A Critique of the Supreme Court Ruling

The Court gives short shrift to industry arguments as to why local pesticide regulations obstruct Congress' objectives.

by Lawrence S. Ebner

On June 21, the U.S. Supreme Court ruled 9 to 0 that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt local governments from regulating the use of pesticides (*Wisconsin Public Intervenor v. Mortier*, 59 LW 4755, US SupCt 89-1905, 6/21/91; 15 CRR 387).

The court's opinion, written by Justice Byron White, is legalistic and mechanical — what *The New York Times* described on June 22 as "a dry review of the text and history" of FIFRA.

Justice Antonin Scalia's separate concurring opinion is a little more spirited, and even accepts industry's view of FIFRA's legislative history, but will be of interest primarily to legal scholars who question the legitimacy of using congressional committee reports to interpret federal statutes.

Neither the court's opinion nor Scalia's concurrence squarely addresses the real issue concerning local regulation: whether allowing tens of thousands of municipal and county governments to ignore or second-guess the Environmental Protection Agency's and the states' scientific and regulatory determinations will undermine the well-coordinated system of professional federal/state pesticide regulation that has evolved under FIFRA during the past 20 years.

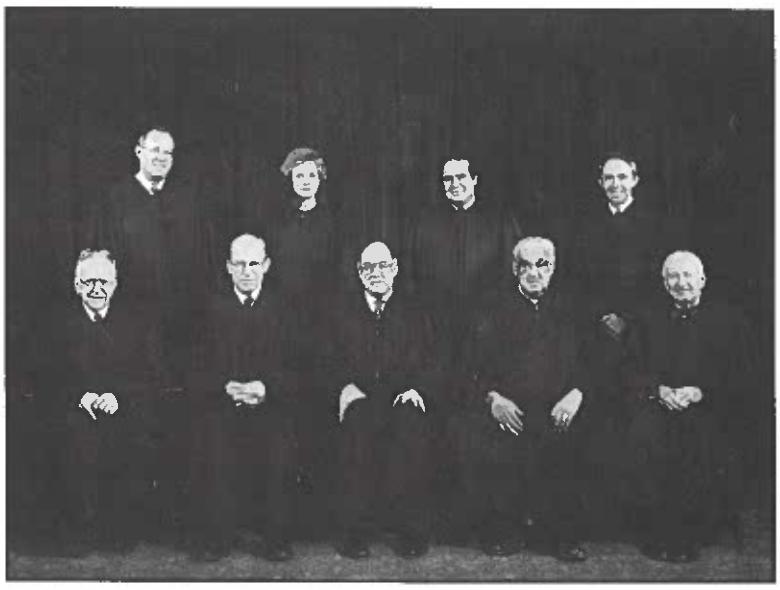
Town of Casey Ordinance

The Supreme Court made it clear at the outset of its opinion exactly where it was coming from on the issue of local regulation. The first footnote explains that the Town of Casey, Wis., which has a population of 400-500, is "large enough to enact the ordinance at issue" in the case.

The Casey ordinance requires a permit to be sought at least 60 days before applying pesticides aerially or to public-use lands. To obtain a permit the prospective pesticide applicator must submit to the Town Board extensive information, including a description of the pesticides and quantities to be used, their regulatory status and potential risks, available chemical and nonchemical alternatives, the environmental impact of the proposed pesticide application and any chemical alternatives, and the precautions that will be taken to protect the public.

The Town Board then can deny or grant the permit, or grant it with conditions. If a permit is granted, placards must be posted giving at least 24 hours' advance notice of the pesticide application.

It is impossible to read the elaborate text of the ordinance without concluding that the members of the Casey Town Board (1) have made it extremely difficult to obtain permission to use pesticides, and (2) have reserved for themselves apparently unfettered discretion to disallow or restrict the use of pesticides which both EPA and Wisconsin authorities have determined will not cause unreasonable adverse effects



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when applied in accordance with label precautions and directions.

The court held that "FIFRA does not preempt the town's ordinance either explicitly, implicitly, or by virtue of an actual conflict." This ruling reversed a decision of the Supreme Court of Wisconsin, and resolved the split of authority on FIFRA preemption of local regulation that had developed among several federal appellate courts and state supreme courts.

The Supreme Court case provoked numerous *amicus curiae* briefs, not only from pesticide industry associations, but also from the solicitor general, a number of states, public interest groups, and others.

The Court's Preemption Analysis

The court identified "textual inadequacies" in FIFRA, such as inconsistent usage of the term "state," and found that "the statutory language ... is wholly inadequate to convey an express preemptive intent on its own."

