Environment, Natural Resources and Land Use

By J. William Futrell*

During the survey period, the major action was in the legislature which addressed a number of important environmental problems, most significantly those of water resource allocation and procedures for safeguarding drinking water supplies. In the judicial sphere, the year's most significant decisions were *Guhl v. Holcomb Bridge Corp.*,[1] which supplemented last year's zoning classic *Barrett v. Hamby*,[2] and a string of lower court cases which placed procedural difficulties in the way of resource enforcement agencies.

I. State Enforcement Activity

State enforcement activities were primarily centered on administrative enforcement of the air and water pollution laws. The state's main enforcement agency, the Department of Natural Resources (hereinafter DNR), lost a series of important cases. The department's enforcement activities flared into public attention in March 1977 when American Cyanamid Company contested the state's authority to impose a $321,000 pollution fine against its Savannah River plant. A DNR hearing officer had levied the fine in 1976 but was reversed by a five person administrative review committee. The full Board of the Department of Natural Resources then voted to review the committee's decision only to have the Fulton County Superior Court enjoin the hearing.[3] The company argued that the state's administrative pollution control machinery allowed only a two-step process: a hearing before a hearing officer and then an appeal to a review committee, with administrative jurisdiction in the case being exhausted after the decision by the review committee. The superior court held for the defendant on the ground that the administrative review process had continued beyond the thirty day period[4] for decision allowed by the Georgia

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1. 238 Ga. 322, 232 S.E.2d 830 (1977).

2. 235 Ga. 262, 219 S.E.2d 399 (1975).

3. American Cyanamid v. Department of Natural Resources No. C-28278 (Fulton County Superior Court March 28, 1977; Notice of Appeal filed April 25, 1977).

4. Ga. Code Ann. §3A-120(b) (Supp. 1977).

Administrative Procedure Act. The case is now on appeal to the Georgia Supreme Court and is slated for argument in September 1977.

DNR's Game and Fish Department received a setback in *Van Howell v. State*,[5] when the Georgia Supreme Court held that the statute delegating the power to the Department to make hunting regulations punishable as misdemeanors was an unconstitutional and unlawful delegation of legislative authority. The court held that, "a statute will be held unconstitutional as an improper delegation of legislative power if it is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law, because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid."[6] The code provision, which was held unconstitutional, stated that, "any person or corporation who shall violate any of the rules or regulations promulgated by the commission shall be guilty of a misdemeanor and upon conviction shall be punished as provided by law."[7] The court split four to three, with Justice Hill writing in dissent:

> While I do not subscribe to uncontrolled bureaucratic law-making authority, neither do I subscribe to the concept that the General Assembly is the only body capable of setting hunting and fishing seasons for various species of animals depending upon their population, fixing bag and creel limits, regulating hunting and fishing methods and utensils, etc. In my view the General Assembly should not be saddled with determining the squirrel limit and season in each county, district or zone in this state annually. In my view the General Assembly should be able to delegate such responsibility to the Board of Commissioners of the Department of Natural Resources which has available the recommendations of the department's game management specialist and field personnel. . . . Our sportsmen and ecologists deserve better. Neither the wildlife in this state nor the legislative logjam will be efficiently managed under such a system.[8]

In *Department of Natural Resources v. Keating*,[9] the Georgia Supreme Court passed upon the DNR's seizure and confiscation of contraband shrimp. In *Keating*, the department's authority rested on a statute making it a misdemeanor to shrimp in closed waters. The question was whether the state was entitled to all the proceeds from the sale of shrimp seized aboard a commercial shrimp boat found fishing in closed waters or only to the proceeds from the shrimp actually caught in the off limits area. The state contended that it was entitled to the entire catch and that holding otherwise would place an unduly heavy burden of proof on enforcement personnel. The shrimper contended that only the shrimp in the net when

5. 238 Ga. 95, 230 S.E.2d 853 (1976).
6. 238 Ga. at 95, 230 S.E.2d at 854 (citation omitted).
7. GA. CODE ANN. §45-116 (1974).
8. 238 Ga. at 96-97, 230 S.E.2d at 854.
9. 238 Ga. 605, 234 S.E.2d 519 (1977).

he was apprehended should be subject to forfeiture and that he could rightfully claim the proceeds from the rest of the cargo on the assumption that it had been caught legally. The supreme court held that the state was entitled to the proceeds from only the illegally caught shrimp and not to proceeds from any shrimp on board which may have been legally caught in open waters. However, the court put the burden on the shrimper to show which, if any, of the shrimp were legally caught. While the burden is on the shrimper, nevertheless, in future cases DNR personnel can no longer rest on easy presumptions and poaching shrimpers have a smaller exposure to meaningful fines.

