



## FIFRA Pre-Emption Battle Waged in Wake of Supreme Court Decision

*Editor's Note: Conversations and articles about the Supreme Court decision in the Town of Casey/FRoWT suit will likely continue for a long time. The potential influence of the decision is enormous.*

*Following is an article that appeared in the Chemical Regulation Reporter of September 13, 1991. It offers yet another point of view.*

In the wake of a Supreme Court decision that state and local pesticide use laws and ordinances are not pre-empted by federal law, environmental and some state officials are challenging efforts by the chemical industry for enactment of federal legislation to prohibit explicitly such local regulation.

The nation's high court ruled unanimously that the Federal Insecticide, Fungicide, and Rodenticide Act does not pre-empt local pesticide use regulations. It upheld the authority of cities and towns to control and ban the use of pesticides through permitting schemes, licensing, notification, and other requirements that focus specifically on the use of pesticides (*Wisconsin Public Intervenor v. Mortier*, US SupCt 89-1905, 6/21/91; 15 CRR 387).

An array of business and industry groups formed the Coalition for Sensible Pesticide Policy (CSPP) soon after the decision. The stated objective of the coalition, is "To secure sensible, uniform federal/state regulation of pesticides, by passing pre-emptive language while allowing local input into the federal/state regulatory process."

The coalition has stated its members believe it is in the nation's best interest to have a partnership of federal and state governments vested with the authority to make and carry out pesticide use regulations.

More than 125 organizations representing chemical manufacturers, farmers, biotechnology companies, lawn care professionals, pest control operators, florists, and others have joined the coalition, representatives of the group told BNA. CSPP letters were sent September 3 to the president, vice

president, nearly all the cabinet secretaries, EPA, and other agencies. The group sought support for a FIFRA amendment that would establish federal pre-emption of pesticide use ordinances.

### 83,000 Regulatory Units?

"We fear that the Court's decision will open the door for upwards of 83,000 local governments to regulate the use of pesticides," the letter to President Bush stated. "Such regulation would lead to increases in the price of food through new artificial limits on agricultural productivity and food processing/storage," the coalition said in its letter to Secretary of Agriculture Edward Madigan.

Local governments lack the scientific and technical expertise to make complex regulatory decisions, CSPP said in the letters. The Supreme Court decision also sends conflicting signals to U.S. trading partners at a time when global harmonization is being sought on food safety standards. The legislation also is needed, the group contended, because of conflicting views within the administration on establishing uniform tolerances—the maximum amounts allowed—for residues of pesticides on food.

An attorney for the National Agriculture Chemicals Association, which has coordinated the administrative functions of the coalition's steering committee, September 11 said the coalition had drafted simple amendments to FIFRA. The steering committee is expected formally to adopt a plan to get the amendments introduced in Congress, attorney Steve Russell said.

One member company of the Professional Lawn Care Association of America, a coalition member, has sent model legislation to nearly all the states. This legislation would set up a framework for regulations of lawn care chemicals by states, according to Jo Cooper of Capitoline International Group, which represents PLCAA on federal issues.

### EPA Position

In an address to the Grocery Manufacturers of America, Linda Fisher, assistant administrator for pesticides and toxic chemicals, September 11 explained that while the administration opposes FIFRA pre-emption of local authority, it favors pre-emption authority under the Federal Food, Drug, and Cosmetic Act for setting pesticide residue tolerances on or in food.

Prior to the Supreme Court ruling, the Department of Justice February 28 submitted a friend-of-the-court brief supporting the notion that FIFRA does not pre-empt state and local regulation of pesticide use (14 CRR 1686).

"It is important, given the fact that in many local or state jurisdictions you have...environmental concerns that may differ from one state to another," she said, noting ground water and endangered species protection as examples. EPA views federal government regulation of pesticide use as a floor above which states could be more protective. The agency does not want this scheme changed in Congress, she asserted. At the same time, however, the agency supports uniform pesticide tolerances.

"The fact that food does travel in interstate commerce, needs to be recognized, and when the agency sets a tolerance that we believe is protective, that tolerance should be nationally uniform, with limited exceptions," Fisher maintained.

### Battle Lines Drawn

"The battle lines are drawn," Jay Feldman, national coordinator for National Coalition Against the Misuse of Pesticides, said September 11. "The permit scheme that was upheld in *Mortier* is a critical one because it establishes the cooperative role that local governments can play."

Involving local governments in determining whether proposed applications are in accordance with label directions would be one of the least intrusive applications of *Mortier*, Feldman maintained.

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One of the most "aggressive" applications would be a complete pesticide ban, he said. But local governments do not appear to be moving in that direction, he noted.

NCAMP is focusing much of its attention and resources on the issue, but Feldman revealed few parts of the group's strategy to protect local authority from industry efforts to limit it. The environmental group would support clarifying language in proposed legislation that would affirm the rights of localities and states to regulate pesticide use, he said, and generally will push to protect FIFRA language as it exists.

Although such local factors as climate, wind conditions, population, geography, and water supply would be considered in local regulation, such rules are unlikely to impede business, he asserted. Industry, he charged, may be subject to enforcement of pesticide labels and other standards in the state and local laws that previously were neglected. But evidence that a patchwork of local laws would result from the ruling is non-existent, Feldman contended.

#### Wisconsin Activity

Thomas Dawson, the Wisconsin public intervenor who successfully argued the *Mortier* case before the U.S.

Supreme Court, told BNA September 9 his office was contacting environmental and local government groups to ensure that they were aware of the decision. Dawson said he is urging them to take a coordinating role in the push to thwart industry actions. His office, he said, is too small to spearhead a national effort.

"This isn't just a local issue," Dawson contended., "This is an attempt by industry to deprive states of their sovereign powers as well. And that power is the ability of states to assign and delegate authority to local governments to regulate pesticide use."

It would be a "broadside attack on the states" if Congress amends FIFRA to include pre-emptive language, Dawson asserted.

In Wisconsin, the public intervenor is negotiating with the Wisconsin Turf Management Association to develop by the end of 1991 uniform statewide regulations for lawn care. Those rules, he said, would be administered at the local level. Involved in those negotiations, he said, are roughly 15 representatives drawn from the turf industry, environmental groups, and local and state governments.

Dawson charged industry with failing to back up its claims of increased local regulation of pesticides. He said more

than 80,000 local governments are not regulating pesticides.

"Even if there were [more than 80,000] local governments in this country...an extremely small minority have even considered, let alone passed regulations relating to pesticide use," Dawson maintained. "And of that tiny percentage, many ordinances are not even regulatory."

The agricultural chemical industry, he said, does not need to worry about the rural sector, since most rural towns boards are comprised of pesticide-using farmers who are unlikely to pass ordinances to "cut their own throats."

The reason for the battle, Dawson claimed, is that the chemical industry does not want effective pesticide regulation. Effective local regulation will put pressure on Congress and state legislatures to follow suit and tighten their oversight, he added.

"The only reason local governments are passing ordinances is because federal and state regulation is a failure," Dawson concluded. "The chemical industry cannot come up with any bona fide data to show that the ability to take care of pesticide problems has been seriously affected by the passage of local ordinances."

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