



**35th
Kentucky
Mineral
Law
Conference**

**October 13-15, 2010
Marriott Griffin Gate Resort
Lexington, Kentucky**

**Energy & Mineral
Law Foundation**



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Program schedule

Wednesday, October 13

Oil & Gas Track

1:00 p.m.

Welcome and Introductions

- G. Brian Wells, Program Chair, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

1:10-2:00 p.m.

Emerging Trends in the Development of the Marcellus Shale

This session covers practical considerations in planning for acquisitions and developing acreage in the Marcellus Shale, including joint ventures and other joint development and partnership arrangements. The speakers will cover organizational structure and choice of entity and related tax structuring, planning for operations post-closing including carried interests, farmouts and use of production payments and rights of participation, and the tax consequences of such interests.

- Charles L. Potter, Jr., *Buchanan Ingersoll & Rooney, P.C.*, Pittsburgh, PA
- Ryan T. Purpura, *Buchanan Ingersoll & Rooney, P.C.*, Pittsburgh, PA

2:00-2:50 p.m.

Seismic Trespass

As the use of 3D seismic technology expands and becomes routine within the petroleum industry, the potential legal ramifications of 3D seismic increasingly become of interest. One of the more troublesome issues, geophysical trespass, is really a very old issue that manifested itself with conventional 2D seismic operations. However, the trespass issue is more complicated with 3D seismic operations.

- Owen L. Anderson, Eugene Kuntz Chair in Oil, Gas & Natural Resources, *The University of Oklahoma College of Law*, Norman, OK

2:50-3:05 p.m.

Break

3:05-3:55 p.m.

Hydraulic Fracturing

This session covers what hydraulic fracturing (“fracing”) is and why it is done, as well as the environmental issues related to it and how traditional oil and gas and real property jurisprudence impact hydraulic fracturing. Also examined are the regulatory frameworks currently in place in eastern states that are undergoing prolific shale gas drilling, regulations specific to hydraulic fracturing and the fluids used, and disposal regulations covering used hydraulic fracturing fluid. This session analyzes the current and contemplated laws and regulations governing hydraulic fracturing on the federal level, and discusses the history of the litigation and legislative efforts challenging the current exception to the Safe Drinking Water Act enjoyed by hydraulic fracturing.

- Christopher S. Kulander, *Haynes and Boone, LLP*, Houston, TX

3:55-4:45 p.m.

Natural Gas Storage Development – Legal and Regulatory Issues

Shale plays have added huge amounts of domestically-produced natural gas to the U.S. market. Gas which cannot be used at the time of production must be stored, typically in underground storage fields. Existing storage is currently near capacity, and continued development in the Marcellus and other shales will only exacerbate the storage problem. A recent report by ICF International estimates that 371 to 598 Bcf of additional storage will be needed by 2030, at a cost of between \$2 to \$5 billion. New development is expected to focus on storage near urban areas to provide high deliverability for electricity generation. This session reviews the technical aspects of gas storage and then turns to the legal and regulatory issues involved in the development of a gas storage field. The discussion will include the property law and leasing aspects of gas storage as well as the role of FERC and various state regulatory programs.

- Karen J. Greenwell, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

4:45-5:30 p.m.

Oil & Gas Law Update

The annual review of oil and gas case law and regulatory developments.

- Amber N. Nisbet, *EQT Gathering, LLC*, Washington, PA



Wells



Potter



Purpura



Anderson



Kulander



Greenwell



Nisbet

Thursday Morning, October 14

General Session Topics

8:00-8:45 a.m.

Responding to Risk – The Importance of Developing Effective Risk Oversight by Boards of Publicly-Traded Energy Companies

For energy companies, risk oversight, particularly in the areas of safety, health and the environment, are playing an increasingly significant role in Board corporate governance processes and procedures. Publicly-traded energy companies are subject to additional regulation by the Securities and Exchange Commission and self-regulatory organizations such as the New York Stock Exchange and MSHA, as well as activism from a broad shareholder base and investor advisory firms. In light of the recent crises within the energy industry, developing effective processes and procedures to identify, monitor and mitigate the impact of risks has grown exponentially. This presentation provides an update on legal developments relating to the Board's increasing involvement in overseeing risk management processes and ensuring that these processes are functioning properly – thereby setting the “tone at the top.” Although no one size fits all, practical take-aways will include procedures that companies may implement to respond to growing investor and governmental pressure to incorporate more risk management oversight into corporate governance.

- Amy I. Pandit, *Buchanan Ingersoll & Rooney, P.C.*, Pittsburgh, PA
- Stephanie L. Gill, *CONSOL Energy Inc.*, Pittsburgh, PA

8:45-9:30 a.m.