The Georgia Department of Transportation fared better in *Turner Communications Corp. v. Georgia Department of Transportation,*[10] and in *Department of Transportation v. Spells Sign Co.,*[11] when the Georgia Court of Appeals upheld the department's discretion in enforcement of the outdoor advertising act.[12] The judicial recognition of the validity of the act is a marked change in the court's attitude from the decade of judicial harassment directed at this enforcement activity.

II. Private Lawsuits to Control Pollution

Despite the concern over the state's administrative powers, courts upheld the rights of private parties in a variety of suits to enjoin or curb pollution activities.

In *Pollock v. Georgia Power Co.,*[13] the Georgia Court of Appeals affirmed judgments in favor of pecan growers against Georgia Power for damages to their crops between 1971 and 1974 caused by sulfur dioxide emissions from the company's Plant Mitchell facility. The farmers alleged that the generating plant could have used coal with a lower sulfur content than that burned at the facility or that the emission stack could have been raised in order to more efficiently disperse the pollutants. Georgia Power contended that it had not been negligent in the operation or construction of Plant Mitchell and that the evidence did not show an ability to burn low sulfur coal at the plant. The court affirmed the jury verdict finding negligence on the part of Georgia Power. The case is significant because of its evidentiary standards.

In a challenge to jurisdiction under the Georgia Long-Arm Statute,[13.1] the court of appeals in *Value Engineering Co. v. Gisell,*[14] held that an airline passenger exposed to contamination due to leakage from radioactive material in the cargo section had a cause of action against Delta

10. 139 Ga. App. 436, 228 S.E.2d 399 (1976).
11. 141 Ga. App. 350, 233 S.E.2d 435 (1977).
12. Ga. Code Ann. §§92A-913 to -934 (1976 & Supp. 1977).
13. 141 Ga. App.678, 234 S.E.2d 107 (1977).
13.1 Ga. Code Ann. § 24-113.1 (1971).
14. 140 Ga. App. 44, 230 S.E.2d 29 (1976).

Airlines, the carrier, and Value Engineering Company, the shipper. This law suit is one of the first to seek damages from exposure resulting from the common practice of shipping radioactive materials on commercial passenger airlines. The practice has been the subject of extensive criticism in the environmentalist press.[15]

In *Herrington v. Liberty Mutual Insurance Co.*,[16] the Georgia Court of Appeals denied workman's compensation despite a claim based on an occupational work place disease. The plaintiff, a senior employee in the unnamed industry, suffered from an allergy traced to chemical fumes in the area where she worked. She was transferred to the company's cafeteria and worked there for four years before being laid off because of an economic slow-down. The plaintiff alleged that she would not have been laid off if she could have been returned to the line and that her dismissal was thus work related. The court of appeals held that the disability was not compensable under the Georgia statute since the plaintiff in her present employment no longer suffered the allergic reaction. The fact that a return to her long time former job would cause a remission of symptoms did not give her a claim since the court perceived the plaintiff's disease as a congenital handicap. The court's opinion raises the question, without discussion of the merits, of the susceptibility of various segments of the population to different environmental diseases. As environmental factors cause greater incidences of diseases such as cancer and emphysema, the problem of the marginally susceptible victim will become a more troublesome one.[17]

In *Lexington Insurance Co. v. Ryder System, Inc.*,[18] the Georgia Court of Appeals held against an insurance company which sought to avoid payment for clean-up of oil spill damage. Ryder successfully sought recovery for lost oil which leaked out of underground tanks at the insured's place of business. The insurance company contested a claim for the clean-up costs based on the debris removal clause, arguing that the waste oil was not debris. The court, rejecting that argument, held the company liable. This holding reinforces the network of pollution control. If regulations, economic incentives, and insurance provisions all combine to work against pollution then the chances of such accidents reoccuring decrease. Insurance companies which are liable for oil spills are more likely to make efficient control systems a prerequisite for insurance of operating companies.