Based on FIFRA Section 24(a), which authorizes "states" to regulate pesticide "sale or use," the court found that "the statutory language tilts in favor of local regulation" because "political subdivisions are components of the very entity the statue empowers."

Along the same lines, the court pointed to FIFRA's statutory structure in finding that "whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular."

The court's decision does make it clear the regulation of pesticide labeling "fall[s] within an area that FIFRA's 'program' preempts." Accordingly, even under *Wisconsin Public Intervenor*, local governments like the states are preempted from regulating pesticide labeling.

The court emphasized that "FIFRA's authorization to the states leaves the allocation of regulatory authority to the 'absolute discretion' of the states themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."

Accordingly, the states remain free to enact legislation (as several have) to prohibit or otherwise restrict their political subdivisions from regulating pesticides.

Although the industry relied heavily on FIFRA's legislative history to establish congressional intent to preempt local regulation, the court found it "at best ambiguous." In this regard, the court adopted EPA's view (expressed in the solicitor general's brief) that the two key Senate committees (agriculture and commerce) with responsibility for rewriting FIFRA in 1972 "agreed to disagree" about local regulation.

Scalia pointedly took exception to the other justices' interpretation of the same legislative history. He quoted from the 1972 Senate Agriculture Committee report which explained that FIFRA Section 24 "should be understood as depriving ... political subdivisions of any and all jurisdiction and authority over pesticides."

Scalia found that "Clearer committee language 'directing' the courts how to interpret a statute of Congress could not be found, and if such a direction had any binding effect, the question of interpretation would be no question at all."

As to the supposed disagreement between the two Senate committees, Scalia cited a Commerce Committee report confirming that the Agriculture Committee report "states explicitly that local governments cannot regulate pesticides in any manner."

According to Scalia, "[t]his legislative history clearly demonstrates ... not (as the court would have it) that the two principal Senate Committees disagreed about whether [the 1972 FIFRA Amendments] preempted local regulation, but that they were in complete accord that it *did*, and in disagreement over whether it *ought* to" (emphasis in original).

Nevertheless, Scalia concurred in the court's holding because he believes that committee reports are unreliable indicators of congressional content.

Industry Arguments Given Short Shrift

Perhaps the most disappointing aspect of the court's opinion is the short shrift that it gives to industry's arguments as to why local regulation of pesticides would obstruct Congress' objectives, including protection of health and the environment. Even where there is no express preemption, federal law preempts a state or local law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Although the court "discern[ed] no actual conflict ... between FIFRA and local regulation generally," it offered little explanation for this misperception.

Instead, the court dismissed industry's arguments as resting "on little more than snippets of legislative history and policy speculations."

The industry had argued that local governments lack the technical resources and expertise to regulate pesticides competently; that local regulation would render superfluous the comprehensive system of professional federal-state regulation established by FIFRA; and that multiple, overlapping, conflicting and onerous local ordinances would lead to regulatory chaos and prevent cost-effective pest control.

The court found that "Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it ... [but] has not done so yet."

A New Challenge

Because the Supreme Court has ruled that FIFRA as currently written does not preempt local regulation, the focus will shift from the courts to the legislative arena, where the industry will seek amendments to FIFRA or state laws. As a practical matter, such amendments will not change the status quo, since it has been widely understood for 20 years that local governments do not have the authority independently to regulate pesticides.

The challenge is to prevent the *Wisconsin Public Intervenor* decision

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from turning pesticide regulation on its head. At a minimum, industry will urge local governments to exercise forbearance and give deference to EPA's and state agencies' scientific and regulatory determinations, while continuing to cooperate on pesticide enforcement.

Public interest groups inevitably — but erroneously — will contend that industry's efforts to meet the challenge of local regulation will place the public at risk by failing to take into account localized needs and conditions.

To the contrary, both EPA and state agencies have in the past — and can in the future — adopt localized restrictions on pesticide use where and when appropriate. Equally important, preempting local governments from regulating pesticides will help ensure that regulatory decisions are based on dispassionate scientific judgments, that they are well balanced and shielded from political pressures, and that cost-effective pest control will remain available for the benefit and protection of society.

Wisconsin Public Intervenor affords Congress and state legislatures a fresh opportunity to reaffirm those objectives.

Larry Ebner is a partner in the Washington, D.C., office of McKenna & Cuneo, where he specializes in pesticide legal matters. He submitted an amicus curiae *brief in* Wisconsin Public Intervenor *on behalf of the National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association.*

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