



BUSINESS COUNSELING UPDATE

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SPECIAL NEEDS TRUSTS

A Method for Providing for Those With Special Needs

In creating an estate plan, an individual may be reluctant to leave assets to a loved one who currently qualifies for government benefit programs (i.e., Medicaid and Supplemental Security) for fear that additional assets will disqualify their loved one. However, Special Needs Trusts allow assets to be held in trust for an individual beneficiary and spent for his/her benefit without disqualifying him/her from government benefit programs.

To determine eligibility for some government benefit programs (i.e. Medicaid and Supplemental Security), an individual's assets must be evaluated and, under most circumstances, the individual must "spend down" those assets to a few thousand dollars before becoming eligible for program benefits. Consequently, without proper planning, leaving assets to an individual who is receiving government benefits will disqualify him/her from government assistance and require him/her to "spend down" to requalify. Alternatively, in creating an estate plan, one may unnecessarily avoid giving assets to individuals who qualify for government benefits for fear that the assets will disqualify them from the government benefit. However, with proper planning, an individual who is receiving government benefits can be a

beneficiary of an estate and still qualify for government benefits.

Special Needs Trusts are vehicles which allow an eligible individual to qualify for government assistance without having to "spend down" the funds in the Special Needs Trust. These types of trusts supplement, rather than replace, the public benefits to which a beneficiary is entitled. The funds in a Special Needs Trust can be used to supplement the individual's care and support.

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allow assets to be held
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Additionally, the creation of a Special Needs Trust should be seriously considered for any minor who has suffered disabling injuries and will receive a large monetary settlement for his/her claim.

Angela M. Pelan

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WETLANDS REGULATION

The “SWANCC” Decision

INTRODUCTION

On January 9, 2001, The United States Supreme Court issued a decision that reduces federal regulatory jurisdiction over wetlands. In *Solid Waste Agency of Northern Cook County (“SWANCC”) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the U.S. Supreme Court (“Court”) held that “non-navigable, isolated, intrastate waters” are not “waters of the United States” within the jurisdiction of the Clean Water Act of 1972 (“CWA”) solely because migratory birds use those waters. The effect of this decision limits the scope of the U.S. Army Corps of Engineers (“Corps”) regulatory authority over isolated waters under the CWA, although its precise effect continues to be debated.

The SWANCC decision carries important implications for municipalities, environmentalists, builders, developers, utilities, and others seeking to conduct activities in and around these waters. The SWANCC decision has the potential to remove much of the protection previously provided by CWA for a significant portion of the nation’s wetlands. The degree of protection actually removed will depend upon the interpretation of the SWANCC decision by lower federal courts.



REGULATORY BACKGROUND

In order to properly assess the implications of SWANCC it is necessary to briefly review the federal law governing the development of wetlands. The nation’s desire to protect its wetlands is a relatively new phenomenon. Until the 1970’s, wetland policy encouraged draining and filling wetlands for agricultural production and development. The federal government utilized cost sharing programs, tax incentives and

farm commodity programs to promote the conversion of wetlands. However, in the early 1970’s a trend emerged that shifted the policy towards wetlands protection.

The 1970’s brought about significant federal regulation intended to protect wetlands. The CWA was enacted during that decade and produced the main federal regulations concerning wetlands. In particular, § 404, which evolved from the Rivers and Harbors Appropriation Act of 1899, regulates “navigable waters of the United States” and prohibits “work” (dredging or filling) or the placement of structures in such waters without Corps approval. However, the CWA reflects a much broader approach to waters than merely navigation. The CWA’s purpose is to restore and maintain the integrity of the waters of the United States. To accommodate this new purpose the CWA retains the traditional jurisdictional phrase “navigable waters” but defines it broadly to mean “waters of the United States.”

The Corps has enacted regulations, which have broadly interpreted the terms of § 404. By 1986, the definition of “waters of the United States” found in the CWA had been expanded to include other waters such as lakes, rivers, streams, mudflats, sand flats, wetlands, sloughs, prairie potholes and natural ponds, to name a few. Another example of CWA’s expansion is found in the preamble to the Corps’ 1986 regulations, which set forth the so-called Migratory Bird Rule (“MBR”), stating that waters of the United States include waters that are or would be used as habitat by birds protected by Migratory Bird Treaties, or by other migratory birds which cross state lines. All of these regulations apply to waters located in the State of Nebraska.