III. LAND USE

The most important case from the Georgia Supreme Court in the land

15. *See, e.g.*, Klarman and Luszczynski, *Radioactivity in Aircraft*, 15 ENVIRONMENT 39 (June, 1973).

16. 140 Ga. App. 319, 231 S.E.2d 99 (1976).

17. *See How Much is Health Worth*, BUSINESS WEEK 36 (Nov. 3, 1973).

18. 142 Ga. App. 36, 234 S.E.2d 839 (1977).

use area was *Guhl v. Holcomb Bridge Corp.*,[19] in which the court voided the county's refusal to rezone farm land from single family residential to office institutional. The case was remanded to the county for rezoning since the trial court did not have the power to rezone property. The significance of the case arises from its reenforcement and further explanation of the standards of *Barrett v. Hamby*.[20] The Georgia Supreme Court reiterated the *Barrett* principle that zoning is a matter of balancing but went on to list the general lines of inquiry which would be considered as relevant:

> "(1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property."[21]

In the *Guhl* case, the property was zoned single family residential in 1956, principally as a holding classification until development trends emerged. In 1956, the land had been open fields but in the intervening years development had occurred on all sides so that the neighboring property was zoned as office institutional and contained numerous commercial structures including a ten story office building, a 70 acre shopping center, and a 15 story hotel. Real estate value had zoomed to $40,000 per acre making the plaintiff's property neither reasonably nor economically suited for single family residences. The county attempted to justify its refusal to rezone on the negative impact of increased traffic in the area. This balancing against the property owner was held to be invalid by both the trial court and the supreme court. However, it was necessary for the supreme court to remand the case because the lower court, instead of sending the case back to the zoning authority for decision, had directly ordered a permit to develop the property for office institutional use.

Similarly, in *City of Atlanta v. McLennan*,[22] the Georgia Supreme Court voided an ordinance barring construction of a shopping center but reversed the lower court in part because it had ordered issuance of a building permit when it should have remanded the matter to the local governing authority for rezoning. These cases make it clear that courts must give the governing authority a reasonable time to rezone property to a constitutional land use classification.

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19. 238 Ga. 322, 232 S.E.2d 830 (1977).

20. 235 Ga. 262, 219 S.E.2d 399 (1975).

21. 238 Ga. at 323-24, 232 S.E.2d at 832, *quoting from* La Salle Nat'l Bank v. County of Cook, 60 Ill. App. 2d 39, 51, 208 N.E.2d 430, 436 (1965).

22. 237 Ga. 25, 226 S.E.2d 732 (1976).

In *Guhl v. Par-3 Golf Club, Inc.*,[23] the Georgia Supreme Court upheld the DeKalb County Board of Commissioner's refusal to rezone the plaintiff's property. Par-3 Golf Club, Inc., owned a motel with adjoining open space which had been used as a golf course. However, some years prior to the suit this land had been flooded by waters from the increased run-off resulting from additional construction in the area. The property owner left the three acres in the flood plain vacant after abandoning the golf course. However, he later sought to develop an automobile race-way and grandstand on the same acres. The plaintiff testified that the flood plain property had very limited uses, all of which were incompatible with the M-zoning classification. After DeKalb County refused the application, the property owner sought reversal in the supreme court, claiming the benefit of the *Barrett* test. However, the court upheld the county's refusal to rezone pointing out that in *Barrett* the county planning commission had recommended the zoning change, while in the instant case the planning department recommended denial of the rezoning application. The court stated that in *Barrett* there had been evidence of numerous advantages to using the land for commercial purposes and few advantages to using it for residential purposes while in the instant case the land on the acres in the flood plain had been abandoned because of flooding and not because of any governmental zoning regulation. The court, therefore, found no taking of property and upheld the board's decision.