Collateral Damage: Representing Individuals Who Are Not the Target of an Investigation – (Theoretically)

When a multiple fatality occurs at a coal mine, an investigation is a certainty, and the likelihood of the matter becoming criminal is high. This presentation addresses the practical problems of representing individuals in mine operations who will be part of an agency's investigation, and who may find themselves targets of an investigation. Problems of indemnification by the company, coordination with company counsel, and joint defense agreements will be discussed.

- William J. Powell, *Jackson Kelly PLLC*, Martinsburg, WV

9:30-9:45 a.m.

Break

9:45-10:45 a.m.

Ethics Session – Litigation Holds: Preservation, Spoliation and Sanctions

The failure to preserve evidence for litigation can result in harsh sanctions for both attorneys and clients. Recent examples include the high profile *Pension Committee* and *Rimkus* cases. A litigation hold is the process of identifying and preserving evidence. This session will explore the triggers, process, and scope of litigation holds, with a focus on the ethics rules that apply.

- David G. Ries, *Thorp Reed & Armstrong*, Pittsburgh, PA

10:45-11:35 a.m.

Carbon Offsets and Their Potential Value for U.S. Industry

This session addresses carbon credits created by reductions in greenhouse gas emissions, avoided deforestation and reforestation, energy efficiency, among other types of projects, and how carbon credits may provide a hedge for any potential adoption of state or federal greenhouse gas regulatory programs in the U.S. Offsets can also serve to address shareholder petitions regarding climate change, and customer and public demands for company action with respect to greenhouse gas emissions.

- Scott D. Deatherage, *Patton Boggs LLP*, Dallas, TX

11:45 a.m.-12:45 p.m. **Luncheon**

Thursday Afternoon, October 14

General Session Topics

1:00-1:45 p.m.

Developments in Energy Legislation

This session provides insight into the latest developments in prospective energy legislation. Peter Robertson will discuss an energy bill if some agreement is reached before Congress takes its pre-election break, or in the alternative, Peter will discuss the likelihood of such legislation moving forward during an election year.

- Peter D. Robertson, Senior Vice President of Legislative and Regulatory Affairs, *American Natural Gas Alliance*, Washington, DC



Pandit



Gill



Powell



Ries



Deatherage

Save the Dates!

December 6-7, 2010

Development Issues in the
Major Shale Plays
Pittsburgh,
Pennsylvania
Co-sponsored with the
Rocky Mountain
Mineral Law Foundation

February 10-12, 2011

Winter Workshops
on Energy Law
Lago Mar Resort
Fort Lauderdale
Florida

May 15-17, 2011

32nd Annual Institute
Nemacolin Woodlands
Resort and Spa
Farmington
Pennsylvania

1:45-2:30 p.m.

Coal Ash Regulation: The Slippery Slope

After months of deliberation, the U.S. EPA announced the first-ever nationwide standard for the regulation of coal ash, a byproduct of burning coal in power plants. Environmentalists assert that coal ash poses serious threats to the public health and environment if not properly managed. The U.S. EPA recently outlined two different proposals to regulate coal ash under the federal Resource Conservation and Recovery Act (RCRA), which reflect varying approaches to enforcement and oversight. The two proposals to regulate coal ash and impacts of each on the mining and power industries will be discussed.

- George L. Seay, Jr., *Wyatt, Tarrant, & Combs, LLP*, Lexington, KY
- Robert J. Ehrler, *E.ON U.S.*, Louisville, KY
- Alan Casaday, *Tennessee Valley Authority*, Chattanooga, TN

2:30-2:45 p.m.

Break

2:45-3:30 p.m.

State Initiatives to Reduce Greenhouse Gas

This session addresses the varied and individual efforts by some states to establish their own greenhouse gas reduction initiatives, in the absence of federal action. Included are renewable portfolio standards, alternative energy standards, and energy efficiency. At issue will be how these programs will be impacted by any federal initiative, whether by rule or legislation.

- Katerina E. Milenkovski, *Steptoe & Johnson PLLC*, Columbus, OH

3:30-4:15 p.m.

Mine Voids: How and When Can a Coal Producer Use Them?

This presentation covers the evolving state of the law regarding use of mine voids and gob areas created by the removal of coal under a mineral lease, and what right, title and interest a coal lessee/producer has to make use of these mine voids and gob areas either to support mining operations on the leasehold or to support mining operations on other lands, with an identification of lease language a coal operator/lessee would find advantageous for maximizing these rights. The presentation addresses the ancillary rights a gas owner or producer may have in the mine voids and gob areas, the competing interests of surface, fee and/or mineral owners/lessors and the resulting legal claims that may arise when these interests come into conflict with those of the coal operator/lessee. The presentation highlights the current state of the law and how granting language in the relevant deeds and leases can impact these rights.

