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Wisconsin Supreme Court Says "No" To Casey Ordinance

By Monroe S. Miller

Wisconsin's agricultural businesses and golf courses won a major victory on March 12 when the Wisconsin Supreme Court said local governments cannot regulate pesticide use.

By a vote of 4-3, the court ruled that an ordinance passed by the town of Casey in Washburn County to regulate pesticide use was pre-empted by a federal law passed in 1972. The court said the law permits only state and federal regulation. The decision affirms the order given by Judge Dennis Bailey in the Washburn County Court where the case was initially filed. His order declared the town of Casey ordinance "void, invalid and of no effect." Bailey issued that order in June of 1988.

The Wisconsin Supreme Court accepted the case on a bypass of the court of appeals from a petition of both Casey and the challengers. This process shortened the time in court. The bypass decision was a wise one because both sides stated they would appeal if they lost in the appellate court.

The suit against the town of Casey board was brought by Ralph Mortier, a Christmas tree grower in Casey township, and the Forestry/Rights-of-Way/Turf Coalition. In addition to the legal principles involved, there was the very practical matter of doing business in Wisconsin. Had the Casey suit been lost, it was possible that there would have been a proliferation of local regulations which would have led to completely different rules every six miles, the distance of town borders.

It would have been an impossible sit-

uation. A township, or any other unit of local government — village, city or county — could have completely prohibited the use of federally approved pesticides applied according to federally approved label instructions. They could have, as Casey tried, imposed impossible restrictions and rendered the management of crops, projects, and golf courses nearly impossible.

The majority justices in the Casey decision focused on Congressional intent in pesticide regulation. They concluded — correctly, we believe — that it is the policy of the U.S. Congress "to allocate the power to regulate pesticides at a level that stops at the state level." They added: "If that policy is less than optimum, the resolution must be left to the political arena and not to the judiciary."

Chief Justice Nathan Heffernan wrote in the majority opinion that the U.S. Supreme Court has decided that the "historic police powers of the states were not to be superseded by federal act unless that was the clear and manifest purpose of Congress.

"While the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not contain any express pre-emption language, it does, however, contain language which is indicative of Congress' intent to deprive political subdivisions, like the town of Casey, of authority to regulate pesticides," the court said. "In Section 136v, Congress authorizes only 'states' to regulate pesticides" and further says political subdivisions are excluded from

the definition of "states", the court said.

The court said two Senate committees negotiated a compromise bill that excluded giving local governments a role. Later, the full Senate rejected an amendment to give local governments a role and passed the compromise bill 71-0.

The court pointed out that the chairman of the Agricultural Research and General Legislation Subcommittee put language into the *Congressional Record* that FIFRA "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."

A decision by the Wisconsin Supreme Court can be appealed to the U.S. Supreme Court if it involves federal law, which this case does. To the surprise of few, the state public intervenor's advisory committee voted on March 28 to appeal the Wisconsin Supreme Court decision. The hope is that the U.S. Supreme Court won't accept the case. It is able to hear only about 100 cases a year from the thousands presented. The percentages are on our side.

It appears Russ Weisensel will have to devote even more time to this issue — time in organization, in fund raising and in gathering support. It could be several months, however, before we know what the U.S. Supreme Court decides to do.