One of the longest zoning controversies concerns quarries in Hall County and neighboring counties. In *Hall Paving Co. v. Hall County*,[24] the Georgia Supreme Court upheld the rezoning decision of the county commissioners to permit the operation of a quarry. The neighboring landowners complained, alleging that the governing authority had the duty to promulgate findings and conclusions justifying their decision. This argument parallels the holdings of cases such as the Oregon decision in *Fasano v. Board of County Commissioners*[25] which held that zoning decisions frequently are of an administrative or quasi-judicial character and thus should be based upon written findings so that they can be readily reviewed by appellate courts. The Georgia Supreme Court rejected the *Fasano* approach and held that in rezoning property the governing authority acts in a legislative capacity and that rezoning legislation, when duly adopted, will be presumed to be valid.

The Hall County quarry again reached the Georgia Supreme Court in *Cross v. Hall County*.[26] This time the intervening property owners alleged that the Hall Paving Company had entered into an illegal agreement with the county and that the rezoning was marred because it was invalid con-

23. 238 Ga. 43, 231 S.E.2d 55 (1976).
24. 237 Ga. 14, 226 S.E.2d 728 (1976).
25. 264 Or. 574, 507 P.2d 23 (1973).
26. 238 Ga. 709, 235 S.E.2d 379 (1977).

tract zoning. The case turned on statements made at the zoning hearing. After several of the neighboring land owners complained that the road leading to the quarry needed paving and that the increased traffic would result in dust, noise, and the decline of the neighborhood, the president of Hall Paving Company offered to resurface the road. The commission passed a resolution approving the rezoning provided that the company resurfaced the road. The court characterized this statement and the ensuing resolution as an example of conditional zoning. Conditional zoning is rezoning to conditions which are pursuant to the police power for the protection or the benefit of neighbors and which are not applicable to other land similarly zoned. In contrast, contract zoning is an agreement between private parties and the zoning authority extracting a land use permit on the basis of services to be performed by the private party. Those who have studied the zoning cases of other states will find little in the opinion to distinguish what happened in *Cross* from that which has been denounced by the supreme courts of other states as contract zoning.[27] However, the Georgia Supreme Court has spoken, and the transaction in *Cross* has been labelled by it as conditional zoning.

Perhaps more important in the *Cross* decision is the discussion of the standard of evidentiary proof demanded of intervenors. The court stated that:

> Neighbors of rezoned property cannot invalidate the rezoning by showing that the preponderance of the evidence was against the zoning change. When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors.[28]

Justice Hall's concurring opinion made it clear that this standard of evidence is similar or is identical to that imposed upon the complaining property owner. He stated, "therefore, whether one attacks an Act of the zoning authority affecting his own land or that of another, the test is the same: absent fraud or corruption, the question is whether there has been a manifest abuse of the rezoning power."[29]

In another interesting decision, the Georgia Court of Appeals, in *Horne v. City of Cordele,*[30] passed upon that type of ordinance, so often found as part of the community implementation of urban renewal programs, which calls for the destruction of substandard property. Georgia Code Ann. §69-1118 (1976) provides that municipalities may require the repair, closing or demolition of dwellings which are unfit for human habitation or which may

27. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, 174-76 (1971).
28. 238 Ga. at 711, 235 S.E.2d at 382.
29. 238 Ga. at 715, 235 S.E.2d at 384.
30. 140 Ga. App. 127, 230 S.E.2d 333 (1976).

imperil the health or safety of surrounding areas. Pursuant to this section the city of Cordele had passed a town ordinance authorizing the destruction of damaged and decayed dwellings which created a serious hazard to the public. The building inspector singled out the plaintiff's two-story Victorian wooden house in the business district of Cordele. The house had indeed fallen into disrepair, part of the porch had been removed after being struck by a falling tree, windows were broken, and the roof, walls and floor needed repairs. The house was also open to trespassers. The evidence suggested that restoration would cost between six and thirty thousand dollars. Demolition was ordered but was enjoined by the Georgia Court of Appeals which held that the ordinance was unconstitutional and void as a violation of the taking clause. Judge Deen, writing for the court, discussed the limits of the taking clause and the police power and held that the ordinance went too far in ordering destruction of the dwelling without compensation to the owner merely because the cost of repair exceeded the value of the structure. Parenthetically, Judge Deen pointed out that the record showed that the owner twice had applied for and was refused building permits in order to repair the house.

