



Endangered Species Committee Newsletter

Vol. 6, No. 2

January 2004

MESSAGE FROM THE CHAIR

James M. Stuhltrager
Mid-Atlantic Environmental Law Center

On behalf of the Endangered Species Committee, I want to thank you for continuing to be a member of our Committee. Whether you are a new member or a member of long standing, the Committee offers many opportunities for you to learn more about emerging and controversial endangered species issues. For example, in the past year, the Committee cosponsored programs with Lewis and Clark Law School and the Environmental Law Institute, hosted a teleconference on military exemptions to the ESA, and cosponsored a teleconference on the Missouri River litigation.

Our Committee will continue to be at the forefront of ESA issues. Some of the projects the Committee is working on for the upcoming year include: brownbag programs in Portland and Florida, a program for the 12th Section Fall Meeting in San Antonio, updating and improving the utility of our Web page, and providing service to the public. In addition, the Committee is taking a leading role in the Section-wide initiative to integrate sustainable development into our practices.

I encourage you to become actively involved in the Committee's activities. For more

information, please visit the Committee's Web page or feel free to contact me or any of the vice-chairs.

DISTRICT COURT ISSUES OPINION IN NO SURPRISES LITIGATION

Sean Skaggs
Ebbin Moser + Skaggs LLP

On Dec. 11, 2003, Judge Sullivan issued a long-awaited opinion in the Endangered Species Act "No Surprises" litigation, *Spirit of the Sage Council, et al. v. Norton*, 2003 WL 22927492 (D.D.C.). Prior to issuance of the decision, the court, in a one-page order dated Sept. 30, had indicated its intent to grant plaintiffs' motion for summary judgment in the case, but provided no additional information. Based on this order, it was expected that an opinion would be issued holding the No Surprises Rule legally invalid. The court chose, however, to dispose of the case without ruling on the merits of the challenge to the No Surprises Rule. Instead, the court remanded the rule to the Department of the Interior (DOI) without vacating it during the period of the remand. The remand is not based on a finding of specific deficiencies with the No Surprises Rule, but on findings concerning the validity of a related regulation,

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Sean Skaggs, Editor**

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Resources, American Bar Association,
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known as the Permit Revocation Rule (PRR), which establishes permit revocation criteria.

The PRR was proposed in 1997, and became a final regulation in June of 1999. The PRR is applicable to Incidental Take Permits (ITPs) issued for Habitat Conservation Plans (HCPs) and provides authority to the U.S. Fish and Wildlife Service to revoke an ITP if continuation of a permitted activity would jeopardize the continued existence of a species and DOI was unable to remedy the situation using the resources of the federal government. Upon issuing the final PRR, the government relied on the rule to defend the validity of the No Surprises Rule in the litigation. In response, plaintiffs amended their complaint to challenge the validity of the PRR in addition to the No Surprises Rule. Specifically, plaintiffs challenged the notice and comment procedures used during the promulgation of the PRR, alleging that the public notice was flawed and inconsistent with the Administrative Procedure Act (APA). Plaintiffs alleged that the 1997 proposed rule was vague, and failed to indicate that the permit revocation criteria would be substantially revised.

In a ruling that allowed the court to avoid the complex and difficult legal issues raised under the ESA, the court found that the rulemaking associated with the PRR violated the notice and comment procedural requirements of the APA. The government had attempted to portray the PRR as a “clarifying” amendment to existing regulations, but the court found that significant revisions to the permit revocation criteria constituted a legislative rule under the APA. The court further rejected the government’s contention that the PRR was a “logical outgrowth” of the proposed rule. Finally, the court determined that the decision by DOI to conduct further public comment on the PRR in 2000, while the rule remained in place, did not serve to cure the public notice deficiencies associated with the PRR. The

court held that the violation of the notice and comment procedures of the APA required that the PRR be vacated and remanded to the agency “to truly begin anew the APA mandated notice and comment procedures.” *Op.* at 19.

Noting the government’s reliance on the PRR in its defense of the No Surprises Rule, the court found that the No Surprises Rule and the PRR were “sufficiently intertwined” such that the No Surprises Rule should be remanded “for consideration as a whole with the PRR without further inquiry into its substantive validity.” *Id.* The court thus avoided the difficult issue of whether No Surprises assurances violate Section 7 of the ESA. Significantly, the court declined to grant plaintiffs’ request that the No Surprises Rule be vacated, and also declined to enjoin DOI from providing No Surprises assurances for HCPs in the permitting pipeline, as plaintiffs had requested.

