

Enviro MVP: Latham & Watkins' Robert Howard

By **Christine Powell**

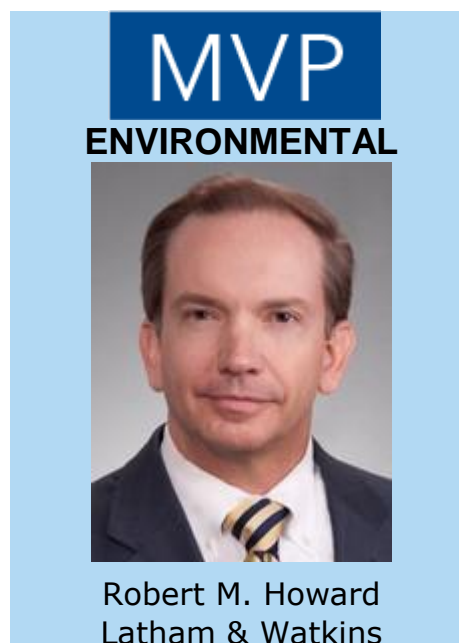
Law360, New York (December 12, 2016, 6:16 PM EST) -- Latham & Watkins LLP's Robert M. Howard landed among Law360's 2016 Environmental MVPs after spending the past year working as lead national counsel for Monsanto Co. in eight cases where West Coast cities allege the agrochemical giant polluted various waterways with polychlorinated biphenyls and raise unprecedented public-nuisance issues.

As chair of the law firm's San Diego environmental, land and resources department, Howard has been defending Monsanto against lawsuits by San Jose, Berkeley, Oakland, Long Beach and San Diego, California; Seattle and Spokane, Washington; and Portland, Oregon, over the alleged PCB pollution of waterways in and around the cities.

The cities claim that a previous incarnation of Monsanto — which had once included defendants Solutia Inc. and Pharmacia LLC, now owned by Eastman Chemical Co. and Pfizer Inc. respectively— continued to manufacture and sell the toxic chemicals for years after learning of the health and environmental risks they posed. PCBs had been ubiquitous in industrial and commercial applications until being banned by Congress in 1979.

According to Howard, the cities are struggling to deal with compliance costs associated with stormwater discharge permits under the Clean Water Act that require the cities to limit stormwater discharges of PCBs. Traditional environmental liability theories do not apply to product manufacturers, so the “municipalities are testing your garden-variety state public nuisance theories to see if that can fill the void,” he said.

“The threat is enormous, because you can imagine any product manufacturer that has any chemicals that are showing up in stormwater would potentially be liable under this particular type of theory,” Howard said, pointing out that legacy chemicals from thousands of manufacturers appear in stormwater. Earlier this year, he helped defeat a bid to have the suits consolidated before the U.S. Judicial Panel on Multidistrict Litigation, which he said would have opened Monsanto up to claims by many more cities.



Whether the theory will be recognized as a means for recovering permit costs is still unclear, given that the disputes are in the beginning stages, Howard said, noting that the courts so far are “coming out in different directions” on whether the cities have standing to allege public nuisance, which he said is generally reserved for the government or municipalities that actually own an at-issue property, whereas here the waterways do not belong to the cities.

U.S. District Judge Edward J. Davila of California’s Northern District, who is overseeing the cases brought by San Jose, Oakland and Berkeley over the alleged contamination of the San Francisco Bay, had found in August that the cities failed to “establish a property interest the nuisance injuriously affected” and that because they did not meet that threshold, they could not pursue nuisance claims for damages.

Meanwhile, in October, U.S. District Judge Salvador Mendoza Jr. of Washington’s Eastern District concluded that Spokane does have standing to assert public nuisance claims in its suit over the alleged contamination of the Spokane River. Howard said that ultimately, he “wouldn’t be surprised at all” if the cases are appealed to the Ninth Circuit in some fashion, whether over the standing issue or another one.

Yet Howard’s impressive feats over the past year went far beyond his work on the Monsanto cases.

He also represented San Diego as lead partner in the largest and longest-running civil case in the city’s history, according to the firm, which culminated in November with the city, once on the brink of bankruptcy due to an adverse jury verdict of more than \$130 million, striking a deal to pay nothing out of pocket.

He played a key role in the landmark settlement of the high-profile, complex and protracted land-use dispute initially brought by the Border Business Park in 1995 over claims that the city had violated an agreement for development of the 312-acre project in San Diego’s Otay Mesa neighborhood along the Mexican border. Under the deal, two former insurance carriers for San Diego agreed to pay \$8.2 million to the city and \$25 million to Border Business Park.

“When [the city] originally tried the case by itself, it didn’t have insurance and then was saddled with this tremendously high judgment of around \$136 million, and it had no options,” Howard said. “The turning point in my mind was not only dismantling some of the key theories of liability on appeal and getting a new trial, but also getting the city a defense.”

--Additional reporting by Juan Carlos Rodriguez. Editing by Edrienne Su.