Appellate procedure in zoning matters was discussed in *Contris v. Richmond County,*[31] in which a property owner who lost his appeal before the County Board of Zoning appeals filed an independent suit in equity instead of pursuing further appellate procedure. The court held that this was improper procedure and that he had forfeited the right to any further consideration of the matter. In a similar vein, the court in *River Hill Community Assoc. v. Cobb County,*[32] held that the Cobb County Planning Commission has no power to rezone property and that a board of zoning appeals has no authority under Georgia law to review a zoning decision of the Board of Commissioners.

IV. Water Law

Georgia courts decided a dozen cases during the year concerning riparian rights and diversion of water. In *Ponce de Leon Condominiums v. Di Girolomo,*[33] a developer of condominiums was held liable for diverting water onto the plaintiff's land. During the two years of work on the project, an increasingly bad run-off problem resulted in the pooling of water and siltation on the plaintiff's property. The plaintiff received a jury verdict for $1,000 nominal damages, $9,000 punitive damages and $5,800 attorney's fees. In addition, injunctive relief against the developer was awarded by the court. In *Hogan v. Olivera,*[34] a plaintiff was awarded

31. 238 Ga. 731, 235 S.E.2d 19 (1977).
32. 236 Ga. 856, 226 S.E.2d 54 (1976).
33. 238 Ga. 188, 232 S.E.2d 62 (1977).
34. 141 Ga. App. 399, 233 S.E.2d 428 (1977).

$10,000 for damages suffered to his property because of the cutting of an extension ditch which caused the discharge of water onto his lot. The court of appeals, in passing on the subdivision developer's challenge on the ground of defects in evidence, discussed the evidentiary standards for expert witnesses in such a case.

In *Jones v. Cowan,*[35] the court of appeals held against a developer whose project caused vast amounts of dirt and silt to form large deposits in the plaintiff land owner's adjacent lake. The jury verdict of $9,000 punitive damages was set aside and a new trial ordered on the ground that the defendant had taken measures to prevent erosion by planting grass and setting out hay bales and that, therefore, punitive damages were improper because there was no evidence of wilful misconduct or malice. In *Buck Creek Industries, Inc. v. Green,*[36] the supreme court upheld a jury verdict which granted damages and an injunction to the plaintiff for the continuing trespass on the land resulting from the flow of water from the defendant's property.

Local governments were also held liable in water diversion cases. In *Eastwind Developers Ltd. v. Board of Education,*[37] the Georgia Supreme Court reversed a court of appeals judgment dismissing the law suit because of the board of education's statutory immunity. The supreme court retained the board of education as a party because the statute empowering it to sue and be sued, expressly revoked governmental immunity. In *City of Arlington v. Smith,*[38] the court entered a judgment on a jury verdict directing the city to remove a tap between a neighbor's and the plaintiff's sewer line which caused sewage to back up into the plaintiff's house. In *Fountain v. DeKalb County,*[39] the county won condemnation proceedings to construct surface water drainage retention ponds on the defendant's property.

In *Payne v. Whiting,*[40] the court of appeals applied traditional riparian water law. The lower riparian owner sued, alleging that the defendant had negligently graded and cleared his land thus allowing surface waters to concentrate and flow onto the downstream plaintiff's property in an unnatural manner, depositing large amounts of sediment in his yard. The difficulty of proof in that case involved the fact that a number of upstream owners were involved in land disturbing activities. The jury visually inspected the site and found that the defendant's negligence proximately caused the plaintiff's damage.

35. 139 Ga. App. 811, 229 S.E.2d 669 (1976).
36. 237 Ga. 699, 229 S.E.2d 454 (1976).
37. 238 Ga. 587, 234 S.E.2d 504 (1977).
38. 238 Ga. 50, 230 S.E.2d 863 (1976).
39. 238 Ga. 14, 231 S.E.2d 49 (1976).
40. 140 Ga. App. 390, 231 S.E.2d 796 (1976).