Federal regulations such as the CWA

protect wetlands, not by completely prohibiting development in or around them, but by requiring the acquisition of a permit prior to the proposed development activity. Section 404 establishes a procedure for regulating the discharge of dredged fill materials into waters of the United States. Furthermore, a variety of activities undertaken to convert wetlands into land suitable for farming and development fall within the scope of § 404. The intent of § 404 is to prevent alterations to wetlands when there is a practical alternative less damaging to the wetland, or when the proposed attraction will seriously impact the ecological function of the wetland.

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Congress delegated most of the authority to administer the CWA to the Environmental Protection Agency (EPA). The EPA developed a three step approach in evaluating applications for a § 404 permit: (1) the applicant must try to avoid adversely impacting the wetland; (2) the applicant must show that it tried to minimize any adverse impacts on the wetland; and (3) the applicant may be required to take steps to compensate for any unavoidable impacts to the wetland caused by the proposed project. While most of the authority to administer the CWA lies with the EPA, the Corps succeeded in obtaining primary authority in administering § 404 permits because of its past experience in managing similar activities. Consequently, Congress authorized the Corps to grant or deny § 404 permit applications, subject to EPA veto.



THE DECISION

The SWANCC decision involved a 533-acre parcel purchased by a consortium of 23 suburban cities and villages in the Chicago metro area. The parcel was the former site of a sand and gravel pit mining operation. The parcel was purchased as a disposal site for non-hazardous solid waste. When the parcel was abandoned in the 1960's, it grew into a forest with a scattering of ponds varying in size from under one-tenth of an acre to several acres, and varying in depth from several inches to several feet.

SWANCC had received numerous state and local permits, including a special use planned development permit from the Cook County Board of Appeals and a permit from the Illinois Department of Conservation. It had also secured the approval of the Illinois Environmental Protection Agency for the use of the parcel for solid waste disposal. As part of this permit process, SWANCC sought a § 404 permit from the Corps. The Corps initially concluded that it lacked jurisdiction over the site because it contained no wetlands. However, the Illinois Nature Preserves Commission subsequently informed the Corps that a number of migratory birds had been seen on the site. After an investigation, the Corps found approximately 121 bird species living at the site. As a result, the Corps determined that although the site did not qualify as a wetland under the CWA, it was "waters of the United States" under the MBR and therefore the Corps assumed jurisdiction over the project and denied the application for a § 404 permit.

SWANCC sued, raising statutory and constitutional issues. It argued that the MBR was beyond the scope of the phrase "waters of the United States" as used in the CWA, but if it was within its scope, the application of § 404 violated the Commerce Clause of the United States Constitution because it placed an unconstitutional burden on interstate commerce. The U.S. District Court and the United

States Court of Appeals for the Seventh Circuit both ruled in favor of the Corps. However, the United States Supreme Court ("Court") reversed those decisions and held in favor of SWANCC.



Chief Justice Rehnquist, writing for a 5-4 majority, struck down the Corps' assertion of jurisdiction and interpreted the phrase "waters of the United States" consistent with SWANCC's claim that Congress did not intend § 404 of the CWA to apply to isolated waters, such as those at issue, merely based upon their use by migratory birds. The Court further held that the MBR did not convey CWA jurisdiction over isolated, non-navigable, intrastate waters that are not a tributary of, or (in the case of wetlands) adjacent to navigable waters or tributaries. Because the Court rendered judgment on its statutory interpretation, the Court did not address the constitutional issue raised by SWANCC regarding the Commerce Clause.

Because of contradictory language in the opinion regarding the scope of the Court's holding, the true impact of the decision is yet to be determined. In January of 2001 the EPA and Corps issued a memorandum that set forth their legal interpretation of the SWANCC decision. While the memorandum acknowledges the Court created a new limitation on how and in what circumstances the EPA and Corps can assert regulatory authority under the CWA, the memorandum narrowly interprets the SWANCC decision as eliminating only the Corps' ability to assert jurisdiction over isolated, non-navigable, intrastate waters on the sole basis of the MBR, while leaving other reasons for jurisdiction over such waters intact and unaffected.

