptions ordained by N.J.S.A. 13:9B-4(d) is without basis in light of the statutory language conferring the exemptions. We do not ascribe any particular meaning or purpose to the Legislature's use of the word "project" in the grandfather clause. The word "project" must be given a rational meaning in the everyday context of the municipal planning process, *i.e.* a proposed economic development, whether commercial, industrial or residential, for which local approval is needed and sought. See Webster's New Collegiate Dictionary, 1976 (defining "project" as "a specific plan or design;" "scheme;" "a planned undertaking."). The Legislature's use of the word "project" is no more than a common sense recognition that local land use approvals are sought because they are a necessary predicate to the construction of something tangible, regardless of whether it is styled a project, a plan, a scheme, a development, a structure or by some other similar descriptive phrase. Use of the word "project" is thus not meant to limit, and does not limit, the exemptions set forth at N.J.S.A. 13:9B-4(d)(1) and (2) which are unambiguous and express the overriding goal of the Legislature.

The nature and scope of the exemptions provided as a result of pending or completed involvements in the local land use process are not however without limitations. It has been held that the Act "directly incorporates the application and approval concepts of the Municipal Land Use Law" in fashioning the exemptions. Matter of Freshwater Wetlands Rules, 238 N.J. Super. at 530 (invalidating DEP rule placing a five-year life on the exemptions granted from the Act by N.J.S.A. 13:9B-4(d)(1) and (2)). The court there properly noted the Legislature is presumed to be aware of its prior enactments, citing Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 279 (1985), especially where it incorporates prior enactments by reference in subsequent legislation, citing Singer, 2A Sutherland Statutory Construction (Sands 4th ed. 1984) §51.02 at 453. The Legislature was thus surely aware of the nature of the subdivision and site plan approval process and the scope of that which is approved pursuant to that process. By incorporating the Municipal Land Use Law in the provision exempting projects with subdivision and site plan approval, and for which subdivision and site plan applications were submitted prior to June 8, 1987, it is clear that the Legislature intended that the scope of the exemptions be defined in part by and tied to the scope and nature of the approvals granted under the Municipal Land Use Law.

Thus, it may be noted at the outset that any exempted project would be subject to and hemmed in by the municipal Master Plan, N.J.S.A. 40:55D-28, and the local zoning ordinances establishing set-back requirements, height restrictions, floor-to-area ratios, use limitations, square feet restrictions and other limitations. N.J.S.A. 40:55D-38, 39, 40, 41. Another limitation is that approvals and applications justifying exemption under N.J.S.A. 13:9B-4(d) must have been made under the Municipal Land Use Law which became effective in August 1976. L. 1975, c. 291. And, as part of the site plan and subdivision review process, a municipality ordinarily provides some environmental review which may incidentally provide certain protections to wetlands. N.J.S.A. 40:55D-38.

Moreover, the applications and approvals under the Municipal Land Use Law are subject to the time limitations imposed by that law and may lapse. Matter of Freshwater Wetlands Rules, 238 N.J. Super. at 530. A preliminary major subdivision approval of ten or fewer lots protects the applicant for a three-year period, which may be extended for additional periods of one year not to exceed a total extension of two years. N.J.S.A. 40:55D-49. Preliminary subdivision approval for 50 acres or more endures beyond three years only at the reasonable discretion of the planning board. N.J.S.A. 40:55D-49(d). The same standards apply to preliminary site plan approval. Ibid. Likewise, final major subdivision approval will expire in 95 days unless properly recorded. N.J.S.A. 40:55D-54. If these valid municipal applications and approvals lapse because of statutory requirements in the Municipal Land Use Law or by virtue of lack of prosecution by the applicant, then by the same line of reasoning, any right to an exemption in the Act based on N.J.S.A. 13:9B-4(d)(1) and (2) would lapse as well. Indeed, the DEP has incorporated this concept in a rule providing that exceptions based on municipal approvals remain in force only if "those approvals remain valid under the Municipal Land Use Law." N.J.A.C. 7:7A-2.7(d)(1).