V. Resource Extraction

Several cases concerning timber sales and leases and the lease or sale of mineral rights were decided during the survey period. In *Hardin v. Great Northern Nekoosa Corp.*,[41] the Georgia Supreme Court held that a timber company which leased farm land could use the land only for the purpose of growing and selling timber and not for general farm purposes pursuant to the provisions of the contract. The timber corporation had sought to get the benefit of crop allotments allocated to the land by the Federal Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture.

In *Nelson v. Bloodworth*,[42] the Georgia Supreme Court, in a case of first impression, passed on adverse possession of a mineral interest. The conventional common law rule is that minerals will not be lost by prescription if there is no adverse user of the minerals themselves, as distinguished from use of the surface.[43] This rule was changed by a 1975 law which provides that the fee simple owner may obtain the mineral interest by showing that, "the owner of such mineral rights, his heirs or assigns . . ., for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for herein, [have] neither worked nor attempted to work such mineral rights nor paid any taxes due thereon."[44] Nelson, the appellant, was the successor in interest to a one-half undivided fee simple interest in a tract from the common grantor who had, in 1941, conveyed all the bauxite on a 270 acre tract to R.M. Lee. Lee pursued the mining of bauxite on the tract in 1941 and 1942 but after his death his widow, who took possession of the mineral interest, did not carry on any mining activity during the next 30 years. The appellee's possession of the mineral interest was pursuant to a warranty deed signed in 1975. Nelson, seeking to quiet the title to the minerals, brought this action based on the 1975 law. The Georgia Supreme Court, concerned over a retroactive disposition of property, read the 1975 Act as being prospective in operation only and held that no actions could be based upon the 1975 law until at least 1982. Nelson's action was thus held to be premature.

VI. Miscellaneous Cases

In *Lindsey v. Guhl*,[45] DeKalb County's move to construct a solid waste disposal land fill was upheld by the Georgia Supreme Court. The choice of the land fill site followed an extensive and prolonged search by a citizen's task force and the county commission. Some years back it became

41. 237 Ga. 594, 229 S.E.2d 371 (1976).
42. 238 Ga. 264, 232 S.E.2d 547 (1977).
43. *See* Brook v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941).
44. Ga. Code Ann. §85-407.1 (Supp. 1977).
45. 237 Ga. 567, 229 S.E.2d 354 (1976).

apparent that the county incinerator could not meet environmental protection standards. Existing county land fills were not adequate and a search was made for an acceptable site. The task force recommended the selection of a site in the southern part of the county. Notice was published in the newspaper, and a public hearing was held by the commission. After the hearing the commission approved the recommendation of the task force and bond funds were expended to acquire the site. These funds had previously been obligated by vote for use in renovating the county incinerator. The plaintiffs, neighbors of the land fill, sought to enjoin the acquisition on the ground that the bond funds must be used to renovate the incinerator and could not be used to purchase the site for the land fill. The court, acknowledging that counties have consistently been prohibited from using bond funds approved for a particular purpose for another and different purpose, held that this use, even though a substitution, was within the purpose of the bond referendum and was valid.

In *Bryan v. Georgia Public Service Commission,*[46] a power company challenged the constitutionality of the Consumer's Utility Counsel Act,[47] which provided for the appointment of a state paid lawyer to appear as a party or otherwise on behalf of consumers in all proceedings involving utility rates before the Public Service Commission, other administrative agencies, or the courts. This experiment in funding public interest counsel by the General Assembly was upheld by the Georgia Supreme Court which held that the Act was not void for vagueness because the counsel was given discretion in choosing which matters to pursue.

VII. FEDERAL CASES

The year saw a number of important cases in the federal courts involving Georgia natural resources. In September 1976, U.S. District Judge Charles Moye enjoined clearcutting of trees in the Chattahoochee National Forest on the basis of a suit filed by the Southern Appalachian Multiple Use Council against the U.S. Forest Service.[48] This case was part of the nationwide resource controversy which culminated in the passage of the National Forest Management Act of 1976.[49]

One of the most important cases for people in the Atlanta area was *Pope v. City of Atlanta*[50] in which the court interpreted the Metropolitan River

46. 238 Ga. 572, 234 S.E.2d 784 (1977).

