

## Environmental Group Of The Year: Mayer Brown

By **Kevin Stawicki**

*Law360 (January 31, 2019, 4:06 PM EST)* -- Mayer Brown LLP racked up a high-stakes victory at the U.S. Supreme Court on jurisdictional questions in Clean Water Rule suits and convinced the justices to keep alive a challenge to the scope of the Endangered Species Act, landing the firm a spot among Law360's 2018 Environmental Groups of the Year.

The practice group carries out its goal of providing effective cross-disciplinary work for clients ranging from chemical manufacturers to environmental trade associations. It supplements 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.

"We focus and have built our success around developing clients and selling partners in other areas to those clients as well," said Mark R. Ter Molen, co-chair of Mayer Brown's environmental litigation group. "We have built a supportive culture of sharing clients as opposed to a culture which some firms have of a more siloed approach and being more defensive about your client."

Among Mayer Brown's successes in 2018 was its representation of a coalition of industry clients in litigating where they must file challenges to the "Waters of the United States" rule, which expanded the scope of the Clean Water Act. The Supreme Court in January decided that district courts, not appeals courts, have jurisdiction over legal challenges to the 2015 Clean Water Rule, which defines what aquatic bodies qualify as "waters of the United States" under the CWA.

"It was an immense practical problem that was costing litigating parties an enormous amount of money case after case because you have to litigate where to litigate," said Timothy S. Bishop, a partner who argued the case at the high court for the National Association of Manufacturers. "The value of that win was that it ended that question."

Part of the challenge was figuring out how to get the Supreme Court to weigh in definitively and to ensure the firm's clients had standing to press the jurisdictional issue, which required a complicated strategy. If parallel legal challenges to the rule were moving forward in both a district and appeals court, it would be harder to appeal an unfavorable decision, Bishop said.



So from a coalition of 18 industry-association clients, the firm devised the strategy of having one client, the National Association of Manufacturers, sit out of a petition for review in the court of appeals. Instead, NAM intervened as a respondent in that case, challenging the court's jurisdiction. That strategy was essential to teeing up the case for the Supreme Court to decide, Bishop said.

"This one was quite tricky from a firm perspective because it put us on both sides," Bishop said. "I spent quite a lot of time with firm management explaining why being on both sides made sense here and why we were forced into this very hard procedural posture."

Mayer Brown also led Weyerhaeuser Co. all the way to the high court in its case against the U.S. Fish and Wildlife Service over whether a 1,500-acre tract in Louisiana can be protected for the endangered dusky gopher frog. The central question was whether the FWS abused its discretion by concluding the conservation benefits of designating the area a "critical habitat" for the frog would outweigh the \$33.9 million in potential costs from barring future development.

The Fifth Circuit had held the agency's decision was nonreviewable under the Endangered Species Act, but the Supreme Court disagreed. On Nov. 27, the high court unanimously vacated the lower court's decision that affirmed the FWS' decision to protect the area owned by Weyerhaeuser. It then remanded the case back to the Fifth Circuit to settle key legal issues in the case.

During oral arguments, justices from both the liberal and conservative wings of the court grilled an attorney for the government about the scope of the FWS' discretion to designate critical habitat under the ESA.

Bishop, who led the Mayer Brown team, said the court's ruling underscored the importance of close textual analysis.

"One thing we are showing with these cases is the critical importance of close reading of the statute and that can't be overridden by the government pointing to their own practical concerns," Bishop said. "We hope these unanimous decisions will send a message to the EPA and Fish and Wildlife Service that you really can't play fast and loose with the powers Congress has given you."

Moving forward, the group plans to stay focused on continuing to grow its capabilities in key cities.

"We're certainly looking to grow," Ter Molen said. "We are always looking and always interested."

--Editing by Marygrace Murphy.