

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-19

Date issued: December 9, 1991
Requested by: Sarah M. Vogel
Commissioner of Agriculture

- QUESTION PRESENTED -

Whether local units of government may enact regulations concerning the registration, enforcement, and use of pesticides.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that local units of government may not enact regulations concerning the registration, enforcement, and use of pesticides.

- ANALYSIS -

In Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476 (1991), the United States Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not prohibit local governmental regulation of pesticide use. Since it was widely believed that FIFRA preempted the entire field of pesticide regulation, this decision has created uncertainty as to the role of local governmental entities in pesticide regulation.

In Mortier, the town of Casey, Wisconsin, enacted an ordinance which required a permit for the application of any pesticide to public lands, to private lands subject to public use, or for the aerial application of any pesticide to private lands. The town board had authority to deny, grant, or grant the permit with conditions. Id. at 2480.

Respondent Mortier was granted a conditional permit, which he appealed on the grounds that the ordinance was preempted by both state and federal law. Id. at 2481. The circuit court ruled that the ordinance was preempted by both FIFRA and state law. The Supreme Court of Wisconsin affirmed, holding that FIFRA preempted local regulation, but declining to rule on the state preemption issue. Id. The United States Supreme Court reversed, holding that FIFRA did not preempt local governmental regulation of pesticide use. Id. at 2487. The Court did not address whether state law preempted the local regulation.

Although FIFRA does not prohibit local regulation of pesticides, local units of government may not regulate pesticides if state law has preempted the field.

North Dakota's pesticide laws are set forth in the North Dakota Pesticide Act of 1975, N.D.C.C. ch. 4-35, and in the Insecticide, Fungicide, and Rodenticide Act of 1947, N.D.C.C. ch. 19-18. N.D.C.C. ch. 4-35 establishes a regulatory scheme for the distribution, storage, transportation, disposal, use, and application of pesticides which is administered by the Pesticide Control Board. N.D.C.C. ch. 19-18 authorizes the Department of Health and Consolidated Laboratories (Health Department) to regulate the sale and registration of pesticides.

It is well settled that local governmental entities have only those powers expressly granted to them by the Legislature, or those necessarily implied from the power expressly given. See, e.g., Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924). N.D.C.C. chs. 4-35 and 19-18 are silent on the role of local governments in pesticide regulation. Furthermore, a review of the statutory powers of municipalities, counties, and townships reveals no instance where these entities are specifically authorized to regulate pesticide registration, distribution, transportation, sale, storage, disposal, or use. These entities may have implied powers to regulate such activity, however, under general welfare statutes. See, e.g., N.D.C.C. ' 40-05-01(1) (municipalities may adopt ordinances as the general welfare of the municipality may require); N.D.C.C. ' 58-03-12 (townships may establish regulations to promote health, safety, and general welfare in township zoning districts); N.D.C.C. ' 11-28-05(7) (county park boards may exercise police power in regulating land under its jurisdiction).

Although these local entities possess the authority to regulate for the general welfare, which may include the power to regulate pesticides, the Legislature has given specific regulatory authority over pesticides to the state through the Pesticide Control Board and the Health Department. Thus, the question becomes whether the Legislature intended to preempt local governmental regulation of pesticides.

Neither N.D.C.C. ch. 4-35 nor ch. 19-18 explicitly prohibits or allows local regulation of pesticides. North Dakota courts have not addressed the issue. However, where the Legislature enacts a comprehensive scheme of regulation, the Legislature implies by that scheme that there is no room for additional regulation by local governmental entities. Pesticide Pub. Policy Found. v. Wauconda, 510 N.E.2d 858, 862 (Ill. 1987).

N.D.C.C. ch. 4-35 declares its purpose to be the regulation, in the public interest, of the distribution, storage, transportation, disposal, and use and application of pesticides. N.D.C.C. ' 4-35-04. The law delegates broad authority to the Pesticide Control Board to make regulations relating to the time, place, manner, methods, materials, and amounts and concentrations in connection with the application of pesticides; to restrict or prohibit the use of pesticides; to prescribe standards for licensing and certification of applicators of restricted use pesticides; to regulate the collection,

examination, and reporting of samples of pesticides; and to regulate the safe handling, transportation, distribution and disposal of pesticides and their containers. N. D. C. C. " 4-35-06, 4-35-09, 4-35-12, 4-35-14, and 4-35-20. Furthermore, N. D. C. C. ch. 19-18 governs the sale and registration of pesticides.

Read together, these statutes address the use, distribution, sale, storage, disposal, and use and application of pesticides, thus creating a comprehensive scheme designed to regulate pesticides in all respects, and, as previously noted, there is no provision delegating authority to local governmental entities.

Since these statutes are comprehensive in nature, it is my opinion that the field of pesticide regulation in the areas of distribution, storage, transportation, disposal, use, application, and sale of pesticides is preempted. However, there may be zoning or police power areas which the state law leaves vacant. In such cases, local governments may enact ordinances which affect pesticides. These situations must be examined on a case-by-case basis.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

Assisted by: Kris Moelter
Assistant Attorney General

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