The court’s ruling appears to maintain the status quo with respect to No Surprises while returning the issue to DOI for a new round of rulemaking that will consider both No Surprises assurances and permit revocation criteria together. It is unclear at this time how DOI will interpret the court’s decision to remand, but not vacate, the No Surprises Rule, as well as the court’s refusal to enjoin the use of No Surprises for pending HCP permits. It is expected, however, that DOI will likely proceed cautiously and continue to use No Surprises “disclaimer” language in its permits.

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**ENDANGERED SPECIES COMMITTEE
COSPONSORS PROGRAM WITH
ENVIRONMENTAL LAW INSTITUTE**

James M. Stuhltrager
Mid-Atlantic Environmental Law Center

On Sept. 25, 2003, the Endangered Species Committee cosponsored a program with the Environmental Law Institute entitled: Emerging Trends and Developments Under the Endangered Species Act. The program featured four outstanding speakers reflecting the breadth of interest in the ESA. John Turner, ELI vice-president of Publications and Environmental Law Reporter editor-in-chief, moderated the discussion.

The first panelist was Gary Frazer, who is assistant director for Endangered Species at the U.S. Fish and Wildlife Service (FWS). Mr. Frazer began his presentation with an optimistic report of a potential 30 percent increase in FWS funding levels for 2004. However, he indicated this funding would not significantly decrease the backlog of Section 4 listing decisions and critical habitat determinations. For example, Mr. Frazer related that by July 2003, FWS ran out of money to make critical habitat determinations, even for those decisions mandated by court order.

Mr. Frazer continued his presentation with an update on the current status of litigation. He gave an overview of the historical perspective of the litigation: from the early listing decisions to the cases seeking designation of critical habitat. He reported the current trend is to challenge the merits of critical habitat designations.

Finally, Mr. Frazer gave an update of regulatory actions by FWS. The agency is currently drafting policy and guidance on how to perform critical habitat designations. This guidance will include the integration of economic concerns.

**ENDANGERED SPECIES COMMITTEE
HOSTS TELECONFERENCE DISCUSSION
OF PROPOSED LEGISLATION TO EXEMPT
MILITARY LANDS FROM ESA CRITICAL
HABITAT DESIGNATIONS**

Michelle Diffenderfer
Lewis, Longman & Walker, P.A.

Mr. Frazer was followed by Larry Liebesman and Rafe Peterson of Holland & Knight (both are members of the Section's Endangered Species Committee). Mr. Liebesman provided an overview of recent legislative attempts to "tweak" the ESA, including the proposed exemption of certain Department of Defense activities (the subject of a June 2003 Endangered Species Committee teleconference) and proposed reforms to the listing/delisting process. Mr. Liebesman agreed with Mr. Frazer that critical habitat is now the lead issue in the ESA and that citizen suits, whether filed by environmental groups or landowners, are the driving force. Rafe Peterson focused on an emerging trend to impose the requirements of Section 7(a)(1) and 7(a)(2) on landowners through the Section 10 HCP process.

The final panelist was William Snape of Defenders of Wildlife (also a member of the Section's Endangered Species Committee). Mr. Snape discussed the Bush administration's response to the ESA. He identified both administrative and judicial attacks on the ESA. He discussed the administration's willingness to allow timber and oil industries to essentially "self-regulate" their compliance. He also discussed the administration's response to the manipulation of the Missouri River to the exclusion of endangered species and the abandonment of grizzly bear recovery plans. Finally, Mr. Snape described a more "insidious threat" to the ESA that has emerged in the form of the administration's legal strategy of abandoning well-established principals in its briefs and entering into "sweetheart" settlement deals with industry plaintiffs.

Approximately 40 people attended the two-hour program. A RealAudio recording of the program is available to ELI members on the ELI Web site (www.eli.org). The Endangered Species Committee is exploring the possibility of cosponsoring a similar program in 2004.

On June 17, 2003, the Endangered Species Committee presented a teleconference on the "Legislative Proposal to Amend ESA Critical Habitat Provision for Military Lands." The faculty included Michelle Diffenderfer, Lewis, Longman & Walker, P.A., West Palm Beach, as moderator; Craig D. Jensen, Lieutenant Colonel, U.S. Marine Corps, Associate Counsel for the Commandant, Environmental and Land Use, Washington, D.C.; John Kostyack, Senior Counsel, National Wildlife Federation, Washington D.C.; and Bart Semcer, Associate, Washington, D.C. Representative and Senior Wildlife Policy Expert, Sierra Club, Washington, D.C. A group of attendees participated in the discussion by way of questions by e-mail.

