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Jurisdiction for Citizens to Enforce Against Violations of the Clean Water Act

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FIRST ANNUAL PACE NATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

Jurisdiction for Citizens to Enforce Against Violations of the Clean Water Act

The First Annual Pace National Environmental Moot Court Competition was a splendid event. The students, faculty and administration of Pace were proud to host it. The Competition differs in many ways from other competitions. First, it features a field of law that has only recently become a major focus of legal practice. It is appropriate that Pace, a young law school, sponsor a competition in a new field of law. Second, the Competition's arguments are between three teams (government, industry and environmental advocates) rather than the traditional two. This is appropriate to the many sided nature of environmental disputes. Third, the Competition is an event. It is accompanied by a rich array of workshops on environmental topics. Thus, it is of educational benefit for many beyond the actual competitors. Fourth, the Competition and workshops are a joint effort by three student organizations, the Moot Court Board, the Pace Environmental Law Review (PELR), and the Environmental Law Society. Thus, a broad spectrum of the school's students are participants and sponsors.

The Competition was conceived when Mary Stockel, a member of the 1988 graduating class and Managing Editor of PELR, attended a national meeting of environmental law societies at Oregon Law School. She discovered a need that was not being met and suggested it to the Moot Court Board on her return. The idea was embraced by Board member Laura Hurwitz, a member of the 1989 graduating class, whose energy and perseverance in turning a good idea into an even better

reality left many of us in awe. When Laura became ill, just before the competition took place, her second, Moot Court Board member David Varoli, also a member of the 1989 graduating class, assumed management of the event. In addition to the management of the competition by the Board, PELR wrote the judges' memorandum of law and the Environmental Law Society organized the workshops. All three provided the people necessary for the logistics of the event, from housing visiting teams to acting as bailiffs in the many moot courts.

Support from bench and bar was impressive. Chief Judge Oakes of the Second Circuit Court of Appeals was Chief Judge in the final round of the competition. Sitting judges and environmental practitioners from as far away as Washington, D.C. were judges in the preliminary rounds, graded briefs and spoke at the many workshops. Dr. Noel Brown, Director of the United Nations Environmental Program's New York Office, gave an impassioned banquet speech on the role of environmental law on the future of the world and the human race. Law firms with major environmental practices in the New York area made contributions to help defray the cost of the event.

Thirty-three teams from twenty-two schools participated in the first Competition. Published here are the best appellant, appellee and intervenor briefs. Best appellant brief was awarded to Hastings College of Law, represented by Christiane Hayashi and Ann J. Reavis. The best appellee brief was awarded to Arizona State University College of Law, represented by David I. Goldberg, John R. Mayo and Michael P. Running, Jr. The best intervenor brief was awarded to the second team from Arizona State University, represented by Michael Burke, Myron Scott and Laurie Stewart. The Competition was won by Arizona State University College of Law, represented by David I. Goldberg, John R. Mayo and Michael P. Running, Jr. Second place was captured by the University of Kansas School of Law, represented by M.J. Willoughby, Phyllis L. Savage and Linda Guinn. Linda Guinn was awarded best oralist.

The success of the Competition is best evidenced by the fact that sixty teams from forty five schools are registered for

the Second Competition, to be held in February of 1990.

The problem for the first Competition presented issues typically arising from citizen enforcement of environmental statutes. Most federal environmental statutes and some comparable state statutes provide for enforcement by private citizens as well as by the government. Citizen enforcement raises several unique legal issues, including the extent of the courts' jurisdiction to hear such cases. The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), held that the Clean Water Act confers jurisdiction only when plaintiffs make a good faith allegation that the complained of violations were continuing or intermittent. The Act confers no jurisdiction for private citizens to maintain enforcement actions for wholly past violations. The Court reached this conclusion based both on the verbal tenses used in the citizen suit section of the Act and its interpretation of the legislative intent, which the court found focused citizen enforcement on abatement of prospective violations. The issue addressed during the competition is one that arises under most federal environmental statutes; the Court's opinion in *Gwaltney* will be precedent for cases arising under them as well as under the Clean Water Act.

The Court's opinion in *Gwaltney* leaves many unanswered jurisdictional questions on what constitutes a good faith allegation, what constitutes continuing or intermittent violations, and on when cases may become moot. The first Competition problem posed a set of issues relating to whether jurisdiction exists to enforce against different types of Clean Water Act permit violations. These issues are typical of those being addressed by trial and appellate courts in the wake of *Gwaltney*.

The problem also posed the issue of whether violations of a permit limitation may be enforced when the limitation is being appealed by the permittee and whether the limitation's validity can be challenged by the permittee in an enforcement proceeding. The limitation at issue was included in a federally issued permit on the sole basis of a "certification" by the state, which provided no opportunity to comment on or appeal the condition. This raised a host of administrative law

and federalism questions typical of environmental practice.

The competitors did an admirable job in deciphering the Act, analyzing the issues and arguing their positions.

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* Professor of Law, Pace University School of Law. Professor Miller received his A.B. from Princeton University and his LL.B from Harvard University. Professor Miller has extensive experience in the practice of environmental law, including litigation, negotiation, and consultation for both public and private clients. During his ten years with the Environmental Protection Agency (EPA), Professor Miller started as an enforcement official, headed EPA's water pollution permitting and enforcement program, started its hazardous waste enforcement program and later directed its entire enforcement efforts. Professor Miller is currently Secretary/Treasurer of the Environmental Law Institute. Professor Miller is the author of many works on environmental law.