47. 1975 Ga. Laws 372. This act was repealed by 1977 Ga. Laws 537 which is the currently effective statute on this subject. The new law, effective July 1, 1977, will be automatically repealed on July 1, 1979. The text of the 1977 act is published in an editorial note at GA. CODE ANN., ch. 93-3A (Supp. 1977).

48. *Southern Appalachian Multiple Use Council,* Civil Action No. C76-702A (N.D. Ga.).

49. 90 Stat. 2949 (1976), 16 U.S.C.A. §§472, 500, 513, 515, 516, 518, 521b, 581h, 1601 to 1614 (Supp. 1977).

50. 418 F. Supp. 665 (N.D. Ga. 1976). The *Pope* matter will come before the Georgia Supreme Court next term.

Protection Act.[51] The court upheld the constitutionality of the Act and enjoined the violation of administrative orders against the building of tennis courts in the flood plain promulgated pursuant to the Act.

In *Hawthorn Environmental Preservation Ass'n v. Coleman,*[52] the U.S. District Court enjoined construction of a state highway pending preparation of an environmental impact statement. The state argued that the Newnan bypass was to be completely paid for with state funds and thus was not a federal action requiring a statement. However, the plaintiff persuaded the court that the Newnan bypass was only one small segment of a much larger planned federal/state highway project which required the filing of an environmental impact statement.

VIII. LEGISLATION

The most significant actions of the 1977 General Assembly were the passage of the Georgia Safe Drinking Water Act of 1977,[53] and of amendments to the Georgia Water Quality Control Act relating to surface water allocation,[54] which made major changes in Georgia water law. The Georgia Safe Drinking Water Act of 1977, which supplements the Federal Safe Drinking Water Act,[55] regulates water quality in all public water systems. It has extensive reporting and record keeping requirements to serve as a basis for judgment of a state operated permitting system. Furthermore, the Director of the Environmental Protection Division is authorized to take action in the event a contaminant presents an imminent danger to public health. The financial burden of the research, reporting, and permitting rests upon the state and not upon local agencies. Thus, the General Assembly, aware of the financial impasse which has kept many small communities from providing safe drinking water to their inhabitants, has acted to insure safe supplies. The amendments to the Water Quality Control Act concerning surface water allocation were a major expansion of the state's regulatory authority. In this drought year, the specter of a short-fall of water, even in the verdant southeast, has become plausible. The Act establishes a permitting system for private users. The Environmental Protection Division will authorize any withdrawal, diversion, or impoundment by a single user of more than 100,000 gallons of surface water per day on a monthly average. By requiring permits for such surface water use, it is hoped that the increasing number of problems and conflicting uses caused

51. 1973 Ga. Laws 128.

52. 9 Envir. Rep. Cases (ERC) 1523 (N.D. Ga. 1977). *See also,* Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1976), in which the plaintiffs alleged that the defendant's environmental impact statement was insufficient and, therefore, a new one should be filed. The court held otherwise.

53. GA. CODE ANN. §§17-1301 to -1321, -9908 (Supp. 1977).

54. GA. CODE ANN. §§17-502, -505(17), -510(1), -510.1, -522, -522.1 (Supp. 1977).

55. 33 U.S.C.A. §§1251-1376 (Supp. 1977).

by inadequate supplies can be resolved. A classification system to resolve conflicts between competing users based upon the number of persons relying upon the water source, its nature and size, any chemical impairment it might suffer, the severity and duration of drought, as well as public health and safety considerations and economic considerations will be established by regulations promulgated by the Board of Natural Resources. The Act is, of course, a major departure from traditional riparian law but is consistent with and follows developments in other states which have established similar regimes based on the Model Water Code and the Model Water Act. In the same vein, the Water Well Standards Advisory Council Act was amended to provide for the development of water well standards as a further attempt to insure safe drinking throughout the state.[56]

Administrative procedure is a necessary subject for environmental lawyers. The operation of the Department of Natural Resources and of the Environmental Protection Division will certainly be affected by an act which amended the Administrative Procedure Act to provide the opportunity for legislative overruling of administrative rules.[57] In the future, administrative agencies must give at least 30 days notice of their intended rulemaking by giving copies of the proposed rule to the legislative council which will then refer it to the appropriate standing committee in each house. In the event a standing committee objects, the rule may be considered by the General Assembly at the time of the next session and overridden. However, the Environmental Protection Division and the Department of Medical Assistance are exempted from this general procedure. The Environmental Protection Division's rules are to be posted to the chairmen of the appropriate standing committees. If the chairman objects, the agency has the duty to consult with the committee prior to the adoption of the rule. Thus, the EPD rules appear to have a less onerous legislative review burden than do the rules of other divisions of the Department of Natural Resources.

