

Preemption of Local Governments Regulating Pesticides

by Mary Ellen Setting, Chief, Pesticide Regulation Section, Maryland Department of Agriculture

Maryland has been actively involved for many years in the preemption issue. The Maryland Attorney General wrote two opinions, in 1985 and in 1988, supporting the position that federal pesticide law preempts the local regulation of pesticides. In late 1985 and early 1986, Montgomery and Prince Georges Counties passed ordinances relating to preposting and posting of lawns to receive an application of a pesticide by a commercial firm. Industry organizations sued the counties, claiming their ordinances were preempted by FIFRA. In June, 1986, a federal District Court Judge issued an injunction against enforcement of the county ordinances and in September, 1986, the same judge said FIFRA preempted local jurisdictions from regulating pesticides in any manner and ruled the ordinances unconstitutional and null and void.

In April 1987, the U.S. Fourth Circuit Court of Appeals affirmed the judge's decision that the ordinances on lawn posting by Prince George's and Montgomery Counties were preempted and illegal. In May 1987, Prince Georges and Montgomery Counties appealed the decision to the U.S. Supreme Court, but later in 1987 dropped the appeals. Since then, the Maryland pesticide regulatory program has operated on the basis that the state and federal pesticide use laws preempted local regulation.

On June 21, 1991, the U.S. Supreme Court ruled unanimously that FIFRA does not preempt local governments from regulating the use of pesticides.

Judge Scalia stated he thought Congressional committees believed the 1972 FIFRA amendments, which gave specific authority to states to regulate pesticides, preempted local regulations, but he disagreed with using committee reports or Congressional intent to determine the meaning of laws. Regardless of Congressional intent, the U.S. Supreme Court ruled FIFRA does not contain explicit language to preempt local regulation of pesticides.

The U.S. Supreme Court had been asked by the Town of Casey, Wisconsin and Wisconsin Public Intervenor (Attorney General) to decide whether FIFRA prohibits localities from regulating the use of pesticides. In 1985, the Town of Casey, Wisconsin passed an ordinance requiring any person to obtain a permit 60 days prior to applying pesticides aerially or to public use lands. The permit request required certain information including a list of pesticides to be used, alternatives to pesticides and the environmental impact. The permit would be approved or disapproved by the Casey Town Board. The Board denied a permit requested by Ralph Mortier to aerially apply pesticides to his property. Mr. Mortier sued the Town of Casey, claiming FIFRA preempted the town order. The case proceeded to the Wisconsin Supreme Court, which decided FIFRA preempted pesticide regulation by local government. The Town of Casey appealed this decision and the U.S. Supreme Court heard the case on April 24, 1991.

Several states, Alabama,

Hawaii, Illinois, Kansas, Maine, Michigan, Nevada, Pennsylvania, filed "friends of the court" briefs supporting local pesticide regulation. These briefs supporting local pesticide regulation were filed by the states' Attorneys General, usually without the knowledge or support of the state pesticide regulatory agency. The State of Maryland, through its Attorney General, joined with California's legal brief supporting preemption. Several other states, Arizona, Indiana, New Jersey, Washington, filed briefs supporting preemption of local regulation.

Prior to the U.S. Supreme Court ruling, there had been at least six different cases in federal District Courts or state Supreme Courts. Three decisions supported preemption and three decisions rejected preemption.

The U.S. Supreme Court's decision reversed any decisions previously made to not allow pesticides to be regulated by local governments and ruled local governments can regulate pesticides until Congress amends FIFRA, or the Court made it clear that the states could enact laws to prohibit/restrict local ordinances.

Currently, at least eight states, Pennsylvania, West Virginia, Virginia, Florida, Louisiana, Minnesota, Colorado, California, have specific language in pesticide laws that prohibits local ordinances on pesticides. Maine and New Jersey have specific language that permits local ordinances under certain conditions. The rest of the states, including Maryland, have no language which specifically restricts or permits local ordinances.