In addition to the protections afforded by the Municipal Land Use Law, individuals exempted from the Act are still constrained in their ability to fill wetlands by the requirements of the Corps permitting process. Thus any filling of wetlands in excess of one acre not covered under nationwide permits other than No. 26 requires an individual permit and the extensive review process which that entails. Filling of less than one acre (and other activities in wetlands) is governed under the nationwide permit process and the procedural and substantive safeguards afforded thereunder. See discussion, infra, pp. 10-11.

EXEMPTIONS BASED ON ARMY CORPS PERMIT APPROVALS

You have also asked us to review the scope of the exemption based on Army Corps permit approvals. That exemption is set forth at N.J.S.A. 13:9B-4(d):

Projects for which ... (3) permit applications have been approved by the United States Army Corps of Engineers prior to the effective date of this act, which projects would otherwise be subject to State regulation on or after the effective date of this act, shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of this act. (Emphasis supplied)

The nature of the "permit" referenced in the exemption is not defined in the Act. In fact, the Corps administers two types of permit programs pursuant to §404 of the federal Clean Water Act, 33 U.S.C. §1344 (§404): the individual permit program and the nationwide permit program. There is a distinct difference in the nature of the review and approval given by the Corps for an individual permit as opposed to a nationwide permit. Only in the case of an individual permit does the Corps require a permittee to file an application and obtain from the Corps specific approval for a particular development proposal which must be exhaustively described in a submitted permit application. See 33 C.F.R. §325.1. An individual permit will only be approved if the applicant meets the test contained in 40 C.F.R. §230.1 et seq. (§404(b)(1) Guidelines).

Under a nationwide permit, however, the submission, review and approval of individual development projects or the granting of individual "permit applications" are not involved. In fact, under the procedures applicable to nationwide permits, there are no individual "permit applications" as envisioned by the plain language of the Act. Rather, a nationwide permit is largely a permit by regulation. Indeed, a nationwide permit may be properly characterized alternatively as an exemption from a permitting requirement, for the very purpose of a nationwide permit is to allow the regulated public to engage in certain specified activities without having to submit a permit application. Consequently, a nationwide permit authorizes only a particular generic type of activity and is not tied per se to a particular development proposal. There are some 26 nationwide permits covering different activities, the most prevalent of which are road crossings and the filling of less than an acre of land. Only four of these 26 even require notification to the Corps that the

permittee intends to conduct activities under the authority of a nationwide permit. See 33 C.F.R. §330.7.

As detailed earlier, our assessment of the legislative intent, gleaned both from the language of the exemption provision and its very existence, is that the Legislature wanted to spare projects from the requirements of the Act where significant development efforts had been expended at the time the Act took effect. The legislative goal was to avoid what it perceived as a fundamental unfairness that would result if projects, well along in the design, planning and financing stages, were stopped precipitously by the intervening standards of the Act. Accordingly, as noted earlier, the Legislature crafted the Act's exemption with reference in part to the Municipal Land Use Law, recognizing that obtaining preliminary approvals or submitting preliminary applications are significant events, predicated on the expenditure of substantial efforts, in the land use development process. By incorporating to some degree Municipal Land Use Law procedures and standards, the Legislature sought to implement its intention to accommodate projects for which meaningful efforts had been undertaken.

Building on the approach of exempting preliminary subdivision and site plan approvals and applications under the Municipal Land Use Law, it is clear that the Legislature intended that projects which received Corps approval based on individual permit determinations receive an exemption. This conclusion is in complete accord with the legislative sentiment, reflected in the exemptions based on local land use approvals and applications, that projects which are sufficiently advanced are entitled to an exemption.