- Brian Wheeler, *Creekmore Law Firm*, Blacksburg, VA

4:15-4:45 p.m.

Health Care Reform and You: How Will It Impact Your Employee Benefits?

This session covers recent legislation and relevant regulations in the context of energy companies and what they need to know about providing health care benefits to employees, their families and retirees now and in the future. The presentation will include "grandfathering" and other key rules addressing coverage of adult children, pre-existing conditions, annual and lifetime limits, and preventive care.

- Gregory J. Ossi, *Venable LLP*, Vienna, VA

4:45-5:15 p.m.

Amendments to the Patient Protection and Affordable Care Act – Changes to Federal Black Lung Law.

A discussion of the retroactive amendments added by the late Senator Byrd to the Patient Protection and Affordable Care Act (PPACA) which rolled back part of the federal black lung law to include presumptions of entitlement which had been done away with as far back as 1981. Resurrecting these presumptions will have significant impact on the number of claims filed and litigated. In the context of expanded definitions of legal pneumoconiosis and adherence to a belief that smoking and coal dust exposure cause the same impairment, the added presumptions also have potentially far reaching impact on the ultimate award rate of the federal black lung program.

- Paul E. Frampton, *Bowles Rice McDavid Graff & Love, PLLC*, Charleston, WV



Seay



Milenkovski



Wheeler



Ossi



Frampton

5:15 -5:45 p.m. **Increased Enforcement in the Workplace by Federal Regulators**

The Equal Employment Opportunity Commission, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs and other federal agencies have increased their focus and enforcement of federal laws and regulation of employers. This session will discuss those issues and the impact on the workplace, and will cover selected decisions of the federal courts relating to these issues.

■ David E. Dick, *Steptoe & Johnson, PLLC*, Morgantown, WV



Dick

6:00-7:30 p.m. **Welcome Reception Hosted by EMLF Members for Conference Registrants and Kentucky Coal Association Members, Speakers and Guests**



Heath

Friday Morning, October 15 — Concurrent Tracks

Coal Track

8:00-8:30 a.m. **Litigating Pattern of Violations Cases: Observations from the Knox Creek PPV Hearing**

A small coal mine company won a case against MSHA earlier this year that kept it off the dreaded “pattern of violations” list. This session will tell how they did it and how other companies may be able to use the same strategy. Issues included in the discussion are handling citations received while implementing a significant and substantial (S&S) violation reduction plan, use of the expedited hearing process, challenging S&S designations, and the impact this case may have on pattern of violations cases, future litigation and possible Congressional action.

■ Mark E. Heath and Alex M. Macia, *Spilman, Thomas & Battle PLLC*, Charleston, WV



Macia

8:30-9:00 a.m. **MSHA Penalty Settlements: Are Things About to Go From Bad to Worse?**

A key to reducing the backlog of pending cases is the ability to settle them. Under the Mine Safety and Health Act, Administrative Law Judges have authority to review and approve settlements, although the actual scope of that authority is unclear. Rejecting settlements not only limits the ability of all parties to eliminate the current backlog, it may result in unpredictable outcomes for operators. Cases are now under appeal in which the Mine Safety and Health Administration (MSHA) will seek review of the issue of the judge’s authority to reject settlements.

■ Arthur M. Wolfson, *Jackson Kelly PLLC*, Pittsburgh, PA



Wolfson

9:00-9:30 a.m. **Underground Coal Mine Plan Disputes**

This session explores the relief available to underground coal mine operators in mine plan disputes with the Mine Safety and Health Administration (MSHA). The Mine Act requires all underground coal mine operators to develop roof control and ventilation plans, subject to approval by MSHA. Once approved, their provisions become enforceable as mandatory standards. The Mine Act itself does not provide a dispute resolution mechanism when the operator and MSHA disagree on one or more plan provisions. While MSHA’s own policies allow review of a mine plan dispute by a Mine Safety & Health Review Commission administrative law judge (ALJ), that process is not binding on MSHA and is fraught with substantial shortcomings. This discussion will probe open questions about the mine plan conundrum, including the proper forum and mechanisms for resolution of plan disputes.

■ Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC



Wolff

9:30-9:45 a.m. **Break**

9:45-10:30 a.m. **The Science Behind Using Conductivity as an Indicator of Biological Impairment**

Surface mining of coal in Appalachia has been shown to increase the conductivity of surface waters downstream of the disturbance. An EPA study correlated conductivity with biological impairment, and based on this study, the U.S. EPA announced plans to study the development of an advisory water quality standard that would utilize field conductivity measures to assess the biological impacts resulting from mining. Conductivity is not currently regulated, but the narrative standards of the Clean Water Act, as interpreted by West Virginia and Kentucky, are applicable. The initially-proposed standard of 300 $\mu\text{S}/\text{cm}$ would effectively prohibit surface mining, so the implications of any rule-making are serious. This session examines the science behind the setting of a conductivity standard, based on the habitat requirements of a few mayfly genera that are extremely sensitive to conductivity, and that USEPA scientists believe are the natural fauna that would occur in all Appalachian headwater streams. Alternative interpretations and efforts to open this issue to a wider debate will be discussed.

■ Robert Singer, Ph.D., and George Rusk, J.D., *Ecology and Environment*, Lancaster, NY



Turner

10:30-11:30 a.m. **Coal Permitting Panel Discussion**

This session covers EPA’s April 2010 Guidance, EPA’s new interpretations and application of narrative criteria, efforts to revise or adopt new numeric water quality criteria, intensive oversight of state permits, expanding role in other federal program areas (Corps and SMCRA), and other efforts that will impact either the mining or use of coal.

■ Allyn G. Turner, *Spilman, Thomas & Battle PLLC*, Charleston, WV

■ Brooks M. Smith, *Hunton & Williams*, Richmond, VA

■ Roger L. Nicholson, General Counsel, *International Coal Group, Inc.*, Scott Depot, WV



Smith



Williams

11:30-Noon **Mine Safety Law and Regulation Changes – MINER Act 2010**
■ John M. Williams, *Rajkovich, Williams, Kilpatrick & True PLLC*, Lexington, KY

Friday Morning, October 15 — Concurrent Tracks

Young Lawyers Track

■ Chair and Moderator: Heather A. Blandford, *Dinsmore & Shohl, LLP*, Morgantown, WV

8:00-8:45 a.m. **Navigating MSHA Liability: Outlining the MSHA Contest Process from Mine Shaft to Gavel**

This provides the basics of how the MSHA process works, from the start of a safety and health inspection through the issuance of a citation. A timeline will demonstrate the necessary steps and most common liability issues, and cover the adjudicative process – from the first contest of a citation to a hearing before an administrative law judge, to appeals to the Federal Mine Safety and Health Review Commission (FMSHRC) and federal courts. This former attorney with the FMSHRC will touch on different approaches to defense of citations, and what new MSHA lawyers or administrative practitioners should know before beginning the process.

■ Erin L. Beatty, *Dinsmore & Shohl, LLP*, Morgantown, WV

8:45-9:30 a.m. **So You Have the Funding and the Rights of Entry – What’s Next?**

This session explores regulatory requirements, including permits and other required authorizations and approvals that must be obtained in order to develop various mineral resources.

■ Joseph K. Reinhart, *Babst, Calland, Clements & Zomnir, P.C.*, Pittsburgh, PA

9:30-9:45 a.m. **Break**

9:45-10:30 a.m. **The Nuts & Bolts of Easements and Rights of Way.**

This session provides a practical overview of easements and rights-of-way. The session will begin with a discussion of the basics of easement and right-of-way law including: definition of easements and rights-of-way; creation of easements and rights-of-way; public v. private use; appurtenant v. in-gross, and exclusive v. non-exclusive. The session will then focus on drafting issues involved with easement and right-of-way documents including: description, use of burdened estate, maintenance, access to easement area, and repair to easement area. Session will conclude by addressing specific issues that can arise with easements and rights-of-way including: overburdening of the subject estate; problems created by inadequate descriptions; relocation rights; abandonment/ termination of easements; removal of improvements; transfer taxes; fair value for easements; indemnity issues; failure of a co-owner to sign; researching public roads in West Virginia, and resolving disputes.

■ Charles F. W. Saffer, *Robinson & McElwee PLLC*, Charleston, WV

10:30-11:00 a.m. **Navigating the Administrative Enforcement and Hearing Process**

The federal Surface Mining Control and Reclamation Act (SMCRA) and individual state surface coal mining programs enacted under the federal act, contain enforcement provisions as well as administrative procedures for the challenge of violations and the assessment of civil penalties. This session examines the various enforcement mechanisms contained in SMCRA and selected state surface coal mining programs, including potential permittee and non-permittee liabilities, as well as a summary of administrative hearing procedures, from the filing of a petition or complaint to the issuance of the final administrative order.

