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Practice Development Workshop, Practicing Public Interest Environmental Law in the Private Sector by:

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I. OVERVIEW OF ENVIRONMENTAL LAW PRACTICE

There are many types of environmental law practices, including: toxics and pollution laws (RCRA, Superfund, Clean Air Act, Clean Water Act, and related state laws, such as Proposition 65 in California, and the California Clean Air Act, state water laws and the state Waste Management Act.); natural resources management (Endangered Species Act, forest practices laws, and a variety of state and federal laws for management of particular resources, such as the California coast, Lake Tahoe, etc.); land use law, focusing on local land use decisions; and environmental review laws, including the National Environmental Policy Act and the California Environmental Quality Act, that intersect with most other areas of practice.

There are many ways to practice environmental law, including: private firms advising or defending businesses and developers; in-house counsel; government attorneys advising and defending agencies; attorneys working in regulatory and legislative forums for clients with a wide range of perspectives; civil and criminal prosecutors; attorneys with environmental groups; and attorneys in private practice doing what is considered by many to be public interest environmental work seeking to enforce existing laws.

II. EVOLUTION OF ENVIRONMENTAL LAW PRACTICES

Modern federal environmental law began with the passage of the Clean Water Act of 1967, the National Environmental Act of 1969, and the Clean Air Act of 1970, followed by many state “little NEPAs”. As actions began to enforce these laws, and

Superfund and other laws dealing with toxics were enacted, a great deal of legal work was generated and firms began establishing environmental law departments.

By the early 1990's, this was the "hot" area of law. Since then, many legal issues have been resolved, many Superfund sites cleaned up, and few new laws have been enacted on a federal level. Some states, such as California, have continued to refine and advance an environmental agenda with new laws such as California's recent legislation related to global warming, Assembly Bill 32. As a result, on a national level there has been attrition in the size of many environmental departments, but individual states vary. The extent of work relating to land use laws is partially tied to economic growth, but there is constant growth in residential, industrial, and commercial developments, as well as infrastructure projects, that may result in litigation.

As development extends into rural areas, wetlands, wildlands, and recreational areas (present or potential), there are more concerns about impacts and consequently more litigation. Many development proposals are opposed because of the damage they will cause to particular local resources. In a public interest oriented environmental law practice, it is very important to maintain associations with broadly based environmental groups for referrals and cases. As in all practices, many referrals are from former opposing counsels.

As a result of many environmental legal challenges, irreplaceable resources are protected, but no damages are sought or awarded. Therefore, it is a challenge for non-profits and community groups to fund public interest litigation to protect the environment. Private attorney general actions, or reliance on statutes that provide for attorneys' fees, is possible. At the federal level, statutes such as the Clean Water Act and the Endangered Species Act provide for private enforcement, with statutory fee provisions. Where such fees are not provided, as under the National Environmental Policy Act, fees are awardable pursuant to statutes such as the Equal Access to Justice Act. States vary in their recognition of the private attorney general doctrine.

California has a strong statute encouraging private attorneys general through its Code of Civil Procedure section 1021.5. Under this statute, California courts may award attorneys' fees to a victorious litigant in an action if certain criteria are met. The statute requires that a significant benefit was conveyed on the general public or a large class, that the litigant incurred fees out of proportion to its own personal stake in the action, and that private enforcement was necessary. California appellate courts have interpreted a trial court's discretion not to award fees where the section 1021.5 criteria are met as being very narrow. Unlike under some federal laws, the California Supreme Court has ruled that fees may be awarded even when the action was the catalyst for a benefit, though the party was not prevailing in the classic sense.

In California, most private sector public interest oriented law offices are quite

small. Income flow can be very erratic when large proportions of a law firm's income are based upon fee awards, which are inherently uncertain because of their award through the adversarial judicial process. Sometimes it is possible to charge reduced rates or place caps on fees for clients with limited financial resources. Representing governmental agencies in opposing projects, or having those with an economic interest fund the litigation can improve the financial picture, but such representation often has narrower objectives than other public interest litigation. Finally, by co-counseling with like-minded counsel, a firm can share the risk of bringing important environmental litigation.