Mrs. Diffenderfer opened the program by introducing the speakers and giving an overview of the program's objectives which included: to provide ESA, natural resource and environmental practice attorneys with information on the proposed ESA amendment, and an analysis of the amendment from various perspectives including the Department of Defense (DOD) and the environmental community. An overview of the differences between the Senate and House bills was also given.

Lt. Col. Craig Jensen was the first panelist and he opened by discussing the need for the amendment to the Critical Habitat provision, explaining the impact that Critical Habitat designation was having on training and readiness for the military. Lt. Col. Jensen explained that although they had received Fish

and Wildlife Service's (FWS's) concurrence under other authorities, these actions were challenged by the environmental community as being illegal. Lt. Col. Jensen also summarized a few recent cases dealing with the issue whereby FWS past policy decisions had been held unlawful. He explained that he supported the House version of the bill at that time as it did not require the secretary of Interior to approve the critical habitat exemption in writing.

Bart Semcer followed Lt. Col. Jensen. Mr. Semcer believed that the legislation was premature and unnecessary. He explained his concern that the Integrated Natural Resource Management Plans (INRMP) that the military prepare for their lands would replace the Critical Habitat designations. Mr. Semcer also believed that in one of Lt. Col. Jensen's examples, Camp Pendleton, almost the entire area covered by the Critical Habitat designation was on non-training lands and on state park lands. Mr. Semcer was interested to hear Lt. Col. Jensen's thoughts on how the exemption should apply to such state or leased lands. Mr. Semcer also posited that the military avoids damage to sensitive areas even in combat so he could not understand why the same care could not be taken in readiness training. Mr. Semcer also discussed a General Accounting Office report on the issue which did not make it clear that there were conflicts regarding the Critical Habitat requirements and the military's needs.

John Kostyack concluded the presentation focusing on whether the legislation was necessary, what the impact on the species would be, and DOD's reputation as a steward of endangered species. Mr. Kostyack felt that there has been a long history of DOD working through these issues on a case by case basis that has been satisfactory, so why an exemption was needed at this point was unclear. Some debate followed regarding the Senate versus the House versions of the bills

and the lack of review by endangered species experts. Mr. Kostyack felt that to allow this exemption to go forward would enable DOD to disengage from what has been a position of being a careful steward of its lands and species. Lt. Col Jensen countered that DOD would continue to be a good steward pursuant to the INRMPs.

Editor's note: In late 2003 Congress passed H.R. 1588, the National Defense Authorization Act. Section 318 of the Act, entitled "Military Readiness and Conservation of Protected Species," provides an exemption from critical habitat designations for Department of Defense lands. Section 318 provides:

The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

LIKE TO WRITE?

The Endangered Species Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Sean Skaggs at 619/858-4707 or sskaggs@emsresourceslaw.com.

New from ABA Publishing and The Section of Environment, Energy, and Resources

Issues of Legal Ethics in the Practice of Environmental Law by Irma S. Russell

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



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The Clean Water Act Handbook, Second Edition

Mark A. Ryan, editor

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.

Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

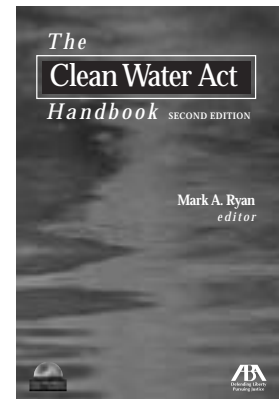
- NPDES permits
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Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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NEW DEFINITION OF “WATERS OF THE UNITED STATES” MAY LIMIT FEDERAL AGENCIES’ AUTHORITY UNDER THE CLEAN WATER ACT

Shawn Zovod
Ebbin Moser + Skaggs LLP

In the wake of the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001), the government began a new rulemaking to redefine “waters of the United States” in a manner consistent with the Court’s ruling. A draft proposed rule redefining “waters of the United States” under the federal Clean Water Act (CWA) was recently leaked to the public. The draft proposed rule’s redefinition could significantly limit federal jurisdiction under the CWA.

The Corps and the U.S. Environmental Protection Agency (EPA) began the process for redefining the regulatory definition of “waters of the United States” at the beginning of 2003. The agencies’ goal, as stated in an advance notice of proposed rulemaking (ANPRM) published in the *Federal Register* Jan. 15, 2003, was to “develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA.” The comment period for the ANPRM closed on April 16, 2003 and over 130,000 comments were received.