■ Lesly A. R. Davis, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

11:00 a.m.-Noon **Pearls of Wisdom . . .**

Practitioners share insights gained from practicing energy and mineral law, covering a range of issues such as the etiquette of site visits, recognizing conflicts of interest, the importance of learning your client’s business, working with in-house counsel, and other tips to help you succeed as a lawyer.

■ Maureen D. Carman, Moderator, *Attorney*, Versailles, KY

■ Anna M. Dailey, *Dinsmore & Shohl, LLP*, Charleston, WV

■ David J. Laurent, *Buchanan Ingersoll & Rooney, P.C.* Pittsburgh, PA

■ Erin E. Magee, *Jackson Kelly PLLC*, Charleston, WV

■ John R. Rhorer, Jr., *Dinsmore & Shohl LLP*, Lexington, KY

■ Russell L. Schetroma, *Culbertson, Weiss, Schetroma & Schug, P.C.*, Meadville, PA



Blandford



Beatty



Reinhart



Saffer



Davis



Carman



Dailey



Laurent



Magee



Rhorer



Yes, I want to attend the 35th Kentucky Mineral Law Conference

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Thursday EMLF luncheon (\$32)

Friday KCA luncheon (\$32)

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Registration information

Conference Registration

EMLF full Conference registration fee includes meeting materials, refreshment breaks and hosted reception Thursday evening. Payment required for the EMLF Thursday luncheon and the KCA Friday luncheon.

	Through Sept. 15	After Sept. 15
Non-Member Registration fee	\$550	\$600
EMLF Member	400	450
EMLF Landmen	330	380
Government/ Law Faculty	350	400
Non-member Landmen	380	430
Young lawyer (3 years or less)	330	380
Law student	100	100
Materials only	125	125

(Written materials will be sent following the conference;

UPS shipping charges will be additional)

EMLF Thursday luncheon 32 32

KCA Friday luncheon 32 32

Accommodations

Marriott Griffin Gate Resort

\$199 per night, single or double plus state and local taxes of 13.42%

1800 Newtown Pike, Lexington, KY 40511

Call hotel at 800.228.9290 or 859.231.5100 and ask for EMLF rate; room block closes September 29, 6 p.m., or whenever sell-out occurs. Make your reservations early.

While in Lexington, enjoy the best in thoroughbred racing at Keeneland race track, October 8-30, with post time at 1:00 p.m., visit the Kentucky Horse Park (site of the 2010 World Equestrian Games), or visit Horse Mania 2010 in downtown Lexington for spectacular outdoor art.

Three ways to register

- If registering online, go to http://www.emlf.org/mineral_10.aspx
- If registering by fax, dial 859.226.0485
- If registering by mail, send form and payment to EMLF, 340 South Broadway, Suite 101, Lexington, KY 40508

Cancellation policy

Full refunds less a \$75 administrative fee will be given for written registration cancellations received by October 1. No registration refunds will be made thereafter, but substitutions can be made by calling the Foundation at 859.231.0271. Persons not entitled to any refund will receive a copy of the handbook and meeting materials. EMLF members who cancel their registrations after October 1 receive materials and a \$100 credit toward a future program.

Mandatory CLE and Professional Credit

Conference accreditation is pending from states with mandatory Continuing Legal Education and with the AAPL. *Please indicate on your registration form where you are seeking credit.* The program contains 940 minutes of instruction, including 60 minutes of professional ethics. The course is conducted over a 3-day period, providing approximately 18.8 CLE hours for states calculating 50-minute hours, and 15.6 CLE hours for states calculating 60-minutes for a CLE hour. Complete information for reporting your credits will be available at the conference. Attorneys claiming Pennsylvania, Tennessee and Illinois CLE credits are required to pay additional per hour fees.



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October 13-15, 2010
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Griffin Gate Resort
Lexington, KY

35th Kentucky Mineral Law Conference Program Planning Committee

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- George Rusk, J.D., *Ecology and Environment*, Lancaster, NY
- Charles F.W. Saffer, *Robinson & McElwee PLLC*, Charleston, WV
- George L. Seay, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY
- Robert Singer, Ph.D., *Ecology and Environment*, Lancaster, NY
- Benjamin M. Sullivan, *EQT Corporation*, Charleston, WV
- Noelle Holladay True, *Rajkovich, Williams, Kilpatrick & True, PLLC*, Lexington, KY
- Allyn G. Turner, *Spilman, Thomas & Battle, PLLC*, Charleston, WV
- Brian S. Wheeler, *The Creekmore Law Firm PC*, Blacksburg, VA
- Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC
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