The role and the status of the Area Planning and Development Commissions has been a long standing topic of discussion in Georgia governmental circles. Doubts have been expressed concerning the management authority of APDCs with many critics wishing to relegate them to an advisory capacity only. Following a controversy in early 1977 which was sparked by an attorney general opinion that Area Planning and Development Commissions could provide advisory services only, the General Assembly passed an act which makes it clear that area planning and development commissions may provide management, administration and the operation of programs.[58] However, a sunset provision has been inserted into the statute which repeals this authority as of June 30, 1979.

56. GA. CODE ANN. §§84-7503 to -7513, -99100 (Supp. 1977).
57. GA. CODE ANN. §§3A-104(a)(1), (e), (f), (g) (Supp. 1977).
58. GA. CODE ANN. §40-2920(k) (Supp. 1977).

Following the bleak winter of 1976-77, increased interest in energy planning was evident in most American legislatures. The Georgia Civil Defense Act was amended to supplement the Governor's energy crisis powers.[59] The Act defines an energy emergency as one which arises out of a present or threatened shortage of usable energy resources and outlines the actions that the Governor may take in an energy emergency such as closing public facilities as well as private establishments not essential to public health, safety or welfare. In addition, the Governor may suspend or put restrictions on transportation of energy resources. In such an emergency the Governor may not seize or condemn property other than energy resources. Another energy crisis related law requires the Building Administrative Board to create energy efficiency standards for buildings.[60] The increasing awareness of shortfalls in fuel and energy resources led to amendments to the Code of Public Transportation to aid mass transit. This act calls on the Department of Transportation to assist mass transit facilities so they can become a viable transportation alternative for the state.[61] Furthermore, another act amends the public transportation code to designate the Department of Transportation as the state agency to offer rail service continuation payments in the federal railroad revitalization program.[62]

In line with the older emphasis on the preservation and protection of scenic resources is the Cave Protection Act of 1977[63] which seeks to end vandalism in caves, prohibit the sale of geological specimens taken from caves, and curb pollution and littering in caves.

In the resource extraction field, a new act provides guidelines for the Department of Natural Resources in leasing oil and gas wells on state owned land.[64] Such leases shall provide for a primary term of not more than 10 years. TheAct also provides for delay rentals and procedures to be followed in drilling development and exploratory wells.

The General Assembly made a complete and comprehensive revision of the state game and fish laws which were consolidated in new code title 45.[65] Trappers and fur dealers were the subject of intense controversy as the legislature considered again the types of traps to be used.[66]

Miscellaneous provisions bearing on the quality of life for people of the state include an act requiring access to buildings and facilities for handicapped persons[67] and amendments to the Outdoor Advertising Act to provide for further limitations on outdoor advertising devices.[68]

59. GA. CODE ANN. §§86-1803, -1807(c), -1807(d) (Supp. 1977).
60. GA. CODE ANN. §84-6016.3 (Supp. 1977).
61. GA. CODE ANN. §§95A-1301 to -1304 (Supp. 1977).
62. GA. CODE ANN. §95A-1305 (Supp. 1977).
63. GA. CODE ANN. §§43-2501 to -2506, -9916 (Supp. 1977).
64. GA. CODE ANN. §91-110a(g), (h) (Supp. 1977).
65. GA. CODE ANN, tit. 45 (Supp. 1977).
66. GA. CODE ANN. §45-602a (Supp. 1977).
67. GA. CODE ANN. §§91-1104, -1105(a), -1107, -1109(b), -1123 (Supp. 1977).
68. GA. CODE ANN. §§95A-914(x), -915.1, -917, -918, -919, -920, -921(c), (d) (Supp. 1977).