Clarification of CWA jurisdiction has been needed since SWANCC, which held that isolated, intrastate, non-navigable wetlands and other waters are not subject to federal regulation under the CWA where the sole basis for regulation is the use of such wetlands and waters by migratory birds (the so-called “migratory bird rule”). While the

SWANCC decision involved only Section 404 of the CWA (dredged and fill material permit program), the rulemaking to redefine “waters of the United States” could significantly alter federal agencies’ jurisdiction over the water quality standards program (Section 303), the state water-quality certification program (Section 401), the National Pollutant Discharge Elimination System permitting program (Section 402) and the spill program (Section 311 and the Oil Pollution Act). A consequence of the proposed rule also would be a reduction in Section 7 consultations under the Endangered Species Act (ESA) for activities such as wetlands fill. Section 7 requires the U.S. Army Corps of Engineers (Corps) to consult with the U.S. Fish and Wildlife Service before it issues any permit which “may affect” a listed species or critical habitat. 50 C.F.R. 402.14(a). The consultation process applies only to federal agencies, or actions by private parties that require federal agency permits, approval, or funding. 16 U.S.C. §1536(b). Section 7 does not apply to private actions that do not require any federal permits, and a reduction in Corps jurisdiction over certain wetlands could mean less ESA review.

Under the draft proposed rule, federal jurisdiction based on 33 C.F.R. 328.3(a)(3)(i)-(iii) would be eliminated. Currently, under this regulation, intrastate lakes, rivers, streams, wetlands, natural ponds and similar types of waters the use, degradation or destruction of which could affect interstate or foreign commerce are defined as “waters of the United States.” This definition includes waters that “could be” used by interstate or foreign travelers for recreational purposes, fished for sale in interstate or foreign commerce, or used for industrial purposes by industries that engage in interstate commerce. Under the current definition, these waters are not required to be hydrologically connected to a traditional navigable water. Under the draft proposed rule, only the territorial seas,

traditional navigable waters, tributaries to traditional navigable waters, and adjacent wetlands that are hydrologically connected to these waters by a regular and continuous flow of surface waters would fall within the definition of “waters of the United States.” Thus, waters that were regulated solely on the basis of their connection to interstate or foreign commerce would no longer be regulated under the CWA.

The draft proposed rule also would substantially reduce federal jurisdiction over interstate waters, including interstate wetlands. Currently, 33 C.F.R. 328.3(a)(2) defines all interstate waters, including interstate wetlands, as “waters of the United States.” The draft proposed rule does not address interstate waters, but those waters which do not have a substantial hydrological connection to traditional navigable waters likely would not be regulated under the new definition.

The emphasis in the draft proposed rule is on the waters’ connection to traditional navigable waters. Without a substantial connection, the water is unlikely to meet the proposed rule’s new definition. The draft proposed rule states that there must be a “regular and continuous flow of surface waters” between wetlands and adjacent waters, and tributaries must contribute a “regular and recurrent flow” to traditional navigable waters. “Ephemeral washes or streams” and other discrete flows that do not have groundwater as a source would not be eligible for regulation under the new definition. Likewise, streams that flow for less than six months a year or are not supplied by ground water, also would not be covered.

Recent courts that have addressed the issue since *SWANCC*, including the generally conservative 4th Circuit Court of Appeals, have interpreted the holding in *SWANCC* narrowly. In *United States v. Deaton*, 332 F.3d

698 (4th Cir. 2003), the Corps claimed authority to regulate a wetland and roadside ditch that, after flowing through a series of manmade and natural waterways, reached the Chesapeake Bay. The *Deaton* court upheld the Corps’ exercise of jurisdiction over all of these waterways, and found that “the Corps’ regulatory interpretation of the term ‘waters of the United States’ as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress’s power or alter the federal-state framework.” *Id.* at 708. The court accepted the Corps’ definition of tributaries as encompassing “the entire tributary system,” including roadside ditches. *Id.* at 710. Relying on *Deaton*, the 4th Circuit rejected another challenge to the Corps’ regulatory interpretation in *Treacy v. Newdunn Associates*, 344 F.3d 407 (4th Cir. 2003). *Newdunn* rejected the argument that *SWANCC* limited the federal government’s jurisdiction to wetlands that are adjacent to navigable-in-fact waters. In *Newdunn*, water flowed intermittently from wetlands on Newdunn’s property through a series of natural and manmade waterways before flowing into traditional navigable waters.