However, a conclusion that qualifying for a nationwide permit constitutes a "permit approval" warranting a complete exemption from the Act is unsupported by legislative intent, as discussed above, and the Legislature's choice of the standard of "permit applications" which have been "approved" by the Corps. While an individual permit is based on an individual assessment, a nationwide permit is one based on a regulation triggered by the unilateral action of the permittee in conformance with certain objective limiting criteria. In referring to "permit applications," the Legislature was certainly aware of the dual permitting system utilized by the Corps. Accordingly, we are constrained by that presumed knowledge from reading into the Act a full exemption from its coverage based on a nationwide permit. Rather, our object again is to construe the scope of any exemption--here one grounded on the Army Corps permitting standards--in accordance with the legislative intent. We cannot infer that the Legislature would have intended to exempt entire development proposals based on

nationwide permits which in fact sanction only a particular kind of activity, are not the subject of individualized review or necessarily even notice to the Corps, and are neither applied for or approved by the Corps.

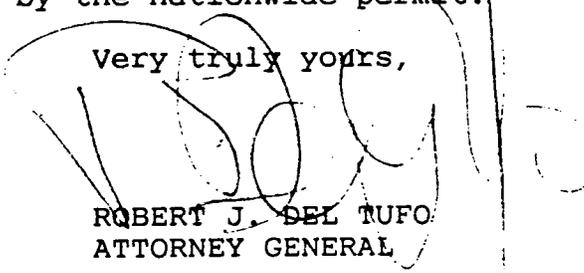
Under current Department regulations, the exempted "project" is limited to the "activities authorized" under the nationwide permit. N.J.A.C. 7:7A-2.7(g). Where an applicant has received individual permit approval from the Corps prior to the effective date of the Act, the Department, consistent with what we have said above, exempts the entire development. However, where an applicant bases its exemption on a nationwide permit, the Department has construed as exempted only those activities specifically permitted under the nationwide permit. Ibid. Consequently, under current DEP practice, the "project" approved under a nationwide permit has been understood by the Department to constitute only the activity for which the nationwide permit has been issued and not the particular development project of any given developer. In light of all of the above, it is our opinion that the Department's current interpretation of the "project" exempted by nationwide permit approvals, as reflected in its regulations, is fully in keeping with the statutory language. The exempted project is therefore correctly limited to the activity authorized by the nationwide permit regulation as opposed to the applicant's project.*

*As discussed supra, a transition area is "an area of land adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral part of the wetlands ecosystem." N.J.A.C. 7:7A-1.4. The federal act does not regulate transition areas. Under the Department's regulations, nationwide permits carry with them an exemption from transition area requirements for that portion of the transition area bordering on that portion of the freshwater wetland in which the exempted activity is to take place. N.J.A.C. 7:7A-6.2(c); see also N.J.A.C. 7:7A-7.1(f). The extent of the transition area exemption is determined by the Department according to the distance deemed necessary to accomplish the activity authorized by the nationwide permit. Ibid. In certain cases, the Department has exercised its discretion to exempt contiguous structures, such as roads, for which there are multiple exemptions based on nationwide approvals, given an overlap or near overlap of the transition area waivers associated with the activities authorized by these approvals. Nothing in this advice is meant to call into question this sound and practical approach by the Department to one of the myriad subset of problems that arise out of the interaction between the exemption and buffer requirements.

CONCLUSION

In sum, you are advised that projects are completely exempt from the Freshwater Wetlands Protection Act based on preliminary Municipal Land Use Law approvals obtained prior to July 1, 1988 or based on the filing of applications for preliminary site plan or subdivision approval prior to June 8, 1987. These exemptions are subject to the limiting principles set forth in the Municipal Land Use Law discussed above. Similarly, projects for which an individual permit has been approved by the Corps prior to the effective dates of the Act are also exempt. Exemptions from the Act based on a nationwide permit extend only to those activities actually authorized by the nationwide permit.

Very truly yours,



ROBERT J. DEL TUFO
ATTORNEY GENERAL