

Environmental Group Of The Year: Mayer Brown

By **Allison Grande**

Law360, New York (January 06, 2012, 4:55 PM ET) -- Mayer Brown LLP's environmental group tackled cutting-edge issues in helping Dow Chemical Co. dodge a high court challenge to the dismissal of novel greenhouse gas tort claims and persuading the U.S. Environmental Protection Agency to take the unusual step of reconsidering the agency's final rule on boiler emission standards, earning it a place among Law360's Environmental Groups of 2011.

The practice group carries out its goal of providing effective cross-disciplinary work for clients ranging from chemical manufacturers to environmental trade associations by supplementing the firm's 25 full-time environmental lawyers in Washington, Chicago, Los Angeles, Brazil, China, London, Brussels and Frankfurt with more than 60 lawyers from other practice areas, including general litigation, real estate, and product liability, who assist on matters as needed.

"Our hallmarks are our depth and breadth of experience, and we're fortunate to have attorneys who are both talented regulatory lawyers and trial lawyers," practice group co-leader Mark Ter Molen told Law360. "This makes us very comfortable in tackling major matters involving the Clean Air Act, Clean Water Act, tort liability and other issues across the country."

The group has used this approach to not only challenge and defend emerging regulations before federal agencies and in court, but also to navigate the intersection of environmental and tort law.

"Over the past decade or so, property owners have found some success in tying their property damage or personal injury claims to environmental statutes, and now they're trying to expand on that model," practice group co-leader Richard Bulger said.

In one of these disputes, Mississippi landowners Ned and Brenda Comer targeted Mayer Brown client Dow Chemical and several other oil and chemical companies over their emission of greenhouse gases that allegedly exacerbated Hurricane Katrina.

Mayer Brown, along with the other defendants' counsel, convinced the Fifth Circuit to reinstate a lower court's decision to dismiss the mass tort in May 2010. The Fifth Circuit had reversed the trial court's decision in October 2009, but the appellate court ultimately dismissed the appeal after the defendants won an en banc hearing because the appellate court lacked an en banc quorum.

The dispute continued into 2011, when the U.S. Supreme Court in January refused to hear the case and the plaintiffs refiled a nearly identical suit in district court, which the defendants have moved to dismiss.

“The plaintiffs are doing an end run around completed litigation in which they lost at every level, and the new suit should be dismissed,” Mayer Brown partner and appellate lawyer Timothy Bishop said. “If this sort of litigation is permitted, anyone who produce greenhouse gases — including those who drive cars — could be potential defendants in suits like this. It's an issue properly dealt with by the government and not by federal judges in different jurisdictions that could reach different conclusions.”

The practice group also used its appellate expertise during the past year to draft a petition asking the Supreme Court to reverse a Ninth Circuit ruling that runoff from logging roads in Oregon's Tillamook State Forest was subject to permitting requirements under the Clean Water Act.

This ruling, which conflicted with other circuits and the position of the U.S. government as amicus, could materially complicate relevant logging in forests if it is allowed to stand, according to the Mayer Brown attorneys who filed the petition for review in September on behalf of timber industry groups including Georgia-Pacific West LLC, the Oregon Forest Industry Council and the American Forest & Paper Association.

“The Ninth Circuit's ruling would have an incredibly destructive result on the forest industry because every ditch and culvert around the forest would need to have a CWA permit,” Bishop said. “It would be extremely costly and disruptive for the industry to obtain countless new permits, which could take up to a decade to get.”

The Supreme Court has yet to rule on the petition or the accompanying call for review by a coalition of 26 states, but the high court did ask the federal government for its take on the suit in December.

Disputes over regulations under the CAA and the CWA have also kept the practice group busy during the past year, as federal agencies seek to meet their agendas by promulgating contentious regulations.

“A principle driver in CAA and CWA area is that there are a lot of very well-funded environmental groups ready to litigate and litigate hard,” Bishop said. “In some ways, they are disappointed with this administration and that they didn't get the immediate turnaround on new regulations that they had hoped for, so they take these disputes to court.”

The practice group faced this situation in two related matters for its client U.S. Sugar Corp., a defendant intervenor in suits brought against the EPA and the South Florida Water Management District by environmental groups including the Friends of the Everglades. Both suits demanded that CWA permits be required for water transfers that move navigable water.

In the suit against the water management district, the Eleventh Circuit sided with the defendants over the permitting issue, while the similar matter against the EPA is currently pending in the Eleventh Circuit.

U.S. Sugar found itself on the other side of a permitting dispute in its challenge to EPA regulations setting emissions limits for hazardous air pollutants from industrial, commercial and institutional boilers and process heaters.

The EPA released a final Boiler MACT rule in March, but due to industry backlash including a challenge to the regulation lodged in the D.C. Circuit by U.S. Sugar, the agency took the “unusual step” of staying the effect of the rule and promising to revise it on the same day it was released.

The EPA on Dec. 2 issued the revised 400-page rule, which the company is still in the process of reviewing before deciding whether to proceed with its pending legal challenge against the agency, according to Bishop.

The firm's work for Arkema Inc. also resulted in the EPA releasing a new interim final rule allocating allowances for consumption and production of two hydrochlorofluorocarbons, which are commonly used for refrigerants, in August.

The rule came as a result of an August 2010 ruling issued by the D.C. Circuit agreeing with Arkema's argument that the allocation rule was inconsistent with the EPA's past approvals of allowance transfers and was unlawfully retroactive. This decision was strengthened when the D.C. Circuit refused to grant the agency's petition for rehearing in February.

Following a successful 2011, the practice group is expecting another busy year in 2012, as regulators continue to issue new environmental regulations and tort claims continue to grow in prevalence in the sector.

"These issues are important now and will continue to be big in the future," Bishop said.

Moving forward, the group plans to continue its focus on "establishing top-notch capabilities in key global areas," including China and Brazil as well as in the U.S.

"Environmental issues are part and parcel of the focus on the growth of natural resources and natural resource development in certain areas, including China and Brazil," Ter Molen said. "We want to make sure that we continue to have the capacity and capability to be able to handle our clients' issues in both the U.S. and abroad."

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.

--Editing by Andrew Park.