Deaton and *Newdunn* both interpreted *SWANCC* as only eliminating the Corps’ jurisdiction over waters that had no connection to traditional navigable waters and where the basis for jurisdiction was based solely on the Commerce Clause. Unlike the draft proposed rule, neither of these cases found any reason under *SWANCC* to change the Corps’ long-standing interpretation of “tributaries” or “adjacent wetlands” or to limit the government’s jurisdiction over such waters.

It will likely be several months before a proposed rule is officially published and the public is given a chance to comment. Although the draft proposal was leaked prior to receiving administration approval and publication in the Federal Register, it nonetheless represents a good first indication of the direction this administration wants to

take in redefining “waters of the United States.”

Editor’s note: On Dec. 16, 2003, the Environmental Protection Agency and the Corps announced that they would not promulgate a new regulatory definition after all, stating that “after soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government’s authority to protect our wetlands.”

ESA SECTION 9 CLAIM TO FORCE EROSION CONTROL ON FIRE ISLAND DISMISSED FOR LACK OF STANDING

Michael L. Pisauro
Frascella, Salak & Pisauro, LLC.
Regional Reporter, Northeast Region

The Second Circuit Court of Appeals recently affirmed dismissal of a complaint seeking to force the Department of the Interior (DOI) to implement an erosion control plan on Fire Island that would allegedly protect piping plover habitat. *New York Coastal Partnership, Inc. v. U.S. Dept. of the Interior*, 341 F.3d 112 (2nd Cir. 2003). The Atlantic Coast population of the piping plover is federally listed as a threatened species. Plaintiff alleged, in part, that failure to implement an interim erosion control plan resulted in the continuing destruction of the piping plover’s habitat in violation of Section 9 of the Endangered Species Act (ESA). The interim erosion control plan was developed by DOI and the U.S. Army Corps of Engineers to address the ongoing erosion of Fire Island pending the development of a final plan. Due to the cost of the plan and the state of New York’s failure to endorse it, the interim plan had not been implemented, prompting plaintiff to file suit.

The Second Circuit reiterated the basic principles of standing, namely that to have

standing a party must show an injury in fact, a causal connection between the plaintiff’s injury and the defendant’s action, and lastly, that a favorable decision by the court will likely redress the injury. The Second Circuit indicated that while government inaction could be the basis for a violation of the ESA, the plaintiff must first show that the government has a duty to act. The plaintiff had failed to show that a duty existed in this case. The Second Circuit also found that the plaintiff had failed to prove that the interim plan, if implemented, would prevent the destruction of the piping plover’s habitat, thus failing to establish redressability. Lastly the court noted that even if the interim plan were successful, it would be short-lived and replaced with another plan that would have unknown chances of successfully addressing the destruction of the plover’s habitat.

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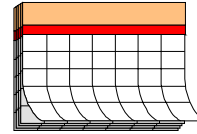
**Sean Skaggs
Ebbin Moser + Skaggs LLP**

In *National Ass'n of Home Builders v. Norton*, 2003 WL 23157770 (D.D.C.), plaintiffs asked the court to stop the Fish and Wildlife Service (FWS) from prescribing the use of a standard survey protocol to determine whether the quino checkerspot butterfly (quino) is present or absent in a particular area. Plaintiffs argued that FWS had not followed the notice and comment procedures of the Administrative Procedure Act (APA) when publishing the survey protocol. Defendants argued that the survey protocol did not constitute "agency action" under the APA and that the plaintiffs lacked standing. Specifically, defendants argued that FWS only provided advice in its survey protocol pursuant to its authority to enforce Section 9 of the Endangered Species Act (ESA) and that the survey protocol had not crossed the line between advising and directing landowners.

The court agreed with defendants that the survey protocol did not alter the legal regime affecting landowners and that the liability of landowners for violations of Section 9 is derived from the ESA and the implementing regulations, and not from the survey protocol. As a result, the court determined that the survey protocol did not constitute "final agency action" and was therefore not subject to judicial review under the APA. The court also found that plaintiffs had failed to establish standing because they had not established a causal link between the alleged injury and the complained of FWS conduct.

**AMERICAN BAR ASSOCIATION
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Best Seller from ABA Publishing and The Section of Environment, Energy, and Resources

Endangered Species Act: Law, Policy, and Perspectives **Donald C. Baur and Wm. Robert Irvin, editors**

Focusing on what may be the most ambitious, stringent, comprehensive, and controversial of all the landmark environmental laws, "Endangered Species Act: Law, Policy, and Perspectives" provides practitioners with a comprehensive guide to current legal practice in this area. Thirty-two experts representing a variety of perspectives contribute chapters to this comprehensive and thoughtful guide.

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