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 that 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:
    - env’tl 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]