

I. (70 min.)

Permits:

- CAA -- permit required for stack emissions
 - attainment area
 - national ambient air quality standards [NAAQS]
 - national performance standards
- CWA § 402 NPDES -- point source discharge permit for boiler water discharge
 - jurisdictional waters: “waters of the US” (not “navigable waters of the US”)
 - “point source”, “pollutant”
 - effluent limitations
 - best available control technology
- CWA § 404 wetlands -- permit for filling
 - jurisdictional wetlands: adjacent to “waters of the US”, above
 - saturated or inundated for 21 continuous days per year
- CWA stormwater -- permit for industrial drainage - drainage from coal pile
 - treatment required
- *bonus*: R&H § 10 navigation obstruction permit -- permits for floating pier & bank notch, for transmission cables over river
 - jurisdictional waters: “navigable waters of the US” [*Appalachian* 3-part test]
 - Missouri River is navigable
- RCRA hazardous waste
 - fly ash is a toxic waste
 - is generator; must prepare manifest; can use only licensed transporter
 - disposal site must be licensed facility

Studies:

- NEPA — EA & EIS
 - “major federal action significantly affecting the ... environment”
 - triggered by CAA, NPDES, RCRA, § 10 and § 404 permits
 - all environmental consequences must be discussed
 - § 102 requirements, inc. no construction alternative
 - other sites and other power sources must be analyzed
 - factual issues:
 - effect on wetlands & migratory birds
 - effect on floods
 - micro-weather effects
 - potential fly ash problem
 - ESA — BO & BA required
 - federal agency cannot take action jeopardizing endangered species or habitat
- (§7)
- private entity cannot “harm” endangered species (§9)
 - “harm” apparently includes destruction of critical habitat

- triggered by presence of Trumpeter Swam & eagles
- must make determination whether swamp is a critical habitat
 - inc. do eagles use swamp as food source?

Other:

- SO₂ power plant emission allowances must be purchased
 - existing plants are granted emission allowances
 - total allowances nationwide fixed; total will be reduced in 2000
 - excess allowances created by closing or upgrading older plants may be sold
 - new plant (post-1996) must acquire such emission allowances in order to operate

II. (40 min.)

theories:

private nuisance?

- yes! unreasonable interference with use & enjoyment of neighbor's land?
- physical damage to Les Bourgeois's land and various owners' cars is unreasonable interference

public nuisance?

- probably. unreasonable interference with public health, safety & welfare?
 - physical damage to cars owned by enough members of public to constitute unreasonable interference with public welfare
- private plaintiff can use theory only if suffering special damage
 - different in kind from that suffered by public at large
- landowners suffer damage greater than public at large [carowners]
- but can carowners also sue? Do they have special damage? No!

negligence?

- activity conducted in unreasonable manner?
 - multiple episodes of activity which frequently damages neighboring property is unreasonable, where the technology should not fail so often
- proximate cause exists (question so states)

trespass?

- physical intrusion required (violation of landowner's right to exclude others)
- particulates are a physical intrusion on Les Bourgeois's land without consent

defenses:

comparative convenience doctrine?

- perhaps. discuss balancing of the equities.

compliance with permits?

- no! private rights & remedies expressly are supplemental under citizen suit provisions of CAA

is existence of public nuisance-type damages a bar to a private nuisance suit?

- no! they are separate causes of action.

remedies:

damages?

- car paint damage
 - grape vine damage
 - loss of profit from grape harvest; added expense of buying grapes elsewhere
- injunction?
- is this a continuing nuisance?
 - comparative convenience is relevant?
- bonus:* CERCLA cleanup indemnification?

III. (20 min.)

citizen suit is basis for suit

- in CAA
- standing:
 - envt'l organization cannot sue in own name alone
 - plaintiff must be adversely affected or aggrieved
 - were members' cars damaged; would they be damaged in future?
- prerequisites:
 - 60 days notice
 - no affirmative enforcement lawsuit (or settlement of suit) by EPA or state
 - agencies here declined to act
- *Gwaltney* limitation:
 - cannot sue for past violations alone; there must be present or potential future violations
 - does fact of 5 violations in one year suggest the possibility of future violations

IV. (20 min.)

ESA § 9 prohibits actions which “take” or “harm” listed species.

- peregrin falcon is a listed species
 - “take” includes capture
 - “harm” includes affecting essential biological functions, including breeding
 - § 9 applies to non-federal government entities
 - exposure to residual SO₂ in the stack emission could “harm” the falcon or its young
 - the order has statutory authority
 - government has authority under ESA to issue order
 - issuing the order may constitute a regulatory taking, *see* below
 - moving the falcon & nest, especially if it causes death of the eggs, violates § 9
- taking:* shutdown of a portion of the plant, even temporarily, may be a regulatory taking
- *Lucas*
 - regulatory taking: denial of most or all economic uses of land
 - temporary takings are compensable
 - shutdown of 1/3rd of plant is a denial of economic use

V. (30 min.)

- (1) harm [ESA: “harass...”]
- (2) prevention of significant deterioration [CAA clean air area regulatory program]
- (3) Montreal Protocol [CFC ban to protect stratospheric ozone layer]
- (4) potential responsible parties [CERCLA liability]
- (5) adversely affected or aggrieved person [APA & citizen suit standing]
- (6) major federal action [NEPA EIS trigger]
- (7) waters of the United States [CWA jurisdictional waters]
- (8) state implementation plan [CAA]
- (9) best available control technology [CWA]
- (10) national priority list [CERCLA cleanup site list]