Lower federal court decisions subsequently interpreting the SWANCC decision have for the most part continued to broadly interpret the phrase "water of the United States" consistent with Court rulings prior to the SWANCC decision. Both Republican and Democratic members of Congress have sent letters to the executive branch requesting guidance on the proper interpretation of the SWANCC decision. Since the SWANCC decision was rendered, many groups have lobbied Congress and the EPA to obtain clarification of the extent of federal wetland regulation.

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CONCLUSION

For the first time in three decades of wetland regulation under the CWA, the Court restricted the authority of the Corps and the EPA to administer isolated wetlands. The full implication of the SWANCC decision will not be realized for some time. Whether it is a decision that will be narrowly confined to its facts or the beginning of a movement restricting the jurisdiction of the EPA and the Corps over isolated wetlands remains to be seen. Much of its impact depends upon how the Corps and the EPA continue to enforce their regulatory duties and how federal courts continue to interpret the meaning of "waters of the United States" in light of the SWANCC decision. In the interim, any landowner or developer dealing with water or wetland issues needs to stay informed of future trends in wetland regulation and litigation in order to properly comply with the CWA.

Ryan N. Boe



EMPLOYEE BACKGROUND CHECKS

Benefits Are Worth the Burdens

Employers are constantly searching for ways to prevent violence in the workplace. Employers often use background checks to verify resumes or determine whether a potential employee has a criminal history. The most common background checks include drug screening, criminal background checks, credit checks, reference checks, education and work history confirmation, license and credential verification, and employment gaps in resumes or applications. These checks can detect potential concerns, such as a history of violent behavior or theft. They can also help prevent an employer from being liable for negligent hiring should an employee become violent. If an employer conducted a thorough background check and found nothing indicating the applicant may pose a risk, the employer is less likely to be found negligent. When using background checks, the employer must be careful to avoid violating the Fair Credit Reporting Act and discriminatory practices.

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CRIMINAL RECORDS

Criminal background checks can pose difficulty. Nebraska law provides that an employer may only inquire about arrests that resulted in conviction. Furthermore, declining to hire an applicant based solely on convicted status could qualify as disparate impact discrimination under Title VII of the Civil Rights Act. The EEOC has indicated that an employer should "give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job." The important phrase to remember is *job-relatedness*. If the conviction is related to the job the applicant is seeking, it is legitimate grounds to deny employment. Denying employment based on convictions not job-related could be construed as disparate impact discrimination. Examples of job-related crimes include embezzlement and theft, as well as many violent crimes. Moving violations are usually not, unless of course, the job involves driving.

CONSUMER RECORDS

The FCRA requires employers to obtain written permission from the employee before acquiring consumer reporting information, including credit reports. This permission must be granted on a separate form from all other hiring documents. Before taking any action based on the reports, the employer must provide a copy to the employee, allowing the employee to contest potentially erroneous information. Should the employee choose not to respond, before the employer may take action based on the reports, the employer must provide the name, address, and telephone number of the consumer reporting agency used, and a notice of the employee's right to dispute the accuracy of the report's information. Although it may seem easier to base a decision on consumer report information and tell the employee the decision was based on other grounds,

it is unlawful and unwise. Should the rejected applicant bring a lawsuit, the employer may be required to state the true reason the applicant was rejected. If so, the employer will have a difficult time defending the lawsuit.

If an employer conducted a thorough background check and found nothing indicating the applicant may pose a risk, the employer is less likely to be found negligent.

DRUG SCREENING

Pre-employment drug screening is also regulated by the federal and state government. Public employers face the additional burden of screening within the Fourth Amendment's restriction against unreasonable searches and seizures. While drug screening may identify applicants who are likely to have increased absenteeism, diminished productivity, greater health costs, and increased potential liability to third parties, employers must respect the applicant's privacy interests. Nebraska does not provide guidelines for respecting privacy, although both the test and testing procedure must be reasonable.

However, if an employer decides to conduct background checks, the most important thing is to keep the checks consistent. Different positions are allowed to have different levels of information obtained, as some positions require more thorough checks than others, but all employees holding the same position should have the same background check. By following state and federal law, background checks are effective tools to use in the prevention and defense of crimes in the workplace.

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